Position

Positioning on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (CSDD)

Federation of German Industries e.V.

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Contents

Summary

German companies want sustainability in their supply chains and are already doing what they can to live up to their responsibilities. They actively contribute to higher social and environmental standards, better living and working conditions, better education and sustainable development through their engagement abroad. However, the **responsibility and influence of companies knows limits and the EU proposal goes too far**, even far beyond the German "Act on Corporate Due Diligence Obligations in Supply Chains" (Lieferkettensorgfaltspflichtengesetz – LkSG). **The EU proposal threatens to overburden companies.** It lacks the necessary sense of proportion for entrepreneurial realities and possibilities of influence. Shifting the task of protecting human rights and the environment onto companies in this way does not do justice to the magnitude of the challenge. We see high risk that the regulation as proposed negatively impacts on the EU's competitiveness and overall economic strength in the current and increasingly geopolitical power play. The shortages and price increases concerning raw materials and resources on the world market that companies experienced last year already are further aggravated by the Russian war against Ukraine. We thus urge the European law-makers **to not overreach** (i. e. civil liability) and promote "stay and behave" instead of "cut and run".

Most importantly the proposal is not part of an updated European industrial strategy that adequately acknowledges that the EU's competitiveness and overall geopolitical strength depends on a secure and sufficient supply of raw materials and resources.

The EU proposal will make the necessary diversification of supply chains much more difficult and will tend to lead to a withdrawal from difficult markets due to unimplementable requirements linked to liability risks. It would definitely not serve the legitimate ambition and purpose of the European Union, if – for example – steel from certain parts of the world is currently excluded from use within the European Economic Area for an unknown period of time and – without a secure and sufficient alternative – the remaining sources are made subject to requirements, which may not be achievable on the world market.

In countries where the EU is highly dependent on the import of certain critical raw materials or components the proposal will lead to high legal uncertainty for companies or even clashes between different legal requirements as we have seen with e. g. conflicting European and Chinese sanction and anti-sanction laws. In the worst case we would have more one-sided dependencies of the EU without changing the human rights situation on the ground.

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Introduction

German industry organised in BDI supports the European Commission's efforts to promote the resilience of the global economy and regards corporate sustainability due diligence as an important element in this connection. For many years, German industry has been highly involved in corporate social responsibility (CSR) and sustainability activities. German enterprises have integrated sustainability systematically in corporate governance and their supply chain management and have taken concrete measures to implement the UN guiding principles on business and human rights as well as the OECD guidelines for multinational enterprises. There exist a number of national and supranational sectoral initiatives in which German enterprises are active.

German enterprises and their governing bodies are aware in their actions of the role of the company in society. Sustainability, CSR, environmental social governance aspects (ESG) and the common good play an essential role in strategy and investment decisions in light of the associated opportunities and risks: enterprises which close themselves off from sustainable action risk not only reputational damage but also access to markets, outside capital and ultimately also the chance of doing business successfully over the long term.

For German businesses, responsible global supply chains, performance of corporate duties of care and by extension safeguarding human rights are self-evident. Accordingly, German enterprises are sought-after employers worldwide and contribute in other countries to higher standards, better education and hence growth and prosperity.

But it is also important to recognise the complexities and limits of statutory measures and the scope for companies to exert an influence. The effective impact of European regulation on protection of human rights at the local level should not be overestimated, not least against the background of international competition. Protection of human rights is a sovereign task. Companies have the responsibility to respect human rights. European enterprises can make an important contribution in this regard with their commitment in developing and emerging countries – but the legislator must not impose obligations on them which states are incapable of implementing themselves through agreements with other states. Enterprises can complement efforts for societal development and social progress with their commitment, but they cannot substitute the duty of states.

1. Subject Matter

The proposal lays down rules on

a. obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts with respect to

- their own operations,
- the operations of their subsidiaries, and
- the value chain operations carried out by entities with whom the company has an established business relationship and

b. on liability for violations of the obligations mentioned above.

The nature of business relationships as ‘established’ shall be reassessed periodically, and at least every twelve months.

The BDI sees the obligations as not implementable in business practice especially due to its concept covering the whole value chain, including indirect “established business relationships” and defining liability rules for third party activities. In particular, we criticize the fact that the scope of application not only covers upstream but also downstream transactions. Companies cannot control their clients’ usage of their products even if they can give instructions. An adjustment is needed here and the scope of application should be narrowed to transactions in the supply chain.

The fact is that there is no legal recourse to suppliers or resellers of the actual contractual partners due to the lack of a contractual relationship. Some of the direct suppliers' suppliers are not even named for reasons of competition law. In addition to a severely limited transparency with regard to indirect suppliers, the influence on them is only possible to a very limited extent, especially since there are no direct contractual relationships.

Mandatory legal and sanction – as well as liability-linked requirements – must therefore be limited to direct suppliers (tier-1) with whom businesses have direct contractual and thus influential relationships.

We thus suggest limiting the obligations to the supply chain instead of the value chain and use a risk-based approach as the UNGP foresees. Law enforcement is guaranteed by administrative sanctions and control by supervisory authorities. Civil liability rules that satisfy necessary conditions (damages occurred and a causal link between the two is established) already exist in the EU member states. The behaviour and actions of independent third parties must not lead to civil liability of companies, which is why we reject new civil liability as formulated in Art. 22 of the CSDD proposal. Empowerment rather than withdrawal (“stay and behave” rather than “cut and run”) should be the goal – as the Commission wants to achieve itself. This is not compatible with civil liability, which promotes withdrawal. Companies can only be liable for their own activities in the supply chain, not for those of their business partners or their suppliers. The German “Act on Corporate Due Diligence Obligations in Supply Chains” as well as the UN

Guiding Principles on Business and Human Rights (UNGP) therefore do not provide for civil liability. The legal uncertainty for entrepreneurs and companies is immense.

It is furthermore irritating that the far-reaching obligations for companies should also apply within the European Union, where it should actually be assumed that the human rights and environmental standards listed in the annex to the draft are guaranteed or must be enforced by the member states.

2. Scope

The **thresholds** for the applicability of the due diligence obligations are clearly too low and should be raised at the very least to the already low threshold of 1,000 employees (valid from 2024) of the German “Act on Corporate Due Diligence Obligations in Supply Chains”. A further lowering is likely to lead to a disproportionately high administrative burden for medium-sized companies. It is essential that the proposed directive suits in time and substance to the European Union`s strategy for secure and sufficient supply of raw materials and resources, which German industry addressed in the summary above.

It is essential that the proposed directive provides fair, proportionate, transparent and non-discriminatory requirements for all enterprises concerned.

We welcome the inclusion of **companies from third countries** that generate turnover in Europe. This will mitigate expected competitive disadvantages for European companies. This is a step towards an international level playing field. At the same time, this also strengthens the assertiveness of European companies in implementing measures with and vis-à-vis companies worldwide. Exemptions should be strictly limited. However, we do not consider the justification given by the EU Commission for a different treatment of companies from the EU and from third countries on pages 16 and 17 as well as in recitals 23 and 24 to be valid. Therefore, it is not necessary that companies from third countries generate their turnover in the EU, this addition should be deleted in Art. 2 (2).

The proposal does not seem to provide a true level playing field in relation to third-country companies. Even though there is no requirement on personnel employed regarding enterprises from third countries, the turnover thresholds for non-EU companies are – even though the amounts are the same – much higher than for EU companies (150 million EUR turnover inside the EU for third country companies, while for EU companies 150 million EUR worldwide. This means that in practice, EU companies which have to comply with the directive will most likely be much smaller than the third-country companies. The Explanatory Memorandum on page 16 in the Directive proposal even recognizes this itself. In addition, Article 15, 25 and 26 appear very difficult to apply on foreign companies. Corporate governance is part of national company law, and it is not possible for a company to be subject to company law requirements in a third-country and in the EU at the same time.

For reasons of policy coherence, the Directive should also level the playing field between European providers of goods and services and third-country providers, a subject which the EU is already addressing in the areas of reciprocal market access (International Procurement Instrument) and distortive foreign subsidies. As currently written, neither a subsidiary established in one or more EU Member States which does not fulfil the criteria in Article 2 (1) nor a branch office of a large third-country company would fall under the scope of the Directive. The third-country parent company itself would only fall under the scope of the Directive if it fulfils the criterion of Article 2 (2). Therefore, the Directive should clarify that all companies bidding for public tenders within the EU Internal Market, whether European or from third-countries, must comply with the due diligence obligations laid out in the Directive in order to become eligible for participation. At least, such compliance must be made mandatory if a tender procedure concerns a good or service that is financed or co-financed with EU taxpayers' money.

The currently proposed **SME exclusion** from the scope of the directive does not mean that they will not be impacted. In practice they will be indirectly affected as suppliers in the supply chain and hence will face massive challenges, if the proposed directive as a whole does not restrict itself to fair, proportionate, transparent and non-discriminatory requirements. It must be taken into account that especially SMEs have less influence on supply chains due to limited resources and less market power. It is important to avoid unnecessary bureaucracy and burdens especially for SMEs in the concrete implementation.

In this context we would like to point out, that the planned support programmes for SMEs must be designed in a practical way so that they are a real relief. In addition, these must be established timely so that they are not overwhelmed by parallel demands from large customers. These support measures for SMEs to implement the requirements should be provided by public authorities at EU or national level. Otherwise, SMEs could be put at a competitive disadvantage. For example, the obligation to pay for the costs of audits for SMEs in the supply chain may put SMEs at a disadvantage when making procurement decisions.

Furthermore, **recycling and secondary raw materials** should be excluded from the scope. Secondary raw materials are the basis for the circular economy and, therefore, play an essential role in shaping the European Green Deal. We call for the exclusion of secondary raw materials from the directive's scope in analogy to the EU Conflict Raw Materials Regulation. The traceability of the secondary raw material resource is only possible at an extremely high cost or not. After the material has been melted down, a purchaser can no longer determine the origin of the secondary raw material (e. g., metal).

The **inclusion of regulated financial undertakings** (Art. 3a IV, Art. 3 g) will create adverse effects as it is likely to lead to spillover effects, far beyond the defined risk sectors and company sizes. For example, we are concerned by the fact that according to Art. 6 para. 3 financial actors – as referred to in Article 3, point (a)(iv) – shall be bound to provide credit, loan or other financial services to clients only after having carried out an identification of actual and potential adverse human rights impacts and adverse environmental impacts on the part of their clients. In the absence of clear-cut measuring standards this will open a new space for unguided actions by financial actors against companies of certain branches, as we have seen them materializing already under EU-Regulation 2019/2088. The consequences of including this sector have not been highlighted in the Commission's own Impact Assessment of the proposal either.

It is not totally clear what happens to due diligence obligations **at the level of groups.** The current text and in particular the definition of "company" (Art 3a) seem to lead to that the requirements of the directive are set at company level, not at group level. This means that a company from a member state with subsidiaries in other member states will have to follow the decisions of several different supervisory authorities. Such an arrangement will not only be practically difficult to handle for the companies but also more expensive. It thereby also risks counteracting the purpose of the directive – to create a level playing field at EU level – in particular given that the directive is a minimum harmonisation directive. Also, it is not in line with how reporting requirements are addressed in the framework of the Non-Financial Reporting Directive (2014/95/EU). Therefore, the proposal should have a group perspective. Major groups usually do not set up their compliance / risk / due diligence functions based on individual units. Instead, these functions are usually group-wide functions where each legal entity do not have their own processes, reporting systems, etc. It would lead to extra unnecessary costs, overlaps and even contradictions between companies of the same group.

According to the Draft directive companies need to comply with the national law "where the company has its **registered office**" (Art. 2,4). A definition of registered office is lacking. As companies may have offices / subsidiaries in different Member States, it should be clarified that the national law of the headquarter of the parent company is relevant and that all due diligence obligations of the affiliated companies in other Member States can be fulfilled by the parent company (on the basis of that national law).

As an alternative the approach of the German "Act on Corporate Due Diligence Obligations in Supply Chains" could be envisaged, if it is not applicable at least to enterprises established in Germany anyway, as the directive clarifies that Member States' legislation may go beyond the proposed directive.

We reject the definition of specific **risk sectors**. Instead, the regulation should adopt the risk-based approach of the UNGP.

3. Due Diligence

The draft stipulates that companies should conduct human rights and environmental due diligence. Specifically, this means that companies should:

- Integrate due diligence into all their corporate policies and have in place a due diligence policy that is updated annually (Art. 5);
- take appropriate measures to identify actual and potential adverse human rights impacts and adverse environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships (Art. 6) (although companies as defined in Art. 2 para. 1 b, Art. 2 para. 2 b need to take measures only in case of sever adverse impacts, Art. 3 lit. l);
- Provide complaints mechanisms for potential or actual adverse impacts and provide access to these systems to trade unions and other workers' representatives as well as civil society organisations, in addition to those directly or likely to be affected (Art. 9);
- periodically assesses the effectiveness of their measures (Art. 10);
- publish an annual statement (Art. 11).

While we very much agree on the "obligation of means" approach understood as reasonable effort, we see the risk of increasing bureaucratisation, which leads to companies orienting themselves less towards real, actual risk prevention and more towards working through legislative and administrative checklists in accordance with the rules. This is not only inefficient from an economic perspective, but also from the perspective of human rights and environmental protection. To limit bureaucracy, it is necessary that risk management should always include a salience and materiality analysis. Companies need to set a clear focus in order to implement the requirements of the Directive.

The undifferentiated extension of due diligence obligations to all companies in the value chain presents companies with considerable to insoluble problems. Above all, it is not clear by what means companies with less market power are supposed to assert themselves even rudimentarily against direct and indirect suppliers or buyers in order to fulfil the due diligence obligations. In case of doubt, this will lead to companies having to withdraw from existing business relationships in order not to take risks.

In many places, there is no differentiation between direct and indirect suppliers. The influence of companies here is very different. For example, a contractual relationship exists only with the direct supplier and thus legal access to the supplier.

The Directive also states that "the statement shall be published by 30th April each year, covering the previous calendar year" (Art. 11), unless Directive 2013/34/EU applies. Harmonisation of the deadlines with reference to the financial year would be desirable. Aligning the reporting requirements in the CSDD with existing or planned requirements (CSRD, EFRAG, and the EU Taxonomy) is essential for robust and comparable reporting. As reporting requirements are increasing extensively, it is necessary to limit the requested disclosures based on a double materiality assessment (salience and materiality assessment) to identify the most important topics.

In the description of the due diligence obligations (Art. 4ff.), the Member States should create possibilities for termination of the contract with a view to corporate preventive and remedial measures (Art. 7 para. 5, Art. 8 para. 6). Our interpretation is that a provision would have to be created in national civil law that allows a company to terminate a contract "for cause" in the event of violations. It is unclear to us to what extent such a provision would apply to contracts in third countries.

4. Accompanying Measures

According to Article 14, Member States and the Commission are obliged to offer accompanying measures to the companies that fall within the scope of this Directive and to the actors along the global supply chains that are indirectly affected by the obligations of the Directive. This support should build on existing EU measures and instruments to promote the implementation of due diligence within the Union and in third countries and develop new measures. It can range from the operation of dedicated websites, portals or platforms to financial support for SMEs and facilitation of joint stakeholder initiatives. This provision also clarifies that companies can rely on sectoral schemes and multi-stakeholder initiatives to support the implementation of due diligence and that the Commission, in cooperation with Member States, can issue guidelines for assessing the suitability of such schemes. According to the draft, this can be complemented by EU development cooperation instruments to support governments of third countries and upstream economic operators in third countries in addressing negative human rights and environmental impacts of their activities and upstream business relationships.

From the BDI’s point of view, it would be important that not only the instruments of development cooperation mentioned in the draft come into play here, but that the EU member states fulfil their very own state duty to protect human rights within the framework of their foreign policy and advocate through the EU for international agreements on improved human rights standards. The EU should also inform companies about human rights risk situations. It should recognise existing sectoral standards. A positive list could help to support companies in their choice of suppliers.

The wording in the draft on industry regulations and multi-stakeholder initiatives (Art. 7 and 8, 22) does not standardise a safe harbour regulation; reference is only made to the industry initiatives and industry standards within the framework of the business partner review / screening. Furthermore, the draft defines the possibility that the Commission, in cooperation with the Member States, will first issue guidelines for assessing the suitability of industry regulations and multi-stakeholder initiatives. This is not a recognition.

Article 12 requires the Commission to adopt guidelines for non-binding model contract clauses to assist companies in complying with the preventive measures described in Article 7 (2 b) and remedial measures described in Article 8 (3 c). The Commission notes that the envisaged model contract clauses may include a harmonised methodology for the alignment of industry systems and multi-stakeholder initiatives.

5. Combating Climate Change

Article 15 requires Member States to ensure that certain companies submit a plan whereby the company's business model and strategy are consistent with the transition to a sustainable economy and with limiting global warming to 1.5 °C (with reference to the Paris Agreement). To enforce climate change mitigation obligations, executives shall be incentivised to mitigate climate change in the case of variable remuneration.

The direct inclusion of climate damage in the directive is too far-reaching and ignores the economic reality and the challenges of international competition facing European companies. A primarily sovereign task of the community of states is thus shifted onto companies. It should be noted that this type of provision as in Article 15 goes far beyond original due diligence, it is rather an environmental impact measure which is not suitable in a due diligence framework nor necessary in order to reach stated objectives of the directive proposal. This has been stressed in the two negative opinions issued by the Commission’s Regulatory Scrutiny Board.

This provision also raises questions on the level of interference in company law and the freedom of enterprise (around objectives, specific business plans, internal management) as this provision seems to overrule the director’s ability to judge what type of plan is appropriate for continued business with that of supervisory authorities who may have neither background nor expertise in the particular business at hand.

Business agrees with the importance of the objectives of the Paris Agreement, but it should be taken in to account that global objectives cannot be imposed as a legal obligation on individual natural persons or individual companies. Therefore, German Industry calls for the deletion of Article 15. The proposed requirements could be replaced by an encouragement in the preamble of the Directive to follow the ambitions of the Paris Agreement and refer to the on-going legislative work under the ‘Fit-for-55’-package, the Corporate Sustainability Reporting Directive (CSRD) and the Taxonomy. It is of great importance that the EU is moving forward ambitiously on climate policy. But the present proposal should focus on human rights and environmental due diligence.

6. Supervisory Authorities, Powers and Sanctions

Each Member State should designate one or more supervisory authorities to monitor compliance with the obligations under Articles 6 to 11 and Article

15(1) and (2) (Art. 17). The authorities shall have adequate powers and resources to carry out the tasks assigned to them by this Directive, including the power to request information and to conduct investigations (Art. 18).

The right of natural and legal persons to report to any supervisory authority with justified concerns if they have reason to believe that companies are not complying with the provisions of the Directive (Art. 19) should, in our view, be limited to certain persons or groups as in Art. 9 of the Directive instead of a right for "everyone".

According to Article 20(1), Member States shall determine sanctions that are effective, proportionate and dissuasive.

The draft Directive foresees far-reaching powers for authorities. Investigative powers go even beyond what classical national authorities are entitled to do today in areas which are far more specific in terms of regulation. Furthermore, the proposed powers are not appropriately counter-balanced with due process and appeal rights for companies targeted. The competence of the supervisory authority should be limited to the diligence obligations in the Directive, i. e., Articles 6-11, which is the focus of the Directive.

When imposing sanctions, due account should be taken of efforts made by undertakings to comply with remedies requested by a supervisory authority, Art. 20(2).

7. Civil Liability

Companies can only be liable for their own activities in the supply chain, not for those of their direct or indirect business partners. Therefore, the German “Act on Corporate Due Diligence Obligations in Supply Chains” as well as the UN Guiding Principles on Business and Human Rights (UNGP) do not provide for civil liability. The provisions in Art. 22 of the CSDD proposal would cause unproportionate and uninfluenceable civil liability risks for companies. As the Commission announced before publishing its CSDD proposal, the goal of any new rules should be empowerment rather than withdrawal: “Stay and improve instead of cut and run”. But the civil liability provisions in Art. 22 of the CSDD proposal are not compatible with this goal. The enforcement mechanism would instead rely on sanctions and administrative enforcement.

The behaviour (actions and omissions) of independent third parties, such as direct or indirect business partners, e. g. suppliers, must not lead to civil liability of companies. Therefore, we reject the civil liability provisions laid down in Art. 22 of the CSDD proposal and strongly suggest its deletion for the following reasons:

According to Art. 22 (1) companies shall always be liable if they have not taken "appropriate (due diligence) measures" (preventive and remedial measures according to Art. 7 and 8 of the CSDD proposal) and as a result of this failure an “adverse impact” occurred, which results in damages. In this respect, the only prerequisite is that the potential of an "adverse impact" arising could at least have been identified with appropriate (due diligence) measures. No prerequisite is that the "adverse impact" or damages resulting from it could have been prevented with appropriate (due diligence) measures of the company. Thus, even if the company had no possibility to prevent the adverse impact or damages resulting from it, it shall still be liable. Further, the civil liability of the company is not limited to cases, where the adverse impact was caused by company's own activities. The civil liability of companies under Art. 22 of the CSDD proposal also applies if the behavior of third parties from the company's value chain(s) exclusively caused the adverse impact.

Furthermore, regardless of whose action caused an adverse impact, there is no foreseeability as to which (due diligence) measures would be deemed appropriate or inappropriate in the assessment of civil liability under Art. 22, because Art. 3 (q) gives to much room for the interpretation and assessment of the appropriateness of (due diligence) measures in the individual case. Thus, there will always be a risk that (due diligence) measures of companies that were in general considered to be appropriate could be deemed inappropriate in individual legal proceedings concerning civil liability suits against the company.

Additional to the civil liability provisions under Art. 22 (1) for inappropriate measures of the company, Art. 22 (2) of the CSDD proposal introduces even civil liability of the company for appropriate measures and therefore for lawful behavior. Although Art. 22 (2) subparagraph 1 in general excludes civil liability of the company for damages caused by "an indirect partner with whom it has an established business relationship" when the company has taken the actions referred to in Article 7(2), point (b) and Article 7(4), or Article 8(3), point (c), and Article 8(5), this provision also establishes that under certain circumstances companies who have taken such measures can still be held liable. Thus, Art. 22 (2) introduces civil liability for lawful behavior regarding damages caused by certain indirect partners: Even if companies did take actions, which in general are sufficient regarding all direct or indirect partners and therefore fulfil the requirements of Art. 7, 8, they can still be held liable for damages caused by specific individual indirect partners (with an established business relationship with the company), regarding whom "it was unreasonable to […] to expect that the action actually taken […] would be adequate". Furthermore, the requirement "unreasonable … to expect" is too vague, giving to much room for interpretation and therefore providing the company with no foreseeability, which is a key necessity for civil liability rules.

How an independent third party behaves or acts in reality cannot be ensured by companies in a legally binding way. At most companies can introduce general provisions for behavior and actions of another person in a contract, but only if the other person agrees to sign the contract with such provisions. Further, even if such contracts were agreed upon and signed, the company cannot ensure the other contractual party in reality actually adheres to the contractual provisions. Outside of contractual provisions there are no possibilities for companies to influence the behavior or actions of others in a legally binding way. Because a company cannot ensure how independent third parties behave or act in reality, the company cannot prevent independent third parties from causing "adverse impacts" and damages resulting from such "adverse impacts". Therefore, introducing a civil liability of companies for the behavior and acts of independent third parties disregards the limits of companies' legal means to influence others.

In the second subparagraph of Art. 22 (2) criteria (company's efforts, etc.) are introduced, which shall be taken into account when assessing existence and extent of liability. If such consideration can only lead to a mitigation of civil liability, e. g. reduction of the amount to be paid, this should be clearly stated. Otherwise, if the criteria could also be taken into account for an extension of the amount to be paid, this would allow for "punitive damages", which are non-systemic to civil liability regimes in the EU.

According to Art. 22 (3) companies should always be liable alongside any other persons. Taking into account the principles of joint liability, with such a provision there would always be a risk that companies alone will be held liable for the entire damages arising from an adverse impact regardless of their share of causation in the adverse impact. Considering companies cannot ensure in a legally binding manner how their direct or indirect business partners actually behave in reality and that Art. 22 (2) even introduces civil liability for lawful behavior of the company, it does not seem appropriate or fair that companies can be made liable for damages from adverse impacts that were entirely caused by third parties, which could also be made liable by plaintiffs.

Art. 22 (4) stipulates that Member State law and other EU legal acts may provide for stricter liability rules for "adverse impacts" than under the Directive. Such a provision is contrary to the harmonisation purpose of the Directive. Art. 22 (4) could not only lead to different sets of civil liability rules regarding "adverse impacts" in different EU Member States, it would also pose a risk towards "forum shopping" in the EU when it comes to civil liability suits. Due to the broad civil liability provisions for companies, which also apply to adverse impacts caused by others who themselves are liable, cases where several companies in different EU Member States could be made liable are possible. Taking Art. 22 (3) into account, the plaintiff could in such cases chose to sue the company in the EU Member State with the most favorable civil liability rules for the whole damages, regardless of the company's share of causation in the adverse impact.

According to Art. 22 (5) the civil liability rules of Member States shall have overriding mandatory application in cases where the law of another country would in general be applicable. The current rules of private international law, in particular the Rome II Regulation, already provide for a sufficient and comprehensive framework on which law is applicable to which case. Under the current rules, cases to which the law of third countries applies can already be brought before (competent) civil courts in the Member States. There is no need for new rules to ensure cases concerning events in other countries can be adequately brought before and decided by courts in the EU Member States.

8. Public Support

We note that the EU proposal in Art. 24 explicitly does not include an optional exclusion from the award of public contracts. In the legislative process, it should definitely be ensured that this is maintained. However, the proposal establishes in Art 24 that companies breaching the duties of the directive will be deprived from public support. Not only is the concept of public support vague but the way this consequence is laid out is not in line with the principle of proportionality. Article 24 should therefore be deleted.

9. Directors' Duty of Care

The related provision should be deleted. The proposed Directive addresses the responsibility of management for human rights and environmental concerns in a very far reaching, unspecified and much more complicated way than the German "Act on Corporate Due Diligence Obligations in Supply Chains". Management must take into account the short, medium and long-term impacts of their decisions on sustainability matters, including human rights, climate change and environmental impacts. Provisions in national law on breaches of duty by management are intended to capture this duty. Furthermore, in certain circumstances, the company must take climate change into account when determining the variable remuneration of the company's management.

The due diligence obligations of company management (Art. 25 and 26), including liability in the area of sustainability are significantly expanded and deeply interfere with existing company law. General and overloading directors' duties do not belong in a due diligence framework. Climate change is in any case a socially important issue that German industry also takes very seriously and addresses with innovative solutions. However, the liability for companies that is tied to political targets, as provided for in Art. 25 (2) and (3) CSDD, including the link to bonus payments, goes too far and is not acceptable to us at all.

10. Transposition

The Directive is to be transposed into national law two years after its entry into force, Art. 30. The provisions are to apply two years after the entry into force of the Directive for companies within the meaning of Article 2 (1) a) and Article 2 (2) a), and four years after the entry into force for companies within the meaning of Article 2 (1) b) and Article 2 (2) b).

With regard to the distinction in Art. 30 of the draft directive on the transposition period of two years (companies with >500 employees and >150 million EUR annual turnover) or four years (companies with >250 employees and >40 million EUR annual turnover), clear rules should be established on how larger companies should position themselves vis-à-vis smaller companies in supply chains during the two-year longer transition period. For larger companies, this can result in a dilemma situation ("contractual cascading" / indirect obligation of smaller companies through the back door vs. violation of due diligence obligations).

11. Annex

The Annex specifies the adverse environmental and human rights impacts relevant to the Directive and lists the violations of rights and prohibitions with reference to selected international agreements and conventions including the international human rights conventions (Part I Section 1), human rights and fundamental freedoms conventions (Part I Section 2) and environmental conventions (Part II).

Compared to the German “Act on Corporate Due Diligence Obligations in Supply Chains”, more environmental conventions are listed with reference to the environment-related due diligence obligations. Likewise, the human rights due diligence obligations refer to further conventions on human rights and fundamental freedoms. This increases the legal uncertainty of the application of international standards or local law for the implementation of due diligence in the value chain. The high level of complexity will pose major challenges for businesses: the directive entails enormous bureaucratic processes; the implementation process will require considerable effort and additional capacity. Moreover, all international norms in the Annex are government-to-government standards. The absence of applicable material norms is an existential concern, as legal certainty for companies, supervisory authorities and judges depends on it. Moreover, Recital 25 indicates that the list of the norms is not even exhaustive which is demonstrated by Point 21 of Part I in the Annex. This is highly problematic as it could amount to a violation of the principle of legality (given that sanctions can be applicable to breaches) and should be addressed.

About BDI

The Federation of German Industries (BDI) communicates German industries' interests to the political authorities concerned. She offers strong support for companies in global competition. The BDI has access to a widespread network both within Germany and Europe, to all the important markets and to international organizations. The BDI accompanies the capturing of international markets politically. Also, she offers information and politico-economic guidance on all issues relevant to industries. The BDI is the leading organization of German industries and related service providers. She represents 40 inter-trade organizations and more than 100.000 companies with their approximately 8 million employees. Membership is optional. 15 federal representations are advocating industries' interests on a regional level.

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