



Climate Protection and Supply Chain Civil Liability

Christine Godt

Professor for European and International Economic Law, Director Hanse Law School, Carl von Ossietzky University of Oldenburg, Oldenburg, Germany

christine.godt@uni-oldenburg.de

Received: 22 June 2023 | Accepted: 5 November 2023 |

Published online: 28 November 2023

Abstract

This article explores two issues raised by the EU legislative project of a Corporate Sustainability Due Diligence Directive (“CSDDD”), that of climate change and civil liability. It focuses on environmental issues – and leaves workers’ protection aside. The comparison of the various draft texts of the EU Commission of 23 February 2022, the position of the EP’s Committee on Legal Affairs of 8 November 2022, the Council’s joint statement of 1 December 2022, and the EP’s statement of 1 June 2023 reveals that climate abatement has become an important pillar, next to workers’ protection. The analysis shows how contested the instrument of civil liability in the context of climate change abatement has become. It is most likely that civil liability for the violation of climate change related due diligence obligations will become central to the final package of compromises, and once enacted it may neither be frequent, nor an important legal tool. However, for the understanding of the political momentum, it is important to understand the background of some delegations standpoints, in this case the fierce opposition of the German delegation against civil liability as a tool, and the counter arguments. The analysis also reveals some interesting novelties: Liability would, if causation could be established, extend to ecological damages. The concept of due diligence changes some basic requirements of civil liability, such as the violation of a duty, the addressee of a claim and the procedural set-up. The limitation to large firms is consistent with this concept, and does not appear non-equitable.

Keywords

civil liability – environmental damages – climate change – causation – corporate veil

1 Introduction¹

On June 1, 2023, the EU Parliament (EP) approved² the EU Commission's proposal for a new "Corporate Sustainability Due Diligence Directive" ("CSDDD"),³ however with 381 amendments – after the EP's Committee on Legal Affairs⁴ and the Council⁵ had issued their negotiation positions. The legislative process will now enter the trilogue negotiations (Art. 294 TFEU⁶). It is expected that the directive will not come into effect until at least 2025. The directive intends to harmonise a scattered legal social responsibility landscape across Europe of five earlier national 'Supply Chain Responsibility Acts'.⁷ While all legal initiatives refer to the UN-Principles

1 A previous version of this article was originally submitted as contribution to the Dutch-German Workshop on Climate Litigation, Oldenburg, 24/25 March 2022, organised by Prof. Dr. Peter Rott. Following the deliberations in the European Parliament and comments of two external reviewers, the article was revised in spring and fall 2023.

2 Plenary decision von 1 June 2023, Doc. No. A9-0184/2023A9-0184/2023 (providing a synopsis of the EP amendments to the European Commission's proposal): As far as the text refers to these amendments, it uses "EPP" as acronym for 'European Parliament's Proposal'.

3 The acronym CSDDD will be used for the legislative project as a whole and for paragraphs which are congruent in all submitted proposals. Where the text refers directly to the EU Commission's proposal of 23 February 2022: COM(2022) 71 final, it is referred to as "CP" [Commission's Proposal]). The Commission's proposal reacted to the EP's Resolution of 10 March 2021 (2020/2129(INL)). The Council approved the Commission's proposal by a joint position on 30 Nov. 2022 (15024/1/22 REV 1).

4 Rapporteur of the EP's Committee on Legal Affairs, Lara Wolter, 8 November 2022, 2022/0051(COD).

5 Council's 'General Approach' of 1 Dec. 2022, doc. No. 15024/1/22 REV 1. A central amendment made by the Council is an additional article ("Art. 4a" CSDDD) which explicitly provides for a responsibility of parent companies on behalf of their subsidiaries. Yet, the obligation shall apply only when both meet the scope thresholds as reflected by a new recital 16a.

6 On the complexities (lack of transparency and democratic oversight) of the trilogue see only: G.J. Brandsma, Transparency of EU informal dialogues through public feedback in the European Parliament: promise unfulfilled, *Journal of European Public Policy*, 26 (2019) 1461–1483.

7 The Commission based the proposal on Article 50 TFEU ("level playing field for all companies") and Article 114 TFEU (internal market), COM(2022) 71 final, 10.

of 2011 and the OECD- Guidelines on Multinational Enterprises of 2011,⁸ the two catastrophic accidents of “Ali Enterprises” in Karachi (Pakistan) in 2012 and “Rana Plaza” in Dhaka (Bangladesh) in 2013 with a death toll of about 1350⁹ provided the political momentum for the legislative processes. First the United Kingdom (2015),¹⁰ then France (2017),¹¹ the Netherlands

8 UN-Guiding Principles on Business and Human Rights, 2011 (available under <<https://www.ohchr.org>>; OECD-Guidelines for Multilateral Enterprises 2011 (available with updates under <<https://www.oecd.org/>>); both legal texts implement the conclusions of “Ruggie Report” *Protect, Respect and Remedy*, A/HRC/8/5 of 7 April 2008.

9 The fire at the “Ali Enterprises” factory in Karachi, Pakistan on 11. September 2012 (250 reported deaths), and at “Rana Plaza” in Dhaka, Bangladesh on 24. April 2013 (1100 reported deaths). Victims sued the textile trader KiK in Dortmund (Germany), but lost due to the applied Pakistani law as *lex causae*; LG Dortmund, judgement of 10. January 2019 – 7 O 95/15, para. 27. Pakistani delict claims expire after two years. The court rejected to apply Article 6 German Conflicts of Law Act (“ordre public”, EGBGB, in Germany damage claims based on negligence expire after 30 years; § 197 BGB) and did not discuss a remission for the limitation period which is qualified under common law as procedural (thus *lex fori*) rule.

10 Modern Slavery Act 2015, UK Public General Acts 2015 c. 30 PART 6. The act obliges companies with an annual turn-over of 36 million pounds to publish a statement which describe the steps undertaken to avoid slavery and human trafficking in the companies supply chains. The law allows that the statement says that no steps had been undertaken. The guidelines of the British ministry of the interior does indicate that the responsible minister can enact a preliminary injunction in case the company did not file a declaration. However, the reporting duty is conceptualised as a market information tool. The idea is that consumers shall react and build up public pressure. In practice, studies found a rather low compliance. Only half of the companies obliged file a declaration.

11 ‘Loi Sapin II’: LAW No 2017-399 of 27 March 2017 on the Duty of Vigilance of parent companies and instructing companies, JORF No 0074 of 28 March 2017, text No 1 (printed, and translated to German, in ZGR 2018, 474 et seq.). L. Nasse, ‘Devoir de Vigilance – Die neue Sorgfaltspflicht zur Menschenrechtsverantwortung für Großunternehmen in Frankreich’, *Zeitschrift für Europäisches Privatrecht (ZEuP)* 4 (2019), 773–801; L. Nasse, *Loi de vigilance – Das französische Lieferkettengesetz* (Tübingen: Mohr Siebeck, 2022). By July 2021, seven law suits are documented (S. Bommier, L. Chatain and C. Loyer (eds), *Duty of vigilance radar – Follow up on current cases (July 2021)*, access via <<https://vigilance-plan.org/wp-content/uploads/2021/07/A4-VF-FICHES-UK-060721-xxs.pdf>> (last accessed 20.10.2023). Another one was filed on 23 Febr 2023 against the French bank BNP Paribas before the civil tribunal in Paris (criticising deficiencies in the vigilance plan related to the allocation fundraising activities). By July 2023, four suits were rejected as inadmissible: he A first suit initiated on 19.6.2019 by several Environmental NGOs and some cities (including Grenoble) filed against Total aiming at an improvement of Total’s business plan to aim at a reduction of emission (scope 1, 2 and 3) attributed to the company (Sherpa et al vs. TotalEnergies) was dismissed as inadmissible on 6 July 2023 by the *Tribunal judiciaire de Paris* (N° RG 22/03403; N° Portalis 352J-W-B7G-CWN5A). A second case (Tilenga and EACOP, initiated 24.6.2019) was rejected as inadmissible in February 2023 (more detail infra fn. 102). Two others were dismissed on the same ground: Suez/Chile (Bommier et al. 2021, p. 13) was dismissed on 2.

(2019),¹² Germany ('LKG' 2021)¹³ and Norway (2021)¹⁴ tabled "supply chain responsibility acts".¹⁵ While the first two and the latest (UK, Netherlands, Norway) focus on labour and human trafficking, already the French act mentions "environmental damages", and the German act installs a set of listed "environmental obligations". While the goals and the techniques employed by all acts are similar in that they aim at a self-governed risk management by

June 2023 (but will be appealed, see FIDH-press release <<https://www.fidh.org/en/issues/litigation/litigation-against-companies/suez-case-chile-court-dismisses-legal-action-the-french-duty-of>> of 2.6.2023; the case 'EDF Mexico' initiated 2020 (Bommier et al. 2021, p. 9) came to an end mid-2021 (because Mexico cancelled the contracts with EDF), and interim measure were rejected on 30.11.2021 (Zerah Brémond, <https://Verfassungsblog.de> of 6.April 2023).

- 12 "Wet Zorgplicht Kinderarbeid" ("Child Labour Due Diligence Law"), Staatsblad van het Koninkrijk der Nederlanden 201, 401 (13-11-2019). This Dutch act is limited to child labour. In contrast to its predecessors, however, the Dutch act is NOT limited to companies registered in the Netherlands, but applies to all companies regardless where they are registered if they offer goods and services to Dutch customers. The duty is to engage in a risk assessment if the company's products can be related to child labour. If so, companies have to submit and implement an action plan, and report on actions undertaken. The reports are made public by an agency in a publicly accessible register. Victims of child labour and Dutch consumers can take action based on clear evidence and file a complaint to the Dutch agency that the duty was not complied with. In addition, there are criminal penalties against the undertaking. For companies not submitting reports, administrative fines can be imposed. While the law is enacted, implementing rules are still missing. The Dutch 'Ministerie van Buitenlandse Zaken' published a statement that it awaits the EU-wide implementation: 'Ministerie van Buitenlandse Zaken', Van voorlichten tot verplichten, press release of 16.10.2020 (<<https://open.overheid.nl/repository/ronl...imvo-van-voorlichten-tot-verplichten.pdf>>).
- 13 The 'Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten' (LKG) of 16. July 2021, BGBl. I (No. 46 of 22. July 2021), 2959 is in effect since 1.1.2023. It was passed on the very last moment of the last legislative term on 16 July 2021. It goes beyond mere "reporting duties", but requires companies to install a policy. For a comparison between the CP and the existing German Supply Chain Law see L. Hübner, V. Habrich, M.P. Weller, 'Corporate Sustainability Due Diligence-Der EU Richtlinientwurf für eine Lieferkettenregulierung', *Neue Zeitschrift für Gesellschaftsrecht* 14 (2022) 644–651.
- 14 Lov om virksomheters åpenhet og arbeid met grunnleggende menneskerettigheter og anstendige arbeidsvilkår, LOV-2021-06-18-99, in effect since 1. July 2022; for a comparison see M. Krajewski, K. Tonstadt and F. Wohltmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?' *Business and Human Rights Journal* 63 (2021) 550–558.
- 15 COM(2022) 71 final (at 1, fn. 3) reports that Austria, Belgium, Denmark, Finland, Italy, Luxembourg are planning to enact similar legislation in the near future, and the Netherlands expanding the existing act. Further (still non-governmental) initiatives are reported from Ireland, Spain and Sweden.

companies (“due diligence”, as far as submitted to the act),¹⁶ the national rules pursue different goals, are positioned in different legal contexts and install different sanctions.

As these precedents, the CSDDD addresses large companies only (although its thresholds are lower¹⁷); its focus is on business reports and director’s responsibility. Yet, it also encompasses two self-standing articles, one on climate change (Art. 15 CSDDD), and one on civil liability (Art. 22 CSDDD). These two articles are the target of this paper. Not only did the EP make extensive changes to both of the articles as proposed by the Commission. But more importantly, while the CSDDD and the French law legislate (some type of) civil liability,¹⁸ the German act had explicitly excluded civil liability based on violations of the due diligence duties *established by that law* (cp. § 3 sec. 3 LKG, leaving the general liability law untouched). A previously foreseen section on liability was

16 All refer to two documents: (1) United Nations’ “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (2011), available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

(2) OECD Guidelines for Multinational Enterprises (2011 update), available at: <https://doi.org/10.1787/9789264115415-en>, with set of recommendations on responsible business conduct, as well as specific OECD Due Diligence Guidance for Responsible Business Conduct (2018) and OECD sectoral guidance, available at: <https://mneguidelines.oecd.org/mneguidelines/>.

17 Article 2 CSDDD limits the personal scope of application by a combination of absolute and relative criteria, such as employees, turnover, sector risk sensitivity and place of registration: The EP widened its scope. It now applies to (abbreviated): (a) to EU firms with more than 250 employees and a net turnover worldwide of EUR 40 million (b) the company did not reach the thresholds under (a) but *is the ultimate parent company of a group that had 500 employees and a net worldwide turnover of more than 150 million in the last financial year for which annual financial statements have been prepared*. Earlier limits to specific sectors and explicit language for non-Eu-based companies became deleted.

18 Though to a different extent: The French law only adds violations of reporting duties to the set of possible duties. Other than that, the regular liability rules apply. Thus, the amendment refers to the grounds of the basic rule (in German doctrine called “Rechtsgrundverweisung”), so that a relationship between the missing plan and the damage must be established, see Cannelle Lavite, *The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence*, 16. Juni 2020, <https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/> (30.09.2020); also Katharina Koch, *Die französische Loi de vigilance als Beispiel für ein deutsches bzw. europäisches Lieferkettengesetz?* Europarecht-Online, Jean-Monnet-Saar-Blog, 1.10.2020, download: https://jean-monnet-saar.eu/?page_id=2818#_edn11.

dropped on the last metres of the German parliamentary consultation.¹⁹ This paper is, as first step, interested in the arguments which triggered the take-off of civil liability as a remedy. To what extent will (a future national) civil liability rule change the law and the real world, if the EU Commission's proposal becomes reality? It builds on previous publications of the author, notably one on 'due diligence' as a legal transplant in EU business regulation,²⁰ and one on the European environmental damages Directive 2004/35/EC.²¹ As a second step, the author considers an inquiry timely that reflects upon the reasons for resistance against civil liability, since previous legislative EU proposals failed due to German opposition. Late in the 1980s, the EU environmental liability directive started out as a project to harmonise civil liability across member states, and to include damages beyond mere violations to individual rights.²² In 2001, the Commission abandoned the civil law approach²³ and enacted in

-
- 19 Civil liability was foreseen throughout the first drafts until the inter-ministerial draft submitted by the Ministry of Int'l. Economic Cooperation and the Ministry for Social and Labour Affaires (on the importance of the civil liability clause already A. Beckers/H.W. Micklitz, 'Eine ganzheitliche Perspektive auf die Regulierung globaler Lieferketten', *Europäisches Wirtschafts- und Steuerrecht (EWS)* 2020, 324 (at 328). However, the former minister of the economy, Peter Altmaier, was a known outspoken opponent. On the preparatory process and the early drafts, see Henn/Jahn, *Rechtsgutachten zur Ausgestaltung einer umweltbezogenen Sorgfaltspflicht in einem Lieferkettengesetz*, Bonn: BUND, Juli 2020. 20; the text is also printed as annex in M. Weller and L. Nasse, 'Menschenrechtsarbitrage als Gefahrenquelle – Systemkohärenz einer Verkehrspflicht zur Menschenrechtssicherung in Lieferketten?' *Neue Zeitschrift für Gesellschaftsrecht* 22 (2020), 107–140, at 136.
- 20 C. Godt/M. Burchardi, 'Due Diligence and the Regulation of Transnational Economic Activity – Regulation (EU) No 511/2014 compared to other EU Due Diligence Schemes', in E.C. Kamau (ed.), *Global Transformation in the Use of Biodiversity for Research and Development: Post Nagoya Protocol Implementation Amid Unresolved and Arising Issues* (Cham: Springer, 2022), 547–586.
- 21 Directive 2004/35/EC of the EP and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, Off.J. L 143/56 of 30.4.2004; C. Godt, '„Zivilistische“ Haftung von und in Unternehmen für Umweltschäden', in: *Umwelt- und Technikrecht* 119 (2013), 237–256.
- 22 For the historical development see C. Godt, *Haftung für Ökologische Schäden* (Berlin: Duncker und Humblot, 1997), 49 et seq.; also T. Kadner, *Der Ersatz ökologischer Schäden* (Berlin: Duncker und Humblot, 1995), 85 et seq.
- 23 M. Petersen, *Die Umsetzung der Umwelthaftungsrichtlinie im Umweltschadensgesetz* (Köln: Heymann, 2013) 26. On the advantages of civil liability over (pure) administrative instruments (other actors, other rationales, cost internalisation, transnationality, control of authorities and [other] right holders) see Godt, *Ökologischer Schaden* (n 21) 284; also all contributions to S. Demeyere and V. Sagaert (eds) *Contract and Property with an Environmental Perspective* (Cambridge et al: Intersentia, 2020).

2004 a narrow public law approach to environmental damages.²⁴ The current CSDDD-draft proposal explicitly aims to complement the Environmental damage directive.²⁵ Against this background, it is timely to revise the arguments and inquire into the question whether the “civil liability debate” serves a symbolic function as an absorber of public pressure with no lasting effect.

The paper proceeds as follows. Chapter 2 explores the way how the directive deals with climate change obligations. Chapter 3 focuses on the civil liability concept behind the proposal, and discusses three questions: First, it briefly revisits the discussion of how to determine the applicable law. Second, the central question is what is meant with “civil liability for due diligence violations”? Third, the relationship between the incorporation principle and enterprise liability is explored. Chapter 4 returns to the question how due diligence transforms the law, what the link between liability and insurance will be, and what member states have to do with regard to procedural standing. Chapter 5 concludes.

2 The Directive and Climate Change

The header for Article 15 CSDDD-draft is “Combating Climate Change”. The EP revamped the structure from three to two sections, fanning out the general language of the Commission’s para. 2 proposal into seven concrete subsections under para. 1. Its core remains that the member states have to oblige (large) companies to adopt a “transition plan” which ensures that their business models and strategies “are aligned with the objectives of the transition to a sustainable economy and with the limiting of global warming to 1.5°C in line with the Paris Agreement and the objective of achieving climate neutrality as established in Regulation (EU) 2021/1119 (European Climate Law) as regards

24 Dir 2004/35/EC (infra n. 19). The EP sharply criticised the directive’s ineffectiveness. In a Resolution in 2017, it stated that “that under the ELD, incidents are defined ‘serious’ only if they give rise to deaths or serious injuries, with no reference to the consequences for the environment” (para. 10 of EP Resolution P8_TA-PROV(2017)0414). The Commission reacted and issued a Notice in April 2021, “Guidelines providing a common understanding of the term ‘environmental damage’ as defined in Article 2 of Directive 2004/35/EC of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage”, COM(2021/C 118/01), OJ C 118, 7.4.2021, 1–49.

25 COM(2022) 71 fin, 8: “It [the Environmental Damage Directive] does not cover companies’ value chains. The civil liability related to adverse environmental impacts of this Directive will be complementary to the Environmental Liability Directive.”

its operations in the Union, including its 2050 climate neutrality target and the 2030 climate target.”²⁶ The EP amended the references to existing EU legislation.²⁷ The Commission had focused on the identification of risks as to the company’s impacts on climate change. The EP concretised what has to be described in the report, including “the resilience of the company’s business model”, and “decarbonisation levers within the company’s operations”. What this means remains to be seen. As an enforcement measure, Article 15 CSDDD obliges Member States to ensure that remuneration schemes link a director’s performance not only to the firm’s profits but also to his or her impact on sustainability.²⁸

More importantly, the Commission’s proposal excluded climate change obligations from the sanction of civil liability. This was achieved by the EU-typical reference technique: Art. 22 liability for damages was limited to “compliance failures of Articles 7 and 8” CSDDD. These two articles refer to “adverse environmental impacts” defined by Art. 3 (b) CSDDD²⁹ as “adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II”. Yet, the Paris Accord (or any other document under the FCCC) is not on the list of Part II. It is therefore that a violation of a climate change related obligation was excluded from damage liability.³⁰ In fact, this result was not surprising considering that back in 2015, the parties to the Paris Accord explicitly excluded a “legal responsibility” in

26 The bold types indicate the changed wording by the EP.

27 Article 19a of Regulation (EU) 2021/0104 (CSRD), and Regulation (EU) 2021/1119 (European Climate Law).

28 The EP clarified: “Member States shall ensure that directors are responsible for overseeing the obligations set out in this Article and that companies with 2 more than 1000 employees on average have a relevant and effective policy in place to ensure that part of any variable remuneration for directors is linked to the company’s transition plan referred to in this Article. Such a policy shall be approved by the Annual General Meeting.” In this, the EP opposes respective amendments of the Council-draft.

29 Commission’s draft “adverse environmental impact” means an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II”; the EP text now reads: “ ‘adverse environmental impact’ means an adverse impact on the environment resulting from the failure to comply with obligations in line with the relevant provisions of the instruments listed in Part I, points 18 and 19, of the Annex and Part II of the Annex, taking into account, where available, the national legislation and measures linked to those provisions related to the international texts listed in Part I, points 18 and 19, of the Annex and Part II of the Annex”.

30 This result, at the time, was overseen by Hübner/Habrich/Weller, ‘Corporate Sustainability’ (n 12) 651 as far as they speak about upwind for “private law climate change litigation”.

form of liability and compensation.³¹ Yet, things changed over the last years, and public pressure has risen. It is therefore predictable that the EP changed the language. Art. 22 para. 1 EPP reads: “(a) failed to comply with the obligations laid down in this Directive and; (b) as a result of this failure the company caused or contributed to an actual adverse impact that should have been identified, prioritised, prevented, mitigated, brought to an end, remediated or its extent minimised through the appropriate measures laid down in this Directive and led to damage”. The reference to Art. 7 and 8 CSDDD under the new Art. 22 para. 2 subsection 2 EPP, does not exclude liability on the grounds, but only limits the extent of the damage.³²

Obviously, the EP reacted to the public climate change concerns,³³ and ongoing litigation.³⁴ But how will the *causal* link be established between the behaviour and the “led to” damage in the first place? In other words: how shall climate change impacts (such as storms, flooding, drought, health risks) be attributed to ‘adverse environmental impact’ when a company violates its duties?

3 Due Diligence and Civil Liability

Originally, the debate about “responsibility for supply chains” revolved around business reporting and due diligence as to identified risks. The focus was on “transnational firms”, and on controlling minimum standards upstream the supply chain. Its core was to install “liability for human rights and environmental violations”, when companies source internationally. The idea was to bind companies to *public international law* standards. The goal has been to overcome post-colonial patterns in the international division

31 In the run-up to next FCCC-COP 27 in Sharm el Scheich in October 2022, state secretary Jochen Flasbarth recalls this result in *Frankfurter Allgemeine Zeitung*, 6. August 2022, page 4.

32 Sec. 2 now reads: “In the assessment of the existence and extent of liability, due account shall be taken of the extent of the company’s efforts, insofar as they relate directly to the damage in question, to take remedial action, including that required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, as well as any collaboration with other entities and affected stakeholders to address adverse impacts in its value chains.”

33 The EP immediately identified the described referral technique which excluded liability for the violation of climate change obligation as most important deficit of the Commission’s proposal.

34 The KiK-decision (supra n 8), and Huarez-procedure (infra n 65).

of labour in transnational production chains. Resulting damages shall be “remedied” (Ruggie Report³⁵). As Anna Heinen explained,³⁶ while the 20th century saw a corporate development towards large integrated firms, with the turn of the millennium, corporate structures moved to fragmented production across the world,³⁷ paralleled with outsourcing pollution. While integrated firms prefer identical standards globally,³⁸ the disintegration of supply chains brought about new management forms between hierarchy and contract³⁹ which created a ‘governance gap’ between self-regulatory (fruitless) company law and territorially bound state law.⁴⁰ The debate which started out with claims for more health and safety (crystallised in “RanaPlaza”) extended to environmental protection and climate change. While the act explicitly aims to internalise costs and to complement the existing environmental damages directive 2004/35/EC, it provides for a ‘smart mix’⁴¹ of sanctions for the violation of the Article 4-duties: Besides direct enforcement by ‘supervisory authorities’ and classical ‘public’ top-down measures such as cessation and fines, the term ‘pecuniary sanctions’ encompasses three different types: (1) the exclusion from public procurement procedures and subsidy programmes (Arts. 20, 24 CSDDD),⁴² (2) civil liability under Article 22 CSDDD for damages

35 John Ruggie (in his function as United Nations Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises) submitted his final Report to the Human Rights Council on June 3, 2008: “Protect, Respect and Remedy: A Framework for Business and Human Rights, A/HRC/8/5 (April 7, 2008), available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>.

36 A. Heinen, ‘Auf dem Weg zu einem transnationalen Deliktsrecht? – Zur Begründung deliktischer Sorgfalts- und Organisationspflichten in globalen Wertschöpfungsketten’, in: M. Krajewski and M. Saage-Maaß (eds), *Die Durchsetzung menschenrechtlicher Sorgfaltspflichten von Unternehmen – Zivilrechtliche Haftung und Berichterstattung als Steuerungsinstrumente* (Baden-Baden: Nomos, 2018) 87–124.

37 Heinen, ‘Transnationales Deliktsrecht’ (n 35) 90.

38 Inter alia M. Herberg, ‘Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making’, in O. Dilling, M. Herberg and G. Winter (eds), *Responsible Business: Self governance and Law in Transnational Economic Transactions* (Oxford: Hart, 2008) 17–40.

39 Heinen, ‘Transnationales Deliktsrecht?’ (n 35) 91; this parallels the analysis of R.U. Fülbier and J. Gassen, ‘Kosten und Nutzen des faktischen Konzerns’ *ZGR Suppl.* 22 (2022), 41.

40 C. Glinski, *Die rechtliche Bedeutung der privaten Regulierung globaler Produktionsstandards* (Baden-Baden: Nomos, 2011).

41 L. Hübner, *Unternehmenshaftung für Menschenrechtsverletzungen* (Tübingen: Mohr Siebeck, 2022) 442.

42 Art. 24 CSDDD, cp. version CP: “Member States shall ensure that companies applying for public support certify that no sanctions have been imposed on them for a failure to comply with the obligations of this Directive.” Version EPP: “Member States shall ensure that (non-)compliance with the obligations resulting from this Directive or their voluntary

caused by violations of duties, (3) the reduction of directors' boni-payments (Arts. 15 and 25 CSDDD). Yet, the directive is conceived of as 'minimal harmonising'; member states are allowed to implement further sanctions. That means, the French focus on the business declaration, and the German focus on competition law sanctions (the exclusion from public tenders, if not adopted for the CSDDD as proposed by the EP) can be upheld.

3.1 *Applicable Law*

This article will not engage deeply in the vivid debate among civil lawyers as to conflicts of laws for supply chain liability.⁴³ Art. 22 sec. 5 CSDDD clearly states: "Member States shall ensure that the liability provided for in provisions of national law transposing this Article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State." The EP proposes an additional Article 2a⁴⁴ EPP concretising

implementation qualifies as one of the environmental and social aspects to be taken into consideration in accordance with the rules applicable to the provision of public support or the award of public contracts and concessions."

43 There was a vivid debate on at least two questions. First, which law does apply by default, and second, to which extend might mandatory rules supersede? Initially, it was argued that the jurisdiction of 'the place where the harmful event occurred or may occur' is attributed a higher rationality', as they function as a 'sword': A. Fuchs, Article 16, in: P. Huber (ed.), *Rome II Regulation – Pocket Commentary* (München: Sellier, 2011), para. 3. This argument deserves criticism as 'protectionist' and is not in line with Savigny's teachings. For an attenuation of Art. 4 Rom II-Reg. by way of differentiating duties „with“ and „without“ a reference object, see C. Wendelstein, "Menschenrechtliche" Verhaltenspflichten im System des Internationalen Privatrechts', *RebelsZ* 38 (2019) 111–153. Then, a dispute between a "narrow" and "broad" approach followed: For a broad approach: C. Thomale and M. Murko, 'Unternehmerische Haftung für Menschenrechtsverletzungen in transnationalen Lieferketten', *Europäische Zeitschrift für Arbeitsrecht* (EuZA) (2021), 40–60 (their central arguments rest on choice and 'singular theological corrections'); also Beckers/Micklitz (n 18) 329. The „narrow approach“ is advocated by Weller and Nasse, 'Menschenrechtsarbitrage' (n 18), 132 et seq. For an overview see A. Halfmeier, 'Zur Rolle des Kollisionsrechts bei der zivilrechtlichen Haftung für Menschenrechtsverletzungen', in: M. Krajewski, F. Oehm and M. Saage-Maaß (eds), *Zivil- und strafrechtliche Unternehmensverantwortung für Menschenrechtsverletzungen* (Berlin/Heidelberg: Springer, 2018), 33–50. The CSDDD now found a clear language to set the norms mandatory, see Hübner/Habrich/Weller, *Corporate Sustainability* (n 12) 650.

44 Para 2a: „Member States shall ensure that: (a) the limitation period for bringing actions for damages is at least ten years and measures are in place to ensure that costs of the proceedings are not prohibitively expensive for claimants to seek justice, (b) 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; (c) measures are in place to ensure that mandated trade unions, civil society organisations, or other

the rules which Member states shall regulate as coercive, such as limitation periods, available remedies, collective representation of the public interest, and alleviation of proof.

While the binding character was rejected for international human rights in general (for different reasons: not enjoying direct effect,⁴⁵ the nature of private law remedies as limited to the individual interest⁴⁶), it was accepted for specific due diligence obligations under Art. 16 Rom II Reg.⁴⁷ This is why the mandatory nature was already stipulated in the draft-German law.⁴⁸ For environmental damages, Art. 7 Rom II-Regulation attenuates the conflict of law decision.⁴⁹

Yet, there is reason for clarification since the conflict of laws debate does not properly take the novel aspects of the 'due diligence' concept into account. Art. 4 CSDDD demands Member States to install duties enumerated therein.

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; (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 in accordance with national procedural law, subject to the Union and national rules on confidentiality and proportionality."

45 G. Wagner, 'Haftung für Menschenrechtsverletzungen', *RabelsZ* 80 (2016), 717–782 (745); T. Görgen, *Unternehmerische Haftung in transnationalen Menschenrechtsfällen* (Baden-Baden: Nomos, 2019) at 192; M. von Falkenhausen, *Menschenrechtsschutz durch Deliktsrecht – Unternehmerische Pflichten in internationalen Lieferketten* (Tübingen: Mohr Siebeck, 2019) at 324, F. Pförtner, 'Menschenrechtliche Sorgfaltspflichten für Unternehmen – eine Betrachtung aus kollisionsrechtlicher Perspektive', in Krajewski and Saage-Maaß, *Die Durchsetzung* (n 35), 311–331 (at 327). For a plea for direct effects of human rights if certain conditions are met, see A. Colombi Ciacchi and L. Lane, 'Human Rights Obligations of Multinational Corporations' (forthcoming, on file with authors).

46 Görgen, *Unternehmerische Haftung* (n 44), 195.

47 Reg. (EC) No 864/2007 of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), OJ L 199/40 of 31.7.2007.

48 The draft German LKG with Article 15 (civil liability) is printed as annex to Weller/Nasse, *Menschenrechtsarbitrage* (n 18); commented by Wagner, 'Haftung für Menschenrechtsverletzungen' (n 44) (748 f.); C. Hartmann, 'Haftung von Unternehmen für Menschenrechtsverletzungen im Ausland aus Sicht des Internationalen Privat- und Zivilverfahrensrechts', in: Krajewski and Saage-Maaß (eds), *Die Durchsetzung* (n 35) 281–310 (at 307/308).

49 It reads: "Environmental damage: The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred."

These duties follow the various precedents on due diligence (although previously enacted in form of directly applicable EU regulations).⁵⁰ Due diligence has a peculiar transformative function to ‘import’ and ‘export’ regulation.⁵¹ There is no straight forward “application order” as in conflicts of law. Previous due diligence regulations stipulated a self-standing autonomous EU duty to ascertain the factual and legal situation abroad and to engage in a risk management exercise.⁵² This model is followed by the CSDDD.⁵³ Neither is this a command to apply foreign law, nor is this a “duty of care” in the sense of the tort of negligence which defines a protective (outcome related⁵⁴) relationship, nor does it ultimately ‘define’ the standard of care. The whole idea is *not* to apply the host country’s law, but to establish – in the *home country’s law* – a corporate duty to monitor the supply chain, i.e. this is an enterprise’s duty to monitor the factual situation along the yardstick of international human rights standards (“the risk”).⁵⁵ That is neither the application of *locus damni*, nor the application of the *locus operandum*, nor a narrow or broad application of either. It is a *tertium*.

50 Godt/Burchardi, ‘Due Diligence’ (n 19).

51 Godt/Burchardi, ‘Due Diligence’ (n 19), at 548.

52 Godt/Burchardi, ‘Due Diligence’ (n 19).

53 Article 4 section 1 EU SC-Proposal reads: “Member States shall ensure that companies conduct human rights and environmental due diligence as laid down in Articles 5 to 11 (‘due diligence’) by carrying out the following actions: (a) integrating due diligence into their policies in accordance with Article 5; (b) identifying actual or potential adverse impacts in accordance with Article 6; (c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8; (d) establishing and maintaining a complaints procedure in accordance with Article 9; (e) monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10; (f) publicly communicating on due diligence in accordance with Article 11.”

54 Which transcends the different member states traditions as regard to ‘Rechtsgüter’ related or damage-related, for an overview see M. Bussani and V. V. Palmer, ‘The liability regimes in Europe – the façades and interiors’, in: M. Bussani and V.V. Palmer (eds), *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003), 120–159; J. Gordley, ‘The architecture of the common and civil law of torts: A historical survey’, in M. Bussani/A. J. Sebok (eds), *Comparative Tort Law*, (Cheltenham/Northampton: E. Elgar, 2015), 173–200; M. Bussani and M. Infantino, ‘The many cultures of tort liability’, in: M. Bussani/A. J. Sebok (ibid), 11–38; for the Germanic tradition with its quest to limit the discretion of the judge, C. von Bar, *Gemeineuropäisches Deliktsrecht*, Vol. 1 (München: Beck, 1996) 20.

55 Yet, technically, the Commission’s proposal leaves the transposition to the member states to an extent that it allows a conflict of law approach – however – under the condition that the duties are qualified as ‘mandatory’ (thus override norms in case a different law is applicable, Article 22 section 5 CP).

3.2 Attribution of Caused Losses

What exactly triggers the responsibility for damages (sic: the reversion of costs)? While reflections on contractual liability have remained limited,⁵⁶ today's debate centres around liability under torts (i.e. responsibility for socially incriminated behaviour). As to environmental liability, problems around causation (3.2.1.) and attribution (3.2.2.) stand out. The attribution of costs in modern disaggregated corporate structures raises additional problems, which will be subsequently discussed (3.3).

3.2.1 Causation

The first step of the modern three-step delict test⁵⁷ is to correlate an action with an injury/damage/rights violation by way of causation. The category of "injury" is coupled with the normative "causal damage", i.e. the attributable costs.⁵⁸ Despite the EP's enthusiastic plea in its Resolution of 2017 that the

56 On the idea to insert third-party protection duties into supply-chain contracts via the constructions like "Vertrag mit Schutzwirkung zugunster Dritter" or "Vertrag zugunsten Dritter" as contemplated (but rejected) by the court in the KiK-case, LG Dortmund, decision of 10.1.2019 (n 8), para. 42, Thomale/Murko, 'Unternehmerische Haftung' (n 42) 51; B. Schneider, 'Menschenrechtsbezogene Verkehrspflichten in der Lieferkette und ihre problematisches Verhältnis zu vertragsrechtlichen Haftungsgrundlagen', *Neue Zeitschrift für Gesellschaftsrecht* 2019, 1369 (1375), I. Heinlein, 'Zivilrechtliche Verantwortung transnationaler Unternehmen für sichere und gesunde Arbeitsbedingungen in den Betrieben der Lieferanten', *Neue Zeitschrift für Arbeitsrecht* 5 (2018), 276–282 (279), F. Graf von Westphalen, 'Einige Vorüberlegungen zum bevorstehenden Lieferkettengesetz', *Zeitschrift für Wirtschaftsrecht (ZIP)* (2020) 2421 (at 2428), D. Johnson, 'Verhaltenskodex mit Lieferanten ist regelmäßig kein Vertrag zugunsten Dritter bzw. mit Schutzwirkung Dritter', *Corporate Compliance Zeitschrift* (2020) 103–106. The argument for the rejection, however, is not convincing. The codes were not directed to the employees of the supplier, but only to the market customers. Academic research has shown that codes are strategically used to create trust for market actors, C. Glinski, *Private Regulierung* (n 39) 99; Heinen, 'Transnationales Deliktsrecht?' (n 35) 110, A. Beckers, *Enforcing Corporate Social Responsibility Codes – On Global Self-Regulation and National Private Law* (Oxford: Hart Publ., 2015) 137 et seq. It is not sensible that those self-created expectations have no legal effect.

57 A three step test as follows: (1) correlation of an activity and a damage by way of causation, (2) attribution – based on personal fault, faulty business organisation, or technical risk (sic. "the standard of care"), and (3) 'remoteness' by identifying the "duty of care", see: G. Brüggemeier, *Haftungsrecht – Struktur, Prinzipien, Schutzbereich* (Berlin/Heidelberg: Springer, 2006).

58 Doctrinal concepts of causation are different in European jurisdictions (double [haftungsbegründend/haftungsausfüllend] in German law, single in French law). Yet, causation is correlated to the overall tort law structure of any jurisdiction. It is therefore, that the factual outcomes are pretty much the same regardless of the doctrinal differences:

IPCC 2013-report established a “rigorous causal relationship between gas emissions and damage related to climate change and the environment”), damages under civil liability will remain in need to be “causal”. That means, the occurred damage must be correlated to (‘caused by’) an identified action (sic. a violation of a duty) and must be quantifiable.

The recent distinction of “scope 1”, “scope 2” and “scope 3” emissions emanated to the legal debate,⁵⁹ and found its way to the EP’s amendments as to the businesses’ climate change assessment (Art. 15 para 1 lit. f). While “scope 1” emissions are emissions directly expelled by an emitter, “scope 2” emissions are those caused by suppliers (upstream), and “scope 3” emissions are those caused by customers (downstream). While these categories are not mentioned under Art. 22, it should be noted that they mix two separate legal issues: Who’s actions and which damages can be attributed?

3.2.1.1 *Environmental and Ecological Damages (Scope 1)*

Which ‘damages’ as to ‘adverse impacts to human rights and the environment’ are covered by Art. 22 CP in the first place (caused by scope 1 actors)? While human rights impacts may amount to the violation of individual rights of health and life – with respective costs for remediation and distress, it is a well-known characteristic of adverse impacts to the environment that they result in two different types of damages, ‘environmental damages’ (i.e. costs emerging to the violation of individual rights) and ‘ecological damages’ (i.e. costs emerging from the impairment of the environment regardless of a violation of individual rights). Civil liability has been limited to ‘environmental damages’, and covers ‘ecological damages’ (only) as far as individual rights cover them *and/or* as far as representative institutions are entrusted to litigate them.⁶⁰

M. Infantino and E. Zervogianni, ‘The European Ways of Causation’, in M. Infantino and E. Zervogianni (eds), *Causation in European Tort Law* (Cambridge: Cambridge University Press, 2017) 85–105. It is for the sake of this paper, that the author chose to discuss causation in conjunction with behaviour and damages (prior to discussing the standard of care).

59 It became fashionable with the Dutch Rechtbank Den Haag decision in *Milieudefensie*; Case C/09/571932/HA ZA 19–379, judgement of 26. May 2021_ECLI:NL:RBDHA:2021:5339 (English translation), see in particular para. 4.4.45; M.-P. Weller, in: Konrad Adenauer Stiftung (KAS) (ed.), “Schönfärberei kann haftungsrechtlich gefährlich werden“, KAS: Bonn, 2021, S. 3, 8, 10.

60 Godt, *Ökologische Schäden* (n 21) 163; legal representation for ecological damages can take various forms, for the Brazilian concept of the ‘interesses difusos’ (Godt, *Ökologischer Schaden* (n 21) 84–87); most noteworthy the expansion to ecological damages in France in 2016: B. Mallet-Bricout, The “obligation réelle environnementale” in French law’ in Demeyere/Sagaert (eds), *Contract and Property* (n 22) 215–234; paralleled by developments

Apart from delicate causation problems as to individual health violations due to climate change ('environmental damages'), the formal question arises if Art. 22 CP covers "ecological damages"? If one reads Recital 60⁶¹ in isolation, one could think that Art. 22 is limited to damages suffered by individuals. However, recital 62 complements: "The civil liability regime under this Directive should be without prejudice to the Environmental Liability Directive 2004/35/EC".⁶² That means, the directive goes beyond and is not limited by Dir. 2004/35/EC.

Clarity is provided by a systematic reading of referrals: Annex Part II lists not only conventions with regard to chemicals and hazardous wastes which are health relevant (Annex Part II No. 3–12) and of which the violation can trigger damages to individuals. It also names Art. 10 lit. b⁶³ Convention on Biological Diversity (including the Cartagena and Nagoya Protocol) and 'import and export prohibitions under CITES, the Washington Convention on Endangered Species. These environmental impacts do not⁶⁴ trigger individual rights, but address collective environmental interests which only trigger 'ecological damages'. Therefore, as a matter of principle, Art. 22 covers also 'ecological damages'.⁶⁵ The proposed Art. 22 para. 2a EPP would provide the necessary procedural pillar (collective regress).

3.2.1.2 *Scope 2 Emissions*

For "scope 2" emissions, the 'Huarez'-case⁶⁶ has tested whether multicausal damages can be proportionally attributed. The case is peculiar because costs

in the US and Canada, see Gaëlle Gidrol-Mistral, Quebec Private Law, Destined to Preserve the Environment? in Demeyere/Sagaert (eds), *Contract and Property* (ibid) 125–141.

61 Recital 60 reads: "As regards civil liability arising from adverse environmental impacts, persons who suffer damage can claim compensation under this Directive even where they overlap with human rights claims."

62 Recital 62 reads: "The civil liability regime under this Directive should be without prejudice to the Environmental Liability Directive 2004/35/EC. This Directive should not prevent Member States from imposing further, more stringent obligations on companies or from otherwise taking further measures having the same objectives as that Directive."

63 It reads: "Each Contracting Party shall, as far as possible and as appropriate: [...] (b) adopt measures relating to the use of biological resources to avoid or minimize adverse impacts on biological diversity".

64 More precise: The CBD triggers 'rights', which however are not 'individual' in the Western sense and may only be litigated if collective entitlements are acknowledged, C. Godt, 'Enforcement of Benefit Sharing Duties in User Countries Courts', in E. Kamau and G. Winter (eds), *Genetic Resources, Traditional Knowledge & the Law – Solutions for Access & Benefit Sharing*, (London/Lifting: Earthscan, 2009) 419–438.

65 It should be noted the term 'civil liability' in Art. 22 CP is submitted to EU autonomous interpretation, thus not limited to the restrictive Germanic tort tradition.

66 Superior Regional Court (OLG) Hamm, 30 November 2017, Doc No. I-5 U 15/17 – *Saúl Luciano Lliuyas vs RWE*. Huarez is a village in Peru, 350 km north of Lima. The plaintiff,

were identified based on precautionary measures to protect property against water from a neighbouring melting glacier (a better pump against flooding), causally⁶⁷ related to non-fault liability under § 1004 German Civil Code (injunction against property violation).⁶⁸ It is argued that RWE is responsible for 0.47% of the global CO₂ emissions.⁶⁹ In 2017, the Superior Regional Court (OLG) Hamm granted a preliminary injunction, since it found the causation argument plausible and mitigating protection required. In May 2022, the court gathered evidence by way of an on-site inspection in Peru.⁷⁰ As of June 15, 2023, the judgement is still awaited.

Technically, the plaintiff(s) transposed the rationale of 'market share liability' to causation.⁷¹ Not the probability of the causation of the damage (as unprovable for the patient in medical cases) as proportionally attributed, but

Saúl Luciano Lliuyas, is a farmer based in Huaraz. The case is supported by the European Center for Constitutional and Human Rights (ECCHR) and numerous individuals.

- 67 As explained by M.-P. Weller and M.-L. Tran, 'Climate Litigation against Companies', *Climate Action* 1:14 (2022) 14; (download: <<https://doi.org/10.1007/s44168-022-00013-6>>, last accessed 10. August 2022), 8; The proportional causation between RWE's action and the food risk to Huaraz (as part of anthropogenic climate change) was consolidated by a study conducted by the University of Oxford and the University of Washington, Stuart-Smith/Roe/Li/Allen, 'Increased outburst flood hazard from lake Palcacocha due to human-induced glacier retreat', *Nature Geoscience* 14 (2021) 85 et seq.
- 68 While not "fault" based, the violated duty must be third party related. On the third party dimension on CO₂ emissions: P Gailhofer and R. Verheyen, *Klimaschutzbezogene Sorgfaltspflichten: Perspektiven der gesetzlichen Regelung in einem Lieferkettengesetz*, *Zeitschrift für Umweltrecht ZUR* 7–8 (2021), 402.
- 69 Based on a quantitative analysis of historical emission data from 1854 to 2010, see Statement of the claim *Lliuyas v. RWE* of 23. November 2015, no. 8.2, <<https://germanwatch.org/sites/germanwatch.org/files/static/19019.pdf>>.
- 70 <https://stiftungzukunft.org/unsere-aktivitaeten/der-fall-huaraz/> (last assessed 15 June 2023).
- 71 More precise, they combine two path-braking decisions. One the one hand, they build on the „market share liability“ which was first accepted by US-courts in *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 – 1980, DES – after the thalidomide-drama in the 70s. The conceptual core is to help the patients with the burden of proof, but only get a share of the incurred costs. The second decision is variant of this proportional attribution, so-called "statistical probability", as accepted by the Court of Justice of the European Union (CJEU) in C-504/2013, CJEU decision of 5. March 2015, ECLI:EU:C:2015:148-*Pace maker*. A patient does not have to prove that the specific pace-maker implanted to him is defective. It is sufficient when there is statistical evidence (reasonable probability) that the pace-maker is part of a production line which has a proven, statistically relevant failure rate. In those cases, the manufacturer pays the (full) costs of the replacement. The decision was differently received: It was approved by N. Reich, 'Fehlerhaftigkeit von Medizinprodukten', *Europäische Zeitschrift für Wirtschaftsrecht* (2014) 898–900; but criticised by G. Brüggemeier, 'Produktfehler und Produkthaftung bei implantierten Medizinprodukten', *Zeitschrift für Europäisches Privatrecht (ZEuP)* (2016) 502–514 and

the damage. The public attention which this (contested) litigation attracted is remarkable; the outcome is to be awaited.

Beyond the question if the wording survives the trilogue, the core issue remains: Can the idea of proportional costs be transposed to civil liability (negligence) law? Is the causation link 'sufficient'? We might accept the statistical re-reading of the 'sine qua non test' and argue that this standard is met (by this, we accept to abstain from the concrete "causal" link between RWE's emissions and the glacier's melting. Yet, at the end, judges have to face policy questions for which the English law developed normative qualifications under "remoteness",⁷² here rather "inverse remoteness" (because of the diluted 0,47 % causation link). Three broader issues deserve reflection. First, the court system would become nonfunctional if they had to adjudicate the consequential mass suits.⁷³ Second, most of the affected people would be overstrained had they to collect (proportional) money from all relevant emitters for mitigation measures.⁷⁴ Third, this case raises concerns as to arbitrary litigation as to the selection of the "right" defendant. While I submit that a proportional damage attribution of 0,47% falls into the normative category of "inverse remoteness", this case induces calls for other finance mechanisms. Causation might be established, but civil (relational) liability procedures are not apt to provide

M. Oeben, *Der potentielle Produktfehler nach der EuGH-Rechtsprechung* (Baden-Baden: Nomos, 2016), both discussing the advantages of contractual liability. For a comparative overview of proportional attribution see contributions to: I. Gilead, M. D. Green, B. A. Koch (eds), *Proportional Liability: Analytical and Comparative Perspectives* (Berlin et al.: De Gruyter, 2013).

72 Judicial Committee of the Privy Council, *Overseas Tankship (UK) Ltd. V. Morts Dock and Engineering Co (The Wagon Mound No. 1)* [1961] A.C. 388. In this case, the court held the damage was unforeseeable because of its large size. The case is conceptualised as an exception to the general principle that "a victim is to be taken as it is found", D. Keenan, *Smith and Keenan's English Law* (London: Piman, 9th edn 1989) 370.

73 (1) Note the difference to Wagner 'Haftung für Menschenrechtsverletzungen' (n 44) 781 who negates (on the first level) the duty as potentially selective (arbitrary) litigation. The author (CG) only rejects the causal cost attribution (second level). This makes a decisive constructive difference: First, the argument as formulated as 'international competitive cost advantages' (780 – rf. Asian textile industry) is rejected. The argument is similar to the one raised in the 18th century against the abolition of slavery (cp. F. Klose, 'Humanitäre Intervention und internationale Gerichtsbarkeit', *Militärgeschichtliche Zeitschrift* 72 (2013) 1–21). The consequence is that the residual responsibility is correlated to the need of a ('de-linked') internationalised insurance scheme. (2) As to the cost-inefficiency of the tort system to reverse costs, K.M. Stanton, *Breach of Statutory Duty in Tort* (London: Sweet & Maxwell, 1986), 140.

74 Exemplified by the numbers submitted in the Huarez-case: Assumed a 0,47 % shared of all emitters, the plaintiff had to approach 213 emitters to collect financial coverage for a pump.

cost internationalisation. Insurance mechanisms are needed (and on their way, *infra* 4.2).

3.2.1.3 *Scope 3 Emissions*

The challenge with regard to “scope 3” emissions is to correlate the claim with the behaviour of and the damages caused by a diffuse group downstream. Can those emissions be “attributed” to a firm by way of civil liability or is this type of cost internalisation limited to public regulation? As part of the risk assessment exercise (“the entire value chain”), upstream as well as downstream emissions can be assessed.⁷⁵ While it is an open question if Article 22 CSDDD remains limited to *direct upstream* partners (Commission’s proposal), the causal attribution of emissions by *downstream* users is beyond the function of civil liability. An allocation contradicts a social order based on autonomy. As long as downstream behaviour is not forced or controlled, there is no “responsibility” in terms of “civil liability”. This is the fault line of private and public law.⁷⁶ There can be no synchronous run; both systems have different, complementary functions. The public law assessment obligations may well demand an assessment of scope 3 emissions. The exclusion of liability to this extent is in line with modern structures of enterprise liability.⁷⁷

3.2.2 Attribution of Caused Losses/Damages

For the attribution of costs, the law provides for three distinct mechanisms: Tort/delict, corporate vicarious liability and breach of statutory duty.⁷⁸ Tort/delict attribute along the three distinct principles of personal fault, technical risk, and defective business organisation.⁷⁹ These structures evolved as case law under the general clauses of the civil law of delict, and found some *lex specialis* complementation for technical risks as to what is now called ‘strict

75 I. Hexel and S. Spangler, ‘Editorial’, *Zeitschrift für Gesellschaftsrecht (ZGR)* 19 (2022) 881.

76 On the important complementary function of modern compliance and the alleviated concern principle, G. Seyfarth, ‘Handlungspflichten der Konzernverwaltung im nachgeordneten Bereich am Beispiel Compliance im Konzern’, *Zeitschrift für Gesellschaftsrecht (ZGR)* 22 (2020) 87–105.

77 G. Brüggemeier, ‘Unternehmenshaftung für „Umweltschäden“ im deutschen Recht und nach EG-Recht’, M. Martinek et al (eds), *Festschrift für Günther Jahr* (Tübingen: Mohr Siebeck, 1993) 223–250 (248.).

78 Brüggemeier, *Haftungsrecht* (n 56) § 2, § 3A, § 7.

79 G. Brüggemeier, ‘The Civilian Law of Delict: a Comparative and Historical Analysis’, *European Journal of Comparative Law and Governance*, 7 (2020), 339–383; G. Brüggemeier, ‘Gefährdungshaftung, Unternehmenshaftung, Verschuldenshaftung – Überlegungen zu den Grundlagen des Haftungsrechts, in: J. Stamm (ed.), *Festschrift Rüssmann* (Saarbrücken: Juris, 2013) 265–290.

liability'.⁸⁰ The principle of 'personal fault' encompasses unlawful intent *and* negligence ("standard of care"⁸¹). Vicarious liability is a mechanism which *directly* assigns the caused damage to a superior (here: the subsidiary's emissions to the mother company). The category of "breach of a statutory duty" is an auxiliary mechanism which alleviates the burden of evidence.⁸² In the context of enterprise liability, it channels the responsibility to the "head of chain" for ongoing emissions and caused damage.

What does "due diligence" exactly mean in terms of civil liability? Evidently, it is addressed to corporations. But is Article 22 CSDDD to be qualified as "breach of statutory duty" or as "defective business organisation"?⁸³ What does the Council aim at with proposing language such as "intentionally or negligently".⁸⁴ The qualification as either "statutory duty" or "defective business organisation" has implications on the requirements (sic: Is there a defence of "best efforts"?) and sits uncomfortably on two fault lines: the interface of private and public law,⁸⁵ and civil and enterprise liability. For enterprise liability, understood as multi-track structure,⁸⁶ Brüggemeier holds three elements constitutive

80 Acknowledged by H. Koziol, 'Die Sicherstellungshaftung – eine weitere Spur im Haftungsrecht?' *Archiv für civilistische Praxis (AcP)* 119 (2019) 376–419, and G. Wagner, 'Haftung für Menschenrechtsverletzungen' (n 44) 767 – although he stresses the tension with (and prevalence of) the corporation principle.

81 Doctrine disagrees as to split tracks or a uniform base, for separation: Brüggemeier, *Haftungsrecht* (n 56) § 2A und § 2B, for a uniforme base: G. Wagner, § 823, *MüKo-Commentary BGB* (8. edn. 2020) para 23 and para 26. In both cases, the standard of care gets defined either in relation to a third party (§ 823 sec. 1 and § 831 German Civil Code) or by way of (third party protective) statutory duties (for the German Law: § 823 sec. 2 German Civil Code); for the very similar function to the English Tort of Breach of Statutory Duty: Stanton (n 72).

82 Stanton (n 72) at 26; G. Wagner, § 823, *MüKo-Commentary BGB* (8th edn. Beck: München, 2020) para. 533 speaks about a "Präzisierung- und Ergänzungsfunktion".

83 Already asked by Weller and Tran (n 66), and Hübner/Habrich/Weller (n 12) 648. Specificities of organisational liability, such as to the addressee, the determination of the standard of care, and the alleviations of the burden of proof are at the centre of the question. The peculiar category of organisation liability responds to the tension between hierarchy and organisation in modern corporate groups, as properly described by Fülber and Gassen (n 38) who call for a more 'transparent corporate veil' (51).

84 With the further restriction that the "right, prohibition or obligation listed in Annex I is aimed at protecting the natural or legal person" (doc. No. 15024/1/22 REV 1, p. 109).

85 Stanton (n. 72) explains the tort 'breach of statutory duty' as a modern tort of the regulatory state. Yet, he finds its functions limited, the tort rather superfluous (148).

86 G. Brüggemeier, 'Unternehmenshaftung für „Umweltschäden“' (n 76) at 223. He explains organisational negligence as an echeloned system of primary liability of the company, subsidiary (internal) liability for directors and managers (in case of insufficient means of the company), and a subsidiary (external) liability for employees limited to gross negligence without reversal of proof for fault.

for organisational liability (exemplified for environmental liability): a basic duty to organise processes environmentally safely (with reversal of proof), concretised by quality management standards, exculpation for evidence of having installed functional safety system.⁸⁷ In such a system public regulation becomes a cross-cutting category, but no automatism (“legality”) applies.⁸⁸

(German) civil law scholars have opposed supply chain liability “upstream” for three reasons: First, the binding control power of the undertaking does not extend to overseas (esp. with regard to independent companies).⁸⁹ The argument is that companies abroad are submitted to the laws of the (host) country only. Second, an undertaking can only be held liable for direct contractual partners.⁹⁰ Third, where local subsidiaries act as independent entities,⁹¹ the relationship to the mother company is governed by corporate governance. That means that there is no direct attribution (in more detail *infra* 3.3).⁹²

Proponents have, in principle, four counter-arguments: First, the responsibility chain for *process* standards has to be approximated to *product* standards as in modern product liability.⁹³ The categorical distinction which

87 Ibid, 224, 244–249.

88 This doctrinal re-conception reacts to the debate of the 80s in the context of environmental and product liability (K. Sach, *Genehmigung als Schutzschild?*, Berlin: Duncker und Humblot, 1994; G. Wagner, *Öffentlich-rechtliche Genehmigung und zivilrechtliche Rechtswidrigkeit*, Köln/Berlin: Heymann 1989): The mere adherence to a public standard does not exclude civil liability; the violation may ‘indicate’ (and reverse the burden of proof) but does not equate the violation of the ‘standard of care’. Brüggemeier, ‘The Civilian Law of Delict’ (n 78). A typology is recently proposed by D. Nolan, ‘Tort and Regulation’ in: J. Goudkamp, M. Lunney, L. McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Oxford: Hart 2022), 181–210.

89 M. Habersack/M. Ehrl, ‘Verantwortlichkeit inländischer Unternehmen für Menschenrechtsverletzungen durch ausländische Zulieferer – de lege lata und de lege ferenda’, *Archiv für civilistische Praxis (AcP)* 219 (2019), 155–210 (163).

90 ‘Rechtsträgerprinzip’, see Habersack/Ehrl, ‘Verantwortlichkeit’ (n 88) 196–207; G. Wagner, ‘Haftung für Menschenrechtsverletzungen’ (n 44) 776, 779.

91 Central to the argumentation of G.v. Westphalen, ‘Vorüberlegungen’ (n 55), 2422; at 2424–2425 – who – tellingly – talks about “importers” not manufacturers.

92 Therefore, Habersack/Ehrl, ‘Verantwortlichkeit’ (n 88) at 210 classify supply chain liability as “not compatible with the German liability system”. While they respect the necessity of internalisation of costs (p. 161), they reject the supply chain liability as an elimination of the ‘economic incentive’ provided by the BGB-“Schutzgütersystem” and incorporation (at 207). These ‘pillars’ should not be weakened by (soft law) human rights.

93 E.-M. Kieninger, M. Krajewski and F. Wohltmann, *Rechtsgutachten und Entwurf für ein Gesetz zur Umsetzung menschenrechtlicher und umweltbezogener Sorgfaltspflichten*, Legal Expertise commissioned by the Federal Parliamentary Group of the Green Party (Bundestagsfraktion ‘Die Grünen’), FAU Studien zu Menschenrechten 6 (Erlangen):

submits process standards exclusively to the production host country and product standards to the country of the market place is outdated, even under WTO law. Second, companies bind themselves to public international standards. Once they commit to *Codes of Conduct* and enforce them against third party contractors, human rights standards *become* binding.⁹⁴ Third, a management system which evaluates risks to human rights produces information. Once concrete information about factual human rights violations have emanated from the risk analysis exercise, general organisational duties *transform* into concrete (relational) duties to act.⁹⁵ In other words, due monitoring can give rise to concrete duties to act, prevent, mitigate, and/or bring to an end. The nature of these duties (non-delegable 'control duties',⁹⁶ original⁹⁷ or

FAU University Press, 2022), 13; This argument is accepted *inter alia* by G.v. Westphalen, 'Vorüberlegungen' (n 55) 2424. He also acknowledges the acceptance of horizontal effects of human rights (at 2430).

- 94 LJ Sales in *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Ors.* [2019] UKSC 20 explicitly rejected the submission that there was any general limiting principle that a parent company could never incur a duty of care merely by issuing group-wide policies and guidelines and expecting the subsidiary to comply; P. Muchlinski, *Multinational Enterprises and the Law*, Oxford: Oxford University Press (3rd edn, 2021), at 312; P. Muchlinski, *The Regulatory Framework of Multinational Enterprises*, in: I. Bantekas/M. A. Stein (eds), *The Cambridge Companion to Business and Human Rights Law* (Cambridge: Cambridge University Press, 2021), 173 at 184. On the expectation creating function of codes of conducts already Glinski, *Private Regulierung* (n 39) 99; M. Herberg, 'Global Legal Pluralism and Interlegality' (n 37), 17, at 24 et seq. For a profound analysis of UK-case law as to when a mother country "has" (because of a responsibility taken over) or "ought to have" control over production conditions of a separated company (be it a corporate subsidiary or a contractor), C. Glinski, 'Corporate Social Responsibility and Corporate Liability for Environmental Damage', in B. Pozzo and V. Jacometti (eds), *Environmental Loss and Damage in a Comparative Law Perspective* (Cambridge: Intersentia, 2021) 111–132.
- 95 C.-S. Scherf, N. Kampffmeyer, P. Gailhofer, D. Krebs, C. Hartmann and R. Klinger, *Umweltbezogene und menschenrechtliche Sorgfaltspflichten als Ansatz zur Stärkung einer nachhaltigen Unternehmensführung*, Legal Expertise commissioned by the German Environmental Agency (Dessau-Roßlau: Umweltbundesamt, 2020) 87 f. (emphasising that the organisational duty is an original own duty of the (managing, controlling) company, that concrete risk information can trigger third party duties, and that duty diligence constitutes a peculiar category of liability in transnational supply chains responding to its peculiar governance gaps).
- 96 Settled case law in Germany, Görgen, *Unternehmerische Haftung* (n 44), at 297.
- 97 G. Brüggemeier, 'Organisationshaftung. Deliktsrechtliche Aspekte innerorganisatorischer Funktionsdifferenzierung', *Archiv für civilistische Praxis (AcP)* 191 (1991), 33–68; G. Brüggemeier, 'Unternehmenshaftung' (n 76). Heinen, 'Transnationales Delktsrecht' (n 35) 112, 116, 118 identified several (own) duties as related to activities of business partners. She states that attribution in organisational business networks has still to be further developed (122).

vicarious⁹⁸) depend on the facts of corporate structure (more under 3.3). Fourth, organisational duties are already adjudicated under general negligence law; a *lex specialis* exclusion of some duties only creates legal uncertainty.⁹⁹

However the final wording of Article 22 will look like,¹⁰⁰ the basic idea is clear: The central duty is the (risk based) due diligence exercise as stipulated in Art. 4 CSDDD: “integrate into a policy, identify, prevent/mitigate potential and end/minimise actual adverse impacts, establishing a complaints procedure, monitor”, all concretised in subsequent Arts. 5–10 CSDDD. Arts. 7 and 8 CSDDD spell out what needs to be done subsequently: “companies [shall] identify [...], prevent, or [...] mitigate (Article 7), or [...] bring to an end (Article 8) potential adverse human rights impacts and adverse environmental impacts. Art. 3 defines “adverse impact” by referring to the two parts of the Annex:

(b) ‘adverse *environmental* impact’ means an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II;

(c) ‘adverse *human rights* impact’ means an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2.

Annex Part I section 2 lists International conventions related to human rights; Annex Part II lists International conventions on environmental protection. These conventions are thus part of the directive’s definition of ‘impacts’. Their stipulations are not directly transposed, but embedded in the concept of due diligence under Art. 4 CP. This wording implies an element of both categories, “breach of statutory duty” and “faulty business organisation”. Both have as consequence to alleviate the burden of evidence as to facts which “lie in the control of the company”. This element would be strengthened by the amendment as submitted by the EP.¹⁰¹

98 “Vicarious” liability is the attribution standard under Common (and French) law, as opposed to the construction under Germanic laws, G. Brüggemeier, *Common Principles of Tort Law – A Pre-Statement of Law*, (London: British Institute of International and Comparative Law, 2004) 121 f.

99 Kieninger, Krajewski and Wohltmann, *Rechtsgutachten* (n 92) 14.

100 Rather concrete by way of the EU Commission’s reference technique, or a general liability clause such as proposed by the EP (a failure “to comply with the obligations laid down in this Directive”).

101 Art. 22 para 2a, lit. d EP proposal (wording n. 40). Commission’s Proposal leaves the question of reversal of proof to the member states (see Recital 58 Commission’s

Another contested issue has been the scope as to indirect partners. While the duty to analyse risks unanimously includes indirect partners (Art. 4: “the entire value chain”), Art. 22 para. 2 subpara. 1 Commission’s proposal¹⁰² excludes the liability for ‘indirect partners’, however the EP deleted this sub-paragraph.¹⁰³ The Commission’s ‘safe-harbour rule’ was discussed as “contractualisation”¹⁰⁴ of due diligence duties.¹⁰⁵ The EP reacted on two different levels. First, with amending a new para. 2b,¹⁰⁶ it made clear that it will not accept mere accreditation and contractual safeguards to be sufficient for the due diligence test. Second, a new proposed Art. 4a EPP¹⁰⁷ clarifies duties of parent companies vis-à-vis “their subsidiaries falling under the scope of this Directive” (this issue will be continued under 3.3.)

The central question will eventually be: When does a company *fail* to comply with obligations laid down in Arts. 7 and 8 CP (regardless of indirect

Proposal), and thereby openly rejected the quest of the EP for a rebuttable assumption. Hübner/Habrich/Weller, ‘Corporate Sustainability’ (n 12) 649 criticised the Commission’s Proposal for this.

102 It says: “Notwithstanding paragraph 1, Member States shall ensure that where a company has taken the actions referred to in Article 7(2), point (b) and Article 7(4), or Article 8(3), point (c), and Article 8(5), it shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact.”

103 The question whether only *direct* contractual partners can bring a claim against a mother company under the Droit de Vigilance was at the heart of the suit *Les Amis de la Terre/Survie vs. Total*. The case was brought by six NGOs on behalf of a community which was relocated in the course of a pipeline project (the EACOP-Eastern Africa Crude Oil Pipeline) through a Ugandan nature reserve (“Tilenga Project”). The central goal of the law suit is an improvement of the business plan. It is the second case under the Droit de Vigilance (S. Brabant, C. Michon and E. Savourey, ‘Le plan de vigilance’, *Revue de la Compliance et de l’Ethique des Affaires* 93 (2017) 26). On 30 January 2020, the Court found itself ‘incompetent’ and transferred the case to the Tribunal de Commerce. On 16 December 2021, the Cour de Cassation remanded and approved the right of the NGOs to bring the case to a civil court <<https://www.business-humanrights.org/en/latest-news/france-french-high-court-allows-case-in-total-uganda-oil-case-to-go-on/>> (last accessed 10 Aug. 2022). Yet, the suit was finally declared inadmissible by the Tribunal Judiciaire de Paris on 28. Febr. 2023 (N° RG 22/53942 – N°Portalis 352J-W-B7G-CXB4M).

104 Hübner/Habrich/Weller, ‘Corporate Sustainability’ (n 12) 649.

105 Article 12 CP mandates the Commission to draft model contract clauses.

106 Para 2b reads: “Companies that have participated in industry or multi-stakeholder initiatives, multi-stakeholders initiatives, or used third-party verification or contractual clauses to support the implementation of specific aspects of their due diligence obligations can still be held liable in accordance with this Article.”

107 Art. 4a EPP reads: “Due Diligence support at group level

partners in-or excluded)? When are efforts “sufficient” or “exhausted”? It is the argument of this article that the peculiar nature of due diligence (and how it got concretised in the law-making process) has to guide the interpretation. First, as analysed for previous regulations, due diligence functions like a “hinge-joint” for “importing” or “exporting” regulation.¹⁰⁸ While the various regulations differ in respect to the concrete legal arrangement,¹⁰⁹ the duties are not prescriptive. Therefore, Art. 22 cannot be qualified as straightforward “breach of statutory duty”. Arts. 7 and 8 do not define a concrete “standard of care” of where non-compliance indicates “fault”. It is this disconnect which makes due diligence a novel sub-section to faulty business organisation.¹¹⁰ Two interlaced differences are important, relativity and boundedness: First, as to “relativity”, due diligence duties lack the protective nature to a concrete third person. A company is only obliged to install a risk management system,¹¹¹ i.e. a duty to systematically monitor *human rights* and *environmental* violations in the supply chain and to act upon them. In principle, this is not more than a general duty to avoid profit making from violations, and respective

-
1. Member States shall ensure that parent companies may perform actions which can contribute to their subsidiaries falling under the scope of this Directive meet their obligations set out in Articles 5 to 11 and Article 15. This is without prejudice to the civil liability of subsidiaries in accordance with Article 22.
 2. The parent company may perform actions which contribute to fulfilling the due diligence obligations by the subsidiary company in accordance with paragraph 1, subject to all the following conditions: (a) the subsidiary provides all the relevant and necessary information to its parent company and cooperates with it; (b) the subsidiary abides by its parent company’s due diligence policy; (c) the parent company accordingly adapts its due diligence policy to ensure that the obligations laid down in Article 5(1) are fulfilled with respect to the subsidiary; (d) the subsidiary integrates due diligence into all its policies and risk management systems in accordance with Article 5; (e) where necessary, the subsidiary continues to take appropriate measures in accordance with Articles 7 and 8, as well as continues to perform its obligations under Articles 8a, 8b and 8d; (f) where the parent company performs specific actions on behalf of the subsidiary, both the parent company and subsidiary clearly and transparently communicate so towards relevant stakeholders and the public domain; (g) the subsidiary integrates climate in its policies and risk management systems in accordance with Article 1.”

108 Godt/Burchardi, ‘Due Diligence’ (n 19) 548; Weller/Nasse, ‘Menschenrechtsarbitrage’ (n 18) 127 use the word ‘arbitrage’ in order to reflect the mandatory recognition of factual internationality.

109 Godt/Burchardi, ‘Due Diligence’ (n 19) 567–571.

110 Godt/Burchardi, ‘Due Diligence’ (n 19) 568, 573: Due diligence installs a “meso-level” duty *between* “neminem laedere” and the “import” or “export” of laws.

111 Godt/Burchardi, ‘Due Diligence’ (n 19) 557; Hübner/Habrich/Weller, Corporate Sustainability (n 12) 646 speak about “Bemühenspflicht” (with further references). Recital 15 CP uses the word “obligation of means”.

incentives for others. However, once actual adverse impacts are identified, the duty materialises “to bring them to an end” and “minimise their extent” (Article 8¹¹²). It is the detection of adverse effects which *transforms* the general monitoring duty into a third-party protection duty. This renders due diligence informational, dynamic and flexible. In this regard, the parallel to producer’s liability as to its dynamic duties with regard to ‘development risks’ is correctly drawn.¹¹³ The “risk management approach” should not be mistaken as lowering the benchmark to gross fault.¹¹⁴

Second, as to “boundedness”, the stipulated public international standards of the Annex are not simply “directly applicable”. Due diligence as such does not “transpose” *these* obligations into binding law. Nor is a respective violation of public law indicative for a violation of a (relative) standard.¹¹⁵ Yet, the stipulated international instruments are the yardstick against which a firm has to monitor its business activities. Once a risk is identified, the firm *has to* take action. As with relativity, the monitoring duty is transformative: It recasts (non-binding) international public law and (applicable) public law regulations without ‘third party protective effect’, once the risk is identified, into a binding rule with protective nature.

Second, this creates a process duty which is open-ended in nature. Yet, the implied enforcement problems are not new. In 2014, the legislator reacted by inserting Art. 5 sec. 5 last part of the sentence ABS-Reg. (EU) 511/2014 in that it added a substantive duty to “discontinue utilisation”. This norm gives the competent authority a legal base to stop the operation of a firm. Similarly, Art. 8 CP requires member states to make companies “to bring [an end] to actual adverse impacts”, and if that is impossible “to minimise”. The EP proposes an additional para. 2b¹¹⁶ EPP which stipulates that industrial activities, be they collective, contractual or self-regulatory, may not *per se* prevent due diligence liability. This language indicates that the “best efforts” have to be concrete and related to a specific risk identified. The final wording will affect the qualification of the liability rule (sic. the rules of evidence applied to it, and possibly the yardsticks for defence).

112 Article 8.2. Commission’s proposal read: “Where the adverse impact cannot be brought to an end, Member States shall ensure that companies minimise the extent of such an impact.” Thus, due diligence takes into account situations where adverse impacts cannot be brought to an end, but then the company shall be demanded to minimise the impact.

113 Weller/Tran, ‘Climate Litigation’ (n 66) 15.

114 See G.v. Westphalen, ‘Vorüberlegungen’ (n 55) 2426–2427.

115 In this regard misleading Weller/Tran (n 66) 11.

116 For the text see (n 101).

There is considerable uncertainty as to when efforts on the part of the firm are exhausted and a duty is 'violated' in a legal sense.¹¹⁷ It is questionable to which extent other legal measures have to be considered.¹¹⁸ As with manufacturer's liability, the 'duty to react' must have 'materialised' in such a way that it is evident to the responsible actor that the damage became foreseeable, probable and avoidable (at the time of acting, not only in retrospect). The consequence is that public authorities can intervene, once "best efforts" are exhausted. However, as to cost attribution under the tort/delict "organisational liability", 'best efforts' have a releasing effect.

As for procedure, the proposed sanctions are truly parallel, not consecutive. Therefore, claimants¹¹⁹ may bring an action when *they* deem the obligations violated (including the potentially reversed burden of proof as procedural *lex fori* measure); they do not have to await approval by the responsible agency.¹²⁰ All liability regimes run in parallel.¹²¹ It is the original task of the judiciary to decide whether a (materialised) duty was violated.¹²²

3.2.2.3 *Interim Conclusion*

Civil liability for due diligence under Art. 22 CSDDD opens only a bumpy road for litigation.

¹¹⁷ Godt/Burchardi, 'Due Diligence' (n 19) 561, 570.

¹¹⁸ The national German supply chain law allows for the exclusion of public tenders. The Commission's draft is a base for the retention of boni-payments (Article 25). It which extent does an engagement for 'minimising' preclude liability?

¹¹⁹ On the contested (mandatory) provision for procedural standing of environmental NGOs see *infra* 4.3.

¹²⁰ Recital 42 CP: „Recourse to the complaints and remediation mechanism should not prevent the complainant from having recourse to judicial remedies.”

¹²¹ The new liability stands *beside* existing civil liability and does not limit it (Article 22 section 3 says: “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 value chain.” In addition, where member state laws allow for “more” liability, the rules of the directive shall not be interpreted at defining a ceiling of liability (Article 22 section 4 reads: “The civil liability rules under this Directive shall be without prejudice 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.”).

¹²² For the delineation of the judiciary and public regulation see G. Brüggemeier, *Prinzipien des Haftungsrechts*, (Baden-Baden: Nomos, 1999) 23 “Über die 'erstmalige Sanktionierung neuer Formen von Verletzungshandlungen 'entdeckt' es potentielle Gegenstände staatlich-administrativen Handelns.” Noland, 'Tort and Regulation' (n 87) 22 speaks about “tort's backstop role”.

3.3 The Corporate Veil

The third issue of corporate attribution deserves more attention. In this discourse, three different discussions converge where national traditions diverge, namely criminal firm accountability (with fines and profit skimming),¹²³ the function of incorporation (‘enablement’ and risk containment), and inter firms’ group attribution (the principle of legal identity).

In retrospect, the fear ‘of piercing the corporate veil’ was an important cause to drop the rules for civil liability in the German parliamentary procedure. A parallel legislative proposal on firm sanctions¹²⁴ did not survive the legislative term,¹²⁵ arguably because criminal responsibility of firms (that is to say: unspecified damages beyond restitution) was not in line with German doctrine.¹²⁶ In this debate, another aspect came to the forefront. If reach-through claims for wrong-doings of a daughter company in transnational supply chains became possible against the mother company, there would be no argument to maintain the restrictive domestic legal situation.¹²⁷ This is particularly tricky considering the non-harmonised situation in Europe.¹²⁸ Many European countries, including the English Common law, accept criminal responsibility¹²⁹

123 F. Oehm, ‘Grundlagen der strafrechtlichen Verantwortlichkeit von wirtschaftlichen Akteuren für Menschenrechtsverletzungen’, in: Krajewski/Oehm/Saage-Maaß (eds), *Die Zivil- und strafrechtliche Unternehmensverantwortung* (n 42), 177.

124 Ministerial Proposal („Referentenentwurf“: „Verbandssanktionengesetz) was published 21 April 2020, a Government proposal (“Gesetzes zur Stärkung der Integrität in der Wirtschaft“) on 16. June 2020. Its § 2 section 1 No. 3, and section 2 stipulated a residuary responsibility of the mother for the daughters wrong-doings in case of the daughter’s insolvency.

125 The legislative term ended on 20 October 2021. The new government has not taken up a new initiative (status 8. Aug. 2022).

126 See P. Hommelhoff, ‘Rettet den Konzern!’, *ZGR Suppl.* 22 (2020), 215–220. For him, the – non existing – right of direction of the mother against the daughter is a central argument against the attribution (218).

127 For a rather neutral account see: M. Renner/M. Kuntz, ‘Konzernhaftung und deliktische Durchgriffshaftung’, in: Krajewski/Saage-Maas (eds), *Die Durchsetzung* (n 35), 51–71. See also N. Behrends, *Das Unionsmodell der Wirtschaftlichen Einheit* (Tübingen: Mohr Siebeck, 2019), 47. Proponents are inter alia: H. Schweitzer and K. Woeste, ‘Die Haftung von Konzerngesellschaften im Europäischen Wettbewerbsrecht’, *ZGR Suppl.* 22 (2020), 141–172, who explain the rationality of sanctions against the whole entity in EU Competition Law; and A. Engert, ‘Vom Schutzrecht zum schützenden Organisationsrecht’, in: *ZGR Suppl.* 22 (2020), 59–80 refers to §§ 311, 322 section 1 German Stock Corporation Act (AktG).

128 This concern dominates the cautious argumentation of G. Wagner ‘Haftung für Menschenrechtsverletzungen’ (n 44).

129 An overview is provided by the Scientific Advisory Service of the German Parliament (Wissenschaftlicher Dienst des Deutschen Bundestags), „Eine Übersicht zum

as well as vicarious liability under the tort of negligence of parent companies for subsidiaries.¹³⁰ While in Germany, the corporate law principle is often put forward as default rule, it is acknowledged that organisational negligence has already pierced the corporate veil.¹³¹ The structural core is whether those duties emerge as their own duty or “vicariously”.¹³² The OECD urged the German Government in 2021 to finally install a criminal responsibility for firms.¹³³ In the case that the EU introduced inter firm liability in supply chains beyond

-
- Unternehmensstrafrecht in einzelnen Mitgliedstaaten der Europäischen Union“, Doc-No.: WD 7 – 3000 – 070/17, 28. June 2017 (including the UK).
- 130 Leading case for the common law is *Vedanta (n 89)*, unanimously decided by the UK Supreme Court. 1,826 Zambian villagers had filed a suit against UK-based Vedanta and its Zambian subsidiary KCM for poacausion tion in the course of copper mining. The ruling got confirmed in *Okpabi [2021] UKSC 3* (42,500 Nigerian citizens claimed damages against UK based Royal Dutch Shell Plc for oil leaks from pipelines in the Niger Delta). Sales LJ Sales found in the Court of Appeals decision in *Unilever (AAA v Unilever plc [2018] EWCA Civ 1532, para 36)* that cases where the parent company might incur a duty of care to third parties harmed by the activities of a subsidiary would usually fall into two basic types: (i) where the parent has effectively taken over management of the subsidiary’s actions and (ii) where the parent has given relevant advice to the subsidiary about how it should manage a risk. In reference to this, Lord Briggs in *Vedanta* said that, “there is no limit to the models of management and control which may be put in place within a multinational group of companies”.
- 131 Wagner, ‘Haftung für Menschenrechtsverletzungen’ (n 44) 767 (who sees the principle of firm organisation already implemented in insolvency law, competition law and bribery, 762; Brüggemeier, ‘Unternehmenshaftung’ (n 76); examples identifies by Heinen, ‘Transnationales Deliktsrecht’ (n 35) and Görgen, *Unternehmerische Haftung* (n 44) 264; H.-P. Mansel, *Internationales Privatrecht de lege lata wie de lege ferenda und Menschenrechtsverantwortlichkeit deutscher Unternehmen*, *ZGR* 2018, 439–478 (at 462 f.) devised three scenarios of inter-firm attribution: (1) No attribution (and therefore the application of the law of the country of the subsidiary) where no acting of the parent firm is identifiable. (2) Was the parent under a duty to survey and control the subsidiary, then the applicable law is the one of country of the subsidiary (as country where the subsidiary acted), (3) Are organisational duties at stake for which the parent company is exclusively responsible, the parent companies home state laws apply. For all constellations, he envisions an emerging ‘global standard’ which applies as element of the *lex causa* (473). Koziol, ‘Sicherstellungshaftung’ (n 79) coined the term “assurance liability”.
- 132 For the diverse constructions of attribution see Brüggemeier, ‘The Civilian Law of Delict’ (n 78), (at 353 et seq).The KIK-procedure was based on this (vicarious) line of argument because Pakistani law applied, see M. Saage-Maaß/R. Klinger, ‘Unternehmen vor Zivilgerichten wegen Verletzung von Menschenrechten – Ein Bericht aus der deutschen und internationalen Praxis’, in Krajewski/Oehm/Saage-Maaß, *Zivil- und strafrechtliche Unternehmensverantwortung* (n 42), 249–266 (at 252).
- 133 K. Würz, Blog of 20 October 2021, <https://www.haufe.de/compliance/recht-politik/verbandssanktionengesetz_230132_515536.html>.

integrated firm consortia (as Vendeta and Shell), the principled preclusion for domestic cases will no longer hold.

In June 2023, the EP not only proposed a new Art. 4a, but respectively added a second sentence to Art. 22 sec. 3 CP which now reads: “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 value chain. In such instances as where a subsidiary is under the scope of this Directive and has been dissolved by the parent company or has dissolved itself intentionally in order to avoid liability, the liability can be imputed to the parent company in case there is no legal successor.” In addition, it found a clearer wording for enterprise liability in para 4,¹³⁴ and left para. 5 as to the mandatory nature of these rules untouched. This amendment takes the situation on board, where especially risky activities are “outsourced” to an independent entity. It thus tackles the direct responsibility of the organising ‘mother’ firm and the liability of a successor company. With *Scanska*,¹³⁵ the Court made clear that it considers the term “corporate liability” as far as it is built on EU directives (in that case succession) to be understood as ‘autonomous’ EU law.

4 The Way Forward

4.1 *Due Diligence and Civil Liability*

Corporate Social Due Diligence will bring some novelties to civil liability. It demands a consideration of factual situations abroad which are to be evaluated in the light of international human and environmental standards. It is risk (and sector oriented) which has two implications: The installed duties are dynamic: by default, they are not third party protective, but materialise with risk identification. The duties are ‘control’ duties, usually addressed to the mother company, and thus further pierce the corporate veil in line with organisational negligence.

Does this type of responsibility violate the Kantian imperative that a behavioural norm has to be universal? It was argued that supply chain liability breaks with the universal standard of “unlawfulness” to be “equal” for every firm; justice would become arbitrary. Sustainability was a societal task and

¹³⁴ Para 4 reads: “The civil liability rules under this Directive shall not limit companies’ liability under Union or national legal systems, including rules on joint and several liability.”

¹³⁵ C-724/17, CJEU of 14.3.2019, *Scanska*, ECLI:EU:C:2019:204, para. 47.

cannot be channelled to firms. I submit that the preceding analysis has shown that the expansion of liability is limited and tailored to the governance gap identified in transnational value chains. It is the discourse on human rights and environmental responsibility which has changed the law, in conjunction with globalising production chains. Due diligence became a concept which translates the “corporate reach” into a “transnational law”.

It follows the rationale of organisation; its focus is on firms, not individuals. Inter firm attribution depends on control. The rationale of the reversal of costs rests primarily on the incorporation of external costs: It is the political goal to channel back external costs into consumption costs.¹³⁶ The compensatory,¹³⁷ punitive, deterrent, and preventive¹³⁸ functions of liability become overshadowed by the principle of the best ‘risk absorber’ and normative ‘responsibility’,¹³⁹ which transform the operative function of civil liability into a normative one.¹⁴⁰ The proper management of transnational supply chains is duly limited to large firms. For reasons of efficiency, it is ‘sufficient’ to impose these additional due diligence duties only on larger firms. It is therefore that ‘absolute’ thresholds (not only ‘relative’ one) to define “large” companies are justified.¹⁴¹

4.2 *Liability and Insurance*

Economic theory of cost internalisation has been the central driver for institutional change since the 1960s, notably with regard to how costs can

¹³⁶ This does not put into question that “sustainability” is a societal task (cheap t-shirts, flights, mobility etc). Yet, corporations are, aside of States, important organisers of societies. Esp. larger ones with transnational supply and production chains bear a peculiar responsibility, exactly because their reach extends beyond the confines of a single regulatory state.

¹³⁷ Weller/Tran (n 66) 15 rebut scope 3-attribution with the argument that liability’s ‘telos is compensation’. To the author’s understanding, scope 3 emissions can be opposed by other reasons, but not with the argument of the liability’s compensatory telos.

¹³⁸ The preventive function became acknowledged in the 1980s. Seminal: G. Brüggemeier, ‘Judizielle Schutzpolitik’, *Juristenzeitung* 1986, 969. He submitted that negligence may unfold a strong impact of behaviour because of the court driven development of secondary duties to inform, to monitor, to inquire into risks.

¹³⁹ On both of these arguments Stanton (n 72) 140–143.

¹⁴⁰ At least in mass phenomena like car and workplace accidents (the author like to add environmental damages) civil liability is not functioning as self-standing institution for individual cost reversion, but as backbone concept for more complex arrangements, sic. insurance models, Stanton (n 72) at 148. On the foundational function of liability for more complex schemes, including certification liability, see also Beckers/Micklitz (n 18) at 328.

¹⁴¹ For a counter-position see Hübner/Habrich/Weller, ‘Corporate Sustainability’ (n 12) 646, 651.

be allocated collectively. It informed liability law that it is the backbone of cost allocation, but only complements collective compensation schemes in modern society, i.e. insurances (which are today available inter alia for strict, fault based, organisational and professional liability).¹⁴² Again, there is good reason for caution. The link between negligence and insurances depends on national traditions. This is why Nolan stresses the functional difference of torts between the European continent and the US.¹⁴³ Due to ubiquitous access to cardinal insurance coverage in Europe, continental courts adapted a cautious approach to damages. On both sides of the Atlantic, the regulatory State demands a sensible complementation of public and private law functions.¹⁴⁴

Where attribution becomes linked to or is substituted by insurances,¹⁴⁵ new (and “de-linked”¹⁴⁶) forms of cost allocation emerge. This will equally be the case for supply chain liability, and is emerging as part of international responsibility.¹⁴⁷ This is how governments of industrialised countries reflect about ‘climate change finance’ (as a consequence of the rejection of the acknowledgment of legal responsibility).¹⁴⁸ The idea is to install joint responsibility mechanisms on the international level (which are “de-linked” from civil liability). Micro-credits shall make it possible to acquire seeds after droughts or flooding destroyed the harvest. Early warning systems are about to be installed, implementing the principle of minimising a probable damage. On first sight ‘unrelated’ policy initiatives re-emerge as climate change adaptation measures, such as land right registries.¹⁴⁹ All these initiatives will be financed by industrialised countries and administered by multilateral funding institutions (further details are beyond the scope of this article).

142 On the connex of liability and insurances G. Brüggemeier, *Deliktsrecht* (Baden-Baden: Nomos, 1986) 54 et seq.; for a comparative account G. Wagner (ed.), *Tort Law and Liability Insurance* (Vienna: Springer 2017).

143 Nolan, ‘Tort and Regulation’ (n 87).

144 For a recent differentiated analysis for US law: Nolan, ‘Tort and Regulation’ (n 87).

145 Either because cost allocation may not be possible due to numbers (‘scope 3’) or politically not supported (Paris Accord 2015).

146 D. Jutras, ‘Alternative compensation schemes from a comparative perspective’, in Bussani/Sebok *Comparative Tort Law* (n 50) 151–170 (170).

147 See the three contributions of part VII “The Role of Insurance” in Pozzo/Jacometti (eds), *Environmental Loss* (n 89): S. Fanetti, ‘Insurance Instruments for Adapting to Climate Change: A Comparative Perspective’ (437–454), A. Monti, ‘Multi-Country Pooling Schemes for the Financing and Transfer of Climate-Related Disaster Risk: A Comparative Overview’ (455–466); A. T. Memola, ‘Environmental Liability, Catastrophic Risk Mitigation and Sustainability: The Role of Insurers Beyond the Insurance Coverage’ (467–480).

148 As stressed by Flasbarth (2022, n 27).

149 Flasbarth (2022, n 27).

4.3 Procedural Standing

Art. 22 CP addresses both environmental and ecological damages. While the CP said little about procedure, the EP demands public interest representation (new Art 22 para.2a, lit c EPP). This proposal is consistent with the goals of the CSDDD. Already the Commission aimed at a complementation of the EU Environmental Liability Directive, because it has been “limited to the ‘polluter pays’ principle for companies’ own operations and does not cover companies’ value chains”.¹⁵⁰ For environmental impacts (ecological damages), representation is a *conditio sine qua non*, as acknowledged throughout academic legal research.¹⁵¹ Dir. 2004/35 installed NGO representation, but provided actions only against authorities. Considering that rules for the litigation ‘on behalf of the environment’ differ across the EU, it is sensible to oblige member states to provide for representation in order to make Article 22 CP effective. While recital (62) CP leaves more stringent obligations to the Member States, the new Art. 22 para 2a (lit c) EPP obliges Member States directly.

As we have seen with litigation such as *KiK*, *EACOP Tilenga*, *Huarez*, already for individual claims, transnational litigation depends on institutional support of NGOs. Discreditation as “strategic litigation”¹⁵² or “ligation business” is not to the point, neither is it an undue shift in balance of powers to the judiciary.¹⁵³ The CSDDD-legislation responds to expectations which earlier legislation has not met. It positions civil liability into the institutional framework for the sake of balancing all constitutional values. It rests on foreseeability and limits, securing the judicial system against arbitrariness. However, considering the achievements and legislative concretisations of the last years as regard to qualified standing for NGOs,¹⁵⁴ the refinements of tort doctrine (enterprise

150 COM(2022) 71 final, 8.

151 Godt, *Haftung für Ökologische Schäden*, (n 19) 278 et seq.; Kadner, *Der Ersatz ökologischer Schäden* (n 21), 310.

152 Weller/Tran (n 66) 13.

153 B. Wegener, ‘Menschenrecht auf Klimaschutz? Grenzen grundrechtsgestützter Klimaklagen gegen Staat und Private’, *Neue Juristische Wochenschrift* 7 (2022), 425–431; G. Wagner, Klimaschutz durch Gerichte, *Neue Juristische Wochenschrift* 7 31 (2021), 2256–2263.

154 Both, in the area of consumer law (with several procedures: so-called “Musterfeststellungsklage” installed in 2018.under § 606 Civil Procedure Act (ZPO), aside of § 2 Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz – UKlaG) (Law on injunctions against infringements of consumer law and other infringements) of 26 November 2001 (BGBl. 2001 I, p. 3138), and environmental law: such as the German Umweltrechtsbehelfsgesetz of 2006 which transposes Dir. (EU) 2003/35/EC), the current version is of 2017 “Umwelt-Rechtsbehelfsgesetz in der Fassung der Bekanntmachung vom 23. August 2017 (BGBl. 2017-I, 3290), as amended 2021 (BGBl. 2021-I, 306).

liability) as to the calibration of the ‘standard of care’, and the limited scope of Art. 22 CP, doctrinal arguments do not stand in the way of a limited extension of cost allocation by civil liability litigation.

The CJEU recently acknowledged the member states right to install objective, collective regress under the EU General Data Protection Regulation 2016/679.¹⁵⁵ In this case, the Court confirmed that judicial remedies in Europe are not limited to ‘subjective’ control,¹⁵⁶ and that member states have to ensure the proper functioning of EU-law.¹⁵⁷ As a consequence, also Member States, such as Germany which rest on a subjective remedy system, have to provide

155 C-319/20, judgement of 28. April 2022, *Meta Platforms Ireland Limited (formerly Facebook Ireland Limited) v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV*, ECLI:EU:C:2022:322. The case revolved around the doctrinal interpretation of Arts. 80 and 84 Reg. (EU) 2016/679 (General Data Protection Regulation, ‘GDPR’) OJ 2016 L 119, 1. It was disputed if the NGO had lost its standing status during the proceedings, following the entry into force of the GDPR (para. 39). The referring court (the German Supreme Court, BGH) argued that Article 80(2) GDPR “does not provide for an association’s standing to bring proceedings in order to secure the application, objectively, of the law on the protection of personal data since that provision presupposes that the rights of a data subject laid down in the GDPR have actually been infringed as a result of the processing of specific data” (para 43). The Court contradicts.

156 The CJEU interprets Article 80 section 2 GDPR as to leave discretion to the Member States as to how to implement judicial regress (para. 59). Article 80 GDPR “presupposes” subjective regress, but does not limit judicial regress to subjective regress (paras. 67, 78–79). In paras. 73–75, 81 the Court clearly acknowledges the effectiveness of objective regress (including the reference to the now effective Dir. (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers; for a thoughtful reflection of this regulation see P. Rott and A. Halfmeier, ‘Verbandsklage mit Zähnen? – Zum Vorschlag einer Richtlinie über Verbandsklagen zum Schutz der Kollektivinteressen der Verbraucher’, *Verbraucher und Recht* 2018, 243–250). In addition, as to ‘subjective regress’ the CJEU reminds the BGH (para. 69), that under EU-law ‘subjective regress’ is not limited to ‘identified natural person’ (“addressed”), but that “direct and individual concern” suffices. The court re-iterates the language it developed for the interpretation of Article 263 section 4 TFEU (inter alia C-321/95 P, judgement of 2 April 1998, ECR 1998 I, 1651). The GDPR “covers not only an ‘identified natural person’, but also an ‘identifiable natural person’, namely a natural person ‘who can be identified’, directly or indirectly, by reference to an identifier such as, inter alia, a name, an identification number, location data or an online identifier. In those circumstances, the designation of a category or group of persons affected by such treatment may also be sufficient for the purpose of bringing such representative action.”

157 *Ibid.*, para. 60.

for collective regress for violations of CP Annex II duties, and to extend the catalogue of collective representation under Environmental Remedies Acts.¹⁵⁸

5 Conclusion

The evaluation of the CSDDD in the light of climate change and civil liability is ambivalent. At first sight, the draft raises high expectations. The EP remedied the missing link between climate change due diligence and civil liability. It lived up to the political and economic pressures to improve the instrument to internalise external costs. The second sight reveals high hurdles which reflect the legal limits of cost reversion. These will make it rather unlikely that civil liability will play a strong role in climate change abatement. Yet, the CSDDD deserves academic attention for several reasons: It puts civil liability (more concrete: faulty business organisation) back on stage as a possible sanction. The EU, and most probably the CJEU, will further develop the due diligence approach. The strong opposition against such a rule in Germany calls for a thorough and serious observation of the further legislative process. The analysis has revealed several particularities which justify that due diligence is limited to larger companies. Yet, it comes close to a Herculean task of those legislators to implement these specificities in jurisdictions which, for historical reasons, understood liability as 'enabling tool'. The political pressure, though, demanded some legal adjustments which reflect the changes in the transnational business world. These adjustments make liability an interesting candidate for testing the limits of civil liability. Foundational principles of the EU, such as equality (everyone is equal and the universal law applies to everyone), freedom (everyone is allowed to do what he/she pleases, unless the law forbids it), and private autonomy (economic exchange is left to the myriads of transactions between individuals) will not be undermined by due diligence civil liability in value chains, but strengthened. The limitation is tailored to (larger) companies engaging in transnational supply chains. Sustainability is a societal task, and will not only be performed by corporations – but "also" by them. Liability will not be the central tool, but one out of several. Yet, corporate social responsibility is a value statement. The critics of strategic litigation may not downplay liability's function for stability and transparency.

158 Such as the German Umweltrechtsbehelfsgesetz of 2006 which transposes Dir. (EU) 2003/35/EC, the current version is of 2017 "Umwelt-Rechtsbehelfsgesetz in der Fassung der Bekanntmachung vom 23. August 2017 (BGBl. 2017-I, 3290), as amended 2021 (BGBl. 2021-I, 306).