The EU’s Ambivalent Approach to Corporate Environmental Due Diligence

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This article belongs to the debate » Lieferkettengesetz Made in Germany
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Towards Planetary Boundaries for Business?

With the Corporate Sustainability Due Diligence Directive (CSDDD), the European Union has taken a bumpy route towards effective prevention and mitigation of environmental harm in corporate value chains. Yet, the EU’s approach breaks more ground than is apparent at first sight, especially in the realm of biodiversity protection.

The CSDDD aims not only to curb the exploitation of workers and other rights-holders in corporate supply chains, but also addresses the exploitation of the natural environment. The EU Commission has in fact always promoted the law as being closely linked to the European Green Deal and contributing to the realization of different dimensions of sustainability.

Adverse impacts on human rights and the environment are, of course, closely linked. As is by now widely accepted in international law, environmental degradation poses a great risk to human rights. Part I, No. 18 of the annex to the CSDDD acknowledges this interlinkage—but the Directive goes beyond this anthropocentric approach: it stipulates a standalone corporate environmental due diligence duty.

The litmus test for effective human rights due diligence legislation is whether there is an observable shift to human-rights-based business behaviour. The equivalent test on the environmental side, arguably, must be whether businesses align their operations with planetary boundaries. Whether the EU Directive will pass this test is questionable. In trying to find a reference point for corporate due diligence obligations, EU lawmakers have mostly relied on fragmented references to international environmental treaty law, which in itself is

riddled with gaps. However, a closer look at the text of the CSDDD reveals that in some instances, its provisions do in fact carry the potential to establish a set of independent, self-standing rules. More generally, things may not be as bleak for the environment as they seem *prima facie*. While the approach taken by the CSDDD does ignore hugely important areas of environmental protection, the final text of the Directive leaves enough room for an interpretation that honours the EU's commitment to protect biological diversity.

Patchy References to International Law

When spelling out the material scope of corporate environmental due diligence obligations, two main approaches can be distinguished. For one, there is the "general-clause approach". This defines environmental due diligence as an obligation to avoid negative impacts on the environment as a whole or on abstractly defined environmental categories, or—if phrased more positively—to comply with some broadly spelt out environmental standards. At the other end of the conceptual spectrum, the material scope of environmental due diligence is determined via reference to a concrete list of environmental provisions in either national or international law (hereinafter "the list approach"). Both approaches can be combined by, for example, explicitly linking environmental categories under the general-clause approach to specific pre-existing environmental norms. These different conceptualisations of environmental due diligence are reflected in the two most well-known human rights and environmental due diligence laws at national level: France's *Loi sur le devoir de vigilance* clearly represents a particularly broad version of the general-clause approach, while Germany's *Lieferkettensorgfaltsplichtengesetz* (LkSG) features a rather restrictive version of the list approach.

As was the case for the LkSG, an important part of the negotiations on the environmental scope of the CSDDD revolved around the question of which of the two aforementioned approaches should prevail. As with many other elements of the EU Commission proposal, its environmental scope is closely modelled after the LkSG. The Commission restricted the material basis for companies' environmental due diligence duties to a narrow list—though slightly broader than in the LkSG—of very specific provisions extracted from international environmental treaties. The Council maintained this approach but added a number of additional references to conventions not previously included. The Parliament, on the other hand, leaned more towards the "general-clause approach" by proposing a comprehensive list of environmental categories as reference point for the corporate due diligence obligations. At the same time, the Parliament text did not give up on the treaty provisions introduced by Commission and Council, although it significantly altered that list, adding five new treaty references (including to the Paris Agreement) but also leaving out five of the references proposed by Commission and Council.

The final outcome of the negotiations closely follows the Council approach. When observed against the backdrop of the major environmental risks of our times, its huge gaps are imminently evident. The biggest elephant in the room is of course EU lawmakers' disregard of the climate crisis, which has been entirely excluded from the substantive scope of environmental due diligence obligations, but is at least somewhat addressed through a separate corporate duty in Article 22 of the Directive. Even when leaving aside its formalistic approach to corporate climate impacts, the list of provisions in the CSDDD ignores many pressing environmental issues. For example, it barely addresses the serious adverse impacts to water resources, as well as soil or air quality that can deteriorate in the context of industrial activity. In an exemplary list of case studies published last year, we showed that the environmental due diligence regimes proposed by the Commission and Council would likely not cover many recent cases of environmental degradation linked to business activity. This should come as no surprise—international environmental law is inherently fragmented and state-centred, and the CSDDD only refers to a fraction of existing environmental treaties (leaving out customary law entirely). Moreover, only a scattered set of very specific references to these treaties made it into the text of the Directive.

Another downside of this approach, which has the potential to cause irritation with companies and environmental lawyers alike, is the notable incongruence with the EU's further corporate sustainability legislation. The EU Taxonomy, the Corporate Sustainability Reporting Directive, which is meant to provide the reporting regime to the CSDDD, or the EU Batteries Regulation all operate with categories of environmental risk. This approach is arguably much closer to the company logic of risk assessment and established environmental management systems, which aims at assessing the overall environmental risks related to a company's operations. It is unclear how the scattered obligations from the CSDDD relate to the sustainability-related duties from other EU legislation or to established best company practices of preventing and remedying environmental harm.

The Helpful Vastness of International Biodiversity Law

Yet, in terms of ultimate positive environmental impact throughout corporate value chains, the CSDDD approach may hold greater potential than one might expect based on the above assessment.

EU lawmakers—as German lawmakers before them—were faced with a fundamental problem when scanning the existing regime of international environmental conventions for universal key norms that could be included in the annex to the Directive: Unlike in human rights law, these key norms—such as the prevention principle—are widely accepted as customary law but relatively rarely included in binding conventions. Where they are, they look suspiciously like the "general clause approach" that many EU decision-makers—

particularly from the Council and Commission—precisely wished to avoid. The result of this dilemma is a mix of incredibly specific and fragmented prohibitions and obligations on the one hand, and some more wide-ranging, “general-clause-like” references on the other.

One area where the provisions included in the Directive’s annex could turn out to cover a wide range of environmental impacts is biodiversity law. While EU lawmakers decided—for now—not to mention the Kunming-Montreal Global Biodiversity Framework, they did include a reference to the Convention on Biological Diversity (CBD) in Part II, no. 1 of the CSDDD annex: ‘the obligation to avoid or minimise adverse impacts on biological diversity, interpreted in line with Article 10(b) of the [CBD] and applicable law in the relevant jurisdiction’.

Regardless of the apparent vagueness of this provision, a number of concrete biodiversity-related obligations can be derived from it. While biodiversity due diligence must enjoy cross-sectoral relevance, there arguably is no sector riskier for species presence, abundance and diversity than agriculture. In our case studies, we pointed to some of the necessary due diligence measures agriculture and food industry companies would have to follow to prevent and mitigate their impact on biodiversity. These include (among other measures) field surveys, assessments of species presence and richness, restricting the use of pesticides and fertilisers and a close eye on any deforestation activities as parts of a biodiversity risk assessment, as well as bringing biodiversity impacts to an immediate end once they are found to have occurred.

From International Law to Independent Corporate Obligations

The wide material scope of Part II, no. 1 of the annex alone is remarkable when compared to the other obligations and prohibitions listed therein. However, there is another, potentially even more important detail here: While the original Article 10(b) CBD only applies the obligation to avoid or minimize adverse impacts to measures relating to the use of biological resources, the provision in the CSDDD is wider than that. The original Commission proposal had indeed included the restriction to use of biological resources. Its removal in the final text indicates that this was a deliberate choice to widen the scope of application of this obligation. While seemingly a detail, this is a remarkable shift away from the idea of simply extracting environmental norms from international treaties—the Directive effectively introduces a new, self-standing norm here. This approach becomes even more evident when looking at some of the other provisions in Part II of the CSDDD annex: For example, no. 13 and 14 apply the obligation to “avoid or minimise adverse impacts” to the geographic areas protected by, respectively, the World Heritage and Ramsar Conventions. This wording has no textual anchor in either of the Conventions. The EU legislator simply established new environmental norms here, without any reference point in international law.

Despite this notable independence of some of environmental obligations and prohibitions in the CSDDD annex, all of them are to be “interpreted in line with” one or more specific provisions from international environmental conventions, taking into account (and, in some instances, “in line with”) applicable national legislation. Much will depend on how the national legislators transposing the CSDDD, national supervisory authorities and, ultimately, courts construe these references to international and national law. At the very least, an effective implementation will require that, where national law is clearly not in line with the requirements of international law, or does not fully transpose these obligations, it cannot serve as a reference point for companies.

Ultimately, both is true: However diligently national authorities implement the CSDDD, some corporate environmental impacts will likely remain unaddressed, with potentially disastrous consequences. Nevertheless, the Directive holds greater potential to have a positive effect for the environmental impact of our European economy than many might expect at first sight.

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