The EU Sustainability Directive and Jurisdiction

The Draft for a Corporate Sustainable Due Diligence Directive currently contains no rules on jurisdiction. This creates inconsistencies between the scope of application of the Draft Directive and existing jurisdictional law, both on the EU level and on the domestic level, and can lead to an enforcement gap: EU companies may be able to escape the existing EU jurisdiction; non-EU companies may even not be subject to such jurisdiction. Effectivity requires closing that gap, and we propose ways in which this could be achieved.

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1. **The Proposal for a Directive on Corporate Sustainability Due Diligence**

The process towards an EU Corporate Sustainability Due Diligence Directive is gaining momentum. The EU Commission published a long awaited Proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD), COM(2022) 71 final, on 23 February 2022; the EU Council adopted its negotiation position on 1 December 2022; and now, the EU Parliament has suggested amendments to this Draft Directive on 1 June 2023. The EU Parliament has thereby backed the compromise textreached by its legal affairs committee on 25 April 2023. This sets off the trilogue between representatives of the Parliament, the Council and the Commission.

The current state of the CSDDD already represents a milestone. It not only introduces corporate responsibility for human rights violations and environmental damage – as already found in some national laws (e.g. in France; Germany; Netherlands; Norway; Switzerland; United Kingdom) – but also and in contrast (with the exception of French law – for more details see *Camy*) introduces civil liability. Art. 22 (1) CSDDD entitles persons who suffer injuries as result of a

failure of a company to comply with the obligations set forth in the Directive to claim compensation. It thereby intends to increase the protection of those affected within the value chain, who will now have the prospect of compensation; it also intends to create a deterrent effect by having plaintiffs take over the enforcement of the law as "private attorney generals". Moreover, the Directive requires that Member States implement this civil liability with an overriding mandatory application to ensure its application, Art. 22 (5) CSDDD. This is not unproblematic: the European Union undertakes here the same unilateralism that it used to criticize when previously done by the United States, with the Helms/Burton Act as the most prominent example.

That is not our concern here. Nor do we want to add to the lively discussion on the choice-of-law- aspects regarding civil liability (see, amongst others, *van Calster*, *Ho-Dac*, *Dias* and, before the Proposal, *Rühl*). Instead, we address a gap in the Draft Directive, namely the lack of any provisions on jurisdiction. After all, mandatory application in EU courts is largely irrelevant if courts do not have jurisdiction in the first place. If the remaining alternative is to bring an action in a court outside the EU, the application of the CSDDD civil liability regime is not, however, guaranteed. It will then depend on the foreign court's conflict-of-law rules and whether these consider the CSDDD provisions applicable – an uncertain path.

Nonetheless, no mirroring provisions on international jurisdiction were included in the CSDDD, although such inclusion had been discussed. Suggestions for the inclusion of a new jurisdictional rule establishing a *forum necessitatis* in the Brussels I Regulation Recast existed (see the Study by the European Parliament Policy Department for External Relations from February 2019, the Draft Report of the European Parliament Committee on Legal Affairs with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL) as well as the Recommendation of the European Groupe of Private International Law (GEDIP) communicated to the Commission on 8 October 2021). Further, the creation of a *forum connexitatis* in addition to a *forum necessitatis* had been recommended by both the Policy Department Study and the GEDIP. Nevertheless, the report of the European Parliament finally adopted, together with the Draft Directive of 10 March 2021, no longer contained such rule on international jurisdiction, without explanation. Likewise, the Commission's CSDDD draft and the Parliament's recent amendments lack such a provision.

2. **Enforcement Gap for Actions against Defendants Domiciled within the EU**

To assess the enforcement gap, it is useful to distinguish EU companies from non-EU companies as defendants. For EU companies, the Directive applies to companies of a certain size which are formed in accordance with the legislation of a Member State according to Art. 2 (1) CSDDD – the threshold numbers in the Commission's draft and the Parliament amendments differ, ranging between 250–500 employees and EUR 40–150 million annual net worldwide turnover, with questions of special treatment for high-risk sectors.

At first sight, no enforcement gap seems to exist here. The general jurisdiction rule anchored in Art. 4 (1) Brussels I Regulation Recast allows for suits in the defendant's domicile. Art. 63 (1) further specifies this domicile for companies as the statutory seat, the central administration or the principal place of business. (EU-based companies can also be sued at the place where the harmful event occurred according to Art. 7 (2) Brussels I Regulation Recast, but this will provide for access to an EU court only if this harmful event occurred within the EU.) The objection of *forum non conveniens* does not apply in the Brussels I Regulation system (as clarified in the CJEU's *Owusu* decision). Consequently, in cases where jurisdiction within the EU is given, the CSDDD applies, including the civil liability provision with its mandatory application pursuant to Art. 22 (1), (5).

Yet there is potential leeway for EU domiciled companies to escape EU jurisdiction and thus avoid the application of the CSDDD's civil liability. One way to avoid EU jurisdiction is to use an exclusive jurisdiction agreement in favour of a third country, or an arbitration clause. Such agreements concluded in advance of any occurred damage are conceivable between individual links of the value chain, such as between employees and subcontractors (in employment contracts) or between different suppliers along the chain (in purchase and supply agreements). EU law does not expressly prohibit such derogation. Precedent for how such exclusive jurisdiction agreements can be treated can be found in the case law following the *Ingmar* decision of the CJEU. In *Ingmar*, the CJEU had decided that a commercial agent's compensation claim according to Arts. 17 and 18 of the Commercial Agents Directive (86/653/EEC) could not be avoided through a choice of law in favour of the law of a non-EU country, even though the

Directive said nothing about an internationally mandatory nature for the purpose of private international law – as Art. 22 (5) CSDDD in contrast now does. The German Federal Court of Justice (BGH) extended this choice-of-law argument to the law of jurisdiction and held that jurisdiction clauses which could undermine the application of mandatory provisions are invalid, too, as only such a rule would safeguard the internationally mandatory scope of application of the provisions. Other EU Member State courts have shown a similar understanding not only with regard to exclusive jurisdiction agreements but also with regard to arbitration agreements (Austrian Supreme Court of Justice; High Court of Justice Queen's Bench Division).

Common to Arts. 17 and 18 Commercial Agents Directive and Art. 22 CSDDD is their mandatory nature for the purpose of private international law, which established by the ECJ for the former and is legally prescribed for the latter in Art. 22 (5) CSDDD. This suggests a possible transfer of the jurisdictional argument regarding jurisdiction. To extend the internationally mandatory nature of a provision into the law of jurisdiction is not obvious; choice of law and jurisdiction are different areas of law. It also means that the already questionable unilateral nature of the EU regulation is given even more force. Nonetheless, to do so appears justified. Allowing parties to avoid application of the CSDDD would run counter to its effective enforcement and therefore to the *effet utile*. This means that an exclusive jurisdiction agreement in favour of a third country or an arbitration clause will have to be deemed invalid unless it is clear that the CSDDD remains applicable or the applicable law provides for similar protection.

3. Enforcement Gap for Actions against Defendants Domiciled Outside the EU

While the enforcement gap with regard to EU companies can thus be solved under existing law, additional problems arise with regard to non-EU corporations. Notably, the Draft Directive applies also to certain non-EU companies formed in accordance with the legislation of a third country, Art. 2 (2) CSDDD. For these companies, the scope of application depends upon the net turnover within the territory of the Union, this being the criterion creating a territorial connection between these companies and the EU (recital (24)). The Parliament's amendments lower this threshold and thereby sharpen the scope of application of the Directive.

While application of the CSDDD to these companies before Member State courts is guaranteed due to its mandatory character, jurisdiction over non-EU defendants within the EU is not. International jurisdiction for actions against third-country defendants as brought before EU Member State courts is – with only few exceptions – generally governed by the national provisions of the respective Member State whose courts are seized, Art. 6 (1) Brussels I Regulation Recast. If the relevant national rules do not establish jurisdiction, no access to court is given within the EU.

And most national rules do not establish such jurisdiction. General jurisdiction at the seat of the corporation will usually lie outside the European Union. And the territorial connection of intra-EU turnover used to justify the applicability of the CSDDD does not create a similar basis of general jurisdiction, because jurisdiction at the place of economic activity ("doing business jurisdiction") is alien to European legal systems. Even in the US, where this basis was first introduced, the US Supreme Court now limits general jurisdiction to the state that represents the "home" for the defendant company (*BNSF Railroad Co. v. Tyrrell*, 137 S.Ct. 1549 (2017); *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011)); whether the recent decision in *Mallory v. Norfolk Southern Railway Co.,* 600 U.S. (2023) will re-open the door to doing business jurisdiction remains to be seen (see *Gardner*).

Specific jurisdiction will not exist in most cases, either. Specific jurisdiction in matters relating to tort will be of little use, as in value chain civil liability claims the place of the event giving rise to damages and the place of damage are usually outside the EU and within that third state. Some jurisdictional bases otherwise considered exorbitant may be available, such as the plaintiff's nationality (Art. 14 French Civil Code) or the defendant's assets (Section 23 German Code of Civil Procedure). Otherwise, the remaining option to seize a non-EU defendant in a Member State court is through submission by appearance according to Art. 26 Brussels I Regulation Recast.

Whether strategic joint litigation can be brought against an EU anchor defendant in order to drag along a non-EU defendant depends upon the national provisions of the EU Member States. Art. 8 (1) Brussels I Regulation Recast, which allows for connected claims to be heard and determined together, applies only to EU-defendants – for non-EU defendants the provision is inapplicable. In some

Member States, the national civil procedure provisions enable jurisdiction over connected claims against co-defendants, e.g. in the Netherlands (Art. 7 (1) Wetboek van Burgerlijke Rechtsvordering), France (Art. 42 (2) Code de procédure civile) and Austria (§ 93 Jurisdiktionsnorm); conversely, such jurisdiction is not available in countries such as Germany.

Various Member State decisions have accepted claims against non-EU companies as co-defendants by means of joinder of parties. These cases have based their jurisdiction on national provisions which were applicable according to Art. 6 (1) Brussels I Recast Regulation: In *Milieudefensie* in December 2015, the Court of Appeal at the Hague held permissible an action against a Dutch anchor defendant that was joined with an action against a Nigerian company as co-defendant based on Dutch national procedural law, on the condition that claims against the anchor defendant were actually possible. The UK Supreme Court ruled similarly in its *Vedanta* decision in April 2019, wherein it found that English private international law, namely the principle of the *necessary or proper party gateway*, created a valid basis for invoking English jurisdiction over a defendant not domiciled in a Member State (with registered office in Zambia) who had been joined with an anchor defendant based in the UK. The claim was accepted on the condition that (i) the claims against the anchor defendant involve a real issue to be tried; (ii) it would be reasonable for the court to try that issue; (iii) the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) the claims against the foreign defendant have a real prospect of success; (v) either England is the proper place in which to bring the combined claims or there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place or the convenient or natural forum. The UK Supreme Court confirmed this approach in February 2021 in its *Okpabi* decision (for discussion of possible changes in UK decisions after Brexit, see *Hübner/Lieberknecht*).

In total, these decisions allow for strategic joint litigation against third-country companies together with an EU anchor defendant. Nonetheless, they do not establish international jurisdiction within the EU for isolated actions against non-EU defendants.

4. **How to Close the Enforcement Gap – *forum legis***

The demonstrated lack of access to court weakens the Directive's enforceability and creates an inconsistency between the mandatory nature of the civil liability and the lack of a firm jurisdictional basis. On a substantive level, the Directive stipulates civil liability for non-EU companies (Art. 22 CSDDD) if they are sufficiently economically active within the EU internal market (Art. 2 (2) CSDDD). Yet missing EU rules on international jurisdiction vis-à-vis third-country defendants often render procedural enforcement before an intra-EU forum impossible – even if these defendants generate significant turnover in the Union. Consequently, procedural enforcement of civil liability claims against these non-EU defendants is put at risk. The respective case law discussed does enable strategic joint litigation, but isolated actions against non-EU defendants cannot be based upon these decisions. At the same time, enforceability gaps exist with respect to EU defendants: It remains uncertain whether the courts of Member States will annul exclusive jurisdiction agreements and arbitration agreements if these undermine the application of the CSDDD.

This situation is unsatisfactory. It is inconsistent for the EU lawmaker to make civil liability mandatory in order to ensure civil enforcement but to then not address the access to court necessary for such enforcement. And it is inadequate that the (systemic) question of judicial enforceability of civil liability claims under the Directive is outsourced to the decision of the legal systems of the Member States. National civil procedural law is called upon to decide which third-country companies can be sued within the EU and how the *Ingmar* case law for EU domiciled companies will be further developed. This is a problem of uniformity – different national laws allow for different answers. And it is a problem of competence as Member State courts are asked to render decisions that properly belong to the EU level.

The CSDDD aims to effectively protect human rights and the environment in EU-related value chains and to create a level playing field for companies operating within the EU. This requires comparable enforcement possibilities for actions based on civil liability claims that are brought pursuant to Art. 22 CSDDD against all corporations operating within the Union. The different regulatory options the EU legislature has to achieve this goal are discussed in what follows.

Doing Business Jurisdiction

A rather theoretical possibility would be to allow actions against third-country

companies within the EU in accordance with the former (and perhaps revived) US case law on *doing business jurisdiction* in those cases where these companies are substantially economically active within the EU internal market. This would be consistent with the CSDDD's approach of stretching its scope of application based on the level of economic activity within the EU (Art. 2 (2) CSDDD). However, the fact that such jurisdiction has always been considered exorbitant in Europe and has even been largely abolished in the USA speaks against this development. Moreover, a *doing business jurisdiction* would also go too far: it would establish general jurisdiction, at least according to the US model, and thus also apply to claims that have nothing to do with the CSDDD.

Forum Necessitatis and Universal Jurisdiction

Another possible option would be the implementation of a *forum necessitatis* jurisdiction in order to provide access to justice, as proposed by the European Parliament Policy Department for External Relations, the European Parliament Committee on Legal Affairs and the GEDIP. However, such jurisdiction could create uncertainty because it would apply only exceptionally. Moreover, proving a "lack of access to justice" requires considerable effort in each individual case. Until now, EU law provides for a *forum necessitatis* only in special regulations; the Brussels I Regulation Recast does not contain any general rule for emergency jurisdiction. Member State provisions in this regard generally require a certain connection with the forum to establish such jurisdiction – the exact prerequisites differ, however, and will thus not be easily agreed upon on an EU level (see *Kübler-Wachendorff*).

The proposal to enforce claims under Art. 22 CSDDD by means of universal civil jurisdiction for human rights violations, which could be developed analogously to universal jurisdiction under criminal law, appears similarly unpromising; it would also go further than necessary.

Forum connexitatis

It seems more promising to implement a special case of a *forum connexitatis* so as to allow for litigation of closely connected actions brought against a parent company domiciled within the EU together with a subsidiary or supplier domiciled in a third country, as proposed by the European Parliament Policy Department for External Relations and the GEDIP. This could be implemented by means of a

teleological reduction of the requirements of Art. 8 (1) Brussels I Regulation Recast with regard to third-country companies, which would be an approach more compatible with the Brussels Regulation system than the implementation of a *forum necessitatis* provision (such a solution has, for instance, been supported by *Mankowski*, in: Fleischer/Mankowski (Hrsg.), LkSG, Einl., para. 342 and the GEDIP). This would simultaneously foster harmonisation on the EU level given that joint proceedings currently depend upon procedural provisions in the national law of the Member States. Moreover, this could avoid "blame games" between the different players in the value chain (see *Kieninger*, RW 2022, 584, 589). For the implementation of such a *forum connexitatis*, existing Member State regulations and related case law (*Milieudefensie, Vedanta*, and *Okpabi*) can serve as guidance. Such a forum is not yet common practice in all Member States; thus, its political viability remains to be seen. It should also be borne in mind that the implementation of a *forum connexitatis* on its own would only enable harmonised joint actions that were brought against EU domiciled anchor defendants together with non-EU defendants; it would not enable isolated actions against third-country companies – even if they are economically active within the EU and fall within the scope of application of the CSDDD.

Forum legis

The best way to close the CSDDD enforcement gap would be introducing an international jurisdiction basis corresponding to the personal scope of application of the Directive. The EU legislature would need to implement a head of jurisdiction applicable to third-country companies that operate within the EU internal market at the level specified in Art. 2 (2) CSDDD. Effectively, special jurisdiction would be measured on the basis of net turnover achieved within the EU. This would procedurally protect the Directive's substantive regulatory objectives of human rights and environmental protection within EU-related value chains. Moreover, this would ensure a level playing field in the EU internal market.

Other than a forum premised on joint litigation, this solution would allow isolated actions to be brought – in an EU internal forum – against non-EU companies operating within the EU. The advantage of this solution compared to a forum of necessity is that the connecting factor of net turnover is already defined by Art. 2 (2) CSDDD, thus reducing the burden of proof, legal uncertainty and any unpredictability for the parties. Moreover, this approach would interfere less with

the regulatory interests of other states than a *forum necessitatis* rule, which for its part would reach beyond the EU's own regulatory space.

A *forum legis* should not be implemented only as a subsidiary option for cases in which there is a lack of access to justice, because this would create legal uncertainty. The clear-cut requirements of Art. 2 (2) CSDDD are an adequate criterion for jurisdiction via a *forum legis*. On the other hand, it should not serve as an exclusive basis of jurisdiction, because especially plaintiffs should not be barred from the ability to bring suit outside the EU. The risk of strategic declaratory actions brought by companies in a court outside the EU seems rather negligeable, and this can be avoided either by giving preference to actions for performance over negative declaratory actions, as is the law in Germany or through the requirement of recognisability of a foreign judgment, which would not be met by a foreign decision violating domestic public policy by not providing sufficient protection.

This leaves a problem, however: The CSDDD does not designate which Member State's court have jurisdiction. Since a *forum legis* normally establishes adjudicatory jurisdiction correlating with the applicable law, jurisdiction lies with the courts of the country whose law is applied. This is not possible as such for EU law because the EU does not have its own ordinary courts. The competent Member State court within the EU must be determined. Two options exist with regard to the CSDDD: to give jurisdiction to the courts in the country where the highest net turnover is reached, or to allow claimants to choose the relevant court. The first option involves difficult evidentiary issues, the second may give plaintiffs an excessive amount of choice. In either case, non-EU companies will be treated differently from EU companies on the question of the competent court – for non-EU companies, net turnover is decisive in establishing the forum, for EU-companies, the seat of the company is decisive. This difference is an unavoidable consequence resulting from extension of the scope of application of the Directive to third-country companies on the basis of net turnover.

5. Implementation

How could this *forum legis* be achieved? The most straightforward way would be to include a rule on jurisdiction in the CSDDD, which would then oblige the

Member States to introduce harmonised rules of jurisdiction into national procedural law. This would be a novelty in the field of European international civil procedure law, but it would correspond to the character of the special provision on value chains as well as to the mechanism of the CSDDD's liability provision. An alternative would be to include in the Brussels I Regulation Recast a sub-category of a special type of jurisdiction under Art. 7 Brussels I Regulation Recast. This as well would be a novelty to the Brussels system, which in principle requires that the defendant be seated in a Member State (see also *Kieninger*, RW 2022, 584, 593, who favours reform of the Brussels I Regulation Recast for the sake of uniformity within the EU). This second option would certainly mesh with current efforts to extend the Brussels system to non-EU defendants (see *Lutzi/Piovesani/Zgrabljic Rotar*).

The implementation of such a *forum legis* is not without problems: It subjects companies, somewhat inconsistently with the EU legal scheme, to *de facto* jurisdiction merely because they generate significant turnover in the EU's internal market. Yet such a rule is a necessary consequence of the extraterritorial extension of the Directive to third-country companies. The unilateral character of the CSDDD is problematic. But if the CSDDD intends to implement such an extension on a substantive level, this must be reflected on a procedural level so as to enable access to court. The best way to do this is by implementing a *forum legis*. The CSDDD demonstrates the great importance of compensation of victims of human rights and environmental damage, by making the cicil liability rule internationally mandatory. Creating a corresponding head of jurisdiction for these substantive civil liability claims is then necessary and consistent in order to achieve access to court and, thus, procedural enforceability.