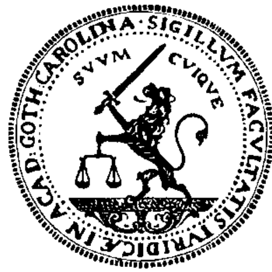

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Unravelling Corporate Civil Liability in the Proposal for a Corporate Sustainability Due Diligence Directive through Value Chain Governance and the Concept of Sustainability Due Diligence

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Summary

In today's global world, production has become increasingly fragmented and outsourced. Multinational companies outsource production to countries where legal standards and enforcement is not as high as in their country of incorporation, and adverse impacts on human rights like forced labour or environmental like oil spills may take place. This type of production takes place in global value chains, a different name for supply chains with multiple layers considering all steps from the start of a product to the end and how value can be added to those processes. Lead companies govern these value chains, and make decisions regarding them, making them the target for transnational sustainability laws to regulate them.

Mandatory due diligence obligations are increasingly used nationally in these sustainability laws, and are now proposed at the EU level, with the proposal for a Corporate Sustainability Due Diligence Directive ("CSDDD") in 2022. Consumers are demanding sustainable products in sustainable work environments and companies are demanding legal certainty from lawmakers. These due diligence obligations stem from business and human rights obligations created by the United Nations in their voluntary Guiding Principles. At the EU level, it is recognized that voluntary requirements are not enough, and that value chains need to be regulated more. The CSDDD imposes obligations upon big companies to identify, mitigate and end adverse impacts on the environment and human rights.

The current legal state of affairs in the EU holds companies liable through corporate civil liability, primarily through national parental liability legal frameworks, but this might broaden with the scope of the CSDDD and extend to other parties of the value chain like contractual parties by using for example contractual assurances. Companies should not think that they can tick-off these obligations and be free from any liability, but actively prevent adverse impacts.

Whatever the final version of the CSDDD will look like once adopted, the proposal will be groundbreaking for mandatory corporate sustainability due diligence on the EU level.

Abbreviations

BHR	Business and Human Rights
CJEU	Court of Justice of the European Union
CMR	Mineral Regulation
CSDDD	Corporate Sustainability Due Diligence Directive
CSR	Corporate Social Responsibility
CSRD	Corporate Sustainability Reporting Directive
DD	Due Diligence
EU	European Union
GVC	Global Value Chain
HR	Human Rights
HRDD	Human Rights Due Diligence
ILO	International Labour Organization
mHRDD	Mandatory Human Rights Due Diligence
MNE	Multinational Enterprises
NGO	Non-Governmental organization
OHCHR	The Office of the United Nations High Commissioner for Human Rights
SCCS	Standard Contractual Clauses
SME	Small and Medium Enterprise
TEU	Treaty of the European Union
TFEU	Treaty of the Functioning of the European Union
TNC	Transnational company
UK	United Kingdom
UN	United Nations
UNGP	United Nations General Principles on Business and Human Rights

1 Introduction

1.1 Background

Imagine a village in Nigeria impacted by oil spills from pipelines causing water contamination and environmental damage. The company that negligently caused the spills is registered in Nigeria and is a subsidiary of a English multinational company. Who can be held liable, the multinational company established in England or the local subsidiary? Or, instead, what about if the relationship is not a parent-subsidiary relationship but a contractual supplier in the supply chain? This scenario is taken from the actual case *Okpabi v Royal Dutch Shell.*[1] Today's global world has resulted in complex, fragmented, and outsourced production, leading to global value chains. Environmental harm in EU production occurs primarily outside of the Union; in the global value chains of European companies, the percentage is as high as 80-90%.[2] Multinational companies are outsourcing production to subsidiaries and other contracting parties, e.g., contractors, to expand their markets as well as increase profitability.[3] This has shifted risks and created a lack of remediation for injured parties.[4] These situations usually concern Western multinationals for adverse impacts in developing countries.[5] The problem that arises is whether the buyer companies have impunity for these harms that take place in their corporate group or value chains.

Sustainability in terms of the environment is an increasingly growing topic in politics and law-making at the moment, especially in the EU with its ambitious European Climate Law[6], and the Green Deal[7] goals stemming from sustainability being a core value of the Union today.[8] The EU has been

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[1] *Okpabi & Others v Royal Dutch Shell Plc & Another* [2021] UKSC 3 (hereafter *Okpabi*).
[2] Explanatory Memorandum to the Proposal for a Corporate Sustainability Due Diligence Directive [2022], 8 (hereafter Explanatory Memorandum).
[3] Radu Mares, 'Liability within Corporate Groups: Parent Company's Accountability for Subsidiary Human Rights Abuses' [2019] *Forthcoming in S. Deva (ed.) Research Handbook on Human Rights and Business (Edward Elgar, 2020) 1.*
[4] ibid.
[5] Liesbeth FH Enneking, 'Putting the Dutch Child Labour Due Diligence Act into Perspective. An Assessment of the CLDD Act's Legal and Policy Relevance in the Netherlands and Beyond' [2019, 2021] Erasmus Law Review, Vol. 12(4) 27.
[6] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') 2021 (OJ L).
[7] Commission, 'The European Green Deal' (Communication) COM 2019 640 final.
[8] European Union, 'Aims and Values' (*European Union*) <https://european-union.europa.eu/principles-countries-history/principles-and-values/aims-and-values_en> accessed 21 May 2023.

a global leader in Business and Human Rights, implementing voluntary and mandatory measures, realizing that human rights and sustainability are important standards to implement due to supply chains growing more global and complex.[9] Against this background, the Commission has on the 23 February 2022 adopted the proposal for Corporate Sustainability Due Diligence Directive (the "CSDDD"), in order to provide for responsible and sustainable corporate behaviour in global value chains. The aim is to diminish adverse impacts on human rights and the environment, supporting the green transition.[10] The CSDDD, and other transnational sustainability laws are tools to tackle the environmental and human rights issues by regulating and governing fragmented and outsourced production that has become global value chains.[11]

Companies are also realizing the importance of sustainability and ask for lawmakers for legal certainty and a level playing field by making obligations mandatory.[12] The CSDDD proposal is a response to what existing international soft law instruments need to improve in due diligence obligations. For example, the UN Guiding Principles on Business and Human Rights[13] ("UNGPs") does not have a legal liability principle, causing legal uncertainty to the due diligence obligations. Making the due diligence obligations mandatory can improve legal uncertainty by establishing hard law statutory obligations.[14] Commissioner Didier Reyners stated that: "We can no longer turn a blind eye on what happens down our value chains." and believes that business leaders will support the cause.[15]

1.2 Purpose and Research Question

[9] Strategic Communications, European Union External Action, 'Business and Human Rights' (*EEAS*, 28 September 2021) <https://www.eeas.europa.eu/eeas/business-and-human-rights_en> accessed 22 May 2023.
[10] Commission, 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (*European Commission Press release, 2022*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145> accessed 13 May 2023.
[11] Jaakko Salminen and Mikko Rajavuori, 'Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis' [2019] 26 Maastricht Journal of European and Comparative Law 602, 611.
[12] Beate Sjåfjell, 'Time to Get Real: A General Corporate Law Duty to Act Sustainably' [2022] Nordic & European Company Law Working Paper 22-06, University of Oslo Faculty of Law Research Paper No. 2022-48, 24.
[13] United Nations Office of the High Commissioner for Human Rights (OHCHR), 'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework' HR/PUB/11/04 (OHCHR, 2011).
[14] Nicolas Bueno and Claire Bright, 'Implementing Human Rights Due Diligence Through Corporate Civil Liability' [2020] International & Comparative Law Quarterly 69(4) 816.
[15] Commission, Press release Just and Sustainable Economy (n10).

The central focus and purpose of the paper is to better understand the proposal for a Corporate Sustainability Due Diligence through analysing the concept of sustainability due diligence and value chain governance. This helps to understand what role corporate civil liability plays in that context and whether the CSDDD has any exceptions to this liability by merely ticking off the new due diligence obligations. As the CSDDD background involves complex, fragmented production chains and inadequate voluntary measures, we must explain these topics to understand how they shaped the proposal. The CSDDD proposal is notable as it makes these sustainability due diligence obligations mandatory on the EU level, promises legal certainty and a level playing field for companies, ensures individuals' civil liability rights, and regulates global value chains beyond the geographical EU.

The goal of this paper and the research question aimed to be answered is: *What are the implications for corporate civil liability in the proposal for a Corporate Sustainability Due Diligence Directive?* The sub-questions to better understand the main research question are thus the following: What is sustainability due diligence and its obligations in the Corporate Sustainability Due Diligence Directive? What is value chain governance? Finally, how can sustainability due diligence be used as a defence for lead companies to avoid liability in their value chains, e.g. as a tick-box exercise?

1.3 Methodology and Material

The research methods employed in this research paper, and to answer the purpose and the above-mentioned research question, are the doctrinal legal research method and the comparative research method. The doctrinal research method has the purpose of logically describing and analysing the relationship between rules, principles and concepts that govern, for example, a field of law looking at bridging gaps or solving unclarities in existing law.[16] This descriptive method is not to be considered merely a description of existing law but involves extensive analysis.[17] Description arranges what is already known to solve legal problems.[18] The choice of sources and material included in this descriptive research method are value-laden.[19]

[16] Jan M. Smits, 'What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' [2015] M-EPLI No. 2015/06 5.
[17] ibid 6.
[18] Anne Orford, 'In Praise of Description' [2012] 25 Leiden Journal of International Law 618.
[19] ibid 624–625.

The second method employed, the functional comparative research method, on the other hand, compares law. The method is factual, relying on the effects of rules, the objects being judicial decisions to similar situations in different countries.[20] Looking at foreign law helps better understand your own discipline. The functional relation to society helps us understand these objects. If two institutions function similarly, they can also be compared. Functionality can be used as an evaluative criterion, looking at which law fulfils its function better.[21] In this paper, the comparative method is used in two different ways. Firstly, in the traditional sense, case law in the Netherlands and in England on parent company liability is compared. Second, the method is used to compare two different versions of the CSDDD, namely the EU Commission's version and the Council of the EU's version. Both positions are then compared to the soft law instruments that existed prior to the adoption of the proposal.

Regarding the sources used, the primary legal sources used are the EU treaties, regulations and directives, and national case law. The primary instrument being analysed is the proposal for a Corporate Sustainability Due Diligence Directive. Other traditional secondary legal sources like the UNGPs, EU authoritative materials such as Commission documents, reports by International Organizations like the OECD and OHCHR, books, academic journals, and relevant legal internet sources and blogs support the primary sources. The secondary sources assist in analysing value chain theory and sustainability due diligence as a backdrop to the CSDDD and the corporate civil liability analysis. Accordingly, the paper discusses several areas of law for example EU law, HR and environmental law, Company law as well as touching upon Civil and Tort law.

1.4 Delimitations

Some delimitations to this paper include that the directors' duties, the liability for natural persons, will not be analysed as the focus of the paper is on legal persons. As the paper deals with sustainability due diligence, it is notable to mention that this includes both human rights and environmental factors, and the analysis focuses on them as one concept, i.e. sustainability due diligence. The reason is that the interconnectedness of human rights and the protection of the environment is increasingly acknowledged.[22] The same regards supply chains and value chains, although the difference in wording

[20] Ralf Michaels, 'The Functional Method of Comparative Law', in Mathias Reimann & Reinhard Zimmermann (eds), The Oxford Handbook of Comparative Law 339 (Oxford University Press 2006), Forthcoming, Duke Law School Legal Studies Paper No. 87, 339, 342.
[21] ibid.
[22] Bueno and Bright (n 14) 799.

will be elaborated on as value chains are a part of the scope of the CSDDD proposal. The concept of corporate civil liability is analysed on an abstract level. The paper will not discuss the position of the European Parliament, as at the time of writing, the official European Parliament position is not final, even though Committee opinions exist.[23]

1.5 Outline

After this introductory chapter, chapter 2 will discuss the background of the paper, i.e. global value chains, trying to define what they are, why they need to be regulated, and why they are a part of the scope of the CSDDD. The concept of sustainability due diligence obligations will be elaborated on in chapter 3, including their background in HR and an analysis of the mandatory due diligence obligations in the CSDDD proposal. Chapter 4 provides an overview of the rest of the CSDDD proposal, together with some initial criticism it has faced and the timeline of the proposal. In chapter 5, corporate civil liability will be delved into, focusing on Article 22 of the CSDDD and prior national case law on parent company liability. Chapter 6 will conclude with the effects of Article 22 and explain circumvention of liability and the tick-box problem further. Finally, the essay will be concluded and answer the research question in the last chapter, namely the conclusion.

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[23] European Parliament, 'Corporate Sustainability: Firms to Tackle Impact on Human Rights and Environment' (*European Parliament Press Release*, 25 April 2023) <https://www.europarl.europa.eu/news/en/press-room/20230424IPR82008/corporate-sustainability-firms-to-tackle-impact-on-human-rights-and-environment> accessed 11 May 2023.

2 New form of production: the Global Value Chain

This paper begins with understanding the role of value chains and what they are to help better understand why the CSDDD was introduced, and the due diligence obligations laid down in the CSDDD. Value chains are governed by transnational sustainability laws, in our case, the CSDDD. These laws are new as they differ from previous regulation forms that used to focus on only individual jurisdictions or imported goods by regulating value chains internationally, and in a new perspective regulates value chains.[24] UNCTAD (the United Nations Conference on Trade and Development) has back in 2013 estimated that 80% of global trade takes place in international production networks of Transnational companies ("TNCs"), i.e. in global value chains ("GVCs").[25] These GVCs, also called global supply chains or global production chains, are an established type of production arrangement that takes place across several industries like energy and manufacturing.[26] If the EU wants to address sustainability due diligence for its companies, that trade globally, it should not be done only on EU territory, but also in the value chains, which occur within and outside the union as well. This chapter briefly discusses the definition of the value chain by discussing its background and what role value chains have in the CSDDD, particularly regarding liability for corporate harm.

Value chains are complex, if production is not handled sustainably, it needs to be regulated, and that is why transnational sustainability laws have come to the rescue.[27] This further relates to the core of the essay, whether lead companies should be liable for outsourcing production to incapable parties.

2.1 Value Chain Governance and its Definition

To properly understand the concept of value chains, it is important to define the concept, which can be difficult. Most simply put, a narrow and practical definition is that value chains are the supply chains of companies, consisting of their subsidiaries as well as suppliers.[28] On the other side of the spectrum,

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[24] Salminen and Rajavuori (2019) (n 11) 625.
[25] United Nations Conference on Trade and Development (UNCTAD), '*World Investment Report 2013: Global Value Chains - Investment and Trade for Development'* (2013) 135 <https://www.un-ilibrary.org/content/books/9789210562126> accessed 15 May 2023.
[26] Charlotte Villiers, 'Global Supply Chains and Sustainability: The Role of Disclosure and Due Diligence Regulation' (6 May 2019) in Beate Sjåfjell and Christopher M. Bruner (eds), Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability (Cambridge University Press, 2019), Chapter 39, University of Oslo Faculty of Law Research Paper No. 2019-43, 554.
[27] Salminen and Rajavuori (2019) (n 11) 617.
[28] Ibid 614.

the wider and more optimal definition is that GVCs go beyond the global supply chain, expanding it by adding value, and how it is generated and caught. In this way, the entire range of steps of products from the inception to the product's end use and beyond are included. In this definition the top-down aspect is referred to as governance focusing on lead firms and how they organize global industries. Governance is central to GVCs, determining profits and risk in the industry at hand, identifying who has power. The bottom-up aspect, on the other hand is referred to as upgrading, meaning strategies used by actors like countries or economic stakeholders, in order to, improve their economic positions.[29] A third important definition is of course the one found in the CSDDD proposal. It is defined in Article 3(g) as: "activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company.". Recital 18 of the CSDDD further explains what it considers upstream and downstream relationships. Upstream relationships include services or products that are imperative for the company to bring about their services, which includes processes like design, transportation, storage and supply of raw materials, extraction and manufacturing. Downstream relationships, on the other hand, receive or use products or services for the life cycle of the product or service. This includes for example storage and transport of product, recycling of it, distribution to retailers, dismantling of product, and landfilling or composting. The recital also includes that the business relationships can be established-, direct- or indirect business relationships, so all options. It is not easy to measure or determine what *value* is either, usually it is determined by the economic term of the recognition of productive innovation.[30]

For upstream companies, in the cocoa industry a Sustainability and HR lead has stated that binding law would be beneficial as they do not face the same consumer pressure as downstream companies, bringing a level playing field.[31] The differentiating definitions of the value chain have effects on liability,[32] which will be later discussed in chapter 5. What is important to

[29] Gary Gereffi, 'Global Value Chains in a Post-Washington Consensus World' [2014] 21 Review of International Political Economy 9, 12–13.
[30] The IGLP Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' [2016] 4 London Review of International Law 57, 67.
[31] Lise Smit, Claire Bright and Stuart Neely, 'Muddying the Waters: The Concept of a "Safe Harbour" in Understanding Human Rights Due Diligence' [2023] 8 Business and Human Rights Journal 1, 9.
[32] Alessio M. Pacces, 'Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis' [2023] European Corporate Governance Institute - Law Working Paper No. 691/2023 Amsterdam Law School

note is that the CSDDD definition of the value chain does not restrict the value chain geographically, and thus the CSDDD can be concluded to relate to global value chains, i.e. for the buyer companies that fall under the directive, any of their value chains, and anywhere on the globe, the only limit is the buyer companies falling under Article 2 having to be established in the EU or established in third countries that generate a certain turnover in the EU. There is also a definition for companies in Article 3(a), referring to the Annexes of the proposal, limiting for example the financial sector and SMEs, although not geographically.

The legal definition of the value chain can include both equity and contractual structures, ideally both. Equity based ones can result in lead firms shifting liability risks by way of outsourcing production from the corporate group to suppliers, by contract.[33] This issue will be further elaborated on in chapter 5 when it comes to the liability aspect of it. Another aspect of the definition is that of established business relationships. Established commercial relationship, is derived from French doctrine, and is used in the context that suppliers are protected from being terminated from their supply contracts. Traditionally this concept in GVCs is unclear unless further defined.[34] In the CSDDD, however, it is mentioned in recital 18 that the obligations extend to indirect parties, both upstream and downstream, leaving the definition quite broad.

An important feature of GVCs is that the production is internally fragmented. This means that GVCs have multiple tiers horizontally, vertically, as well as spatial complexities, relating to both production and regulatory challenges. There are multiple layers of suppliers, leading it to be hard for companies to identify suppliers in different layers. To illustrate, according to a project it can take over a year to map out a company's entire supply chain, technology company Philips said that electronic component can have a 50-tier deep supply chain. Apple, for example has almost 800 suppliers in more than 30 countries producing the iPhone (data from 8 years ago).[35]

In GVCs, the role of lead firms is important as they effectively control production horizontally and geographically. The lead firm is the most central actor in the governance of a certain product. This can be demonstrated by owning a brand that designs a product and owning its

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Research Paper No. 2023-14 Amsterdam Center for Law & Economics Working Paper No. 2023-02 Forthcoming in Ondernemingsrecht (2023) 1, 4.

[33] Salminen and Rajavuori (2019) (n 11) 20.

[34] ibid 21.

[35] Villiers 2019 (n 26) 552–3.

intellectual property rights and making production-related decisions. They have the power to choose whether to outsource production, and in that case to whom.[36] The transnational sustainability laws try to bridge the gap of liability deficits, raising questions like whether lead firms ought to be liable for production that is outsourced e.g. to subsidiaries or suppliers, leading to differentiating treatment of actors within the value chain. Conversely, where value chain actors operate in different jurisdictions, fragmentation has become more prominent. The lead firms drive the value chains and the choice made within them, thus they ought to be regulated. It seems that most transnational laws have either been subject-specific like the EU Product Liability Directive or dealt with national contexts. Focusing on the quality of products or national contexts have been deemed insufficient, especially as they do not extend to environmental protection or labour conditions.[37] Reasons why value chains are challenging to regulate depend on not only the fragmented production, but also political reasons like legitimacy, participation as well as sovereignty. This is indeed the reason for why hard law has not existed before and why regulation has been done by public international law, labour organizations, NGOs, and private actors.[38] The transnational sustainability laws regulate lead companies, which in their turn govern transnational production, so the laws indirectly steer the fragmented production.[39] I will be using the term lead firm when talking about value chains and the CSDDD, but when analysing existing national case law that covers parent-subsidiary relationship the term parent company will be used for the sake of clarity, as it is used in the judgments. The term parent company in context of parent company liability will be used and described in chapter 5.

For the GVC definition, it can be concluded that value chains are not legally defined to allow the lawmakers to change the scope and influence how lead firms govern contractually their value chain actors, but transnational sustainability laws recognize the complexities of value chains and the distinction between equity and contract.[40]

2.2 The Role of Value Chains within the CSDDD

In Europe, several Member States have enacted due diligence laws, for example the French Loi de Vigilance[41], also touching upon scopes that

[36] Salminen and Rajavuori (2019) (n 11) 8.
[37] ibid 9–10.
[38] ibid 11.
[39] ibid 9.
[40] ibid 22–23.
[41] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (1) 2017 (2017-399).

include a wider supply or value chains than that of a parent-subsidiary relationship.[42] States want to prevent abuse that takes place in GVCs by companies that operate in their jurisdiction by requiring responsible governance for value chains.[43] These transnational sustainability laws attempt at regulating GVCs, and the states take control over production not only in its own jurisdiction but outside as well.[44] The next instrument to do this is the CSDDD, on the EU level. The CSDDD also uses value chain in its scope for the mandatory due diligence obligations in Article 1. The value chain is used as the scope firstly because it is parts of the scope of the CSDDD proposal and in its turn to determine which companies are included in this scope, and secondly, as it can help determine the due diligence obligation scope.[45] The following quotes by Commissioners regarding the CSDDD highlight their importance in the scope of the proposal. Thierry Bretton, the Internal Market Commissioner has said that: "Complex global value chains make it particularly difficult for companies to get reliable information on their suppliers' operations. The fragmentation of national rules further slows down progress (…) Our proposal will make sure that big market players take a leading role in mitigating the risks across their value chains while supporting small companies in adapting to changes.".[46] To illustrate, the German company Mercedes-Benz has operated in Vietnam since the mid-1990s and has over €150 billion in turnover globally and 172,000 employees. Depending on the final version of the CSDDD and the circumstances of the business relationships, this example sets out some sustainability due diligence requirements for the Vietnamese subsidiary and its operations.[47]

Lead companies can technically be any companies, e.g. the UNGPs apply to all companies equally, notwithstanding their size, location, structure or ownership. Most laws limit the scope, however, for example size, looking at financial indicators for example turnover, sales and personnel numbers.[48] The CSDDD does precisely this, looking at turnover in combination with personnel numbers, and for the somewhat smaller companies at certain sectors in Article 2, as well as geographically by being formed by Member

[42] Loi n° 2017-399, Article 1. See for example 'French Corporate Duty of Vigilance Law (English Translation)' (European Coalition of Corporate Justice, 2016) <https://respect.international/french-corporate-duty-of-vigilance-law-english-translation/> accessed 21 May 2023.
[43] Salminen and Rajavuori (2019) (n 11) 5.
[44] ibid 5 and 9.
[45] Florian Favreau and Marine Bastiege, 'The value chain in the proposal for a Directive on corporate sustainability due diligence', [2022] I.B.L.J. 5, 467.
[46] Commission Press Release Just and sustainable economy (n 10).
[47] Uyen Nguyen, 'EU Due Diligence Laws and Supply Chains in Vietnam' (*Vietnam Briefing News*, 6 March 2023) <https://www.vietnam-briefing.com/news/eu-due-diligence-vietnam.html/> accessed 15 May 2023.
[48] Salminen and Rajavuori (2019) (n 11) 23.

States in the EU or third countries generating turnover in the EU according to Article 2 and the company definitions in Article 3(a).

As lead firms have information superiority from controlling and organizing the value chain, they are expected to inform their consumers, the state and other actors about impacts of their value chain. At the same time, previous transnational sustainability laws accept the fact that due diligence requirements as well as disclosures are challenging. The challenges can be resolved by auditing and certification. Adding this auditing or certification aspect, requires these lead firms to change their value chain structures by opening them up, which leads to the sustainability risk management being moved to third parties. Notably certification and auditing efficiency is disputed in this context.[49] The CSDDD does indeed impose disclosures in for example Article 11 communicating on due diligence publicly on their website. The auditing and certification is added in the CSDDD in for example Article 7(4) verifying compliance through independent third-party verification.

Looking at why the proposal chose to regulate value chains, instead of something less broad like only subsidiaries, or focusing only on social impacts - sure the statutory due diligence would be more specific and extensive, but would not tackle the entire value chain. Then lead firms could potentially govern value chains differently, which would be problematic. This way, the entire value chain is tackled, and will be governed in a more harmonized way.[50] Against this background, the change in production and race to the bottom practices of companies have led to fragmented complex value chains with multiple layers, lead firms governing them and choosing to outsource production. Now transnational sustainability laws try to tackle them and the CSDDD will do this on the EU level.

[49] Salminen and Rajavuori (2019) (n 11) 24.
[50] ibid 17–18.

3 The Concept of Sustainability Due Diligence

This chapter will go through the development of human rights due diligence (HRDD), how it has evolved and been defined in the recent years through the soft law and guidelines and led to sustainability due diligence being the term used in the CSDDD. The chapter will also go more into depth on the due diligence obligation in the CSDDD and assess it to the already existing international standards. Antoine Duval, states in his article that the foundations of HRDD, based on the UNGPs author John G. Ruggie, is double, on the one hand it lies in the privatisation of transnational human rights governance with companies being governance entities, and on the other hand the publicization of corporate governance by introducing external accountability, transparency requirements and participatory spaces.[51]

3.1 Mandatory HRDD and defining Sustainability Due Diligence

There are several guidelines and voluntary disclosure recommendations for business and human rights. These include for example the OECD Due Diligence Guidance on Responsible Business Conduct[52], and the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy[53]. There are also Draft treaties on due diligence by the Open-ended intergovernmental working group (OEIGWG)[54]. Next to these, there are also sustainability guidelines and recommendations, some examples include the United Nations ("UN") Sustainable Development Goals ("SDGs")[55] and the UN

[51] Antoine Duval, 'Ruggie's Double Movement: Assembling the Private and the Public Through Human Rights Due Diligence' (2023) Nordic Journal of Human Rights, T.M.C. Asser Instituut, 1 <https://www.tandfonline.com/doi/abs/10.1080/18918131.2023.2171633?forwardService=showFullText&tokenAccess=VVKJUAXJGSXIENXTXTQB&tokenDomain=eprints&doi=10.1080%2F18918131.2023.2171633&doi=10.1080%2F18918131.2023.2171633&doi=10.1080%2F18918131.2023.2171633&target=10.1080%2F18918131.2023.2171633&journalCode=rnhr20> accessed 23 May 2023.

[52] OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (OECD, 2018) <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> accessed 23 May 2023.

[53] International Labour Organization (ILO), 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' 6th edition (International Labour Organization 2022).

[54] Open-Ended Intergovernmental Working Group (OEIGWG), Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Third revised draft (17 August 2021) < https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf> accessed 23 May 2023.

[55] United Nations, 'The 17 Goals | Sustainable Development Goals' (United Nations) <https://sdgs.un.org/goals> accessed 21 May 2023.

Framework Convention on Climate Change ("the Paris agreement")[56] with more climate related goals. Most of these are referred to in the explanatory memorandum and the recitals of the CSDDD. However, the focus in this paper is due diligence obligations, and they have their start in human rights due diligence. The concept has first been introduced by the UN in its Guiding Principles on Business and Human Rights[57] ("UNGP's") and the UN's 'Respect, Protect and Remedy' framework[58], and have been incorporated to other standards like the OECD Guidelines for Multinational Enterprises[59]. The three pillars this concept has been evolved around include the duty of the state to protect its businesses and individuals from human rights abuses by third parties, the responsibility of corporations to respect human rights, and finally the ability for victims to effectively access remedy.[60] The UNGP's has defined HRDD in principle 17 similar to the OECD, as: "The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed." in order for business enterprises to "identify, prevent, mitigate and account for how they address their adverse human rights impacts,". Principle 17(a) follows by saying that adverse impacts arise when companies "cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships". It follows in principle 17(b) factors it can depend on are the complexity and size of the business, the operation's nature and context and the risk of the adverse impact. In principle 17(c) it is concluded that the HRDD should be ongoing to show that risks can change over time and as the company and its operations evolve.[61] Even though the UNGPs are over ten years old the terminology

[56] United Nations, 'What Is the United Nations Framework Convention on Climate Change?' (UNFCCC) <https://unfccc.int/process-and-meetings/what-is-the-united-nations-framework-convention-on-climate-change> accessed 21 May 2023.
[57] OHCHR, 'Guiding Principles on Business and Human Rights Implementing the United Nations "Protect, Respect and Remedy" Framework' HR/PUB/11/04 (United Nations, 2011)
<https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 23 May 2023.
[58] John Gerard Ruggie and UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, 'Protect, Respect and Remedy : A Framework for Business and Human Rights : Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (UN General Assembly A/HRC/8/5, 7 April 2008) <https://digitallibrary.un.org/record/625292> accessed 16 May 2023.
[59] OECD, 'OECD Guidelines for Multinational Enterprises 2011 Edition' (*OECD Publishing,* 2011) <https://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 16 May 2023.
[60] Claire Bright and Karin Buhmann, 'Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition' (2021) Sustainability 13 10454, 4 < https://www.mdpi.com/2071-1050/13/18/10454> accessed 23 May 2023.
[61] OHCHR UN Guiding Principles (n 57) Principle 17.

and ideas are similar to the CSDDD. The due diligence in both is expected to be applied globally, throughout the value chain.[62] To put it simply, companies can be part of human rights adverse impacts in three ways: causing the impact, contributing through own activities, or being directly linked to the impact. The harm is caused when the company's own actions or omissions remove or reduce, on their own, the ability to enjoy human rights of a person or a group of persons.[63]

Today, there has been some confusion on the terminology and definitions of the due diligence obligations, as Member States in the EU use differentiating terminology, examples include duty of care and vigilance. The term due diligence is used to build consensus and is different from a legal standard of care and is used in a business context. Rather than the duty bearer discharging an obligation, it is a standard of care of companies and their responsibility to respect.[64] This is a reason for why the European Commission study in 2020 supported that an EU level mandatory due diligence requirement be introduced.[65] The legal standard or duty of care has its basis in Roman law in contract and tort law, which generally means that persons are not to harm another, which is possible by exercising a certain standard of care.[66] In international law, it is used for States being responsible for private actors, and whether they have taken steps or appropriate and reasonable nature to mitigate or prevent international law breaches by private persons.[67] A distinction is also important to be made between human rights due diligence exercised by corporations and corporate risk management due diligence. The former is key to this paper and has a focus on society and its people whereas the latter focuses on the prevention of financial, legal and technical risks related to the company.[68]

The Impact Assessment to the CSDDD proposal refers to the study on due diligence, and describes (Corporate) due diligence as: "the establishment and implementation of adequate measure by a company with a view to identifying, preventing and mitigating the actual and potential (i.e. risk of) adverse impacts on human rights (including labour rights) and the environment (including the climate), in the company's own operations, its supply or value chains and adverse impacts linked to the company's

[62] Bright and Buhmann (n 60) 4.
[63] ibid 5.
[64] Lise Smit and others, 'Study on Due Diligence Requirements through the Supply Chain: Final Report' (*Publications Office of the European Union*, 2020) 156–7 <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> accessed 23 May 2023.
[65] Smit, Bright and Neely (n 31) 2.
[66] Smit and others, Study (n 64) 156.
[67] ibid 158.
[68] Bright and Buhmann (n 60) 5.

products and services." and recognized that it is the same as sustainability due diligence.[69] In the due diligence study from 2020, it is stated that it is a general practice in Member States to include corporate group subsidiaries in sustainability due diligence obligations as there is an apparent legal relationship between the subsidiary and its parent company, evidenced by control in some jurisdictions. Additionally, national laws have included suppliers as being captured by due diligence obligations of a company.[70] This means that the due diligence obligations in the CSDDD apply to the value chains as earlier discussed, including both parent-subsidiary relationships as well as other indirect parties like suppliers. All in all, HRDD help understand and operationalize the responsibility that businesses have towards HR impacts by acting as a dominant conceptual frame.[71]

3.2 The Mandatory Sustainability Due Diligence Obligation in the CSDDD

The Due Diligence obligation in the CSDDD has referrals to both the UNGPs in recital 5, OECD Guidelines in recital 6, and OECD Due Diligence Guidance for Responsible Business Conduct in recital 16. The recital further explains that the six steps in OECD Guidance should be covered in the proposal. These steps are the following: "(1) integrating due diligence into policies and management systems, (2) identifying and assessing adverse human rights and environmental impacts, (3) preventing, ceasing or minimising actual and potential adverse human rights, and environmental impacts, (4) assessing the effectiveness of measures, (5) communicating, (6) providing remediation.". These steps give a short summary of the due diligence obligations contained in the CSDDD proposal.

In the CSDDD, Article 4 of the proposal sets out that articles 5-11 of the proposal are part of the mandatory obligation to conduct human rights and environmental due diligence, i.e. sustainability due diligence, and the Member States are to ensure that companies conduct them. Article 5 integrates due diligence into companies' corporate policies and introduces a due diligence policy to be updated annually. The due diligence policy should include the following: the company's due diligence approach in the long run, a code of conduct recounting the rules and principles that are to be followed by both subsidiaries and employees of the company, and lastly a description of processes made in order to implement the due diligence. This provision is complemented by the Article 11 communicating provision,

[69] Commission, 'Impact Assessment Report Accompanying the Document Proposal for a Directive on Corporate Sustainability Due Diligence' (2022) SWD(2022) 42 final, iv.
[70] Smit and others (n 64) 209.
[71] Duval (n 51) 1–2.

which ensures that are not subjected to Directive 2013/34[72] arts. 19a and 29a report annually a statement on their website on their compliance with the CSDDD.

Article 6 requires the "identification of actual and potential adverse impacts" (human rights and environmental, hereafter the term adverse impacts will refer to both). This is done by taking appropriate measures for own operations, subsidiaries or established business relationships relating to their value chains (companies operating in the sectors mentioned in Article 2 must take measures only for those sectors). Regulated financial undertakings in Article 3(a)(iv) need to do it only before providing their services. Member States are to ensure that there are enough information and resources for identification.

Article 7 prevents the potential adverse impacts. "Companies should take appropriate measures to prevent", or where not possible to "adequately mitigate potential adverse impacts that have been, or should have been identified" in Article 6. There are five possible actions to do this. Firstly, developing and implementing a prevention action plan (including timelines, indicators and is developed by consulting affected stakeholders). Secondly, "seeking contractual assurances from a business partner with whom it has a direct business relationship, ensuring compliance with the company's code of conduct and (…) a prevention action plan, including by seeking corresponding contractual assurances from its partners, to the extent that their activities are part of the company's value chain (contractual cascading)." Third, make necessary investments into e.g. production processes, infrastructures and management. Fourth, "provide targeted and proportionate support for" small and medium enterprises ("SMEs") to which it has an established business relationship with (if the viability is compromised in case of "compliance with the code of conduct or prevention action plan"). Lastly, collaboration with other entities in compliance with EU and competition law, to end an adverse impact, especially where no alternative action is effective or suitable. If not possible, "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." This should be done in combination with appropriate measures that verify compliance which is done through independent third-party verification or industry initiatives. The company is required to desist from extending or entering new relations with that partner where the impact arose and temporarily suspend its commercial relations (whilst simultaneously prevent and minimize efforts in case there are

[72] Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings [2013] OJ L182/19.

expected success efforts) and “terminate the business relationship with respect to the activities concerned if the potential adverse impact is severe”.

The appropriateness mentioned in Articles 6 and 7 is further elaborated on in recital 29 and Article 3(q), and is defined in the Article as the following: “a measure that is capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including characteristics of the economic sector and of the specific business relationship and the company’s influence thereof, and the need to ensure prioritisation of action.” In other words, this includes many factors and depends on the specific case at hand. Examples will be provided in section 5.1.1.

Article 8 brings the “actual adverse impacts to an end”. Companies are to bring “actual adverse impacts that have been, or should have been, identified pursuant to Article 6 to an end”, and if not possible the impact should be minimized. Actions to do this include neutralizing the adverse impact or minimizing it, “develop and implement a corrective action plan”, “seek contractual assurances from a direct partner with whom it has an established business relationship”, “make necessary investments”, “provide targeted and proportionate support for an SME” and “collaborate with other entities” in compliance with Union law and competition law in accordance with Article 8(1)-(3). In accordance with Article 8(4)-(7), if ending or mitigating measures is not possible, a contract with partners with an indirect relationship can be concluded to achieve “code of conduct and corrective action plan” compliance. “The contractual assurances or the contract shall be accompanied by the appropriate measures to verify compliance”. In cases where an actual adverse impact is neither brought to an end or minimized in Article 8(1), the company is to refrain from extending or entering new relations with the partner and should “temporarily suspend commercial relationships with the partner (…) while pursuing efforts to bring to an end or minimize the extent of the adverse impact, or” “terminate the business relationship with respect to the activities concerned” if considered severe.

Article 9 introduces a complaints procedure "for persons and organisations to submit complaints” on concerns about “adverse impacts in their own operations or the operations of their subsidiaries”, and Article 10 sets out monitoring for companies to assess “their own operations and measures” as well as for their subsidiaries to improve the due diligence processes at least once a year. These outcomes will be updated in the due diligence policies.

The due diligence obligation concerns all value chain activities, meaning that companies who carry out said activities are subject to those due diligence obligations. The obligation can be considered direct and indirect. The direct obligation concerns the companies that reach the turnover, number of employees, or sector requirement in Article 2(1) of the CSDDD. The indirect obligation then concerns the indirect partners, other than established business partners, within the value chain like contractual partners such as suppliers.[73] As environmental harm is not specifically mentioned in the UNGPs, but an integral part of sustainability due diligence in the CSDDD and is mentioned in the material scope of the proposal, here is some clarity on what categories of environmental harm is included. Article 3(b) of the proposal on adverse environmental impacts is defined as: "resulting from the violation of one of the prohibitions and obligations pursuant to the international environmental conventions listed in the Annex, Part II;". These 12 conventions include for example the CITES convention on international Trade in Endangered Species of Wild Fauna and Flora. Only these conventions would constitute a narrow scope but the proposal also includes the Article 3(l) severe adverse (environmental or human rights) impacts, which are described as: especially significant, large-scale (number of persons or area), is irreversible, or particularly difficult to remedy. Article 6 of the proposal explains that the Article 3(l) harms apply to the second group of companies with a lesser turnover threshold that operate in the high impact sectors.[74] Interestingly enough the ECHR is not listed among the conventions, leaving it incomplete.[75]

It can be concluded that due diligence, and sustainability due diligence in particular and for the purpose of this essay is about a company's respect and duty of care, a notion that has persevered from soft law to mandatory obligation. No matter the differences in terminology in countries, guidelines or principles, the concept and core reasoning is the same. It can also be concluded that there is a big change in the nature of due diligence obligations as the proposal creating an unprecedented mandatory obligation on more than a national level. The due diligence obligations set out in the CSDDD largely reflect the voluntary obligations in the UNGPs and the OECD, especially as these are directly mentioned in the recitals of the CSDDD. Since there is no definition of sustainability due diligence, in the

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[73] Florian Favreau and Marine Bastiege, 'The Value Chain in the Proposal for a Directive on Corporate Sustainability Due Diligence' (2022) 5 International Business Law Journal 467, 467.
[74] Florian Favreau and Marine Bastiege, 'The Value Chain in the Proposal for a Directive on Corporate Sustainability Due Diligence' [2022] International Business Law Journal 5, 467, 467.
[75] Anne Danis-Fatome, 'The Proposal for a European Directive on the Duty of Vigilance: Brief Views on Civil Liability' [2022] 5 I.B.L.J 489, 491.

CSDDD, it can be concluded from the due diligence obligations and from the wording in the proposal that this notion reflects both mandatory human rights due diligence and environmental due diligence together.

4 The Proposal for a Directive on Corporate Sustainability Due Diligence

The following chapter will give a background as to why the CSDDD was proposed in the first place, and a brief overview of the articles not discussing the due diligence obligations in the proposed directive. The timeline will also be explained as the proposal is subject to change and in the early stages of the EU's legislative process, with the first step being the Councils position on the proposal. Some of the initial criticism will also be highlighted.

4.1 Background to the CSDDD

To answer the question why the proposal was adopted, it is important to understand the background and the goals of the EU. The Commission has found in its stakeholder consultations that a corporate due diligence duty is needed on EU level, many actors on different groups like businesses and EU citizens have called for EU action on the matter.[76] The problem has been that sustainability has not been included in corporate governance enough in the past. Sustainability laws that are based on transparency by disclosing information are deemed inadequate for the problems that global value chain capitalism seeks to solve.[77] The internal dimension of this sustainable corporate governance is stakeholder interests and risks, and the external counterpart is that companies are not adhering to the EU's human rights and environmental commitments by not sufficiently mitigating adverse environmental and human rights impacts. Drivers to these problems are regulatory failures, e.g., the lack of legal certainty, too diverging EU and national corporate due diligence laws, the voluntary nature of soft law, the emergence of global value chains that have made company law lag behind, as well as market failures like competitive pressure and short term goals.[78] Looking at the goals of the EU, the CSDDD is an instrument to be understood through the Green Deal, which emphasizes a just transition to a green economy, climate change neutrality[79], and sustainable finance.[80] The

[76] Commission, 'Corporate Sustainability Due Diligence: Fostering Sustainability in Corporate Governance and Management Systems.' (*European Commission*, 23 February 2022) <https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en> accessed 24 May 2023.

[77] Salminen and Rajavuori (2019) (n 11) 30.

[78] Commission, 'Impact Assessment Report Accompanying the Document Proposal for a Directive on Corporate Sustainability Due Diligence' (n 69) 8–10.

[79] Commission, The European Green Deal (n 7).

[80] Radu Mares, 'The New EU Directive on Corporate Sustainability Due Diligence: Origins, Compliance Effects and Global Significance' (*The Raoul Wallenberg Institute of Human Rights and Humanitarian Law*, 2022) <https://rwi.lu.se/blog/the-new-eu-directive-on-

Green Deal recognizes that the corporate governance framework should further embed sustainability into its framework.[81] The Impact assessment to the CSDDD clearly states that the aforementioned voluntary standards have not been enough to reduce adverse impacts, do not reflect the commitments of the EU for HR and the environment and do not maintain legal certainty or alleviate market pressure.[82]

The proposal comes at a point in time where it complements several recent and ongoing legal initiatives from Member States like France, the Netherlands and Germany. In France, the Loi de Vigilance[83] came into force in 2017 and imposes a legal duty onto large companies to exercise HRDD, including similar rules to the CSDDD, like implementing a vigilance plan, identify and prevent violations to the environment and human rights.[84] Some criticism for these national laws that the Commission has introduced in the CSDDD, are for France that it has weak compliance and a long judicial enforcement procedure, and for Germany that its law has a technocratic approach and repugnance for claims of civil liability.[85]

The EU has the competence to act as the legal basis found in arts. 50 and 114 of the Treaty of the Functioning of the European Union ("TFEU") preventing obstacles for the freedom of establishment on the internal market. The proposal fulfils the subsidiarity requirement by being more effective on union than Member State level, which could resort in more legal uncertainty and the cross-border nature makes union action more favourable.[86] The proposal is also proportional as it is not a burden and does "not go beyond what is necessary"[87] when it comes to the personal and material scopes, sanctions, or costs.[88] In the explanatory memorandum, it is explained that the proposal is complementing several EU Regulations and

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corporate-sustainability-due-diligence-origins-compliance-effects-and-global-significance/> accessed 15 February 2023.

[81] Samuel Garcia Nelen, 'The Proposal for a Corporate Sustainability Due Diligence Directive: Background and Latest Developments' (2023) Tijdschrift Ondernemingsrecht – the Leading Dutch Company Law Journal 5(32), 199, 223 <https://www.stibbe.com/sites/default/files/2023-03/Tijdschrift%20Ondernemingsrecht%20%E2%80%93%20the%20leading%20Dutch%20company%20law%20Journal.pdf> accessed 15 May 2023.

[82] Commission, 'Impact Assessment Report Accompanying the Document Proposal for a Directive on Corporate Sustainability Due Diligence' (n 69) 10.

[83] Chantal Mak, 'Corporate Sustainability Due Diligence: More than Ticking the Boxes?' [2022] 29(3) Maastricht Journal of European and Comparative Law 301, 301.

[84] Bueno and Bright (n 14) 801.

[85] Daniel Bertram, 'Green(wash)ing Global Commodity Chains: Light and Shadow in the EU Commission's Due Diligence Proposal' (Verfblog, 2022) <https://verfassungsblog.de/greenwashing-global-commodity-chains/> accessed 15 May 2023.

[86] Explanatory Memorandum (n 2) 10-17.

[87] Explanatory Memorandum (n 2), 17.

[88] Explanatory Memorandum (n 2),10-17.

Directives. This includes next to the already mentioned guidelines, e.g., the European Climate Law, with the climate neutrality goal in 2050, the plan includes corporate governance in adding sustainability to its framework more to meet the climate objectives.[89] In other words, the proposal will support and complement the unions regulatory environment and existing policies by adding a framework on mandatory sustainability due diligence across the value chain.[90] The EU wants to communicate that the CSDDD will bring with it many benefits for several actors. For companies this includes increased awareness, improved risk management, and creates a level playing field and legal certainty by harmonising the legal framework in the EU. EU citizens can enjoy improved human- and labour rights protection, transparency, access to justice, and healthier environment. Lastly for developing countries the CSDDD will bring sustainable investment, increased enforcement of international standards and living conditions, and better environmental and HR protection.[91]

Against this background, it can be concluded that the CSDDD brings in some new elements and extends the scope of national due diligence to Europe and beyond, setting new standards to even to non-EU companies. The CSDDD can even be considered to foster fairer globalization and the sustainable economy transition by upholding standards for human rights, the environment, and labour throughout the value chains.[92] Due diligence in the CSDDD is not only a standard of care, but statutory obligations with actual legal consequences.[93]

4.2 Overview of the CSDDD Proposal

The current state of the directive, as proposed by the Commission, consists of 32 Articles. Article 1 sets out the subject matter of the proposal, which lays down rules on obligations for companies own operations including subsidiaries and value chain operations on adverse impacts on human rights and the environment, as well as on liability for violation of these obligations. The scope of the directive is laid down in article 2(1), being companies formed under the legislation of a Member State fulfilling one of the following conditions: a) more than 500 employees and net worldwide

[89] Proposal for a Corporate Sustainability Due Diligence Directive 2022 COM/2022/71 final, recital 2.
[90] Explanatory Memorandum (n 2), 10.
[91] Commission, Press release Just and Sustainable Economy (n 10).
[92] Stéphane Brabant and others, 'Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)' (Verfblog, 2022) <https://verfassungsblog.de/due-diligence-around-the-world/> accessed 15 May 2023.
[93] Pacces (n 32) 4.

turnover of more than EUR 150 million b) more than 250 employees and net worldwide turnover of more than EUR 40 million provided that at least 50% of the turnover was generated in sectors like textiles, forestry, and mineral resources, and 2(2) for extraterritorial application companies a) turnover of more than EUR 150 million in the union or b) turnover of EUR 40 million but not more than EUR 150 million with 50% generated in the abovementioned sectors. Definitions are explained in Article 3, to add clarity and explains for example legal forms for companies concerned referring to the annexes, among other things.

The due diligence obligations are encompassed by articles 5-11, as provided for in Article 4. See chapter three for an in-depth overview of these due diligence obligations. To briefly recollect them again: article 5 includes the company policy integration of due diligence, article 6 requires the identification of potential and actual adverse impacts. Then, articles 7 and 8 goes more into depth about first preventing the potential impacts and then bringing to an end the actual impacts, and finally articles 9-11 include a complaints procedure, and communication clause.

The Commission will adopt model contractual clauses for Articles 7(2)(b) and 8(3(c) in accordance with Article 12, and where appropriate and in consultation guidelines on a specific sector or adverse impact in accordance with Article 13 guidelines. Article 14 provides for a provision on accompanying measures, for Article 14(2) financial support for SMEs. A climate change provision is provided in Article 15 by adopting a plan to comply with the Paris Agreement, which supports the aforementioned European Climate Law. After this, Article 16 explains that companies need to designate an authorised representative for communication purposes. Article 17 regulates supervisory authorities in combination with Article 18 which provides for the powers of the supervisory authorities. Article 19 sets out that natural and legal persons can submit substantiated concerns to the supervisory authorities for reasons to believe non-compliance with the subsequent national provisions after the adoption of the directive. Article 20 provides for sanctions, which are determined by the Member States. A European Network for Supervisory Authorities is explained in Article. 21, set up by the Commission. Article 22 discusses the civil liability, which will be analysed further in chapters five and six. Protection of reporting persons and reporting for breaches is provided for in Article 23, applying Directive (EU) 2019/1937[94]. Article 24 states that companies need not have sanctions imposed upon them if applying for public support. The director's duty of care is provided for in Article 25, explaining that directors of companies in

[94] Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law OJ L305/17.

Article 2(1) need to consider their decision's consequences on adverse impacts whether for human rights or the environment. In connection to Article 25, Article 26 sets out that directors need to set up and oversee the Article 4 and 5 actions, and report to the board of directors. And finally, Articles 27-32 in order regard the amendment of Directive (EU) 2019/1937, the exercise of delegation, review of the effectiveness, transposition of the directive, the entry into force and finally the addressees being the Member States of the Union.

Looking at the overview of the articles, it can be concluded that the substance of the proposal has sort of a dual nature. It is both an instrument legislating on corporate accountability to protect societal instruments from wrongful business conduct and a corporate governance instrument with director's duties.[95]

4.3 Next Steps and Initial Criticism

Since the Commission published the proposal, the Council of the EU has adopted its position in December 2022. The main changes are the scope, definitions, financial undertakings, the climate change provision, civil liability (which is analysed on in the next chapter, chapter five), director's duties, and the Annex I and the adverse impacts definitions.[96] The main change for the scope is adding a provision on information exchange on the net turnover for third countries generated in the EU who do not have a branch in the Union, accompanied by a phase-in clause and *'vacantio legis'* period, another Annex on high-risk sectors and an adjusted review clause.[97] The definition changes in Article 3 are the following: established business partner is changed to merely business partner, and value chain to chain of activities. The Council justifies these changes by saying that the definition business partner will ensure the alignment with the international framework and feasibility, adding an Article 6(a) to prioritize adverse impacts, chain of activities is more neutral to reflect the Member States' diverging view on the scope.[98] For regulated financial undertakings there are several amendments, for example the removal of financial products from the scope.[99] The Climate change provision is aligned to the CSRD Directive[100]

[95] Radu Mares (n 79).
[96] Council of the European Union, 'General Approach to the Proposal for a Corporate Sustainability Due Diligence Directive' (2022) 2022/0051(COD) 4–11 <https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf> accessed 15 May 2023.
[97] ibid 4–5.
[98] Council of the European Union, General Approach (n 94) 6–7.
[99] ibid 7–8.
[100] Directive (EU) 2022/2464 as regards corporate sustainability reporting OJ L322/15 (the CSRD directive).

to enhance its legal interpretations, but removing the link to the director's remuneration (Article 15(3) in the proposal).[101] The Director's duties in Articles 25 and 26 are further deleted from the Council's position, stating that Member States have expressed strong concerns on this matter as it interferes with national corporate governance rules on director's duties.[102] Finally, Annex I and the adverse impact definition is changed, adding international instruments ratified by all Member States and clarifying the adverse impacts definition.[103] In other words, the due diligence provision have been left almost untouched and the changes lie in other provisions and definitions.[104] Whilst certain changes of the General Approach of the Council add clarity, like the Climate Change alignment, adverse impacts definition, other do not and restrict the scope from the original proposal. Director's duties are removed, whilst they could instead be amended to reflect the concerns of the Member States instead of removing them entirely. In general, the position of the Council seems to restrict the proposal more than the Commissions version does, whilst recognizing the concerns of the Council committees and that they have taken into consideration the concerns of the Member States.

Since the proposal was made, there has been both appraisal and criticism for the CSDDD. Many believe that actors will welcome it and support the overall goal of the instrument, but there are several factors that remain unclear and may be subject to changes in the process of adopting the proposal, including the position of the Council and later the European Parliament. Here are a few examples of criticism that have been noted so far: whilst the Commission has the estimate that 13,000 companies in the EU would be affected by the proposal[105], Eurostat states that less than 0,2% of EU companies are big enough to fall into the scope in Article 2(1)(a) when it comes to number of employees, and 99% are micro and small enterprises and would be excluded from the scope, but can be passed on obligation through business relationships[106].[107] Not only is the scope of companies criticized for being too narrow, but also not being aligned with other similar legislative instruments within the EU, for example the CSRD directive, which has a wider scope and as both include reporting obligations

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[101] Council of the European Union, General Approach (n 94) 9.
[102] ibid 10.
[103] ibid 10–11.
[104] James Marlow and others, 'EU Council Reaches Compromise on CSDDD' (*Linklaters*, 5 December 2022) <https://sustainablefutures.linklaters.com//post/102i2tk/eu-council-reaches-compromise-on-csddd> accessed 15 May 2023.
[105] Explanatory Memorandum (n 2), 16.
[106] Explanatory Memorandum (n 2), 14.
[107] Eurostat, 'Structural Business Statistics Overview' (October 2022) <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Structural_business_statistics_overview> accessed 16 May 2023.

then why are the scopes different?[108] On a more positive note, there is evidence that the big corporations cause the most harm, i.e. few global players cause disproportionate quantities of environmental harm like plastic pollution and deforestation, so regulating these can prove effective. Targeting these can also contribute in changing market structure and spur investment in best environmental practices.[109] Furthermore, two other criticisms stating that the proposal does not reach its full potential are that the individual company approach creates uncertainties as well as potential strategic behaviour of lead companies, and lastly that the focus is on the companies identifying and addressing adverse impacts and that ease over the due diligence process being a risk-based and pre-emptive process with meaningful stakeholder engagement.[110] No matter how many companies fall under the scope of the directive in the end, the expectation is that large companies, like the ones in scope of the CSDDD, and their disclosure and governance practices will be looked at as best practice or lead to market pressure for many companies to act similarly.[111]

The EU Parliament is the next to adopt its position, in accordance with the ordinary legislative procedure (Article 294 TFEU), before trilogues will begin, with predicted earliest CSDDD adoption to be set in early 2024.[112] There is a two-year transposition deadline for Member States to integrate the Directive into national law once it is adopted.[113] The European Parliament Legal Affairs Committee has adopted a position[114] but as the institution has not come out with a final official approach, it will not be assessed in the paper as mentioned earlier.

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[108] Mares (n 79) 565.
[109] Bertram (n 73).
[110] Anne Lafarre, ‘Mandatory Corporate Sustainability Due Diligence in Global Value Chains: The Long-Awaited European Solution Compared to Existing International Standards’ (2023) Tijdschrift Ondernemingsrecht – the Leading Dutch Company Law Journal 5/33, 199, 237 <https://www.stibbe.com/sites/default/files/2023-03/Tijdschrift%20Ondernemingsrecht%20%E2%80%93%20the%20leading%20Dutch%20company%20law%20Journal.pdf> accessed 29 April 2023.
[111] Sarah Joseph and Joanna Kyriakakis, ‘From Soft Law to Hard Law in Business and Human Rights and the Challenge of Corporate Power’ [2023] 36 Leiden Journal of International Law 335, 338–339.
[112] Cristoph H Seibt and others, ‘Supply Chain Compliance: Update on the EU Corporate Sustainability Due Diligence Directive’ (*Freshfields Bruckhaus Deringer*, 16 December 2022) <https://sustainability.freshfields.com/post/102i3p0/supply-chain-compliance-update-on-the-eu-corporate-sustainability-due-diligence> accessed 15 May 2023.
[113] Commission, Press release Just and Sustainable Economy (n 10).
[114] European Parliament (n 23).European Parliament (n 23).

5 Corporate Civil Liability in the CSDDD

Having discussed the background to the CSDDD, namely GVCs, the UNGPs and the due diligence obligation, it is now necessary to discuss the vital part of the due diligence obligation when it comes to its enforcement and feasibility, namely corporate civil liability encompassed in Article 22 of the proposal. Corporate civil liability is the overarching name for holding companies liable for harm caused by them, their subsidiaries.[115] Or as per CSDDD for business relationships as well. This chapter will also go into the topic on parent company liability in relation to the CSDDD, highlighted by some case law on parent companies being liable for the harm caused by their subsidiaries and contracting parties.

5.1 Lead Company Liability in the CSDDD

The starting point in lead company liability is that company law protects parent companies from liability for harm caused by their subsidiaries.[116] For this theoretical section on lead company liability the term parent company will be used as this is the commonly used definition in for example case law, which is examined later in this section. Parent companies are companies that have the power, real or potential, to exercise influence through for example majority shares or voting rights over a company. The definitions for dominance or control, parent and subsidiary etc. vary between countries.[117]

To understand parent company liability, it is vital to understand the rule of limited liability, an essential principle in corporate law as it incentives investments. In a company, the shareholders liability is limited to the share capital of the company, that is the capital that they contributed or ought to contribute to. The concept applies to companies that hold all shares of another company.[118] Limited liability is not absolute, there is an exception called piercing the corporate veil. Shareholders can be liable both jointly or severally, for engaging in harm, fraud or other wrongdoing resulting in damage caused by their company.[119] This refers to the legal separation principle, an exception to standard liability rules based on fault, not holding

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[115] Bueno and Bright (n 14) 799.
[116] Mares (n 3) 3.
[117] Rafael M. Manóvil, 'Groups of Companies: Les Groupes de Sociétés - General Report', in Rafael M. Manóvil (Ed), *Groups of Companies: A Comparative Law Overview*, Ius Comparatum - Global Studies in Comparative Law, vol 43 (1st edn, Springer 2020) 6.
[118] Penelope A Bergkamp, 'Parent Company Liability After *Okpabi v. Shell*' (2018) 15 European Company Law 112, 112.
[119] ibid 113.

parent companies liable. In practice, this means that parent companies can be held liable, whilst simultaneously it protects against the abuse of legal separation.[120] Under new theory of parent company liability, veil piercing is not necessary and parent companies are regarded directly liable for their subsidiaries by way of an obligation of a duty of care no matter the liability of the subsidiary (relating to the subsidiary's creditors).[121] It can be agreed that for victims of environmental misconducts, corporate veil piercing cannot be regarded as an accessible remedy.[122] Multinationals use specific group structures to be able to divide liability risks that occur remotely, a decision they may take to avoid liability.[123] Other than corporate veil piercing, and holding parent and lead companies liable for the duty that arises from control and supervision, there are some other options to hold group companies liable. These include e.g., enterprise liability, meaning the whole group, or adjusted vicarious liability for 'network companies' to avoid defining what a group company is looking at degrees of integration and other links.[124]

To give examples of the laws of the EU Member States, France uses a fault-based liability whereas the Swiss Responsible Business Initiative[125] uses a strict liability for lead companies. This switches the burden of proof from the claimant to the company (in combination with their liability defence) leaving the company to prove that due diligence was exercised properly.[126] The suggestion for a civil liability clause in a law on HRDD obligations by Claire Bright and Nicolas Bueno, is a strict liability regime, that contains a defence for due diligence, as long as the notion of control is well defined for both lead and lead companies, and adding that companies cannot automatically escape liability by merely demonstrating that they have formally exercised HRDD, i.e. the tick-box exercise.[127] This tick-box exercise possibility will be examined in chapter 6.

[120] Mares (n 3) 8.
[121] Bergkamp (n 116) 113.
[122] Michael Faure, 'Environmental Liability of Companies in Europe' [2022] 39 Arizona Journal of International and Comparative Law 1, 67.
[123] Ben Ye, 'Okpabi v. Shell and Nestle USA v. Doe: Trend and Divergence on Parent Company Liability for Human Rights Abuse in the United Kingdom and United States Commentary' (2021) 54 New York University Journal of International Law and Politics 261, 262.
[124] Martin Petrin and others, 'Rethinking Group Company Liability' (University of Oxford - Faculty of Law Blogs, 24 January 2019) <https://blogs.law.ox.ac.uk/business-law-blog/blog/2019/01/rethinking-group-company-liability> accessed 16 May 2023.
[125] Chancellerie fédérale, Initiative populaire fédérale 'Entreprises responsables – pour protéger l'être humain et l'environnement' <www.bk.admin.ch/ch/f/pore/vi/vis462t.html> accessed 23 May 2023.
[126] Bueno and Bright (n 14) 805.
[127] ibid 817.

Another aspect of determining liability for adverse impacts for sustainability due diligence is that it is hard to define the contribution to the harm. The distinction between being directly linked and contributing has not been legally defined to a sufficient extent, to determine legal liability. This argument is supported by stating that the notion is not used coherently in European Member States, using notions like factual and legal control in the Draft Treaty on Business and HR, The French Loi de Vigilance discussing exclusive control (specifically decision-making power), and lastly the Swiss Responsible Business Initiative using the notion economic control.[128] The common factor being a notion of control however, but the differences of how the control is defined does bring confusion.

Before, companies beyond the corporate group but part of the value chain, like buyer companies that are leveraged, controlled or influenced and caused harm, have been rejected in the part for various reasons like the relationship between the companies not being close enough or time-barred claims. Nonetheless, it can be deduced from those instances that a certain degree of control as well as supervision can be exercised by lead companies as well, over their for example (sub)contractors or suppliers, that can be compared to parent company control over their subsidiaries. Not only case law but legal developments toward this are in the draft treaties on business and HR and in the aforementioned French law, that suggest that as lead companies liability is progressively being defragmented, it has started to extend beyond corporate groups as well.[129] What was missing before the CSDDD proposal, before mandatory due diligence, was that the lack of decisions on merits in combination with heterogenic criteria used by domestic courts provided legal uncertainty.[130]

5.1.1 Case Law on Parent Company Liability

A potential key driver for effective private governance is the threat of liability, which is seen in private law general doctrines in case law.[131] To understand liability of multinationals, it is important to look at recent developments in parent company liability, where ground-breaking changes are taking place in England and the Netherlands. The cases highlight implications for international human rights-, environmental litigation, and

[128] Bueno and Bright (n 14) 817.
[129] ibid 812–15.
[130] ibid 815–16.
[131] Jaakko Salminen, 'Sustainability and the Move from Corporate Governance to Governance Through Contract' (May 6, 2019) in Beate Sjåfjell and Christopher M. Bruner (eds), Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability (Cambridge University Press, 2019), Chapter 5., University of Oslo Faculty of Law Research Paper No. 2019-10, 67.

climate change litigation, giving examples from common and civil law jurisdictions.[132] The selection of cases is thus made based on the implications they have for parent and lead company liability on a larger scale. The case law that exists on civil liability cases for harm caused by companies are decided based on different national liability regimes, and therefore have differing outcomes, that may lead to legal uncertainty and even distortions to competition law.[133] Another reason for why the CSDDD will bring legal certainty with it so EU Member States can have the same standards and level playing field to apply their national laws to. The following cases are watershed in parent and lead company liability.

Historically the first cases are English. *Chandler v Cape* is the first notable case in this comparison, where a parent company, Cape Plc, has been considered to owe a direct duty of care toward one of its subsidiaries' employees.[134] The Court of Appeal held that Cape Plc owns a direct duty of care to Mr Chandler.[135] The duty of care is not automatic but depends on the following circumstances: "(1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.".[136] When this case was decided, the judgment gave the impression that it is irrelevant where the subsidiary is incorporated, as long as the parent company is registered in the England.[137] Following this case, a few years later *Lungowe v Vedanta*[138] was held. The case concerns toxic emissions from a Copper Mine in Zambia. The claimants in the case are Zambian citizens, affected by the emissions in their only source of drinking water (to drink, for their

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[132] Daniel Leader 'The Developing Legal Landscape on Parent Company Liability - Corporate Impunity Drawing to a Close?' (*UCL Centre for Law and Environment* - Climate Change and the Rule of Law Blog, 29 March 2022) <https://www.ucl.ac.uk/law-environment/blog-climate-change-and-rule-law/developing-legal-landscape-parent-company-liability-corporate> accessed 18 May 2023.

[133] Loes Lennarts 'Civil Liability of Companies for Failure to Conduct Corporate Sustainability Due Diligence throughout their value chains - Is Art. 22 CSDDD Fir for Purpose? Tijdschrift Ondernemingsrecht - The leading Dutch Company Law Journal (2023) 5(36) 199, 258 <https://www.stibbe.com/sites/default/files/2023-03/Tijdschrift%20Ondernemingsrecht%20%E2%80%93%20the%20leading%20Dutch%20company%20law%20Journal.pdf> accessed 15 May 2023

[134] *Chandler v Cape* [2012] EWCA Civ 525 [1] (hereafter *Chandler v Cape*).

[135] Ibid par. 80.

[136] Ibid par. 80.

[137] Linklaters, 'Chandler v Cape Plc.' (*Linklaters*, 21 May 2012) <https://www.linklaters.com/en/insights/publications/ecc/chandler-v-cape-plc> accessed 18 May 2023.

[138] *Lungowe v Vedanta* [2019] UKSC 20 (hereafter *Lungowe v Vedanta*).

livestock, and crops), whereas (one of) the defendant(s) is the parent to the multinational Vedanta, listed in the England.[139] For group-wide policies, the case held that they: “do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries”.[140] The case confirmed that tort principles apply to parent company duty of care.[141] A third English case in this comparison is *Okpabi v Shell*[142], concerns two sets of proceedings named Ogale and Bille, the case builds on *Vendanta*, for example referring to it in par. 148. The first claim brought by the leader of a community of about 40 000 Nigerians, and the second by about 2300 Nigerians, both claims from different Kingdoms.[143] The claims concern oil spills form pipelines causing environmental damage like contamination of water and the ground caused by Nigerian registered Shell Petroleum development Company of Nigeria Ltd, owned by multinational Royal Dutch Shell.[144] Before the appeal, the English courts made the applicants show control, proven hard without access to corporate documents internally, as Shell tried to persuade that they had no real involvement in the subsidiary’s conduct whilst simultaneously refusing to disclose documentation to prove otherwise. Luckily for the applicants the appeal court overturned the decision and shed light on the importance of internal documents, and rejecting the restrictive liability test allowing not only control but supervision and other intervention forms.[145] Simply put, Okpabi held that Shell has a duty of care to the claimants and that the case can proceed in court, it is this not a final judgment but sets the tone for future claims of similar nature.[146] English tort law has its basis in the case *Donoghue v Stevenson*[147], which holds that a duty of care can be owed by parent companies if they manage or jointly manage their subsidiary’s activities, defectively advices or issues group-wide policies or actively makes sure they are implemented.[148] It was held in *Lubbe v Cape*[149] that this duty can be applied to foreign claimants.

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[139] *Lungove v Vedanta* par. 1-2.
[140] Ibid par. 53.
[141] Joseph and Kyriakakis (n 109) 350.
[142] Okpabi and others v Royal Dutch Shell Plc and another [2021] UKSC 3 (hereafter *Okpabi*).
[143] *Okpabi*, par. 3.
[144] Ibid, paras. 4–6.
[145] Leader (n 129).
[146] Lucas Roorda and Daniel Leader, ‘Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court’ (2021) 6 Business and Human Rights Journal 368, 369.
[147] *Donoghue v Stevenson* [1932] UKHL 100 (hereafter *Donoghue*).
[148] Cees van Dam, ‘Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms’ (2021) 18 European Company and Financial Law Review 714, 735–736.

In Begum v Maran[150], the claimant is a widow of a worker in shipyards in Bangladesh. The case concerns the demolition of an oil tanker, in the process of which the worker died by falling to his death. The vessel was operated and managed by Liberian company Maran Tankers Management ("MTM"), which had an agreement with the Appellant, incorporated in the England, that sold the ship to Hjesar Maritime Inc.[151] In other words, the case concerns a supplier who outsourced the dismantling by contract to another party. In *Begum v Maran*, it is discussed that the harm only existed for this vessel disposal place, had the boat been sold to another place as Maran both could and should have sold it to a place with good working practices and a safe demolition, and that these places exist. This is achievable through for example MoA provision.[152] Clause 22 in the agreement set an obligation to the buyer, to sell the ship to a place with safe and healthy working practices, was in the sellers reasonable control.[153] In the evidence it was made known that the buyer and seller knew that the clause, and similar clauses, would be ignored, allowing the seller to escape ensuring the performance of it, and for the buyer no sanction in case of a breach of it.[154] At the minimum arguable that could and had the seller acted differently it could have affected the outcome.[155] This type of contractual clause is similar to the CSDDD liability provision, and the defense in article 22(2). Coincidentally the same provision number as in *Begum v Maran*.
The court's commentary is noteworthy as companies increasingly rely on contractual obligations focused on e.g. HR and ESG as a response to UNGPs, and other transnational sustainability laws like the UK Modern Slavery Act 2015[156] and Coulson LJ's view of the clause proposes that courts will not allow defendants to rely on contractual clauses to escape liability, in cases where there is evidence that the parties know that the clause would or could not be enforced or followed.[157] The case raises questions of general nature on corporate civil liability for consequences in interactions of economic nature and can have significant effects for similar cases in other industries as well. However, the case was made on arguability

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[149] *Lubbe v Cape plc* [2000] UKHL 41, par. 20-26.
[150] *Begum v Maran* [2021] EWCA Civ 326, (hereafter *Begum v Maran*).
[151] *Begum v Maran, par. 5-8.*
[152] Ibid par. 67.
[153] Ibid par. 68.
[154] Ibid par. 69.
[155] Ibid par. 70.
[156] UK Modern Slavery Act 2015.
[157] Ruth Cowley and others, 'Court of Appeal Considers "Unusual Extension" to Duty of Care Principles' (*Norton Rose Fulbright, March 2021*) <https://www.nortonrosefulbright.com/en/knowledge/publications/f248bef3/court-of-appeal-considers-unusual-extension-to-duty-of-care-principles> accessed 16 May 2023.

not final merits and establishing the existence of a duty of care is not straightforward.[158]

Continuing on the three aforementioned cases, parent and lead companies can be held liable for group-wide policies in certain circumstances. In *Okpabi*, the court ruled that group-wide policies are in themselves a base for liability for example in implementation by subsidiaries contains errors which in their turn cause harm to others.[159] Another aspect is value chain governance standards, and parent company liability arising from it as it puts in place standards for value chain actors to follow. This can be beneficial as its less demanding than other explicit acts of governance that require to show evidence and that materials these standards are more accessible given investments into public reporting and similarity to disclosure requirements. Case in point, this is illustrated in *Lungowe* in that the court held that liability of the parent company was founded in published material, in claims of control[160]. Similarly, in *Okpabi* the group guidelines had errors in the standards, having the capability of leading to liability (even if explicit enforcement was not attempted by the parent company).[161] A third alternative a situation in which a lead firm does not claim or explicitly govern its value chain, but instead indirectly governs it because of something called a market price mechanism. In this situation the lead companies only partake in basic due diligence, and as outsourcing is the standard practice in market price mechanisms, this liability type is regarded as exceptional. An example is for a parent company to on knowingly, or on purpose, take risky actions or outsource production to actors deemed incapable. An illustration of this is the case *Begum v Maran*, the English court held that the seller ought to have known the danger, taking into account the ship fuel status, location and price. The liability would then depend on the parent company's, i.e. the sellers, market knowledge. This type of liability seems controversial as the parent company has actual knowledge of the risk of outsourced production, it being a prerequisite to the type of liability, and knowingly engage in business with a supplier that

[158] Madison Hardwicke-Hunter, 'Begum v Maran (UK) Ltd [2021] EWCA Civ 326' (*Linklaters*, 2021) <https://www.linklaters.com/knowledge/-/media/digital-marketing-image-library/files/06_ckp/2021/june/gc22869_begum_v_maran_ewca_client_alert_2pp_fs-final_screen.ashx?rev=ce2d418a-fa8e-440e-becd-06df774233f6&extension=pdf&hash=40454A4D64699A730538A22A50711AEE> accessed 24 May 2023.

[159] Jaakko Salminen and Mikko Rajavuori (2023), "A typology of governance for conceptualizing liability for inadequate value chain governance", working paper presented at conference "Sustainability and Corporate Accountability", Oslo University, 13 April 2023 <https://www.jus.uio.no/english/research/areas/sustainabilitylaw/events/2022/22-04-27-sustainability-corporate-accountability.html> on file with author, 10-12.

[160] *Lungowe* v *Vedanta*, par. 53.

[161] Salminen and Rajavuori (2023) (n 156) 13-14.

cannot undertake the task at hand based on elements such as price. This type of liability is in sum hard to prove, and showing negligence challenging, the mere existence of it is important for the sake of principle. If it were not to exist, lead companies would and could disregard liability through market governance.[162] Some criticism to these cases is that the cases were triable, to success of the claim was not addressed, the focus lies on corporate groups rather than value chains that are contractually organized with a focus on negligence principles rather than liability in company law.[163]

For the Dutch case law, I want to bring up two cases, both involving Royal Dutch Shell and *Milieudefensie*[164]. The first being *Milieudefensie* bringing a case on Shell's climate change actions, and whether Shell has an obligation to reduce CO2 emissions through the entire group by 2030 and compared to levels in 2019.[165] Remarkable in this case is that the UNGPs are referred to specifically, Shell Groups policies in combination with their CO2 emissions, consequences, reference to ECHR rights, Shell control over its group (Shell group was considered as one entity[166]), climate change gravity, reduction possibilities, dual challenge of energy demand and climate change and a few more criteria.[167] The court ordered Shell to reduce their CO2 emissions to be in adherence with the Paris Agreement.[168] The reasoning included that the damage applies both to future and current generations.[169] The case refers to the whole Shell group and also reflects that the responsibility extends further, to suppliers as well as customers. The obligation is described as a result obligation within the group and as an best-efforts obligation for suppliers and customers.[170]

The *Four Nigerian Farmers and Stichting Milieudefensie v Shell*[171] cases (hereafter *Four Nigerian Farmers*) is the first case where a parent company

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[162] Salminen and Rajavuori (2023) (n 156) 15-16.
[163] Ibid 16-17.
[164] Hague District Court 26 May 2021 RBDHA, *Milieudefensie v Royal Dutch Shell* [2021] ECLI:NL:GHDHA:2021:1825 (hereafter *Milieudefensie*).
[165] *Milieudefensie*, 4.1.1-4.1.2.
[166] van Dam (n 145) 726.
[167] *Milieudefensie* par. 4.4.2.
[168] Ibid par. 5.3.
[169] Ibid par. 4.4.54
[170] Rechtbank Den Haag, '*Royal Dutch Shell must reduce CO2 emissions*' (Rechtbank Den Haag Niuews, 26 May 2021) <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Den-Haag/Nieuws/Paginas/Royal-Dutch-Shell-must-reduce-CO2-emissions.aspx> accessed 24 May 2023.
[171] Court of Appeal The Hague 29 January 2021, ECLI:NL:GHDHA:2021:132 (hereafter the *Oguru* case), Court of Appeal The Hague 29 January 2021 ECLI:NL:GHDHA:2021:133 (hereafter the *Dooh* case), Court of Appeal The Hague 29 January 2021 ECLI:NL:GHDHA:2021:134 (hereafter the *Akpan* case) (together hereafter the *Four Nigerians Farmers* cases).

has breached its duty of care towards adverse impacts by its foreign subsidiary and been held liable.[172] The cases consist of the Oguru[173] (two farmers jointly[174]) case, Dooh[175] and Akpan[176] case. The cases concern Milieudefensie, Royal Dutch Shell and its Nigerian subsidiary Shell Petroleum Development Company ("SPDC"), again for oil leaks in several villages called Oruma, Goi and Ikot Ada Udo. The Hague Court of Appeal in 2021 found, that SPDC has strict liability for the oil leaks.[177] Subsequently it was ruled that a duty of care for safety measures by the subsidiary was had, and for damages a tort was committed under Nigerian common law.[178] The case is thus similar to *Okpabi* as is concerns oil leaks in the same geographic area in Nigeria. The case highlights the difficulty in applying foreign law in transnational cases. The Court applied English law wrong as they used the test set out in the *Caparo*[179] case rather than the broader guidance in *Vedanta*.[180] The Caparo test includes firstly foreseeability of damage, secondly the proximity of the relationship and thirdly the reasonableness.[181] The *Caparo* test should only be used for new duties of care[182], parent company liability is not new according to *Vendanta*, the case was not of the same type and finally parent company liability does not require negligent conduct from the subsidiary. However, even with the right Vedanta interpretation the right result could have been reached.[183]

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[172] Wubeshet Tiruneh, 'Holding the Parent Company Liable for Human Rights Abuses Committed Abroad: The Case of the Four Nigerian Farmers and Milieudefensie v. Shell' (*EJIL: Talk!*, 19 February 2021) <https://www.ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-shell/> accessed 12 May 2023.
[173] The Hague Court of Appeal, 29 January 2021, ECLI:NL:GHDHA:2021:132 (*hereafter Oguru*).
[174] M.T.Kawakami, 'Don't sweat the small stuff? The new proposal for the EU directive on corporate sustainability due diligence' (Law Blogs Maastricht University, 6 March 2022) <https://www.maastrichtuniversity.nl/blog/2022/03/don%E2%80%99t-sweat-small-stuff-new-proposal-eu-directive-corporate-sustainability-due> accessed 16 May 2023.
[175] Court of Appeal The Hague 29 January 2021 ECLI:NL:GHDHA:2021:133 (hereafter *Dooi*).
[176] Court of Appeal The Hague 29 January 2021 ECLI:NL:GHDHA:2021:134 (hereafter *Akpan*).
[177] Cees van Dam, 'Commentary: Shell Liable for Oil Spills in Niger Delta' (*Business & Human Rights Resource Centre, 8 February 2021*) <https://www.business-humanrights.org/en/latest-news/commentary-shell-liable-for-oil-spills-in-niger-delta/> accessed 16 May 2023.
[178] Lucas Roorda, 'Broken English: A Critique of the Dutch Court of Appeal Decision in Four Nigerian Farmers and Milieudefensie v Shell' (2021) 12 Transnational Legal Theory 144, 145-6.
[179] *Caparo Industries Plc V Dickman* [1990] UKHL2 (hereafter *Caparo*).
[180] Lucas Roorda, 'Shell in Court, Again: A Short Comparison of the Okpabi and Milieudefensie Judgments' (Corporate Justice Coalition, 30 March 2021) <https://corporatejusticecoalition.org/news/shell-in-court-again-a-short-comparison-of-the-okpabi-and-milieudefensie-judgments/> accessed 17 May 2023.
[181] *Caparo*, see <https://www.bailii.org/uk/cases/UKHL/1990/2.html> accessed 23 May.
[182] van Dam (n 145) 739.
[183] ibid.

They case may bring future claims for parent companies as the claim was based on merit rather than hypothetical liability[184]

Civil litigation towards parent and lead companies has grown in domestic tort law in the EU, and sustainability due diligence is an integral part in determining the extent of supervision that needs to be exercised over the subsidiary or business partner, and a relevant part to determine liability or negligence. Most jurisdictions use the company law principle called separate legal personality. This means that separately incorporated companies in corporate groups are vis-à-vis regarded as separate legal entities with their distinct existence from owners and managers, which means that it is rare for parent companies to be automatically held liable for harm caused by a subsidiary based on the shareholding by the corporate vail being lifted so the parent company would be held vicariously liable (meaning to liable for torts committed by someone else[185], i.e. a parent company for its subsidiary's tort irrespective to any negligence by the parent company[186]). But this has started to change. This can happen in two ways. The traditional way is that the harm caused depends on a degree of control that is exercised by the parent company about the decision made, and the new way is that the relationship between the parent company and the subsidiary has a special relationship by way of creating an expectation that control is exercised by the parent over the subsidiary.[187] The traditional way can be illustrated by the case *Okpabi* (before the appeal). In this case the claimants could not demonstrate the duty of care being owed for devising a material policy of the subject of the claim or controlling the subsidiary (in the original judgement, later overturned by the appeal). On the other hand, the *Chandler v Cape Plc*[188] case illustrates the new way. In this case an ex-employee had contracted asbestosis during his employment to the subsidiary of the parent company. The duty of care was demonstrated by four indicia by Lady Justice Arden: " (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection."[189].[190] It is not always one or the other when it comes to the new and traditional approaches. One of the *Four Nigerian farmers* cases, *Dooh* allowed the claim, unlike *Okpabi* (before the appeal), with the grounds that:

[184] Roorda (n 175) 146–147.
[185] Paula Giliker 'What Is Vicarious Liability?', in *Vicarious Liability in Tort: A Comparative Perspective*, Cambridge Studies in International and Comparative Law (Cambridge University Press 2010) 1.
[186] Lucas Bergkamp and Wan-Q Pak, 'Piercing the Corporate Veil: Shareholder Liability for Corporate Torts' [2001] Maastricht Journal of European and Comparative Law, 8(2), 167, 170.
[187] Bueno and Bright (n 14) 807–8.
[188] *Chandler v Cape.*
[189] *Chandler v Cape*, par. 80.
[190] Bueno and Bright (n 14) 807–9.

"Considering the foreseeable serious consequences of oil spills to the local environment from a potential spill source, it cannot be ruled out from the outset that the parent company may be expected in such a case to take an interest in preventing spills" citing the *Caparo* test.[191]. The court's decision became a hybrid approach using both the supervision over the subsidiary and the degree of supervision that should have been exercised based on the relationship evidenced by group-wide policies. Another case with a hybrid approach is the *Lungowe v Vedanta* case. The court came to the decision that there is three ways that group-wide policies can give rise to duty of care by parent company. Poor group-wide policies[192], ensuring subsidiary implementation by taking active steps like enforcement, supervision and training[193], lastly the parent company has responsibility to third parties if it publishes materials that the company holds itself out to exercise control or supervision of its subsidiaries even in case that is not factually correct.[194] The conclusion that can be drawn from this is that parent companies do have a duty of care toward third parties, e.g. local communities, if, the company exercises supervision to a certain degree as well as control over the subsidiary's activities as a part of its group-wide policies, and that the duty of care rises both for failure to take action and for positive steps.[195] The case provides for jurisdiction in the English based on difficulties in accessing justice in the countries we the damage occurred, Zambia, in the case of *Vedanta*. This case highlights that it is not a given that the corporate vail can be lifted.[196] The case also highlights that there is a general fear of companies to be more transparent as it could lead to increased legal risks.[197] Companies might be disincentivised to devise group-wide commitments or policies, fearing to be exposed to legal liability and lifting the corporate vail. On the other hand, growing support for mandatory HRDD contradicts this statement. Bringing the CSDDD to this discussion, the mandatory nature of the instrument changes this risk by shifting the question of a risk to a breach of duty. [198]

To this end, the most notable case law in Europe about parent and lead company liability are Dutch and English, many of the cases being against the multinational Shell, that amid some of the cases discussed, changed its headquarters from the Netherlands to England.[199] Had Shell proactively or

[191] *Dooh* par. 3.2.
[192] Bueno and Bright (n 14) 811.
[193] *Lungowe v Vedanta* par. 53.
[194] *Lungowe v Vedanta,* par. 53.
[195] Bueno and Bright (n 14) 811.
[196] Yenkong Ngangjoh-Hodu and others, 'The Proposed EU Corporate Sustainability Due Diligence Directive and Its Impact on LDCs: A Legal Analysis' (Ministry of Foreign Affairs of Finland, 27 March 2023) 92 <https://um.fi/publications/-/asset_publisher/TVOLgBmLyZvu/content/kehityspoliittinen-tilausselvitys-the-proposed-eu-corporate-sustainability-due-diligence-directive-and-its-impact-on-ldcs-a-legal-analysis/35732> accessed 18 May 2023.
[197] Smit, Bright and Neely (n 31) 9.
[198] Danis-Fatome (n 74) 490.
[199] Sarah McFarlane, 'Shell to Move Headquarters to London Amid Energy Transition' (*Wall Street Journal*, 15 November 2021) <https://www.wsj.com/articles/shell-plans-to-

actively implemented sustainability due diligence earlier they could have avoided these costs, blaming others has just proven to be the result of failed leadership.[200] Reasons for why the oil contamination continues is that these oil companies take advantage of the weak regulatory regime or rule of law.[201] These cases have been lengthy with some settled 10-20 years after the claims we made. The main argument that emerges from the case law on liability for multinationals is then the extent of the liability, and that it can go further than parent companies being liable for their subsidiaries. Most of these cases regard parent-subsidiary relationships, *Milieudefensie* and *Begum v Maran* are those that extend the liability beyond the company group. Looking at these cases substantively, liability for parent companies is not remarkable as it may depend on failure to prevent damage or behavioural things, the increase of risks (i.e. in liability) is not enough in effective HR protection. There has been a shift in looking at risks, the risks are no longer just about the company, but the harmed individuals, to manage them not externalise them, a necessary paradigm shift for both parties.[202] The parent-subsidiary cases are still of importance for establishing lead company liability as they can also cover other contractual relationships and set precedent, and these type of cases will increase in the future.[203] The key findings from these cases is that parent company, even lead company liability, claims have become more feasible with a broadened scope, foreign courts need to understand that broadened scope, and barriers for effective remedies still exist.[204]

5.2 Article 22 CSDDD on Civil Liability

Looking at HRDD and civil liability, whereas there is a clause on civil liability in Article 22 of the CSDDD proposal, the UNGPS merely touch upon legal liability, stating in the commentary to principle 12 that liability (and enforcement) is largely left to national law and is distinct from the due diligence responsibility, but that remedies are to be provided for or cooperated for.[205] This phenomenon of the lack of liability being mentioned in the UNGP's is referred to as the accountability gap sometimes in human rights and business.[206] The UNGPs provide that due diligence help companies by mitigating legal risks like legal claims by showing that reasonable steps have been taken in case of being alleged with human rights

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scrap-dual-share-structure-to-help-navigate-energy-transition-11636967889> accessed 16 May 2023.

[200] van Dam (n 145) 727.

[201] Leader (n 129).

[202] van Dam (145) 747-8.

[203] ibid 747.

[204] Roorda and Leader (n 143) 375–376.

[205] Smit, Bright and Neely (n 31) 3.

[206] Bueno and Bright (n 14) 793.

abuse, but importantly, this step should not be seen as a safeguard for automatically being cleared from liability for human rights abuses as provided in the commentary to principle 17.[207]

The CSDDD has already shown that value chains are vital to this instrument, and part of the objective is that companies need mandatory due diligence also down their value chains, in other words, lead companies need to exercise the due diligence obligations for e.g. subsidiaries and established business relationships, and if not, they might be liable for damages for failing to complete this obligation. In other words, the civil liability exists both within the company as well as with contractual partners down the value chain. These partners can be located remotely both contractually and geographically.[208] Lead companies are then liable for both vertical relationships within their own group, for examples subsidiaries (supply chain width), as well as horizontal relationships within the value chain, like contracting partners (supply chain length). As such, the threshold to trigger lead liability seems comparatively low as both relationships can trigger this type of liability.[209] In other words, companies can be held liable for not taking appropriate measures in ending or minimising adverse impacts. What is considered appropriate measures is examined in chapter 5.2.1 in the case law section.

Looking at the Article itself, Article 22 sets out that in principle, companies that fail to comply with the article 7 and 8 obligations are liable for damages, if the failed obligation (e.g. identification, prevention, mitigation, ending or minimizing an adverse impact) led to damage. Now for the liability outside of the company itself it is different. Article 22(2) follows 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.". Account of efforts relating to the damage in question, compliance with remedial actions required by supervisory authority, investments, targeted support in arts. 7 and 8, and cooperation with other bodies to address harm in the GVCs are

[207] Smit, Bright and Neely (n 31) 3.
[208] Pacces (n 32) 4.
[209] Charlotte Villiers, 'New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity' [2022] 13 European Journal of Risk Regulation 548.

also factors that weigh in.[210] This article 22(2) of the proposal could be seen as a tick-box clause, a way for companies to escape liability by doing the bare minimum with no real intention to foster sustainability due diligence for other reasons than to adhere to the mandatory due diligence requirements.[211] Article 22(3) under this provision, provides that the liability is "without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the value chain". Subparagraphs four and five discuss that stricter rules in national or union law situations are allowed, and that Member States are to ensure that national law provisions transposing this article have overriding mandatory application in such cases where the applicable law to a claim is not an EU Member State law to that effect, to be able to ensure access to remedy.[212]

Companies use limited liability to be able to avoid tort liability, conveying damages onto society.[213] Civil liability regimes are used for victims to be able to seek access to justice for adverse impacts brought about by a corporation.[214] The article at hand is a fault-based regime, in contrast to a strict liability regime. This means that the claimant carries the burden of proof.[215] This liability regime lifts the corporate vail for overseas harms of the company. Within the CSDDD, victims have to prove standing, damage, fault as well as causation, bearing the burden of proof, creating obstacles like costs.[216] Otherwise, the burden of proof is left to national law, which for example in France is on the victim.[217] The burden of proof here is another aspect that has been criticised, asking why the victims need to bear this burden instead of the liable party causing harm.[218] Some other peculiarities to the article include that the fault is assessed by national supervisory authorities, and that it includes incentives as efforts that are assessed as well as investments, which can help collaboration between entities and finding links in production.[219] Causal links have been proven hard to determine with the French Loi de Vigilance, so Member States transpositions will be crucial in the victims linking the fault to the company.[220] Another aspect that requires clarity is if there are multiple parties liable, how is the burden

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[210] Explanatory Memorandum (n 2), 17.
[211] Bueno and Bright (n 14) 790.
[212] Lennarts (n 130) 258-259.
[213] Pacces (n 32) 15.
[214] Ngangjoh-Hodu and others (n 193) 90–91.
[215] Stéphane Brabant and others, 'Enforcing Due Diligence Obligations: The Draft Directive on Corporate Sustainability Due Diligence (Part 2)' [2022] Verfblog 2 <https://verfassungsblog.de/enforcing-due-diligence-obligations/> accessed 18 May 2023.
[216] Ngangjoh-Hodu and others (n 193) 90–91.
[217] Brabant and others (Part 2) (n 212).
[218] Brabant and others (n 212).Brabant and others (n 212).
[219] Danis-Fatome (n 74) 496.
[220] ibid 492.

shared in that situation?[221] As there is sometimes a liability gap present, with outsourced production and GVCs it seems that this indeed is present, holding lead companies liable for how they govern value chains (for failure to adhere to obligations) seems like a reasonable justification and effective way to govern value chains.[222]

Ultimately, the effectiveness of determining liability will depend on the Member States and the enforcement. Some challenges include e.g. costs of compliant business operations, how damages are calculated, the discovery and proving the causal link of the perpetrator relating to the burden of proof.[223] As the CSDDD will be applied in the Member States, for civil liability it not only gives security to this right, but acts as a sounding board, as a standard for companies to give clarity to when they can be held liable and what due diligence obligations they need to follow. This can raise the bar for some Member States who do not yet have similar sustainability laws or add to those who have laws but are not as extensive or apply to less companies for example. is important to note that fault can be contributed to natural persons, to the directors according to Article 25 of the proposal, but this will not be analysed in this paper.

5.3 Comparing the Article 22 in the Commission Proposal to Article 22 in the Council Position

The prima facie impression when comparing the articles from the start is the title of the provision. The Council position wants to emphasize the right to compensation as an equally important right as the right to civil liability. The position of the Council, claims to achieve legal clarity and certainty to the civil liability provision, by for example clarifying the conditions that need to be met to hold a company, jointly and severally liable of subsidiary or established business partners. The four criteria to hold a company liable are the following: (1) damage caused to a legal or natural person (2) breach of duty (3) a causal link between the breach of the duty and the damage (4) fault by intention or negligence. The Council also justifies the amendments by saying that they want to avoid any unreasonable interference with the tort law systems in the Member States.[224] Following those criteria, the observation is that the difference in the wording of Article 22(1) in both the Commission proposal and Council position, subsection one does add a little

[221] ibid 494.
[222] Salminen and Rajavuori (2019) (n 11) 9 and 23.
[223] David Krebs, 'Environmental Due Diligence Obligations in Home State Law with Regard to Transnational Value Chains' in Peter Gailhofer and others (eds), *Corporate Liability for Transboundary Environmental Harm: An International and Transnational Perspective* (Springer International Publishing 2023), 245, 304.
[224] Council of the European Union General Approach (n 94) 9–10.

clarity to the text (in practice it does not seem necessary) by adding the words legal and natural person as well as intent and negligence. Interestingly the same provision adds that companies cannot be held liable for damage caused by business partners in the chain of activities, hinting at a strict liability provision, which definitely needs some clarification as it is unclear whether that includes subsidiaries or not.

Instead of the Commission proposal Article 22(2) exception, the Council position adds the express right to full compensation, adding in the summary that it should not provide for overcompensation like punitive damages.[225] The reasoning is it was heavily criticised for its reliance on contractual assurances, and that the other clarifications made allowed for this deletion. The Council adoption claims to clarify joint and several liability between the company and business partner or subsidiary as well as the overriding mandatory application of civil liability.[226] However subsections 4 and 5 are virtually the same, the fifth being that of the overriding mandatory application, so the added clarity is not visible there. Subsection 3 of the Article is also similar, with the change being the definition chain of activities instead of the value chain.

I would not agree with the Council position view that the changes bring more clarity, it merely adds to the wording in subsection 1, and other than that restricts the scope of the liability to parent-subsidiary relationships not clarifying the relationship to business partners when they ought to be liable. The Council's version can in other words be understood as a supply chain rather than value chain liability. Even though established business relationships are defined in the CSDDD, the effects and Council and EP positions hint at the prediction that this is no longer a precondition and that more partners can fit within the limits of establishing liability.[227] Even though the Council position excludes the Article 22(2) exception, the position still leaves arguably more room to escape liability than the Commission proposal. By adding the requirements of the breach having to be negligent or intentional in combination with not breaking causation, which means that there is no liability if the harm was done only by the business partner. As the due diligence scope is more limiting with the adverse impact having to be severe with a high likelihood unless unfeasible. It can be concluded that the Council position generally makes it harder for a company to face liability.[228]

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[225] ibid 9.
[226] ibid 10.
[227] Pacces (n 32) 3–4.
[228] Council of the European Union, General Approach (n 94) ibid 5–6.

Table 1.[229]

Commission proposal for a CSDDD[230]	Council position, General Approach[231]
Article 22 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. 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	Article 22 Civil liability **of companies and a right to full compensation** 1. Member States shall ensure that a company can be held liable for a damage **caused to a natural or legal person, provided that:** (a) the company **intentionally or negligently** failed to comply with the obligations laid down in Articles 7 and 8, **when the right, prohibition or obligation listed in Annex I is aimed to protect the natural or legal person;** and (b) as a result of a failure as referred to in point (a), **a damage to the natural or legal person's legal interest protected under national law was caused.** **A company cannot be held liable if the damage was caused only by its business partners in its chain of activities.** 2. **Where the company was held liable in accordance with paragraph 1, a natural or legal person shall have the right to full compensation for the damage occurred in accordance with national law. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.**

[229] The changes made by the Council position are in bold in the right column of *Table 1*.
[230] Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, art. 22
[231] Council of the European Union, General Approach (n 94) 109-110.

adverse impact. 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. 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. 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. 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.	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 company's chain of activities.** **When the damage was caused jointly by the company and its subsidiary, direct or indirect business partner , they shall be liable jointly and severally, without prejudice to the provisions of national law concerning the conditions of joint and several liability and the rights of recourse.** 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. 5. Member States shall ensure that the provisions of national law transposing this Article are of overriding mandatory application in cases where the law applicable to claims to that effect is not the law of a Member State.

6 Drawing implications from Article 22 CSDDD

This chapter draws conclusions from Article 22 of the CSDDD, lead company liability, and analyses whether Article 22(2) allows for the possibility of a tick-box problem and other possibilities for liability circumvention by lead companies.

6.1 Article 22(2) CSDDD and the Tick-box Problem

Article 22(2) of the CSDDD allows for a liability exception, which can be problematic for assessing liability for lead companies in the value chain. The Article 22(2) exception is applicable for "indirect business partners, with whom the company has an established business relationship". This is possible in situations where the company has used contractual assurances in relation to its code of conduct and prevention or corrective action plan, and verify compliance by appropriate measures, to be able to prevent, mitigate, minimise, or end the scope of the adverse impacts from the indirect partners pursuant to Articles 7(2)(b), 7(4), 8(3)(c), and 8(5) of the CSDDD. The company will not be considered liable unless it was unreasonable when looking at circumstances of actions taken. This contractual assurance is also called contractual cascading as stated in Article 7(2)(b) of the CSDDD, which means that the clauses are meant to transfer obligations by 'flow-down' clauses to all companies within the value chain.[232] These clauses make sure the buyer company's duty of care is complied with in its value chain, contractually cascading the obligation to other value chains actor that are not obliged to comply to the same obligations, making it a risk-prevention method by cascading the duty of care to all contractual supply chains.[233] The contractual guarantees can include e.g. codes of conduct and can be regarded as greenwashing.[234]

It can be argued that the CSDDD due diligence obligations can be used as a tick-box exercise, and that Article 22(2) excluding liability furthers this argument. The tick-box metaphor can be defined as follows: "a list of criteria that applies across the board to companies and is unrelated to their real human rights risks or the quality of their due diligence processes."[235]. This means that companies can circumvent liability by having those criteria in place, no matter their adequacy, actual impacts or their implementation in

[232] Gilles Lhuilier, 'The Proposal for a European Directive on the Duty of Care of Companies with Regard to Sustainability [2022] 5 I.B.L.J 423, 433.
[233] Luca Tenreira, 'The Drafting of Due Diligence Clauses by Global Lawyers: The Example of Flow-down Clauses' (2022) 5 I.B.L.J 453, 457.
[234] Danis-Fatome (n 74) 492.
[235] Smit, Bright and Neely (n 31) 10.

practice[236]. The OHCHR has stated that a defence to due diligence could incentivise companies from meaningfully take part in human rights due diligence, and that a check- or tick-box approach would be applied in a non-meaningful way, superficially checking off obligations instead of having a genuine intent to end the adverse impacts.[237] The reason for why companies could use due diligence as a tick-box exercise could be that companies need incentives with visions in economic and political reform to integrate care towards sustainability due diligence into their business models. [238]

Discussing Article 22(2) of the CSDDD and the liability defence, a discussion on safe harbour provision in this context has arisen, namely a provision on the exemption of liability provided that conditions have been met, which is distinct from a liability defence provision, where in a due diligence respect the quality of the measures would be demonstrated whereas this demonstration is not necessary in a safe harbour provision.[239] Examples of non-due diligence safe harbour provisions include e.g. the case *Schrems I*[240], where, as put by Smit, Bright and Neely: "companies that self-certified as adhering to US Department of Commerce (…) would be deemed to meet the conditions required for the transfer of personal data from the EU to the US"[241], which the Court of Justice of the European Union ("CJEU") found invalid, against the right to privacy, and lacking legal remedies. It can de deduced that a safe harbour provision interferes with the right to legal remedies by limiting or removing civil claims against a company. In the due diligence concept, a safe harbour provision that relies on industry standards only, contradicts the whole sustainability due diligence concept as a standard of care.[242] The due diligence being a standard of care would then offer the option of a liability defence, by way of due diligence, focusing on how and if a company has exercised enough care.[243]

So how do we connect Article 22 to the tick-box or safe harbour provision? Well, tick-box criteria have often entailed some contractual clauses or audits, an example being the *Schrems I* case, but this time the subsequent case *Schrems II*[244] that discussed the use of 'standard contractual clauses'

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[236] Smit, Bright and Neely (n 31) 9–10.
[237] Bueno and Bright (n 14) 805.
[238] Chantal Mak, 'Corporate Sustainability Due Diligence: More than Ticking the Boxes?' (2022) 29 Maastricht Journal of European and Comparative Law 301, 302.
[239] Smit, Bright and Neely (n 31) 3–5.
[240] Case No. C-362/14 *Schrems v Data Protection Commissioner, Judgement of the Court* (Grand Chamber) (E.C.J. 6 Oct 2015) (hereafter *Schrems I).*
[241] Smit, Bright and Neely (n 31) 6.
[242] ibid 6–7.
[243] ibid 9–10.
[244] *Data Protection Commissioner v Facebook Ireland Limited and Maximillian Schrems* [2020] ECJ Case C-311/18 ECLI:EU:C:2020:559, (hereafter *Schrems II*).

(“SCCs”), the transfer of personal data to third countries, and their legal effect, the verdict being that they can be valid but sometimes it depends on a case-by-case basis. Here the element was whether the third country has adequate protection to ensure the transferred personal data. In Article 22(2) of the CSDDD, contractual assurances are indeed mentioned as an exception to avoid liability in case of indirect partners, and initial responses to this proposal and this article in particular, were that this sub-paragraph would constitute a tick-box or safe harbour provision. However, this is not the case as: “by referring to the ‘unreasonable[ness]’ and ‘adequa[cy]’ of the ‘action actually taken’ ‘in the circumstances of the case’, the law echoes the classic standard of care test applicable to civil disputes more generally:”[245]. Companies cannot rely on contracts with direct partners to contractual cascading the obligations to indirect business partners, bringing an objective reasonableness standard to the defence in case of court proceedings, where the relevant courts determine this factor depending on the risk, but contractual cascading will not be deemed sufficient.[246] All in all, it depends on the appropriateness of the measures, looking at whether the company failed to comply with due diligence obligations (i.e. as a duty of care as understood in the UNGPs[247]), as well as the circumstances of the case relating to the harms caused by the indirect partner.[248] Regarding the verification mentioned in the proposal, it is a common procedure for companies to have to demonstrate an achieved external verification for compliance with ISO (International Organization for Standardization) in e.g. health, safety of information security areas. So, if liability could be avoided simply by having a compliance programme or showing verifications regardless of their effectiveness, they would also be vis-à-vis looked at as a tick-box defence. For remedies, the CSDDD has introduced a statutory civil liability clause in Article 22, and the right to judicial remedies are mentioned in Article 18(7). As such, there is no tick-box defence argument for remedies, even though the burden of proof element has been criticized.[249]

This section can be concluded by clarifying that a difference between a safe harbour provision and a due diligence defence is that the former regards court remedies whereas the latter regards a defence to demonstrate a standard of care that is required by law.[250] This article and the exemption of liability remains to be clarified, especially what it means for established business relationships – if anything, as the article regards indirect partners.

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[245] Smit, Bright and Neely (n 31) 11.
[246] ibid 11–12.
[247] Brabant and others (Part 2) (n 212).
[248] Smit, Bright and Neely (n 31) 11.
[249] Smit, Bright and Neely (n 31) 12–13.
[250] ibid 16–17.

As the article allows for a case-by-case analysis the Member States and national courts will determine what it means, the effects, i.e. the damages, and the effectiveness in the end.[251]

6.2 Effects of Article 22 CSDDD

It can be said that liability based on failure to comply with due diligence obligations has been constructed by soft law, and been imposed by hard law.[252] Even the author of the UNGPs, John Ruggie, has voiced some warnings about an accompanying liability regime: "If parent or lead companies fear that they may be held legally liable for any human rights harm anywhere within their value chains, irrespective of the circumstances of their involvement, it would create the perverse incentive to distance themselves from such entities.".[253] This risk should instead be tackled by the legal duty to exercise HRDD for lead companies, based on international standards, accompanied by legal liability, which in its turn is established by showing control over the company causing harm. In other words, parent companies' liability regimes should be the same as that for lead companies, i.e. extended beyond parent-subsidiary relationships. This should also be accompanied by objective criteria like the market position and the harm-causing company, terms to the contract to help identify the control for companies outside the group. There is a possibility for lead companies to claim that even though they have exercised HRDD, they say that the adverse impacts could not be prevented by them, even though they control the entity causing the harm or, alternatively, if not control is established, there is no presumed liability, and claimants need to prove the negligence of the company.[254] As previously mentioned, the UNGPs do not discuss liability per se, but do refer to what is called the trichotomy of involvements, which include the elements direct link, cause, and contribution[255]. HRDD legislation does not mention this usually. Even though the distinction is important for establishing being directly linked or contributing to harm, something that has not been sufficiently defined legally.[256]

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[251] Danis-Fatome (n 74) 492.
[252] Gilles Lhuilier, 'The Proposal for a European Directive on the Duty of Care of Companies with Regard to Sustainability | International - Secondary Sources | Westlaw' (2022) 5 I.B.L.J 423, 444.
[253] John G. Ruggie, 'Keynote Address' (Conference on Business and Human Rights: Towards a Common Agenda for Action, Brussels, 2 December 2019) 5 <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/Brussels%202019%20Final.pdf> accessed 19 May 2023.
[254] Bueno and Bright (n 14) 816.
[255] ibid 817.
[256] ibid.

Some ways to get around the civil liability in Article 22 can be for example for corporations established outside the EU, even when meeting the turnover threshold, can circumvent liability by operating by multiple smaller companies. Another alternative is looking at subsidiaries. They are referenced in the CSDDD is made to the Transparency Directive[257] which describes subsidiaries as 'controlled undertakings', and the control exercised by the lead company should be control de jure or de facto for due diligence obligations to arise for the subsidiary. The former is based on majority voting rights or directors, whilst the latter refers to a dominant influence. So, regarding lead company liability, the possibility to circumvent liability is through not exercising enough control, avoiding the definition of a subsidiary, and simultaneously maintaining the control in a more subtle way. This option, however, depends importantly on the scope and definition of the value chain. Finally, the proposals capability of preventing companies engaging in adverse impact and relying on limited liability depends on the credibility of value chain liability, the liability of the business partners (as the proposal relies on the definition consolidated business relationships and avoids appropriate measures).[258] Whether these options can be used in practice remains to be seen, the big lead firms that are in the scope of the directive will at least likely not be able to avoid the subsidiary definition. Even if there are options for companies to circumvent liability by allowing loopholes, undermining the effectiveness of the proposal, and even if the Article 22(2) exception exists or not in the end, the CSDDD proposal will still provide something new, a statutory clause on civil liability with legal effect for failure to comply with mandatory due diligence obligations.[259]

The CSDDD obligations are obligations of means, not result. This means that the efforts taken by the company mentioned in Article 3(q) on appropriate measures and recital 29 have vital importance in potential liability claims in court, when it comes to assessing the failure to comply with the due diligence obligations as mentioned in Article 22(1)(a). The UNGPs have a similar approach, looking at the due diligence obligations not as a tick-box approach but as a standard of care, as well as the French Loi de Vigilance.[260] When using this standard of care approach, the reasoning is to prevent companies from insufficient and formal contractual clauses escaping liability. The CSDDD requirements adds many requirements for a judge to look at: the contractual assurances, verification, auditing schemes, circumstances of the case, and as these are often not

[257] Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [2004], OJ L390/38, art. 2(f).
[258] Pacces (n 32) 11–12.
[259] ibid 15.
[260] Brabant and others (part 2) (n 212) 3–4.

considered enough, the appropriateness and reasonableness as well.[261] Recital 29 adds that the influence a company holds over a business relationship includes both ability to persuade action to end adverse impacts including factual control, linking incentives and market power, and on the other hand, the leverage or influence degree reasonably exercised like cooperation and engagement with the party which has taken part in an adverse impact.

Even though transnational sustainability laws have these disclosure and due diligence requirements by law, they leave a lot of discretion for lead firms by allowing them to precise the content they disclose and definitions. This paired with minimal mechanisms for enforcement and sanctions lead to the conclusion that lead firms are no incentivized to improve their harmful practices. Private lawsuits are the most effective driver when it comes to developing standards for adequate governance of value chains. This is because disclosure mechanisms do increase information on lead firm value chain practices even with its criticism (that might facilitate litigation), and statutory mechanisms limiting liability, which could result in companies being more motivated to engage in reporting.[262] It would be ideal if companies would not seek recourse by disclosing less, leaving markets, or choosing production or suppliers in the value chains based on being able to avoid liability rather than identifying the possible adverse impacts that cause the liability, and ending, or mitigating them instead.[263]

Some good outcomes of the Article, is that it gives foreign victims of corporate harm potentially the opportunity to access courts within the EU, which they normally would not.[264] The Rome II regulation[265] states in Article 4 that in a company's home state, the competent Member State's court might need to apply the law of the host state where the damage occurred, which can be a third country.[266] On the other hand, one failure of Article 22 can be argued to be the delegation to the Member States of civil litigation schemes so questions like standing remain open and national laws remain to diverge on this subject.[267] Adding to access to court and European Private law, Brussels I (recast)[268] determines who has jurisdiction in

[261] Brabant and others (n 90).
[262] Salminen and Rajavuori (2019) (n 11) 28.
[263] Paul Krüger Andersen and others, 'Response to the Proposal for a Directive on Corporate Sustainability Due Diligence' (2022) Nordic & European Company Law Working Paper 22(1), 17.
[264] Kawakami (n 171).
[265] Regulation No 864/2007 [2007] on non-contractual obligations OJ L 199.
[266] Lennarts (n 130) 258.
[267] Bertram (n 73).
[268] Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters OJ L351/1.

accordance with the general rule art. 4(1), usually the place of domicile e.g. the country where the headquarters of a company that is being sued is located. The internationality of the transnational laws and cases proves difficult, as demonstrated in the *Milieudefensie* case.

So, to conclude this chapter on civil liability for lead companies is complicated and depends on the Member States as the CSDDD does not regulate the conditions for it, except for which companies fall under the scope of the proposal. Regarding the questions if the liability can be circumvented or used as a tick-box exercise it has been concluded that the proposal does not allow for any tick-box like consequences and that Article 22(2) is not such a provision. At best, lead company liability in general can be avoided, but seems hard for those big lead companies that fall under the scope of the directive.

7 Conclusion

To conclude, multinationals can indeed be held liable for harm caused by subsidiaries or contractual suppliers depending on the case. The scenario from the introduction in the case *Okpabi*, is that Shell, the parent company indeed could be held liable for the harm of its subsidiaries.[269] The topic of lead companies being liable for harm caused by actors in their value chains has been a discussed topic in recent years, with the most notable recent development being the proposal for a Corporate Sustainability Due Diligence Directive to harmonize the diverging national rules in the EU. This essay has tried to answer the following research question*: What are the implications for corporate civil liability in the proposal for a Corporate Sustainability Due Diligence Directive?* With the sub-questions: What is sustainability due diligence and its obligations in the Corporate Sustainability Due Diligence Directive? What is value chain governance? Finally, how can sustainability due diligence be used as a defence for lead companies to avoid liability in their value chains, e.g., as a tick-box exercise? The answer to this has been elaborated by going into depth about the goals of the EU and why the instrument was enacted, discussing why the complex nature of value chains has created an environment governed by lead companies, which in their turn need to be governed by transnational sustainability laws with due diligence obligations.

The findings for sustainability due diligence and value chain governance in the essay is that sustainability due diligence in the CSDDD is both human rights and environmental due diligence, a duty of care which should be exercised by companies to avoid adverse impacts in those areas with its basis in the voluntary UNGPs. Companies must not only make policies public but take active steps to identify, mitigate, prevent and end adverse impacts within the group and outside, in the value chains. The CSDDD makes this duty and obligation mandatory beyond Member State laws and thus brings something new to the table by making these obligations statutory within and outside the EU for lead companies that are within the scope of the directive. Value chain has been analysed by looking at this new fragmented and outsourced production type, and its driver lead companies to understand why it was included in the Commission scope of the CSDDD proposal. The reason being that it has a broad scope and introduces the due diligence obligation to more partners than merely subsidiaries or a limited number of business partners. It is left to be seen if the value chain will be used in the end or if the scope will be more limited.

[269] See *Okpabi*.

Mandatory due diligence alleviates the risk of companies being afraid of setting out commitments to human rights and the environment for risking legal liability by facilitating legal certainty. Whether companies are held liable depends on Member State civil liability laws, usually tort law. The CSDDD in Article 22 ensures this right for citizens, and that remedy shall be provided for. Lead company liability has had recent developments related to due diligence obligations, hopefully the transnational laws and case law developments will bring clarity to future developments in conjunction with the final adoption of the CSDDD. Concluding what implications, the CSDDD adds to the current framework for lead company liability in the EU is that Member States will have to adopt the CSDDD into their national laws, which adds these mandatory due diligence obligations for companies to follow. Depending on the final scope, the EU dimension can increase the amount of parties that have to oblige to these obligations which hopefully will lessen adverse impacts and thus the need for corporate civil liability cases. By making obligations mandatory the Member State laws on corporate civil liability will have to have the EU level of compliance as a minimum, which can raise the bar in some countries, catching more companies who outsource production and take part in adverse impacts.

The CSDDD does allow for a liability exception in Article 22, but it cannot and should not be regarded as a defence or tick-box exercise. Companies cannot expect that if they have done due diligence (currently or) in the past that liability can be excluded. This relates to the question whether the exception in Article 22(2) of the CSDDD can be regarded as a tick-box exercise, which it cannot. It is possible for lead companies to circumvent liability. Not as a tick-box exercise but in other ways by circumventing the turnover and employee criteria's or by avoiding the subsidiary definition. Theoretically, ticking off due diligence obligations to expect an exemption from liability for adverse impacts is possible, but it is not regarded as a possibility in the CSDDD. The CSDDD will have to successfully create a balance between protecting the environment and HR whilst simultaneously ensuring that companies want to genuinly work against adverse impacts by ensuring them legal certainty.

For now, the European Parliament's position is yet to be published before trialogues begin with the Commission, to see what the final version of the CSDDD will become, and what the final impacts will be. One thing about the adoption of the CSDDD proposal is clear: consumers and victims of adverse impacts want due diligence, the EU wants due diligence and as companies seem to want legal certainty in this regard, companies want due diligence as well.

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