

Restrictive, but clear?

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This article belongs to the debate » [Unboxing the New EU Corporate Sustainability Due Diligence Directive](#)

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Conditions of Corporate Civil Liability in the Corporate Sustainability Due Diligence Directive

The civil liability provision of the Corporate Sustainability Due Diligence Directive (CSDDD) in Article 29 has been highly debated during the entire drafting and negotiation process of the Directive, but it held on. The battle for and against civil liability in the making of mandatory due diligence legislation did not always end this way. While a civil liability provision passed in the form of a general fault-liability for severe impacts in the French Duty of Vigilance law, it is excluded in the German national supply chain law (*Lieferkettensorgfaltspflichtengesetz*). The Swiss government openly campaigned against the Swiss Responsible Initiative that contained such liability clause.

The traditional argument against civil liability is the fear of a flood of claims brought by civil society organizations against corporations. To be clear, this argument has never been proven in reality and the experience in France shows that it is rather unlikely due to procedural and cost constraints. That being said, it is also true that there is a lot at stake for companies because civil liability in mandatory due diligence legislation legally sets conditions of parent company liability and of contracting company liability in global value chains, at least for human rights and environmental abuses. This is quite a change after decades of blurry transnational case law on the matter and over a century of theories of limited liability, corporate veil, and separation of legal entities that benefited corporations.

The situation of the CSDDD within the existing liability environment is also relevant. Article 29 CSDDD is complementary to the administrative supervision of due diligence by the member states (Articles 24-28). If sufficient resources are used to supervise and companies cooperate, actual harm should be avoided, and with it, civil claims for reparation as well. But if harm nevertheless occurs, will Article 29 CSDDD fulfill its function to provide a right to

remedy for the affected individuals and legal clarity for the companies at the same time? This depends on the conditions of liability and some procedural arrangements to access justice to which we now turn.

The Conditions of Civil Liability

There are three conditions of liability in Article 29 CSDDD that must be fulfilled regardless of the applicable law of the case. They are quite restrictive and the result of intense negotiations. Initially, the EU Parliament invited the Commission to draft a strict corporate civil liability where companies could prove that they took all due care to escape liability. The Commission proposed instead a fault-based liability where claimants had to prove that a failure to comply with certain due diligence obligations caused the damage. To this, the Council of the European Union added further restrictions, primarily aiming at excluding the reparation of human rights violations that do not correspond to a typical damage in national tort law (death, physical or psychological injury, property, etc..) and of purely environmental damage.

The three conditions that a claimant must prove are as follows. Firstly, a claimant must prove damage. This damage must 1) be caused to a natural or legal person, 2) must impact a legal interest protected under national law, and 3) must arise from the adverse impact on a right listed in Annex I that aims to protect the natural or legal person.

This overcomplicated definition of damage aims at preserving well-known concepts of domestic tort law when assessing reparation arising from the breach of an international human rights or of an international environmental obligation. In practice, it excludes reparation of purely environmental damage, which exists in several jurisdictions, as the damage must be caused 'to a natural or legal person'. The concept of 'protected legal interest' refers to specific entitlements that the law or the courts protect in tort law by guaranteeing that their infringement must lead to reparation. In Germany, for instance, § 823 German Civil Code lists specific rights that are protected in an absolute manner (life, body, health, freedom of movement and property) and 'other legal rights' defined as protected legal interests by courts, such as the right to privacy and the free development of one's personality. For example, the violation of the right to form a trade union as listed in Annex I CSDDD could not be covered by the definition of protected legal interest when considering the origins of German Tort Law. Finally, the rights listed in Annex I must protect the claimant and not someone else. Recital 79 CSDDD gives the example of the right to safe and healthy working conditions protecting workers and not the landlord from a fire factory. This is also another indication that environmental obligations aiming at protecting the environment will remain outside of the scope of liability, at least as long as they do not aim at protecting a natural or legal persons.

Second, the claimant must prove a breach defined as the negligent or intentional failure to comply with the due diligence obligations laid down in Articles 7 to 16 CSDDD. These articles list the appropriate measures that companies covered by the CSDDD must take to prevent, mitigate, or end adverse human rights and environmental impacts. An important improvement in comparison to the Commission's draft is the elimination of so-called 'safe harbor' clauses. Different versions of such a so-called 'safe harbour' clause were debated during the negotiation process. To some extent, these clauses could have enabled a company from escaping liability by merely demonstrating participation in industry or multi-stakeholder initiatives or by using third-party verification or contractual clauses. However, the claimants will still face an important practical hurdle as they have to prove the breach although evidence regarding decision-making and due diligence processes is likely to lie in the control of the company.

Third, the claimant must prove causation between the breach and the damage, in other words, that the lack of appropriate measures caused the damage. In practice, most of the breaches will probably consist in an omission, which will require a hypothetical causation of the kind: had the company taken the appropriate measure, would the harm have occurred? Lastly, causation can be interrupted if the damage is caused 'only' by a business partner in its chain of activities. Recitals 41 and 79 of the Directive refer in this regard to a situation described as the "directly linked" scenario of the UNGPs. In this scenario, a company does not cause or contribute to harm, for example with price pressure, but is only directly linked to the entity that causes harm. This sentence seems superfluous. A judge must already determine whether the failure to adopt the appropriate measures caused the damage. If an omission caused the damage, the conduct of a business partner cannot logically 'alone' cause it as well. This would equally exclude causation.

A Flood of Civil Liability Claims?

Certainly not. As shown above, civil liability is complementary to an important administrative mechanism aiming at preventing adverse human rights and environmental impacts. Most risks should be prevented at this stage. If a company does not prevent, mitigate or end such impact in its chain of activities, it should be liable. In this situation, the drafters of the CSDDD have, however, been overcautious with the numerous material conditions and sub-conditions of civil liability, the practical exclusion of purely environmental liability and the requirement that victims must prove the company's failure to comply with its own due diligence obligations.

Towards an Effective Access to Civil Liability

Finally, conditions of civil liability are not the only factor for an effective access to remedy. Procedural hurdles also play an important role as identified by [Anton Zimmermann](#) in this blogpost symposium. We simply remark that the setting of a limitation period of at least five

years for these kinds of claims and the possibility to demand injunctive measures to stop infringements will improve access to remedy. This is also the case of requiring member states to provide for the discovery of evidence that lies in the control of the company even if this should be done “in accordance to national procedural law”. By contrast, the vague provision on costs and the explicit indication that member states can, but are not expected to expand their representative actions, do not have such an effect on access to remedy.

When transposing the directive into national tort law, member states have no reason to fear that the floodgates are opened for civil liability claims. Member states are in fact encouraged to go beyond the Directive. The further clarification of the conditions of parent company liability and contracting company liability in the chains of activities in practice is welcomed. We also encourage Member States to seize the opportunity to include liability for purely environmental damage when transposing the directive in their national law. It is not every day that the material conditions for corporate liability are on the political agenda.

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