Deutsches Institut für Menschenrechte

Position Paper

Access to justice under the CSDD Directive

Finalizing trilogue negotiations of the Corporate Sustainability Due Diligence Directive

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Contents

1 Overview

In February 2022, the European Commission presented its proposal[1] on an EU Corporate Sustainability Due Diligence Directive (CSDD Directive), imposing due diligence obligations for human rights and the environment to certain corporations operating in Europe. The European Council provided its so-called general approach on the Commission's proposal in November 2022 (in the following: Council proposal or draft)[2] and the European Parliament reacted with amendments in April 2023 (in the following: Parliament's proposal or draft)[3]. Trilogue negotiations between Commission, EU Council and EU Parliament on CSDD Directive are ongoing and likely to continue until the end of 2023. Once the CSDD Directive enters into force, Member States are obliged to transpose it by adapting national legislation.

The three currently circulating drafts on the CSDD Directive contain both a civil liability clause, as well as clauses on administrative supervision.[4] Hence, once the CSDD Directive needs to be implemented in national law, Member States are obliged to align with the proposal and provide for effective remedies through civil liability and administrative supervision. In line with the UNGPs and the OECD Guidelines, States have an obligation to provide for effective remedies for rightsholders of potential corporate abuse. Worldwide litigation efforts in cases of human rights abuses by corporations point to obstacles that can potentially be tackled by a robust civil liability clause and well-structured administrative measures within the CSDD Directive.

Against the background of potential implications under German law, the Institute summarizes key access to justice elements for both the design and transposition of the CSDD Directive and points out that the civil liability and administrative supervision clauses should entail the following elements:

– **Burden of proof:** relaxation of the burden of proof, ideally by implementing a reversal of burden of proof, but at least by referring to a duty of disclosure of evidence including its conditions
– **Injunctive measures:** rule on injunctive measures for the time between the discovery of damage and settling of a case.
– **Representation**: right for organisations to act in their own name on behalf of rightsholders in courts
– **Limitation period**: clear requirements for all Member States for starting of limitation period with the discovery of damage, as well as clear conditions for the suspension of the limitation period
– **Definition of "adverse human rights impact":** as "any action which removes or reduces the ability of an individual or group to enjoy the rights or be protected by the prohibitions enshrined in international conventions and instruments

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1 European Commission, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071 .
2 Council of the European Union, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – General Approach, 15024/1/22 REV 1, https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf .
3 European Parliament, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – Report, P9_TA/2023)0209, https://www.europarl.europa.eu/doceo/document/A-9-2023-0184_EN.html#_section1 .
4 Civil liability is entailed in Draft Article 22 CSDD Directive, administrative supervision in Articles 17 ff. CSDD Directive. On a national level, jurisdictions foresee such claims to be brought under tort law claims. In contrary to the French loi de vigilance, the German Supply Chain Act, for instance, does not contain any civil liability clauses, but exclusively relies only on administrative supervision.

listed in the Annex". Furthermore, annex must be up for amendments in future revision processes and include a comprehensive list of relevant and globally ratified human rights instruments

– **Administrative supervision:** supervisory authorities must establish easily accessible channels for submitting information about human rights and environmental violations. National laws must include the possibility for affected persons to be represented during submission proceedings

2 Key elements of civil liability and administrative powers

The CSDD Directive should provide for civil liability and administrative measures to be taken where corporate failure to undertake adequate due diligence results in harm. Rightsholders shall thereby have effective access to remedy. This requires a liability regime that addresses persisting obstacles to access to justice identified by the European Union Agency for Fundamental Rights[5] and in OHCHR's Accountability and Remedy Project[6], including legal standing, access to information, evidence barriers, legal costs, the length of proceedings, and limitation periods.

Supervisory Authorities should have a range of competences to effectively enforce the CSDD Directive, alongside the possibility of judicial review. They should also bear obligations of transparency, publishing the names of companies that fall under the Directive and reporting annually about their own work, to empower other stakeholders to monitor both corporate compliance and public enforcement efforts.

From the Institute's perspective, the following elements are particularly important for strengthening access to justice for rightsholders in cases of corporate human rights abuses.

2.1 Civil liability and national procedural laws

As the Commission points out in its explanatory memorandum to the proposal for the CSDD Directive, effective enforcement of the due diligence duty is key to achieving the objectives of the initiative. Furthermore, the right to effective remedy is a basic human right as enshrined in many human rights instruments.[7]

In the following, we will focus on distribution of burden of proof, injunctive relief, and the possibility of legal representation of rightsholders by trade unions or Civil Society Organizations.

2.1.1 Distribution of burden of proof

Most lawsuits will be structured as such: claims will be based on business-related human rights abuses where companies fail to comply with due diligence obligations and this failure leads to violation of human and environmental rights. Rightsholders therefore typically face the challenge of bringing claims against large, multinational

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5 European Union Agency for Fundamental Rights (FRA) (2020): Report Business and human rights – Access to remedy (europa.eu).

6 OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses | OHCHR

7 The right to effective remedy is enshrined in Art. 8 of the Declaration of Human Rights, Article 2 (3) of the International Covenant on Civil and Political Rights, and Article 9 (3) of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters and Art. 47 of the EU Charter, see also Recital 59a Parliament proposal on CSDD Directive.

entities with complex structures and supply chains. A key point of contention in the lawsuit will typically be whether a company met their due diligence obligations - which will be mostly internal company processes and measures and documentation of which will lie with the company. Furthermore, the complexity and scope of corporate structures results not only in a general imbalance of power between the parties but creates well-documented obstacles to effective remedy - particularly with regards to evidence barriers and access to documents to prove a claim.[8]

For the benefit of rightsholders, the burden of proof can be reversed from the claimant to the defendant, in particular where a party traditionally faces complex evidence barriers. Consequently, the company must prove the contrary when a claimant brings certain elements of a case prima facie. The mechanism that has found expression in Article 22 2.a. (d) of the Parliament's draft is a duty for companies to disclose evidence. As of the draft of the EU Parliament, "when a claimant provides elements substantiating the likelihood of a company's liability and has indicated that additional evidence lies in the control of the company, courts are able to order that such evidence be disclosed by the company in accordance with national procedural law, subject to the Union and national rules on confidentiality and proportionality." However, since the use of the instrument depends on the procedural laws of the Member States, its effectiveness is limited as the requirements for triggering the duty to disclosure may vary in Member States.

Under German law, in line with the general principles for distribution of evidence, the claimant would have to prove the elements of a breach of duty, the damage and its causal links. However, identifying the correct defendant in complex, cross-border supply chains is a major challenge.[9] German procedural law regulates that in cases where evidence regarding internal structures of a company is inaccessible to the claimant, the company is required to disclose information to fulfil its obligation to declare the facts.[10]

Thus, it is not sufficient for the defendant to simply deny the facts, but they must disclose information to demonstrate that the assertion it is disputing is incorrect. If it does not substantially rebut the facts brought forward by the claimant, the claimant's assertion is deemed to be admitted. The corresponding article states that facts, which are not expressly disputed shall be deemed to be admitted. That way, the claimant shall be put in the position to be able to prove the correctness of the claim. The requirements to trigger this relaxation of the burden of proof are akin to those of the mechanism proposed by the Parliament. The Parliament's draft entails a duty to disclose information in possession of the accused company. Both legal concepts require claimants to present indications for facts in dispute and the possibility of the company to disclose the information and substantiate the likelihood of the facts.

The Institute wants to underline that a duty to disclose enables the court to order the disclosure of certain information. Under German law, such court order, however, requires the claimant to individualize and specialise the demanded documents in detail. It thereby creates an obstacle for the claimant to individualize a document to an extent that would require knowledge about the specific content. Hence, it is difficult to

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8 FRA (2020), Report Business and human rights. pp. 59, 60, 62 f.
9 Ibid, p. 60.
10 See § 138 II German Code of Civil Procedure and the rules on so-called "sekundäre Darlegungslast".

succeed with a duty to disclosure before German courts. Rightsholders do not and indeed cannot know which documents the company possesses as this depends on the company's internal structures. Overall, the demands on specification of documents are so high that without knowing the content of the requested documents beforehand, it is impossible to meet the requirements on specification.[11]

While the proposal by the Parliament aims to tackle the dilemma, jurisprudence demonstrates that the mechanism loses effect due to insurmountable hurdles to obtain a court order on disclosure of evidence, and without disclosure of evidence, the claims are regularly impossible to prove.[12] **The Institute therefore recommends that the Directive not only refers to rules of disclosure in Member State's procedural law, but actually regulates effective measures on reversal of the burden of proof to reduce barriers of access to justice for rightsholders.**

2.1.2 Injunctive relief

The right to remedy is as effective as the respective domestic rules on enforcement of judgements and responses to claims. Due to the complexity of cases and time-consuming challenges in obtaining evidence, court proceedings are often lengthy. It can take multiple years from the occurrence of harm to rightsholders until a case is settled. Therefore, the CSDD Directive should entail a possibility to stop the violation in court in the meantime[13]; this is especially true in cases of environmental hazards and safety threats.[14] An ongoing threat can be put to an end by committing Member States to ensure that injunctive measures for affected rightsholders can be granted.

However, only the draft of the Parliament responded to this issue. Art. 22 2.a. (b) of the draft of the CSDD Directive by the Parliament reads, "Member States shall ensure that claimants are able to seek injunctive measures, including summary proceedings. These shall be in the form of a definitive or provisional measure to cease an action which may be in breach of this Directive, or to comply with a measure under this Directive." **From a human rights point of view, this clause should be adopted in the final draft of the Directive.**

2.1.3 Representative action

Under German law, the right to conduct a legal dispute as a proper party is granted only to rightsholder, unless otherwise provided for.

Art. 22 2.a. (c) of the Parliaments draft states that "mandated trade unions, civil society organisations or other relevant actors acting in the public interest such as National Human Rights Institutions or Ombudsperson, should be able to bring actions before their courts on behalf of a victim or group of victims of adverse impact and should have the rights and obligations of a claimant party in the proceedings without prejudice to existing national law." Rightsholders as a party to the proceedings cannot provide evidence as witnesses, which remains possible when an organisation sues the company on their behalf. By enabling organisations to act on behalf of affected rightsholders, similar claims can be joined in collective redress; proceedings are

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11 FRA (2020), Report Business and Human Rights, p. 62.
12 Ibid, p. 62.
13 See European Coalition for Corporate Justice (ECCJ) (2021), "Suing Goliath", case reference ProDESC, ECCHR and others v Électricité de France, p. 47.
14 Ibid, case reference Fédération Internationale pour les Droits Humains and others v Suez SA, p. 49.

accelerated and more efficient. Furthermore, the risk of different judgements in similar cases and thus fragmentation and an uneven playing field are avoided.

2.1.4 Limitation period

Rules on limitation periods are essential for prevision of potential outcome of a civil litigation, both for claimants and defendants. **To help litigating parties assessing risk, the final Directive should include a uniform provision on limitation for all Member States.**[15]

With Art. 22 2. a.(a) the Parliament proposed a minimum limitation period of 10 years. However, it does not clarify what should mark the beginning of the limitation period. In Recital 59c to the proposal of the CSDD Directive, the Parliament states, that when setting the starting point of limitation periods, Member States should consider the moment the impact causing the damage has ceased and when the victim concerned knew or could be reasonable expected to have known that the damage they suffered was caused by the adverse impact. Implementing a comparable clause is beneficial, because cases of environmental damage, results and harm can occur years after the damaging event took place.[16] Since such damages would be covered by the scope of the CSDD Directive, the limitation period should therefore be set to start accordingly with the moment damages were discovered. Under German law, the Environmental Liability Act serves for compensation of damages due to an environmental impact. It refers to the limitation provisions of the German Civil Code applying to torts, which entails a regular limitation period of three years and thirty years for bodily injury and property damage, starting from knowledge or expected knowledge of the circumstances giving rise to the claim.

Finally, the limitation period should not exceed a certain time. As mentioned above, the complexity of potential lawsuits lies, inter alia, within their frequent transnational character, lengthy procedures to investigate the defendants within corporate structures, admissibility prerequisites of a case and gathering of evidence. Nevertheless, the extensive limitation period of 10 years proposed by the Parliament could potentially be shortened without thereby exempting great amounts of rightsholders from their right of access to justice in cases of human rights violations, if a clear starting point to start with discovery of harm would be included in the directive.

Likewise, the conditions of suspension of limitation periods should be regulated unambiguously and uniformly in all Member States. If this remains unclear, a limitation period might expire without notice of lawyers, for instance during mediation.[17]

2.2 Scope of human rights and environmental rights

The Council's general approach refers to rights listed in Annex I and states that as a prerequisite, the company intentionally or negligently had to fail to comply with the obligations laid down in Articles 7 and 8, when the right, prohibition or obligation listed in Annex I is aimed to protect the natural or legal person. According to the Institute's interpretation, such addition to the liability provision would exclude any indirect

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15 The litigation in the case of Jabir et. al. vs. Kik, Higher Regional Court Dortmund, where due to international private law provision Pakistani limitation provisions were applicable and the court in Germany had to dismiss the case for that reason serves as an example, see also ECCJ (2021), Suing Goliath, pp. 14 ff.

16 See inter alia in the case of Arica Victims KB v. Boliden Mineral AB, where at least 13 years after the contaminating events took place, personal injuries resulting from the harm were discovered, ECCJ (2021), Suing Goliath, pp. 11 ff.

17 See also FRA (2020) Report, Business and Human Rights, p. 46.

damage, as well as damage occurring in the context of the environment as such and the possibility to claim damages for organisations not organized as judicial persons. The restriction constitutes legal uncertainty for rightsholders, as well as for companies. It is therefore advisable not to include such broad limitations in the final version of the Directive.

The need to remove obstacles to remedy also requires that adverse human rights impacts are not defined by reference to a violation of one of the rights or prohibitions in the Annexes. This could result in a court being required to decide that there has been a violation of international law for a claimant to succeed. **In this regard, the Institute supports the definition given by the EU-Parliament: It defines an adverse human rights impact as "any action which removes or reduces the ability of an individual or group to enjoy the rights or be protected by the prohibitions enshrined in international conventions and instruments listed in the Annex".**

2.3 Negligence and intent

While the Commission's proposal and the Parliament's draft on civil liability do not include any elements on fault, the Council's general approach provides some legal clarity by determining four conditions for civil liability, namely

– damage caused by a natural or legal person,
– a breach of duty,
– the causal link between damage and breach of duty, and
– fault defined as intent or negligence.

By introducing intent and negligence, the Directive clearly indicates that the standard of fault covers any form of negligence, even the lightest form of gross negligence. In case the civil liability clause in the final Directive will not include any provision on fault, Member States could transpose differing standards of fault into their national legislation, in particular excluding gross negligence. This could create an uneven playing field. **Therefore, the Institute welcomes the clarification on fault by the Council.**

2.4 Administrative supervision

The three draft versions assign the task of public supervision and enforcement to Supervisory Authorities in the Member States. Supervisory Authorities can investigate cases of non-compliance and mandate companies to meet their due diligence obligation, impose sanctions, and take interim measures (Articles 17, 18 & 20). A European Network of Supervisory Authorities should facilitate coordination among national institutions. Natural and legal persons can submit "substantiated concerns" to a Supervisory Authority if they have reason to believe that a company fails to comply with its due diligence obligations.

When it comes to the scope of competences assigned to Supervisory Authorities, the three drafts differ. The Parliament suggests additional responsibilities, including the power to assess the validity of corporate prioritisation strategies.[18] It introduces additional considerations determining whether and how an authority should impose

[18] Article 18(5) (c).

sanctions and expands the spectrum of available sanctions. The Parliament's position also obliges Supervisory Authorities to disclose the companies under their jurisdiction that are subject to the Directive, to keep records on investigations and remedial actions, and to release annual reports. These are necessary amendments because they put civil society organisations, National Human Rights Institutions, and other stakeholders in the position to monitor the enforcement measures of Supervisory Authorities and encourage companies to learn from this published information.

In light of experience with administrative supervision on the German Supply Chain Act, **the Institute wants to underline the importance of easily accessible channels for submitting information about human rights abuses and environmental impacts and of including the possibility for affected persons to be represented when submitting information.**[19]

[19] The current regulation under the German Supply Chain Act requires for complaints to be submitted by the complainant personally. Third parties can submit information, but the Supervisory Authority will act upon its discretion and has no obligation to pursue the case (Ermessensentscheidung). It will furthermore not inform about developments and decision in the case.

3 Annex: Explanatory proposal for Art. 22 CSDD Directive

Proposal for Art. 22 CSDDD	**Explanation**
1. Member States shall ensure that a company can be held liable for a damage caused to a natural or legal person, provided that: (a) the company intentionally or negligently failed to comply with the obligations laid down in this Directive,; and (b) as a result of this failure the company caused an actual adverse impact that led to damage.	A reference to annex I combined with the provision that the right has to aim to protect a natural or legal person, as it is entailed in Art. 22 of the Council's General Approach would unjustifiably exclude certain right violations; whereas land rights would probably be covered (i.e. in case of environmental damage to land), purely environmental damage would not fall under the scope according to current international law interpretation of human rights law/environmental law.
2. Where the company was held liable in accordance with paragraph 1, a natural or legal person shall have the right to full compensation for the damage occurred in accordance with national law	In accordance with our interpretation, no reference to parent company liability is needed (see Art. 22 (3) Council General Approach). E.g. German corporate law recognizes the option of parent company liability in case of dissolution to avoid liability ("rechtsmissbräuchliche Haftungsvermeidung") plus labour law recognizes similar models.
2 a. Member States shall ensure that: (a) the limitation period for bringing actions for damages is at least ten years for environmental harm and three years for other damages, starting with the damage discovered, and measures are in place to ensure that costs of the proceedings are not prohibitively expensive for claimants to seek justice;	Clear requirements for all Member States for starting of limitation period with the discovery of damage are necessary. Ideally, conditions for the suspension of the limitation period are also regulated (e.g. in recitals).
(b) claimants are able to seek injunctive measures, including summary proceedings.	Injunctive measures are particularly important in the context of environmental law and ongoing harm, e.g. pollution, and should

Proposal for Art. 22 CSDDD	**Explanation**
	therefore be guaranteed under all circumstances.
(c) measures are in place to ensure that mandated trade unions, civil society organisations, or other relevant actors acting in the public interest can bring actions before a court on behalf of a victim or a group of victims of adverse impacts, and that these entities have the rights and obligations of a claimant party in the proceedings, without prejudice to existing national law;	Very important access to justice vehicle (see in further detail above) as it guarantess access via representation.
(d) when a claim is brought, that a claimant provides elements substantiating the likelihood of a company's liability under this Directive and has indicated that additional evidence lies in the control of the company, courts are able to order that such evidence be disclosed by the company without further specification of the documents by the claimant, subject to the Union and national rules on confidentiality and proportionality;	At least adaptation of disclosure rules should be added to the Parliament's proposal; a complete reversal of burden of proof would still be preferable from a human rights perspective.
3. The civil liability of a company for damages arising under this provision shall be without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the company's value chain. When the damage was caused jointly by the company and its subsidiary, direct or indirect business partner, they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the conditions of joint and several liability and the rights of recourse.	Clarification on joint liability and subsidiary liability supports harmonized liability standards which create a level playing field within the EU.a
4. The civil liability rules under this Directive shall be without prejudice	Important clarification.

Proposal for Art. 22 CSDDD	**Explanation**
to Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than this Directive.	
5. Member States shall ensure that the provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.	Important to keep overriding mandatory application, which regulates that once Art. 22 CSDDD is transposed into national civil liability clause, such clause is applicable before non-MS law in any case (independent of Rome II Regulation)

Imprint

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German Institute for Human Rights

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