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Is Article 15 of the Corporate Sustainability Due Diligence Effective to Combat Climate Change?

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What Obligations Does the Proposal by the European Commission for a Directive on Corporate Sustainability Due Diligence Impose upon Greenhouse Gas Emitters?

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Climate change and its adverse consequences have been considered as a human rights issue by the Intergovernmental Panel on Climate Change, the United Nations Human Rights Council, and in emerging climate change litigation against companies. Climate change undoubtedly impacts (or is likely to impact in the future) the enjoyment of human rights by people throughout the world, particularly the right to life, to health, to family life, access to water, and the right to a healthy environment.

The relationship between climate due diligence, on one hand, and human rights and environmental due diligence, on the other, is a controversial topic. It should be stated that sustainability, which is at the core of the planned Corporate Sustainability Due Diligence Directive (CSDDD), is a broader concept than preventing dangerous climate change. The proposal by the European Commission (hereafter: Commission Proposal) contains with Article15 a separate provision on combatting climate change – seemingly outside of the due diligence provisions. Despite changes and compromises proposed by the Council of the European Union in its 'General Approach' (hereafter: Council Proposal), the question remains whether the proposals call, at least to some extent, for climate due diligence.

Climate Transition Plan – Goal and Content

Article 15 of the Commission Proposal focuses on 'combating climate change' and requires companies to adopt a plan on climate change. Based on the Council Proposal the obligation to adopt such plan would also encompass the duty to adopt implementing actions and related financial and investments plans. All these actions (here collectively referred to as a 'climate transition plan') shall ensure that the business model and strategy of the company are compatible not only with the transition to a sustainable economy, but also, specifically, with (a) limiting global warming to 1.5°C in line with the Paris Agreement and (b) the objective of achieving climate neutrality by 2050 as established in the European Climate Law Regulation. Where relevant, companies must also (c) disclose their exposure to coal-, oil- and gas-related activities.

The aim of the revised wording of Article 15 by the Council was to align the text as much as possible with the Corporate Sustainability Reporting Directive (CSRD), which entered into force on 5 January 2023, in order to ensure coherent interpretation of the two instruments. Article 15(1) of the Council Proposal thus makes an express reference to relevant sustainability reporting provisions in Directive 2013/34/EU as amended by the CSRD. The revised text mirrors the text contained in Articles19a(2)(a)(iii) and 29a(2)(a)(iii) of the CSRD that mandates the disclosure and publication of such plans.

The ultimate goal imposed upon a company by Article 15 is *to ensure* that its business model is compatible with limiting global warming to the Paris Agreement 1.5°C benchmark, respectively with achieving climate neutrality by 2050. The Paris Agreement requires States *to pursue efforts* to limit the temperature increase to 1.5°C above pre-industrial levels. Based on the recent report of the Intergovernmental Panel on Climate Change (IPCC), the overshoot scenario (i.e. exceeding the Paris Agreement's temperature goals of limiting global warming to 1.5°C to 2°C, even if temporarily) is more likely to occur than not in the near-term, even for the very low greenhouse gas emissions scenario. In this light, the temperature target already appears unworkable and requiring the climate transition plan to be compatible with climate neutrality by 2050 thus seems more appropriate. Moreover, the climate neutrality target calls for greenhouse gas (GHG) emission reductions even in the event that the temperature rise surpasses 1.5°C.

Some commentators question the proportionality of Article 15 arguing that it exceeds the Paris Agreement's requirements by setting an obligation of result for companies to meet the Paris Agreement temperature goal and giving a direct effect to an international treaty, even though the requirements for a direct effect are not fulfilled. The climate neutrality target for companies by 2050, which is in line with European Climate Law, could diminish such criticism. Despite the clear reference to the climate neutrality target, as added by the Council to Article15(1), the text outlining the subject matter of the CSDDD in Article 1(c) has remained unchanged in the Council Proposal.

As regards the content criteria of the climate transition plan, Article 15(1) is rather vague. In line with the concept of double materiality, the plan shall, *in particular*, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations. A question arises as to whether the CSDDD will follow the criteria in the CSRD defined for reporting purposes, including draft sustainability reporting standards being developed by EFRAG. In a similar vein, the draft position report of the European Parliament's legal committee calls for much more clarity of the climate transition plans and suggests incorporating targets related to sustainability matters, including absolute greenhouse gas emission reduction targets for scope 1, 2 and 3 emissions for 2030 and, thereafter, every five years until 2050, an identification of decarbonisation levers within the company's business and value chain, or for companies active in the energy and agricultural sectors, the share of methane emissions, including their methane emissions reduction plan.

The vaguer the plan is the more difficult it is to monitor its implementation. A supervisory authority to be designated by the Member States will be tasked with ensuring compliance with Article 15(1) and (2). It is unclear to what extent such supervisory authority will have the right (and competence) to set specific GHG emission reduction targets for companies and whether such interference in the business strategy of a private company with a vague criteria could not be an infringement of the freedom to conduct business protected by the Charter of Fundamental Rights of the European Union (Articles 16 and 58) and the Member States' constitutions as already raised by some business platforms.

Due to concerns of some EU Member States, the proposal by the Commission to link the variable remuneration of directors to their contribution to the company's business strategy and long-term interest and sustainability, which was contained in Article 15(3), was abandoned in the Council Proposal.

Are All Major Polluters Covered?

The scope of companies covered by Article 15 is narrower than the personal scope of the proposed CSDDD itself, which is estimated to capture 13,000 EU companies and 4,000 non-EU companies. The obligation of combatting climate change is limited to (i) EU companies with more than 500 employees and a net worldwide turnover of more than EUR 150 million (Article 2(1)(a)) and (ii) non-EU companies with a net turnover of more than EUR 150 million generated in the EU (Article 2(2)(a)). As regards the reach of the climate transition plans, a company's consideration of both, its impact on climate change and business risk arising from climate change, seems to be limited to the company's own operations (without the value chains and emissions from the use of company's products).

Evaluation of Article 15 in Terms of Zero-Carbon Emission Targets

At this point, it is important to examine the compatibility of Article 15 with GHG emission targets. Because GHG emissions are the major cause of global warming and climate change, a regulation aiming to combat climate change should take this into account. According to data published by NOAA Global Monitoring Lab, carbon dioxide is responsible for about two-thirds of the total effect of all greenhouse gases. 'Carbon dioxide in the atmosphere warms the planet, causing climate change. Human activities have raised the atmosphere's carbon dioxide content by 50% in less than 200 years'. As a matter of fact, the agenda of combating global warming is currently advancing the topic of reducing carbon emissions, and there are various international initiatives to limit anthropogenic emissions of greenhouse gases and enhance greenhouse gas sinks and reservoirs.

In this context, one of the important developments is the climate neutrality objective and zero emission target set by the EU. The Council approved in December 2019 the goal of making the EU climate neutral by 2050 in pursuit of the temperature goal set out in the Paris Agreement. The European Climate Law of 2021 directs the EU economy to net zero emissions by 2050, and aims at achieving negative emissions thereafter.

Against this background, Article 15(2) of the Commission Proposal reads: 'Member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes emission reduction objectives in its plan'. This paragraph is an important step to clearly address carbon emissions, which are the main cause of climate change. According to this provision, relevant companies will determine the GHG reduction target in the plan they will prepare to combat climate change. The reference to a specific GHG emission reduction target is, however, proposed to be required only for companies that identify or should have identified climate change as a principal risk for, or a principal impact of, their operations (Recital 50). Where the impact or risk is not 'principal', the explanation of the alignment of the business model of a company with limiting global warming to 1.5°C and achieving climate neutrality

does not need to be based on reference to GHG emission reduction targets. The provision might raise uncertainty as to which companies have to include targets and which authorities could be competent to assess the application of such criteria.

Yet, global GHG emissions differ according to the sectors and sizes of companies. As mentioned in Article 15(1) of the Commission Proposal, the assessment of GHG emissions caused by companies' activities should be based on information reasonably available to the company, and the company should pay attention to this when including emission reduction targets in its plan.

What is more, for the objective of climate-neutrality by 2050, the EU Member States should develop national long-term strategies on how to reduce carbon emissions within the framework of their commitments in line with the Paris Agreement and EU targets. The long-term strategies to be prepared by each Member State regarding the climate will also include companies, so the EU's zero emission target and Article 15 shall mutually reinforce each other. As a result, despite shortcomings regarding the content criteria and limited personal scope, it can be said that Article 15 is a positive step towards achieving the overall goal of reducing carbon emissions.

The Features of Article 15: Is it Supplementary to the Due Diligence Obligations?

The purpose of Article 15, as stated in its title, is to 'combat climate change'. Harming the environment violates the right to have a clean, healthy, and sustainable environment that was recognised as a human right in the United Nations Human Rights Council Resolution A/HRC/RES/48/13 of October 2021. It can also negatively affect the right to life and the rights to health and nutrition. In a final declaration published before the Committee of Ministers of the Council of Europe, it was stated that living in a healthy environment is a precondition for individuals to enjoy their rights and freedoms guaranteed in the Universal Declaration of Human Rights and the European Convention on Human Rights.

Therefore, the responsibilities of businesses regarding human rights are embodied in the right to the environment, and companies are under an obligation not to harm the environment while carrying out their business activities. As a matter of fact, in the Third Revised Draft of a Treaty on Business and Human Rights, the right to a safe, clean, healthy, and sustainable environment is also emphasised together with internationally recognised human rights and fundamental freedoms. In addition, in the same instrument, within the scope of human rights due diligence, it is proposed that business enterprises shall undertake regular environmental and climate change impact assessments and report publicly and periodically on environmental and climate change standards.

This means that companies have a responsibility to respect environmental rights in parallel with human rights, and companies are obliged to identify, prevent and mitigate their negative impacts on the environment and account for how they address these violations, within the scope of human rights and environmental due diligence. Given the inherent connection between the climate, environmental rights, and human rights, Article 15 of a future CSDDD should not be designed as a stand-alone provision but, in our view, supplement human rights and environmental due diligence processes that also cover adverse climate change aspects (for environmental due diligence and Article 29(d) see Laura Arenas Peralta). The linkage between Articles4, 15 and 22 should be strengthened in a future CSDDD and it should further clarify the consequences of companies' failure to implement their climate change-related obligations.

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