GEDIP Recommendation to the European Commission on the private international law aspects of the future EU instrument on corporate due diligence and accountability

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The European Group for Private International Law (GEDIP) at its annual – virtual – meeting in September 2021 adopted a Recommendation to the EU Commission concerning the PIL aspects of corporate due diligence and corporate accountability.

The GEDIP adopted this Recommendation although the Commission has not yet published its legislative initiative on mandatory human rights and environmental due diligence obligations for companies, to which EU Commissioner for Justice, Didier Reynders, committed on 19 April 2019[1]. Meanwhile, however, on 10 March 2021 the European Parliament adopted a Resolution "with recommendations to the Commission on corporate due diligence and corporate accountability"[2]. As the Commission will likely draw inspiration from this document, the GEDIP considered the EP Resolution when drafting its Recommendation. The GEDIP also took into account various legislative initiatives taken by Member States such as the 2017 French *Loi sur le devoir de vigilance* and the 2021 German legislative proposal for a *Sorgfaltsplichtengesetz*[3], as well as recent case law in the UK and the Netherlands[4]

The Recommendation starts from the premise that the future EU Instrument (whether a Regulation or a Directive) will have a broad, cross-sectoral scope, and will apply both to companies established in the EU and those in a third State

when operating in the internal market. In order to accomplish its aim, the Instrument, in addition to a public law monitoring and enforcement system, should create civil law duties for the relevant companies. Since such duties may extend beyond Member States' territories, they will give rise to issues of private international law. To be effective, the Instrument should not leave their regulation to the differing PIL systems of the Member States. Ultimately, the proposed rules may find their place in revised texts of EU regulations, including Brussels I recast, Rome I and Rome II. But since revisions of those regulations are unlikely to take place before the adoption of the Instrument, and as these rules are indispensable for its proper operation, the proposal is to include them in the Instrument itself.

The Recommendation therefore proposes that the Instrument extends the current provision on connected claims (Art. 8 (1) Brussels I) to cases where the defendant is not domiciled in a Member State, creates a *forum necessitatis* where no jurisdiction is available within the EU, determines that the Instrument's provisions have overriding mandatory effect whatever law may apply to contractual and non-contractual obligations and companies, and extends the rule of Art. 7 of Rome II to claims resulting from non-compliance in respect of all matters covered by the Instrument, while excluding the possibility of invoking Art. 17 of Rome II by way of exoneration[5]

[1] European Commission promises mandatory due diligence legislation in 2021 – RBC (responsiblebusinessconduct.eu).

[2] https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html.

[3] See II Background to the Proposal, 3.

[4] See II Background to the Proposal 2.

[5] The Annex to the Proposal contains suggestions concerning the form and the substantive scope of the future EU instrument.