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Towards a Framework for Effective Regulatory Supervision of Sustainability Governance in Accordance with the EU CSDD Directive. A Comparative Study

by

Harm-Jan de Kluiver*

This article emphasizes that the wave of regulation focusing on sustainability, like the CSDDD, is fundamentally different in scope and character from traditional rulemaking. Given the wide-ranging objectives of the CSDDD and its open norms, companies and supervisory authorities will need to cooperate and have open and fair discussions to develop alternative instruments and best practices taking account of what can be reasonably required from companies in addressing complex issues in an even more complex world also in terms of feasibility and resources. This is fully in line with the CSDDD which explicitly recognizes that companies will have to balance diverging interests, and – as set out in Articles 6-8 CSDDD – will inevitably need to make choices and prioritize actions. Where traditionally regulatory supervisors focus on strict compliance, the CSDDD marks a fundamental change to process rules and goals to be achieved and therefore calls for a fundamentally different approach and oversight strategy by supervisory authorities. It is also demonstrated that extending liability rules for companies is not an effective policy instrument. This article compares developments in the UK, France, Germany, Norway and the Netherlands, and by identifying the lessons learned, concludes that a strategy as set out above seems best fit to realise the ambitious goals set by the CSDDD. Therewith a paradigm shift is in the making. Governments and regulatory supervisors would misinterpret the signs of the times if, in promoting the purposes of the CSDDD, they were to cling to traditional ideas of how supervisors should operate.

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1. Sustainability and Regulatory Supervision: The Challenge

In 2023, sustainability governance is becoming a buzzword both in corporate circles as in the public domain. Dominant in that debate will be the quickly expanding EU legislation. In January 2023, not only delegated regulations based on the EU Sustainable Finance Disclosure Regulation ("SFDR") came into force but, even more important, also the EU Corporate Sustainability Reporting Directive 2022/2464 ("CSRD") became effective. In addition, major steps have been taken in the process to agree on an EU Corporate Sustainability Due Diligence Directive ("CSDDD").

All these regulations stem from the EU Green Deal ("Green Deal"), with the intention that sustainability "should be further embedded into the corporate governance framework, as many companies still focus too much on short-term financial performance compared to their long-term development and sustainability aspects". This thinking on the relationship between sustainability, long-term strategy and corporate governance has since been captured under the heading "Sustainable Corporate Governance" or "Sustainability Governance". In addition to the CSRD, the CSDDD aims to further "due diligence" duties in the value chain (particularly the supply chain) (i) to safeguard human rights and limit/prevent adverse environmental impacts and (ii) to take measures to combat global warming and related climate change.

All these newly created legal obligations have to be monitored and supervised by regulators. This is, however, much easier said than done. Due diligence duties are fundamentally different from traditional rules and regulations as they are both broad and indeterminate. That will make it inevitable that new concepts of regulatory supervision have to be explored and developed.

In this article, the key question is what requirements and characteristics should be fulfilled to create effective and efficient regulatory supervision of companies in contributing to sustainability policies. To that end, the framework in the draft CSDDD will be analysed against the background of national legislation already in force or being debated in EU Member States (such as France, Germany and the Netherlands) and non-EU states (such as the UK and Norway) and the supervision strategies and practices that have been developed in these jurisdictions. From this analysis I will try to draw lessons and formulate recommendations on how the CSDDD might be best implemented to realize the goals which it envisages to achieve.

This article concludes that effective and efficient regulatory supervision of sustainability legislation and the realization of sustainability goals as articulated in the CSDDD firstly, will require that regulatory supervisors adopt a policy approach and set policy goals and be fully transparent on what they intend to achieve year on year. Secondly, it will be crucial that regulatory supervisors assist companies by providing them with the information and instruments to implement and to realize the policy goals. Traditional instruments such as civil liability, fines and penalties are not particularly apt to achieve this. Much more is to be expected from setting guidelines and, if necessary, issuing orders and injunctions to encourage companies to develop policies in accordance with the CSDDD. This is in line with key provisions of the CSDDD. It is, however, not evident that this will be reflected in national law. As is demonstrated in this article, national legislation related to corporate sustainability and supervision of this legislation still is diverse and divergent.

It will be a challenge for all EU Member States to implement the CSDDD in such a way that the policy goals of the CSDDD are realized effectively and efficiently. A key element here is how supervisory authorities will perform their task. To coordinate how due diligence duties are being implemented and supervised in the various EU Member States, the CSDDD provides for a Network of Supervisory Authorities (Article 21 CSDDD). That does not, however, answer the question which principles the supervisory authorities should be guided by in executing their role. This article aims to provide an answer to that important question. To that end, I will analyse and compare the various tools supervisory authorities have at their disposal.

2. *Sustainable Governance: State of Play*

Sustainability has moved to the centre of the corporate debate after the 2008 economic crisis. There are a number of reasons for this. In part, these are linked to that economic crisis. It has raised pressing questions about the attention that exists for aspects other than economic gain. It stimulated thinking about a

more sustainable economic model with attention for all stakeholders, in which the long rather than the short term should be decisive. This has coincided with an increased awareness of ecological limits in terms of environmental pollution, biodiversity and, in particular, climate change. This is illustrated, for example, by the adoption of the UN Guiding Principles on Business and Human Rights in 2011. In the EU, too, the focus on human rights and the importance of the environment and climate has increased significantly. This has resulted in the Green Deal as presented by the European Commission on 11 December 2019, which made sustainability an EU priority. Rightly so. The elaboration of that theme has resulted and will result in important EU legislation in the near future.[1]

Basically, the EU regulations pursue two goals, namely (i) far-reaching transparency of the effects of actions by companies on people, the environment and the climate, and at the same time (ii) tightening of due diligence obligations of companies in this respect. With regard to transparency, this concerns both the reporting of sustainability risks due to the company's actions or omissions and the risks to the company ("double materiality"). The EU also has imposed obligations on financial institutions to be transparent about the actual 'greenness' of companies (and avoid greenwashing) when offering their shares or bonds to clients. This is an important objective of the SFDR, which entered into force on 10 March 2021.[2]

This SFDR requires financial institutions to highlight aspects of sustainability aspects and related risks ("Principal Adverse Impacts") when offering certain financial products (e.g. if these are pension-related). Closely related to this is what is known as the 'taxonomy' (literally: classification), i.e. the determination of what does or does not qualify as a 'green' investment (in EU terminology: "environmentally sustainable activities").[3] This is elaborated in the EU Taxonomy Regulation 2020/852, which came into force on 12 July 2020. Very briefly, its basic principle is that a 'green' activity exists if sustainability is promoted in a particular respect (e.g. air or water quality or biodiversity) without harming other aspects of sustainability. One interesting discussion in this area was whether the use of nuclear power or gas could count as 'sustainable'. The EU has since decided it does. Both the SFDR and the Taxonomy Regulation provide for detailed delegated (implementing) regulations. Regarding the

1 https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal_en (last accessed: 10 April 2023).

2 Regulation (EU) 2019/2088.

3 See Green Deal para. 2.2.1. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52019DC0640&from=EN (last accessed: 10 April 2023).

SFDR, important rules contained in Commission Delegated Regulations entered into force on 1 January 2023.[4]

The main legislative projects in this area, however, remain the CSRD and the CSDDD. The CSRD includes strict reporting rules on a broad range of sustainability and human rights issues, which rules are supplemented by very detailed standards developed by the European Financial Reporting Advisory Group ("EFRAG").[5] According to Article 33 CSRD, directors have a "collective responsibility" that such reports are drawn up and made public by the relevant companies. This is also captured by the general obligation that information provided by the company is "to the best of their knowledge" correct.[6] The CSRD came into force on 6 January 2023 and has to be transposed in national law not later than 18 months after that date (i.e. mid 2024). The compliance of companies with these obligations is in the hands of the company auditors as is the case with all reporting obligations companies have.

The CSDDD originates from the Green Deal, with the intention that sustainability "should be further embedded into the corporate governance framework, as many companies still focus too much on short-term financial performance compared to their long-term development and sustainability aspects". This thinking on the relationship between sustainability, long-term development and corporate governance has since been captured under the heading "Sustainable Corporate Governance". The CSDDD aims to further formulate duties of "due diligence" in the value chain (particularly the supply chain) in respect of both human rights violations and adverse environmental impacts and to take measures to combat global warming and related climate change.

3. The Proposal for a CSDDD as Amended by the EU Council of Ministers on 1 December 2022

The European Commission's original proposal, introduced in February 2022, had a very broad and indeterminate scope, especially in terms of the extent of responsibility for the entire chain of both suppliers and customers as well as sanctions (including far-reaching civil liability). This has been widely criticized not only by companies and others but also by the EU Regulatory Scrutiny Board. The latter body is tasked with reviewing all proposed legislation in the

4 Regulation (EU) 2022/1288.

5 For further information and draft guidelines see www.efrag.org (last accessed: 10 April 2023).

6 See also Directive (EU) 2004/109/EC.

EU. It concluded twice that the proposal should not go through. The EU Commission, however, largely ignored the criticism, citing "the *political importance* of this initiative" and the "*urgency of action*" *(italics in the original).*[7]

However, the EU Council of Ministers was much more receptive to the criticism. This has resulted in an amended (compromise) proposal for the CSDDD dated 30 November 2022[8] and adopted by the Council on 1 December 2022 with a qualified majority.[9] This amended proposal will be subject to negotiations with the European Parliament and the European Commission (a "trilogue") with the aim of reaching agreement. That will probably involve some conversations back and forth as the European Parliament wants to go further concerning a number of issues.[10] While the EU Council of Ministers would be willing to tighten up on certain parts, I do, however, not expect that the ministers would be willing to concede much on fundamental issues as highlighted below. Given the qualified majority reached by the EU ministers, I will take the amended proposal of 30 November 2022 as approved by the EU Council of Ministers on 1 December 2022 as a starting point.[11]

Among other things, the EU Council of Ministers reduced the obligations for companies in the financial sector. The concern that led to this is that it is not very feasible for banks, for example, to effectively monitor whether all those to whom they lend money comply with human rights and environmental obligations. Following in the footsteps of the provision that already allowed EU Member States to exempt pension institutions from the CSDDD (Art. 2(6)), on the initiative of France and Italy in particular, a provision was included that leaves it up to the EU Member States themselves to decide whether and to what extent the CSDDD will apply to financial institutions.

7 Explanatory Memorandum EU CSDD Directive, COM(2022)71, p. 20 *et seq*.

8 See https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/en/pdf (last accessed: 10 April 2023).

9 See www.consilium.europa.eu/en/meetings/compet/2022/12/01/ (last accessed: 10 April 2023); www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/ (last accessed: 10 April 2023). See for a video of the discussions in the EU Council of Ministers https://video.consilium.europa.eu/event/en/26329 (last accessed: 10 April 2023).

10 See for an indication the Draft Report of the Committee on Legal Affairs of the European Parliament published 7 November 2022: https://www.europarl.europa.eu/doceo/document/JURI-PR-738450EN.pdf (last accessed: 10 April 2023).

11 The Political Compromise adopted by the EU Council of ministers has elicited many commentaries already. Amongst others a broad overview of all its aspects is provided by the special issue (no. 2023-5) of the Dutch Journal Ondernemingsrecht, "The Proposal for a Corporate Sustainability Due Diligence Directive, with all its contributions in English.

A second important limitation introduced by the EU Council of Ministers is that the initially very broad concept of (any) "impact" on human rights and the environment in the whole 'value chain', has been changed to "chain of activities" and, in principle, therefore the "supply chain" (Art. 3 sub (g)). Again, France and Italy, as well as Spain and Portugal and others, have reportedly insisted on this. This is no coincidence. As we will see below, all countries where human rights due diligence has been introduced have, for now, limited its operation to the supply chain.[12] This therefore means that the use of products by customers generally will fall outside the scope of the CSDDD (e.g. weapons supplied in accordance with the applicable rules and (export) licences). The company's responsibility (and possible liability) therefore primarily applies to its suppliers ("upstream" business partners) and not its customers ("downstream" business partners).

A third fundamental change made by the EU Council of Ministers relates to the provisions on liability of companies and their directors. In its original proposal, the EU Commission included rather firmly formulated rules on the liability of companies and their directors in Articles 22, 25 and 26 of that proposal. Articles 25 and 26 provided that directors, in fulfilling their duty to act in the best interest of the company, should take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term and would be responsible for putting in place and overseeing the due diligence actions. This was perceived by some commentators as a basis for personal liability of directors.[13] These provisions were partly inspired by an EY Report commissioned by the EU Commission,[14] which suggested that personal responsibility and liability of directors would be a good instrument to promote compliance with the rules set out in the CSDDD. The

12 As is made clear in § 2(5) of the LkSG: "von der Gewinnung der Rohstoffe bis zu der Lieferung an den Endkunden". Also the French *Loi relative au devoir de vigilance* is only applicable to entities in the supply chain in as far as there is a "*relation commerciale*".

13 See on this proposal inter alia *Federica Agostini/Michele Corgatelli*, "Art. 25 of the Proposal for a Directive on Corporate Sustainability Due Diligence: Enlightened Shareholder Value or Pluralist Approach?", European Company Law 2022, 19(4), 92. In my view these provisions did not *ipso facto* imply liability, but the fact that a number of ministers – including the Dutch minister – interpreted it as a liability rule, underlines that taking these provisions out was the right decision. See extensively *Harm-Jan de Kluiver*, "Ondernemingsrecht, mensenrechten en klimaat. Doen we de goede dingen en doen we ze goed?", Nederlands Juristenblad 2022/952, 1174, 1181.

14 EY Study on directors' duties and sustainable corporate governance, July 2020: https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en (last accessed: 10 April 2023).

EY report, however, has been received extremely critically not only by business but also by the academic community.

The EU Council of Ministers has amended these liability provisions heavily. In the proposal as adapted by the EU Council of Ministers, the original Articles 25 and 26 of the CSDDD are deleted because of "strong concerns" among many EU Member States that this would introduce a great amount of legal uncertainty and was perceived as "inappropriate interference" with national law. The Netherlands also supported the deletion of these provisions partly out of "opposition to personal civil liability for directors".[15] The proposal to make such obligations "personal" has not found any supporters in other countries. An example is the German *Lieferkettensorgfaltspflichtengesetz* ("LkSG"), which explicitly determines that this law cannot serve as a basis for civil liability ("*begründet keine zivilrechtliche Haftung*").

Article 22 now restricts liability of companies explicitly to situations in which all customary conditions for liability are fulfilled. The EU Council of Ministers underlines that this requires that the company acted knowingly or at least clearly negligently ("intentionally or negligently"), and that there is a direct causal link with the act. As a starting point, the company is not liable if adverse impacts on human rights and the environment are exclusively attributable to actions of a business partner in the supply chain. The background of all these considerations is that the EU Council of Ministers explicitly wants to guard against "overcompensation" (as explicitly mentioned in Art. 22 CSDDD). That, for example, implies that punitive damages should be out of the question. As is elaborated below, these changes made by the EU Council of Ministers can be applauded.

All this is not to say that liability may not be appropriate under circumstances, but it will then be an avenue to recoup damages, not the dream tool to implement a policy. If all the customary requirements for liability have been met, a company definitely may be held liable for damages if its actions qualify as a tort and a causal link between the actions and the damages can be established. Under specific circumstances such liability may extend to directors if an act or omission can be attributed to them in which they neglected their responsibilities and it was foreseeable that damages would occur. In practice, this will be relatively rare, but it cannot and should not be excluded. Although the law for good reasons acknowledges and respects the complexity of their role and the discretion that comes with it, they may be held to account if the role is not fulfilled with the appropriate level of diligence.

15 As explained in letters of the Dutch Minister of Foreign Trade and Development Cooperation of 22 November 2022, p. 2 (Brief regering 26485-404) and of 16 December 2022, p. 2 (Brief regering 22112-3586).

4. The CSDDD Is in Need of a Strong Policy Framework and Effective Policy Instruments. Liability Rules are not that Instrument

From the perspective of supervisory strategies available to monitor that human rights are being respected, the debate on liability is highly relevant. It highlights the key question of what are effective and efficient instruments to realize policy goals, such as increasing sensitivity to human rights violations in the supply chain and the question of how to develop a corporate policy and a corporate culture which can be instrumental in detecting and addressing human rights violations. This ties in with a broader debate on liability as a policy instrument.

The concept of liability as an effective tool to implement policy does not have a strong track record. Generally, realizing liability claims will require long and complex legal proceedings. Liability can be a useful additional instrument in addition to a set policy if concrete damages have been sustained and such damages are attributable to specific perpetrators whose actions are evidently wrongful under civil law and there is a direct causal link between the actions and the damages.

When human rights are violated, this is often not the case. For example, if child labour is used in the supply chain or working conditions do not meet decent standards and therefore involve significant dangers, it does not mean that a failure to end such situations constitutes a claim for damages. Child labour in a factory does not necessarily imply damages if the alternative is that children not working in a factory will be confronted with even deeper poverty and no available education (and even may end up in criminal networks). Let me be very clear: this is in no way a defence of child labour! The point I want to make is that where a supplier uses child labour, the challenge for a CSDDD-compliant company goes much further than only monitoring that child labour is being banned. Such a company should also feel bound to do everything possible to ensure that the supplier pays wages to adults such that their children do not have to work and that education is available locally. That, however, clearly requires a broad, policy-oriented, approach. Civil law claims for damages will not bring about these kind of actions.

This holds also true in the case of environmental adverse impacts. The well-known *Shell / Nigeria* case is just one example. After more than ten years of complicated litigation, a limited number of farmers who sustained damages due to oil spills from pipelines used by a Shell Nigeria subsidiary, ultimately reached a settlement and received relatively modest compensation for damages sustained.[16]

16 According to the settlement press release of 23 December 2022, the Nigerian Shell subsidiary (SPDC) will pay EUR 15 million in damages. The press release also acknowl-

The key in this case was, however, that such oil spills should be prevented. Therefore much more relevant was that Shell was ordered to oversee that the Nigerian subsidiary installed a leak detection system on its pipelines. This would stop the transport of oil once a leak is detected and therefore prevent the pollution of farmlands.

Even more strongly, this point can be made in relation to actions aimed at limiting climate change through reduction of greenhouse gas ("GHG") emissions. Although there is no doubt that exceeding a certain level of GHG in the atmosphere will have disastrous consequences, it is impossible to attribute such consequences to GHG emissions by specific businesses or other institutions and even if this were possible it will be inevitable that very complicated questions will arise as to who actually should and should not be expected to reduce emissions. It would seem for example pretty inconceivable that all institutions emitting GHG are held to reduce emissions proportionally, independent of whether the institution is a hospital or a year-round speedskating arena in the desert. Moreover, the issue of climate change is fundamentally different from environmental adverse impact events where emission of hazardous agents directly impact the health of persons affected by being exposed to those agents. GHG, including CO2 and methane, are not such agents. This can be put even more strongly: without emitting GHG, life would simply not be possible. In a police novel it would be referred to as a corpse with no perpetrator or, more fitting, a corpse with all others being the perpetrators. It is quite clear that civil law liability is not effective or efficient in addressing the climate problem.

Even the well-known and much debated decision of the The Hague District Court rendered on 26 May 2021 in the *Shell* climate case[17] did not result in liability of Shell, but boiled down to an order for Shell to have reduced its emissions by 45% by 2030. Although 'climate litigation' certainly is a topic of the day and generates many publications, the conclusion is generally that claims against governments (as in the Netherlands in the well-known *Urgenda* case) sometimes are successful, but that private law claims against companies tend to get stuck in private law limitations as discussed above.[18]

edges that in the meantime the installation of a leak detection system took place also under the oversight of the parent company. See for the press release www.shell.com.ng/media/2022-media-releases/shell-and-milieudefensie-settle-long-running-case-over-oil-spills-in-nigeria.html (last accessed: 10 April March 2023).

17 Rechtbank Den Haag, 26 May 2021, *Vereniging Milieudefensie et al v Royal Dutch Shell Plc*, ECLI:NL:RBDHA:2021:5337. An English translation of the case has been made available as ECLI:NL:RBDHA:2021:5339.

18 Among many others I refer to inter alia *Brian J. Preston*, "Mapping Climate Change Litigation", The Australian Law Journal 2018, 774; *Brian J. Preston/Nicola Silbert*, "Trends in Human Rights-Based Climate Litigation: Pathways for Litigation in Austra-

The Shell climate case is no exception to this rule as liability issues were avoided.[19]

What might be more important, and seems to be gaining wider recognition, is that the case illustrates the role of the parent company and its corporate policy. As the Court itself articulated (4.1.1): "This case revolves around the question whether or not RDS has the obligation to reduce [...] CO2 emissions [...] through the corporate policy of the Shell group". It is no longer an exception that also the parent company is deemed to have a "duty of care" independent from the subsidiary. The impact of the CSR debate on the law of corporate groups has not gone unnoticed.[20] In this article I will, however, not expand on this issue.

Even if we were to decide to resort to alternative theories on tort and causality, such as ideas of alternative and/or proportional causality, it will not be possible to make a convincing connection between acts or omissions of specific actors and damages sustained by specific parties. In all jurisdictions, on the continent as well as in the Anglo-US world, this is identified as a huge stumbling block in

lia", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205303 (last accessed: 10 April 2023); *Geetanjali Ganguly/Joana Setzer/Veerle Heyvaert*, "If at first You Don't Succeed: Suing Corporation for Climate Change", Oxford Journal of Legal Studies 2018, 1; *Marc-Philippe Weller/Mai-Lan Tran*, "Klimawandelklagen im Rechtsve rgleich – private enforcement als weltweiter Trend?", Zeitschrift für europäisches Privatrecht 2021, 574; *Marc-Philippe Weller/Nina Benz*, "Klimaschutz und Corporate Gove rnance", Zeitschrift für Unternehmens- und Gesellschaftsrecht 2022, 563; *Benoit Mayer*, "Prompting Climate Change Mitigation through Litigation", International & Comparative Law Quarterly 2022, 233; *Martin Spitzer*, "Tortious liability of Government Ministers for Climate Change: Aristotelian Potential and the Limits of Negligence", Cambridge Law Journal 81(3), 2022, 456; *Grégoire Leray*, "La loi climat et l'entreprise ", Droit de Sociétes 2021, 682; and last but certainly not least, *Jaap Spier*, Climate Litigation in a Changing World, The Hague, Eleven/Boom Publishers, 2022.

19 See for example *Mayer*, ICLQ 2022, (fn. 18), 233; *Preston*, ALJ 2018, 774 (fn. 18).

20 See for example, among many others, *Karsten E. Sørensen*, "Corporate Sustainability Due Diligence in Groups of Companies", European Company Law, Vol. 19 (5) 2022, 119; *Holger Fleischer/Stefan Korch*, "*Okpabi* v. *Royal Dutch Shell* und das deutsche Deliktsrecht in Konzernlagen", Zeitschrift für Wirtschaftsrecht 2021, 1241; *Cees C. van Dam*, "Breakthrough in Parent Company Liability: Three Shell Defeats, the End of an Era and New Paradigms", European Company and Financial Law Review, 2021, vol. 18 (5), 714. Dutch commentaries on the *Shell* cases include *Ger van der Sangen/Anne Lafarre*, "Transnationale ondernemingen en concernaansprakelijkheid: Beschouwingen naar aanleiding van de Shell/Nigeria zaken", Weekblad voor Privaatrecht, Notariaat en Registratie 2021/7342, 747 and 2021/7343, 778; *Loes (M.L.) Lennarts*, "Moeders let op uw dochters! Over multinationals en human rights due diligence", Maandblad voor Ondernemingsrecht 2021; *Steef M. Bartman*, "Een concernrechtelijke beschouwing naar aanleiding van het Shell-klimaatvonnis", Ondernemingsrecht 2022/73 514.

using private law as an instrument for change.[21] Some have suggested that therefore one should ignore the requirement of a causal link all together, and hold companies liable on the grounds of reasonableness and fairness. I am, however, convinced that opening up that Pandora's box and granting the courts the authority to decide at will what amounts should be paid is a bad idea. The consequence of such an approach could easily lead to what *Spier* refers to as the threat of "crushing liability", where companies are held liable for damages in such magnitude that bankruptcy will be unavoidable. The uncertainty that would be created by such an approach would only exacerbate the problem, not contribute to its solution.

Let me, however, be very clear (again): by no means should the huge consequences of global warming be played down. On the contrary, the fact that this is a very serious threat should imply that legal instruments should be developed which can effectively stop global warming. However, liability rules are no such instrument. What the climate crisis does call for is a well-designed policy framework supplemented by an effective legal system and regulatory supervision. Such a framework in essence has been created by the EU Emissions Trading System ("ETS").

5. Human Rights and Climate Change. The Interplay between the CSDDD (and the CSRD) and the ETS

For the reasons set out above, the CSDDD includes only limited rules in relation to climate change and GHG emissions. The issue is covered by Article 15 of the draft CSDDD. The principal obligation (in Article 15 CSDDD) is that EU Member States secure that companies subject to the CSDDD "*shall adopt a plan* to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5° C in line with the Paris Agreement" (italics added). That plan should indicate "the extent to which climate change is a risk for, or an impact of, the company's operations". If climate change is a "principal risk" for the company or if the company has a "principal impact" on the climate (both aspects are relevant: "double materiality"), the company must include "emission reduction objectives" in the plan. This is in line with what the CSRD already requires as a reporting obligation.

21 See *Spier* (fn. 18) and on the causality issue in particular p. 242 *et seq*.; and in a broad comparative perspective inter alia *Weller/Tran* (fn. 18), 573, including the Anglo-US perspective, 578; as well as *Mayer* (fn. 18), 233. See also *Daniel Walden/Lukas Frischholz*, "Climate Change Litigation: Beitrag zu globaler Gerechtigkeit oder Abkehr von (zivil)rechtlichen Grundprinzipien", Zeitschrift für Wirtschaftsrecht 2022, 2473.

As to the role of the Competent Supervisory Authority ("*CSA*"), Article 18 (1) CSDDD provides the important limitation that as regards obligations related to climate change, the national CSAs will only have the authority to supervise that companies have adopted the plan. Consequently, the designated CSA is *not* the competent authority to monitor whether a company is doing enough to limit its contribution to global warming. In line with this, the provision on corporate civil liability (Art. 22) is also limited to the violation of obligations relating to respect for human rights and environmental damage within the meaning of Articles 7 and 8 CSDDD.

Here one should realize, as already mentioned above, that the CSRD does provide for detailed reporting rules on climate change which are further specified in the European Sustainability Reporting Standards ("ESRS") articulated by EFRAG. According to Article 19a CSRD, companies must report "plans [...] to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5° C in line with the Paris Agreement". In that context (see Article 29b (2)(a)(1) CSRD), the company is also bound to report on its GHG emissions including emissions related to its Scope 1, 2 and 3 context (and therefore all emissions in the value chain) and on projects which aim to decrease its emissions and the releated costs and benefits. Furthermore, a calculation must be published of the amount of CO2 emitted divided by turnover. This provides a standard to determine a company's CO2 efficiency. At a number of large companies this reporting with respect to Scope 1, 2 and 3 is already taking place, and sometimes already quite extensively. Although Shell, of course, is often heavily criticized, and for a reason, it should be acknowledged that when it comes to reporting these emissions, Shell provides a very detailed overview with regard to Scope 1, 2 and 3.[22] These reporting obligations will be audited by professional auditors and, therefore, there is no need for an additional supervisory role as provided for in the CSDDD.

As a consequence, the CSDDD is of limited relevance in addressing issues of climate change. I would argue that this is a good choice. Climate change has fundamentally different characteristics, and therefore requires other remedies than provided for in the CSDDD. Climate change is literally a collective problem. The only effective way to tackle it will necessarily require a far-reaching form of coordination and regulation at a significantly higher level than individual companies or even individual states. That collective goal is impossible to achieve by letting each individual company fill it in by itself. Like a sports team

22 I refer to https://reports.shell.com/annual-report/2022/strategic-report/our-journey-to-achieving-net-zero/climate-related-metrics-and-targets/greenhouse-gas-emissions.html (last accessed: 10 April 2023).

will not win games if players may themselves individually decide their position and role, addressing climate change will require coordination and a 'blueprint' that also secures a level playing field, preferably on a supranational level. I refer to former Advocate-General, Professor *Jaap Spier*, who has discussed this concept in a number of important publications.[23] As *Spier* rightly points out, such a 'blueprint' will be impossible to realize through judicial decisions.[24]

To make substantial progress in addressing climate change, a fundamentally different structure, with specialized supervisors, other than the CSDDD is needed. That structure is provided by the ETS, as recently refined by the Carbon Border Adjustment Mechanism ("CBAM"). In the ETS, we fortunately already have a mechanism to impose emission reduction obligations on (large) companies in a coordinated manner. The amount of such emissions is reduced annually. At the same time, a trading system is set up whereby a company that successfully invests in reducing emissions can sell the excess allowances to another entity which has not yet achieved a similar result. In effect, this creates an incentive to do more than meet the quotas. That is not to say that the ETS system is perfect, but it is a system that can be well refined. Such refinement is embodied in the agreement reached in late 2022 between the EU Council of Ministers and the European Parliament on supplementing the ETS with a mechanism that taxes CO2 emissions from companies from non-EU countries in the EU when an economic activity takes place within the EU. This CBAM aims to prevent CO2 'leakage' that may occur when goods are produced outside the EU without emission limits and then sold in the EU internal market.[25] For the underlying information I refer to the EU website on this subject.[26] As recently as 18 April 2023, the European Parliament also approved this climate change package (which is known as the "Fit for 55" package) including the stricter ETS rules.[27]

Ultimately, this structure should also be extended outside the EU. In this context, with regard to promoting internationally coherent regulation, see recently, for example, the 2022 report of the UN High Level Expert Group on

23 *Spier* (fn. 18), in which the "blueprint" is discussed on p. 198 *et seq*. and p. 261 *et seq.*

24 Spier is therefore – rightly – highly critical of court rulings such as the decision of the The Hague District Court in the *Shell* climate case.

25 See www.consilium.europa.eu/nl/press/press-releases/2022/12/13/eu-climate-action-provisional-agreement-reached-on-carbon-border-adjustment-mechanism-cbam/ (last accessed: 10 April 2023).

26 https://climate.ec.europa.eu/eu-action/eu-emissions-trading-system-eu-ets_en (last accessed: 10 April 2023).

27 https://www.europarl.europa.eu/news/en/press-room/20230414IPR80120/fit-for-55-parliament-adopts-key-laws-to-reach-2030-climate-target (last accessed: 18 April 2023).

the Net Zero Emissions Commitments of Non-State Entities.[28] This is another step towards a system that can lead to a blueprint for reducing greenhouse gas emissions globally.

6. The Regulatory Framework as Provided for by the CSDDD and the Crucial Role of the Competent Supervisory Authority ("CSA")

Just as complicated as the question how to legislate 'due diligence' is the question *how to supervise compliance with such legislation* once adopted in view of the relatively open norms and broad policy goals in relation to alleged violations of human rights. As argued above, traditional legal concepts as tort, causality and liability for damages may not fit well in an area where issues and legislation are not black or white but to a large extent policy-oriented. In that perspective, there is not only a need, but also a necessity to develop new instruments and associated legal notions. The attempts at regulation and implementation so far (as discussed below) illustrate that this will not only be a major challenge for EU Member States individually but will also raise the question how a level playing field in the EU can be realized and maintained.

As discussed above, these issues have so far received relatively little attention. In exploring this further I will first explain how according to the CSDDD, supervision of the CSDDD is supposed to function. Subsequently, I will discuss in a comparative context what kind of supervision for the various categories of obligations would seem to be appropriate. Lastly, I will focus on what we have learned so far from jurisdictions which already have enacted human rights due diligence legislation.

6.1. The Architecture of Regulatory Supervision in the CSDDD

The architecture of regulatory supervision provided for by the draft CSDDD is set out in Articles 17–21 CSDDD. First, Article 17 provides that every EU Member State will be required to designate "one or more supervisory authorities to supervise compliance with obligations" laid down in Articles 6-11 and 15 of the CSDDD. Member States are free to decide which organization will assume the responsibilities. In principle, the CSA is the supervisory authority of the Member State in which the company has its "registered office", unless a

28 www.un.org/en/climatechange/high-level-expert-group (last accessed: 10 April 2023).

parent company fulfils the obligations resulting from the CSDDD on behalf of its subsidiaries as permitted by Article 4A.[29]

The powers a CSA should have are described in very general terms in Article 18 CSDDD. Such powers should be "adequate" and include the right to request information, carry out investigations "where it considers that it has sufficient information indicating a possible breach" of obligations (Art. 18 (2)) as well as conduct "inspections" (Art. 18 (3)). In addition, the CSA (Art. 18 (5)) should have the power to make "orders" including the cessation of infringements, abstention from repeating certain conduct, a "remediation proportionate to the infringement" as well as "to adopt interim measures in case of urgency due to risk of severe and irreparable harm". All this subject to the right of companies to an "effective judicial remedy" against decisions of the CSA (Art. 18 (7)).

The CSA should also have the power to impose penalties, which should be "effective, proportionate and dissuasive" and should be commensurate with the company's worldwide net turnover (Art. 20 (3)). What is important, however, is that in determining the appropriate level (i) "due account shall be taken in particular of the company's efforts to comply with any remedial action required of them" by the CSA, as well as (ii) "any investments made and any targeted support provided pursuant to Articles 7 and 8 [CSDDD]" and (iii) "collaboration with other entities to address adverse impacts" (Art. 20 (2)).

Decisions of CSAs on penalties will be published, but should not contain any personal data (Art. 20 (4)). These decisions must also be sent to the Network of Supervisory Authorities provided for in Article 21 and to be set up by the European Commission. This Network will also publish these decisions (Art. 20 (9)). Essentially, this network should facilitate cooperation, coordination and alignment of "regulatory, investigative, sanctioning and supervisory practices" of the CSAs (Art. 21 (1)). Clearly the aim of this Network is to secure a level playing field in the EU as much as possible.

Lastly, an important feature of the supervisory architecture is that all members of the public will be entitled to submit substantiated concerns that a company is failing to comply with its CSDDD obligations (Art. 19 (1)). Member States shall ensure that CSAs assess such substantiated concerns "in an appropriate period of time and, where appropriate, exercise their powers" (Art. 19 (3)). The

29 However, if the CSA identifies a failure of a subsidiary to provide information to the parent company, or does not abide by its policy or otherwise does not fulfil its obligations according to the CSDDD, the CSA of the parent company may advise the supervisory authority competent in relation to the subsidiary to discipline the subsidiary and exercise its powers to that effect.

CSA should advise the person on the result of the assessment as soon as possible (Art. 19 (4)). If such person has a "legitimate interest" in the matter, such persons are entitled to have access to a court or independent and impartial public body to review the decision of the CSA (Art. 19 (5)).

Last but not least, it should also be noted that the CSDDD (Art. 18 (4)) provides that if the CSA identifies a compliance failure, "it shall grant the company concerned *an appropriate period of time to take remedial action*, if such action is possible" (italics added). However, at the same time it is noted that this "does not preclude the imposition of penalties or the triggering of civil liability". Clearly this leaves a lot of discretion to national legislatures and supervisory authorities to decide what is the best and most effective supervisory strategy and work method to realize the goals set by the CSDDD. This underlines that passing the CSDDD is only a beginning. The real challenge is to realize the goals articulated in the CSDDD in the various Member States.

6.2. The Crucial Role of CSAs: Market and Consumer Authorities to be Preferred over Financial Market Regulators

The preceding description of the architecture of regulatory supervision illustrates that CSAs have wide discretion and, therefore, will play an extremely important role in implementing the CSDDD and realizing sustainability goals set by the CSDDD. The CSDDD leaves the choice of the CSA to the Member States. It indicates that it may be a newly set up authority but also an existing one including an authority for the financial markets. The choice is not indifferent. On the contrary; the choice will have considerable impact on the supervision strategy deployed. Generally speaking, authorities for the supervision of the financial markets will be more prone to securing strict compliance through imposing fines than a consumer and market authority, which will be more inclined to focus on structural improvements like increasing the level of information to market participants including consumers. As we will see below, countries which have already adopted due diligence legislation clearly prefer to designate agencies that oversee the function of markets and consumer protection over authorities overseeing financial markets. I think that is indeed a very wise choice.

Over the last 10 years, the Europeanization of the supervision of the financial markets under the aegis of ESMA (which commenced its work in 2011), has led to a disappointing and inflexible supervisory practice focused on strict compliance while at the same time refusing to rein in sometimes extremely broad legal categories and taking responsibility for practical solutions by issuing specific guidance. In certain fields, like the regulation of disclosure of inside information, ESMA has displayed a stubborn reluctance to provide flexibility

and/or simplify the law, while taking the position that the market supported its approach. Even the European Commission has publicly noted that ESMA is overstating its case and that a number of policy positions are certainly not supported by market participants. I refer to reports of the European Commission accompanying the proposals for the EU Listing Act package[30] and the draft Directive that aims to make capital markets more attractive for small and medium-sized companies (SMEs) and specifically the accompanying Impact Assessment Report by Commission Staff.[31]

This is a striking difference with the willingness of market and consumer authorities to be flexible and, for example, explore exemptions from competition law limitations to promote sustainability initiatives. Recently the EU Commission has published a proposal allowing such additional flexibility.[32] This willingness to explore constructive proposals can also be discerned at the national level. An example is the position of the Dutch regulator ACM which already in January 2021 published draft guidance on sustainability agreements which may be exempt under the Dutch Competition Act (Article 6(3) *Mededingingswet*).[33] In this policy (p. 7) the ACM emphasizes: "The ACM's enforcement policy in relation to sustainability agreements focuses on finding solutions that enable the sustainability benefits of initiatives to be realized and not on enforcement through fines". The situation in the Netherlands is further discussed below in 8.5.

The same attitude is reflected in the statement of the director of the Norwegian Market and Consumer Authority (Trond Rønningen), which has been designated to oversee the implementation of the Norwegian sustainability legislation. He explicitly emphasizes (see the website of the Consumer Authority)[34] that: "It is no goal to sanction as soon as possible. Our main working method is dialogue and guidance". And on its website the Consumer Authority explains it will do its best, for example by initiating (e-mail) surveys and meetings

30 https://finance.ec.europa.eu/publications/capital-markets-union-clearing-insolvency-and-listing-package_en

31 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022SC0762&from=EN i.e. the Staff Working Document of 7 December 2022 SWD (2022) 762 final specifically p. 213 *et seq*. where it is stated that the Commission carried out an assessment in relation to the most relevant MAR provisions "*for which ESMA's conclusions are not in line with the feedback received from experts and stakeholders" (italics added)*, "namely: the definition of inside information (Article 7), delayed disclosure (Article 17(4)), administrative sanctions (Article 30) market soundings (Article 11), and insider lists (Article 18)."

32 https://competition-policy.ec.europa.eu/public-consultations/2022-hbers_en

33 www.acm.nl/sites/default/files/documents/2e-concept-leidraad-duurzaamheidsafspraken.pdf.

34 www.forbrukertilsynet.no/the-transparency-act (last accessed: 10 April 2023).

with the business community to learn from their experiences, to gain insights in the issues companies and organizations are confronted with.[35] The situation in the Norway is further discussed below in 8.4.

In the same vein the German Supply Chain legislation in force since 1 January 2023 and the German regulators hold that they have a responsibility to assist companies with guidance,[36] information, support and recommendations to help companies to comply with the law. The website of the designated supervisory authority, the *Bundesamt für Wirtschaft und Ausfuhrkontrolle* ("BAFA"), offers a wide range of brochures explaining the law and providing tools on how to implement the law.[37] A second extensive body of guidance is presented under the responsibility of the *Agentur für Wirtschaft und Entwicklung* (Agency for Economy and Development) by the *Helpdesk Wirtschaft und Menschenrechte*[38] (The Economy and Human Rights Helpdesk). The situation in Germany is further discussed below in 8.3.

7. Human Rights and Adverse Environmental Impact. In Search of Effective Strategies and Complementary Regulatory Supervision

Discussing the obligation of human rights due diligence means discussing corporate policy. This is already clear from the draft CSDDD where the CSDDD itself notes that respect for human rights violations must be *integrated in the policy* and the "risk management" of the business. Subsequently, companies are expected to monitor the effectiveness closely "whenever there are reasonable grounds to believe that significant new risks [...] may arise" (Articles 4 and 10). The "due diligence policy" should include a "code of conduct" which lays down the rules and principles that apply to all those involved in the company, and a description of the measures for complying with them ("compliance"). At least every two years, the policy must be reviewed and adjusted if necessary (Article 5). A "prevention plan" must also be drawn up. Actual action must be taken to identify and address "actual and potential adverse impacts" (Article 6). This may involve prioritization based on the severity and likelihood of the (potential) breach (Article 6a). Action may include explicit contractual ar-

35 Ibid.

36 ("*Handreichungen*" as it is put in para. 20 of the German Supply Chain Act, the LieferkettensorgfaltsGezetz; "LkSG")

37 www.bafa.de/DE/Lieferketten/Ueberblick/ueberblick_node.html (last accessed: 10 April 2023).

38 www.wirtschaft-entwicklung.de/wirtschaft-menschenrechte/ and CSR – Umsetzungshilfen (csr-in-deutschland.de) (last accessed: 10 April 2023).

rangements with business partners to prevent or end infringements (Articles 7 and 8). To this end, the European Commission may draw up guidelines, including model contract clauses (Articles 12 and 13).

The focus will therefore be on human rights violations and adverse impacts on the environment by polluting land, water and air with hazardous substances (which is fundamentally different from climate change as GHG emissions in themselves are not hazardous). In the literature the first category, human rights violations, seem to be dominant, although it is clear that pollution may also infringe human rights if it leads to unhealthy conditions of the population living in the vicinity of a site where the pollution originates. At the same time, there are clear differences. If hazardous substances are being discharged, this is something that generally can be measured and quantified and therefore a direct causal link can be established with adverse health consequences. Moreover, in many cases there are established standards on what is acceptable from a health perspective and what is not. All these factors make it relatively straightforward – though not necessarily simple – to conclude whether legal norms have been violated and damages are due. This becomes much more complicated when discussing broader human rights obligations companies may have on the basis of the OECD Guidelines and/or the UN Guiding Principles and/or the CSDDD.

This can be illustrated by the reference to the 17 Sustainable Development Goals ("SDG") formulated by the UN. Basically those 17 SDGs picture an ideal world where everybody has work, earns a good salary, standards of living are high, energy is abundantly available and at the same time people live in a healthy environment where nature is fully respected and undisturbed. Such ideal situations will not come into existence overnight. Industries will have to be set up to secure work but that will lead to adverse effects such as people being expropriated, relocated, being confronted with a loss of nature and other impacts on the environment. Human rights in this broader context will therefore always be, at least to a certain extent, aspirational and policy oriented. Obviously, there are minimum standards that are non-negotiable. Slavery is out of the question. Exposing workers to hazardous agents that knowingly pose serious threats to their health is not acceptable. However, here already questions may arise. Working as a miner clearly is not a healthy profession. At the same time, the mining of rare materials does create jobs and may have beneficial effects on the economic development of a certain area and its people (not to mention that it will be necessary to develop electric cars etc.). Another example is child labour. This is a subject that, quite rightly, evokes strong emotion and rejection. At the same time, it is widely accepted that children are helping their parents on their farms or in their businesses. As long as that is kept within limits, and children are permitted to go to school, this will not by definition qualify as fundamental human rights violations.

Clearly there is much more to say on all the dilemmas that may arise in this respect. However, there is already a wide-ranging literature available and the aim of this article is not to contribute to that literature. What this article does aim for is to explore how supervisory authorities could best fulfil their roles given that promoting human rights and caring for the environment in many instances will not be a black-and-white issue and, contrary to what the terminology may suggest, only to a limited extent is a legal issue as human rights cannot be equated with traditional 'subjective' rights. Therefore human rights debates may also entail complicated policy questions. This will by definition also impact the role of regulatory supervisors. In exploring what would be the best approach in this respect a lot can be learned from jurisdictions which have already introduced human rights and environmental due diligence legislation.

8. Comparative Overview of National Laws on Sustainability Objectives and Strategies of Supervisory Authorities

As set out in the preceding paragraph, the draft CSDDD does not provide much guidance on how the supervision of the CSDDD rules should take place. However, we may learn from the experiences of countries which have introduced human rights due diligence legislation. When we look at how such countries have organized the regulatory supervision, we see considerable differences. There does not seem to be a consensus on what would be the best approach. In a way this may be a blessing in disguise as it offers the opportunity to learn from the experiences.

As part of this learning experience I will review and analyse the supervision structure around the UK Modern Slavery Act, which came into force in 2015, the French *Loi relative au devoir de vigilance*, enacted in 2017, the German LkSG (*Lieferkettensorgfaltspflichtengesetz)* and the Norwegian *Åpenhetsloven*, which were adopted in 2022 as well as the discussion in the Netherlands (where a Child Labour Act was adopted but never came into force). I will conclude by summarizing the lessons we have learned from national experiences and the recommendations which may be drawn from this.

8.1. United Kingdom

In 2015, the UK Modern Slavery Act[39] came into force and this Act is still regularly depicted as a trailblazing event in the corporate social responsibility

39 www.legislation.gov.uk/ukpga/2015/30/enacted/data.pdf (last accessed: 10 April 2023).

movement. However, upon further analysis there is very little that actually justifies that view. It is true that one chapter of the Modern Slavery Act (Part 6) is devoted to obligations of companies that require "transparency in supply chains". It is applicable to commercial organisations supplying goods or services with a minimal total turnover of GBP 36 million.

Companies meeting those requirements are expected to prepare a statement on a yearly basis in which they explain what steps have been taken to secure that no forced labour is being used in their supply chains. However, that pretty much sums up what the Act requires. The content of the yearly statement is basically for the companies to decide and there are no mandatory rules that set minimum standards for such statement. According to the Act, further guidance as to the content of the statement may be provided, but to date such guidance has not been issued. Currently, a company even complies with the law if the statement explains that no steps have been taken (see Clause 54(4)(b) of the Act). The statement has to be approved by the board of directors.

The Act provides for an independent supervisory agency to oversee compliance with the law in the office of the Anti-slavery Commissioner (s. 40 *et seq.*) (the "Commissioner"). Basically, the Commissioner has an oversight role in reporting to the government and making recommendations on the basis of independent research. In addition the Commissioner may assist victims (s. 41), but is not allowed to act as counsel in individual cases (s. 44) and is expected to draft a strategic plan to address forced labour (s. 42). The persons guilty of facilitating forced labour will be confronted with criminal sanctions, basically imprisonment, confiscation of assets and reparation orders (s. 5 and 6). This, however, is the responsibility of the prosecuting authority and not of the Commissioner. Insofar as the duties of companies are concerned, the Commissioner does not have the authority to bring actions to enforce those duties. The duties companies have, are only enforceable by the Secretary of State, who may bring civil proceedings and request injunctions in the High Court (Clause 54 (11)).

An excellent overview of how the Act works in practice is provided in the latest Annual Report of the Commissioner, Dame *Sara Thornton*, which was published in 2022. A first highly relevant finding in that report is that the government "has never used its powers of injunction against non-compliant companies or other organisations",[40] although, as the Commissioner notes with a certain understatement, the response of business to the Act and the compliance therewith has been "uneven". As the Commissioner describes, the government in 2020 did announce additional initiatives to strengthen compliance such as

40 Annual Report of the Anti-Slavery Commissioner 2021-2022, www.antislaverycommissioner.co.uk/media/1796/iasc-annual-report-2021-2022.pdf (p. 35 *et seq.*) (last accessed: 10 April 2023).

seeking to impose "fines for non-compliance" and considered "the development of a single enforcement body", but these statements have not been followed by actions. As the Commissioner notes, since 2020 the only initiative that has been followed through is setting up a centralized register where companies have to file a link to the anti-slavery statement on the company's website. This register is available since 11 March 2021.[41] However, the filing of statements in the register is not yet mandatory and according to the Commissioner in practice only 45% of companies filed a correct link to the statement on its company website.

Commissioner *Thornton* therefore notes in relation to the (lack of) compliance of companies with the Act: "The lack of momentum is disappointing and sends a message to business that government does not care". As a remedy the Commissioner suggests that she would welcome steps that would make it easier for shareholders and investors to ask questions related to this subject in the annual meeting. The Commissioner is also very critical of the apathy of the financial sector. She therefore suggests that financial institutions be mandated to report on their investment and lending portfolios and their efforts to secure that forced labour is not facilitated. As she summarizes: "While I will continue to encourage voluntary disclosure, I suspect that this risk-averse and compliance driven sector will need to be compelled to report before real progress can be made."

The Annual Report is not only very informative and a good read because of the insights into current practices, but also because it contains more general interesting observations on the risk that human rights violations may be on the rise in certain sectors due to the specific needs of the Western world, for example related to the energy transition. As Commissioner *Thornton* explains:[42] "Vulnerability [of people in developing countries] is exacerbated by climate change and modern slavery is linked to unsustainable production. But, supply chains for some critical minerals needed in the transition to clean energy also pose a high risk for modern slavery. The pandemic has shown how increased demand in some sectors and shifts in supply chain dynamics dramatically exacerbates risks."

Lastly, I note that the term of Commissioner *Thornton* ended in April 2022 and that the government has not been in a hurry to appoint a successor. NGOs active in the field as well as others have expressed their concern that the government may deliberately stall the appointment of a new Commissioner as it first wants to make a number of changes, in line with its wish to strengthen policies

41 https://modern-slavery-statement-registry.service.gov.uk (last accessed: 10 April 2023).

42 Annual Report of the Anti-Slavery Commissioner 2021-2022, www.antislaverycommissioner.co.uk/media/1796/iasc-annual-report-2021-2022.pdf (p. 57) (last accessed: 10 April 2023).

against illegal immigration, significantly raise the threshold someone must meet to be considered a modern slave and the required "objective evidence" before she or he may invoke being protected from forced labour practices.[43]

All in all, the UK experience seems to underline the point that two elements in any case seem crucial to create an effective oversight framework in relation to human rights violations, i.e. mandatory rules for companies related to reporting of the risks of such violations and providing the regulatory supervisor with the right to initiate actions and take measures like making orders and injunctions if companies do not comply with key obligations such as adequate reporting. In a way, of course, these are two sides of the same coin. As has been explained above, the CSDDD will provide for both. At the same time this only provides for a minimum level of compliance. More will be needed, although what exactly is needed to secure an effective and efficient system, without overly burdening businesses, is still something that is being worked out in various jurisdictions (as is discussed below).

8.2. France

The first national legislation with a broad due diligence focus that was enacted is the French *Loi no. 2017-399 Relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, (the "*Loi de vigilance*"*)*, which came into force in July 2017. The key obligation of this law is that each company employing more than 5,000 people should draw up a due diligence plan ("*plan de vigilance*"). This plan should identify the risks of human rights violations in the supply chain and address serious violations ("*les atteintes graves*") thereof and of provisions which protect the health and safety of workers and others, and set out the measures taken to prevent or mitigate such risks.

The supervisory approach in the *Loi de vigilance* is relatively straightforward (which is not to say simple) in the sense that *no* specific supervisory authority has been designated but that every person having a legitimate interest may request a court order if a company does not act in accordance with the law (see for all this Article 225–102-4 *Code de commerce*) or request damages (Article 225–102-5 *Code de Commerce*). However, if damages are requested, all customary civil law requirements, as required by Articles 1240 and 1241 of the *Code Civil*,

43 According to various internet sources such statements have also been made by the UK Prime Minister, Rishi Sunak. www.cips.org/supply-management/opinion/2023/january/failure-to-appoint-an-anti-slavery-commissioner-leaves-victims-high-and-dry/ (last accessed: 10 April 2023); www.bbc.com/news/uk-politics-64098701 (last accessed: 10 April 2023).

have to be fulfilled (i.e. actions of the company should qualify as a tort, the person making the request should have sustained damages and a direct causal link between the actions and the damages should be demonstrated).[44] Simply put: it basically is up to private parties to oversee compliance with the law by companies by bringing civil law actions. Originally the legislature also considered including a civil fine ("*une amende civile*") of maximum EUR 10 million, but that proposal was struck down by the *Conseil Constitutionnel* as the rules were far too vague and indeterminate to justify such a sanction and in fact would create liability for deeds of third parties (i.e. companies that are part of the supply chain).[45] To date, the French approach has not been very successful. As recently as 28 March 2023 the Paris Court (*Tribunal judiciaire de Paris*) rejected a claim against Total Energies to be decided in summary proceedings.[46]

The French approach to supervision of human rights obligations therefore is quite different from what other jurisdictions have done. That begs the question whether the French approach actually works and works better than relying primarily on a supervisory authority. In answering that question we have the benefit, besides academic publications,[47] of a number of detailed reports that have evaluated the law over the last couple of years.[48] The conclusion of these evaluating reports is basically the same: the French approach relying on civil liability does not work and the system needs a supervisory authority. Initially, in the report of the *Conseil Général de l'économie* (p. 20), it was suggested to designate an existing governmental agency to collect relevant data, process it in light of the criteria set by the *Loi de vigilance* and promote compliance by advising companies on the risks involved. The subsequent report sponsored

44 See also the *Décision* of the Conseil Constitutionnel (cited hereafter), para. 27: Conseil Constitutionnel 23 March 2017, n° 2017-750 DC: www.conseil-constitutionnel.fr/decision/2017/2017750DC.htm (last accessed: 10 April 2023).

45 Conseil Constitutionnel 23 March 2017, n° 2017-750 DC: www.conseil-constitutionnel.fr/decision/2017/2017750DC.htm (last accessed: 10 April 2023).

46 https://www.lemondedudroit.fr/decryptages/86131-devoir-vigilance-tribunal-judiciaire-paris-deboute-ong-action-contre-totalenergies.html (last accessed: 10 April 2023).

47 See inter alia, *Armand Hatchuel/Blanche Segresti*, "Devoir de vigilance: La norme de gestion comme source de droit?" Revue Droit et Société 2020/3, 667.

48 I refer to the report of the Conseil Général de l'économie: *Anne Duthilleul/Matthias de Jouvenel*, Evaluation de la mise en œuvre de la loi n° 2017-399 du 27 mars 2017 (published in January 2020), www.economie.gouv.fr/files/files/directions_services/cge/devoirs-vigilances-entreprises.pdf?v=1620744564 (last accessed: 10 April 2023) and to the report for the ILO by *Pauline Barraud de Lagerie/Elodie Béthoux/Rémi Bourguignon et al.*, Mise en œuvre de la Loi sur le devoir de vigilance. Rapport sur les premier plans adoptés par les entreprises (filed in 2020 with the International Labour Organisation) www.ilo.org/wcmsp5/groups/public/—europe/—ro-geneva/—ilo-paris/documents/meetingdocument/wcms_732938.pdf (last accessed: 10 April 2023).

by the French parliament, drafted by its reporters (*rapporteurs*) *C. Dubost* and *D. Potier*, and published in 2022 (the "Report")[49] went, however, much further. It proposes that an independent agency should be established and be tasked with a relatively broad mission (see p. 75 *et seq*.). The Report is the outcome of a thorough analysis and reflects intensive discussions and roundtables with all interested parties and organizations (which are enumerated in the Report). It makes quite clear that the civil law and liability approach which characterizes the *Loi de vigilance* up to now is insufficient to make the law work and realize its goals. Only very few cases have been brought and these cases led to very complicated debates on judicial authority and other procedural legal issues. Until the beginning of 2022 there were four cases in which an injunction was requested and only one in which damages were claimed (Report p. 76 *et seq*.). Moreover, the very few cases that have been brought also mean that crucial standards set by the law (like the aforementioned standard that the violation should qualify as an "*atteinte grave*") are not being clarified in case law (Report p. 75).

The main conclusions of the Report to the French parliament is therefore that both from the perspective of the legislature as from the perspective of the companies and third parties who may want to take action, a supervisory authority is definitely needed and setting up such an organization is in the interest of all involved, companies and third parties alike (Report p. 79). In the words of the evaluation report, such an "*autorité administrative indépendante*" (in the Report abbreviated to "AAI") should be tasked with the responsibilities "*du suivi, de l'accompagnement, voire du contrôle et de la sanction du devoir de vigilance*", i.e. it should monitor, support, control and sanction the human rights due diligence obligations set out in the law. In this respect the *rapporteurs* specifically refer to the efforts that Germany has undertaken to assist German companies and organizations. As has been considered by the German legislature, the French *rapporteurs* do underline there is a legitimate need of companies to assist them in effectively implementing the law in practice ("*un besoin d'accompagnement pour aider a la mise en oeuvre effective du devoir de vigilance*" (Report p. 75 and p. 80–81) and that companies legitimately may expect pragmatic responses taking account of very different situations ("*des réponses pragmatiques et adaptées á la grande diversité de situations rencontrées*"). The *rapporteurs* do not see a problem with this as long as it does not result in a box ticking exercise and such assistance by the government is not being perceived as an exemption from liability. As said, the *rapporteurs* also made the point that

49 *Coralie Dubost/Dominique Potier* (Rapporteurs), Rapport d'information sur l'évaluation de la loi du 27 mars 2017, Assemblée Nationale n°. 5124, published 24 February 2022: www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b5124_rapport-information (last accessed: 10 April 2023).

such an agency should not only assist companies, but organizations and NGOs who actively seek to protect people against human rights violations should also be assisted by such an AAI (e.g. by receiving information on legal avenues open to them).

In discussing the role of such an agency to impose sanctions like fines, the *rapporteurs* (Report p. 82) distinguish between overseeing strict obligations (like the obligation to have a plan that meets the requirements), which should be sanctioned by the AAI, and the assessment of whether the broader goals of the law are respected, which should be judged by the courts. Insofar as the AAI were to conclude that a company does fulfil its basic obligations, but not live up to what the law envisages, the *rapporteurs* seem to suggest that the AAI therefore should not primarily impose fines or penalties, but use the instrument of the injunction (Report p. 84). In this respect the *rapporteurs* also address the criticism that a broader role for an AAI may lead to and legitimize the "*managérialisation*" of the law (Report p. 82). The *rapporteurs* see no reason for such concerns as long as the AAI does not as such certify *plans de vigilance*. In their view the effectiveness of the law may substantially increase if an AAI has a broad remit to not only oversee that plans are drawn up in accordance with the law, but may also act if it is made aware of human rights violations and, of course after discussions with the relevant company, has the authority to make recommendations and issue orders if a company is negligent in taking action (Report p. 83).

Lastly, the *rapporteurs* note that an AAI as described above would fit squarely with the requirements of the draft CSDDD. As discussed, Articles 17 *et seq*. CSDDD will indeed require that a regulatory supervisor be established in every EU Member State. Although it is too early to assume that the future French CSDDD supervisor will resemble the AAI as proposed in this report to the French parliament, it may not be a big surprise if that turns out to be the case.

8.3. Germany

The German LkSG (*Lieferkettensorgfaltspflichtengesetz*) is the most detailed of the national due diligence laws currently in force in Europe in respect of due diligence legislation.[50] Compared to the *Loi de vigilance,* a first fundamental

50 There is a relatively vast body of literature on the LkSG, including *Lucina Berger*, "Lieferkettenverantwortung aus Unternehmens- und Beratersicht: Notwendigkeit oder Überforderung", Zeitschrift für Unternehmens- und Gesellschaftsrecht 2022, 607; *Andreas Rühmkorf*, "The German Supply Chain Law: A First Step Towards More

difference is that the LkSG does not rely on private law and private law litigation, but on actions by governmental agencies and administrative sanctions (including pecuniary sanctions which may amount up to EUR 8 million or 2% of the average yearly turnover). The LkSG even explicitly includes a provision which states that a violation of the provisions of the LkSG does not provide a basis for civil law liability (see para. 3 (3)).[51] Of course this does not imply that civil law liability is always excluded, but such liability will only arise if all general conditions for such liability are fulfilled.

Secondly, it is made clear that the regulatory supervisor also has the responsibility to assist companies with guidance ("*Handreichungen*" as it is put in para. 20 LkSG) and provide information, support and recommendations to help companies act in accordance with the law. This part of the mission of the law has been taken very seriously by the regulatory supervisor as well as other government bodies. The website of the designated supervisory authority, the *Bundesamt für Wirtschaft und Ausfuhrkontrolle* ("BAFA"), which falls under the authority of the *Bundesministerium für Wirtschaft und Klimaschütz* ("BWK") (Federal Ministry for Economic Affairs and Climate Protection), offers a wide range of brochures explaining how companies should interpret the law and tools on how to implement the law in their business organization.[52] This includes extensive guidance and brochures for example on the principle of proportionality ("*Angemessenheit*") and risk analysis.[53]

Very interesting is the extensive discussion of the principle of reasonable proportionality ("*Angemessenheitsprinzip*") in the guidance provided by the supervisory authority. The guidance takes as its starting point that a company has substantial discretion ("*großen Spielraum*") in deciding which risks should be addressed and in which order and which measures are sensible in light of the risk analysis. It is explicitly noted that such discretion is acknowledged and taken into account by the supervisor ("*anerkannt und berücksichtigt*"). The

Corporate Sustainability", European Company Law 2023, 6; *Björn Schneider*, "Deliktische "Lieferkettenhaftung" unter Geltung des Lieferkettensorgfaltspflichtengesetzes (LkSG)", Zeitschrift für Wirtschaftsrecht 2022, 407.

51 The LkSG § 3(3) determines: "Eine Verletzung der Pflichten aus diesem Gesetz begründet keine zivilrechtliche Haftung". The French law refers explicitly to the customary criteria that have to be met to conclude liability as required by articles 1240/1241 Code Civil ("*faute*", "*dommage*" and direct causal link).

52 www.bafa.de/DE/Lieferketten/Ueberblick/ueberblick_node.html (last accessed: 10 April 2023).

53 See www.bafa.de/DE/Lieferketten/Angemessenheit_und_Wirksamkeit/angemessenheit_und_wirksamkeit_node.html (last accessed: 10 April 2023) and; "Handreichung Risiken ermitteln, gewichten und priorisieren "www.bafa.de/DE/Lieferketten/Risikoanalyse/risikoanalyse_node.html (last accessed: 10 April 2023).

BAFA defines therefore its own role as a check whether a company at the time of making that decision, *ex ante*, has acted reasonably proportionately (“*angemessen*”). The company therefore has to explain (“*nachzuweisen*”) according to which criteria the risks have been assessed and why certain measures have or have not been taken and were deemed adequate. The internal process to weigh all relevant interests must be plausible (“*plausibel*”) and logical (“nachvollziehbar”). The guidance underlines that the supervisory authority is very much aware that it should avoid a hindsight bias. According to the supervisory authority, this principle (“*Prinzip der Angemessenheit*” reassures that companies will not be confronted with unreasonable requirements (“*Unzumutbares*”), and that it will depend on specific risks (“*spezifischen Risikodisposition*”) what reasonably (“*vernünftigerweise*”) can be expected to mitigate the risks or put an end to them. As set out in the LkSG itself (para. 3 (2)), the supervisory authority repeats principal criteria such as nature and size of the business, the ability to control and influence the risks, the seriousness of the risk, and the role of the company in the risk being materialized. According to the supervisory authority, companies meet the requirements of the law if on the basis of these criteria a balanced and plausible decision is being taken, even if later on it would become clear that human rights violations have taken place.[54]

In addition to the guidance by the BAFA, a second extensive body of guidance is presented under the responsibility of the *Agentur für Wirtschaft und Entwicklung* (Agency for Economy and Development) by the *Helpdesk Wirtschaft und Menschenrechte*[55] (Economy and Human Rights Helpdesk (the “Helpdesk”)) which is set up and financed by the *Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung* (“BMZ”)) (Federal Ministry for Economic Cooperation and Development) in cooperation with, inter alia, the *Deutsche Gesellschaft für Internationale Zusammenarbeit* (“GIZ”) (German Organization for International Cooperation). The body of guidance that is available here focuses on the situation in and cooperation with developing countries and companies in those countries. According to the website of the Helpdesk, companies may ask for advice or ask questions free of charge and on a confidential basis (“*kostenfrei, individuell und vertraulich*”). The Helpdesk does not shy away from making clear statements which reflect the complexity of the task, including that it is absolutely legitimate (“*absolut legitim*”) for companies to focus first on specific products or countries or partners which may raise the most obvious risks. According to the materials published

54 See for further guidance www.bafa.de/DE/Lieferketten/Risikoanalyse/risikoanalyse_node.html (las accessed: 10 April 2023).

55 www.wirtschaft-entwicklung.de/wirtschaft-menschenrechte/ and CSR – Umsetzungshilfen (csr-in-deutschland.de) (last accessed: 10 April 2023).

by the Helpdesk, the two overriding criteria companies should consider in articulating their policies are the seriousness ("*Schweregrad*") of violations and the likelihood thereof ("*Wahrscheinlichkeit*"). Lastly, also the *Bundesministerium für Arbeit und Soziales* ("BMAS")) (German Ministry of Labour and Social Affairs) plays a role in assisting companies inter alia by organizing dialogue sessions with business entities.[56]

8.4. Norway

The same principles that underlie the German legislation can be discerned in the Norwegian due diligence act, but in a much more condensed fashion. In comparison to the other legislative initiatives discussed above, the act has an important additional goal, which is to inform the general public on what a company is doing to prevent or remedy any human rights violations. That is reflected in the name of the act, which is "*Åpenhetsloven*", which can be very well translated as the Transparency Act (the "Act").[57] Already Section 1 of the Act explicitly states that it aims to ensure the general public access to information regarding how enterprises address adverse impacts on fundamental rights and decent working conditions. The Act came into force on 1 July 2022.

As in other countries, the duties according to the Act only apply to activities in the (upstream) supply chain, i.e. from the raw material stage to a finished product (Section 3 of the Act). The Act is applicable to all companies with at least 50 workers and a revenue of at least NOK 70 million (which in February 2023 was around EUR 6.4 million) and/or a balance sheet total of NOK 35 million and therewith has by far the widest application compared to due diligence laws of other countries. However, the Act explicitly notes that due diligence should be carried out "in proportion to the size of the enterprise, the nature of the enterprise, the context of its operations and the severity and probability of adverse impacts" (Section 4). The Ministry may issue additional guidance regarding the due diligence requirements. According to the Act, companies must publish a report describing their actions and findings related to the due diligence obligations. This report may be part of a broader CSR report. The Ministry may issue further regulations on how the information is to be reported. The first deadline for filing of the company reports is 30 June 2023.

As said, a unique element of this Act is that any person may in writing request additional information from the company "relating to a specific product or

56 www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/Umsetzungshilfen/Branchendialoge/branchendialoge.html (last accessed: 10 April 2023).

57 www.lovdata.no/dokument/NLE/lov/2021-06-18-99 (last accessed: 10 April 2023).

service offered by the company" unless it relates to an individual's personal affairs, information not to be shared for competitive reasons or "clearly unreasonable", or the request does not provide a basis for the request (Section 6). In principle, that information must be provided by the company in writing and within three weeks after the request had been made. If that is too burdensome, the period can be extended to two months. If the company denies a request, it should motivate why it is not answering the request as well as point out that the person making the request may address the Consumer Authority as the supervisory body (Section 7).

As supervisory authority, the Act designates the *Forbrukertilsynet*, which is the Norwegian consumer protection authority (the "Supervisory Authority"). This is an independent administrative agency of the Ministry of Children and Family Affairs. As in the German LkSG, the Act explicitly provides, in Section 8, that the Supervisory Authority has the responsibility to provide information, advice and guidance. In this respect the Act also refers to Section 11 of the Norwegian Public Administration Act (*Forvaltningsloven*),[58] according to which the duty to provide guidance should enable parties to protect their interests and administrative bodies should already, on their own initiative, assess the need of private parties for guidance including the relevant laws and regulations. Section 9 of the Act reinforces that the Supervisory Authority, next to the monitoring of compliance with the provisions of the Act, has as its mission to promote enterprises' respect for fundamental human rights and decent working conditions.

In line with this, the Supervisory Authority is not primarily expected to impose fines or other sanctions but should "seek to influence enterprises to comply with the Act, including by conducting negotiations with the enterprises or organizations" (Section 9(2) of the Act). The Supervisory Authority may request a written statement of the company that the illegal conduct will cease, prior to taking other measures (Section 9 of the Act). If the Supervisory Authority finds that an enterprise is in breach of the Act, the Supervisory Authority must first obtain a written confirmation that the illegal conduct will cease or issue a decision before other sanctions are considered.

The director of the Supervisory Authority, *Trond Rønningen*, explicitly underlines (see the website of the Consumer Authority)[59] that "It is no goal to sanction as soon as possible. Our main working method is dialogue and guidance, and this also applies to the Transparency Act. It is nevertheless important to emphasize that we will crack down on extensive and obvious breaches of the

58 www.lovdata.no/dokument/NL/lov/1967-02-10/KAPITTEL_3#§ 11 (last accessed: 10 April 2023).

59 www.forbrukertilsynet.no/the-transparency-act (last accessed: 10 April 2023).

law's provisions." Nevertheless, if the Supervisory Authority finds it necessary to take more severe action, it is authorized to issue orders, including prohibitions (with a maximum of 5 years) and impose penalties (Section 11). The penalties or injunctions that limit business activity are not yet specified but should reflect "the severity, scope and impact of an issue".

All in all the Act and the role of the Supervisory Authority reflect a supervision model that in essence relies on cooperation with business through dialogue.[60] "Cooperation and interaction between the various actors and stakeholders, the public sector, businesses, organizations, workers and consumers is imperative to achieving the goals of transparency and respect for fundamental human rights and decent working conditions envisaged by the Transparency Act."[61] In giving rights to consumers, including the right of consumers to request information on what the company is doing to prevent and remedy human rights violations, everyone can "become a force for ethical consumption".

Lastly, the Supervisory Authority explains that it would be happy to provide further guidance to companies, but at the same time realistically notes that it will take time before the planned guidance tools are in place. It underlines, however, that in the meantime it will do its best, for example by initiating (e-mail) surveys and meetings with the business community, to learn from the experiences, to gain insights into the issues companies and organizations are confronted with, and how they can work to find good answers and solutions.[62]

8.5. The Netherlands

In almost all international publications on sustainability legislation, the Netherlands is mentioned as one of the few countries which already in 2019 enacted due diligence legislation, albeit on a limited scale, i.e. focusing on fighting child labour. However, this is only partly correct. Yes, the Child Labour Bill (the "Bill") was adopted in 2019, but *the act never came into force!* After the Bill was adopted by the parliament, the government decided that it was preferable to await EU-wide legislation as presented in the CSRD and the CSDDD. At the time this position was accepted by a majority in the Dutch parliament.

However, a parliamentary minority was unhappy with the decision and subsequently moved to introduce another draft Bill, with a much wider scope than the Child Labour Act. The draft Bill captures any activity of which a Dutch

60 www.forbrukertilsynet.no/english (last accessed: 10 April 2023).
61 www.forbrukertilsynet.no/the-transparency-act (last accessed: 10 April 2023).
62 Ibid.

company "knows or can reasonably suspect" that it "may have adverse effects on human rights or the environment in a country outside the Netherlands".[63] Currently an amended version of the draft Bill, introduced on 2 November 2022, is under consideration.[64]

This amended draft Bill differs from the approach in other countries – with the exception of France – that it now heavily relies on civil liability as a disciplining mechanism. The Bill lowers the thresholds for liability both in terms of access to the Dutch courts as in attributing the burden of proof for a large part on the company which allegedly has violated human rights. In addition, the common private international law principle that claims will only be admitted if there is a close connection with the country in which the proceedings are being brought, is substantially altered. The draft Bill holds that every claim on the basis of violations of due diligence obligations on the basis of the draft Bill is assumed to have a connection with the Dutch legal sphere and designates this rule as an overriding mandatory provision within the meaning of Article 16 EU Rome-II Regulation. For a claimant, it would suffice to state facts on the basis of which a connection between the acts and omissions of the company and the sustained damages "may be presumed" (Article 3.2.6). If that is the case, the burden of proof shifts and it is for the company to prove that it did not violate any obligation as set out in the draft Bill.

Apart from these civil liability provisions, the draft Bill provides for a regulatory authority. However, different from the German and Norwegian approach, the draft Bill is almost completely silent on whether the regulatory authority is expected to assist companies by providing them with information and tools to help discharge their responsibilities under the law. The supervisory authority – currently the draft Bill designates the Dutch authority for consumer protection and market regulation ("ACM") – will have the power to levy fines up to 10% of net turnover and impose orders, but almost nothing in the draft Bill refers to a role of the supervisor in providing information and assisting companies. The draft Bill only notes, clearly a pretty obsolete remark, that the supervisory authority has the "authority to provide information in relation to the obligations set out in the draft Bill". It is left to the discretion of the supervisory authority whether a fine will be conditional upon the company not having observed specific orders (Article 3.2.3 (2)).

Interestingly enough, the envisaged supervisory authority, the ACM (see the preceding paragraph as well as well as 6.2 *supra*) is much more open-minded and seems to distance itself from the old school supervision through sanctions that the parliamentarians apparently prefer. According to its own web-

63 Kamerstukken (Parliamentary documents) II, 2020-2021, 35 761 no. 2, Article 1.2(1).

64 Kamerstukken (Parliamentary documents) II 2022-2023, 35 761 no. 8.

site, under the heading 'Our supervisory style', the ACM takes a broader view and notes: "We do not only want to punish infringements, but also address the underlying causes and prevent recurrence. [...] A structural solution to market and consumer problems, that's what we are all about." Over the past years the ACM – in consultation with market parties – has also been open on its priorities year-on-year (in 2020-2021 for example the focus was on Energy Transition and Digital Economy). In that vein the ACM has as well provided draft guidance (published in 2021) whether and to what extent agreements between companies promoting sustainability, and specifically reducing GHG emissions, may be exempt from competition law restrictions.[65] In this guidance (p. 7) the ACM emphasizes: "The ACM's enforcement policy in relation to sustainability agreements focuses on finding solutions that enable the sustainability benefits of initiatives to be realized and not on enforcement through fines."

In the meantime the Dutch Council of State on 8 July 2021 issued a scathing opinion on the draft Bill and concluded that enacting this Bill would be "irresponsible" due "its combination of open norms, wide scope" on the one hand and the "extensive administrative and criminal law enforcement mechanism" on the other hand, and would not be in accordance with "principles of legal certainty and proportionality".[66] On the practical level, the Council of State points out that "the proposal does not sufficiently take into account the limited clout of companies abroad in the absence of (sufficient) international consensus on concrete abuses. [...] In this regard, the proposal does not sufficiently reflect the extent to which the obligations imposed on companies are proportionate in the light of the real possibilities to adequately implement them" (p. 8). In addition, recently the Board of the council overseeing the Dutch judiciary ("*Raad voor de rechtspraak*") also issued a critical opinion.[67] Up to this point, these opinions did not have any impact on the draft Bill and its sponsors.

I have no doubt that the initiative reflects good intentions. But good intentions are not enough to produce effective law changing the world for the better. That will also require an analysis of the relevant facts and which legal mechanisms

65 www.acm.nl/sites/default/files/documents/2e-concept-leidraad-duurzaamheidsafspraken.pdf . The exemptions may be based on Article 6 paragraph 3 of the Dutch Competition Act. This enabling approach has been criticized by others, but so far the ACM in its response is staying its course. See also supra in this article paragraph 6.2.

66 Kamerstukken (Parliamentary documents) II 2022-2023, 35 761 no. 8 p. 6 *et seq*.

67 Raad voor de Rechtspraak, 8 maart 2023, Advies initiatiefwetsvoorstel Wet verantwoord en duurzaam internationaal ondernemen, https://www.rechtspraak.nl/SiteCollectionDocuments/2023-11-advies-initiatiefwetsvoorstel-maatschappelijk-duurzaam-internationaal-ondernemen.pdf.

work best. The rules set out in the CSDDD are definitely more promising than the draft Bill. It remains to be seen whether this draft Bill or the CSDDD will carry the day in the Netherlands. At this point the Dutch Cabinet does not support the draft Bill, nor does it seem that there is a parliamentary majority in favour of this initiative. Obviously, this may, or may not, change in the course of the parliamentary discussions.

9. Lessons Learned and Recommendations

The above holds some powerful lessons and findings in relation to the crucial role of supervisory authorities in realizing the policy goals enshrined in sustainability legislation.

First and foremost, it is clear from the analysis, and the French experience illustrates this point, that relying on a regime of liability is not effective. Civil law litigation may be the preferred instrument if parties have sustained damages which can be attributed to acts or omissions of another (legal) person and the causality between the one and the other is clearcut. If that is not the case, liability is not the fast track to realizing policy goals. Liability cases will by definition focus on specific circumstances of a specific company in a specific situation, and will only be decided after time- and money-consuming procedures have been conducted. Moreover, the legal effect of judicial decisions in individual cases will always be limited. It is telling that the French parliamentary working group evaluating the 2017 *Loi de vigilance* concludes that there is a pressing need to set up a regulatory supervisor. It is also telling that the parliamentarians underline that such a supervisory authority should not only have the powers to impose fines and make orders, but should assist companies in providing them with tools to discharge their responsibilities. The working group explicitly refers to, and recommends, the German approach (discussed above in 8.3).

In the German approach, the choice unequivocally has been made for supervisory authorities which not only, and not primarily, impose fines or other penalties but are expected to assist and to some extent coach companies in discharging their responsibilities. This has materialized inter alia in a helpdesk organization which provides a pretty impressive set of documents and guidance for companies on how to address the responsibilities as set out in the German LkSG). It is interesting, as well as realistic, and very much in point, that the helpdesk organization explicitly states that it is impossible for companies (but that also applies to supervisors) to have reviewed the whole supply chain at the time the LkSG comes into force. Moreover, it acknowledges that it is legitimate ("*legitim*") to set priorities and address the responsibilities over time in a step-by-step approach.

The same approach, but even articulated more strongly, has been laid down in the Norwegian Transparency Act. As already highlighted above (see 8.4), both the Act itself and the supervisory authority make clear that the supervisory authority primarily aims to assist companies in achieving the broader policy goals and is not focused on fines or other sanctions. Of course that leaves unaffected that, if companies do not move in the right directions, the supervisory authority may and will certainly resort to the use of sanctions.

From those experiences we can draw a number of lessons and formulate recommendations for the implementation of the CSDDD in national law. First, it is clear that civil liability is not an instrument to achieve the goals set out in the CSDDD. That is not to say that companies should not be held liable if damages have been sustained by specific parties due to actions of companies. But taking into account that damages will be difficult to attribute and assessing damages will require complex and prolonged litigation and in itself will not lead to structural changes, civil liability cannot be the prime instrument of choice to make the CSDDD work.

A fundamentally different structure of oversight is required to incentivize and assist companies in developing the right instruments to improve their human rights policies and actual impact, and to prevent and minimize environmental adverse consequences.

Obviously this commences with a due diligence investigation. First, it should be noted that investigating whether each and every actor in the supply chain fully respects the whole catalogue of human rights and does not cause any negative environmental impact will require a vast amount of time and resources. This work can only be done over time. In that respect it may be helpful if supervisory authorities, in close consultation with businesses, issue guidance and develop best practices setting out which actions companies could undertake and up to what level of detail, and in which manner, information should be gathered. Clearly, companies may benefit greatly from the assistance of specialized governmental agencies sharing information on foreign countries or regions and the risks associated with having suppliers in those countries or regions, as the German Helpdesk is doing. In addition, also setting up other mechanisms and processes in which information could be gathered collectively by companies active in certain countries or regions, and allowing companies to rely on that information, at least up to the point a company would receive information contradicting earlier findings, would be very helpful.

Second, and the term has been mentioned already in this article, it will be inevitable to prioritize areas of investigation, whether geographically or per sector as well as actions to be undertaken to remedy situations which have been uncovered. Here regulatory supervisors could also play an important role.

One could very well imagine that supervisors would determine prior to a fiscal year what specific areas of human right violations or adverse environmental impact companies are expected to focus on. When a regulatory supervisor has announced what companies are expected to focus on in a certain fiscal year, this also facilitates the actual oversight and supervision by the supervisors on the various plans and, if necessary, taking measures against companies which have clearly performed below par. Such prioritization by supervisory authorities may be more effective than leaving the prioritization to companies, as is now anticipated in the CSDDD.

Third, upon the phases of investigation and reporting being completed, companies will need to meet the challenge to remedy situations in which human rights or the environment have been found to be negatively affected. As set out above, the CSDDD itself in Articles 6-8 recognizes that this may not be as simple as it sounds. Also, setting priorities by supervisory authorities could help both companies and the supervisors. For example: in a certain year the focus could be on addressing child labour and education in a certain region and another year on labour conditions and fair wages.

The fundamental lesson that in my view can be drawn from this article is that realizing the ambitious goals set out in the CSDDD does require that supervisory authorities are willing to engage in an open and fair discussion with companies on what they reasonably can be expected to do in practical terms but also in terms of feasibility and in terms of the financial impact of measures on companies, in order to achieve the ultimate goals the CSDDD strives to realize. This will, and will need to, diverge from what until now generally is expected from regulatory supervisors, i.e. securing strict compliance with specific rules through the levy of fines or other sanctions. Furthering the goals set out in the CSDDD requires something different.

In this respect the CSDDD both signifies and requires a fundamental change in legal thinking and transcending traditional legal practices and legal techniques. From that perspective we are witnessing the beginning of a paradigm shift. We do not know yet what the ultimate impact of this shift will be. But what we do know is that in implementing the CSDDD, national governments and supervisory authorities would misinterpret the signs of the times if they were to be guided by traditional ideas of how regulators should operate.

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