

**The UN Legally Binding
Instrument and the EU proposal
for a Corporate Sustainability
Due Diligence Directive:**

**Competences, comparison and
complementarity**

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Executive Summary

I. Introduction

The field of business and human rights is currently at a crossroads in terms of normative developments, as two major legislative instruments are currently being negotiated at regional and international levels. At the UN level, a legally-binding instrument (LBI) regulating business enterprises under international human rights law is being negotiated, while at the EU level a directive proposal (CSDDD) was introduced in 2021 aimed at ensuring business responsibilities for the respect of human rights and the environment within the European Union. Once adopted, these two instruments will have different natures, objectives, and scopes, and will operate at different levels. The study assesses the complementarity of the two instruments in their current form, where complementarity refers to how the two instruments can contribute to each other's adoption, and improvement and implementation. The study is non-exhaustive, it takes a selective approach and focuses only on four key elements: the competences of the EU and its member states on both instruments, and the complementarity between the instruments on the due diligence duty, civil liability and issues of private international law. At the same time **the study shows that both instruments serve distinct, but interlinked purposes and therefore would complement each other also substantially. One should therefore not be substituted by the other.**

II. EU competence concerning the LBI

The EU can only act both internally and externally within the boundaries of its competences as defined by European treaties. The EU's competence with regards to the CSDDD is rooted in Articles 50 and 114 of the TFEU. There is no straightforward external EU competence on human rights but, it must be kept in mind that the LBI could affect rules found in the future CSDDD: therefore, **the adoption of an internal legislative instrument on corporate due diligence by the EU would establish and increase its competence to negotiate and conclude an international agreement covering this topic.**

Nonetheless, since the LBI will touch not only on exclusive and shared EU competences, but also on Member States competences (e.g. provisions on procedural law), **the instrument should be concluded as a "mixed agreement"**, needing to be negotiated, signed and ratified by the EU and all of its Member States. **However, the Member States could also mandate the EU Commission to negotiate on behalf of them in addition to negotiating on behalf of the EU.**

III. Comparison and complementarity of due diligence obligations in the CSDDD and the LBI

On company scope, the CSDDD sets up strict size and turnover limits, while the LBI aims to apply to all business enterprises, although it does provide the possibility for states to differentiate between businesses according to set criteria. On due diligence process, the CSDDD focuses on corporate due diligence while the LBI is more victim-centred and focuses on respect for human rights, and redress. On material scope, the LBI adopts a broad definition of business relationship, while, the CSDDD is limited to 'established business relationships', a major difference between the two. **If law-makers want to align the CSDDD with the UN Guiding**

Principles on Business and Human Rights (UNGPs) more closely, the LBI could serve as a model and therefore also complement the CSDDD.

While many elements of the LBI are more in line with the UNGP than the CSDDD, the latter provides more detailed guidance to companies and lawmakers. **The two instruments should therefore be seen as mutually reinforcing and complementary models for implementing the UNGPs.**

IV. Comparison and complementarity of access to justice and remedies in the CSDDD and the LBI

Civil liability

The CSDDD contains two liability regimes when a company fails to prevent potential adverse impacts and/or bring actual adverse impacts to an end. **Under the CSDDD, such liability can be avoided if specific due diligence measures were carried out** by the company, which includes seeking contractual assurances from indirect established business partners. Moreover, in CSDDD, a causal link between a breach of the prevention duty and harm must be present for a company to be held liable. **The LBI, on the other hand, sets a broader definition of business relationships, and provides that human rights due diligence shall not automatically absolve a company from liability for the harm caused**, setting a liability regime that applies beyond simple due diligence obligations as an effort requirement. The LBI also explicitly separates between fulfillment of due diligence obligations and liability for broader human rights abuses and environmental harm.

Private international law

The complex reality of cross-border corporate practices makes it so that issues of private international law pertaining to jurisdiction and applicable law could be detrimental to the viability of legal claims brought against companies. Issues regarding which entity to sue (e.g. subsidiary, parent company), in what jurisdiction the case should be brought, applicable law, etc., can be determining factors resulting in rights-holders' inability to access remedy for corporate abuse. **The inclusion of private international law provisions in the LBI and the CSDDD is hence relevant to addressing these obstacles.**

Currently, art. 9 of the LBI attempts to facilitate bringing cases against parent or lead companies in their forum of domicile or Home States, and to facilitate the enjoining of other parties involved in such cases, such as subsidiaries. The often-mentioned risk of parallel proceedings should be viewed as limited given victims' limited resources; in any case, such risks could be addressed through specific procedural rules, for example by deferring to the court where proceedings are first filed, while preserving the current approach to adjudicative jurisdiction that is empowering victims.

Unlike the LBI, the CSDDD contains no provisions governing jurisdiction when a civil action brought under national law transposing Article 22 of the CSDDD raises cross-border elements. This is most likely due to the existence of an existing EU legal framework in this area (i.e., Brussels Ia Regulation). Nonetheless, **the LBI could complement the CSDDD on this point, as it includes provisions for determining jurisdiction.**

Applicable law

Choice of law often comes into play and can constitute a significant barrier to accessing remedy for victims of human rights abuses. **The LBI provision governing applicable law leaves ample margin for the victims to influence which substantive law** should be applied, opting for a result-oriented approach that could help elevate the applicable law to a higher standard from a human rights perspective. In contrast, because of the mandatory overriding provision accompanying its civil liability regime, **the CSDDD does not allow claimants to select the applicable law through choice-of-law provisions**. Both the LBI and the CSDDD contain provisions on applicable law in cross-border civil lawsuits, taking different approaches. Also, the LBI covers a much broader set of rules that could be applicable in the cases that it would cover, including human rights, tort and environmental laws.

If the two instruments are adopted in their current form, their provisions on applicable law could conflict with each other in the context of civil proceedings relating to corporate due diligence obligations.

Other procedural and practical issues pertaining to access to justice

Contrary to the LBI, the **CSDDD contains no provisions addressing the procedural and practical barriers** that have prevented victims of business-related human rights abuse and environmental harm from seeking justice so far (incl. distribution of the burden of proof, collective redress, litigation costs, access to information, and access to legal aid). The majority of these aspects are within the competence of the Member States, so it is unclear if they will be included in the final CSDDD.

As a result, **the LBI, which contains provisions on these procedural aspects, could fill the gaps and play a complementary role** by imposing specific obligations on States Parties.

I. Study Introduction

The field of business and human rights is currently at a crossroads in terms of normative development on corporate due diligence and access to justice. On the one hand, a treaty on business and human rights is currently being negotiated under the auspices of the United Nations (UN). In June 2014, the UN Human Rights Council decided ‘to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights’ (OEIGWG), with the mandate ‘to elaborate an international legally-binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises’.¹ On the other hand, in February 2022, the European Commission published the long-awaited proposal for a Directive on Corporate Sustainability Due Diligence (CSDDD) aimed at establishing a legal framework to ensure business responsibilities for the respect of human rights and the environment in the European Union (EU).² Both initiatives depart from the normative instruments that have previously been used to regulate the behaviour of corporations, particularly multinational corporations, with respect to human rights and the environment. They demonstrate, in particular, the emergence of political willingness to shift away from soft-law initiatives in favour of binding standards, providing unprecedented opportunities to fill gaps in the current regulatory framework governing corporate accountability and access to justice.

Both instruments are currently being negotiated. The OEIGWG held its Seventh Session between 25 to 29 October 2021 and deliberated on the basis of the Third Revised Draft of a legally binding instrument (Third Draft of the LBI, or LBI) on business activities and human rights released in August 2021.³ While full intergovernmental negotiations have yet to materialise in the OEIGWG, many states have been endorsing the process and some have also contributed to textual revisions of the draft text of the LBI. Despite repeated calls from civil society and a resolution of the European Parliament, the European Commission has not yet taken a clear position on the LBI and remains at best partially engaged in the process. In particular, the EU still lacks a negotiating mandate on this issue. In the EU, the proposal for a CSDDD will now be debated by the European Parliament and the Council, the EU’s co-legislators. If adopted, the CSDDD would have to be transposed in all EU Member States.

Once adopted, these two instruments will have very different natures, objectives, and scopes, and will operate at different levels. The LBI will be an international treaty open to ratification by all States that will, in principle, address broad issues concerning business and human rights, such as corporate respect for human rights and access to justice by victims of business-related abuses, including those resulting from transnational business activities. While State Parties will be bound by the obligations contained in the LBI, in practice, the enforcement of human rights obligations remains difficult, and States often neglect to respect their obligations. The CSDDD, on the other hand, will be a directive adopted by the EU, a regional organisation, whose 27 Member States will be obliged to transpose the directive into their own national order. If they

¹ UNHRC Res 26/9 (2014) UN Doc A/HRC/RES/26/9.

² Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final, 23 February 2022.

³ OEIGWG Chairmanship, Third Revised Draft 17.08.2021, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises
<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

fail to do so, the EU has a robust enforcement mechanism in place. For instance, the European Commission can initiate infringement proceedings against Member States that fail to transpose directives or transpose them in an incomplete or incorrect manner. Another feature of the CSDDD is that it will focus on corporate human rights and environmental due diligence obligations, as well as (to a lesser extent) access to justice by victims when companies fail to meet these obligations.

In light of such differences, it is crucial that these initiatives do not exist in a vacuum and that they complement each other to create a more coherent legal framework capable of effectively preventing corporate abuse and improving access to justice for victims of such abuse. This is particularly important in the context of rapid globalisation where transnational corporations operating in and through complex webs are often able to exploit legal and regulatory loopholes at the cost of human rights and the environment. As a result, this study assesses the complementarity of the Third Draft of the LBI and the CSDDD and analyses how the two processes can be mutually reinforcing and how both instruments would complement each other if adopted. Complementarity refers to the process of amending and adopting the instruments as well as to their substance. Concerning the process of amending and adopting, instruments can be considered “complementary” if they address similar issues, but with different legal techniques and if the differences in the models influence the debates about and developments of the instruments. Concerning substance, complementarity can be achieved if certain gaps in or shortcomings of one instrument are addressed in the other instrument and therefore partly fill those gaps.

The study therefore asks how if and how the CSDDD can support the process leading towards a LBI and improve the current draft and also discusses if and how the LBI can contribute to improvement of the CSDDD. At the same time the study shows that both instruments serve distinct, but interlinked purposes and therefore would complement each other also substantially. One should therefore not be substituted by the other. In fact, it is suggested that the EU engages both in a process of improving and adopting the CSDDD as well as in the negotiations of the LBI with the aim to improve and adopt it. As a pretext to the analysis of the two instruments, the study addresses the division of competences of the EU and its Member States in the process leading to the LBI anticipating the adoption of the CSDDD. Finally, the study will contain some policy recommendations aimed at the improvement of the EU’s engagement in the process leading to the LBI.

The study is organised as follows: Section II analyses key elements of the division of competences between the EU and its Member states. It addresses which competences the EU already has in the fields covered by the LBI and how this may change if the CSDDD is adopted. Section III provides a comparison between the Third Draft of the LBI and the CSDDD concerning corporate due diligence obligations and the relevant complementarity in this regard. Section IV then does the same for questions concerning access to justice (in particular civil liability, applicable law, jurisdiction and other procedural matters) and also identifies the potential of the two draft instruments to complement and reinforce each other. It should be noted that both instruments analysed in this study are draft instruments and will not be adopted in their current form. While this may make a comparative analysis in a formal way difficult, it is useful to assess the drafts in their current forms as this allows for improvements of them during the respective negotiations.

II. EU competence concerning the LBI

This section examines the EU's competence to negotiate the LBI in general and in particular anticipating the adoption of the CSDDD. Annex I to this study contains a detailed description of EU and Member States' competences in relation to LBI topics.

The EU can only act both internally and externally within the boundaries of its competences as defined by European treaties. The division of competences in the EU is governed by the principle of conferral (Article 5 Treaty on European Union – TEU⁴). Accordingly, the EU is only competent to act in a certain area if the founding treaties of the EU confer that competence to it. Competences not conferred upon the Union in the Treaties remain with the Member States (Article 4 TEU). The EU's competence is of particular relevance on the area of law-making, both internally and externally. The EU's external 'legislative' power concerns its power to negotiate and conclude international agreements. As the LBI would be an international agreement, the focus needs to be on the external competence of the EU. Contrary to this, the CSDDD is an act of internal law-making and therefore requires internal legislative competences of the EU.

1. The system of EU competences

The Treaty on the Functioning of the European Union (TFEU) determines the areas in which the EU may exercise its competences. It distinguishes between areas where the EU has exclusive competence (Article 3 TFEU), areas where the EU shares competence with the Member States (Article 4 TFEU), and competences to support, coordinate or supplement the actions of the Member States (Article 6 TFEU).⁵ However, such a division of competence is not always clear-cut, making it difficult to determine where the EU has clear power to negotiate international agreements.

Exclusive competence of the EU means that only the EU can legislate and adopt legally binding acts. Member States may only legislate if empowered by the EU or for the implementation of EU's acts (Article 2(1) TFEU). Pursuant to Article 3(1) TFEU, the EU has the explicit exclusive competence in five areas including external trade and competition policies.⁶ In addition and more relevant in the present context the EU has the competence 'for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope' (Article 3(2) TFEU). This provision determines the 'implied treaty-making power' of the EU.⁷ According to this doctrine, competence in external matters derives from explicit internal competence. Where the Treaties assign explicit powers to the EU in a particular area (e.g., internal market), the EU must also

⁴ The Treaty on European Union (TEU) establishes the general principles of EU law, the organs of the EU and the framework of its foreign policy, while the Treaty on the Functioning of the European Union (TFEU) contains more detailed provisions on how the EU operates, including the areas in which the EU can create legally binding instruments.

⁵ See also FDIH and FOEI, Policy Brief: analysis of EU Competences regarding the UN Legally Binding Instrument on Transnational Corporations, Other Business Enterprises and Human Rights, 10th April 2020, p. 3.

⁶ Article 3 (1) TFEU includes the following areas: Customs union; competition rules necessary for the functioning of the internal market; monetary policy regarding the euro; the conservation of marine biological resources under the common fisheries policy; and common commercial policy.

⁷ Friedrich Erlbacher, 'Article 216 TFEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2021), 1647.

have similar powers to conclude agreements with non-EU countries in the same field (the principle of parallelism between internal and external powers). In such cases, the EU has 'implied exclusive external competences'.⁸

Shared competence, on the other hand, means that when the Treaties confer on the EU a competence shared with the Member States in a specific area, the EU and the Member States may legislate and adopt legally binding acts in that area. The Member States exercise their competence to the extent that the EU has not exercised its competence or has decided to cease exercising its competence (Article 2(2) of the TFEU). Article 4(2) of the TFEU lists the areas of shared competence between the EU and the Member States. Three areas are particularly relevant in the context of the LBI negotiations: internal market, environment, and the area of freedom, security and justice. In the context of international treaty negotiations, EU shared competence means that 'the EU competence to act on its own depends largely on the area and the action taken', and 'most policy areas under the shared competences category will actually require that both EU and Member States participate alongside in the agreement'.⁹

When determining the competence of the EU to negotiate and conclude an international agreement, it should be kept in mind that it is possible that some elements of the treaty would fall into the exclusive competence of the EU, some into the shared competence and some may remain within the competence of the Member State. In such a case, the EU cannot negotiate and adopt the entire agreement solely based on its own competence. Instead, the Member States also need to become parties of the agreement in order to complement the competence of the EU. In such cases, both the EU and its Member States need to become parties to the relevant treaty. Such treaties are referred to as 'mixed agreements'.¹⁰

Mixed agreements will have to be signed and ratified by the EU as well as by all its Member States. Typically, this will require parliamentary consent in all EU Member States. In practice, mixed agreements are often negotiated by the EU Commission on behalf of the EU and on behalf of the Member States. This allows the EU to speak with one voice and also creates greater consistency in the EU's overall approach to the matter of the treaty as the EU Commission consults with Member States during the negotiation. It also avoids complications during the negotiating process if the exact determination of the areas of competence is not entirely clear. Instead of engaging in a complicated internal process to delineate the competences before the negotiations can proceed, the EU Commission can actively engage in the negotiations. Member States will not lose any rights as the agreement needs their approval before coming into force for the EU and its Member States.

2. EU competence regarding the CSDDD and the LBI

The competence of the EU to adopt the CSDDD is based on Article 50 and Article 114 TFEU. Both provisions give the EU the competence to legislate internally: Article 50 TFEU contains the powers of the EU to adopt legislative measures in the field of coordinating company law while

⁸ Paola Conconi, Cristina Herghelegiu and Laura Puccio, 'EU Trade Agreements: To Mix or Not to Mix, That Is the Question' (2021) *Journal of World Trade* 55, 231, 234.

⁹ Paola Conconi, Cristina Herghelegiu and Laura Puccio, 'EU Trade Agreements: To Mix or Not to Mix, That Is the Question' (2021) 55 *Journal of World Trade*, 231, 234.

¹⁰ Paola Conconi, Cristina Herghelegiu and Laura Puccio, 'EU Trade Agreements: To Mix or Not to Mix, That Is the Question' (2021) *Journal of World Trade* 55, 231, 232.

Article 114 TFEU enables the EU to adopt measures concerning the approximation of laws affecting the internal market. Most internal EU acts relating to economic matters are based on that provision. The competence of the EU to adopt the CSDDD based on these provisions seems straightforward and has not been disputed by any Member State so far.

The determination of the EU to negotiate and conclude the LBI is less clear. To begin with, there are no TFEU provisions that directly address a competence concerning to human rights. While human rights are a foundational value of the EU (Article 2 TEU) and a key objective of its external policies (Article 3(5) and 21 TEU), the treaties do not confer an explicit competence in the field of human rights to the EU. However, fundamental rights must constitute general principles of EU law (Article 6 TEU).¹¹ Furthermore, the EU's action on the international scene must be guided by 'the universality and indivisibility of human rights and fundamental freedoms' (Article 21(1) TEU).¹² Yet, this and other references to human rights in the founding treaties do not provide an exclusive EU competence to negotiate and conclude every international agreement in the fields of human rights.

When determining the EU's competence, it is therefore necessary to analyse the contents of the LBI in detail as each issue addressed by the LBI could fall into different areas of EU and Member State competence.

For example, the EU has exclusive external competence in the field of trade policy (i.e. the common commercial policy) as enshrined in Article 3(1) TFEU. As Article 14.5 of the Third Draft of the LBI refers to the relationship between the LBI and trade and investment agreements and contains a requirement for future trade and investment agreements, this aspect of the LBI would fall into this aspect of EU competence.

All other aspects of the LBI, in particular in the fields of due diligence obligations and access to remedies the EU does not seem to have an explicit competence. Its competence would therefore need to be based on the implied powers doctrine mentioned above which empowers the EU to conclude an international agreement where such agreement conclusion is likely to affect internal EU rules or alter their scope. This basis of EU competence is particularly relevant in the context of the LBI negotiations as the LBI is likely to cover areas which could affect the application rules found in EU directives and regulations.

Article 9 of the Third Draft of the LBI includes rules for determining jurisdiction in cross-border civil disputes. These rules could directly affect the application of the EU's rules on jurisdiction, i.e. the Recast Brussels I Regulation,¹³ which establishes conflict-of-jurisdiction rules in cross-border civil and commercial matters and therefore determines which national courts have jurisdiction to hear which cases. Similarly, Article 11 of the Third Draft of the LBI contains rules on applicable law in cross-border civil disputes, which is governed by the EU's rules on

¹¹ Article 6 TEU refers to fundamental rights 'as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States'.

¹² Article 21(2)(b) TEU also provides that the 'Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to [...] consolidate and support democracy, the rule of law, human rights and the principles of international law'. Article 205 TFEU also reaffirms that the EU's action on the international scene shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the TEU, to which Article 21 belongs.

¹³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

applicable law concerning non-contractual obligations, i.e. the so-called Rome II Regulation.¹⁴ Another example is the Non-Financial Reporting Directive¹⁵, which could be affected by Article 6.3(d) of the Third Draft of the LBI which holds that states shall require business enterprises to communicate regularly how they “address actual or potential human rights abuses that may arise from their activities including in their business relationships”.

Most importantly, the LBI could affect rules found in the future CSDDD. The LBI provisions on due diligence (e.g. Article 6 Third Draft of the LBI) are likely to affect the CSDDD’s respective provisions (in particular Articles 4 to 11). To put it differently: The adoption of an internal legislative instrument on corporate due diligence by the EU would establish its competence to negotiate and conclude an international agreement covering this topic. Hence, if the EU were to adopt the CSDDD before the conclusion of the LBI, its own competence would increase in this field. However, to the extent that Member States laws on human rights and environmental due diligence of companies would not be replaced by an EU internal act, Member States would also remain competent externally in this area which would then fall into the shared competence of the EU and its Member States. This relationship already indicates one aspect of the complementarity of the two instruments: The EU can actually increase its competence concerning the LBI by adopting the CSDDD.

However, not all areas of the LBI would fall into the exclusive or shared EU competence. For examples, provisions on procedural law such as burden of proof, allocation of costs, provisions concerning the statute of limitations or judicial cooperation remain in the competence of the Member States. These aspects will also not fully be addressed by the CSDDD which means that even if the EU were to adopt the CSDDD Member States would keep some competences concerning the LBI. It should also be noted that the Member States remain competent in the field of human rights and environmental due diligence of companies until the EU adopts its own internal legislative instrument covering this area. Hence, if the negotiations on the LBI are concluded and the instrument is adopted before the EU adopts the CSDDD the scope of Member States’ competence concerning matters of the LBI would be even larger.

3. Conclusion

The LBI covers some aspects which fall either under the EU exclusive or shared competence. This scope of EU competence vis-à-vis the LBI will increase with the adoption of the CSDDD. However, there are still many aspects of the LBI that will remain within the competence of the Member States.

Given the fact that the LBI will cover areas of EU and Member State competence, it will have to be concluded as a so-called mixed agreement, i.e. an agreement which needs to be signed and ratified by the EU and all of its Member States. The negotiations can be conducted by the EU and its Member States in parallel. However, the Member States could also mandate the EU Commission to negotiate on behalf of them in addition to negotiating on behalf of the EU. In such a case, the EU would act with one voice in the OEIGWG.

¹⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

¹⁵ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15.11.2014, p. 1.

Once adopted, the LBI will have an impact on the implementation of various EU instruments, including the CSDDD, in the EU, as international law takes precedence over secondary EU law, including regulations and directives. As a result, EU participation in the LBI negotiations is not only possible, but also necessary to ensure that the LBI and European law addressing aspects regulated in internal EU legislative instruments are consistent.

III. Comparison and complementarity of due diligence obligations in the CSDDD and the LBI

This section compares the Third Draft of the LBI and the CSDDD concerning corporate due diligence obligations and identifies the respective complementarity of the two instruments. The Third Revised Draft of the LBI and the CSDDD proposal cover similar ground. Both texts seek to require companies to carry out a due diligence process to prevent adverse impact. Both texts take inspiration from the due diligence provisions in 2011 UN Guiding Principles on Business and Human Rights. This subsection analyses how due diligence is conceptualised in both texts and highlight points of convergence and divergence between the two approaches. For clarity, we break due diligence into four categories, namely: Company scope; due diligence process; value chain and material scope; and compliance and enforcement.

We find that the CSDDD is in many ways more detailed than the LBI. This is unsurprising considering they are two very different types of instruments. On certain aspects the CSDDD is more onerous for companies, especially because it explicitly includes environmental instruments. Overall, the two texts complement each other well and there is no irremediable incompatibility between the two.

1. Company scope

On the face of it, the two texts diverge greatly, with the LBI aiming to apply to all business enterprises, specifically to ‘all business activities including business activities of a transnational character’. The EU itself pushed for this broad wording. By contrast, the draft directive sets up strict size and turnover limits. While this is a major difference between the two texts, Article 3.2 of the LBI leaves open the possibility for states to ‘differentiate between business enterprises according to their size, sector, operational context or the severity of impacts on human rights.’ Article 6.3 of the LBI reiterates this point: ‘States Parties shall require business enterprises to undertake human rights due diligence, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships.’

Thus, there is room to argue that with regard to company scope the two texts are complementary. The fact that the European Commission chose to set up more detailed rules for large companies and at least for now has excluded SMEs from due diligence duties does not necessarily mean that this approach is set in stone. Moreover, the directive recognises that the new rules will impact SMEs and includes Article 14 on accompanying measures among others for SMEs, which are therefore not entirely outside the scope of the directive.

Despite the differences regarding company scope, the LBI and the CSDDD complement each other: The LBI’s wider scope follows the UNGP’s approach more. However, the CSDDD’s

approach indicates the level of detailedness which is necessary to make a legislative instrument operate in practice. Whether policy-makers aim at a broader scope which is more in line with the UNGP and thus follow the LBI model or opt for a more limited approach as illustrated by the CSDDD remains of course a matter of political choice. From a legal perspective, both approaches are viable. If the LBI and the CSDDD were adopted in their present form they would also complement each other as the CSDDD could be seen as an instrument implementing aspects of the LBI and would need to be measured against the standards of the LBI.

2. Due diligence process

a) State obligations

The CSDDD only focuses on corporate due diligence while the LBI, as a human rights instrument, is more victim-centred and covers areas other than the due diligence process. Under the LBI, states must regulate the activities of business enterprises (Article 6.1) and 'take appropriate legal and policy measures to ensure that business enterprises, (...) respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their business activities and relationships.' (Article 6.2.) '*For that purpose*' (emphasis added) they must 'require business enterprises to undertake human rights due diligence.' (Article 6.3.).

States obligations under the CSDDD are to adopt legislation to transpose these due diligence rules. The CSDDD aims at establishing common rules for corporate due diligence in the EU and is therefore more an instrument of corporate law than a human rights instrument. . To put it differently, the CSDDD focuses on regulating corporate behaviour, from a corporate perspective, while the LBI focuses on respect for human rights, and redress. This is an important difference between the two texts, which are based on different approaches. However, the texts adopting different approaches does not necessarily mean they are incompatible, but simply that they have different starting points. This difference also highlights the complementarity between the texts, with the CSDDD being more technical and detailed and the LBI setting broad orientations and principles.

b) Elements of due diligence

This is a clear requirement in the CSDDD to **integrate** due diligence into company policy (Article 5 CSDDD) and there is no similarly clear requirement on this in the LBI. This is one example of a topic where the directive is stronger than the LBI, albeit on a narrow point. Moreover, arguably, a company policy is of less practical relevance than the actual due diligence process which means the lack of clear requirement in the LBI is not a crucial omission.

Both texts are similar with regards to **identifying** human rights risks, but still with important differences. The CSDDD talks about identifying adverse impact while the LBI talks about identifying human rights abuse. While symbolically the difference of language is important, it admittedly does not have important practical consequences in terms of how the process should be conducted. Importantly, when it comes to the identification of impact/abuse coming from their relationships, the directive talks about established relationships while the LBI does not qualify the term and defines it broadly (see section c) below). Moreover, the CSDDD creates

special, less onerous rules for high-risk sectors and for regulated financial undertakings, than for all other sectors.

Another important difference concerns the process of identification. The CSDDD highlights that ‘companies are entitled to make use of appropriate resources, including independent reports and information gathered through the complaints procedure provided for in Article 9’ and that ‘*where relevant*’ (emphasis added) they shall ‘also carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts’. By contrast, the LBI uses stronger language from the perspective of rights-holders. Under the LBI, the process must include: undertaking impact assessments, integrating a gender perspective, conducting meaningful consultations (and not just consultations) while giving special attention to named marginalised groups, acting in line with the principle of free, prior and informed consent of indigenous peoples, and paying special attention in conflict areas or areas under occupation. While identification processes under the directive and under the LBI may bring similar results, the LBI attempts to give affected stakeholders a clearer, stronger role, while the directive appears written from a corporate perspective.

There are also important differences with regards to **avoiding, preventing and mitigation** of adverse human rights impacts. Under the LBI, states must require the company firstly to ‘take appropriate measures to avoid, prevent and mitigate effectively the *identified (...)* human rights abuses which the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages’ (emphasis added); secondly, to ‘take reasonable and appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships’. By contrast, the directive requires EU Member States to ‘ensure that companies take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts that have been, or should have been, identified.’

We note two important differences here. First, the CSDDD is clearer about when the company is only expected to mitigate, whereas the LBI includes mitigation but without explaining when it is acceptable. Second, under the LBI, the company only needs to worry about the abuses they have identified whereas under the directive, companies also are required to act with regards to impacts they should have identified but did not. This makes the text of the directive stronger from the perspective of rights-holders.

In terms of how to act, the LBI is vague. The text talks about ‘reasonable and appropriate measures’, including ‘integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate.’

The directive also includes contracts as tools but in general provides much more detail about what such measures could be. It talks for example of ‘appropriate measures to verify compliance’ with such contracts, of companies providing support to SMEs to ensure compliance and of suspending contracts when impact has arisen, among other aspects (full list in Article 7). Here the CSDDD is more detailed, and could serve as a basis to strengthen the LBI. While contractual assurances of supplier human rights due diligence are sometimes misused as an excuse to not engage in meaningful activities of the company itself, they can be an important

tool of ensuring human rights due diligence in the supply chain if combined with other instruments such as investing in the capacity of the suppliers to respect human rights. However, the limits and dangers of relying on contractual instruments only should also be noted. Hence, it would be useful to address contracts as an instrument of supply chain governance in legislative instruments, but also to include requirements for contractual instruments in this regard, and to ensure that contractual clauses alone do not constitute the extent of the concrete measures companies are expected to take.

This is a clear requirement in the CSDDD to bring adverse impacts to an **end** (Article 8 CSDDD), but there is no similarly clear requirement on this in the LBI. This is one example of a topic where the directive is stronger than the LBI.

The CSDDD also provides more detail on how to effectively **monitor** the due diligence. The directive being more detailed on this point, and could potentially serve as a basis to introduce more detailed language in the LBI.

Concerning the obligation to **communicate**, the CSDDD mentions yearly reports to be published on the company's website 'in a language customary in the sphere of international business'. The LBI mentions regular communication, which should be accessible to affected stakeholders, and overall includes much more detail. The contrast between the two texts, particularly regarding accessibility is striking on this point. This is a very important point because genuine access to relevant information, or lack thereof is a determining factor when it comes to access to justice for victims.

3. Value chain and material scope

The LBI refers to business relationships and adopts a broad definition, namely 'any relationship between natural or legal persons including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State, including activities undertaken by electronic means' (Article 1.5). By contrast, the CSDDD is limited to 'established business relationships', a term defined in Article 3(f). Although the term established business relationship covers indirect partners, it is still narrower than the LBI's text on the point. This is a major difference between the two texts and an important point of divergence. Similar to the broader scope with regards to companies¹⁶ the LBI seems more in line with the UNGPs. If law-makers want to align the CSDDD with UNGPs more closely, the LBI could serve as a model and therefore also complement the CSDDD.

Concerning the material scope, the CSDDD is much broader, chiefly because it includes adverse environmental impact. Although climate is not explicitly included in the due diligence process but in a separate and more general provision (Article 15 CSDDD) instead, the material scope of the directive is still broader than the LBI's because of its dual focus on human rights and environmental issues.

¹⁶ See above section 1.

It is unclear how much room there is to push for the LBI having a broader scope given the OEIGWG's current mandate, which could be changed but is human rights focused at present. But arguably there is scope for the EU to push for a stronger LBI on environmental and climate issues as the human rights consequences of environmental issues and climate change are now undeniable. In 2021, those links were recognised by the UN Human Rights Council itself in Resolution 48/13 establishing the human right to a safe, clean, healthy and sustainable environment, and in Resolution 48/14 creating a Special Rapporteurship on the promotion and protection of human rights in the context of climate change. All 9 EU member states sitting on the Human Rights Council (namely Austria, Bulgaria, Czech Republic, Denmark, France, Germany, Italy, Netherlands, Poland) voted in favour of the resolution. This suggests some agreement at least in certain EU countries that human rights and environmental issues go hand in hand.

4. Compliance and enforcement

The CSDDD is much more precise than the LBI on compliance and enforcement of due diligence obligations. The LBI mentions effective national procedures to ensure compliance, and the obligation for states to provide for penalties for companies who fail to comply, but the text does not explain what this means in practice.

In the CSDDD, Articles 17 (Supervisory Authorities), 18 (Powers of supervisory authorities), 20 (Sanctions) and 21 (European Network of Supervisory Authorities) detail how within Member States supervisory authorities will supervise compliance and will have 'the power to request information and carry out investigations', and to 'conduct inspections' They will also be able to '(a) order the cessation of infringements of the national provisions adopted pursuant to this Directive, abstention from any repetition of the relevant conduct and, where appropriate, remedial action proportionate to the infringement and necessary to bring it to an end; (b) to impose pecuniary sanctions (...); (c) to adopt interim measures to avoid the risk of severe and irreparable harm. Moreover, Article 19 offers the possibility for 'natural and legal persons' to 'submit substantiated concerns to any supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive.' On this issue, the CSDDD could serve as a basis to strengthen the LBI.

5. Conclusion and policy considerations

As shown above, many elements of the LBI seem generally more in line with the UNGP than the CSDDD. However, the CSDDD is in some elements of the due diligence obligations more detailed and offers clearer guidance to companies and lawmakers. The two instruments should therefore be seen as mutually reinforcing and complementary models of implementing the UNGPs. Concerning material scope and value chain scope the texts are very different. However, on company scope there is arguably room to reconcile the EU approach in the directive (only large companies) with the LBI approach, which allows for differentiated rules for different companies. The focus on established business relationships (value chain scope of the CSDDD) is more difficult.

The CSDDD is a corporate law text, the LBI is a human rights treaty. They approach similar issues from different perspectives. This transpires from the general approach but also in specific

areas, especially: (1) identifying harm/abuses, with LBI placing affected stakeholders at the centre, while the directive speaks to corporations; and (2) communicating about their policies and practices. The LBI's priority is to ensure accessibility of this communication to potentially affected rights-holders.

In the following areas, the CSDDD is stronger and provides more detail than the LBI: Integration of due diligence into company policy; avoiding, preventing and mitigating adverse human rights impacts; ending adverse human rights impacts; monitoring; material scope; and compliance and enforcement of due diligence duties. Regarding these areas it would be in the interest of the EU to engage in the LBI negotiation to ensure consistency and thus strengthen the LBI.

IV. Comparison and complementarity of access to justice and remedies in the CSDDD and the LBI

This section compares the CSDDD and LBI with regards to access to justice in particular civil liability, applicable law, jurisdiction and other procedural questions and shows where and how the two instruments can complement each other.

There are numerous accounts of the difficulties that victims of human rights abuses and environmental harm caused by or involving companies face when seeking justice, particularly when the harm occurs within complex corporate groups and value chain activities.¹⁷ This ranges from the inability for victims to aggregate their claims due to the lack of collective redress mechanisms to the inability of NGOs to file claims. Another obstacle is the lack of disclosure procedures that allow victims to obtain the evidence required for their claim to be heard in court or to demonstrate corporate liability. In the context of litigation against transnational corporations, victims may be confronted with complex private international law rules that prevent them from suing foreign subsidiaries in the EU or applying the law of the home country where the event giving rise to the human rights violation or environmental damage occurred. The absence or inadequacy of legal liability rules in the context of complex corporate groups or supply chains may also prevent victims from obtaining redress. Finally, because of the complexity and transnational nature of business and human rights litigation, it is often lengthy and costly. As a result, it is critical that future instruments imposing human rights and/or environmental obligations on companies includes rules on access to justice that address or consider the obstacles victims face in litigation. In light of these considerations, this section compares the LBI and the CSDDD with regards to access to justice. In particular, it addresses civil liability, jurisdiction, applicable law, as well as other procedural and practical issues.

1. Civil liability

a) General principles of liability

Liability is addressed in Article 8 of the LBI and Article 22 of the CSDDD.

¹⁷ See ECCJ, 'Suing Goliath: An analysis of civil cases against EU companies for overseas human rights and environmental abuse' (2021) <<https://corporatejustice.org/publications/suing-goliath/>> accessed 22 May 2022; EU FRA, 'Improving Access to Remedy in the Area of Business and Human Rights at the EU Level' FRA Opinion – 1/ 2017 [B&HR], Opinion 21.

Under the draft LBI, the proposed standard on civil liability can be found under Article 8, which sets an obligation on State Parties to develop a 'comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships' (Article 8.1 of the draft LBI).¹⁸

The CSDDD also contains one significant article governing civil liability. Article 22(1) provides that Member States must ensure that companies are liable for damages if they failed to comply with their obligations to prevent potential adverse impacts and bring actual adverse impacts to an end and, as a result of this failure, an adverse impact¹⁹ occurred and led to damage.

The LBI and the CSDDD approach liability in very different ways. On one hand, Article 8.1 of the LBI provides rules imposing legal liability on companies and natural persons conducting business activities for human rights abuses that may arise from their own business activities or from their business relationships. Business activities are defined broadly to mean 'any economic or other activity, ...[including] activities undertaken by electronic means' (Article 1.3 of the draft LBI). The LBI covers liability for human rights abuse and also covers environmental harm. For example, the proposed definition of human rights abuse under the LBI covers 'harm...that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment' (Article 1.2 of draft LBI). The draft also refers to environmental remediation and ecological restoration under the provision on remedies (Article 4 of the draft LBI). Yet, it is not clear whether the LBI covers environmental issues as stand-alone issues or to the extent they result in human rights abuse. While the human rights consequences of environmental issues and climate change are increasingly recognized by human rights authoritative bodies (such as the 2021 Human Rights Council Resolution on the issue mentioned earlier under the section on due diligence), this could help in clarifying and potentially broadening the scope of the LBI and the reach of its liability regime.

Article 22(1) of the CSDDD, on another hand, only considers a company's legal liability in the context of a breach of its due diligence obligations. This means that the CSDDD does not establish a liability mechanism when human rights abuses and environmental harm occur in the context of corporate group activities in general. This distinction should be interpreted in light of the different objectives of each instrument. The CSDDD aims to impose due diligence obligations on specific corporations; it does not seek to address corporate responsibility for human rights and the environment in general.

Another significant difference between the LBI and the CSDDD is that the LBI provides for the liability of both legal and natural persons conducting business activities (Article 8.6) while the CSDDD only refers to the liability of companies (Article 22(1)). For example, the LBI specifies in Article 8.2 that 'State Parties shall ensure that their domestic liability regime provides for

¹⁸ During the 7th meeting of the inter-governmental working group, no delegation participating in the negotiations challenged this provision. Yet, some interventions implied that the liability regime could be civil, criminal or administrative, rather than covering the three together.

¹⁹ The adverse impact should have been identified, prevented, mitigated, brought to an end or its extent minimised through appropriate due diligence measures laid.

liability of legal persons without prejudice to the liability of natural persons...’, underlining the importance that liability of natural persons such as decision makers within a corporation do not substitute for the liability of the entity itself.

The CSDDD has no mention of the civil liability of natural persons, such as the director of a company involved in human rights or environmental adverse impacts. Nonetheless, it is worth noting the potential legal implications of Article 25 of the CSDDD on director’s duty of care. Article 25(1) requires corporate directors to take into account the consequences of their decisions on human rights, climate change, and the environment when fulfilling their duty to act in the best interest of the company.

b) Liability in complex corporate groups and in the supply chain

The approach taken in both the LBI and the CSDDD attempts to cover complex situations where multiple legal entities, such as a parent or lead company, along with a subsidiary or business partner, are involved in causing the harm. As a result, both instruments cover situations of human rights abuses that may arise in the context of corporate groups or supply chains.

Article 8.6 of the LBI provides that a legal or natural person could be held liable for ‘their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses, when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to take adequate measures to prevent the abuse’.

As noted earlier in this study, business relationships are defined broadly under Article 1.5 of the LBI, and taken to mean ‘any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State, including activities undertaken by electronic means’. This would cover relationships within a corporate group and value chain. While ‘contractual relationships’ are not explicitly covered under this definition, it nonetheless could potentially cover various other contractual engagements that a company may have.

In general, the CSDDD establishes civil liability for harm caused by corporate groups activities involving parent companies and their subsidiaries, as well as value chain operations. More specifically, companies will be held liable if they failed to comply with their obligations to prevent potential adverse impacts and end actual adverse impacts **in 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**, if such a failure results in damage.²⁰

²⁰ Joint reading of Articles 1 and 22 of the CSDDD.

In contrast to the LBI, the CSDDD does not use a broad definition of ‘business relationship’, instead distinguishing between the different types of ‘relationships’ that can result in a company's liability where abuse takes place.

First, a company can be liable for the adverse impacts in the operations of its **subsidiary**. A ‘subsidiary’ is defined as a legal person through which the activity of a ‘controlled undertaking’ (as defined in Article 2(1)(f) of Directive 2004/109/EC) is exercised.²¹

Second, a company can be liable for the adverse impacts in the value chain operations carried out by **entities with whom the company has an established business relationship**. An ‘established business relationship’ means ‘**a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain**’.²² Adverse impacts that occur in the context of value chain operations of non-established business relationships are therefore excluded from this liability regime.

In contrast to the LBI, liability under the CSDDD is limited to adverse impacts caused by a subsidiary’s operations and the value chain operations of an entity with which the company has an established direct or indirect business relationship. Furthermore, as regards damages occurring at the level of **established indirect business relationships**, the liability of the company is subject to specific conditions. Article 22(2) of the CSDDD provides grounds for exemption when harm is caused by an adverse impact arising from the activities of an indirect partner with whom the company has an established business relationship. This liability exemption narrows the scope of the liability regime established under Article 22(1) of the CSDDD even further. It is discussed in greater detail below.²³

The CSDDD does not provide for the possibility of holding the subsidiary and the entities with whom the company has an established business relationship liable. However, the company’s liability for damage arising under Article 22 does not preclude its subsidiaries or any of its direct and indirect business partners in the value chain from being held civilly liable under EU and national law (Article 22(3) & (4) of the CSDDD).

c) Conditions for civil liability

The LBI provides three modalities or grounds for civil liability that seem to attempt to cover the complex corporate practices in the context of equity-based relations or supply chains. First are cases where a company failed to prevent abuses by entities under its control, management or supervision. Second are cases where company failed to prevent abuses resulting from activities of other entities, when the former controls, manages or supervises the concerned activities. Third are cases where a company should have foreseen risks of abuses, including in its business relationships, but failed to take “adequate measures” to prevent them. While the intention behind the drafting seems to be heading in a useful direction, the way of drafting seems to conflate multiple standards relevant to negligence cases and strict liability.

²¹ CSDDD, Article 3(d).

²² CSDDD, Article 3(d).

²³ See below section d).

The second ground listed above, that is currently drafted with a focus on control, management and supervision of the activity that caused or contributed to the abuse, is in line with the latest jurisprudence pertaining to parent-company liability in cross-border cases.²⁴ This approach would enable establishing direct liability of a parent or lead company for acts that it controls or sufficiently intervenes in and that have resulted in harm to third parties. It would provide an alternative to piercing the corporate veil, or discarding limited liability as provided for under general corporate law, because it will be tackling the direct responsibility of the parent company due to actions or omissions that it has undertaken.

The first ground would cover cases where control by one entity of another would result from equity ownership for example. This approach may mean that the shareholding that a parent company exercises in its subsidiary, which may be the basis of control by the parent company of its subsidiary, may lead to liability without proving the control or supervision by the parent company over the specific activities that led to the harm. Usually, liability within a corporate group does not arise from the equity relations between parent and subsidiary, such as the equity holdings/ ownership of one company by another.

If the LBI is to provide that liability would emerge in cases where ‘a business enterprise (legally or factually) controls another legal person’, such a test could in effect form a challenge to the current dominant approach to the doctrine of piercing the corporate veil. Corporate law as applied in most jurisdictions separates between the liabilities of parent and subsidiary companies. As an exception, the doctrine of piercing the corporate veil allows for establishing indirect liability of the parent company for the acts of its subsidiary but only in very limited circumstances. Courts have generally been cautious in applying this doctrine and have availed of it on very exceptional basis, particularly in cases of fraud, for example where a ‘corporation is something less than a bona fide independent entity’ and in some cases of ‘inequitable and wrongful’ conduct.

Yet, such a standard if adopted under the LBI would only apply to the business and human rights cases to be covered under the treaty. In such cases, negligence on the part of a parent company in relation to the concrete activity of its subsidiary that caused the harm will be presumed by the mere fact of control by the parent over the subsidiary, which could arise from a mere equity relation among the two entities.

The third ground for liability that the draft LBI text proposes is that of foreseeability of risk of human rights abuses or harm in the context of business relationships. On such grounds, liability will be presumed where reasonable foreseeability of risks is present and where the entity fails to take adequate measures to prevent the abuse. This would be useful in cases arising in the context of supply chains, such as between lead and supplier companies and in cases of environmental and climate-related harm. Yet, this proposition has been critiqued because it is not clear whether the reference to “adequate measures to prevent” the abuse is referring to an obligation of means or of result (i.e. it is not clear whether a measure would be “adequate” so long as it is reasonable or if it would be “adequate” only if it results in preventing the

²⁴ For example, see *Vedanta Resources PLC and another v. Lungowe and others*, [2019] UKSC 20, and *Okpabi and others v Royal Dutch Shell and another*, [2021] UKSC 3, which helped clarify that what matters in cases of parent company liability is not ownership but the facts of the parent’s sufficient intervention in the subsidiary’s activities that led to the harm.

abuse)²⁵. If the latter is the case, then such provision might give perverse incentives to companies not to undertake preventative measures. This is especially the case because the scope of business relationships covered under the LBI is broad (as per the definition under Article 1.5), potentially leading to covering relationships where one entity takes reasonable measures but the other entity in the business relationship does not act accordingly, especially because the former entity lacks sufficient influence on the latter.

Agreeing on an international standard that gets reflected across jurisdictions will limit the ability of multinational companies to manoeuvre the discrepancies across jurisdictions in attempts to avoid liability. This effect will clearly be dependent on the number of States that end up ratifying and implementing the proposed LBI. It will also depend on the extent of guidance that would be available to implementing States, which would allow for coherent approaches to implementing the states obligations. This will also mean that the applicable standards will be set in statute rather than incrementally being developed through judicial proceedings. For victims or plaintiffs in such cases, this would potentially translated into clearer legal avenues to access justice and less time and costs in legal proceedings. This will also give clarity for companies on what is expected from them and how their practices would be assessed under the applied regime of legal accountability.

Two provisions of the CSDDD, i.e., Article 22(1) and (2), establish distinct liability regimes.

First of all, according to Article 22(1) of the CSDDD, companies are liable for damages if two conditions are met:

1. they failed to comply with their obligations to prevent potential adverse impacts and bring actual adverse impacts to an end (obligations laid down in Articles 7 and 8 of the CSDDD);
2. as a result of this failure an adverse impact – which should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 – occurred and led to damage.

There are two problems with this provision. A first problem is that victims can invoke civil liability only for breaches of a limited number of due diligence obligations (ie when a company fails to prevent potential adverse impacts or mitigate actual adverse impacts). Based on the provisions laid down in the CSDDD civil liability cannot be invoked when a company fails to comply with other due diligence obligations (e.g. identification of actual or potential adverse impacts; monitoring the effectiveness of due diligence policy and measures). Furthermore, companies will be liable if there is a direct causal link between the company's failure to comply with its due diligence obligations and the damage. In the absence of specific provisions in the CSDDD addressing the burden of proof and the possibility of disclosure mechanisms²⁶, victims are likely to struggle to establish such a causal link.

Second, Recital 57 states that the company's liability for damage occurring at the level of **established indirect business relationships** should be subject to specific conditions. The

²⁵ Doug Cassel (August 2021), 'The New Draft Treaty on Business and Human Rights: How Best to Optimize the Incentives?'

²⁶ See below section c) on other procedural and practical issues.

company should not be liable if it carried out specific due diligence measures. This rule is detailed in Article 22(2) of the CSDDD.

Accordingly, a company shall not be liable for damages caused by an adverse impact arising as a result of the **activities of an indirect partner with whom it has an established business relationship** when the company has taken specific actions to prevent or bring to an end adverse impacts. These actions include seeking contractual assurances that the partner will ensure compliance with the company's code of conduct and, as necessary, a prevention action plan or a corrective action plan. For instance, the company should require the partner to use contractual cascading (i.e. seeking corresponding contractual assurances from its partners to the extent that they are part of the value chain) (Articles 7(2)(b) and 8(3)(c)).²⁷ When such contractual assurances are obtained, the contractual assurances or the contract shall be accompanied by the appropriate measures to verify compliance (Article 7(4) and Article 8(5)).

However, these exemption grounds do not apply when 'it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact'.

In the assessment of the existence and extent of liability under Article 22(2), due account shall be taken of the company's efforts, insofar as they relate directly to the damage in question, to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, as well as any collaboration with other entities to address adverse impacts in its value chains.

The logic, complexity, and ambiguity of Article 22(2) are likely to impede victims' access to justice. A company's liability stems primarily from its failure to seek contractual assurances from partners and implement appropriate compliance measures. However, the due diligence defence under Article 22(2) is based on the company's use of codes of conduct, action plans, and audit/verification processes, all of which have proven ineffective in preventing abuses.²⁸ Furthermore, when the company has taken the actions outlined in Article 22(2), the victim must show that 'it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact' in order for the company to be held liable. In the absence of specific guidance on this point, national judges will be left to decide which actions are reasonable or not, resulting in interpretation differences amongst Member States and uncertainty for plaintiffs (and businesses). Moreover, victims are unlikely to be able to demonstrate a high standard in the absence of adequate rules governing access to evidence. As a result, victims may be left without a remedy while potential abuses are not effectively prevented.

²⁷ Note the wording incoherence between Article 22(2), which mentions an indirect partner with whom the company has an established business relationship, and Articles 7(2)(b) and 8(3)(c), which mention 'a business partner with whom it has a direct business relationship' and 'a direct partner with whom it has an established business relationship'.

²⁸ Shift, 'The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive: Shift's Analysis' (March 2022).

d) Grounds for exoneration

The LBI provides that human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person (See Article 8.7). This is a significant addition to ensure that fulfilment of the obligations pertaining to human rights due diligence does not become a shield for businesses from liability in cases of abuse.

As previously mentioned, the CSDDD contains grounds for exoneration when civil liability is raised as a result of adverse human rights and environmental impacts occurring in a company's value chain (see analysis above).

e) Concluding remarks

The CSDDD contains two liability regimes when a company fails to meet its due diligence obligations and, as a result, harm occurs. However, liability at the level of established indirect business relationships should be subject to specific conditions, and the company should not be liable if it carried out specific due diligence measures. The LBI sets a liability regime that applies beyond due diligence obligations, and actually explicitly separates between fulfilment of due diligence obligations and liability for broader human rights abuses and environmental harm. The three grounds for establishing liability that the draft LBI currently provides for extend to a broad set of direct and indirect business relationships, without differentiation or specific limitations.

2. Private international law

The complex reality of corporate conduct, especially cross-border corporate practices, translates into a multitude of legal hurdles that face plaintiffs attempting to bring a legal suit in a case involving multiple entities within a corporate group or a supply chain. In such cases, where parent and subsidiary entities or multiple entities within a supply chain are implicated, the legal frameworks of multiple jurisdictions come into play. Issues of private international law pertaining to jurisdictional and applicable law embroiled in such cases could be detrimental to the viability of related legal claims.

In liability cases against companies operating through multinational corporate groups or supply chains, plaintiffs have to undertake a choice of forum and decide on which entity or entities to sue. For example, should they sue the entity whose direct actions led to the harm, such as the subsidiary undertaking mining operations in a host country? Should they sue the parent company or lead company whose decisions or other actions contributed to the harm? In which jurisdiction should they sue and what would that mean to the possibility of enjoining the other involved entity? What do those choices mean for jurisdictional issues and to the choice of applicable law?

Many stories of failure by victims of corporate abuse to access justice could be linked back to challenges emanating from private international law rules that are ill-equipped or ill-adapted to address cross-border claims, the cumulative effect of which makes it difficult to bring companies to account. For those reasons, private international law rules have been critiqued and seen as reluctant to become involved in regulating cross border activities and inefficient in

addressing corporate accountability issues.²⁹ Private international law has been characterized as refraining from confronting the ‘unequal distribution of wealth and power in the world’ and ‘...leaving ... largely untended the private causes of crisis and injustice affecting such areas as financial markets, levels of environmental pollution, [...among others]’.³⁰

The inclusion of private international law provisions in the LBI and the CSDD is hence relevant to addressing obstacles preventing victims of business-related human rights abuse and environmental harm from gaining access to justice in the context of transnational civil litigation against companies.

a) Jurisdiction

The success of tort liability claims in addressing the challenges of cross-border operations of corporate groups depends on the rules governing domestic courts’ power to adjudicate such disputes. The territorial focus of the adjudicative jurisdiction rules often makes them ineffective in the face of transnational corporate activities, enabled by corporate law that allows, and often incentivizes, companies to structure or spread their activities across jurisdictions while benefitting from legal separation and limited liability as well as regulatory discrepancies across jurisdictions.

Under the LBI, jurisdiction in civil claims is vested in the courts of the State where the human rights abuse occurred and/or produced effects; or an act or omission contributing to the human rights abuse occurred; or the legal or natural persons alleged to have committed such an act or omission are domiciled; or the victim is a national of or is domiciled (Article 9.1). Domicile is considered to be ‘the place of incorporation or registration; or place where the principal assets or operations are located; or central administration or management is located; or the principal place of business or activity on a regular basis’ (Article 9.2).

The approach adopted in the LBI attempts to facilitate joint litigation against parent and subsidiary companies, which is very important in cross-border cases, especially given that victims have limited resources to resort to multiple jurisdictions. The LBI provides that ‘Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is connected with a claim against a legal or natural person domiciled in the territory of the forum State’ (Article 9.4). Currently, jurisdiction pertaining to connecting cases is based on the domestic conflict of law rules.

Furthermore, the LBI explicitly prohibit the application of the *forum non conveniens* doctrine in cases covered under the treaty (Article 9.3). This doctrine allows courts, whose jurisdiction is established under the applicable rules, the discretion to decline to hear a case if it finds that it is an inappropriate forum or that another forum would be more appropriate.

Article 9.5 of the LBI addresses *forum necessitatis*, which is the doctrine upon which a forum serves as a court of last resort to hear a case although ordinarily it would lack jurisdiction due to the fact that no other competent forum is available to the claimant, or the court that

²⁹ See: Muir Watt, H. (2014). The relevance of private international law to the global governance debate. Private international law and global governance, 1-19. See also: Juenger, F. K. (1994). Private International Law or International Private Law. KCLJ, 5, 45.

³⁰ Ibid, H. Muir Watt, page 1.

otherwise would have jurisdiction refuses to permit the action, will provide an unjust judgment, or is unable to adjudicate the claim. This is a very important addition, and in the context of the LBI will apply to those business and human rights cases covered by the LBI. However, the links proposed in the draft (i.e. the presence of the claimant on the territory of the forum; b. the presence of assets of the defendant; or c. a substantial activity of the defendant) seem to set a high threshold that could hinder the operationalization of this doctrine. These links could form sufficient links for a traditional basis for jurisdiction. Indeed, an earlier draft of the LBI has proposed jurisdiction of courts where a business entity has ‘substantial business interest’. During the 7th session of the inter-governmental working group negotiating the LBI, Palestine suggested the addition of ‘holding of substantial assets’ by a company in a certain jurisdiction as basis for courts to be vested with jurisdiction over cases involving that company.

Overall, Article 9 of the LBI is currently designed in a way that attempts to facilitate bringing cases against parent or lead companies, which are embroiled in a cross-border harm, in their forum of domicile or Home States, and to facilitate the enjoining of other parties involved in such cases, such as subsidiaries. The approach in the LBI seeks to facilitate access to a forum when the victim is not able to utilize the courts of the home or host State. Such an approach to adjudicative jurisdiction is well suited for an instrument whose primary objectives is to ensure access to justice and remedy by victims of corporate violations and abuse.

One point raised during the consultations on the draft LBI text was the potential risk of parallel proceedings and conflict of jurisdictions. It is important to put issues into perspective. The risk of parallel proceedings brought by victims is limited given their limited access to resources and legal support to enable such action. But it was noted that parallel proceedings may arise for many reasons, including possible counterclaims, different class action claims by members of the same class and the possibility of corporations seeking declarations of non-liability.³¹ These risks could be addressed through procedural rules to organize the approach to multiple proceedings that could potentially arise and possibly defer to the court where proceedings are first filed, while preserving the current approach to adjudicative jurisdiction that is empowering victims.

The CSDDD contains no provisions governing jurisdiction when a civil claim brought under national legislation transposing Article 22 of the CSDDD raises cross-border elements (eg harm occurring outside the EU). As a result, the rules on jurisdiction of the Recast Brussels I Regulation will be applicable.

The general rule under the Recast Brussels I Regulation is that defendants domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.³² A company is deemed to be domiciled at the place where it has its statutory seat, central administration, or principal place of business.³³ Therefore, victims of human rights abuse and environmental harm resulting from a company’s failure to comply with its due diligence obligations under the CSDDD can sue this company in the Member State where it is domiciled. However, the situation becomes more complicated when a company subject to due diligence obligations is not domiciled in a Member State. The CSDDD does not use the domicile criterion

³¹ Joseph and Keyes, available at: <http://opiniojuris.org/2020/09/09/bhr-symposium-the-business-and-human-rights-treaty-and-private-international-law/>

³² Recast Brussels I Regulation, Article 4(1).

³³ Recast Brussels I Regulation, Article 63(1).

to determine which companies are subject to due diligence obligation. It applies to companies formed under the laws of a Member State or a third country, provided that they meet the requirements outlined in Article 2 (scope) and Article 3(a) (definition of 'company'). A company incorporated in a third country must generate more than a certain specific turnover in the EU. In the case of a claim brought against a company subject to due diligence obligations but not domiciled in the EU, and in accordance with the Recast Brussels I Regulation,³⁴ national law of the Member State where the claim is brought will determine whether the Member State's court is competent to hear the claim. To date, plaintiffs in cross-border business and human rights cases have struggled to establish jurisdiction of Member States' courts when the defendant to the action is a non-EU-domiciled company. In France, plaintiffs used to rely on *forum necessitatis* to establish French courts' jurisdiction over third-country domiciled defendants. However, the Court of Cassation interpreted *forum necessitatis* in such a restrictive manner that it almost impossible to rely on it anymore.³⁵ This situation raises the prospect of disparities in access to justice amongst Member States, as well as a lack of certainty for victims of adverse impacts.³⁶ As a result, this oversight could cause problems when affected persons seek to hold companies not domiciled in the EU liable under national legislation transposing Article 22.

It is worth noting that, in anticipation of the adoption of the due diligence directive, the European Parliament's Committee on Legal Affairs adopted a draft report on the due diligence directive in 2020,³⁷ in which it proposed amendments to the Recast Brussels I Regulation to address jurisdictional issues that arise in cross-border business and human cases. One of the suggested amendments was to include a *forum necessitatis* provision applicable to cross-border business and human rights claims (Article 26a). However, these suggestions were not included in the final resolution on the directive adopted by the European Parliament in March 2021.³⁸

To conclude: Unlike the LBI, the CSDDD contains no provisions governing jurisdiction when a civil action brought under national law transposing Article 22 of the CSDDD raises cross-border elements. This is most likely due to the existence of an existing EU legal framework in this area (i.e., Brussels Ia Regulation). Nonetheless, the LBI could complement the CSDDD on this point. It includes provisions for determining jurisdiction.

b) Applicable law

Choice of law, as it often comes into play in cross-border corporate liability cases directs the choice of applicable law towards the legal regime where the harm occurred. In such transnational proceedings, choice of law could be crucial especially where potential applicable law is significantly more lenient to the corporate defendant. Various studies have shown that

³⁴ Recast Brussels I Regulation, Article 6(1).

³⁵ Oscar Oesterlé and Sandra Cossart, 'Pour la consécration d'un *forum necessitatis* en cas de violations de droits humains par les entreprises transnationales' (2018) 1808 *Semaine Sociale Lamy*.

³⁶ Marion Ho-Dac, 'Brief Overview of the Directive Proposal on Corporate Due Diligence and PIL' (*EAPIL*, 27 April 2022) <<https://eapil.org/2022/04/27/brief-overview-of-the-directive-proposal-on-corporate-due-diligence-and-pil/>> accessed 22 May 2022.

³⁷ DRAFT REPORT with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), 11 September 2020.

³⁸ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

the issue of the applicable law can constitute a significant barrier to accessing remedy for victims of human rights abuses.³⁹

The single-focus of the *lex loci delicti* rule directing cases towards the substantive law of the place where the tort occurs does not seem to be an efficient rule in the context of corporate liability cases involving multiple instances of decision making, in which multiple entities are embroiled, and the source of the harm spreads across multiple jurisdictions.

In the context of the LBI, it is important to bring more clarity to the rules pertaining to applicable law and attempt to control any uncertainties in this regard. Lack of certainty and complexity could work against victims because it will also complicate the considerations that victims' lawyer face when deciding where to bring the case and how to articulate or focus the case.

Article 11.2 of the draft text of the LBI provides that 'All matters of substance which are not specifically regulated under this [international legally binding instrument] may, upon the request of the victim, be governed by the law of another State where: a. the acts or omissions have occurred or produced effects; or b. the natural or legal person alleged to have committed the acts or omissions is domiciled'. The core point of this article is to put the victim in the driver's seat in terms of choosing which substantive law would be applied. This is a choice-of-law provision in favour of the victim.

Such choice-of-law provisions have not been uncommon. They are often used in relation to cases involving discrepancy between the parties, such as consumers or employees. Several jurisdictions, while they follow the law of place of conduct or injury, had incorporated such victim-empowering approaches, thus allowing tort victims to choose between the laws of the state of conduct and the state of injury, or authorizing the court to choose the law most favorable to the plaintiff or victim.⁴⁰ These approaches have been justified on the basis of the principle of favoring the injured party. The Rome II Regulation does so in environmental torts, which allows the claimant to choose between the law of the place where the injury occurs and the law of the place where the tort was committed. This approach had been also adopted by multiple European jurisdictions. For example, the German private international law codification provided that 'Claims arising from tort are governed by the law of the state in which the person liable to provide compensation acted. The injured person may demand, however, that the law of the state where the result took effect be applied instead'.⁴¹ The Italian codification provided that torts are to be governed by the law of the state of injury, but 'the person suffering damage may request the application of the law of the State in which the event causing the damage took place'.⁴² The Portuguese codification gave this choice to the court coupled with a foreseeability proviso by providing that '[i]f the law of the state of injury holds the actor liable but the law of

³⁹ See: A. Marx, C. Bright and J. Wouters, 'Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries', Study requested by the DROI Committee, European Parliament (February 2019), at 112, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)

⁴⁰ Symeon C. Symeonides, Choice of Law in Cross-Border Torts: Why Plaintiffs Win and Should, 61 *Hastings L.J.* 337 (2009). Available at: https://repository.uchastings.edu/hastings_law_journal/vol61/iss2/2

⁴¹ Einführungsgesetz zum Bürgerlichen Gesetzbuch [Introductory Act to the Civil Code], May 21, 1999, BGBl.I at 1026, art. 40(I) (F.R.G.), amended by Federal Act of 1999 for the Revision of Private International Law, translated in Peter Hay, From Rule-Oriented to "Approach" in German Conflicts Law: The Effect of s986 and 1999 Codifications, 47 *AM. J. COMP. L.* 633, 650 (1999), referenced in supra. Symeon C. Symeonides (2009)

⁴² Law No. 218 of 31 May 1995, Article 62, Gazz. Uff., Supp. Ord. No. 128, June 3, 1995, translated in Andrea Giardina, Italy: Law Reforming the Italian System of Private International Law, 35 *INT'L MATERIALS LEGIS. & PERSP.* 760,779 (1996), referenced in supra. Symeon C. Symeonides (2009)

the state where he acts does not, the law of the former state shall apply, provided the actor could foresee the occurrence of damage in that country as a consequence of his act or omission'⁴³.

If the objective is to fulfil the highest human rights standards, then the conflict of laws regimes or systems should not be blind to the goal of 'material justice' or the substantive outcome that the law to be applied produced.⁴⁴ A choice of law provision in favour of victims, to be applied to cross border business and human rights cases as the ones to fall under the LBI, would help elevate the applicable law to the higher standards from a human rights perspective rather than allowing traditional concepts of conflict of laws to trump meaningful access to justice, in a result-oriented approach. Offering a choice of law to victims would also take into consideration the specific nature of the business-related human rights claims and help redress the power imbalance between the parties. In business and human rights cases as the ones that the LBI would cover, as long as minimum connecting factors are to be found, the law that favours the substantive fulfilment of human rights should apply.

Article 22(5) of the CSDDD asserts the 'overriding mandatory application' of the liability regime provided for in Article 22 'where the law applicable to claims to that effect is not the law of a Member State'.⁴⁵ This provision ensures the effective application of the liability regime under Article 22. As a result of the mandatory nature of Article 22, the CSDDD does not provide for claimants the possibility to choose the law applicable through choice-of-law provisions.

It is worth noting that in its 2020 draft report on the due diligence directive,⁴⁶ the European Parliament's Committee on Legal Affairs also proposed amending the Rome II Regulation. It suggested 'to include a specific choice of law provision for civil claims relating to alleged business-related human rights abuses committed by EU companies in third countries, which would allow claimants who are victims of human rights abuses allegedly committed by undertakings operating in the Union to choose a law with high human rights standards'. A new Article 6a, entitled 'Business-related human rights claims', would have been modelled after Article 7 of the Rome II Regulation on environmental damage. The proposal would have given victims of human rights violations the option of choosing between potentially four different laws: (1) the law of the country where the damage occurred (i.e. the law of the place of injury), (2) the law of the country where the event giving rise to damage occurred (i.e. the law of the place of action), (3) the law of the country where the parent company has its domicile or, where the parent company does not have a domicile in a Member State, (4) the law of the country

⁴³ C6DIGO CIVIL PORTUG as amended in 1966, art. 45(2), referenced in supra. Symeon C. Symeonides (2009). Some jurisdictions condition the application of the law chosen to an express foreseeability proviso requiring that the actor could foresee the occurrence of damage as a consequence of his act or omission in the country whose law will be applied.

⁴⁴ Traditional choice-of-law systems have set as goal the application of the law of the state that has the most appropriate relationship with the case, regardless of the substantive quality of the result that law produces. The "material justice" view rejects this goal and instead aims for the law that would produce the most appropriate substantive result in the particular case. See footnote 46 of *ibid*, Symeonides, S. C. (2009).

⁴⁵ This provision is consistent with Article 20 of the directive on corporate due diligence and corporate accountability proposed by the European Parliament in 2021. Article 20, which governs private international law, provides that 'Member States shall ensure that relevant provisions of this Directive are considered overriding mandatory provisions in line with Article 16 of Regulation (EC) No 864/2007'. See European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

⁴⁶ DRAFT REPORT with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), 11 September 2020.

where the parent company operates. However, this suggestion was not included in the final resolution on the due diligence directive adopted by the European Parliament in March 2021.⁴⁷

Summing up the above analysis, both the LBI and the CSDDD contain provisions on applicable law in cross-border civil lawsuits. They take a different approach to this issue, however. Because of the mandatory nature of Article 22, the CSDDD does not allow claimants to select the applicable law through choice-of-law provisions. Yet, it is important to note that the LBI covers a much broader set of rules that could be embroiled in the cases that the LBI would cover, including human rights, tort and environmental laws. If the two instruments are adopted in their current form, their provisions on applicable law could conflict with each other in the context of civil proceedings relating to corporate due diligence obligations.

3. Other procedural and practical issues pertaining to access to justice

It is critical to determine whether the LBI and CSDDD contain provisions that, in the context of their civil liability regime, remove the procedural and practical barriers that have prevented victims of business-related human rights abuse and environmental harm from seeking justice.

As a result of its emphasis on access to justice, the LBI expressly addresses the majority of procedural and practical obstacles that victims face in human rights and environmental lawsuits against companies, primarily through Article 4 (rights of victims) and Article 7 (access to remedy). The CSDDD, on the other hand, does not address such obstacles, implicitly leaving Member States to decide whether and how to address them. From an access to justice perspective, this approach is problematic because it creates the risk that the CSDDD's liability regime will remain a dead letter in the absence of strong procedural safeguards ensuring that victims, usually the weaker parties in such disputes, can effectively sue companies. It also raises the risk of multi-speed justice across the EU, with victims having limited access to justice in Member States lacking appropriate procedural rules (e.g. disclosure) or practical mechanisms (eg sufficient legal aid systems). However, the lack of specific provisions on some important procedural aspects is most likely due to the division of competences between the EU and the Member States. Indeed, Member States retain competence in most of the procedural aspects at stake here.

The **role of victims in judicial proceedings** is emphasised in the LBI. Article 4 on victims' rights outlines a number of guarantees that victims must be able to enjoy, including when seeking redress. For example, victims must be guaranteed the right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation, and effective remedy (Article 4.2.c). They must also be guaranteed the right to submit claims, including by a **representative or through class action** in appropriate cases, to courts and non-judicial grievance mechanisms of the States Parties (Article 4.2.d). Furthermore, Article 7 on access to remedy includes provisions allowing victims to participate in proceedings. States Parties are required to provide adequate and effective legal assistance to victims throughout the legal process by **making information about their rights and the status of their claims available and accessible to victims** (Article 7.3.a) and guaranteeing the rights of victims **to be heard in all stages of proceedings** (Article 7.3.b). In comparison, there are no rules in the

⁴⁷ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

CSDDD that govern victim participation in proceedings, such as standing or collective redress. This means that it is up to the Member States to decide on those matters. The omission of collective redress mechanisms from the CSDDD comes as a surprise, given that the European Union has legislated on collective redress over the last ten years, requiring Member States to develop such mechanisms in specific fields. Furthermore, Commissioner Reynders had mentioned the use of collective redress mechanisms to ensure access to justice in the context of the proposed directive.⁴⁸

With regard to **evidence matters**, the LBI takes into account and seeks to reduce the asymmetry of power that typically exists between victims (ie plaintiffs in the case) and corporate defendants. For example, the LBI provides that ‘States Parties shall enact or amend laws allowing judges to reverse the **burden of proof** in appropriate cases to fulfil the victims’ right to access to remedy, where consistent with international law and its domestic constitutional law’ (Article 7.5). Furthermore, even though it does not explicitly address the issue of disclosure, the LBI requires victims to ‘be guaranteed **access to information** [...] relevant to pursue effective remedy’ (Article 4.2.f). States Parties must also ensure that their domestic laws facilitate access to information, including through international cooperation outlined in the LBI (Article 7.2). In contrast, the CSDDD contains no rules governing evidence matters in civil liability claims, such as burden of proof or disclosure. According to Recital 58 of the CSDDD, the ‘liability regime does not regulate who should prove that the company’s action was reasonably adequate under the circumstances of the case, therefore this question is left to national law’.

In terms of **litigation costs**, the LBI states that victims must be guaranteed **legal aid** relevant to pursue effective remedy (Article 4.2.f). State Parties are also required to provide adequate and effective legal assistance to victims throughout the legal process, including by **avoiding unnecessary costs** or delays for bringing a claim and during the disposition of cases and the execution of orders or decrees granting awards (Article 7.3.c). Furthermore, States Parties must ensure that ‘court fees and rules concerning allocation of legal costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings’ and that ‘there is provision for possible waiving of certain costs in suitable cases’ (Article 7.4). An important progressive measure is the **creation of an international fund for victims** to provide legal and financial aid to victims seeking redress (Article 15.7). The CSDDD, on the other hand, contains no rules governing litigation costs, such as legal aid, funding mechanisms, or the loser pays principle.

The LBI specifies the various **types of remedies** that should be available in business and human rights cases. Victims must be guaranteed the right to individual or collective reparation and effective remedy, such as ‘restitution, compensation, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration’ (Article 4.2.c). In contrast, the CSDDD makes no mention of the types of remedies that should be available in the context of civil claims brought under national law transposing Article 22. Injunctive relief, which could be useful in preventing or stopping adverse impacts, is not addressed.

⁴⁸ Mirjam Erb and Dr. Julia Grothaus, ‘EU Commissioner for Justice reveals details of forthcoming EU legislative proposal on human rights supply chain due diligence’ (*Lexology*, 3 March 2021) <<https://www.lexology.com/library/detail.aspx?g=76345b5f-b3a7-4035-b5dd-8f0c0d89f56e>> accessed 22 May 2022.

In conclusion, it becomes clear that contrary to the LBI, the CSDDD contains no provisions addressing the procedural and practical barriers that have prevented victims of business-related human rights abuse and environmental harm from seeking justice so far. Because the majority of these aspects are within the competence of the Member States, it is unlikely that they will be included in the final CSDDD. As a result, the LBI, which contains provisions on these procedural aspects, could fill the gaps and play a complementary role by imposing specific obligations on States Parties.

Annex I – Examples of EU and Member State competence in topics covered by the LBI. Note: In order to provide a comprehensive analysis of MS competence in key topics, a fuller assessment of the extent of EU and MS competence in relevant EU instruments would be needed. **This table provides only a number of examples and is non-exhaustive.**

Key topics	Provisions of the 3 rd draft of the LBI	EU competence	MS competence
Due diligence	Article 6. Prevention	<p>Relevant instruments:</p> <p>Timber Regulation⁴⁹ à based on Article 192(1) TFEU (environmental protection)</p> <p>Non-financial reporting directive⁵⁰ à Article 50(1) TFEU (freedom of establishment)</p> <p>Conflict Minerals Regulation⁵¹ à based on Article 207 (common commercial policy)</p> <p>CSDDD à based on Articles 50(1)⁵² and (2)(g)⁵³ (freedom of establishment) and 114 TFEU (approximation of laws)</p>	<p>Timber Regulation à Rules on penalties applicable to infringements</p> <p>Conflict Minerals Regulation à Rules applicable to infringements</p>

⁴⁹ Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market.

⁵⁰ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

⁵¹ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

⁵² Articles 50(1) of the TFEU states: 'In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives'.

⁵³ Article 50(2)(g) of the TFEU states: 'The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: [...] (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union'.

Key topics	Provisions of the 3 rd draft of the LBI	EU competence	MS competence
Conflict of jurisdiction	Article 9. Adjudicative jurisdiction	Relevant instrument: Recast Brussels I Regulation à based on Art 81(2)(c) TFEU (compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction) and Article 81(2)(e) TFEU (effective access to justice)	In some situations, the rules governing jurisdiction are determined by MS national law (eg when defendant not domiciled in the EU (Art. 6(1) Recast Brussels I Regulation))
Conflict of laws	Article 11. Applicable law	Relevant instrument: Rome II Regulation à based on Articles 61(c) TEC (measures in the field of judicial cooperation in civil matters as provided for in Article 65) and 67 TEC Relevant articles of TFEU: Art 81(2)(c) TFEU: compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction Article 81(2)(e) TFEU: effective access to justice	
Collective redress	Article 4. Rights of victims	Relevant instrument: Collective Redress Directive ⁵⁴ à based on Article 114 TFEU (approximation of laws). Focuses on collective redress mechanisms for consumers	MS are competent to determine collective redress rules in civil matters

⁵⁴ Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

Key topics	Provisions of the 3 rd draft of the LBI	EU competence	MS competence
Corporate liability	Article 8. Legal liability	<p>Relevant instruments: Environmental Liability Directive⁵⁵ à based on Article 175(1) TEC (now Article 192 TFEU on environmental protection). Applies to legal persons.</p> <p>CSDDD à based on Articles 50(1)⁵⁶ and (2)(g)⁵⁷ (freedom of establishment) and 114 TFEU (approximation of laws)</p>	MS are competent to determine general civil liability rules applicable to companies, unless the EU imposes specific liability rules.
Evidence	<p>Article 4. Rights of victims</p> <p>Article 7. Access to remedy</p> <p>Article 12. Mutual legal assistance & international judicial cooperation</p>	<p>Relevant instrument : Recast Regulation on taking of Evidence⁵⁸ à based on 81(2)(d) TFEU: cooperation in the taking of evidence. Application in cross-border situations.</p>	<p>Evidence rules are usually governed by MS national law.</p> <p>MS determine the rules that apply in evidence-taking cooperation with non-EU countries.</p>

⁵⁵ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

⁵⁶ Articles 50(1) of the TFEU states: 'In order to attain freedom of establishment as regards a particular activity, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall act by means of directives'.

⁵⁷ Article 50(2)(g) of the TFEU states: 'The European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular: [...] (g) by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union'.

⁵⁸ Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) (recast).

Key topics	Provisions of the 3 rd draft of the LBI	EU competence	MS competence
Litigation costs	Article 4. Rights of victims Article 7. Access to remedy	Relevant instrument: Directive on legal aid ⁵⁹ à based on Articles 61(c) TEC (measures in the field of judicial cooperation in civil matters as provided for in Article 65) (now Article 67 TFEU) and 67 TEC. Minimum common rules that applies to cross-border disputes only. Relevant TFEU's articles: Article 81(2)(e) TFEU: effective access to justice Article 81(2)(f) TFEU: the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States	MS are competent to determine rules on legal aid in civil disputes and application of legal aid rules to third-country nationals not residing in the EU
Remedies	Article 4. Rights of victims Article 7. Access to remedy	Relevant instrument: Directive on injunctions for consumer protection ⁶⁰ à based on Article 95 TEC (now Article 114 TFEU). Applies to consumer cases.	MS are competent to determine rules on remedies in civil litigation.
Mutual recognition and enforcement of foreign judgments	Article 12. Mutual legal assistance &	Relevant instrument: Recast Brussels I Regulation à based on Art 81(2)(a) TFEU (mutual recognition and	MS determine the rules applicable to recognition and enforcement of foreign judgments

⁵⁹ Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes.

⁶⁰ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests. This directive will be repealed by and replaced by the Collective Redress Directive as of 25 June 2023.

Key topics	Provisions of the 3 rd draft of the LBI	EU competence	MS competence
	international judicial cooperation	enforcement between Member States of judgments and of decisions in extrajudicial cases) and Article 81(2)(e) TFEU (effective access to justice)	

Annex II – Comparison concerning scope and due diligence obligations

	Draft directive on Corporate Sustainability Due Diligence	Third Revised Draft Legally Binding Instrument
1. Company scope	<p>Article 2 EU companies - Companies with >500 employees and >€150m turnover worldwide; OR - Companies in high-risk sectors: agriculture, garment and minerals (>250 employees and >€40m turnover worldwide)</p> <p>Non-EU companies - Companies with >€150m turnover in the EU - Companies in high-risk sectors: agriculture, garment and minerals (>€40m turnover in the EU)</p> <p>Article 3(a) Detailed definition of company</p>	<p>Article 3.1 Text applies to ‘all business activities including business activities of a transnational character’</p> <p>Article 3.2 States may differentiate between business enterprises according to their size, sector, operational context or the severity of impacts on human rights</p> <p>Text uses ‘business enterprises’ throughout as an umbrella term, but it is not defined.</p> <p>+ Article 6.5 ‘ States Parties may provide incentives and adopt other measures to facilitate compliance (...) by micro, small and medium sized business enterprises.’</p>

2. Due diligence process		
2.1. State obligations	<p>Article 4 'Member States shall ensure that companies conduct human rights and environmental due diligence' by carrying out actions described in Articles 5-11. i.e.:</p> <ul style="list-style-type: none"> (a) integrating due diligence into their policies in accordance with Article 5; (b) identifying actual or potential adverse impacts in accordance with Article 6; (c) preventing and mitigating potential adverse impacts, and bringing actual adverse impacts to an end and minimising their extent in accordance with Articles 7 and 8; (d) establishing and maintaining a complaints procedure in accordance with Article 9; (e) monitoring the effectiveness of their due diligence policy and measures in accordance with Article 10; (f) publicly communicating on due diligence in accordance with Article 11. 	<p>Article 6.1 'States Parties shall regulate effectively the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control'</p> <p>Article 6.2 'States Parties shall take appropriate legal and policy measures to ensure that business enterprises, (...) within their territory, jurisdiction, or otherwise under their control, respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their business activities and relationships.'</p> <p>Article 6.3 'For that purpose, States Parties shall require business enterprises to undertake human rights due diligence, proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships.'</p>
2.2. Integrate due diligence into company policy	<p>Article 5 Integrating due diligence into companies' policies 1.'The due diligence policy shall contain all of the following:</p> <ul style="list-style-type: none"> (a) a description of the company's approach, including in the long term, to due diligence; (b) a code of conduct describing rules and principles to be followed by the company's employees and subsidiaries; (c) a description of the processes put in place to implement due diligence, including the measures taken to verify 	<p>No specific article requiring states to ensure companies integrate due diligence into their policies</p>

	<p>compliance with the code of conduct and to extend its application to established business relationships.’</p> <p>2. Member States shall ensure that the companies update their due diligence policy annually.’</p>	
<p>2.3. Identify</p>	<p>Article 6 Identifying actual and potential adverse impacts</p> <p>‘1. Member States shall ensure that companies 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’.</p> <p>2. EU Companies in high-risk sectors (agriculture, garment and minerals with >250 employees and >€40m turnover worldwide) AND non-EU companies in high-risk sectors: agriculture, garment and minerals (with >€40m turnover in the EU) ‘shall only be required to identify actual and potential severe adverse impacts relevant to the respective sector’.</p> <p>3. When regulated financial undertakings (defined in Article 3, point (a)(iv)) ‘provide credit, loan or other financial services, identification of actual and potential adverse human rights impacts and adverse environmental impacts shall be carried out only before providing that service’.</p> <p>4. Member States shall ensure that, for the purposes of identifying (...) adverse impacts (...) companies are entitled to make use of appropriate resources, including independent reports and information gathered through the complaints procedure provided for in Article 9.</p>	<p>Article 6.3 (a)</p> <p>States shall require business enterprises to (a) ‘Identify, assess and publish any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships’.</p> <p>Article 6.4</p> <p>In order to identify actual or potential human rights abuses, states shall ensure that measures taken by companies include:</p> <p>a. Undertaking (...) regular human rights, labour rights, environmental and climate change impact assessments throughout their operations;</p> <p>b. Integrating a gender perspective, in consultation with potentially impacted women and women’s organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experienced by women and girls;</p> <p>c. Conducting meaningful consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities,</p>

	<p>Companies shall, where relevant, also carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts.’</p>	<p>indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas; d. Ensuring that consultations with indigenous peoples are undertaken in accordance with the internationally agreed standards of free, prior and informed consent; g. Adopting and implementing enhanced human rights due diligence measures to prevent human rights abuses in occupied or conflict-affected areas, including situations of occupation.</p>
<p>2.4. Avoid/ Prevent/ Mitigate</p>	<p>Article 7 Preventing potential adverse impacts ‘1.Member States shall ensure that companies take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts that have been, or should have been, identified.’ 2. Companies shall be required to: (a) develop and implement a prevention action plan (b) seek contractual assurances from a business partner with whom it has a direct business relationship that it will ensure compliance with the company’s code of conduct and, as necessary, a prevention action plan (c) make necessary investments, such as into management or production processes and infrastructures, to comply with paragraph 1. (d) provide targeted and proportionate support for an SME with which the company has an established business relationship, where compliance with the code of conduct</p>	<p>Article 6(3)(b) States shall require business enterprises to ‘take appropriate measures to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses which the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages, and take reasonable and appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships’</p> <p>Article 6.4 In order to identify actual or potential human rights abuses, states shall ensure that measures taken by companies include: f. Integrating human rights due diligence requirements in contracts regarding their business relationships and making provision for capacity building or financial contributions, as appropriate.</p>

	<p>or the prevention action plan would jeopardise the viability of the SME</p> <p>(e) in compliance with Union law including competition law, collaborate with other entities, including, where relevant, to increase the company's ability to bring the adverse impact to an end, in particular where no other action is suitable or effective</p> <p>3. As regards potential adverse impacts that could not be prevented or adequately mitigated by the measures in paragraph 2, the company may seek to conclude a contract with a partner with whom it has an indirect relationship, with a view to achieving compliance with the company's code of conduct or a prevention action plan</p> <p>4. The contractual assurances or the contract shall be accompanied by the appropriate measures to verify compliance</p> <p>5. As regards potential adverse impacts (...) that could not be prevented or adequately mitigated (...) the company shall be required to refrain from entering into new or extending existing relations with the partner in connection with or in the value chain of which the impact has arisen and shall (...) take the following actions: (a) temporarily suspend commercial relations with the partner in question, while pursuing prevention and minimisation efforts, if there is reasonable expectation that these efforts will succeed in the short-term; (b) terminate the business relationship with respect to the activities concerned if the potential adverse impact is severe.</p> <p>6. When regulated financial undertakings (defined in Article 3, point (a)(iv)) 'provide credit, loan or other</p>	
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	<p>financial services, they shall not be required to terminate the credit, loan or other financial service contract when this can be reasonably expected to cause substantial prejudice to the entity to whom that service is being provided’.</p>	
<p>2.5. Bring to an end</p>	<p>Article 8 Bringing actual adverse impacts to an end 1. Member States shall ensure that companies take appropriate measures to bring actual adverse impacts that have been, or should have been, identified.(...) 3. Companies shall be required to take the following actions, where relevant (a) neutralise the adverse impact or minimise its extent, including by the payment of damages to the affected persons and of financial compensation to the affected communities. (...); (b) where necessary due to the fact that the adverse impact cannot be immediately brought to an end, develop and implement a corrective action plan with reasonable and clearly defined timelines for action and qualitative and quantitative indicators for measuring improvement. Where relevant, the corrective action plan shall be developed in consultation with stakeholders; (c) seek contractual assurances from a direct partner with whom it has an established business relationship that it will ensure compliance with the code of conduct and, as necessary, a corrective action plan, including by seeking corresponding contractual assurances from its partners, to the extent that they are part of the value chain (contractual cascading). (...).</p>	<p>No specific article requiring states to ensure companies bring human rights abuses to an end.</p>

	<p>(d) make necessary investments, such as into management or production processes and infrastructures (...)</p> <p>(e) provide targeted and proportionate support for an SME with which the company has an established business relationship, where compliance with the code of conduct or the corrective action plan would jeopardise the viability of the SME;</p> <p>(f) in compliance with Union law including competition law, collaborate with other entities, including, where relevant, to increase the company's ability to bring the adverse impact to an end, in particular where no other action is suitable or effective.</p> <p>4. As regards actual adverse impacts that could not be brought to an end or adequately mitigated by the measures in paragraph 3, the company may seek to conclude a contract with a partner with whom it has an indirect relationship, with a view to achieving compliance with the company's code of conduct or a corrective action plan. When such a contract is concluded, paragraph 5 shall apply.</p> <p>5. The contractual assurances or the contract shall be accompanied by the appropriate measures to verify compliance. (...).</p> <p>6. As regards actual adverse impacts within the meaning of paragraph 1 that could not be brought to an end or the extent of which could not be minimised (...) the company shall refrain from entering into new or extending existing relations with the partner in connection to or in the value chain of which the impact has arisen and shall, where the</p>	
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	<p>law governing their relations so entitles them to, take one of the following actions:</p> <p>(a) temporarily suspend commercial relationships with the partner in question, while pursuing efforts to bring to an end or minimise the extent of the adverse impact, or</p> <p>(b) terminate the business relationship with respect to the activities concerned, if the adverse impact is considered severe.</p> <p>7. When regulated financial undertakings (defined in Article 3, point (a)(iv)) ‘provide credit, loan or other financial services, they shall not be required to terminate the credit, loan or other financial service contract, when this can be reasonably expected to cause substantial prejudice to the entity to whom that service is being provided’.</p>	
2.6. Monitor	<p>Article 10 Monitoring</p> <p>‘Member States shall ensure that companies carry out periodic assessments of their own operations and measures, those of their subsidiaries and, where related to the value chains of the company, those of their established business relationships, to monitor the effectiveness of the identification, prevention, mitigation, bringing to an end and minimisation of the extent of human rights and environmental adverse impacts. Such assessments shall be based, where appropriate, on qualitative and quantitative indicators and be carried out at least every 12 months and whenever there are reasonable grounds to believe that significant new risks of the occurrence of those adverse impacts may arise. The due diligence policy shall be</p>	<p>Article 6(3)(c)</p> <p>States shall require business enterprises to ‘monitor the effectiveness of their measures to prevent and mitigate human rights abuses, including in their business relationships.’</p>

	updated in accordance with the outcome of those assessments’.	
2.7. Communicate	<p>Article 11 Communicating</p> <p>Member States shall ensure that companies that are not subject to reporting requirements under Articles 19a and 29a of Directive 2013/34/EU report on the matters covered by this Directive by publishing on their website an annual statement in a language customary in the sphere of international business. The statement shall be published by 30 April each year, covering the previous calendar year.’</p>	<p>Article 6(3)(d)</p> <p>States shall require business enterprises to ‘communicate regularly and in an accessible manner to stakeholders, particularly to affected or potentially affected persons, to account for how they address through their policies and measures any actual or potential human rights abuses that may arise from their activities including in their business relationships’</p> <p>Article 6.4</p> <p>‘States Parties shall ensure that human rights due diligence measures undertaken by business enterprises shall include:</p> <p>a. (...) Publishing regular human rights, labour rights, environmental and climate change impact assessments throughout their operations;</p> <p>e. Reporting publicly and periodically on non-financial matters, including information about group structures and suppliers as well as policies, risks, outcomes and indicators concerning human rights, labour rights, health, environmental and climate change standards throughout their operations, including in their business relationships;</p>
3. Value chain scope		
	<ul style="list-style-type: none"> - Own operations and subsidiaries - ‘Established business relationships’ (direct and indirect relationships that are or are expected to be lasting, not negligible and not merely ancillary) in all tiers of the global value chain, upstream and downstream 	<p>Article 1.5</p> <p>‘Business relationship refers to any relationship between natural or legal persons including State and non State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents,</p>

	<p>- SME clients are excluded from financial institutions' due diligence</p>	<p>suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State, including activities undertaken by electronic means.</p> <p>Business enterprises shall carry out all the due diligence steps 'throughout their business activities and relationships' (Article 6).</p>
4. Material scope		
	<p>Article 3 b. 'adverse environmental impact' means an adverse impact on the environment resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II.</p> <p>This annex lists environmental conventions BUT does not include the Paris Agreement or other climate instruments.</p> <p>Article 15 Combating climate change This article creates a separate obligation for large companies to 'adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement.' However, climate due diligence is not included in the due diligence process.</p>	<p>Article 1.2 Human rights abuse shall mean any direct or indirect harm in the context of business activities through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment.</p> <p>Article 3.3 The LBI 'shall cover all internationally recognized human right sand fundamental freedoms binding on the State Parties of this [treaty] including those recognized in the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, all core international human rights treaties and fundamental ILO Conventions to which a State is a Party, and customary international law.</p> <p>Climate is mentioned in Article 6.4 (a) and (e) in relation to impact assessments and reporting respectively.</p>

	<p>(c) ‘adverse human rights impact’ means an adverse impact on protected persons resulting from the violation of one of the rights or prohibitions listed in the Annex, Part I Section 1, as enshrined in the international conventions listed in the Annex, Part I Section 2;</p> <p>This Annex includes the International Bill of Rights, all the UN Core Conventions, ILO Conventions, the UN Declaration on the Rights of Indigenous Peoples, and anti-trafficking instruments.</p>	
<p>5. Compliance /enforcement of due diligence obligation</p>		
	<p>Articles 17 (Supervisory Authorities), 18 (Powers of supervisory authorities), 20 (Sanctions) and 21 (European Network of Supervisory Authorities) detail how within Member States supervisory authorities will supervise compliance and will have ‘the power to request information and carry out investigations’, and to ‘conduct inspections’ They will also be able to ‘(a) order the cessation of infringements of the national provisions adopted pursuant to this Directive, abstention from any repetition of the relevant conduct and, where appropriate, remedial action proportionate to the infringement and necessary to bring it to an end; (b) to impose pecuniary sanctions (...); (c) to adopt interim measures to avoid the risk of severe and irreparable harm.</p>	<p>Article 6.6 States Parties shall ensure that effective national procedures are in place to ensure compliance with the obligations laid down under this Article, taking into consideration the potential human rights abuses resulting from the business enterprises’ size, nature, sector, location, operational context and the severity of associated risks associated with the business activities in their territory, jurisdiction, or otherwise under their control, including those of transnational character.</p> <p>Article 6.7 (...) State Parties shall provide for adequate penalties, including appropriate corrective action where suitable, for</p>

	<p>Article 19 (Substantiated concerns) 'Natural and legal persons are entitled to submit substantiated concerns to any supervisory authority when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive ('substantiated concerns')</p>	<p>business enterprises failing to comply with provisions of Articles 6.3 and 6.4.</p> <p>Article 6.8 In setting and implementing their public policies and legislation with respect to the implementation of this [treaty] States Parties shall act in a transparent manner and protect these policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of transnational character.</p>
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Annex III – Comparison concerning civil liability and related issues

	Draft directive on Corporate Sustainability Due Diligence (CSDDD)	Third Revised Draft Legally Binding Instrument
1. Civil liability		
1.1 Liability of both legal and natural persons	<p><i>Article 22</i> Civil liability 1. Member States shall ensure that companies are liable for damages if: [...]</p> <p>No mention of liability of natural persons.</p> <p>Reference to a ‘light’ directors’ duty of care (Article 25). However, no direct reference to the director’s civil liability when they fail to uphold their duty of care.</p>	<p><i>Article 8.6</i> Civil liability ‘States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, ... including those of transnational character, for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses, when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to take adequate measures to prevent the abuse’.</p>
1.2 Civil liability in corporate groups (parent company/subsidiary)	<p><i>Article 1</i> Subject matter 1. This Directive lays down rules (a) on 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</p>	<p><i>Article 1</i> Definitions</p> <p><i>Article 1.2</i> ‘Human rights abuse shall mean any direct or indirect harm in the context of business activities through acts or omissions, against any person or group of persons, that impedes the full enjoyment of internationally recognized human rights and fundamental freedoms, including the right to a safe, clean, healthy and sustainable environment’.</p> <p><u>Additional references to environment and climate can be found in:</u></p>

	Draft directive on Corporate Sustainability Due Diligence (CSDDD)	Third Revised Draft Legally Binding Instrument
	<p>(b) on liability for violations of the obligations mentioned above. [...]</p> <p><i>Article 22</i> Civil liability 1. Member States shall ensure that companies are liable for damages if: (a) they failed to comply with the obligations laid down in Articles 7 and 8 and; (b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage. [...]</p> <p>3. The civil liability of a company for damages arising under this provision shall be without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the value chain.</p> <p>4. The civil liability rules under this Directive shall be without prejudice to Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered</p>	<p><i>Article 4.2.c</i> on remedies: ‘...effective remedy in accordance with this (Legally Binding Instrument) and international law, such as restitution, compensation, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration; ...’</p> <p><i>Article 6.4 (a) and (e)</i> in relation to impact assessments and reporting respectively.</p> <p><i>Article 1.5</i> ‘Business relationship’ refers to any relationship between natural or legal persons, including State and non-State entities, to conduct business activities, including those activities conducted through affiliates, subsidiaries, agents, suppliers, partnerships, joint venture, beneficial proprietorship, or any other structure or relationship as provided under the domestic law of the State, including activities undertaken by electronic means.</p> <p><i>Article 3.3</i> Scope The LBI ‘shall cover all internationally recognized human rights and fundamental freedoms binding on the State Parties of this [treaty] including those recognized in the Universal Declaration of Human Rights, the ILO Conventions to which a State is a Party, and customary international law’.</p> <p><i>Article 8.1</i> Civil liability</p>

	Draft directive on Corporate Sustainability Due Diligence (CSDDD)	Third Revised Draft Legally Binding Instrument
	<p>by or providing for stricter liability than this Directive. [...]</p>	<p>'States Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, within their territory, jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships'. <i>See also Article 8.6 (copied above)</i></p>
<p>1.3 Civil liability in the supply chain</p>	<p><i>Article 1</i> Subject matter 1. This Directive lays down rules (a) on 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. [...]</p> <p><i>Article 22</i> Civil liability 1. Member States shall ensure that companies are liable for damages if:</p>	<p><i>See Articles 1.2, 1.5, 3.3, 8.1 and 8.6 copied above.</i></p>

	Draft directive on Corporate Sustainability Due Diligence (CSDDD)	Third Revised Draft Legally Binding Instrument
	<p>(a) they failed to comply with the obligations laid down in Articles 7 and 8 and;</p> <p>(b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage.</p> <p>2. Notwithstanding paragraph 1, Member States shall ensure that where a 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), it shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact.</p> <p>In the assessment of the existence and extent of liability under this paragraph, due account shall be taken of the company's</p>	

	Draft directive on Corporate Sustainability Due Diligence (CSDDD)	Third Revised Draft Legally Binding Instrument
	<p>efforts, insofar as they relate directly to the damage in question, to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, as well as any collaboration with other entities to address adverse impacts in its value chains.</p> <p>3. The civil liability of a company for damages arising under this provision shall be without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the value chain.</p> <p>4. The civil liability rules under this Directive shall be without prejudice to Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than this Directive.</p> <p>[...]</p>	
1.4 Conditions for liability	<p><i>Article 22</i> Civil liability</p> <p>1. Member States shall ensure that companies are liable for damages if:</p>	<p><i>Article 8.6</i> Civil liability</p> <p>'...for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses, when the former controls, manages or supervises</p>

	Draft directive on Corporate Sustainability Due Diligence (CSDDD)	Third Revised Draft Legally Binding Instrument
	<p>(a) they failed to comply with the obligations laid down in Articles 7 and 8 and;</p> <p>(b) as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures laid down in Articles 7 and 8 occurred and led to damage. [...]</p>	<p>such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to take adequate measures to prevent the abuse’.</p>
<p>1.5 Grounds for exoneration</p>	<p><i>Article 22</i> Civil liability [...] 2. Notwithstanding paragraph 1, Member States shall ensure that where a 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), it shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it has an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an</p>	<p><i>Article 8.6</i> Civil liability ‘States Parties shall ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities, including those of transnational character, for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses, when the former [...] should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to take adequate measures to prevent the abuse’.</p> <p><i>Article 8.7</i> ‘Human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a natural or legal person as laid down in Article 8.6. The court or other competent authority will decide the liability of such legal or natural persons</p>

	Draft directive on Corporate Sustainability Due Diligence (CSDDD)	Third Revised Draft Legally Binding Instrument
	<p>end or minimise the extent of the adverse impact.</p> <p>In the assessment of the existence and extent of liability under this paragraph, due account shall be taken of the company's efforts, insofar as they relate directly to the damage in question, to comply with any remedial action required of them by a supervisory authority, any investments made and any targeted support provided pursuant to Articles 7 and 8, as well as any collaboration with other entities to address adverse impacts in its value chains.</p>	<p>after an examination of compliance with applicable human rights due diligence standards'.</p>
<p>2. Private international law issues</p>		
<p>2.1 Determination of jurisdiction</p>	<p>No specific article addressing determination of jurisdiction</p>	<p><i>Article 9</i> Adjudicative Jurisdiction 'Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:</p> <ul style="list-style-type: none"> a. the human rights abuse occurred and/or produced effects; or b. an act or omission contributing to the human rights abuse occurred; c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled; or

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	<p>d. the victim is a national of or is domiciled.</p> <p>This provision does not exclude the exercise of civil jurisdiction on additional grounds provided for by international treaties or domestic laws.</p> <p>9.2. Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its:</p> <ul style="list-style-type: none"> a. place of incorporation or registration; or b. place where the principal assets or operations are located; or c. central administration or management is located; or d. principal place of business or activity on a regular basis. <p>9.3. Courts vested with jurisdiction on the basis of Article 9.1 and 9.2 shall avoid imposing any legal obstacles, including the doctrine of <i>forum non conveniens</i>, to initiate proceedings in line with Article 7.5 of this (legally binding instrument).</p> <p>9.4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is connected with a claim against a legal or natural person domiciled in the territory of the forum State.</p> <p>9.5. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair judicial process is available and there is a connection to the State Party concerned as follows:</p> <ul style="list-style-type: none"> a. the presence of the claimant on the territory of the forum; b. the presence of assets of the defendant; or c. a substantial activity of the defendant’.

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2.2 Choice of law	<p><i>Article 22</i> Civil liability [...] 5. Member States shall ensure that the liability provided for in provisions of national law transposing this Article is of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.</p>	<p><i>Article 11</i> Applicable Law ‘11.1. All matters of procedure regarding claims before the competent court which are not specifically regulated in the (Legally Binding Instrument) shall be governed by the law of that court seized on the matter. 11.2. All matters of substance which are not specifically regulated under this [international legally binding instrument] may, upon the request of the victim, be governed by the law of another State where: a. the acts or omissions have occurred or produced effects; or b. the natural or legal person alleged to have committed the acts or omissions is domiciled’.</p>
3. Procedural and practical issues pertaining to access to justice		
3.1 Participation of victims in proceedings	<p><u>Standing</u>: No specific article addressing who can bring a claim under Art. 22</p> <p><u>Collective redress</u>: No specific article addressing the availability of collective redress</p>	<p><u>Standing and collective redress</u>:</p> <p><i>Article 4.2</i> Rights of Victims Victims shall...d. be guaranteed the right to submit claims, including by a representative or through class action in appropriate cases, to courts and non-judicial grievance mechanisms of the States Parties;’</p> <p><i>Article 1.1</i></p> <p>Definitions</p>

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		<p>‘Victim shall mean any person or group of persons, irrespective of nationality or place of domicile, who individually or collectively have suffered harm that constitute human rights abuse, through acts or omissions in the context of business activities. The term ‘victim’ may also include the immediate family members or dependents of the direct victim. A person shall be considered a victim regardless of whether the perpetrator of the human rights abuse is identified, apprehended, prosecuted, or convicted’.</p>
3.2 Evidence	<p><u>Burden of proof</u>: No specific rules addressing burden of proof.⁶¹ Recital 58 provides that the liability regime does not regulate who should prove that the company’s action was reasonably adequate under the circumstances of the case, therefore this question is left to national law.</p>	<p><i>Article 7</i> Access to remedy ‘7.5. States Parties shall enact or amend laws allowing judges to reverse the burden of proof in appropriate cases to fulfill the victims’ right to access to remedy, where consistent with international law and its domestic constitutional law’.</p>
	<p><u>Disclosure</u>: No specific rules addressing disclosure</p>	<p><i>Article 4.2</i> Rights of Victims Victims shall ...’f. be guaranteed access to information and legal aid relevant to pursue effective remedy’. <i>Article 7</i> Access to remedy</p>

⁶¹ In its Directive Proposal, the European Parliament suggested a provision governing, to some extent, burden of proof. Article 19(3): *Member States shall ensure that their liability regime as referred to in paragraph 2 is such that undertakings that prove that they took all due care in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, are not held liable for that harm.*

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		<p>7.2. States Parties shall ensure that their domestic laws facilitate access to information, including through international cooperation, as set out in this (Legally Binding Instrument), and enable courts to allow proceedings in appropriate cases.</p> <p><i>Article 12</i></p> <p>Mutual Legal Assistance and International Judicial Cooperation</p> <p>12.3. States Parties shall make available to one another the widest measure of mutual legal assistance and international judicial cooperation in initiating and carrying out effective, prompt, thorough and impartial investigations, prosecutions, judicial and other criminal, civil or administrative proceedings in relation to all claims covered by this (Legally Binding Instrument), including access to information and supply of all evidence at their disposal that is relevant for the proceedings.</p> <p>12.5. Mutual legal assistance and international judicial cooperation under this (Legally Binding Instrument) will be determined by the concerned Parties on a case-by-case basis.</p> <p>a. Mutual legal assistance under this (Legally Binding Instrument) is understood to include, <i>inter alia</i>:</p> <p>i. Taking evidence or statements from persons;</p>
3.3 Litigation costs	<p><u>Legal aid & funding mechanisms</u>: No specific rules addressing legal aid & funding mechanisms</p> <p><u>Loser pays principle</u>: No specific rules addressing loser pays principle</p>	<p><i>Article 4.2</i></p> <p>Rights of Victims</p> <p>Victims shall ...'f. be guaranteed access to information and legal aid relevant to pursue effective remedy'.</p> <p><i>Article 7</i></p> <p>Access to Remedy</p>

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		<p>'7.3. States Parties shall provide adequate and effective legal assistance to victims throughout the legal process, including by:</p> <ul style="list-style-type: none"> a. Making information available and accessible to victims of their rights and the status of their claims, in relevant languages and accessible formats to adults and children alike, including those with disabilities;...' <p>'7.4. States Parties shall ensure that court fees and rules concerning allocation of legal costs do not place an unfair and unreasonable burden on victims or become a barrier to commencing proceedings in accordance with this (Legally Binding Instrument) and that there is a provision for possible waiving of certain costs in suitable cases'.</p> <p><i>Article 15</i> Institutional Arrangements International Fund for Victims</p> <p>'15.7. States Parties shall establish an International Fund for Victims covered under this (Legally Binding Instrument), to provide legal and financial aid to victims, taking into account the additional barriers faced by women, children, persons with disabilities, Indigenous peoples, migrants, refugees, internally displaced persons, and other vulnerable or marginalized persons or groups in seeking access to remedies. ...'.</p>
3.4 Remedies	No specific rules addressing potential types of remedy	<p><i>Article 4</i> Rights of Victims</p> <p>4.2'c. be guaranteed the right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation and effective remedy in accordance with</p>

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		<p>this (Legally Binding Instrument) and international law, such as restitution, compensation, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration;...'</p> <p><i>Article 6</i> Prevention '6.7. Without prejudice to the provisions on criminal, civil and administrative liability under Article 8, State Parties shall provide for adequate penalties, including appropriate corrective action where suitable, for business enterprises failing to comply with provisions of Articles 6.3 and 6.4'.</p> <p><i>Article 7</i> Access to Remedy '7.1. States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary competence in accordance with this (Legally Binding Instrument) to enable victims' access to adequate, timely and effective remedy and access to justice, and to overcome the specific obstacles which women, vulnerable and marginalized people and groups face in accessing such mechanisms and remedies'.</p>