Católica Global School of Law
Faculdade de Direito da Universidade Católica Portuguesa

Understanding the corporate liability problem for human rights abuses along global value chains: a critical analysis of the European proposal for a Corporate Sustainability Due Diligence Directive

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Nadia Fauck

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ABSTRACT

This dissertation discusses the topic of corporate responsibility for human rights abuses along global supply chains. With the growing power of multinational corporations, comes the importance of liability mechanisms not only for their own operations but also for those of independently owned suppliers. To provide a comprehensive understanding of the failure to hold corporations accountable for misconducts of their suppliers, this study portrays the current system of non-binding corporate social responsibility frameworks and presents relevant case law. Neither soft-law mechanisms, nor national laws have been capable of providing legal norms to not only to prevent violations from occurring but to simultaneously provide a civil liability mechanism for potential victims to claim compensation. To strengthen this argument, relevant case law is incorporated and additionally shows the severity inhumane working conditions can have.

In this context the dissertation investigates the potential of the European Commission's proposal for a European Sustainability Due Diligence Directive and critically analyzes its potential. After identifying the shortcomings of the Directive, the dissertation intends to provide incentives for the improvement of the proposal in order to create a European level playing field for corporations while also providing mandatory due diligence obligations with effective civil liability mechanisms.

Keywords: corporate social responsibility; corporate sustainability; supply chains; supply chain law; civil liability; multinational corporations; Corporate Sustainability Due Diligence Directive

TABLE OF CONTENTS

LIST OF ABREVIATIONS

AEFFAA	Ali Enterprise Factory Fire Affectees Association
CSDD	Corporate Sustainability Due Diligence Directive
CSR	Corporate Social Responsibility
ECCHR	European Center for Constitutional and Human Rights
EP	European Parliament
EU	European Union
FDI	Foreign Direct Investment
GATT	General Agreements on Tariffs and Trade
ILO	International Labor Trade Organization
JURI	EP Committee on Legal Affairs
OECD	Organization for Economic Cooperation and Development
UN	United Nations

THESIS

I. Introduction

Modern businesses are based on global supply chains with outsourced production. For example, a European company may source its raw material from one location, produce goods in another and distributes the final product into various different locations. Most work steps involve multiple actors located in different parts of the world and are therefore subject to different jurisdictions and government regulations. On the one hand value chains like this can help create jobs, attract investors and further improves the overall economic situation in many developing countries. But, at the same time, this phenomenon has created a solely money-driven market where low production costs have been prioritized over the well-being, labor rights and safety of workers.

This is a well-known issue, however solving it has not been very easy considering that corporations often operate in a highly complex manner, which unfortunately comes with certain challenges. Complying with and protecting human rights along a value chain is hard, with significant problems pertaining to oversight, controls and guarantees. Today, human rights violations still occur in various forms, such as child labor, forced labor, low wages, unsafe working conditions and also environmental degradation.

For example, according to the International Labor Trade Organization ("ILO") there are at least 168 million children between the ages of 4 and 17 that are employed worldwide and 85 millions of those have hazardous jobs. The numbers speak for themselves and in Asia, Latin America, the Middle East and North Africa, more than 9% of the children work. It is even worse in the Sub-Saharan Africa, where the number goes as high as 21 %. Unfortunately, these young workers are much more vulnerable to exploitation or sexual harassment. Additionally, those circumstances are often paired with long hours and repetitive motion that often lead to injuries.[1]

[1] J. R. Paul, „The Cost of Free Trade" (2015) in Brown Journal of World Affairs Vol 22 No 1 pp 191-212

Furthermore, there are numerous devastating cases that portray that due to unsafe working environments, hundreds or even thousands have lost their lives or have been injured.[2] What is particularly notable is that the victims had no proper way of making a claim against those at fault. Host countries often have weak government structures making it impossible for victims to obtain legal aid within their jurisdiction as the regulatory framework simply does not exist. But also suing the parent company abroad often fails as complex legal structures of companies complicate demonstrating a company's involvement in outsourced operations.

The failure to hold multinational corporations accountable for their actions has revealed to be the key challenge in addressing human rights abuses. However, with the profoundly growing importance of multinational companies, several soft law mechanisms have been developed to close this regulatory gap. A whole system around Corporate Social Responsibility ("CSR") has grown extending a corporation's responsibilities beyond their own financial interest to also cover the social impacts of their businesses. While the idea of self-regulating through voluntary rules has been the first step in this direction, a lot of further work remains necessary.

Looking at different possibilities to hold multinational corporations responsible for misdemeanors within their operations, the question regarding their responsibility over independent suppliers arises. Now, value chains include more than just company owned subsidiaries, and they also extend to legally independent suppliers. These complex structures make proving a causal link between two legally independent operating entities even harder than is the case for parent companies and their subsidiaries.[3] A victim's claim pertaining to harm caused not by the large company itself but by its foreign supplier therefore often fails due to the burden of proof falling on the damaged party. The hardship lies within having to establish the existence of a causal link between the corporation abroad and its foreign supplier causing the damage. However, completely disregarding a company's influence over a producing supplier leaves victims and many human rights violations overlooked and ignores the influence that large corporations have on their suppliers and the workplace they

[2] M. Saage-Maaß/ P. Zumbansen/M. Bader/P. Shahab, „Transnational Legal Activism in Global Value Chains" (2021) in Interdisciplinary Studies in Human Rights Vol 6

[3] R. Chambers, "Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court" (2021) in University of Pennsylvania Journal of Int. Law Vol 42:3 2021

provide for their employees. Also, it needs to be pointed out that the chance of receiving financial compensation is much more likely when going after the multinational corporations, rather than often foreign suppliers. Which is why a reform for regulating these situations is necessary and in the making.

Such global problems call for a global solution, which however comes with difficulties as there is no global regulator to impose such framework. The closest to it would be a solution at the European level, particularly as European Union ("EU")-sponsored regulatory solutions have often been found to carry a global impact.[4]

Conforming to all the reasons above the European Commission has published a proposal for a Corporate Sustainability Due Diligence Directive in February 2022 to tackle the problem of corporations not being held accountable for human rights violations across their supply chain. Specifically, the Directive aims to "foster a company's respect to human rights and environment in their own operation and through their value chains by identifying, preventing, mitigating and accounting for adverse human rights and environmental impacts".[5]

In this work I will investigate if the proposal of the European Corporate Sustainability Due Diligence Directive has the potential to close the existing regulatory gap of corporate liability in global value chains. I will present a critical view on existing frameworks, proving their partly ineffectiveness and the necessity to expand regulatory mechanisms. Ultimately, I will argue which aspects are essential to be considered in such a directive and which aspects need improvement to ensure its effectiveness. The goal is to not only decrease instances of human rights violations, but also to provide a system for victims to claim compensation in the form of civil remedies.

I will begin by analyzing the core of the corporate accountability problem, specifying which aspects are the ones that fail to prevent human rights violations from taking

[4] A. Bradford, "The Brussels Effect: How the European Union Rules the World" (2020) in Oxford Academic, https://academic.oup.com/book/36491 last accessed 22.03. 2023

[5] EU Commission, "Proposal on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937

place, but also which aspects prevent claimants from enforcing their rights. In order to get a better understanding of the failure to provide legal remedies for victims, I will analyze two devastating cases both showcasing the extent to which the current system was not built for global value chains, as they exist today, and how it fails to support victims' pursuit for legal aid.

Further, I will provide an insight into existing human rights and CSR frameworks that have been developed in the past few years to display how close they have come to closing the regulatory gap, while pointing out existing blind spots.

Lastly, I will evaluate the European Commission's draft of the Corporate Sustainability Due Diligence Directive and try to verify its feasibility and effectiveness to tackle the previously investigated regulatory problem. On the one hand, I will examine the potential impact the Directive might have on corporations within the European Union that fall under it. On the other hand, I will assess the impact the Directive might have on the global human rights situation.

Overall, this thesis aims to contribute to the ongoing debate about corporate accountability for human rights, particularly in the context of global supply chains, and to suggest potential improvements for the EU Directive proposal. It will point out the incompleteness of the Directive in particular regarding victim compensation and the access to legal aid.

II. Globalization and New Markets

The economic landscape has changed immensely in the past few decades. The capitalism system, which promotes voluntary exchange on free and open markets, is often regarded as the most effective social coordination strategy to promote societal wellbeing and individual freedom.[6] Consequently, the main goal had been to liberalize trade and diminish artificial borders between national economies and societies, as exemplified by the foundational establishment of the General Agreement on Tariffs and Trade ("GATT").[7] This resulted in further privatization, deregulated economies and decreased influence of states on the economy. And at the forefront of these changes there have been corporations, which have greatly benefited from these liberal markets.[8]

Economic globalization has meant that multinational companies do not operate only in one country, but all over the world with their own subsidiaries, and often through foreign suppliers. Corporations have had the chance to explore new markets and become "multinationals" within an open economy, where business activities occur inside and outside of a country's borders.[9]

One of the main expected effects of globalization was that free trade could help reduce poverty and close the gap between rich and poor countries. However, in the past few decades, we witnessed the exact opposite with a rising income inequality both within and between nations.[10]

Nevertheless, as statistics have shown the main beneficiaries of economic growth and increasing wealth have been the developed countries, their corporations and consumers. However, other, mostly the developing countries, have been enduring the negative side effects of globalization, and are seen bearing most of the cost of free trade.[11]

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[6] M. Friedman, "Capitalism and Freedom" (1962) in Chicago: University of Chicago Press.

[7] Douglas A. Irwin, "The GATT in Historical Perspective." (1995) in *The American Economic Review*, vol. 85, no. 2, pp. 323–28. *JSTOR*, http://www.jstor.org/stable/2117941. Last Accessed 08.03.2023

[8] J. L. Cernic, "Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational enterprises" (2008) in Hanse Law Review 4 pp 71-102

[9] G. Gereffi/R. Kaplinsky, "Introduction: Globalisation, Value Chains and Development" (2001) in Institute of Development Studies Bulletin, Vol 32 No 3 pp 1–8

[10] Paul (n 1)

[11] B. Milanovic, "Global Inequality – A New Approach for the Age of Globalization" (2016) in Harvard University Press

1. Outsourced production through foreign suppliers – legal problems

For the longest time, the concepts of the corporate veil, separate personalities and limited liability have been seen as the major building blocks of various company law systems around the world.[12] These concepts actively averted the liability of parent companies for the behaviors of their subsidiaries or suppliers. The idea behind it was to encourage global investments and foster economic growth, without investors or entrepreneurs having to fear personal liability.[13] However, globalization has expanded and developed profoundly and while possibilities have grown, responsibilities have never been upheld. The unsupervised division of labor between nations has proven to be harmful to a huge part of society as it leaves a blind spot for the abuse of foreign independent suppliers.[14] Crucially, global supply chains and the outsourcing production also create significant regulatory gaps.

Multinational corporations benefit from suppliers that offer low production costs when they gain access to labor markets with low-wage workers. They can generate large sales margins while maintaining relatively low prices to attract as many customers as possible.[15] Consumers benefit from this, as they can receive products at a much lower price.

For example, wages in certain countries like Bangladesh go as low as 0,29 € (32 USD cents) per hour, the lowest hourly wage in the world.[16] In comparison, under the current legislation the German government has agreed upon a minimum hourly wage of 12€.[17] In addition to portraying how unbalanced wealth is distributed

[12] R. Kraakman, "The Anatomy of Corporate Law: A Comparative and Functional Approach" (3rd edn Oxford University Press, 2017)
[13] Chambers (n 3)
[14] A. M. Pereira Milheiras, "Holding Parent Companies Accountable for the Human Rights and Environmental harms caused by their Subsidiaries: the role of the Civil Law concept of the Household" (2022) for NOVA School of Law
[15] G. Kolev/A. Neligan, "Nachhaltigkeit in Lieferketten: Eine ökonomische Bewertung von Gesetzesvorschlägen" (2021) in IW-Policy Paper 5/21
[16] Nathan Associates Inc., "Cost Competitiveness of Pakistan's Textiles and Apparel Industry" (2009) FOR United States Agency of International Development
[17] T. Krebs/M. Drechsel-Grau, „Mindestlohn von 12 Euro: Auswirkungen auf Beschäftigung, Wachstum und öffentliche Finanzen" (2021) in IMK Studies, Institut für Makroökonomie und Konjunkturforschung (IMK), Hans-Böckler-Stiftung

globally, these numbers also help explain how and why global supply chains have been established so successfully from an economic point of view.

Given these gaps in labor costs, it seems evidently more economically reasonable for a German retailer to have his garments manufactured in a factory in Bangladesh. The German retailer does not have to pay his manufacturers in Bangladesh a minimum wage that complies with German standards. It does not even have to provide safety measures that would be mandatory in Germany. And since Bangladesh does not have proper labor regulations, foreigners, like the German retailer, are not even breaching the law. But while German companies and its population benefit from these kind of business relationships, those stuck under unethical working conditions and low paid jobs continue to live in poverty and carry the weight of this system.

Nonetheless, it needs to be noted that developing countries do benefit from international contracting partners. Because these corporations create employment, foster tax revenue and attract investors into their economy, their governments may even encourage them. However, the foreign suppliers that contract with these corporations frequently operate in developing or emerging countries that are incapable or unwilling to sustain a decent degree of human rights protection for their citizens.[18] The lack of a regulatory infrastructure to impose labor, safety and environmental standards on their corporations causes negative externalities. Which means while these fall mainly onto foreign workers and therefore have an external impact, these circumstances have hardly any internal impact on the business itself.[19] These creates so called "regulatory gaps". These weakly governed countries welcome foreign investment in their industries, while giving huge potentials for environmental destruction and human rights abuses.[20] Ironically, this is one of the main reasons multinational corporations produce in these countries, as avoiding governmental guidelines allows them to offer much lower production costs, which is what attracts corporations from abroad in the first place. In the long run this

[18] E15 Initiative, "Global Value Chains: Development Challenges and Policy Options, Proposals and Analysis" (2013) in International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum www.e15initiative.org/ last accessed on 15.03.2023

[19] Paul (n 1)

[20] C. Albin-Lackey, "Without Rules – A Failed Approach to Corporate Accountability" (2018) in Human Rights Watch

results in a regulatory chill, which is when new regulation is intentionally avoided to prevent investor arbitration and that is very common in these countries.[21]
But it goes even further than that. The market for low end supply chains (such as the garment sector) is heavily driven by intense cost competition, unstable orders and reselection leading to a downward competition.[22] This is referred to as the so called "race to the bottom". In order to attract foreign direct investments ("FDI") governments have been removing policies that are in general socially desirable but are viewed as rather unattractive to investing firms, as they usually involve higher costs. So generally speaking, many developing countries compete with each other by lowering their labor and environmental standards, as they are seen as barriers to investment. Having the lowest possible standards and guidelines as possible helps them attract FDI. That this creates a downward spiral with severe negative impacts can go unsaid. When one country for example lowers its minimum wage others tend to follow suit, ultimately leading to child labor, low wages and other unethical labor practices. [23]

This dynamic shows that multinational corporations can dictate the conditions in global supply chains by applying pressure onto their suppliers, who further pass this pressure on to their employees that suffer and endure these horrible conditions.[24] And this can even impact the host countries government decisions, portraying the power of those corporations quite well. The adverse impacts this has on human rights and environmental protection are negative externalities as such corporations do not bear the full social cost of human and environmental degradation. This is where sustainability-driven regulations come into play, as it is meant to correct these negative externalities that mostly the workers have to endure.[25]

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[21] S. Brabant/C. Bright/N. Neitzel/D. Schönfelder, "Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)"(2022) in Verfassungsblog, https://verfassungsblog.de/due-diligence-around-the-world/ last accessed on 12.03.2023

[22] A. Evans, "Overcoming the global despondency trap: strengthening corporate accountability in supply chains" (2019) in Review of International Political Economy Vol 27 Issue 3 pp 658-685

[23] R. B. Davies/ K. C. Vadlamannati, „A race to the bottom in labor standards? An empirical investigation" (2013) in Journal of Development Economics Vol 103 pp 1-14

[24] Saage-Maaß/Zumbansen/Bader/Shahab (n 2)

[25] A. M. Paccess, "Supply Chain Liability in the Corporate Sustainability Due Diligence Directive Proposal" (2022) in Oxford Business Law Blog https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/supply-chain-liability-corporate-sustainability-due-diligence last accessed on 13.03.2023

And this is where the problem arises. What about the workers hired along these multinational supply chains? Do they have a possibility to claim legal aid for unsafe working environments, long hours, inhumane conditions? Child labor? Victims of such abuses usually cannot seek effective remedy in their home countries and in many cases the parent companies of these companies, or their more significant contracting partners from abroad manage to evade any consequences from these abuses.[26,27] The so-called "governance gaps" in these countries leave victims without any possibility of legal remedies as the national laws do not protect labor and human rights, or seeking legal protection is simply not available.[28] And because there are hardly any legal consequences for the multinational corporations that sit atop these long international supply chains, these systems of violations form a vicious cycle of human rights abuses that continue to go unpunished.

2. Relevant Case Law

There are a few cases that portray the unfortunate legal situation that surrounds the activity of multinational supply chains and its full dimension. In order to understand the regulatory gap and point out where the legal issue lays, this dissertation now turns to cases that portray the extent of the unfair working conditions to which employees along these supply chains are subject to. They do not only illustrate the current devastating conditions workers in developing countries have to endure, but they prove the deathly consequences of unsafe working environments. The fallout the lack of proper safety measures can have reconfirms the necessity of regulated labor practices. Indeed, these cases show the inability of proving liability over foreign suppliers while drawing attention to how the lack of a framework hinders victims from the possibility to claim compensation for their losses and damages.

[26] P. Wesche/M. Saage-Maaß „Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from *Jabir and Others v KiK*" (2016) in Human Rights Law Review, Vol 16 Issue 2 pp 370-385

[27] K. Haider, "Haftung von transnationalen Unternehmen und Staaten für Menschenrechtsverletzungen" (2019) in Studies in International Economic Law § 13 p 259

[28] T. Schröder, „Unternehmensverantwortlichkeit für Menschenrechtsverletzungen – zum Gesetzesentwurf in Deutschland" (2021) in European Integration Studies Vol. 17 Number 1 pp 42-49

a) Loblaws Canada in Bangladesh

Firstly, it is worth looking at the Das V. George Westend Limited Canada case.[29] Here, a Canadian retailer called "Loblaws" purchased their clothes from "Pearl Gold" in Bangladesh that outsources most of their work to "New Wave". Loblaws' direct contracting partner was therefore „Pearl Gold", however, the garments that were produced by "New Wave", entered into the consumer market through Loblaws, creating an indirect business relationship between the two parties.

New Wave's production was situated in "Rana Plaza", a building in Bangladesh in which unfortunately one of the biggest tragedies in the garment sector has taken place when it collapsed on 24th April 2013. The incident killed 1.130 people and injured 2.520, a devastating loss. Two years after the incident a class action suit was brought to the Superior Court in Ontario against Loblaws. The claims contained three points: 1) negligence 2) vicarious liability for negligence of Pearl Global and New Wave and 3) breach of fiduciary duty.[30] The judge determined that Bangladeshi law had to be applied as it was the law of the jurisdiction in which the wrongdoing occurred. A ruling that dealt with the question of declining the use of Bangladeshi law due to it being too unsophisticated or unjust has failed to materialize. In the later appeal, this decision was confirmed as being fair and correct. Be that as it may, after applying Bangladeshi Law the case was dismissed for two reasons. The first being that the case was statute-barred, as Bangladesh's Limitation Act allows only a one-year limitation period for fatal accidents and personal injuries, with the exception for those claimants that were minors. Nonetheless for the minors of the class action suit, the second reason for dismissal applied which is that the judge found that Loblaw did not bear any duty of care, as Loblaw had not created the dangerous workplace, didn't have control over the dangerous circumstances and furthermore didn't have control over the employers or employees of Rana Plaza.[31] The judge found it "*plain and obvious that a claim*

[29] Das v. George Weston Limited, 2018 ONCA 1053 (CanLII), https://canlii.ca/t/hwqc0 last accessed on 30.03.2023 (hereinafter Loblaws Case)

[30] J. Polyzogopoulos, „Blaney's Appeals: Ontario Court of Appeal Summaries" (2018) https://canliiconnects.org/en/summaries/64979 last accessed on 27.03.2023

[31] R. Cardozo, "Appeal court upholds dismissal of Bangladeshi garment workers' class action against Loblaws over deadly favtory collapse" (2019) in CanLII Connects https://canliiconnects.org/en/summaries/65359 last accessed on 13.03.2023

based on vicarious liability against Loblaws cannot succeed under the law of Bangladesh".[32]

Despite this ruling not discussing the long-awaited question of a corporation's responsibility, it has opened the discourse about CSR and its fragility. It was argued, that if Loblaw's insisted that they had complied with their CSR program, then what was the purpose of it, if it did not apply to working conditions to the factories that supply them? This opened the debate about CSR practices often being solely "window-dressing" measures, that do not seem to make much of a difference. The Canadian judge was of the opinion that window-dressing CSR, where a company publishes a code of conduct but then ignores it when it violates it, is still better than when a company does not have one at all. This has been heavily criticized and portrays the weaknesses of the voluntary nature of CSR explicitly.[33] It emphasizes the belief that companies adopt codes of conduct "not to protect workers, but to limit legal liability of global brands and to prevent damages to their reputation".[34]

Apart from playing a huge role in the debate about the skepticism around CSR this case has additionally played a crucial role in the worldwide dialogue about the question of mandatory legal norms regarding the responsibility of corporations for human rights abuses. As a response to this, the French legislature, was the first jurisdiction worldwide to publish a Corporate Duty of Vigilance Law[35], that until today many refer to as the "Loi Rana Plaza".[36]

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[32] C. Perkel, "Loblaws off the hook for Rana Plaza disaster; Bangladeshi lawsuit fails" (2019) in The Canadian Press https://www.cbc.ca/news/politics/rana-plaza-disaster-loblaws-supreme-court-1.5240493 last accessed on 15.03.2023

[33] D. J. Doorey, "Lost in Translation: Rana Plaza, Loblaw, and the Disconnect Between Legal Formality and Corporate Social Responsibility" (2018) Unpublished Paper http://www.labourlawresearch.net/sites/default/files/papers/DooreyLostinTranslation.pdf last accessed on 15.03.2023

[34] T. Bartley, "Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry" (2005) in Research in Political Sociology vol 14 pp 211-244

[35] France, La loi n°2017–399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/ last accessed on 30.03.2023

[36] D. Krebs, "Wirtschaft und Menschenrechte: die „Loi Rana Plaza" vor dem französischen Conseil constiutionnel" (2017) in Verfassungsblog https://verfassungsblog.de/wirtschaft-und-menschenrechte-die-loi-rana-plaza-vor-dem-franzoesischen-conseil-constitutionnel/ last accessed on 15.03.2023

b) KiK Germany in Pakistan

Another case that involves companies from European member states arose in 2012 when a fire in a textile factory owned by Ali Enterprises in Karachi (Pakistan) killed 260 people and injured 31. Investigations have shown, that if the factory had fulfilled basic safety standards the severeness of the tragedy could have been prevented. The complex lacked all sorts of basic fire safety measures: windows and emergency exits were closed; workers had never undergone training for emergency situations; and fire alarms as well as fire extinguishers were simply missing.[37]

But also, in the aftermath of the fire it was hard for the victims or their families to receive adequate compensation from Ali Enterprises. Many workers were not registered with the company, so they were unable to prove the employment relationship.

The German clothing discounter "KiK" used to buy around 70 % of the products manufactured in the factory, making KiK the main purchaser of the production and Ali Enterprises their independently owned supplier. Given this large proportion, KiK's responsibility in the missing safety standards has been heavily discussed.[38] Prior to the incident, KiK claimed that any supplier had to abide with the KiK Code of Conduct and that in the case of Ali Enterprises they hired an Italian auditing firm called RINA to monitor and assess potential risks. The goal was to maintain a working environment that was in compliance with the ILO Conventions and the UN norms regarding working hours, safety and health measures and so on. In an audit in 2007 multiple security issues were identified but were claimed to have been cleared by necessary corrective actions undertaken by RINA in 2011.[39] Only a few weeks prior to the tragedy this auditing firm even issued the factory a SA-8000 safety certificate, which is known to be one of the leading social certification standards for factories and organizations worldwide.[40]

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[37] Saage-Maaß/Zumbansen/Bader/Shahab (n 2)

[38] K. Burck, "The German KiK Case: From failed case towards National supply chain Legislation" (2020) PILPG – A Global Pro Bono Law Firm, https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2020/12/7/the-german-kik-case-from-failed-case-towards-national-supply-chain-legislation# last accessed on 22nd December 2022

[39] M. Theuws/M. van Huijstee/P. Overeem/J. van Seters/T. Pauli, "Fatal Fashion: Analysis of recent factory fires in Pakistan and Bangladesh: a call to protect and respect garment workers' lives" (2013) in SOMO

[40] Saage-Maaß/Zumbansen/Bader/Shahab (n 2)

Shortly after the fire, the "Ali Enterprise Factory Fire Affectees Association" (AEFFAA) started working together with the European Center for Constitutional and Human Rights (ECCHR) and medico international (a German humanitarian organization) to fight for justice for the victims.[41] The legal proceedings were not supposed to be merely a fight for compensation, but it was seen as "*a wider political aim of challenging corporate irresponsibility in today's globalized capitalist economy by making the legal argument that lead firms like KiK do in fact bear legal responsibility for conditions that prevail in their supply chain."* The effects of such human right litigation were intended to be precedence-setting, movement-building, and were meant to help shape legal discourses.[42] [43]

aa) Legal Interventions against KiK

In accordance with the German Code on Civil Procedure and the Brussels I Regulation the Regional Civil Court Dortmund had jurisdiction over the case. It was also clear that following Article 4 (1) of the Rome II Regulation the law applicable in this transborder litigation would be the Pakistani civil law. This law is highly influenced by the Indian and English law, whereby the English Law cases "Caparo v Dickman"[44] and "Chandler v. Cape"[45] were relevant to the decision. The main question and problem in this court case would have been whether there was an established responsibility link between KiK and Ali Enterprises. This would be crucial to finding a way to decide over KiK's liability for the harm that has been caused.

Unfortunately, to the disappointment of many that had hoped this could have been a precedent case for corporation's responsibility and liability for suppliers, the court dismissed the claim after the first hearing as the case was time-barred under Pakistani Law. Hence, the court never addressed the

[41] M. Bause/P. Jedamzik, "Hearing in KiK case in front of Regional Court in Germany" (2018) inn ECCHR press release https://www.ecchr.eu/en/press-release/hearing-in-kik-case-in-front-of-regional-court-in-germany/ last accessed on 2nd March 2023
[42] Saage-Maaß/Zumbansen/Bader/Shahab (n 2)
[43] Jabir and Others v. KiK Textilien und Non-Food GmbH, (2019) LG Dortmund Case No. 7 O 95/15 (hereinafter KiK Case)
[44] Caparo Industries plc v Dickman [1990] 2 AC 605
[45] Chandler v Cape plc [2012] EWCA Civ 525

liability question and never investigated a potential causal legal link between a company and its suppliers.[46]

However, in a way this case did set a legal precedence, as it was the first time a German court granted a legal standing and legal help to workers that are suing a retailing company for damages that occurred in a supplier's factory outside of Europe. Also, in an international context it has been a novelty that transnational corporations had been sued not in the role of a parent company but for labor rights violations caused by an independent supplier.[47]

"*My son has paid with his life for the profits of KiK. Finally, a German court is looking into the case*." – Saeeda Khatoon

In conclusion, despite the outcome of the case, the very fact that it was heard by an EU member state court has been seen as a big step in the right direction.[48]

bb) Legal Interventions against the Social Auditor: RINA

Concurrently to the claims brought against KiK, Italian lawyers have brought criminal charges against RINA, the Italian auditing firm.[49] It was alleged that top managers at RINA had approved the issuing of the SA-8000 certification and had therefore made themselves liable under Italian Criminal Law for false certification and falsification of documents. Unfortunately, the judge closed the proceedings as it would have been hard to argue that there was a causal link between the factory fire and the issued certification. It was found that it could hardly be argued that the factory owners would have taken measurements to ensure better safety in the factory if the certification had not been issued.[50] The case was therefore dismissed, as a causal link could not be found.

[46] Saage-Maaß/Zumbansen/Bader/Shahab (n 2)
[47] ibid
[48] Bause/Jedamzik, (n 41)
[49] Tribunale de Genova, Ufficio del Guidice per le Indagini Preliminari, Decreto di Fissazione dell' Undienza a seguito di opposozione – art. 409 c2 c3 c.p.p., N 3240/16 / N 10400/16, 11 December 2018
[50] Saage-Maaß/Zumbansen/Bader/Shahab (n 2)

cc) ILO Negotiation procedure

Workers and worker's rights activists joined forces to represent the victims and engage in a negotiation with KiK. In 2012 the "relief for the victims of the Ali Enterprises Fire Case" started and KiK agreed to provide one million US dollars as an immediate relief but furthermore that they were willing to contribute to a long-term compensation. After these agreements stalled for a couple of years, in 2016 KiK agreed to settle the negotiation with an agreed amount of 5.1 million US dollars.[51] This negotiation was particularly good for the company as they were able to showcase their commitment towards CSR without having to acknowledge any form of liability for it. While the motive for the settlement appears to have been reputational reasons, it cannot be denied the victims in this case finally received financial compensation.

Ultimately, this lawsuit did have an impact on the German legal debate. Even though the case was not successful, it brought the liability issue along supply chain to the surface and has furthered this debate.[52]

3. Conclusion: A missing legal framework?

These cases do not only portray the local problem of the systematic flaw of missing government protection of labor, safety and in general human right standards especially in the garment industry, but also the fact that this has become a global problem. For example, around 91% off the garments produced in these factories are exported to the European Union and the US.[53] The global competition in the garment sector has caused and created a downward pressure on wages and working conditions. Consequently, host countries have not furthered labor laws and practices. Especially in those countries that have weak state inspection regimes private audits and local certifications have not done much to improve the situations.[54] Foreign corporations that have their products manufactured in those

[51] International Labour Organization, Compensation arrangement agreed for victims of the Ali Enterprise factory fire in Pakistan, Press release, 10. September 2016, https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_521510/lang--en/index.htm last accessed on 25.03.2023

[52] Saage-Maaß/Zumbansen/Bader/Shahab (n 2)

[53] Theuws/van Huijstee/Overeem/van Seters/Pauli, (n 39)

[54] R. Prentice, "Workers' Right to Compensation after Garment Factory Disasters: Making Rights a Reality" (2018)

factories therefore barely face any consequences for misconducts. At this point their laws in their home countries, that would prohibit such working conditions, do not apply to their independent suppliers and the laws in the host countries are not strict enough to hold their purchasers accountable. And even in cases of tragedies, as the above mentioned, a proper legal solution for victims' compensation is still absent.

There have been developments of courts that have shown a duty of care of parent companies for the activities of their company-owned subsidiaries abroad. Courts have cautiously moved away from the strict separation between the parent companies and its subsidiaries. This illustrates that liability control is growing; however, it does not go as far as taking independent suppliers into account. But cases like the above prove the desperate call of finding a way to hold corporations accountable for their suppliers along their supply chain.[55]

Court cases create awareness that shapes the legal discourse. Which is why the initiative for the German Supply Chain Act was reasoned with current business practices being described as following: "*With unscrupulous business practices, they contribute significantly to dangerous working conditions, exploitative child labor and destroyed rainforests around the world*."[56] After having understood that corporate activities can carry a lot of responsibilities, comes the question of transforming these responsibilities into effective potential liabilities.

In the context of this dissertation the abovementioned cases have shown the severity of the working conditions and the dimension those can have. While simultaneously stressing the flaws of the current system, it ultimately shows the abandonment of a victim's pursuit for compensation after having suffered severe harm caused by a corporation's value chain.

[55] P. Rott, "Supply Chain Liability of Multinational corporations?" (2015) in European Review of Private Law Volume 23, Issue 3 pp 415-436

[56] German Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz) (2021) (Germany)

III. Current soft-law mechanisms

One of the key aspects of the world's globalization is the growing importance and impact of multinational corporations. While they have a huge economic impact on the world, they are underlying a rather weak legal regime. This creates a problem that is vividly described as a "legal vacuum" or an "accountability gap".[57] The severeness of this has become visible through the above-mentioned cases.

Governments have been struggling to fight the negative externalities caused by corporations and have been aspiring to find ways for these companies to internalize them. However, it is rather easy for corporations to escape governments regulations as they can easily choose the jurisdiction, they fall under depending on where they produce or corporate their business. Especially in global value chains liability is rather limited. This is where global solutions have come and continue to come into play.[58]

In order to analyze and evaluate if the European Directive can be a solution to this problem, one must first look into current frameworks and mechanisms for accountability and responsibility of multinational corporations, the effectiveness of these measures and the extent to which they already answer that problem.

1. Public International Law

In general, the conventional international protection of human rights is a State-centered model. It is set up to push States to protect and promote and not to violate human rights. Private actors such as multinational corporations were not meant to fall under it.[59] Corporations are not seen as legal subjects within public international law. Some jurisdictions have allowed claims against corporations in recent years.[60] However, the aspect of companies outsourcing their work to external suppliers is not yet taken into consideration within this shift and

[57] L. Davarnejad, "Menschenrechtsverantwortung multinationaler Unternehmen und Corporate Social Responsibility (CSR)" (2019) in Schriften des MenschenRechtsZentrums der Universität Potsdam
[58] Pacces (n 25)
[59] S. Deva, "Human Rights Violations by Multinational corporations and International Law: Where From Here?" (2003) in Connecticut Journal of International Law
[60] cf Vedanta Resources Plc and Another v. Lungowe and Others. (2019) UKSC 20. Judgment. At https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf UK Supreme Court, April 10, 2019

accountability for behaviors of independent suppliers cannot be reasoned under Public International Law.[61]

2. Corporate Social Responsibility

In order to fill the gap in the process of fighting against human rights abuses and environmental challenges carried out by corporations the concept of Corporate Social Responsibility was created. Defining CSR is a difficult, but globally debated subject. However, there is consensus over the underlying principle behind it. Overall, CSR is based on the idea that companies have obligations that go beyond maximizing profits but include social imperatives and social consequences of a business' success. It is grounded on the part of a firm's policies and practices that other stakeholders benefit from and that go beyond mere shareholder interest. Reaching further than what they are obliged to do from a financial and administrative point of view, it deals with externalities linked to corporate activity.[62]

While the success of CSR, being a self-regulatory system based on voluntary measures,[63] can be debated, another important aspect to point out is that its idea is limited to responsibilities and practices within one corporation and potentially extended to their subsidiaries. Indeed, what has not been fully taken into consideration is that throughout the years it has become more and more common for companies to manufacture goods not only in wholly-owned facilities of the business but to engage in supply chains with independent supplier-based manufacturing chains across borders. This shift raises the question of a potential responsibility of corporations not only for their own and their subsidiaries behavior but also for independent suppliers and business partners along their value chain.[64] The current idea of CSR therefore needs to be expanded to supply chain social responsibility.

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[61] E. Askin/B. Scharaw, "Business and Human Rights: Verantwortung für Menschenrechte und Umweltschutz bei grenzüberschreitenden Wirtschaftsaktivitäten. (2023) in JuS 2023, 21

[62] S. Quak/J. Heilbron/R. van der Veen, „Has globalization eroded firms' responsibility for their employees? A sociological analysis of transnational firms' corporate social responsibility policies concerning their employees in the Netherlands, 1980–2010" (2012) in Business and Politics Vol 14 (3) pp 1-21

[63] K. Buhmann, "Corporate social responsibility: what role for law? Some aspects of law and CSR" (2006) in Corporate Governance Vol 6 No 2 pp 188-202

[64] M. Andersen/T. Skjott-Larsen, „Corporate social responsibility in global supply chains" (2009) in supply chain Management Vol 14 No 2 pp 75-86

3. United Nations-Guiding Principles

One of the first steps towards the regulation of corporations' behaviors was the attempt to set up international Codes of Conduct for Transnational Corporations.[65] While establishing these took around 15 years of discussions, they did pave the way and provide a template for multiple other codes of conduct.[66]

In an effort to try to impose a framework for policymakers to protect and for executives to respect human rights John Ruggie (UN Special Representative on Business and Human Rights) developed a framework that the UN Human Rights Council endorsed as the "UN Guiding Principles on Business and Human Rights" in 2011.[67, 68] It is based on a "Protect, Respect, Remedy" module, where governments are meant to protect individuals from human rights abuses related to business operations, the need for corporations to respect human rights and at the same time ensuring that abuse victims have access to effective remedies.[69]

At the time the Guiding Principles were the first ever corporate human rights responsibility initiative to be approved by the UN and were viewed as defining a path towards the enforcement of corporate human rights responsibilities. It is a precedence-setting international regulation that does not only address states but also corporations directly. While the principles apply the "duty to protect" to states, they do also impose a "responsibility to respect human rights" on companies.

Value chains are also mentioned vaguely, thus the responsibility over business partners within them is very limited and can easily be waivered. Yet, it cannot be denied that the principles have shown first signs of awareness and corporate responsibility over them.[70]

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[65] U.N. Code of Conduct on Transnational Corporations, 23 I.L.M. 626 (1984)

[66] S. D. Murphy, "Taking Multinational Codes of Conduct to the Next Level" in Columbia Journal of Transnational Law Vol 43(2) pp389-434

[67] S. A. Aaronson, I. Higham, "Re-Righting Business: John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms" (2013) in Human Rights Quarterly Vol. 35 No 2 pp 333-364

[68] United Nations Human Rights Council, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf last accessed 29.03.2023

[69] Albin-Lackey (n 20)

[70] Ibid Art. 13 and 17

However, they are seen as a mere useful guidance to companies and other stakeholders, as they are voluntary, and their disregarding attracts no legal consequence.[71]

John Ruggie closed the presentation of the Guiding Principles with the following remarks: "*I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the beginning."*[72] While the UN Guiding Principles have laid out a key groundwork towards corporate responsibility, they do not provide the means to claim liability.

4. OECD Guidelines for Multinational Enterprises (updated in 2011)[73] & for Responsible Business Conduct (2018)[74]

The Organization for Economic Cooperation and Development (hereinafter "OECD") has created the first and only corporate responsibility instrument formally adopted by state governments. The guidelines they created provide recommendations for responsible business conduct addressed to enterprises that are operating in participating OECD countries.[75] While the principles and standards established in this framework are of voluntary nature, mechanisms like setting up OECD National Contact Points are meant to promote compliance and ensure accountability. Also, the guidelines include and consider supply chain practices and acknowledge a corporation's responsibility for practices along those chains.[76]

However, what limits the effectiveness of these measures is the voluntary nature of their rules. The crucial limitation is that they are only as effective as their corporate members choose them to be and only apply to those that actively decide to adhere to

[71] S. Deva, "Guiding Principles on Business and Human Rights: Implications for Companies" (2012) in European Company Law Vol 9 Issue 2 pp 101-109
[72] J. Ruggie, "A UN Business and Human Rights Treaty? AN Issues Brief by John G. Ruggie" (2014) in Harvard Kennedy School
[73] OECD, "OECD Guidelines for Multinational Enterprises" (2011), in OECD Publishing, http://dx.doi.org/10.1787/9789264115415-en last accessed on 29.03.2023
[74] OECD, "OECD Due Diligence Guidance for Responsible Business Conduct" (2018) http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf
[75] Cernic (n 8)
[76] Ibid

them.[77] Additionally, the contact points are being criticized for being too weak and not strictly non-adjudicatory.[78]

5. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[79]

This main instrument of the ILO, which is a specialized UN Agency, is meant to provide enterprises with guidance on social policy and an inclusive, responsible and sustainable workplace practice. It has been adopted more than 40 years ago and has been amended several times. It tries to bring governments (home and host), multinational companies, workers and employees together to solve challenges and identify potential for inclusive growth with the focus on social and employment rights.[80] This agreement is also non-binding, as it is of voluntary nature.

The successful involvement of the ILO must be pointed out in regard to the KiK Rana Plaza building collapse and the process of negotiations that followed. The ILO played an important role when facilitating the negotiation between the involved parties, while providing assistance to victims to claim compensation. At the end of the negotiations the victims did receive financial compensation, even KiK refused to admit a legal liability.[81]

Ultimately, despite the successes of the ILO hosted negotiation, the framework is insufficient in providing instruments that go beyond guidance and recommendations for business conducts. The non-binding nature of the provisions ultimately leaves the effectiveness up the corporations themselves, which has proven to be unsatisfactory.

6. Codes of conduct

As a reaction to consumer campaigns calling out human rights abuses in the textile industry in North America and Europe many companies have reacted by setting up

[77] Albin-Lackey (n 20)
[78] ibid
[79] International Labour Organization, "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" (1977) 17 ILM 422 https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf last accessed on 29.03.2023
[80] Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, "Corporate social responsibility (CSR) and its implementation into EU Company law" (2020)
[81] J. Siddiqui/S. Uddin, "Human rights disasters, corporate accountability and the state: Lessons learned from Rana Plaza" (2016) in Accounting, auditing, & accountability Vol 29 Issue 4 p 679 – 704

internal codes of conduct in which they commit to labor standards pertaining, in particular, to health and safety at the workplace. To ensure the compliance of supplying factories these companies usually hire social auditing firms.[82] This form of self-regulation is, as seen in the KiK Case, often prone to window-dressing CSR and usually set up for merely reputational purposes. Its effectiveness is therefore rather limited.

7. Conclusion

As the cases above have shown, existing frameworks and measures have proven to be insufficient to prevent and avoid human rights abuses along supply chains. To find a framework that provides for the necessary change one would have to point out the elements that have hampered the effectiveness of existing frameworks. The next section addresses each of these elements in turn:

a) "Soft law"

A common element across existing frameworks is that they all fall under the category of "soft law" by their own nature. This means that they are only soft obligations, that are non-binding, or mere voluntary resolutions. They are usually meant to lay down international principles or provide guidelines. But they are not intended to be enforceable by binding laws.[83] The unfortunate ineffectiveness of self-regulating voluntary frameworks is vivid. The 2019 Corporate Human Rights Benchmark assessed 200 of the largest publicly traded companies based on human rights indicators. The results have shown that over half of the major corporations in apparel, extractive, food & beverage and tech manufacturers are failing to fulfill the human rights and due diligence based on the UN Guiding Principles.[84]

A study conducted by the European commission "Due diligence requirements through supply chains" has found that the introduction of a mandatory due

[82] Saage-Maaß/Zumbansen/Bader/Shahab (n 2)
[83] A. Ahmed/J. Mustofa, "Role of Soft Law in Environmental Protection: An Overview" (2016) in Global Journal of Politics and Law Research Vol 4 No 2 pp 1-18
[84] Corporate Human Rights Benchmark (2019) https://www.ihrb.org/focus-areas/benchmarking/2019-corporate-human-rights-benchmark last accessed on 12.01.2023

diligence framework would have the largest positive impact on human rights and environmental misconducts.

However, industry organizations have expressed preferring voluntary measures over a mandatory due diligence framework.[85] It is clear that this is related to the fact that, in that regard, they can hardly be held accountable because all of their efforts are purely voluntary.

On top of that the effectiveness also profoundly depends on the existence of State monitoring and sanctions for non-compliance.[86] So, a major downside of soft law is the lack of penalties and sanctions. That is said to be the main aspect holding back the success of existing CSR frameworks. It is the fact that this concept is mainly employed on instruments that work on a voluntary basis. Additionally, since it does not impose any legal liability for companies, there are hardly any penalties or fees for cases of misconduct or breaches of the provisions. A study by the European Commission from 2020 has shown that the main incentives for businesses to take due diligence actions are "reputational risks, investors requiring a high standard and consumers requiring a high standard". The same study has also shown that despite the UN Guiding Principles and the OECD Guidelines suggesting best practices for over a decade only 37% off all businesses have taken measures to conduct environmental and human rights due diligence measures. [87] These numbers portray quite well how ineffective voluntary measures unfortunately have turned out to be, as they do not impose enough of an incentive for corporations to conduct business ethically.

A corporation's finest actions are typically greatly encouraged, especially when faced with the threat of state sanctions or civil liability charges. The fact that neither of the two is mandated by these voluntary frameworks, however, reduces their overall effectiveness.

[85] A. Schilling-Vacaflor/A. Lenschow, "Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges" (2021) in Regulation & Governance

[86] ibid

[87] EU Commission, "Study on due diligence requirements through the supply chain" (2020) https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en last accessed 24.01.2023

To conclude on the downside of regulations that are merely voluntary, it is worth pointing to a report of the UN General Assembly where, in 2003, Jean Ziegler, a Special Rapporteur of the UN Commission on Human Rights, already saw the necessity for binding legal norms as following: "*the growing power of transnational corporations and their extension of power through privatization, deregulation and the rolling back of the State also mean that it is now time to develop binding legal norms that hold corporations to human rights standards and circumscribe potential abuses of their position of power."*[88]

The need to step away from soft-law mechanisms towards binding legal norms thus appears evident.

b) European Regulation rather than national

In the words of Antonio Guterres, the UN Secretary-General of the United Nations, "*I am deeply convinced, that there is no other way to deal with global challenges, than with a global response*."[89]

However, a global solution to the above analyzed problem is not as easy as one may think it is.

John Ruggie describes it as a "*perfectly understandable reaction to the global problem of business-related human rights harm to say there ought to be a law, one single international law, which binds all business enterprises everywhere under a common set of standards protecting human rights.*"[90] However, the development of such instruments comes with various challenges. It raises not only the question of which human rights should be seen as forming part of an international standard or if only a limited set of rights, which would they be? It is also unclear how such a treaty should be enforced. Would establishing an international court for corporations be the solution? Would states enforce it? Would it only bind multinational corporations or also nationals? Finding ways to

[88] UN News, "Transnational corporations should be held to human rights standards - UN expert" (2003) https://news.un.org/en/story/2003/10/82232 last accessed on 27.03.2023

[89] A. Guerres, „António Guterres: Read the UN Secretary-General's Davos address in full" (2019) in Wolrd Economic Forum Annual Meeting published by World Economic Forum, https://www.weforum.org/agenda/2019/01/these-are-the-global-priorities-and-risks-for-the-future-according-to-antonio-guterres/ last accessed on 02.03.2023

[90] Ruggie (n 67)

establish a global legislator appears out of scope. But a solution closest to a global applicable law is to create one at European level.

The EU and its economy are immensely powerful. It is considered as the world's largest trading block. It's share in importing goods from developing countries is higher than those from USA, Canada, Japan and China combined.[91]

Several attempts to regulate corporate human rights and environmental due diligence at national level have shown the difficulties of regulating in this area.[92] The French Law on the Duty of Vigilance was the first national mandate to impose due diligence obligations onto companies.[93] Subsequently a German Supply Chain Due Diligence Act came into force in 2023.[94] Whilst these frameworks represent crucial initial steps in the right direction, these national frameworks may be limited in scope and effectiveness due to concerns of competitiveness within the domestic market.
The most effective means of promoting an ethical and sustainable business environment needs to be conducted at EU level. Creating a level playing field through a European solution seems more advantageous and would simultaneously avoid legal arbitrage between EU Member States.

A preference for the option to establish a harmonized legal framework at EU level has also been expressed by most single business respondents, as they seek legal certainty. Uncertainty cases of potential civil liabilities can lead to extremely high damage payments as well as reputational costs. So, if there will be binding obligations corporations prefer clear rules to find ways to abide with them instead of bearing costs they could have avoided.[95]

[91] European Commission, "EU position in World Trade" (2020) https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/eu-position-world-trade_en last accessed on 12.02.2023
[92] Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, "Corporate social responsibility (CSR) and its implementation into EU Company law" (2020)
[93] France, La loi (n 35)
[94] German Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz) (2021) (Germany)
[95] Pacces (n 21)

c) Extending CSR to supply chain liability

The problem with the current idea of CSR is that is usually ends where the legal personality of a company ends. Yet, this does not align with the way business is being conducted in the globalized world.

Global trade is conducted in governance systems, where businesses connect with each other through various sourcing and contracting agreements. The term "governance" suggests that some important supply chain participants, frequently major multinational firms, are in charge of overseeing the inter-firm division of labor and the abilities of individual participants to advance their activities. They do not only oversee the activities the production of their suppliers, but they actually have significant control over it.

These businesses' market power and control over essential resources are what gives them the power to influence the supply chains they participate in. Due to their influence, these performers have a big say in what is produced, how, and by whom.[96] However, they enjoy a limited legal liability for negative environmental or social impacts caused by their subsidiaries or suppliers.[97]

It is therefore necessary to broaden the concept of CSR, to expand it further beyond company-owned subsidiaries, and to extend it to suppliers and trade partners that are working closely with multinational companies. It is said, a company is only as sustainable as its supply chain.[98]

Such supply chain liability is meant to create a liability for damages that business partners cause in their countries. And what differentiates this concept from the one within CSR is that it not only includes subsidiaries owned by parent companies but also those that have business relationships with the company, such as suppliers and even customers. This notion, which was initially a mere academic theory, has developed as courts started considering it in their decisions, as well through legislative initiatives that have started to consider it.

For example, a recent case decided by a Dutch court displays this shift explicitly. In the decision against Shell in a climate case in June 2021 the judge ruled that the standard of negligence does not only include subsidiaries owned by Shell, but that

[96] Andersen/Skjott-Larsen (n 64)

[97] J. G. Ruggie, „Multinationals as global institutions: Power, authority and relative autonomy" (2017) in Regulation & Governance Vol 12 Issue 3 pp 317-333

[98] S. Zeisel, „Lieferkettengesetz – Sorgfaltspflichten in der Supply Chain verstehen und umsetzen" (2021) p 2

the duty of protection and respect of human rights includes also its suppliers. It is said:

"It is not in dispute that through its purchase policy the Shell group exercises control and influence over its suppliers (...) This means that through its corporate policy Shell is able to exercise control and influence over these emissions." [99]

The fundamental issues with the current framework highlight the need for new policies that guarantee and safeguard workers' human rights.

Analyzing the existing frameworks has led to the conclusion that any new solution must consist of binding obligations and would ideally be implemented at EU level. It is also important that State sanctions and civil liability regimes are included, as they provide the necessary incentives for corporations to abide by any given obligations.

[99] The Hague District Court: Milieudefensie et al vs. Royal Dutch Shell Rechtbank Den Haag 26 mei 2021, ECLI:NL:RBDHA:2021:5339

IV. The European Directive – A solution to our supply chain accountability problem?

The EU Commission released a proposal for a Corporate Sustainability Due Diligence Directive ("CSDDD") on February 23rd 2022.[100] The Directive is meant to offer a solid legal foundation and innovations to improve corporate accountability, while establishing a European and possibly global standard for ethical and sustainable business activities.[101] In accordance with Art. 1, the Directive's main goal is to guarantee that companies "operating in the [EU] internal market fulfill their duty to respect human rights, the environment, and good governance and do not cause or contribute to risks...in their activities and those of their business relationships."[102]

1. Legislative process

One of the initial, yet subtle, steps taken by the European Commission to pursue corporate sustainability were the Directive on Non-Financial Reporting (Directive 2014/95) and the revised Shareholder Rights Directive (Directive 2017/828). They have set out a pathway to encourage corporations to carry out their business more sustainably and in a long-term oriented way.[103]

Further steps in this direction were taken in March 2018 with the Action Plan on Financing Sustainable Growth.[104] Its overarching goal was to establish a legal framework that promotes environmentally friendly investment, lessens the chance of greenwashing, and makes sure that sustainability is completely incorporated into the financial system. In the long-term, private capital was meant to be

[100] EU Commission, "Annex to proposal for a Directive on corporate sustainability due diligence" (2022) COM (2022) 71 final
[101] S. Brabant/C. Bright/N. Neitzel/D. Schönfelder, (n 21)
[102] P. Bourke/S. Neely, "First steps taken towards a mandatory human rights due diligence law in the EU" (2020) in Norton Rose Fullbright LLP
[103] F. Möslein/K. Engsig Sørensen, "The Commission's Action Plan for Financing Sustainable Growth and its Corporate Governance Implications" (2018) in Nordic & European Company Law Working Paper No. 18-17
[104] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth, COM/2018/097 final. Action Plan, COM (2018) 97

mobilized towards more sustainable investments and financial flows were supposed to be redirected towards a more sustainable economy.[105]

Later in February 2020, a study was published aiming to assess a potential development of regulatory measures on the due diligence topic at the European level by reporting on due diligence requirements along supply chains.[106] This study confirmed the failure of mere voluntary measures and strengthened the requirement of a new mandatory due diligence framework.[107]

Two months later the European Commissioner for Justice, Didier Reynders, announced that as part of the Sustainable Corporate Governance initiative the Commission committed to introducing rules for mandatory corporate environmental and human rights due diligence.

In response to that, members of the Parliament developed a European Parliament ("EP") position on the shape of such law. Later, in January 2021 the EP Committee on Legal Affairs ("JURI") published a report with recommendations for the Commissions on mandatory corporate due diligence accountability. The final report was adopted in March 2021, consisting of a strong statement from the Parliament with the indication that the Commission would have to go further with the legislative proposal.

In December 2020 the Council called for a proposal for the anticipated EU framework on sustainable government from the Commission. This was meant to include cross-sector corporate due diligence obligations along supply chains.

After public consultations and various delays, the first proposal of the Commission was published on 23rd February 2022.[108]

In November 2022 the European Council acquired a negotiation position on the proposed Directive with various suggestions for change. The next step would be for the European Parliament to establish their initial negotiation position.

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[105] T. Myklebust, "High-Frequency Trading as an Impediment to Long-Term and Sustainable Finance: Identifying a Regulatory Gap that Can Put the Goals of the European Action Plan on Financing Sustainable Growth at Risk" (2020) in Oslo Law Review Vol 7 Issue 2 pp 63-83

[106] J. Crespin, "EU Directive on Corporate Sustainability Due Diligence: critical analysis and limitations of the European Commission's proposal" (2022)

[107] EU Commission, "Study on due diligence requirements through the supply chain" (n 84)

[108] Business & Human Rights Resource Centre, "Towards an EU mandatory due diligence & corporate accountability law (2020), available at https://www.business-humanrights.org/en/latest-news/eu-commissioner-for-justice-commits-to-legislation-on-mandatory-due-diligence-for-companies/ last accessed on 15.02.023

Following that the Parliament and the Council will reconcile to develop a final draft.[109]

2. Legal Nature

The Initiative is set out in the form of a directive instead of a regulation, meaning Member States must transpose it into national law giving them a certain degree of flexibility.[110]

In European Law there are two types of directives, those that impose minimum or those that call for maximum harmonization. The latter means that Member States must introduce the standards as they are set out in the directive and may not exceed them. The minimum harmonization in contrast allows for Member States to go further than the directive as it solely sets a minimum standard for national laws. The present Directive can be interpreted as minimum harmonization, giving Member States the freedom to impose even stricter rules.[111]

For the implementation process the Commission plans to set up a European Network of Supervisory Authorities. The Member States are then given a two-year transposition period, starting when the Directive is adopted and published. The implementation period for larger companies is set to 2 years and to smaller companies in a high-risk sector it is supposed to be 4 years. An individual can still rely on the Directive to a certain extent, even in the case of incorrect or the lack of transposition by a Member State.[112]

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[109] M. Morgan/L. Hopkins/D. Gage/K. Gruver, "European Union Adopts ESG Reporting Requirements and Other Global Developments" (2022) in The National Law Review Volume XII No 356 https://www.natlawreview.com/article/2022-wrap-esg-reporting last accessed on 04.03.2023

[110] J. MacLennan, C. Connellan, L. Lundberg, " Pressure mounts on EU regulator to deliver on Mandatory Human Rights, Environmental and Governance Due Diligence" (2021) https://www.whitecase.com/insight-alert/pressure-mounts-eu-regulator-deliver-mandatory-human-rights-environmental-and last accessed on 24.11.2022

[111] Crespin (n 106)

[112] Publications of the Office of the European Union, "Summary of Art. 288 TFEU – Directives" (2022) in Summaries of EU Legislation https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=legissum:l14527 last accessed on 23.03.2023

3. Content

a) Company Size

One of the most criticized aspects of the Directive is that it limits its applicability to only large EU-based companies. It therefore excludes any small, medium or micro enterprises in Europe.[113]

The Directive is according to Art. 2 meant to apply to large European companies, that can be divided into three different groups with different conditions to fulfill.

1. A company that has more than 500 employees on average and a net worldwide turnover of more than EUR 150 million in the last financial year (Art. 2 lit 1 (a)).
   This first group is segregated from the others with the obligation in Article 15, that their adopted plan and strategy need to be aligned with the Paris Climate Agreement.
2. A company that does not reach the threshold of 500 employees as in (a) but has more than 250 employees and a net worldwide turnover of more than EUR 40 million in the last financial and where min. 50% of the turnover was generated in one of the sections mentioned in the Directive, that are seen as highly prone to Human Rights and Environmental abuses (Art. 2 lit 1 (b)).
3. And lastly companies that are formed in a third country but fulfill one of the two conditions within the Union (Art. 2 lit 2).

The scope of the Directive has been criticized heavily particularly for the reason that about 99% of the corporations within the Union fall under small and medium enterprises ("SME") and would therefore not fall under the personal scope of the Directive.[114]

[113] Human Rights Watch, "EU: Disappointing Draft oN Corporate Due Diligence" (2022) https://www.hrw.org/news/2022/02/28/eu-disappointing-draft-corporate-due-diligence accessed on 24th November 2022

[114] O. Martin-Ortega/C. O'Brien, „Sustainable corporate governance: Submission to Consultation on European Commission's proposal for a Directive on corporate sustainability due diligence COM(2022)71 final" (2022)

This raises multiple concerns. Is the Directive going to be sufficient to tackle the current problematic situation, if most companies do not fall under its legislation? Does regulating the liability make sense if it does not affect the majority of the corporations within the Union?

First of all, the justification for the limited scope seems plausible as it serves to unburden smaller corporations from disproportionate administrative and financial burdens associated with having to implement due diligence measures. Also, it can be claimed, that SMEs will be indirectly affected by the Directive through their business relationships with larger companies when they form a part of their value chain.[115] Although they might not fall directly under the Directive, they will be impacted by measures taken by larger companies whom they do business with.

However, it needs to be argued that this lacks the rationale of a risk-based approach and fails to acknowledge that even companies that may be smaller in size can be prone to higher risks than other larger ones.[116]

Failing to include SMEs merely due to their size while paying no regard to their operations potentially in a high-risk sector is a huge mishap. As the Parliaments proposal noted, SMEs should not have to carry the same obligations as large corporations, but proper guidance and support could have been provided for them to implement the relevant due diligence standards into their operations.[117]

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https://www.researchgate.net/profile/Claire-Obrien-12/publication/360845316_Sustainable_corporate_governance_Submission_to_Consultation_on_European_Commission's_proposal_for_a_Directive_on_corporate_sustainability_due_diligence_COM202271_final/links/628e320255273755ebb50dbd/Sustainable-corporate-governance-Submission-to-Consultation-on-European-Commissions-proposal-for-a-Directive-on-corporate-sustainability-due-diligence-COM202271-final.pdf last accessed on 30.03.2023

[115] Pereira Milheiras (n 10)

[116] Shift, „The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive – Shift's Analysis" (2022) https://shiftproject.org/resource/eu-csdd-proposal/shifts-analysis/ last accessed on 26.03.2023

[117] European Parliament, "European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability" (2020/2129(INL)) https://www.europarl.europa.eu/doceo/document/TA-92021-0073_EN.pdf last accessed on 30.03.23

b) Addressees: Limited Value Chain Scope

As recognized before, the Directive is not established with a risk-based approach in mind, which is why is the main reason for it not including the entire value chain under its scope. In Article 1, it limits a company's due diligence obligations to its own operations, those of its subsidiaries ("controlled undertakings" (Article 3 lit (d)) and to those entities along the value which whom the company has a so-called "established business relationship" with.[118]

According to Art. 3 lit (f), these are deemed to exist when the relationship between the companies is "expected to be lasting". Concerning is, however, that is does not include those relationships that are rather short, unstable or informal. Especially, since these are more prone to human rights or safety breaches. Also, this might incentivize corporations to switch between different suppliers more regularly, making sure those business relationships do not fall under the scope of the Directive. This is contradictory to the to the idea of the Directive as it is meant to foster long-lasting business relationships.[119] The ECCJ recommends returning to the risk-based approach that has also been used in the UN and OCED standards. Impacts here are measured on the basis of severity and likelihood and not on characteristics like the intensity or duration of a business relationship.[120]

The reduced scope of applicability generally seems restricting and troubling. Firstly, it is understandable that in relation to the civil liability a narrow scope is necessary. Basing a civil liability on any business relationship might actually be harmful, corporations might avoid outsourced production as it includes too many risks. However, it seems counterproductive to apply these limits to the due diligence obligations and to refrain from expanding a "duty to prevent harm" throughout the entire value chain. It would also contradict

[118] C. Patz, "The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment" (2022) in Business and Human Rights Journal Vol 7 pp 291-297

[119] F. R. Schufft, "An umbrella with holes? The proposal for a Directive on Corporate Sustainability Due Diligence and its potential impact on deforestation" (2022) on Germanwatch

[120] ECCJ, "European Commission's proposal for a directive on Corporate Sustainability Due Diligence – A comprehensive analysis (2022) https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf last accessed 11.03.2023

other international standards.[121] To conclude, imposing due diligence obligations should be expanded not only to established but to all business relationships. The established relationship could be said to suffice within the civil liability regime, however in order to achieve wide due diligence measures obligations should be applied in a broader manner.

The Directive narrows down the scope even further in Art 3 lit (e) (ii). When a business relationship with another legal entity has been established, the obligations are limited to only those business relationships that have a specific link to the development of the product or the company's operations. Again, this shows that the Directive does not intend on expanding responsibility over the entire supply chain.[122] This can be reasoned with the fear of corporations ultimately refraining from hiring external companies entirely for the risk of liability being too unpredictable. However, in the digital age this might oversee the work of many technology or financial institutions. Also, it needs to be noted that expanding obligations does not necessarily pave the way for a causal link required in civil liability claims. Being cautious with extending the scope appears unnecessary. And finally, narrowing down the scope for liability, yet again, seems counterproductive.

Overall, the focus on the indeterminate legal term "established business relationships" fosters legal uncertainty and causes different transpositions throughout the Member States. It creates disharmony and does not really serve the purpose of the Directive. Also, limiting the obligations and not including the entire supply chain might lead to loopholes and appears counterproductive.

c) Obligations

The Directive's main goal is for Member States to prevent all serious negative human rights and environmental harm generated by their activities,

[121] Shift (n 116)
[122] M. Bettermann/V. Hoes, "Die EU Corporate Sustainability Due Diligence Directive – Besondere Pflichten für Kreditinstitute?" (2022) in Zeitschrift für Bank und Kapitalmarktrecht 2022, 686

those of their subsidiaries or those of their business partners. In this matter it imposes six main obligations onto the member states.

First of all, Art. 5 calls for companies to incorporate appropriate due diligence policies that consist of a code of conduct that obliges all participants in the value chain to comply with it. These also need to be periodically monitored in accordance with Art. 10. Then, under Art. 6, companies are asked to take proactive measures to identify actual or potential negative corporate impacts on human rights and the environment with an examination of implications along the entire value chain. Potential adverse impacts need to be prevented and mitigated and actual adverse impacts need to be corrected according to Art. 7 and 8. Another crucial aspect is the establishment of a complaint procedure for victims of harm caused by the companies' activities or those along their value chain. And lastly, Art. 11 obliges companies to the public disclosure of their due diligence process as part of their non-financial information communication.[123]

These obligations are generally helpful, however certain terms can be interpreted very broadly, which ultimately leads to legal uncertainty failing the mission of creating an EU level playing field. Additionally, companies can then easily find ways to escape supply chain liability, as it is based on rather vague standards.

One of those uncertain legal terms can be found in Art. 7 lit 1 and is the obligation to take "appropriate measures" to prevent human rights impacts if possible. Art. 3 lit (q) mentions the prerequisites to be considered, like the severity of a potential impact, its likelihood, etc. For example, if a corporation failed to identify a risk and failed to contact any possibly affected party, a judge or regulator would then need to determine whether the company had still taken "appropriate measures" to identify the risks to those parties despite not having consulted any potentially affected party.[124]

[123] Crespin (n 106)
[124] Patz (n 118)

Problematically, the obligations that bind companies under this article are not specified. An estimation for appropriateness is therefore very vague and gives too much room for interpretation to each Member State and their courts. Again, failing at setting an overall standard and leading to legal uncertainty.

Another noteworthy aspect is the fact that corporations can waiver their obligations through "contractual assurances" that ensure that due diligence measures have been taken (Art. 7 lit 2 (b)). This could cause a so-called box-ticking effect, which makes setting up mandatory obligations just as ineffective as voluntary ones, as they fail to fulfill their purpose. It is rather useless to set up a contract with suppliers, demanding them to abide with human rights and environmental standards without thoroughly examining the issues and confirming that they can in fact be carried out. The purpose behind this would mostly be holding someone else accountable for a potential harm, not to the intention to prevent it.
Nonetheless, contractual assurances between business partners can definitely be helpful, as they have the potential to reciprocate duties and expectations, strengthen the understanding for due diligence and can aid in holding each other responsible with possible contractual penalties. However, these assurances have also shown to be an instrument for helping a company shift their responsibility for carrying out due diligence as well as upholding human rights and environmental standards onto their business partners, who often have neither the means nor the operational infrastructure to implement them. Additionally, these contractual assurances fail to lay down any obligations for overseeing their business partners, or to ensure that the imposed measures can and will be adopted.[125]

The argument at hand bears resemblance to third-party social audits, as seen in the KiK case, where KiK argued to have fulfilled its obligations by hiring a social audit firm to oversee the production site. Despite the KiK case proving the ineffectiveness of these practices, the Directive promotes including codes of conduct in contracts and having third-party companies verify these. This

[125] Shift (n 116)

fulfills their obligation for "contractual assurances" without having to explicitly make sure that their purchasing practices do not contribute or cause any harm.[126] It seems surprising that this has not been taken into consideration as the KiK case has shown exactly that hiring third-party audits does not only not ensure and verify certain standards, but it also contributes to the liability problem. Again, contractual assurances merely transfer the responsibility to a third party without clarifying its extent or obligations to oversee certain measures.

d) Civil Liability Regime

As analyzed before one major problem has been the missing legal aid for victims of human rights abuses. By standardizing civil liability procedures, the Directive seeks to address this issue by reducing national distortions.[127]

Art. 22 of the Directive requires Member States to ensure civil liability of the companies if they fail to comply with the obligations from Art. 7 and 8. These articles are meant to prevent potential and actual human rights impacts.[128]

aa) Contractual assurances

Similar to the aforementioned obligations, Art. 22 lit 2 gives companies the possibility to waiver their liability for the activities of their direct or indirect partners, if they can prove they have taken the necessary due diligence measures. However, again none of these obligations are specified. The only requirement is that it should not have been unreasonable to expect that the implemented measures would prevent, mitigate, end or minimize the human rights abuse. A further understanding can be seen in the fact that Art. 22 lit 2 directly refers to the Art. 7 lit 2 (b), 7 lit 4 and 8 lit 3 (c) and 8 lit 5. This is where the Directive calls for the

[126] Patz (n 118)

[127] T. Pantazi, „The Proposed Corporate Sustainability Due Diligence Directive and its provisions on civil liability and private international law in particular" (2023) in Perspective of Law in Business and Finance

[128] S. Gibbons, „Some initial thoughts on the proposed EU Due Diligence Directive" (2022) https://www.cambridge.org/core/blog/2022/02/25/some-initial-thoughts-on-the-proposed-eu-due-diligence-directive/ accessed on 13.01.2023

earlier discussed "contractual assurances" that are meant to ensure compliance with the company's code of conduct. As mentioned earlier this comes with the risk of companies merely facilitating codes of conducts and contractually confirm these with their business partners to avoid their own liability and offload it to third companies.[129]

Ultimately, the regime might falter due to the possibility of easily avoiding liability when a company can prove that with previous contractual assurances referring to their codes of conduct, they have fulfilled their obligations. This opens the door to the known problem of window-dressing CSR and is likely to lead to the impossibility of claiming and proving civil liability.

bb) Burden of proof

The burden of proof is another issue that victims face, even when a nation permits them to seek legal justice in the jurisdiction, as cases like the KiK case have demonstrated. A civil case is often lost when the victim cannot prove causal link between the company's breach of duties and the harm and suffering that the victims have endured, particularly when the companies try to argue that they have fulfilled their duty by hiring a third-party audit. Regarding this manner the Directive chose a fault-based liability regime rather than a strict liability regime, meaning that victims can try to seek compensation through the Member State's civil law, which ultimately means the question of proof lies within national law (according to Recital 58). And since Member States usually put the burden of proof on the claimants, the case depends on whether or not the claimant can prove that there is a causal link between the company's behavior and the harm caused, which can be a real challenge.[130]

[129] ECCJ, "European Commission's proposal for a directive on Corporate Sustainability Due Diligence – A comprehensive analysis (2022) https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf last accessed 11.03.2023

[130] S. Brabant, "Enforcing Due Diligence Obligations" (2022), in Verfassungsblog https://verfassungsblog.de/enforcing-due-diligence-obligations last accessed on 13.03.2023

The failure to clearly predetermine who carries the burden of proof has been criticized as being a "fatal mistake" made by the Directive. Indeed, placing the burden on the victim is seen to undermine the liability's effectiveness, and leaving the choice to national law adds to it, as it fosters regulatory arbitrage. This is a phenomenon which occurs when companies take advantage of differences in jurisdictions, leading to a company basing its decision in which country to operate on looser regulatory requirements.[131] It can be described as the opposite of an EU level playing field. And since the Directive has to be implemented by the Member States the rules can vary especially when certain aspects are not clearly specified.

cc) Applicable Law

A further aspect from the Directive may address some more of the problems found in the KiK case. Art. 22 lit 5 and Recital 61 define that even when the damage occurred in a third country, the applicable law will be the law of a Member State. This provision strengthens the access to justice and can help ensure civil liability cases. That was specifically the reason why the Regional Court Dortmund in Germany could not decide on the KiK case, as it was being dismissed for being time-barred under Pakistani Law.[132]

dd) Obligations of Means

Another problematic aspect is explained in Recital 15 and involves the concept of the Directive being focused on "obligations of means" rather than "obligations of result". This has an essential impact on civil liability, similar to the UN Guiding Principles, where the liability depends on the appropriateness of the measure taken rather than on their effectiveness.[133] This might open the door to the known problem of window-dressing CSR, where a company ticks the box of having taken certain measures, without expecting them to actually be effective.

[131] Pacces (n 21)
[132] Brabant (n 130)
[133] ibid

e) National Supervisory Authority

In accordance with Art. 17 and 18 Member States are meant to provide an independent authority to supervise the companies that have their registered office or branch in their territory. With the help of supervising authorities, the Directive is meant to provide a mechanism of administrative oversight to ensure compliance with the obligations set out in the Directive.[134]

In case investigations conclude that a corporation does not operate according to its obligations laid down in the Directive the supervisory authority can impose sanctions of several types. However, it is worth pointing out the voluntary nature of this provision: it is entirely up to the Member States, and the only criteria under Art. 20 is that the measures need to be effective, proportionate and dissuasive.[135]

Fostering legal uncertainty about proper sanction mechanisms can take a toll on the effectiveness of a framework, as sanctions in the case of misconduct are an important incentive to abide with obligations. While some Member States might impose strict sanctions, others might not, potentially leading to imbalance and regulatory arbitrage.

Another weakly regulated point pertains to the question of whether these authorities would provide the investigated data to potential victims so as to assist them in pursuing legal aid as plaintiffs. And the fact that the Directive did not modulate or easen the burden of proof for the plaintiffs failing to clearly define that the supervisory authorities are meant to provide guidance and assistance for victims to make their case, contributes to the problem of pursing legal aid. It stands to reason that having these authorities that have collected data about a company's conducts, should be able to use and provide them in support of civil liability cases.[136]

[134] Brabant/Bright/Neitzel/Schönfelder (n 21)
[135] Crespin (n 106)
[136] M. Kawakami, "Don't sweat the small stuff? The new proposal for the EU directive on corporate sustainability due diligence" (2022) in Maastricht University Blog https://www.maastrichtuniversity.nl/blog/2022/03/don%E2%80%99t-sweat-small-stuff-new-proposal-eu-directive-corporate-sustainability-due last accessed on 16.03.2023

f) Scope of environmental harms

One final aspect of criticism that has been raised towards the Directive pertains to the rather limited scope and vagueness regarding environmental due diligence and climate change mitigation. Still, it is worth pointing out that this is a relatively new field. Particularly when it comes to environmental law, there are not any precedence regulations on this field for guidance like the UN guiding principles or the OECD guidelines in the field of human rights.[137]

Given these aspects a reoccurring issue of the Directive has to be seen in the limited scope and in the rather vague legal terms. This does not only lead to legal uncertainty and potential legal arbitrage, but it might ultimately give loopholes to corporations to make sure a certain business relationship does not fall under the scope or if it does to easily find ways avoid liability through "contractual assurances".

[137] Pantazi (n 126)

V. Conclusion

While many criticize various aspects of the EU proposal some see it as a landmark monument that serves as a groundbreaking legislative project in unchartered waters.[138] It can indeed be seen as an important and necessary step towards corporate liability for human rights abuses along the supply chain. However, since many points of the Directive are left rather vague, other voices find that the instrument has failed to eliminate the legal fragmentation and legal uncertainty for companies caused by different national implementations and regulations and that the hoped-for EU-wide legal standardization, level playing field and legal certainty will remain a distant prospect for the time being.[139]

Furthermore, the analysis leads to the conclusion, that while the Directive covers many important aspects, its indeterminate legal terms leave too much room for interpretation. And as the Directive is only as effective as the national laws that the Member States transform it into, it leaves many uncertainties open and can ultimately lead to its ineffectiveness. In order to provide a useful guidance for improvements, I will in the last section of my work summarize the most important points of the analysis to portray which are the provisions that may need further work.

1. Can this be a solution? Critical analysis

Although the previously mentioned aspects suggest that there has been a widespread support for establishing a mandatory due diligence regulation at the EU level, a closer examination illustrates that many crucial institutional design features and enforcement measures still need to be defined. Numerous topics, particularly the specific obligations of business and their civil liability are broadly debated. While business players and conservatives as well as liberal parties are pushing for rather less rigorous and enforceable regulations, civil society actors, leftist, green and other parties are fighting for a more comprehensive and stringent regulation. [140]

[138] Gibbons (n 128)

[139] P.S. Stöbener de Mora/P. Noll, „Noch grenzenlosere Sorgfalt? Der Richtlinienvorschlag zu Sorgfaltspflichten von Unternehmen im Hinblick auf Nachhaltigkeit“ (2023) in Europäische Zeitschrift für Wirtschaftsrecht Vol 14 in 2023

[140] Schilling-Vacaflor/Lenschow (n 85)

Apart from certain groups pushing for certain interests, having particularly the protection of human rights in mind, one would have to point to certain points of the Directive that need to be re-evaluated in order to ensure effectiveness.

a) Discretionary powers of the Member States

An overall reoccurring issue with the Directive is that many crucial aspects are left open for the Member States to deal with. In the end, it needs to be acknowledged that effectiveness of its provisions ultimately come down to how it ends up being implemented by Member States. In other words, the Directive will only be as effective as the Member States that implement it in their legislation.[141] Leaving room for interpretation might lead to certain provisions not being (sufficiently) considered in the transposed law of the Member States. Setting a clear and specified standard would have therefore been crucial.

b) Civil liability

One particularly crucial aspect also left for the Member States to decide, is the question of civil liability that lays in the hands of national judges to determine. They will conclude which acts are "appropriate measures" due to the lack of precise guidance on this subject, leading to interpretation discrepancies among Member States and uncertainty for claimants (and businesses).

Additionally, the possibility to waiver liability through "contractual assurances" is bound to make proving liability extremely difficult. Allowing corporations to so easily transfer their duties to their contracting partners linked to no further requirements opens door to already familiar window-dressing CSR practices.

In general, it needs to be pointed out that seeking legal aid before a court in a Member State for a victim harmed in a foreign place is fairly linked to several hurdles. The Directive does not seem so include any mechanisms or help for victims wishing to pursue a case and access civil remedies. Neither are the financial, procedural and linguistic barriers reduced.[142]

[141] Gibbons (n 128)

[142] C. Lichuma, "Centering Europe and Othering the Rest: Corporate Due Diligence Laws and Their Impacts on the Global South" (2023) in Völkerrechtsblog

aa) Burden of proof

In particular, failing to lift the burden of proof imposed on suing victims greatly increases the difficulty of obtaining compensation and justice more broadly. Further, victims are not supported when trying to provide the information and data needed to prove the responsibility of their opponent. And because the absence of proper regulations limits their access to evidence, victims are then unlikely to be able to meet this higher standard of proof. As a result, prospective abuses may not be adequately averted while victims may not have access to legal remedies, just as they have not in the past.[143]

As a minimum, the Directive should have created a possibility for a victim to receive access to the information that the relevant National Supervisory Authority has gathered. Having a case fail due not to the lack of blameworthiness of the offending party, but to the lack of evidence does not only encourage misdemeanors to reoccur but changes nothing in corporate behavior.

bb) Applicable Law

What has to be pointed out as a positive point is the fact that the applicability of the law of Member States for civil claims is now granted by the Directive. This can play a crucial role as the above analyzed cases have shown. Both could not be decided by the courts as the national law of the host country declared the cases as time-barred, leaving major decisions open and unsolved. Closing this gap and allowing a compensation under reliable tort law systems makes pursuit of justice much more attenable.

Still, in general, it is apparent that the Directive does not directly address or guarantee victim compensation. The emphasis is more on the transparency and

https://orbilu.uni.lu/bitstream/10993/53885/1/Centering%20Europe%20and%20Othering%20the%20Rest%20-%20Vo%CC%88lkerrechtsblog.pdf last accessed on 25.03.2023

[143] N. Bernaz/M. Krajewski/K. Mohamedieh/V. Rouas, „The UN Legally Binding Instrument and the EU proposal for a Corporate Sustainability Due Diligence Directive: Competences, comparison and complementarity" (2022) for European Coalition for Corporate Justice https://corporatejustice.org/wp-content/uploads/2022/11/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf last accessed on 16.03.2023

accountability of misconduct, which makes sense given the main goal was preventing human rights violations in the first place. That can be seen as the greater long-term solution, as it tries to tackle the underlying core of the systematic issue behind inhumane working conditions. However, when trying to get to the root of that problem, one cannot leave the impact of civil procedures go unnoticed. Firstly, it provides financial compensation for victims, but apart from that it can influence corporate behavior heavily through its reputational pressures. In a society with a growing awareness for sustainability, losing or winning such civil liability cases can have a huge impact on consumer behavior. The actual fear of a court's decision proving a company's responsibility and showing its link to inhumane working situations should not be underestimated. It would certainly provide an additional incentive for corporations to participate in fairer supply chains and to make use of their power over their suppliers to foster safe and sustainable productions.

c) The Brussels-effect [144]

Lastly, an important aspect to point out is the so-called Brussels-effect. It describes the power of the European Union to shape the global business environment and to elevate standards worldwide. A positive impact of EU regulations that can also be expected from the Directive is therefore the prospect of the implementation of mandatory human rights due diligence frameworks becoming a global standard.[145]

2. Application of Directive on Case Law

Ultimately a way to test the Directive on its effectiveness would be to evaluate the previously decided KiK case by the German Regional Court of Dortmund from a fictional standpoint where the Directive would have already been in force and accordingly implemented by German national law. To examine the case in its entirety would go beyond the scope of this work, but applying it to a case to briefly evaluate the Directive's validity may be illustrative of its effectiveness.

First, the fact that the Directive governs that the law of the Member States is applied would already be significant and ensure that the Courts actually do get to consider the

[144] Brabant/Bright/Neitzel/Schönfelder (n 21)
[145] Bradford (n 4)

key issues of the case. The KiK Case would have then been decided upon German Civil Law and not Pakistani Law, under which the Case was time-barred and could not be decided. It is expected under German Law that a liability and causal link between KiK and its suppliers in Pakistan could have been proven, as under German civil law an indirect causation to a certain extend can be enough to fulfill the requirements of legal liability.

However, since the burden of proof lays with the claimants a few difficulties would be expected, even when only having to prove an indirect link. Receiving evidence from KiK that show the influence they have over the textile factory in Pakistan would have been hard for the claimants to obtain. They could have stated that KiK's share of the produced clothes in that factory was quite high, but from there they could only conclude and speculate about how the actual business relationship took place.

It is also not unlikely that KiK would have insisted on having taken the necessary measures by setting up a code of conduct hiring the social audit firm RINA to assist with it. They would probably argue that by that they had fulfilled their due diligence obligations. If the judge viewed these measures as appropriate, then nothing else would have mattered.

Ultimately, the analysis of the proposal of the European Corporate Sustainability Due Diligence Directive leads to the conclusion that if the Directive would have been enforced in that way it would come with many challenges as many aspects foster legal uncertainty and miss the aspired EU level playing field. Yet, despite the limitations, the Directive may be valuable in light of the importance of a mandatory framework acknowledging corporate liabilities for human rights violations along global value chains. It is indeed a huge step in the right direction, that with a few targeted improvements could make a huge impact.

3. Further aspects

Further research of the subject reveals more crucial aspects that should be discussed. Additional investigation regarding the potential enhancement of colonial powers through the Directive would be of great importance. Also, meaningful to the debate would be the significance and impact of non-governmental initiatives and how they can contribute to finding a solution.

a) Critics about the strengthening of colonial power structures

An aspect that goes beyond the scope of this thesis but should not go unmentioned is the fact that the Directive is set up by the "Global North" for the "Global North" supposedly helping and benefitting the so-called "Global South". However, with barely any consultation with the one's affected in the "Global South". This disempowers potentially affected rightsholders and reinforces colonial power.[146]

A "duty to consult" would be recommended to include the affected people. Similarly, in cases where a corporation's activity may interfere with indigenous people or local communities, including an obligation to consult would also be appropriate.[147]

b) Alternate non-governmental initiatives

In the discourse about battling abuses along supply chains, it is important acknowledge the role of consumer boycotts, citizen participation and non-governmental initiatives.

Their success was very vivid in a campaign in the Mexican town of Mexicali formed by local farmers and residents of the affected area against a global beverage producer that was initially granted access to the drinking-water supply in the town. However, after the campaign Mexico decided to terminate the construction permits in March 2020, proving the power consumer campaigns can

[146] Lichuma (n 142)
[147] Shift (n 116)

have on governments.[148] Also, in the garment sector there are many campaigns and organizations trying to make a change.

[148] O. R. Medrano-Pérez/L. F. Nava/A. Cáñez-Cota, "The Visibility of Citizen Participation and the Invisibility of Groundwater in Mexico" (2022) in Water Vol 14 No 9: 1321 https://doi.org/10.3390/w14091321 last accessed on 27.03.2023

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