BUSINESS, HUMAN RIGHTS AND THE ENVIRONMENT

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How to Draw the Line?

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Determining the 'Appropriateness' of Corporate Human Rights and Environmental Due Diligence Under the Proposed Corporate Sustainability Due Diligence Directive of the European Union

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The European Union (EU) is currently preparing a new directive on Corporate Sustainability Due Diligence (CSDDD), which is likely to shape how companies manage their negative impacts on human rights and the environment in the foreseeable future. To date, there are three proposals on the table: the initial proposal by the European Commission from February 2022 (Commission Proposal), the draft report by the Committee on Legal Affairs of the European Parliament from November 2022, prepared by rapporteur Lara Wolters (Wolters Draft Report), and the General Approach of the Council of the EU adopted in December 2022 (Council Proposal).

While the three proposals for a CSDDD differ on several issues, there seems to be consensus on the legal nature of the proposed human rights and environmental due diligence (HREDD) provisions: the three proposals stipulate in unison that 'the main obligations' on due diligence should be 'obligations of means' (recital 15). Thus, rather than demanding a result, companies are required to '*take appropriate measures* with respect to identification, prevention and bringing to an end adverse impacts' (recital 29) on human rights and the environment. They are consequently not obliged to 'guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped' (recital 15 Commission Proposal). This blog post assesses this regulatory choice and elaborates on the criteria

determining the appropriateness of HREDD.

Linking HREDD to Reasonableness Considerations

Sorting the wheat from the chaff when it comes to HREDD is not always straightforward. The *right* course of action when managing adverse impacts cannot be fully defined *in abstracto*, but depends on the circumstances of the specific case. What follows is that companies necessarily maintain some level of discretion in the implementation of HREDD processes. For example, under Article 6a of the Council Proposal companies are tasked with setting priorities where two or more adverse impacts cannot be addressed 'at the same time to the full extent'. Pursuant to said provision, they must, first, identify and address the *most significant* impacts and, second, manage those in *reasonable* time before turning to the less significant impact(s). Either task requires companies to consider the circumstances of the specific case. The relative significance of adverse impacts depends on their severity and likelihood, whereas the reasonable timeframe must be determined under additional consideration of a company's resources and the characteristics of the relevant economic sector (recital 32 Council Proposal). Similar obligations that grant companies some level of discretion can be found throughout the proposals for a CSDDD. To guide companies in these situations and to constrain their discretion, the EU legislator plans to combine HREDD obligations with a so-called *reasonableness standard* , that is, a requirement to take 'appropriate measures which can reasonably be expected' (recital 15 Commission Proposal).

Scholars have long suggested to supplement human rights and environmental due diligence, understood as a management process set out in international guidance, with a reasonableness standard to distinguish between sufficient and insufficient practice. Focussing on the United Nations Guiding Principles on Business and Human Rights (UNGPs), Mares has proposed to rely on a reasonable person standard as it is known in common law jurisdictions. Bonnitcha and McCorquodale, in turn, have argued to consider reasonableness criteria from international human rights law to guide corporate efforts in relation to adverse impacts occurring in their business relationships. Yet, these interpretations are criticised for lacking a clear basis in the UNGPs. Furthermore, they do not provide for an authority that could flesh out the substance of a reasonableness standard in individual cases. A future CSDDD may resolve these challenges by defining a reasonableness standard under hard law and by empowering enforcement agencies and courts to substantiate the standard over time.

'Appropriate Measures' and the Discretion of Companies Under the CSDDD

All three proposals for a CSDDD apply the term 'appropriate measures' to circumscribe the scope of the individual HREDD obligations to the extent that companies have a margin of discretion. This applies particularly to Articles 6 to 8, which require companies in their first paragraph, respectively, to take appropriate measures to identify adverse human rights and environmental impacts (Article 6(1)), to prevent and mitigate potential impacts (Article 7(1)), and to bring actual impacts to an end (Article 8(1)). What is *appropriate* for the fulfilment of these general duties is substantiated in the subsequent paragraphs of these provisions. According to Article 7(2), appropriate measures to prevent adverse impacts include, for instance, the development of a prevention action plan and seeking contractual assurances from business partners. Importantly, the appropriateness of measures is also relevant for the question of accountability under Article 22(1), as civil liability only arises where a company fails to comply with the obligations laid down in Article 7 or Article 8.

Pursuant to Article 3(q) of the Commission Proposal, the term 'appropriate measures' describes a measure that is capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and

reasonably available to the company, taking into account the circumstances of the specific case.

This definition comprises three elements: first, a measure must serve the objectives of due diligence, which are arguably to prevent, mitigate, or cease adverse human rights and environmental impacts. Thus, a measure is not appropriate if it is incapable of accomplishing these objectives in a specific case. Second, an action must be proportionate to the severity and likelihood of an adverse impact. According to Article 3(l) of the Commission Proposal, the severity of an impact depends on the significance of its nature, the quantity of people or environmental areas affected, and its reversibility. These elements align with the criteria set out in the UNGPs and relevant OECD guidance. Third, the definition limits what is appropriate to measures that are *reasonably available* to the company considering the circumstances of the specific case. At this point, the three proposals differ in their wording and define slightly different criteria, such as the characteristics of the economic sector, the nature of the adverse impact, or the company's influence over the business relationship.

Missing Link? Appropriate Measures and the Type of a Company's Involvement

What is notably missing from the definition and criteria discussed is the type of corporate involvement in an adverse impact. Under the UNGPs, companies have a negative responsibility to '[a]void causing or contributing to adverse human rights impacts *through their own activities*' and a positive responsibility to '[s]eek to prevent or mitigate adverse human rights impacts *that are directly linked to their operations, products or services* by their business relationships, even if they have not contributed to those impacts' (Principle 13 UNGPs). The Commission Proposal, by contrast, merely defines a positive obligation to take appropriate measures, irrespective of whether a company (may) causes or contributes to a potential or actual impact, or whether it is linked to such event through its (established) business relationships.

Yet, there are indications in the Council Proposal that the type of involvement in an adverse impact is, in fact, key for determining what measures are appropriate in a specific case. Noteworthy, are recitals 33 and 38, which suggest that, when assessing what is *appropriate*, 'due account shall be taken of the so-called "level of involvement of the company in an adverse impact" in line with the international frameworks and the company's ability to influence the business partner causing the adverse impact'. The two recitals further specify that 'companies should be *obliged* to prevent or mitigate [or to bring to an end or minimise the extent of] the adverse impacts that they *cause* by themselves […] or jointly with their subsidiaries or business partners', while businesses must merely 'use their influence' or 'increase their influence' for the same purpose where an adverse impact is caused by their business partners. The Council Proposal hence suggests that what is *appropriate* to comply with the 'obligations of means' set out in Articles 7 and 8 depends considerably on the type of a company's involvement.

Do No Harm – A *De Facto* Obligation of Result for Companies' Own Conduct

Linking the appropriateness of HREDD processes to a company's level of involvement arguably has an important implication, namely that the obligations under Articles7 and 8 to take *appropriate measures* where a company (may) causes or contributes to a negative impact, fully or jointly through its own activities, can *de facto* take the form of a negative obligation to *do no harm* . This is because such involvement necessarily limits the company's margin of discretion: where a business sets a cause to an impact, it must do no less than ceasing its contribution. More leeway must be granted, in turn, where the impact is caused by a third party, e.g. an indirect supplier, in which case a company bears a positive obligation to take appropriate measures to influence the conduct of the third party

or to increase its influence with a view to address the situation. This conception can also be found in Article 7(1)&(2) of the German Supply Chain Due Diligence Law (*Lieferkettengesetz*, see also BAFA Guidance on Risk Analysis, p. 19), which demands *appropriate* remedial action in response to adverse impacts. This duty can take the form of an obligation of result or an obligation of means – depending on the company's level of involvement and control over the situation.

A similar approach has been taken by the Hague District Court in the recent *Milieudefensie et al. v. Royal Dutch Shell* case, where the court assessed the liability of the parent company, Royal Dutch Shell (RDS), for the contribution of the Shell group to climate change. In the judgement, the District Court derived an obligation of RDS to reduce CO2 emissions from the corporation's general duty of care. Drawing on the UNGPs, it considered that 'the level of responsibility is related to the extent to which companies have control and influence over the emissions' (para. 4.4.18). The court found that, after identifying and assessing 'actual or potential adverse human rights impacts with which they may be involved', RDS must take '*appropriate* action' (para. 4.4.21). In this context, the District Court distinguished between an obligation of result, that is, to reduce the emissions caused by the Shell group's own activities (para. 4.4.23), and an obligation of means 'to take the necessary steps to remove or prevent the serious risks ensuing from the CO2 emissions generated by [RDS's business relations], and to use its influence to limit any lasting consequences as much as possible' (para. 4.4.24).

Insights from the concept of due diligence under international human rights law

Notably, the same distinction can be found under international human rights law, where states bear obligations to *respect* human rights, meaning that they must abstain from violating human rights through their own actions or omissions, and obligations to *ensure* human rights, which includes, in case of the right to life for instance, a duty to

take reasonable, positive measures that do not impose disproportionate burdens on them in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State.

The appropriate measures expected from states to ensure human rights against abuses committed by third parties, including private corporations, must comprise threefold: prevention, ceasing, and punishment/repair. In this context, states are not responsible for every violation committed by private actors under their jurisdiction, but only when the harm was foreseeable, meaning that they knew or should have known about the harmful conduct. This foreseeability requirement is interpreted more strictly if the (potential) victims of an abuse are particularly vulnerable, as it is the case for indigenous people. Furthermore, what adequate measures are expected from a state depends on its capacity to influence a third party, which is determined on a case-by-case basis.

Conclusions

Mandatory HREDD legislation, which like the proposed CSDDD obliges businesses to better manage their negative impacts, offers a promising remedy to corporate abuse of human rights and harm to the environment. The approach of the EU lawmaker to combine HREDD provisions with a reasonableness standard is laudable. It is certainly superior to mere procedural obligations, which bear a heightened risk of tick-box compliance. Furthermore, a reasonableness standard is, by definition, a flexible tool. It allows courts and enforcement agencies to define (and, over time, raise the bar of) what is *appropriate* under given circumstances. In addition, it leaves companies some leeway to develop best practice in their specific business context. To fully exploit this potential, the EU legislator should define, based on international standards, clear criteria for determining what is *appropriate* in a specific case. These criteria are needed to provide guidance to enforcement authorities

and companies, which often claim not to be in the position to 'balance different societal interests' (Shell case, para.4.4.12). In this context, we argue that the type of a company's involvement in an adverse impact should be *one* important criterion. Thus, a future CSDDD should further specify that causing an adverse impact, fully or jointly through the own activities, substantially limits a company's margin of discretion and renders *de iure* obligations of means *de facto* obligations of result to *do no harm*.

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