Complementarity of the Legally Binding Instrument on Business and Human Rights and the EU Corporate Sustainability Due Diligence Directive

A study

by

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1. Introduction

The open-ended intergovernmental working group (OEIGWG) on business and human rights held its Tenth negotiation Session between 16 and 20 December 2024 to continue deliberations on the Updated Draft of a legally binding instrument on business activities and human rights (LBI).

Despite repeated calls from civil society and the European Parliament, the EU Commission has not taken a formal position on the LBI yet and remains partially engaged in the process at best.

The EU still lacks a negotiating mandate on this issue, which stands in stark contrast to the EU's internal legislative development. In June 2024 the EU adopted a Directive on Corporate Sustainability Due Diligence (CSDDD) aimed at establishing an EU framework for ensuring businesses are held accountable for climate and environmental destruction, as well as human rights violations. The CSDDD will have to be transposed in all EU Member States by 26 July 2026.

In light of this development this study assesses the complementarity of the LBI and the CSDDD and analyses how the two processes can be mutually reinforcing. In particular, the study asks how the CSDDD can support the process leading towards a LBI and improve the current draft. The study places special emphasis on the aspects of climate change-related obligations.

The study is organised as follows: Section 2 analyses the scope of the two legal instruments by discussing the personal scope, the material scope with regards to human rights and environmental matters as well as the scope of corporate obligations. Section 3 addresses the different corporate obligations including general due diligence obligations as well as specific obligations related to combating climate change beyond due diligence. Section 4 assesses issues concerning access to justice including liability, private international law questions, access to evidence and other issues.

2. Scope

2.1. Personal scope

The LBI, as outlined in Article 3.1 of the Updated Draft, adopts a broad scope, encompassing all companies regardless of their activities, with a primary focus on their transnational character.[2] In contrast, the CSDDD takes a narrower approach, targeting large EU-based companies—formed as limited liability entities or partnerships—with over 1,000 employees and an annual global turnover exceeding €450 million, as well as non-EU companies generating at least €450 million within the EU market.[3] The CSDDD includes specific rules for calculating employee numbers, treating part-time workers as full-time equivalents and ensuring temporary or non-standard workers are covered under EU labour laws.[4]

[2] UN Human Rights Council Text of the updated draft legally binding instrument with the textual proposals submitted by States during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights 13 February 2024 A/HRC/55/59/Add.1 (LBI), Article 3.1;

[3] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, 5 July 2024 (CSDDD), Article 2.1(a).

[4] Ibid, Article 2.4 and Recital 27.

The Directive further extends to ultimate parent companies, both EU and non-EU, of corporate groups that meet these thresholds on a consolidated basis, even if the parent company itself does not individually meet them.[5] Additionally, EU and non-EU franchisors and licensors are covered if their agreements generate royalties exceeding €22.5 million and if the companies or groups achieve a net global turnover of over €80 million (or equivalent turnover within the EU for non-EU entities).[6] The CSDDD applies to companies meeting these criteria for two consecutive financial years.[7]

Financial institutions, defined as regulated undertakings under the CSDDD—including banks, investment firms, and insurance companies—are covered by the Directive but are excluded from due diligence obligations regarding their downstream business partners that receive their services and products.[8]

With its personal scope, the CSDDD is projected to cover approximately 6,000 EU-based companies and 900 non-EU companies, although some CSOs estimate the figure to be closer to 5,500 EU entities, leaving a significant number of companies outside its coverage.[9] However, while SMEs are not explicitly included within the Directive's scope, they may be indirectly impacted as contractors or subcontractors within the chains of activities of in-scope companies.[10] To address this, the CSDDD includes provisions aimed at protecting SMEs from excessive compliance and financial burdens imposed by larger entities.[11]

In comparison, the CSDDD adopts a selective, threshold-driven focus, targeting only large, economically significant companies while incorporating group-level and sector-specific obligations. Critics argue that by excluding a substantial number of companies, the CSDDD fails to meet international standards, such as the UNGPs, which call for universal human rights and environmental responsibilities for all companies, regardless of size or activity.[12] They caution that this limited scope may undermine broader global efforts to encourage corporate implementation of due diligence obligations.[13] In this context, the LBI's broader and more comprehensive coverage is better aligned with international business and human rights standards compared to the CSDDD. However, to further enhance its scope, the inclusion of specific corporate actors, such as financial institutions and SMEs, alongside entities with a transnational character, should be emphasised to ensure the effective implementation of its broad coverage.

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[5] Ibid, Article 2.1(b)

[6] Article 2.1(c).

[7] Article 2.5

[8] Article 3.1.a (iii) and Recital 26.

[9] European Coalition for Corporate Justice 'Overview of Corporate Sustainability Due Diligence Directive: Advancing Corporate Responsibility May 2024 <https://corporatejustice.org/wp-content/uploads/2024/10/Overview-of-the-Corporate-Sustainability-Due-Diligence-Directive-Advancing-Corporate-Responsibility-ECCJ-2024.pdf#page=4.58> (30 November 2024).

[10] CSDDD (n 2), Recital 69.

[11] Ibid.

[12] LBI (n 1), Article 3.1.

[13] ClientEarth and FrankBold 'Corporate Environmental Due Diligence and Reporting in the EU Legal analysis of the EU Directive on Corporate Sustainability Due Diligence and policy recommendations for transposition into national law' September 4, 21.

2.2. Material scope

2.2.1. Human rights adverse impacts

Article 3.1(c) of the CSDDD defines "*adverse human rights impact*" in two ways: first, as abuses of rights explicitly listed in Part I, Section 1 of the Annex and as those human rights are enshrined in the international instruments listed in Part I, Section 2, and second, as abuses of rights not listed in Section 1 but enshrined in the instruments of Section 2, provided specific conditions are met.[14] These conditions require that the rights that are listed in the Part I is susceptible to corporate abuse, the abuse directly impairs a legally protected interest, and the company could have reasonably foreseen the risk based on its operations and context.[15]

The Directive's material scope for human rights has faced substantial criticism.[16] Critics highlighted that the Annex excludes several key human rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), the UN Declaration on Human Rights Defenders, and the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDRoP). While Recital 33 encourages companies to consider standards beyond those listed in the Annex—explicitly referencing instruments such as the UNDRIP and CEDAW—it also opens the possibility for member states to incorporate additional instruments when transposing the CSDDD into national legislation.[17] Nevertheless, the Directive's selective inclusion of international human rights instruments undermines its comprehensiveness and leaves significant gaps in its human rights coverage.

An additional challenge stems from the three conditions that must be satisfied to establish an adverse human rights impact. As argued by the CSOs, the first condition, requiring the right to be susceptible to corporate abuse, is redundant since the UNGPs establish that businesses can impact all internationally recognised human rights.[18] The second condition, requiring the abuse to impair a "*legal interest*", is unclear, as the distinction between a legal interest and the abused right is undefined, and the phrase "*directly impair*" lacks clarity.[19] The third condition, requiring the foreseeability of risks, contradicts the core purpose of due diligence, which is to identify and address potential risks, making foreseeability a natural outcome of the process rather than a prerequisite.[20] These ambiguities create regulatory uncertainty, potentially undermining the Directive's enforcement and effectiveness.

In contrast, the LBI adopts a broader and more inclusive approach. Article 3.3 of the LBI asserts that it encompasses all internationally recognised human rights and fundamental freedoms

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[14] CSDDD (n 2), Article 3.1(c), Nele Meter and Christopher Patz 'Dividing the Indivisible: Human Rights under the EU Corporate Sustainability Due Diligence Directive' 1 June 2024 Verfassungsblog <https://verfassungsblog.de/dividing-the-indivisible-human-rights-under-the-eu-corporate-sustainability-due-diligence-directive/> (30 November 2024).

[15] Ibid, Section (ii).

[16] ECCJ and other SCOs 'Corporate Sustainability Due Diligence Directive: A guide to transposition and implementation for civil society organisations' November 2024; 'Nele Meyer and Christopher Patz 'Dividing the Indivisible Human Rights under the EU Corporate Sustainability Due Diligence Directive' Verfassungsblog 1 June 2024 <https://verfassungsblog.de/dividing-the-indivisible-human-rights-under-the-eu-corporate-sustainability-due-diligence-directive/> (accessed on 22 August 2024).

[17] CSDDD (n 2), Recital 33.

[18] ECCJ and other SCOs (n 18), 22-23.

[19] Ibid.

[20] Ibid.

required by State Parties. However, this provision raises ambiguities. First, the term "*binding*" could imply that a state must be a party to the relevant treaty, which creates challenges since some countries have not ratified key international conventions, including the CEDAW or the ICRMW. Second, the focus on binding treaties leaves uncertainty regarding the inclusion of significant soft law instruments, such as the UNDRIP and the UNDRoP, which, while important, remain non-binding. To fully ensure comprehensive coverage of internationally recognised human rights, these ambiguities must be addressed. Nonetheless, the LBI's broader scope offers a more comprehensive alignment with international human rights standards than the CSDDD, providing a stronger framework for tackling business-related human rights abuses.

In addition, compared to the CSDDD, the LBI distinguishes between "*adverse human rights impact*" and "*human rights abuse*" as separate concepts.[21] According to the LBI, an "*adverse human rights impact*" refers to harm that diminishes or removes a person's ability to exercise or benefit from an internationally recognised human right. On the other hand, "*human rights abuse*" is defined as any act or omission connected to business activities that result in adverse human rights impacts. This distinction implies that while all human rights abuses result in adverse impacts, not all adverse impacts may legally qualify as abuses. This broader definition allows the LBI to address harms that may not meet the strict legal criteria of abuse but still constitute significant human rights violations.

2.2.2. Environmental adverse impacts

Article 3(b) of the CSDDD defines adverse environmental impacts as those arising from breaches of specific prohibitions and obligations listed in its Annex. Critics argue that this narrow scope, tied to a limited set of internationally recognised rules, undermines the opportunity to establish a more comprehensive framework for environmental due diligence.[22] The fragmented nature of international environmental law, with significant gaps such as the lack of regulations addressing soil degradation or plastic pollution, raises concerns that critical environmental harms may be excluded.[23] The *UN Special Rapporteur on human rights and the environment* criticised the selective approach, advocating instead for a comprehensive, adaptable provision that addresses all actual and potential adverse impacts on internationally recognised human rights (including the right to a clean, healthy, and sustainable environment), environmental concerns such as climate change and biodiversity, and principles of good governance.[24] The CSDDD's selective approach falls short of a comprehensive interpretation of environmental due diligence and does not fully align with the broad environmental categories in the recently updated OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (hereafter referred to as OECD guidelines) Guidelines.[25] It is criticised for overlooking the crucial preventive standards found in

[21] LBI (n 1), Articles 1.2 and 1.3.

[22] Virginie Rouas, Julia Otten and Daniel Torán 'From Paper to Practice: Moving to a Coherent Implementation of the EU Corporate Sustainability Due Diligence Directive's Environmental and Climate Obligations' 10 June 2024 Verfassungsblog <https://verfassungsblog.de/from-paper-to-practice-csddd-implementation/> (accessed on 28 August 2024).

[23] Ibid.

[24] Special Rapporteur on human rights and the environment 'Policy Brief No. 3: Essential elements of effective and equitable human rights and environmental due diligence legislation, A policy brief by David R. Boyd, UN Special Rapporteur on human rights and the environment, and Stephanie Keene, Independent Consultant, International Human Rights Lawyer, June 2022 - See section on Climate Change I. Delinking environmental due diligence and climate change issues.

[25] Virginie Rouas, Julia Otten and Daniel Torán 'New Wine in Old Bottles: Environmental and Climate Aspects of the EU's Corporate Sustainability Due Diligence Directive' 10 June 2024 Verfassungsblog <https://verfassungsblog.de/new-wine-in-old-bottles-csddd/> (accessed on 28 August 2024).

key international agreements, such as the waste minimisation principle in the Basel Convention and under the EU Batteries Regulation 2023/1542.[26]

However, a report by ClientEarth and Frank Bold notes that the broad language in Points 15 and 16 of Section 1, Part I of the Annex offers an opportunity for a more comprehensive interpretation of environmental impacts.[27] The phrase *"any measurable environmental degradation or other impact on natural resources"* includes a non-exhaustive list of environmental impacts, aligning closely with examples provided in the OECD Guidelines, such as biodiversity loss, climate change, and pollution.[28] This broad interpretation allows Member States, when transposing the Directive, to expand their scope and align it with international standards like the OECD Guidelines.

Furthermore, the inclusion of the definition of human rights abuse in Point 15 indicates that the CSDDD acknowledges the interdependent link between the environment and human rights. Specifically, Points 15 and 16 address environmental adverse impacts on people.[29] The report recommends that EU nations, when transposing the Directive, should seize this opportunity to ensure comprehensive coverage of environmental impacts aligns with OECD Guidelines.[30] Additionally, they advocate for strengthening the connection between environmental protection and human rights by emphasising the right to live in a healthy environment.[31]

However, despite its criticism, the CSDDD's notable integration of environmental issues alongside human rights concerns more thoroughly than the LBI, where environmental considerations are largely absent.[32] This recognition in the CSDDD demonstrates a more progressive approach to addressing environmental issues compared to the LBI. While it may appear that the LBI does not explicitly recognise environmental human rights, the right to a clean, healthy, and sustainable environment is now an internationally recognised human right. As such, it should logically fall within the scope of "*internationally recognised human rights*," as referenced in the draft LBI and under the UNGPs. However, the LBI's current stance on environmental matters remains implicit. Moving forward, the LBI should not only align with the CSDDD but also strive for a more comprehensive and coherent framework to ensure that all dimensions of environmental protection are adequately addressed.

2.2.3 Climate change impacts

Climate change is not explicitly integrated in the environmental adverse impacts covered under the CSDDD. As noted under the previous section, the definition of environmental adverse impact adopted under the CSDDD covers a select list of environmental conventions (See part II of the Annex to the Directive). This list does not include the agreements on climate change. The other part of the definition of "*adverse environmental impact*" is linked to the prohibition of causing 'any measurable environmental degradation' (see paragraph 15 of part I of the annex to the Directive).

[26] Rouas, Otten and Torán (n 22).

[27] ClientEarth and FrankBold (n 12), 32.

[28] Ibid.

[29] Ibid, 35-36.

[30] Ibid, 66.

[31] Ibid.

[32] Nadia Bernaz, Markus Krajewski, Kinda Mohamadieh and Virginie Rouas, The UN Legally Binding Instrument and the EU proposal for a Corporate Sustainability Due Diligence Directive October 2022, p. 16 <https://www.cidse.org/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf> (accessed 6 October 2024).

It could be argued that the approach under paragraphs 15 of part I of the annex to the Directive, which is part of the definition of "*adverse environmental impact*", covers a broad scope of "*measurable environmental degradation*" that effectively overlaps with climate change, including the reference to "*harmful emissions"*. It has been argued that "*water or air pollution*" is listed separately from the "*emissions*", the latter clearly includes anthropogenic greenhouse gas emissions (including through deforestation), which lead to global warming and climate change.[33] Thus, this part of the definitions could indirectly encompass the causes and impacts of climate change, despite not explicitly referring to climate change. Yet, under this part of the definition, for the harmful emissions to be taken into account, an impact on "*preservation and production of food*", human interest such as a person's access to safe and clean drinking water and sanitary facilities, person's health, safety, normal use of land, or on human wellbeing appears to be required. The CSDDD addresses climate change explicitly and extensively under Article 22 dedicated to "*combating climate change*", which sets an obligation on companies covered under the CSDDD to "*adopt and put into effect a transition plan for climate change mitigation*" (see discussion of Article 22 under section 3.2). Yet, the lack of an explicit reference to climate issues in the context of addressing the broader adverse environmental impacts might lead in practice to a potential disconnect between the three areas of climate, environmental harms and human rights.

In comparison, the latest draft text of the LBI does not integrate comprehensive references to environmental and climate issues. At the early stages of negotiating the LBI, references to environmental harms resulting from business activities, including climate change, were included in the draft. For example, under definitions, human rights violation or abuse integrated a reference to "[..]*substantial impairment of human rights, including environmental rights*". [34] Other elements of the earlier versions of the draft text, such as on the due diligence obligation, had integrated references to environment and climate change.[35] The section on rights of victims covered environmental remediation and ecological restoration. While this language was not carried forward in later drafts of the text, the revision of the text during the 9th session of the open-ended inter-governmental working group saw the reinsertion of language concerning environmental harm and related remedies in sections of the text that were revised during that session.[36]

For example, under the preambular section of the revised text, references to environmental rights and climate change were proposed by multiple Members.[37] Similarly, Members suggested adding reference to "*clean, healthy and sustainable environment*" under the definition of "*adverse human*

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[33] ClientEarth and FrankBold 'Corporate Environmental Due Diligence and Reporting in the EU Legal analysis of the EU Directive on Corporate Sustainability Due Diligence and policy recommendations for transposition into national law', page 34.

[34] See the 2019 draft LBI text 3rd revised version, available at: <https://documents.un.org/doc/undoc/gen/g23/008/93/pdf/g2300893.pdf>.

[35] The provision on human rights due diligence had integrated language on environmental due diligence including environmental impact assessments and reporting on policies and risks for environment along human rights and labor standards. See the 2019 draft LBI text 3rd revised version, available at: <https://documents.un.org/doc/undoc/gen/g23/008/93/pdf/g2300893.pdf>.

[36] Text of the updated draft legally binding instrument with the textual proposals submitted by States during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (February 2024), A/HRC/55/59/Add.1, available at: <https://documents.un.org/doc/undoc/gen/g24/022/86/pdf/g2402286.pdf>.

[37] Ibid, Text of the updated draft legally binding instrument, <https://documents.un.org/doc/undoc/gen/g24/022/86/pdf/g2402286.pdf>. For example: '(PP 11 ter) To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation and security agreements; (Palestine)', and 'PP18 Noting Stressing the growing economic might of some business entities, in particular transnational corporations and their particular responsibilities and impacts on human, labour, and environmental rights ILO Declaration on Fundamental Principles and Rights at Work and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; (Cameroon, Ghana)'.

rights impact" and under the definition of "*human rights abuse*".[38] Under scope, more than one Member suggested adding reference to international environmental law as part of the 'internationally recognised human rights and fundamental freedoms' to be covered under the proposed Instrument. The latest text also includes references to environmental remediation under Article 4 on rights of victims, and guarantees for persons, groups and organisations that promote and defend human rights and the environment under Article 5 pertaining to protection of victims. Climate change is much less explicitly referenced in the latest text, limited to two propositions under one of the preambular paragraphs.[39]

Negotiation of the LBI could aim for an integrated approach that reflects the interdependence of climate and other environmental issues as well as human rights. This integrated approach ought to be reflected in relation to various elements of the LBI, including in the context of the definitions and in relation to due diligence, rights of victims and access to remedy, along other elements of the LBI. A comprehensive approach to environmental harms ought to cover all actual or potential harm caused to the environment or its components including pure ecological harm (i.e. harm to the environment, such as biodiversity and ecosystems, protected species and natural habitats, that does not necessarily correspond to damage to a physical or natural person such as death, physical or psychological injury, property damage or the line). It is also important to account for the rights of future generations.[40] For example, under the definitions section, the terms '*adverse human rights impact*' could be replaced with 'adverse human rights and environmental impacts', allowing for inclusion of an open-ended reference to environmental harm, including climate change.[41] Similarly, since the right to a clean, healthy and sustainable environment is now an internationally recognized human right,[42] it ought to be included within the scope of the rights covered by the terminology 'internationally recognized human rights', which is integrated in the draft LBI and referred to under the Guiding Principles on Business and Human Rights.

[38] For example, in its opening statement at the 9th session of the open-ended working group negotiating the LBI, the European Union said "The EU would nevertheless wish to express a number of concerns with the current text. We would have appreciated that the references to the right to a clean, healthy and sustainable environment, which was recognised first by the UN Human Rights Council in October 2021 and then by the UN General Assembly in July 2022 had been maintained…". Statement can be found in the compilation of general statements from States and non-State stakeholders made during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, page 21, available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-compilation-general-statements.pdf>.

[39] Text of the updated draft legally binding instrument,
Available at: <https://documents.un.org/doc/undoc/gen/g24/022/86/pdf/g2402286.pdf>, '(PP 11 bis) To affirm the importance of the pro persona principle and the principle of the primacy of the most favourable norm to the human person in the interpretation of any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation, and security agreements' and (PP 11 ter) 'To affirm the primacy of human rights obligations in relation to any conflicting provision contained in international trade, investment, finance, taxation, environmental and climate change, development cooperation and security agreements'.

[40] CIEL, submission to the International Court of Justice on obligations of States in respect of climate change, memorandum on rights of Future generations (March 2024), available at: <https://www.ciel.org/wp-content/uploads/2024/02/Amicus-Brief-ICJ-Defining-States-Climate-Obligations-Rights-Future-Generations.pdf>.

[41] In this case, the definition of 'adverse human rights and environmental impact' should be well integrated in the definitions of human rights abuse or violation, which are the basis for defining the scope of the liability standard.

[42] In accordance with Human Rights Council resolution 48/13 and General Assembly resolution 76/300.

2.2.4. Recent developments reflecting an integrated approach to climate, environmental issues and human rights

Multiple recent normative and other developments have asserted an integrated approach to environmental adverse impacts and climate issues. For example, under the 2023 edition of the OECD,[43] climate change is explicitly included in the non-exhaustive list of environmental impacts that guide the recommendations of Chapter VI on 'Environment'. Similarly, the French duty of vigilance law[44] covers risks to human rights, fundamental freedoms, the environment, and public health,[45] under which the reference to "*the environment*" enables coverage of all possible types of environmental harms including climate change related harms.

Furthermore, some of the latest developments and clarifications under human rights and environmental laws, and related case law, unequivocally approaches climate change as a human rights crisis.[46] It is increasingly acknowledged that the interpretation of human rights treaties must consider and account for the climate crisis and that human rights law plays a crucial role in clarifying, shaping, and strengthening States' obligations to address the climate crisis.[47]

Recent UN resolutions recognised the right to a safe, clean, healthy and sustainable environment as an independent right and located climate change as part and parcel of the covered environmental issues. The October 2021 United Nations Human Rights Council (HRC)[48] resolution on the right to a safe, clean, healthy and sustainable environment, followed by the second formal recognition of this right by a UN General Assembly resolution in July 2022, reflects such an integrated approach. To underline that, the resolutions *recall* "*States' obligations and commitments under multilateral environmental instruments and agreements, including on climate change …" and recognise "… the impact of climate change, … [and that it] interfere with the enjoyment of a clean, healthy and sustainable environment and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights*".[49]

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[43] OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, available at: <https://mneguidelines.oecd.org/mneguidelines/>.

[44] Article L. 225-102-4.-I. of the French commercial code.

[45] Ibid. The French duty of vigilance law requires establishing, effectively implementing and publishing a 'plan of vigilance', which: 'shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls (...) as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship'.

[46] UN Human Rights Council Text of the updated draft legally binding instrument with the textual proposals submitted by States during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights 13 February 2024 A/HRC/55/59/Add.1 (LBI), Article 3.1; CIEL, CLX, Greenpeace International, OSJI, UCS, amicus brief submitted to the InterAmerican Court of Human Rigths (2024), available at: <https://www.ciel.org/wp-content/uploads/2024/02/Amicus-brief_IACHR_Climate_Emergency_and_Human_Rights_Corporate_Accountability_brief.pdf>.

[47] Picolotti, Romina and Luengo, Sebastian, 'Integrating Human Rights and Science Perspectives in Climate Responses', Institute for Governance & Sustainable Development (IGSD), available at: <https://sdg.iisd.org/commentary/guest-articles/integrating-human-rights-and-science-perspectives-in-climate-responses/.> It can be noted that the Paris Agreement on climate change (preamble) recognises that in addressing climate change, States "should respect, promote and take into account their respective human rights obligations".

[48] A/HRC/RES/48/13, Resolution adopted by the Human Rights Council on 8 October 2021, The human right to a clean, healthy and sustainable environment. The Human Rights Council also decided to establish a new mandate for a Special Rapporteur on the promotion and protection of human rights in the context of climate change. See: Human Rights Council, *Mandate of the Special Rapporteur on the promotion and protec- tion of human rights in the context of climate change*, A/HRC/RES/48/14 (8 October 2021).

[49] Resolution adopted by the General Assembly A/RES/76/300, 28 July 2022, The human right to a clean, healthy and sustainable environment. This sets the stage for further developments in relation to this right and the obligations of States, international organizations, companies, and other actors concerned to take all necessary measures to

The HRC and UNGA resolutions recognised that "*the protection of the environment, including ecosystems, contribute to and promote human well-being and the full enjoyment of all human rights, for present and future generations".*[50]

In its advisory opinion clarifying States' obligations to protect oceans from the drivers and impacts of climate change (May 2024), the International Tribunal for the Law of the Sea (ITLOS) acknowledged that climate change represents an existential threat and raises human rights concerns and found that anthropogenic greenhouse gas (GHG) emissions into the atmosphere constitute pollution of the marine environment.[51] Thus, GHG emissions constitute pollution which undermines the right to safe healthy and sustainable environment, which directly links obligations concerning climate change inducing emissions to achieving the environmental right. The Tribunal also concluded that obligations in relation to climate change may arise under various international legal regimes and are not limited to the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement.[52]

In a recent decision by the European Court of Human Rights in the *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* climate case[53], the Court found Switzerland in violation of the European Convention on Human Rights for failing to implement sufficient measures to combat climate change. The approach of the Court reinforces the centrality of acting on climate change related obligations as part and parcel of acting to fulfil human rights.[54] The Court found that *"(…) Article 8 [of the European Convention on Human Rights] must be seen as encompassing a right for individuals to effective protection by the State authorities from serious adverse effects of climate change on their life, health, well-being and quality of life*."[55] The Court went on to say that it "*derives from Article 8 a right for individuals to enjoy effective protection by the State authorities from serious adverse effects on their life, health, well-being and quality of life arising from the harmful effects and risks caused by climate change*."[56]

The Hague Court of Appeal, in a recent decision in the case concerning Shell's emissions, concluded that "*there can be no doubt that protection from dangerous climate change is a human right. It is recognised worldwide that states have an obligation to protect their citizens from the adverse effects of dangerous climate change"*.[57] The decision stated that "[*f]or the court, there is*

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guarantee a clean, healthy and sustainable environment for all. See also: International Law Association ILA, White Paper 8 on Business and Human Rights, page 89.

[50] Ibid, UNGA Resolution, A/RES/76/300, 28 July 2022 and HRC resolution A/HRC/RES/48/14.

[51] CIEL, ClientEarth, Pacific Island Students Fighting Climate Change, WYCJ, Legal Memorandum (2024), Advisory Opinion on Climate Change, delivered by the International Tribunal for the Law of the Sea: Relevance for the International Court of Justice Climate Advisory Proceedings, available at: <https://www.ciel.org/reports/legal-memorandum-advisory-opinion-on-climate-change-itlos/ >.

[52] The Tribunal said that: "*the Convention* [UNCLOS] *and the Paris Agreement are separate agreements, with separate sets of obligations*" (para. 223). Thereby, what is required under UNCLOS to protect and preserve the marine environment from anthropogenic GHG emissions may go beyond the obligations under the UNFCCC and Paris Agreement. See: ibid, CIEL and others, legal memorandum.

[53] Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland, (Application no. 53600/20), judgment available at: <https://hudoc.echr.coe.int/#%7B%22itemid%22:%5B%22001-233206%22%5D%7D>.

[54] CIEL press release, "Historic Climate Ruling: States Must Step up Climate Action to Protect Human Rights", available at: <https://www.ciel.org/news/historic-climate-ruling-on-climate-justice/>. The Court also underlined that States have human rights obligations to act urgently and effectively and in line with the best available science to prevent further devastation and harm to people and the environment.

[55] Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, ECLI:CE:ECHR:2024:0409JUD005360020, para. 519, judgement available at: <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20240409_Application-no.-5360020_judgment-1.pdf>.

[56] Ibid, paragraph 519.

[57] Shell v. Milieudefensie et. al, Court of Appeal the Hague, ECLI:NL:GHDHA:2024:2100, 12-11-2024, para. 7.17. Judgement available at: <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20241112_8918_judgment.pdf>.

no doubt that the climate problem is the greatest issue of our time. The threat posed by climate change is so great that it could be life-threatening in several places on earth and will start to have a profound and negative impact on human and animal existence in many other places. Climate change damages the rights protected by Articles 2 and 8 ECHR (European Convention on Human Rights), both in the Netherlands and abroad, and will damage them even further".[58]

The Hague Court of Appeal reviewed several cases that had approached the lack of action in regards to reduction of GHG emissions as a violation of human rights. In the Urgenda case, the Supreme Court of the Netherlands concluded that the Netherlands has an obligation under Articles 2 and 8 ECHR to 'do its part' to prevent dangerous climate change, even if it is a global problem.[59] A 2022 Brazilian Federal Supreme Court ruled climate change is a constitutional matter and that treaties on climate change are a species of treaties on human rights.[60] Other cases addressing climate change and human rights include the 2015 *Leghari* judgment of the Lahore High Court in Pakistan that considered climate change poses a serious threat to access to water and food, among other things, and constitutes a violation of the right to life,[61] and a decision by Colombia's Supreme Court in relation to the Amazon deforestation, ruling that this deforestation and the resulting emissions is a serious attack to fundamental rights, including the right to life.[62]

2.3. Scope of corporate obligations

2.3.1. Value chain and economic activities

Subsidiaries and business partners within defined "*chains of activities*" encompasses both upstream and downstream activities.[63] Upstream activities include production and service provision, such as design, sourcing, manufacturing, and transport—illustrated by a clothing manufacturer's textile supplier or a car manufacturer's tire or rubber producer.[64] Downstream activities cover distribution, transport, and storage of the company's products by business partners performed "*for or on behalf of the company*".[65] The Directive distinguishes between direct business partners (with which the company has a commercial agreement) and indirect partners (with which the company does not have a commercial agreement, but which perform operations related to the company's operations, products or services).[66] However, Recitals 25 and 26 explicitly exclude activities like product disposal and downstream services, significantly narrowing its coverage.

In contrast, the LBI adopts a broader and more inclusive approach to defining the value chain. Article 1.4 of the Updated Draft of the LBI expansively defines "*business activities*" to include all

[58] Ibid, para. 7.25.

[59] Supreme Court (20 December 2019), ECLI:NL:HR:2019:2006, *Nederlands Juristenblad* 2020/41. The Supreme Court ruled that the obligation to take appropriate measures under Articles 2 and 8 ECHR includes the obligation of states to take preventive measures against an impending danger, even if it is not certain that the danger will materialise. This may include both mitigation measures (measures to prevent the materialisation of the danger) and adaptation measures (measures to absorb or soften the consequences of that materialisation).

[60] Federal Supreme Court of Brazil 7 April 2022 (*PSB et al v. Brazil*).

[61] Lahore Hight Court 4 September 2015, case no. W.P. No. 25501/2015, par. 7 (*Leghari/Federation of Pakistan*).

[62] Supreme Court of Colombia 5 April 2018, no. STC4360-2018, p. 13 (*Future Generations/Ministry of the Environment*).

[63] CSDDD (n 2), Article 3.1(g).

[64] Ibid, Section I.

[65] Ibid, Section II.

[66] Article 3.1(f)

economic and other activities—such as manufacturing, transportation, distribution, marketing, retail, and electronic activities—carried out by natural or legal persons, including State-owned enterprises, financial institutions, investment funds, and transnational corporations. Unlike the CSDDD, the LBI's universal definition encompasses all types of business activities, including those of a non-commercial nature, of value chain ensuring that all enterprises, regardless of their nature or relationships, are covered. This broad scope is better suited for achieving more comprehensive corporate accountability in human rights and environmental standards.

In this context, CSOs have highlighted several limitations in the CSDDD's downstream coverage, which Member States are urged to address during transposition into national laws.[67] First, the CSDDD excludes key downstream activities such as product disposal and use, leaving significant adverse impacts—such as environmental clean-up costs for PFAS chemicals, as highlighted by ClientEarth and Frank Bold—unaddressed and often shifted to public authorities, undermining the polluter pays principle.[68] Second, financial institutions are exempt from due diligence obligations for downstream activities, such as those linked to client relationships, despite their substantial human rights and environmental impacts.[69] Third, CSOs argued that the CSDDD's focus on commercial activities neglects non-commercial activities, such as those involving companies operating in conflict-affected areas protected by state security forces, where adverse impacts may arise.[70]

Furthermore, while the CSDDD excludes certain business activities, it extends corporate due diligence responsibilities to indirect business partners—entities involved in operations related to a company's products or services without a formal contractual relationship.[71] In contrast, the Updated Draft of the LBI narrowly defines business relationships, focusing only on direct ties, such as affiliates, subsidiaries, agents, suppliers, partnerships, joint ventures, and other structures or relationships recognised under domestic law, including electronic activities.[72]

To create a more effective framework, the LBI should ensure universal value-chain coverage, explicitly including all relevant downstream activities and non-commercial operations, while retaining the CSDDD's inclusion of both established and non-established business relationships. This comprehensive approach would better address potential adverse impacts across all areas of business operations.

2.3.2. Parent companies and subsidiary due diligence responsibility

It is a significant advancement in corporate responsibility for human rights and environmental impacts that parent companies are allowed to conduct due diligence responsibilities on behalf of their subsidiaries. Under Article 6 of the CSDDD, parent companies are permitted to fulfil these obligations on behalf of their subsidiaries provided that these subsidiaries also fall under the CSDDD's scope, with an emphasis on cooperation between parent and subsidiary entities. This cooperation includes sharing information, aligning policies, and integrating due diligence into the subsidiary's risk management systems.[73] However, subsidiaries are still required to independently fulfil certain obligations, such as preventing, mitigating, and remediating adverse impacts and

[67] ECCJ and other SCOs (n 18), 33-34.
[68] ClientEarth and FrankBold (n 12), 24.
[69] Ibid.
[70] Ibid.
[71] CSDDD (n 2), Article 3.1(f)
[72] LBI, Articles 1.6 and 6.5
[73] CSDDD (n 2), Article 6.2.

conducting stakeholder engagement.[74] Furthermore, if the parent company fulfils the subsidiary's climate change obligations under Article 22 on its behalf, the subsidiary must adhere to the parent company's transition plan for climate change mitigation.

In contrast, the LBI's Article 6.5 takes a more direct approach, mandating that business entities must prevent human rights abuses by third parties they control, manage, or supervise. While this provision imposes a legal duty on parent companies to prevent harm, it lacks specificity on how due diligence responsibilities should be shared or coordinated between parent companies and subsidiaries. As a global treaty instrument, the LBI may not require detailed compliance and procedural mechanisms but must establish a strong mandate for parent companies to oversee, cooperate with, and share due diligence responsibilities with their subsidiaries, aligning with the approach taken by the CSDDD. International standards like the OECD Guidelines respect the principle of separate legal entity responsibility for respecting human rights and the environment, they also recognise the parent company's responsibility to oversee and ensure its subsidiaries' adherence to human rights due diligence obligations.[75] The LBI should emphasise clear and strong principles that prioritise harm prevention and accountability across all entities within a corporate group.

3. Corporate obligations

3.1. Due diligence obligations

This section delves into the steps of the due diligence process outlined in the CSDDD, which are heavily influenced by the OECD Guidelines.[76] The CSDDD stands out by offering detailed and comprehensive guidance for implementing due diligence practices. Also, unlike the LBI, which focuses primarily on identifying, mitigating, monitoring, and communicating human rights impacts as defined in its HRDD under Article 1, the CSDDD takes a broader approach by addressing both human rights and environmental adverse impacts within a unified framework. By integrating these two dimensions, the CSDDD establishes a comprehensive approach to corporate due diligence.

3.1.1. Policy integration

A key difference between the LBI and the CSDDD is that the LBI does not mandate the integration of due diligence policy into a company's overall business strategy, whereas the CSDDD explicitly requires this integration.[77] For large companies with multiple departments and subsidiaries, having a well-integrated due diligence system is not just important—it's essential. Such integration ensures that due diligence practices are consistently applied across the organisation, particularly in complex supply chains. In this context, the CSDDD complements the LBI by asking group companies to integrate due diligence procedures into company policies and risk management systems within group level. Specifically, the CSDDD requires companies to establish a code of conduct describing rules and principles to be followed throughout the company and its subsidiaries, and even including the company's direct or indirect business partners.[78] This aligns

[74] Ibid, Article 6.2(d).
[75] For example, OECD Guidelines, Chapter II: General Policies, Commentary para 9.
[76] CSDDD (n 2), Recital 6.
[77] Ibid, Article 7.
[78] Ibid, Article 7.2.(b).

with the OECD Guidelines (Chapter IV, paragraph 4), which recommend enterprises publicly commit to respecting human rights through a policy that's approved at the highest level, informed by expertise, and embedded in corporate operational procedures. Such policies should outline expectations for personnel and business partners, be communicated widely, and guide consistent actions across decentralised structures. Recital 39 of the CSDDD similarly emphasises applying due diligence policies across all functions, including procurement and employment. Integrating these practices into the LBI would strengthen its ability to enforce consistent sustainability principles across corporate operations.

3.1.2. Identification

The CSDDD adopts a structured approach to identifying and assessing adverse impacts, placing particular emphasis on marginalised and vulnerable groups. Companies are required to map their operations, subsidiaries, and business partners and conduct thorough assessments of potential risks. Article 8 focuses on identifying adverse impacts, while Article 9 prioritises these impacts based on their severity and likelihood.

Moreover, Recital 33 reinforces this approach by urging companies to adopt gender and culturally responsive due diligence. It highlights the importance of considering specific contexts and intersecting factors, such as gender, age, race, ethnicity, class, caste, education, migration status, disability, and socio-economic status.[79] Companies are also encouraged to pay attention to particular adverse impacts on individuals at heightened risk due to marginalisation or vulnerability, whether individually or as part of groups or communities, including Indigenous Peoples. In alignment with the UNDRIP, this includes respecting Free, Prior, and Informed Consent (FPIC). Recital 42 stresses the need for heightened risk assessments in high-risk areas, including those involving conflict-related contextual and geographical risks. Recital 65 goes further, requiring meaningful engagement with stakeholders, particularly marginalised groups, ensuring their voices are heard and incorporated. Companies must account for the needs of these groups through genuine, ongoing dialogue, especially at project or site levels, with regular engagement. Where direct stakeholder engagement is not feasible, companies are encouraged to consult experts, including civil society organisations and human rights or environmental defenders, to obtain credible insights into actual or potential adverse impacts.

While these considerations are predominantly outlined in the CSDDD's recitals rather than its core text, states are urged to integrate these principles when transposing the Directive into national law. This would ensure stronger protections for marginalised groups and align corporate due diligence with international standards like UNGPs and the OECD Guidelines.

In contrast, the LBI provides limited guidance on conducting risk assessments, such as supply chain mapping, or on whether businesses should prioritise the most severe adverse impacts. Although the term "*severe*" human rights impacts is included in the LBI's definition of human rights due diligence, the text does not clarify whether businesses are obligated to prioritise adverse impacts based on their severity and likelihood.[80] This lack of specificity is critical, as prioritisation is a crucial concept of a risk-based approach, as outlined in the UNGPs and OECD Guidelines. Such an approach allows companies to focus on addressing the most severe impacts first, particularly when it is not feasible to address all issues simultaneously.

[79] Recital 33.

[80] LBI (n 1), Article 1.8

However, it is equally important to recognise, as others highlighted that, prioritisation is a matter of sequencing, not exclusion.[81] Impacts that are not deemed "*severe*" are still critical and must be addressed in due course.[82] The absence of explicit language on prioritisation in the LBI, combined with its inclusion of terms like "*severe human rights impacts*" in the HRDD definition, risks creating confusion. It could lead companies to believe they are only responsible for addressing impacts they subjectively consider severe, thereby neglecting other significant human rights impacts. To avoid this, the LBI should provide clear guidance on prioritisation while ensuring comprehensive coverage of all human rights impacts.

3.1.3. Prevention / Cessation

When it comes to prevention measures, the LBI briefly addresses them in Article 1.8(b) within the definition of human rights due diligence and in Article 6.5, which directs states to ensure that companies take appropriate measures to prevent human rights abuses. However, it does not detail specific actions businesses must take to prevent potential adverse impacts or to minimise and end actual adverse impacts. In contrast, the CSDDD offers a more comprehensive framework. It defines "*appropriate measures*" (Article 3.1(o)) as actions capable of effectively addressing adverse impacts based on their severity, likelihood, and the company's capacity to act.

The CSDDD provides detailed and actionable measures for addressing both potential and actual adverse impacts. Article 10 requires companies to assess risks, develop prevention action plans, and actively engage with business partners to prevent potential adverse impacts. Article 11 focuses on bringing actual adverse impacts to an end, obligating companies to implement corrective measures, secure contractual assurances, and provide targeted support to smaller partners. Both articles emphasise leveraging influence, consulting experts, and, as a last resort, suspending or terminating relationships to prevent or address adverse impacts. By comparison, the CSDDD offers a comprehensive and structured framework for prevention and remediation that the LBI currently lacks. As previously noted, the CSDDD employs stronger language, such as "*bringing actual impacts to an end*," which aligns with international human rights law principles by emphasising the necessity of addressing harms through appropriate and effective measures.[83] This approach underscores a commitment to taking concrete actions to eliminate adverse impacts and prevent further harms. While the LBI, as a treaty, does not need to prescribe detailed actions for companies, it should at least establish clear obligations requiring companies to effectively prevent potential adverse impacts and minimise or eliminate actual adverse impacts, in alignment with the UNGPs and OECD Guidelines.

One of the key concepts in addressing potential and actual adverse impacts is disengagement. Article 11.7 of the CSDDD outlines specific conditions and processes for companies to disengage from or terminate business relationships. Recognising the potential harm to smaller businesses the CSDDD discourages immediate termination. Instead, it advises companies to first collaborate with suppliers and partners to address adverse impacts. If disengagement is unavoidable, companies must ensure ongoing monitoring of adverse impacts if they choose not to terminate the relationship.[84] The concept of disengagement or cessation is not addressed in the LBI.

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[81] ClientEarth and FrankBold (n 12), 71.

[82] Ibid.

[83] Bernaz, Krajewski, Mohamadieh and Rouas (n 32), 15.

[84] Radu Mares 'The Unintended Consequences of Mandatory Due Diligence: The Importance of Supportive Measures in the EU Corporate Sustainability Due Diligence Directive' Verfassungsblog 13 June 2024 <https://verfassungsblog.de/csddd-the-unintended-consequences-of-mandatory-due-diligence/> (accessed on 28 August 2024).

Incorporating guidance similar to that in the CSDDD would provide clarity on the actions companies must take as a last resort when actual adverse impacts cannot be effectively addressed, particularly in conflict-affected areas.

3.1.4. Monitoring

The CSDDD offers more comprehensive guidance on effectively monitoring due diligence measures to evaluate their effectiveness. Article 15 and Recital 61 outline the corporate obligation to oversee the effectiveness of actions taken to address adverse impacts. Companies are mandated to regularly monitor both the implementation and the effectiveness of their due diligence initiatives. This involves conducting periodic evaluations of progress in their own operations and measures, as well as those of their subsidiaries and, where applicable, their business partners within the company's chain of activities. These assessments should determine how well the measures are being implemented and whether they adequately and effectively identify, prevent, minimise, terminate, or mitigate adverse impacts.
The LBI should introduce more specific language and requirements to establish a clear framework for monitoring and evaluating the effectiveness of due diligence measures, with regular assessments of operations, subsidiaries, and business partners.

3.1.5. Communication

The CSDDD establishes specific requirements for corporate communication on due diligence practices; however, it is arguably framed more as a compliance exercise rather than a means to effectively communicate due diligence efforts to rightsholders. For reports to serve their intended purpose, they should be clear, easily understandable, and available in local languages. Genuine access to relevant information is essential for enabling access to justice for victims and fostering transparency and accountability in corporate operations.[85] Currently, both the LBI and the CSDDD fall short of fully addressing this requirement.

Under the CSDDD, Article 16 requires Member States to ensure that companies publish an annual statement on their website, detailing their due diligence responsibilities as outlined in the Directive. The statement must be published in at least one official language of the European Union used in the Member State of the supervisory authority and, if different, in a language customary in international business. Additionally, the statement must be made available within a reasonable timeframe, no later than 12 months after the financial year's balance sheet date, or for companies subject to sustainability reporting standards under Directive 2013/34/EU, by the date of publication of their annual financial statements.

The LBI, on the other hand, goes further by requiring more frequent reporting under Article 6.4(a), which mandates that companies publish human rights impact assessments regularly, including prior to and throughout business operations. This continuous reporting approach can significantly benefit rightsholders, particularly in addressing sudden high-risk adverse impacts, by ensuring timely engagement and access to critical information. However, beyond the requirement for publication, the LBI does not impose any additional communication responsibilities on companies to ensure that these reports are accessible or actionable for stakeholders.

[85] Bernaz, Krajewski, Mohamadieh and Rouas (n 32), 15.

Both the LBI and the CSDDD would benefit from greater emphasis on ensuring that reports are accessible, inclusive, and tailored to the needs of all stakeholders, particularly marginalised groups and rightsholders. While Article 19 of the CSDDD obliges the European Commission to issue guidelines on conducting due diligence in accordance with Articles 5 to 16, including best practices for stakeholder identification and engagement as outlined in Article 13, these guidelines have yet to be developed.

3.1.6. Remedy

The CSDDD offers detailed guidance on corporate remedial actions as part of the due diligence process, particularly in Articles 12 and 14, and Recitals 58 and 59. It requires companies to provide remediation when they have caused or jointly caused adverse impacts. For cases where companies have not directly caused the harm, they may voluntarily remediate or use their influence to encourage business partners to do so. However, the CSDDD's definition of remediation is narrow from the perspective of effective remedy for rightsholders. It primarily focuses on restoring individuals, communities, or the environment to a state as close as possible to what it would have been had the adverse impact not occurred, emphasising financial and non-financial compensation but lacking explicit mention of broader substantive remedial measures.

In contrast, the LBI adopts a more expansive approach to "*remedy*," as defined in Article 1.9. It emphasises restoring victims of human rights abuses to their pre-impact state or as close as possible, while also includes the concept of "*effective remedy*" which are adequate, effective, prompt, and responsive to gender and age considerations. The LBI recognises various forms of remedies beyond compensation, including restitution, rehabilitation, cessation of abuse, apologies, sanctions, and guarantees of non-repetition, in line with established international standards.[86]

Despite its broad definition of remedy, including the concept of "*effective remedy*", the LBI's Updated Draft fails to establish specific provisions requiring remediation as part of corporate human rights due diligence. Key sections of the LBI, such as the HRDD definition in Article 1 and Article 6 on prevention, make no mention of "*remedy*" or obligations for companies to provide effective remediation. While Article 7 on access to remedy addresses remedies for victims, it stops short of imposing direct corporate responsibilities to deliver effective remedies. As a result, while the LBI conceptually embraces a broader framework for remedies, it does not mandate remediation as part of corporate HRDD obligations, making it less limited than the CSDDD in this critical area.

One notable strength of the CSDDD is its explicit requirements for company-based grievance mechanisms under Article 14. These mechanisms enable individuals and entities with legitimate concerns about actual or potential adverse impacts to submit complaints related to a company's operations, subsidiaries, and business partners. The grievance mechanisms must be fair, transparent, accessible, and designed to ensure confidentiality and prevent retaliation.[87] Complainants are entitled to follow up on complaints, meet with company representatives to discuss potential remedies, and receive explanations for the outcomes.[88] Companies must also establish anonymous or confidential reporting channels and ensure that submitting complaints does not restrict access to judicial or non-judicial remedies.

[86] The Universal Declaration of Human Rights (Article 8), the International Covenant on Civil and Political Rights (Article 2), the European Convention on Human Rights (Article 13), and the EU Charter of Fundamental Rights (Article 47).
[87] CSDDD (n 2), Article 14.3.
[88] Ibid, Article 14.4.

While the LBI prioritises ensuring victims receive effective and adequate remedies, it provides limited guidance on the specific actions companies should take, including the establishment of grievance mechanisms. Both frameworks aim to restore victims to their pre-impact state, but the LBI's broader definition of remedy, which incorporates a variety of reparative actions sensitive to gender and age considerations, offers a more comprehensive theoretical framework. In contrast, the CSDDD, while narrower in scope, provides actionable mechanisms such as grievance processes and focuses on financial and non-financial compensation, including reimbursement for public authorities' remedial costs. Together, these frameworks present complementary strengths but highlight gaps in implementation that could be bridged by aligning the best practices of both approaches.

3.1.7. Stakeholder engagement

Stakeholder engagement is a crucial component of the human rights due diligence obligation, yet it remains one of the most challenging aspects for companies to effectively implement. According to the Corporate Human Rights Benchmarking 2023, while 61 percent of the global top 110 companies have a human rights due diligence system in place, only 27 percent engage stakeholders in their due diligence process.[89] Both the CSDDD and the LBI recognise the importance of stakeholder engagement, but their approaches differ.

The CSDDD adopts a broad definition of "*stakeholders*", potentially encompassing all rights holders. However, Article 13 focuses primarily on procedural compliance—such as how to conduct engagement—without addressing how these actions account for stakeholders' vulnerabilities, specific needs or power imbalances. These critical aspects are addressed instead in Recitals 33 and 65. Recital 33 encourages companies to consider Indigenous Peoples and other vulnerable groups, but it falls short of making this a mandatory requirement. Recital 65 strengthens the concept of "*meaningful*" engagement by emphasising the need to address barriers to participation, ensure protection from retaliation, maintain confidentiality, and prioritise vulnerable stakeholders, particularly those protected under the UN Declarations on the Rights of Indigenous Peoples and Human Rights Defenders.

However, as highlighted in the discussion on material scope, the CSDDD's failure to cover all internationally recognised human rights and environmental issues limits its capacity to fully include vulnerable stakeholders. For instance, instruments like the UNDRIP are not officially listed in the Annex, further weakening protections for these groups. To ensure inclusivity, Member States should, when transposing the Directive, recognise all relevant rightsholders and require companies to implement tailored measures for engaging with vulnerable stakeholders, taking into account their specific needs, languages, cultures, and customs.

The LBI adopts stronger language than the CSDDD in recognising rightsholders and detailing corporate and state obligations for stakeholder engagement. Article 6.4(c) explicitly requires companies to give special attention to individuals and groups at heightened risk of vulnerability and marginalization. It further emphasises the importance of consulting Indigenous Peoples, workers, women, human rights defenders, and other vulnerable groups, acknowledging their disproportionate exposure to corporate harm and heightened likelihood of suffering its impacts. Additionally, Article 6.4(d) mandates "*meaningful consultation*," while Article 1.8(d) reinforces the obligation to communicate effectively with affected and potentially affected persons. Unlike the CSDDD, which broadly references victims' rights in its Recitals without defining them in the main

[89] World Benchmarking Alliance 'Corporate Human Rights Benchmark 2023: Key Findings' 20 November 2023 <https://www.worldbenchmarkingalliance.org/publication/chrb/findings/most-companies-fail-to-include-rightsholders-in-their-human-rights-due-diligence-processes/> (accessed on 4 September 2024).

Directive, the LBI provides a clear definition of "*victims of human rights abuses*".[90] This ensures focused attention on rightsholders directly impacted by corporate abuse, prioritising their needs in corporate due diligence and remediation processes.

The LBI would greatly benefit from incorporating a definition of 'stakeholders', similar to the CSDDD, alongside its definition of 'victims' Without such clarification, the LBI risks creating confusion by focusing solely on victims, potentially excluding those affected by impacts that do not meet the "*abuse*" threshold. Conversely, while the CSDDD's broader term 'stakeholders' implicitly includes victims, its general focus may dilute attention on those directly impacted by corporate harm.[91] Striking a balance between these approaches is crucial for effective protection and engagement. To this end, both the LBI and CSDDD should clearly define and differentiate between 'victims' and 'stakeholders' to ensure comprehensive inclusion and accountability.

When it comes to engaging and communicating with stakeholders, the CSDDD provides a more structured framework. Article 13 outlines detailed requirements for stakeholder consultation at various stages of the due diligence process. It mandates that companies engage with stakeholders when identifying actual or potential adverse impacts, developing prevention and corrective action plans, deciding on terminating or suspending business relationships, adopting remediation measures, and, where appropriate, establishing monitoring indicators. While the CSDDD integrates stakeholder engagement into several processes, its application under Article 14, which addresses the complaint and notification mechanisms, remains unclear. Although Article 13 requires companies to involve stakeholders in remediation measures set out in Article 12—which could encompass grievance mechanisms as they are a form of remediation—the Directive does not explicitly mandate stakeholder engagement in the design, evaluation, or operation of grievance mechanisms. Stakeholder input and feedback are essential for ensuring grievance mechanisms are responsive and effective, and this lack of clarity in Article 14 creates confusion. Addressing this ambiguity would strengthen the Directive by emphasising the critical role of stakeholders in designing and assessing remediation processes.

The CSDDD's structured approach contrasts with the LBI, which, while highlighting the importance of engaging rights holders, lacks concrete guidance on when and how companies should involve stakeholders in their processes. The CSDDD's detailed requirements help ensure systematic and comprehensive engagement, reducing the likelihood of overlooking critical input from affected groups. However, its non-mandatory language regarding certain vulnerable groups, such as Indigenous Peoples, weakens the CSDDD's potential impact.

3.1.8 Climate change under the due diligence obligation

Climate change is not explicitly integrated in the due diligence obligation under the CSDDD. Similarly, climate change, and environmental issues more broadly, are currently not explicitly addressed under the due diligence section of the draft LBI text.

Multiple recent developments take a comprehensive approach that covers climate issues under the due diligence requirement. As noted under the section pertaining to scope, the French duty of vigilance law requires companies to adopt a due diligence plan that covers risks to the environment, among other elements.[92] This approach enables coverage of all possible types of environmental harms including climate change related harms, and does not limit the due diligence

[90] CSDDD (n 2), Recitals 79, 82 and 84; LBI (n 1), Article 1.1

[91] CSDDD (n 2), Article 3.1 (n).

[92] Article L. 225-102-4.-I. of the French commercial code.

requirement pertaining to climate-harming emissions to the extent it affects human interests. The OECD guidelines sets out the expectation that enterprises conduct due diligence to assess and address adverse environmental impacts associated with their operations, products and services, including in relation to climate change and biodiversity.[93] In this relation the guidelines provide that enterprises should ensure that their GHG emissions and impact on carbon sinks are consistent with internationally agreed global temperature goals, based on best available science, as assessed by the Intergovernmental Panel on Climate Change (IPCC), and that they introduce and implement science-based policies, strategies and transition plans on climate change mitigation and adaptation.[94] Outside Europe, in the petition filed with the Philippines Commission on Human Rights by NGOs, the petitioners successfully argued that corporations under the UN Guiding Principles (UNGPs) are responsible for assessing and addressing the climate change impacts of their operations.[95]

The *Special Rapporteur on the human right to a healthy environment* had recommended that a comprehensive due diligence approach would cover "*impacts to human rights, the environment (inclusive of the climate and biodiversity) and good governance*",[96] including a requirement to undertake environmental, climate and biodiversity-based assessments. The *Special Rapporteur on climate change* had also recommended that "*businesses should accurately report and disclose their climate impacts in an accessible manner that is sufficient to evaluate the adequacy of their efforts to prevent climate change-related human rights harms*" and "*States should adopt and enforce regulatory measures on the mandatory disclosure of accurate information on the climate and human rights performance of business*".[97]

Under the CSDDD, the due diligence obligation requires Member States to ensure companies falling under the scope of the Directive to conduct due diligence that covers "*adverse impact*" defined as an adverse environmental impact or adverse human rights impact. As addressed earlier, the definition of "*adverse environmental impact*", which effectively determines which environmental issues would be included in the company's due diligence processes, does not explicitly address climate change. Arguably, certain references made under this definition, such as those made of 'harmful emissions' (under paragraph 15 of part I of the annex), could be understood as grounds for requiring companies to pay attention to adverse impacts caused by their greenhouse gas emissions, and thus are basis to include climate-change related considerations in the implementation of the due diligence obligation. In effect, covering climate-harming emissions under the environmental due diligence obligation set by the CSDDD will

[93] OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, Chapter VI. Available at: https://mneguidelines.oecd.org/mneguidelines/ The guidelines explain that "adverse environmental impacts are significant changes in the environment or biota which have harmful effects on the composition, resilience, productivity or carrying capacity of natural and managed ecosystems, or on the operation of socio-economic systems or on people..." (point 68).

[94] OECD powerpoint, OECD Guidelines 2023 edition, available at: <https://mneguidelines.oecd.org/targeted-update-of-the-oecd-guidelines-for-multinational-enterprises.htm>.

[95] Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change, available at: <https://www.greenpeace.org/static/planet4-philippines-stateless/2016/07/213f91ba-amended-petition-may-2016.pdf>.

[96] David Boyd and Stephanie Keene, 'Essential elements of effective and equitable human rights and environmental due diligence legislation', available at: <https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/activities/2022-07-01/20220701-sr-environment-policybriefing3.pdf>.

[97] Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change, 'Access to information on climate change and human rights', A/79/176, para. 64, page 9 of 24. The Special Rapporteur proposes that "Companies should share the climate footprint of their products and services; technical and physical characteristics and impacts of high-emission projects, and available technologies; as well as broader sustainability efforts, compliance with environmental regulations and investments in renewable energy and eco-friendly technologies. Companies engaged in projects to address climate change should share information prior to starting these projects" (citing A/76/154 and A/HRC/55/43).

eventually depend on the interpretation and application of the prohibition pertaining to 'harmful emissions.

The prohibition pertaining to harmful emissions is covered to the extent these emissions "*substantially impairs the natural bases for the preservation and production of food*", affect a person's access to drinking water, access to sanitary facilities, or a person's health, safety, normal use of land, or "*substantially adversely affects ecosystem services through which an ecosystem contributes directly or indirectly to human wellbeing*".[98] This could mean that due diligence pertaining to the impact of harmful emissions on climate change more broadly, and on the ability of the company to fulfil the climate transition related obligation as covered under Article 22 of the CSDDD more specifically, is not covered (See discussion of Article 22 under the Section 3.2). Yet, there is a certain element of complementarity that could be identified between the two elements of the CSDDD. For example, Client Earth and Frank Bold argue that the requirement pertaining to climate change transition planning relates to only part of the steps required by due diligence, such as the identification of potential and actual impacts and the monitoring of the appropriateness of action taken.[99] Certain elements of due diligence support the fulfilment of Article 22 obligation, including in regard to policy and system integration, stakeholder engagement, establishing a notification and complaints mechanism, monitoring effectiveness, public communication.[100]

Under earlier versions of the LBI draft negotiation text, there was a proposal from more than one State to include the obligation of business enterprises to "*undertak(e) and publish regular human rights, labour rights, environmental and climate change impact assessments prior and throughout their operations*" under the provision on human rights due diligence.[101] This language was not carried forward in later drafts of the text.

In line with the integrated approach suggested in relation to the scope, environmental and climate change dimensions ought to be integrated under the due diligence section and related definitions. This will be in line with recent practice reviewed above in this section.

Revising the definition of 'adverse human rights impacts' under the draft LBI to cover 'adverse human rights and environmental impacts', while integrating an open-ended reference to environmental harms including climate change, will allow covering the environment including climate issues under the definition of due diligence. The latter could be similarly revised to refer to 'human rights and environmental due diligence'. Furthermore, it is important that the impact assessments required under the due diligence obligation cover the impact on the environment, including climate change. The due diligence obligation could also mandate that impact assessments be made publicly available, which will meet part of the recommendation by the Special Rapporteur on climate change referenced earlier in this section.

Members negotiating the LBI would need to consider the level of detail they want to include in relation to how the obligation pertaining to climate change related due diligence is to be implemented. Further guidance could also be mandated to the institutional framework(s) to be

[98] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, 5 July 2024 (CSDDD), para. 15, Annex Part I.

[99] ClientEarth and FrankBold 'Corporate Environmental Due Diligence and Reporting in the EU Legal analysis of the EU Directive on Corporate Sustainability Due Diligence and policy recommendations for transposition into national law', page 81.

[100] Ibid, Client Earth and Frank Bold report, page 34.

[101] The 2019 draft LBI text 3rd revised version, available at: <https://documents.un.org/doc/undoc/gen/g23/008/93/pdf/g2300893.pdf>, proposal by Panama and Philippines under Article 6.4a 6.

attached to the instrument, such as a Conference of Parties or specialised committees, as may be decided.

3.2 Obligations related to combating climate change

Article 22 of the CSDDD lays out an obligation on covered companies to "*adopt and put into effect a transition plan for climate change mitigation (…) through best efforts*" applicable to all companies covered under the scope of the Directive, including 'regulated financial undertakings' as defined under the Directive.[102] The transition plan should ensure that "*the business model and strategy of the company are compatible with*" the Paris Agreement goal to limit average global temperature rise to 1.5°C, and with the European Union objective of achieving climate neutrality.[103] This approach follows that proposed under the OECD guidelines, which recommends that *"[e]nterprises should ensure that their greenhouse gas emissions and impact on carbon sinks are consistent with internationally agreed global temperature goals based on best available science, including as assessed by the Intergovernmental Panel on Climate Change (IPCC)*".[104] The Article explicitly addresses implementation by requiring "*put(ting) into effect*" the plan and by containing requirements pertaining to the content of the transition plan, including a description of the role of the administrative, management and supervisory bodies regarding the transition plans.[105]

In comparison, climate transition has not been addressed in the context of the LBI negotiations. The drafters of the LBI are negotiating this instrument in a time of rapidly evolving clarity on the interactions of human rights, environmental and climate-related norms and legal instruments, (see section 2.2.4 for more discussion on recent developments). Thus, it is important that these developments are accounted for and built upon in negotiating and drafting the LBI. It is also important that the proposed LBI be designed in a way that allows any climate-related elements to be included in it to evolve in line with any future developments that might emerge in relation to this matter.

How to approach climate issues under the LBI and the extent of detail that the LBI could delve in when addressing climate-related obligations is an issue that negotiators should closely consider. This includes the question of whether the LBI should require climate change-related due diligence and adopt an obligation pertaining to climate transition and emissions' reduction as included in the CSDDD. Multiple factors could inform this discussion. For example, the nature of the proposed LBI is different from the CSDDD. The LBI is a rights-focused instrument. It is an international instrument, thus covering States that face very different obligations under the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. This is unlike the CSDDD that addresses conduct within the European Union Member States, which have joint nationally determined contributions under the UNFCCC.[106] Furthermore, there is increasing clarity that

[102] For scope of business covered by the Directive, see Article 2(1), a, b, and c, and Article 2(2) a, b, and c under Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, 5 July 2024 (hereafter referred to as CSDDD). According to the explanatory recitals of the CSDDD, the obligation to 'put into effect' the plan is designed as an obligation of means. See recitals 10 and 73 of CSDDD.

[103] The CSDDD refers to the European Union objective of achieving climate neutrality as established in Regulation (EU) 2021/1119, including its intermediate and 2050 climate neutrality targets.

[104] OECD guidelines, commentary on chapter VI Environment, para. 76.

[105] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, 5 July 2024 (CSDDD), Article 22(1)(d).

[106] The last such submission was made to the UNFCCC Secretariat on December 18, 2020, and includes, among other things, the goal of reducing greenhouse gas emissions by at least 55 percent by 2030 compared to 1990 levels. Source:

obligations in relation to climate change may arise under various international legal regimes and that the climate agreements, including the Paris Agreement and the UNFCCC, do not exclusively guide the interpretation of State duties in the climate context.[107]

Besides setting a climate change due diligence obligation (as discussed under section 3.1.8 on due diligence), the LBI should clarify the climate-related dimensions of the State's obligation to regulate the conduct of businesses domiciled or operating in its territory, jurisdiction or otherwise under its control, in order to prevent climate-related harm caused by businesses. In this context, States' should mandate through domestic law that businesses align their conduct with the adopted climate-related objectives, including in relation to the emission reduction requirements set under the State's nationally determined contributions.[108]

Yet, it is important to underline that businesses will continue to have their own obligation to limit emissions in order to counter climate change even if this obligation is not explicitly laid down by the State in domestic law. [109] This is indeed the position of the Hague Court of Appeal in the case pertaining to Shell's emissions, whereby the Court states that it is "*of the opinion that companies like Shell, which contribute significantly to the climate problem and have it within their power to contribute to combating it, have an obligation to limit CO2 emissions in order to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations of the countries in which the company operates. Companies like Shell thus have their own responsibility in achieving the targets of the Paris Agreement*".[110]

Domestic law could bring further clarity to this obligation by clarifying details, such as requirements in terms of percentage of emissions reduction and specific requirements that might apply to selected high emitting sectors or high emitting entities, taking into account the nationally

<https://dgap.org/en/research/glossary/climate-foreign-policy/nationally-determined-contributions-ndcs#:~:text=The%20European%20Union%20submits%20a,2030%20compared%20to%201990%20levels>.

[107] International Tribunal on the Law of the Sea, advisory opinion on climate change and international law, para. 223 and 224, available at: https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf and CIEL, ClientEarth, Pacific Island Students Fighting Climate Change, WYCJ, Legal Memorandum (2024), Advisory Opinion on Climate Change, delivered by the International Tribunal for the Law of the Sea: Relevance for the International Court of Justice Climate Advisory Proceedings, available at: https://www.ciel.org/reports/legal-memorandum-advisory-opinion-on-climate-change-itlos/, see section on applicable law. This issue is being addressed as well in the context of the ICJ Advisory Opinion proceedings on obligations of States in respect of Climate Change, <https://www.icj-cij.org/case/187>.

[108] 'The human right to a clean, healthy and sustainable environment', A/HRC/RES/52/23, resolution adopted by the Human Rights Council on 4 April 2023, available at: <https://documents.un.org/doc/undoc/gen/g23/076/98/pdf/g2307698.pdf>. In this Resolution, States were called upon to establish, maintain and strengthen effective legal and institutional frameworks to regulate the activities of public and private actors in order to prevent, reduce and remedy harm to biodiversity and ecosystems, taking into account human rights obligations and commitments relating to the enjoyment of a clean, healthy and sustainable environment, and were encouraged to adopt integrated, intersecting and holistic national and local policies and an effective legal framework for the enjoyment of the human right to a clean, healthy and sustainable environment

[109] The Guiding Principles on Business and Human Rights. Principle, available at: <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf>. Principle 11 provides that business enterprises' responsibility to respect human rights "exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights." See also: IACHR, Inter-American Standards for business and human rights, available at: <https://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf>, para 177; UN OHCHR, 'The Corporate Responsibility to respect Human Rights: An interpretive Guide' (2012).

[110] Shell v. Milieudefensie et. al, Court of Appeal the Hague, ECLI:NL:GHDHA:2024:2100, 12-11-2024, para. 7.27. Judgement available at: <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20241112_8918_judgment.pdf>.

determined contributions of the concerned State.[111] How such obligations would be implemented in the context of corporate groups and companies operating or sourcing from multiple jurisdictions requires specific attention.

The CSDDD for example addresses certain issues arising in the parent-subsidiary relation under Article 6 and recital 21, which clarifies that in case the parent adopts a climate transition plan, the subsidiary should comply with the parent's plan, taking into account its business model and strategy. This recital focuses primarily on effectiveness of implementation and reduction of the burden on companies. In a multilateral context, such as the one which the LBI is covering, the issues arising in the context of corporate groups might be broader, especially given the emission reduction targets might differ between the jurisdictions where the parent and subsidiary entities are located.

Additional considerations in light of the approach adopted by the CSDDD

The remaining of this section will review elements of the CSDDD's approach to climate transition that could be considered if climate issues come under discussion in the context of the LBI negotiations.

The obligation under Article 22 of the CSDDD is limited to climate change mitigation and does not explicitly address adaptation. Internationally agreed goals on climate change cover mitigation and adaptation. The OECD Guidelines tackle both mitigation and adaptation and set out expectations on how enterprises should avoid and address adverse environmental impacts and contribute to reaching climate change mitigation and adaptation goals, amongst others.[112] This includes "*the introduction and implementation of science-based policies, strategies and transition plans on climate change mitigation and adaptation as well as adopting, implementing, monitoring and reporting on short, medium and long-term mitigation targets*".[113] The guidelines recognise that *"[a]chieving climate resilience and adaptation is a critical component of the long-term global response to climate change to protect people and ecosystems and will require the engagement and support of all segments of society. Enterprises should avoid activities, which undermine climate adaptation for, and resilience of, communities, workers and ecosystems*".[114]

While corporate climate change mitigation is supposed to focus on the reduction or prevention of greenhouse gas emissions, climate adaptation involves efforts to move away from polluting products, services and related processes, including through innovating and leveraging new products, services and ways to create revenue growth and sustainability, while protecting local communities and ecosystems where companies operate.[115] The CSDDD addresses changes in products by requiring that the design of the transition plans for climate change mitigation include "*a description of decarbonisation levers identified and key actions planned …, including, where appropriate, changes in the product and service portfolio of the company and the adoption of new*

[111] Lack of such country level specifications was the basis for the decision by the Hague Court of Appeal that rejected the proposition that a 45% reduction obligation (or any other percentage) applies to Shell. The decision provided that "[t]he court of appeal has come to the conclusion that Shell cannot be bound by a 45% reduction standard (or any other percentage) agreed by climate science because this percentage does not apply to every country and every business sector individually. The court has answered in the negative the question whether a sectoral standard for oil and gas can be established on the basis of scientific consensus. This entails that based on the available climate science, it cannot be said that a 45% reduction obligation (or any other percentage) applies to Shell in respect of scope 3". Ibid, para. 7.111.

[112] Guidelines, commentary on Chapter VI: Environment, para. 66.

[113] Ibid, para. 77.

[114] OECD Guidelines, commentary on Chapter VI: Environment, para. 79.

[115] 'Accelerating Business Action on Climate Change Adaptation', available at: <https://www.pwc.com/gx/en/services/sustainability/publications/critical-business-actions-for-climate-change-adaptation.html >.

technologies".[116] Such language, while useful in pointing towards the need for changes in a company's products and services, does not replace the importance of directly referencing adaptation in the context of setting a climate-transition related obligation for businesses.

Article 22 sets requirements pertaining to the content of the transition plan, specifying that it should include time-bound targets "*based on conclusive scientific evidence and, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions*" (emphasis added).[117] Along that, the Article specifies three other obligations, including that the transition plans shall include a description of decarbonisation levers and key actions planned to reach the set targets, an explanation and quantification of the investments and funding supporting the implementation of the plan for climate change mitigation, and a description of the administrative, management and supervisory bodies responsible for the plan. In this regard, recital 73 states that *"[s]uch requirements should be understood as an obligation of means and not of results. Being an obligation of means, due account should be given to the progress companies make, and the complexity and evolving nature of climate transitioning. While companies should strive to achieve the greenhouse gas emission reduction targets contained in their plans, specific circumstances may lead to companies not being able to reach these targets, where this is no longer reasonable*".

The Hague Court of Appeal, in a recent decision concerning Shell's emission reduction targets,[118] considered the application of these CSDDD provisions in regard to finding a specific percentage for Shell's emissions reduction, although it was not asked to deliver a judgment on Shell's obligations under the CSDDD. The Court opined that the transition plan required under the CSDDD "[..]*need not necessarily include an absolute reduction commitment (of, for example, 45%) for scope 1, 2 and 3. The text of the preamble to the directive suggests some flexibility for companies to periodically adjust their own targets to market conditions*".[119]

The approach of the Court aligns with the arguments presented by Shell in the appeal proceedings.[120] The Court adopted such a strict reading of Article 22 despite acknowledging the interaction of the CSDDD, which ensues from the European Green Deal, with other related legal instruments that also ensue from the same Deal, including the Corporate Sustainability Reporting Directive (CSRD) and European Sustainability Reporting Standards (ESRS).[121] Indeed, the Court said that "*reporting requirements under the CSRD are specified in the (comprehensive) European Sustainability Reporting Standards (ESRS). Under the ESRS, companies must report on their scope 1, scope 2 and scope 3 emissions and companies with a climate transition plan must, among other things, provide information on the targets they have set for the reduction of their*

[116] CSDDD, Art 22,1(b).
[117] CSDDD Article 22 a, b, c, and d.
[118] Shell v. Milieudefensie et. al, Court of Appeal the Hague, ECLI:NL:GHDHA:2024:2100, 12-11-2024, decision available at: < https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ >
[119] Ibid, para. 7.46 of the decision.
[120] Shell v. Milieudefensie et. al, Court of Appeal the Hague, ECLI:NL:GHDHA:2024:2100, 12-11-2024, para. 7.45, which indicate the Shell had argued that "However, the plan need not necessarily include an absolute reduction commitment (of, for example, 45%) for scope 1, 2 and 3. The text of the preamble to the directive suggests some flexibility for companies to periodically adjust their own targets to market conditions. Shell also points out the interconnection with the CSRD: under the CSRD, companies can set intensity targets, which Shell has done for scope 3; a transition plan with such a target is sufficient for the CSDDD, Shell argues."
[121] The approach of the Court of Appeal differs from the understanding of civil society groups that analysed the CSDDD. For example, ClientEarth and Frank Bold provide that "To fulfil their transition plan obligation, companies have to explain how their plan and actions will enable them to be compatible with goals set in the Paris Agreement and the EU climate targets. They should describe a plausible scenario or pathway to demonstrate how their business model and strategy is compatible with the set goals. *This means that companies must set an objective of achieving net-zero GHG emissions (scopes 1–3) by 2050 at the latest, depending on sector, and consistent with a 1.5°C pathway"* (emphasis added). ClientEarth and FrankBold 'Corporate Environmental Due Diligence and Reporting in the EU Legal analysis of the EU Directive on Corporate Sustainability Due Diligence and policy recommendations for transposition into national law', page 76.

greenhouse gas emissions in scope 1, scope 2 and (where applicable) scope 3".[122] Given this development, and considering that companies often argue that there is no prescribed pathway to achieve the goals of the Paris Agreement and that achieving net zero emissions do not require the complete elimination of fossil fuels,[123] it is important to clarify more directly that obligations of companies in relation to climate change include absolute emission reduction targets.[124]

Article 19 of the CSDDD requires the Commission to produce practical guidance on the climate transition plan within 36 months of the Directive's entry into force.[125] Such guidance plays a key factor in relation to the effectiveness of the implementation across various covered jurisdictions. In the context of negotiating the LBI, negotiators could consider how the institutional framework to be established under the LBI, such as the conference of parties and/or the specialised committees to be attached to the LBI, could play a role in providing practical guidance in relation to climate-related obligations to be set under the LBI.

4. Access to justice and remedies

Improving access to justice and remedies for victims of human rights violations is one of the central objectives of the LBI. The latest draft LBI emphasises that legal liability has to be responsive to the needs of victims in regards to remedy, but provides little specific information on the conditions for liability, leaving this to the discretion of State parties. The LBI does however address major hurdles for access to remedy for victims, including procedural costs, burdens of proof and questions of private international law.

The CSDDD is an instrument with a heavy focus on corporate obligations, however, it also includes important provisions for victims' access to remedy, including both the possibility of bringing forward substantiated concerns to supervisory authorities – and thereby initiating public enforcement of corporate obligations – and the possibility of initiating civil liability claims under specific conditions. The CSDDD considers some of the procedural hurdles that victims face in initiating litigation and accessing supervisory authorities, however it remains mostly silent on issue of private international law.

While the LBI looks at corporate liability in a broad sense, the CSDDD's provisions on liability are designed to enforce the corporate due diligence obligations specifically, and this explains some of the major differences in the way liability and access to remedy are addressed in both instruments. The following sections analyse issues relating to requirements for liability, private international law, access to evidence for victims, support provided to victims when they seek access to justice and other forms of remedy.

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[122] Shell v. Milieudefensie et. al, Court of Appeal the Hague, ECLI:NL:GHDHA:2024:2100, 12-11-2024, para. 7.41.

[123] Shell Statement of Defence (unofficial translation) in Milieudefensie et al. v. Royal Dutch Shell plc., The Hague District Court, C/09/571932 / HA ZA 19-379. See point 2.2.2, page 25. Available at: <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20191113_8918_reply.pdf >.

[124] See also: Commission Delegated Regulation (EU) 2023/2772 (31 July 2023), supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, which provides "34. If the undertaking has set GHG emission reduction targets … (a) GHG emission reduction targets shall be disclosed in absolute value (either in tonnes of CO2eq or as a percentage of the emissions of a base year) and, where relevant, in intensity value;…". In relation to metrics and targets, the minimum disclosure requirement – Targets MDR-T- requires that "AR 24. When disclosing targets related to the prevention or mitigation of environmental impacts, the undertaking shall prioritise targets related to the reduction of the impacts in absolute terms rather than in relative terms…". Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02023R2772-20231222&qid=1718530944591#E0039 >.

[125] CSDDD, Article 19, requires the Commission to produce practical guidance on the climate transition plan within 36 months of the Directive's entry into force.

4.1. Liability

The Updated Draft LBI takes a broad approach to liability outlining general principles applicable irrespective of the liability regime, and only in some instances provides specific rules (for example that criminal liability is not contingent upon the establishment of civil liability and vice versa, see sections 4.1.3 and 4.1.4 below). This was not the case in the previous LBI draft where specific minimum conditions concerning liability in complex corporate groups and within the supply chain did feature.

In contrast, the CSDDD provides two forms of corporate liability: an administrative enforcement regime through the supervision of public authorities, and civil liability.

This subsection will start by analysing the general principles applicable to liability laid out in the Updated Draft LBI. It will then look at the three types of liability featured in the LBI (administrative, civil and criminal) and compare these with the liability regimes under the CSDDD. Finally, this section will address the omission of a provision on liability in complex corporate groups and supply chains in the Updated Draft LBI.

4.1.1. General principles applicable to liability

Article 8 of the Updated Draft LBI is dedicated to legal liability. State Parties have the obligation to establish a "*comprehensive and adequate system of legal liability of legal and natural persons conducting business activities*" (Article 8.1). Unlike previous treaty drafts, the Updated Draft explicitly mentions "*criminal, civil or administrative*" liability "*as appropriate to the circumstances*" (Article 8.2). The Updated Draft does not provide detailed explanations on the expected liability regime; however, it does set out essential requirements. Article 8.2 requires the type of liability established by the State Party to be:

> *"(a) responsive to the needs of the victims as regards remedy; and*
> *(b) commensurate to the gravity of the human rights abuse;"*

The Updated Draft does not provide an explanation of what is meant with the expression "*needs of the victims as regards remedy*". Article 1.9 of the Updated Draft does define the concept of "*remedy*" as the restoration of a victim to the position they would have been in had the abuse not occurred but seems to distinguish that from the more comprehensive notion of "*effective remedy*" (also defined under Article 1.9). What in turn is meant by the notion of "*needs*" is unclear. This might be more or less difficult to assess depending on the type of liability considered. In civil liability cases, victims will often be a party to the case, generally as claimants, and their needs are therefore more directly expressed through the claims of the lawsuit. In administrative or criminal liability configurations however, the role given to victims of human rights violations is not always clear, and their needs are not necessarily a built-in feature of the liability system.

One possibility to overcome this interpretative difficulty is to read together Article 8 on Legal Liability with Article 4 on the Rights of Victims. Indeed, one could argue that to be fully compliant with the other provisions of the LBI, the type of liability instituted under Article 8 of the Updated Draft LBI must also respect the rights of victims as laid out in Article 4. These include:

- The "*right to fair, adequate, effective, prompt, non-discriminatory, appropriate and gender-sensitive access to justice, individual or collective reparation and effective remedy in according with this (Legally Binding Instrument) and international law*" (Article 4.2 (c));

- The right to submit claims to courts and non-judicial grievance mechanisms (Article 4.2(d));
- The protection of victims' rights to privacy and protection from threats and intimidation (Article 4.2 (e));
- Access to information held by business enterprises or relevant State agencies (Article 4.2 (f));
- Full participation, transparency, and independence in reparation processes (Article 4.2(g)).

Whether the concept of "*remedy*" under Article 8.2 is meant to include an "*effective remedy*" with a combined reading of Article 4.2(c) or whether it should be distinguished from that concept following the definitions under Article 1.9 is unclear in the way the Updated Draft LBI is currently drafted.

In addition, Article 8 of the Updated Draft contains many qualifiers which subject the principles laid out in this draft to the domestic legal systems of State Parties.[126] Article 8.2, specifically, contains two such qualifiers ("*Subject to the legal principles of the State Party*" and "*consistent with [the State Party's] domestic legal and administrative systems*"). Under the current draft it is unclear which domestic legal principles could override the principles laid out under Article 8, including the requirement for liability to "*respect the needs of victims as regards remedy*".

The CSDDD in contrast does not contain general principles applicable to liability but distinguishes between administrative enforcement by supervisory authorities and civil liability claims, which can be brought by victims. Each of these will be studied in turn below and compared to the LBI's specific mentions of these types of liability and the general principles highlighted in the preceding paragraphs.

4.1.2. Administrative liability

Administrative enforcement of corporate obligations plays an important role in the CSDDD. To fully enable a comparison with the Updated Draft LBI, it is important to distinguish two aspects of this type of liability: the public enforcement of corporate liability through the intervention of State agencies, and the role of victims in administrative proceedings.

4.1.2.1. Public enforcement through State agencies

The Updated Draft LBI does not explicitly mandate for the public enforcement of corporate obligations. In other words, it does not require State Parties to establish or appoint a State agency responsible for the oversight of business compliance with the requirements and obligations laid out in the LBI. The Updated Draft does however reference the possibility of public (or administrative) enforcement on multiple occasions.

For example, Article 1.10 defines "*relevant State agencies*" as "*judicial bodies, competent authorities and other agencies and related services relevant to administrative supervision and enforcement of the measures referred in this (Legally Binding Instrument)*". Relevant State agencies are then mentioned in Article 4 (Right of Victims), Article 7 (Access to Remedy), and

[126] A more thorough mapping of domestic law qualifiers under the Updated Draft is provided in the 2023 CIDSE study, see Markus Krajewski, Stephanie Regalia and Otgontuya Davaanyam, 'Analysis of the UN 2023 Updated Draft Legally Binding Instrument on Business and Human Rights' (CIDSE 2023) 8 <https://www.cidse.org/2023/10/19/analysis-of-the-un-binding-treaty-updated-draft/>.

Article 12 (Mutual Legal Assistance). In Article 6 (Prevention), the Updated Draft mentions the role of "*competent authorities*" (a term not defined, and which can therefore be understood in a broad sense) to the implementation of corporate obligations (see Section 3 above). Similarly, Article 8 on legal liability mentions administrative liability as a possible type of legal liability, which presumes that an administrative entity is involved in the enforcement of corporate obligations. On specific issues, the LBI does provide guidance, for example on the rights and needs of victims when seeking access to State agencies (see section below) or in the production of evidence relevant to a victim's claim (see section 4.3 below). Similarly, in relation to corporate obligations under Article 6 (Prevention), the LBI requires that competent authorities *"have the necessary independence […] to carry out their functions effectively and free from any undue influence*" (Article 6.3). This provision would presumably apply to State agencies as well. The LBI does not, however, provide further guidance on the powers and responsibilities of State agencies, specifically in the context of administrative enforcement (for example on State agencies' investigative powers or the types of sanctions that could be imposed).

The CSDDD requires Member States to designate one or more supervisory authorities in charge of supervising corporate compliance with the obligation laid out in the directive. Articles 24 to 28 explain the powers of supervisory authorities, the ways in which natural and legal persons can submit substantiated concerns to these authorities, the penalties that can be issued against companies in case of infringements and how supervisory authorities should collaborate across the EU.

Public enforcement of corporate obligations can be initiated in two different ways. First the competent supervisory authority, through its own monitoring of corporate activities may initiate an investigation into a specific company's activities and due diligence (Article 25.2). Second, legal and natural persons can submit substantiated concerns to supervisory authorities "*when they have reasons to believe, on the basis of objective circumstances, that a company is failing to comply with the provisions of national law adopted pursuant to this Directive*" (Article 26.1). The directive requires supervisory authorities to assess these substantiated concerns "*in an appropriate period of time and, where appropriate, exercise their powers*" of investigation. Natural and legal persons submitting information under the "***substantiated concern"*** procedure need to have "*a legitimate interest in the matter*". This means that victims of human rights and environmental harm, but also broader categories of natural and legal persons can in theory initiate the administrative enforcement process, although the interpretation of a 'legitimate interest' will be left to domestic law.[127]

Supervisory authorities are required to communicate, as soon as possible, the result of their assessment of substantiated concerns and provide the reasoning for that result. The supervisory authority's decision must also be accompanied with a description of further steps and measures, including practical information on access to administrative and judicial review procedures, meaning that persons submitting information must also have the opportunity to contest supervisory authorities' decisions.

<u>Comparison between the Updated Draft LBI and the CSDDD</u>:
While the LBI references the role of State agencies at various points and will often highlight the rights of victims in that context (see section below), the Updated Draft does not provide a detailed model of public supervision and enforcement. The CSDDD on the other hand does provide this specific information and can therefore be seen as one example of the type of administrative

[127] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, 5 July 2024 (CSDDD), Article 2.1(a) Markus Krajewski, 'Administrative Enforcement of Corporate Human Rights Due Diligence Legislation: A Flower in the "Bouquet of Remedies"' [2024] Verfassungsblog <https://verfassungsblog.de/administrative-enforcement-of-corporate-human-rights-due-diligence-legislation/ > accessed 12 June 2024.

enforcement which falls under the scope of the LBI. That being said, the CSDDD's model is dependent on supervisory authorities having the adequate resources to carry out investigations and follow up on the submission of substantiated concerns and might therefore not always be easily replicable beyond the EU. Given the LBI is meant to become an instrument for ratification internationally, the EU's experience with administrative enforcement under the CSDDD is a useful example to draw from but should not be considered as the only possible model, especially for States which may not yet have the adequate resources to establish supervisory authorities with the same powers and responsibilities. The LBI negotiations and a future LBI's implementation could, nevertheless, provide a good forum to exchange and learn from different models of administrative enforcement (under Article 13 of the Updated Draft, "*International Cooperation*").

4.1.2.2. Role of victims in administrative proceedings

The Updated Draft LBI requires under Article 8.2 that the type of liability established by State Parties, including of an administrative nature, shall be responsive to the needs of victims as regards remedy. This explicit requirement is important because the role of victims in the context of public enforcement of corporate obligations is not necessarily obvious depending on the domestic legal system in question.

The rights of victims under Article 4 of the Updated Draft LBI provide a useful catalogue of rights that can ensure that the needs of victims are also taken into account in administrative enforcement proceedings. This includes for example:

- protection from intimidation and threats in the course of enforcement actions;
- the ability to submit claims to courts or in non-judicial grievance mechanisms, including in company-based grievance mechanisms or directly to the public authority enforcing corporate obligations;
- access to information held by businesses or relevant State agencies, such as public bodies leading administrative enforcement actions; and
- full participation, transparency, and independence in the reparation process, which should also be applicable to corporate remedial obligations ordered by public authorities in compliance with due diligence obligations.

In addition, Article 7.5 (b) of the Updated Draft LBI also calls on State Parties to ensure that "*victims are meaningfully consulted by relevant State agencies with respect to the design and delivery of remedies*". In administrative enforcement scenarios, State agencies should therefore consult with victims prior to ordering remedial action from businesses.

The CSDDD in turn does provide certain guarantees that are in line with some of the requirements laid out in the LBI. Article 24.9 of the directive sets out requirements for the independence and impartiality of supervisory authorities, in particular to avoid 'corporate capture' and external influence, including market interest. Article 24.10 requires supervisory authorities to publish and make accessible online an annual report on their activities. Both of these provisions allow for an alignment of the supervisory authorities' exercise of power with the requirements of independence and transparency set out in the LBI.

With respect to the role of victims in the course of administrative enforcement, it is important to distinguish between cases where public enforcement is initiated through substantiated concerns, and cases where the supervisory authority decides to initiate investigations and potentially sanction the company or orders the company to take specific remedial measures.

In cases of substantiated concerns, and as outlined in the previous section, supervisory authorities have to communicate the result of their assessment to the person who brought these

concerns forward and explain potential next steps. Under Article 26.6 persons submitting substantiated concerns "*and having, in accordance with national law, a legitimate interest in the matter*" can have access to a court to "*review the procedural and substantive legality of the decisions, acts or failures to act of the supervisory authority*." Supervisory authorities are also required to take "*the necessary measures for the appropriate protection of the identity*" of persons submitting information (Article 26.2). This requirement contributes towards victims' right to protection from intimidation and threats, although the CSDDD remains silent on further measures of protection for victims in the course of administrative investigations.

However, the CSDDD does not provide explicit equivalent provisions for victims in cases where supervisory authorities are the ones initiating administrative proceedings, without first receiving substantiated concerns. In this scenario, the directive remains silent on what role victims can have in the course of administrative proceedings, whether they should be directly consulted by the supervisory authority itself and to what extent their needs have to be taken into account, in the course of public enforcement. The CSDDD does require under Article 25.7 that Member States ensure that "*each natural or legal person has the right to an effective judicial remedy against a legally binding decision by a supervisory authority concerning them, in accordance with national law*." This does mean that decisions by supervisory authorities which concern victims of corporate human rights abuses can be contested by these victims. It remains unclear, and subject to interpretation, whether these victims must be directly informed and consulted throughout the administrative investigations and enforcement process (i.e. before a legally binding decision is issued). This provision provides no guidance on what constitutes an 'effective judicial remedy' in this context, leaving the issue to the domestic law of Member States.

Comparison between the Updated Draft LBI and the CSDDD:
The LBI provides more explicit guarantees to victims on their right to be meaningfully consulted by relevant State agencies in the design and delivery of remedies, as well as the requirement for any administrative liability to be responsive to the needs of victims as regard remedy. The CSDDD provides clear procedural guarantees for victims in the context of substantiated concerns in this respect but lacks such explicit language in cases where enforcement of corporate obligations is initiated by the supervisory authorities acting alone. This is not to say victims should not be consulted by supervisory authorities in these scenarios. Quite the contrary. Supervisory authorities wishing to avoid judicial challenges to their decisions should consult victims throughout the investigation and sanctioning process. Consultations of victims in any case is an important step in identifying the extent to which a company's due diligence process had adequately identified human rights and environmental adverse impacts and properly addressed them (see section 3.1.7 above on stakeholder engagement).

4.1.3. Civil liability

4.1.3.1. Conditions for liability

The Updated Draft LBI does not provide explicit conditions for civil liability, aside from the general principles applicable to liability laid out above in Article 8.2. It does, however, specify how this type of liability interacts with other types of liability: Article 8.4 (b) states that civil liability is not contingent upon the establishment of criminal liability and vice versa.

The CSDDD provides explicit conditions for civil liability under Article 29. These include:

- a damage caused to a natural or legal person;

- the company intentionally or negligently failed to comply with the obligations laid down in Articles 10 (prevention) and 11 (bringing to an end an actual adverse impact);
- the damage was caused as a result of this failure.

The notion of damage under Article 29 is further complicated because it must relate to a person, therefore excluding many types of purely environmental damages, but it must also relate to a "*right, prohibition or obligation listed in the Annex to this Directive and aimed at protecting the natural or legal person*", and must impact "*the natural or legal person's legal interests that are protected under national law*." Practically speaking, these cumulative conditions may result in certain harms suffered by a person not meeting the definition of damage under this civil liability provision.[128]

The CSDDD, similarly to the French Duty of Vigilance Law in this respect, makes causality an important condition of civil liability, because the damage must result from the failure to comply with due diligence obligations. In practice, this can be difficult to prove, which is why the provisions relating to access to evidence and evidential burdens of proof (studied below in section 4.3) are essential to determine whether needs of victims can really be met.

In practice, it is still difficult to determine to what extent victims will be able to bring successful civil liability claims that meet all these conditions.[129] The French experience with the Duty of Vigilance Law which also provides for civil liability shows, however, that a floodgate of civil liability lawsuits is unlikely.[130]

Comparison between the Updated LBI and the CSDDD:

Given the Updated Draft LBI does not provide specific conditions for civil liability (aside from the fact it should not be contingent upon criminal liability), the civil liability regime under the CSDDD can be seen as an example of the kind of civil liability which the LBI is meant to govern. Given, however, some of the limitations associated with the specific conditions for civil liability under the CSDDD (in particular that the damage must be caused to a person and must result from an intentional or negligent violation of due diligence obligations), it is a strength for the LBI to not have set specific conditions for civil liability yet. This means that under the current LBI draft, civil liability that encompasses strict liability standards or reparation of purely environmental damages is possible and compatible.

Given also that at this stage of implementation of the CSDDD, there is no case law to guide the interpretation and practice of civil liability claims, it is hard to assess to what extent this type of liability is responsive to the needs of victims as regards remedy, one of the essential requirements of Article 8.2 of the Updated Draft LBI. In this respect, being able to assess the comparative strength of the CSDDD liability regime remains speculative.

[128] Nicolas Bueno and Franziska Oehm take the example of the violation of the right to form a trade union which could not be covered by the definition of protected legal interest under German Tort Law, Nicolas Bueno and Franziska Oehm, 'Conditions of Corporate Civil Liability in the Corporate Sustainability Due Diligence Directive' [2024] Verfassungsblog <https://verfassungsblog.de/conditions-of-corporate-civil-liability-in-the-corporate-sustainability-due-diligence-directive/ > accessed 4 September 2024.

[129] Some commentators have highlighted that the cumulative conditions of the CSDDD are rather restrictive and the result of intense negotiations, see ibid. The experience with the French Duty of Vigilance Law has also not yet provided much case law on the basis of civil liability claims. A few civil liability cases have been filed in France but were still pending at the time of writing. Some cases filed under summary proceedings for the enforcement of due diligence obligations, not civil liability claims, have reached the merit stages under the French law, see section 4.5 below on 'Other forms of remedy'.

[130] An overview of cases filed before French courts can be found on the website "duty of vigilance radar": <https://vigilance-plan.org/court-cases-under-the-duty-of-vigilance-law/>.

4.1.3.2. Causes of exoneration

The Updated Draft LBI does not include causes of exoneration specific to civil liability. The previous Third Draft did however provide more details on the relationship between due diligence and liability, with former Article 8.7 providing that *"[h]uman rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability*". This is an important consideration because the possibility of transforming due diligence into an automatic liability defence against corporate liability for human rights harms runs the risk of transforming mandatory human rights due diligence into a tick-box compliance exercise, as opposed to a process which should help companies identify their human rights impacts and address them in practice.[131]

The CSDDD does not make due diligence a defence to corporate liability. The directive explicitly provides for exoneration from civil liability for a company where "*the damage was caused only by its business partners in its chain of activities*". One interpretation is that a company could be exonerated from civil liability when it is only directly linked to the damage through its business relationships but has not caused or jointly caused the damage. The distinctions between "*cause*", "*contribute*" and "*directly linked*", which feature in Recital 45 of the Preamble, will be subject to national interpretations as well, given the civil liability regime is largely left to the national laws of Members States to determine exact rules and conditions.

4.1.3.3. Civil liability and climate change related obligations

The current approach to civil liability under the LBI does not pay specific attention to climate change issues, given that climate issues overall are yet to be addressed in a holistic manner under the LBI negotiations. The civil liability regime under the CSDDD does not cover a company's failure to fulfil the climate transition related obligations as set under Article 22 of the Directive. The CSDDD liability regime covers climate issues to the extent those arise under parts of the definition of "*adverse environmental impact*" (as discussed under section 2.2.3) and taking into account the conditions laid out under Article 29 (as discussed under section 3.2.).

This leaves the liability regimes under national legal systems as the basis for advancing liability standards in relation to climate change and other purely environmental harms, including in relation to the adequacy of companies' climate-related transition plans and the climate impact of their activities and products. In that regard, the CSDDD provides under Article 29.6 that "*the civil liability rules under this Directive shall not limit companies' liability under Union or national legal systems and shall be without prejudice to Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than this Directive*".[132] This approach protects the space for the evolution of standards of corporate liability under national law, including in relation to environmental harms and climate change, such as through strategic and climate change litigation.

The LBI offers an opportunity to advance convergence over standards of liability for environmental harm, including climate change, resulting from business activities. Liability for climate change related harm ought to be accounted for in the design of the overall legal liability provision under

[131] Surya Deva, 'Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?' [2023] Leiden Journal of International Law 1, 2.

[132] This in addition to recital 17 of the CSDDD, which provides that "This Directive is without prejudice to obligations in the areas of human, employment and social rights, protection of the environment and climate change under other Union legislative acts. If the provisions of this Directive conflict with provisions of another Union legislative act pursuing the same objectives and providing for more extensive or more specific obligations, the provisions of the other Union legislative act should prevail to the extent of the conflict and should apply to those specific obligations".

the LBI, as it raises similar issues to those that arise in relation to liability for harm in cases involving multiple legal entities operating in multiple jurisdictions.

It is important that the liability regime under the LBI address overall harm beyond failure to fulfil the due diligence obligations. As pointed out in the previous section 4.1.3.2, one crucial element that had been negotiated under the draft LBI was that fulfilment of the due diligence obligations shall not automatically absolve an entity from liability for causing or contributing to harm.[133] This approach still leaves discretion to the adjudicator to consider how fulfilment of the due diligence obligation is to be considered in a decision on liability, yet does not provide a complete shield from liability by mere formalistic fulfilment of due diligence. This provision does not appear in the latest negotiation text[134], yet it is important to reintroduce it in the draft negotiating text.

Liability for climate change-related harm could emerge in relation to the impacts of a company's goods and services on climate change in a jurisdiction other than the one where this entity operates. The challenges of asserting attribution and causation are fundamental in such cases.[135] Also, liability could emerge in relation to the activities of a parent or lead company for its actions or omissions concerning the overall climate change-related conduct of the corporate group, or conduct of a subsidiary or business partner. It is important to account for liability in such cases in order to avoid the outsourcing or exporting of heavy emissions activities to foreign jurisdictions as a way of limiting potential climate change related liability.

Besides covering cases where one business enterprise legally or factually controls another entity involved in the harm, the standard should extend to cover instances of sufficient influence by one person on another.[136] This would extend beyond the instances of 'control, management or supervisions' under the latest version of the LBI text.[137] Rather, it would cover instances of influence, such as where one entity sets the corporate group policies relevant to climate change or sufficiently influences the practices in a supply chain that has substantial climate change related effects. Also, this standard ought to cover instances where the business enterprise should have reasonably foreseen the risk of harm arising in the activity within its business relationships and did not take reasonable and necessary measures to prevent it. While a similar approach, which required further work, was reflected in Article 8.6 of the earlier versions of the draft LBI

[133] Updated draft legally binding instrument (version with track changes), Article 8.7, available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-track-changes.pdf.> There was no registered contestation of this Article in the open-ended intergovernmental working group, except for a reservation by China.

[134] Text of the updated draft legally binding instrument with the textual proposals submitted by States during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (February 2024), A/HRC/55/59/Add.1, available at: <https://documents.un.org/doc/undoc/gen/g24/022/86/pdf/g2402286.pdf>.

[135] Claimants have attempted to use tort law to sue companies not in their jurisdictions and not directly linked to them for climate change impacts felt in their vicinity. For example, see: Luciano Lliuya v. RWE AG, Case No. 2 O 285/15 Essen Regional Court (2015). More details available here: <http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/>.

[136] In the case MilieuDefensie et al. v. Royal Dutch Shell plc. (RDS), the Hague District Court focused on the influence and control that RDS exercised and the 'policy-setting influence' that RDS has over the companies in the Shell group. The Court noted that: 'Due to the policy-setting influence RDS has over the companies in the Shell group, it bears the same responsibility for these business relations as for its own activities. MileudDefensie et al. v. Royal Dutch Shell plc., The Hague District Court, C/09/571932 / HA ZA 19-379, May 2021 (engelse versie, unofficial English translation), para. 4.4.4, 4.4.6, 4.4.23.

[137] Text of the updated draft legally binding instrument with the textual proposals submitted by States during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (February 2024), A/HRC/55/59/Add.1, available at: <https://documents.un.org/doc/undoc/gen/g24/022/86/pdf/g2402286.pdf >.

text,[138] it does not appear in the latest negotiation text.[139] It is important to reintroduce and further develop and clarify such wording.

Advancing such a standard will help avoid the challenges that emerge when the victims have to wait for the standard to be incrementally developed through judicial proceedings. For victims or plaintiffs, this would translate into clearer legal avenues to access justice and less time and costs in legal proceedings. For companies, this will result in more clarity on what is expected from them and how their practices would be assessed under the applied regime of legal accountability. The effectiveness of a standard to be agreed under the LBI will depend on the extent of guidance that would be available to implementing States. As reflected in the CSDDD,[140] it is important that the standards to be developed by the LBI do not prejudice the ability to advance stricter and more comprehensive liability rules under national legal systems and through climate change related litigation.

4.1.4. Criminal liability

The Updated Draft LBI mentions the possibility of corporate criminal liability under Article 8.2. The draft does not provide much information on the requirements for criminal liability, aside from Article 8.4 (b) which states that criminal liability must not be "*contingent upon the establishment of civil liability*". This can partially be explained by the fact corporate criminal liability varies greatly between domestic legal systems (as well as specific conditions of criminal liability in general). This is not to say that the Updated Draft remains completely silent on the matter. The draft does provide limited indications on the types of crimes that could lead to criminal liability under Article 10.1 regarding statutes of limitations, by providing a list of the most serious crimes recognised under international law: "*human rights abuses which constitute the most serious crimes of concern to the international community as a whole, including war crimes, crimes against humanity or crimes of genocide*".[141]

The CSDDD does not include any specific provision mentioning criminal liability, which can be partially explained by the fact Member States showcase very different approaches to corporate criminal liability, and it was not in the ambitions and mandate of the CSDDD to tackle this complex question.

[138] Updated draft legally binding instrument (version with track changes), Article 8.6, available at: <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-track-changes.pdf >.

[139] Text of the updated draft legally binding instrument with the textual proposals submitted by States during the ninth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (February 2024), A/HRC/55/59/Add.1, available at: https://documents.un.org/doc/undoc/gen/g24/022/86/pdf/g2402286.pdf

[140] CSDDD, Article 29.6.

[141] This explicit list had been present in the 2019 Revised Draft under former Article 6.7 (a) but had disappeared from the 2020 Second Revised Draft and the Third Draft. Its reintroduction provides, to a limited extent, a bit more guidance and legal certainty on the types of crimes which should give rise to liability, see Virginie Rouas, 'Achieving Access to Justice through an International Treaty on Business and Human Rights', *Achieving Access to Justice in a Business and Human Rights Context* (University of London Press 2022) 356 <https://www.jstor.org/stable/j.ctv293p4bn.14>.

4.1.5. Liability in complex corporate groups and in the supply chain

An important change in the Updated Draft LBI compared to the previous Third Draft relates to liability in complex corporate groups and in the supply chain. The Third Draft included a former Article 8.6, which required State Parties to:

> *"ensure that their domestic law provides for the liability of legal and/or natural persons conducting business activities […] for their failure to prevent another legal or natural person with whom they have had a business relationship, from causing or contributing to human rights abuses, when the former controls, manages or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to take adequate measures to prevent the abuse."*

The Updated Draft no longer includes this provision. By remaining silent on the issue of liability within corporate groups and along the supply chain, the Updated Draft does not provide explicit provisions to hold parent companies or buyers accountable for human rights abuses in their business activities and business relationships, although the Updated Draft does address situations of corporate complicity in a broad sense.[142]

Under the CSDDD, the personal and material scope of corporate obligations will determine when a company can be liable for the harms caused by another business or its subsidiaries (see section 2.3 above on scope of corporate obligations). However, the extent to which a company can be held civilly liable is conditioned, at least in its supply chain, by the last sentence of Article 29.1, which provides that a "*company cannot be held liable if the damage was only caused by its business partners in its chain of activities.*"

Comparison between the Updated Draft LBI and the CSDDD:

The Updated Draft LBI is considerably weaker than the CSDDD when looking specifically at the liability of parent companies for the activities of their subsidiaries or of businesses more generally for the human rights and environmental harms that occur through their business relationships. By not addressing these situations explicitly, the Updated Draft LBI fails to provide common understanding on one of the main drivers behind the treaty negotiations: the regulation of the activities of transnational companies, which operate through complex corporate groups and supply chains.

[142] Krajewski, Regalia and Davaanyam (n 1) 9.

4.2. Private international law questions

In cases involving complex corporate groups or transnational supply chains, victims will often be faced with the decision of how to sue a company most strategically, in order to obtain an effective remedy. Rules of private international law will in many respects determine the viability of a claim.[143] Civil society has continuously campaigned for the LBI to include choices for victims, both in terms of competent jurisdiction and applicable law, to enable them to hold businesses accountable.

The CSDDD, however, has avoided addressing these issues directly, with the exception of the law applicable to civil liability claims, despite the important transboundary effects of the directive and the likelihood of private international law issues arising.[144] As the following sections show, the current EU rules on jurisdiction and conflict of laws contain important gaps for the successful enforcement of corporate obligations and access to remedy for victims.

The LBI could therefore play an important role in enabling adaptations of rules of private international law for cases relating to corporate human rights and environmental harm, especially in the context of the evaluation of important EU regulation on questions of jurisdiction and applicable law (the Recast Brussels I Regulation and the Rome II Regulation).

4.2.1. Jurisdiction

The Updated Draft LBI tackles the question of jurisdiction in Article 9. Paragraph 1 establishes the jurisdiction of the State Party where: the human rights abuse took place (Article 9.1 (a)); *the relevant harm was sustained* (Article 9.1 (b)); *the human rights abuse was carried out by a company domiciled in that Sate Party or a natural person who is a national of, or has their habitual residence, in that State Party* (Article 9.1 (c)); *the* victim *seeking remedy through civil law* proceedings is a national of, or has their habitual residence in the territory of, that State Party (Article 9.1 (d)).

It is important to note that the Updated Draft has lost important grounds for jurisdiction compared to the Third Draft LBI. Former Article 9.4 provided a ground for jurisdiction in cases of 'connected claims', that is cases brought against a person not domiciled in the territory of the forum State but where the claim is connected to another case against a person domiciled in the forum State. The new Article 9.4 of the Updated Draft does provide for the coordination of judicial proceedings between State Parties, which might provide an opportunity for joining such claims, but unlike former Article 9.4 does not provide explicit rules to determine which State Party has jurisdiction. In addition, where the Updated Draft LBI marks a difference compared to the previous Third Draft is on the issues of "*forum non conveniens* and *forum necessitates"*.[145]

[143] Nadia Bernaz and others, 'The UN Legally Binding Instrument and the EU Proposal for a Corporate Sustainability Due Diligence Directive; Competences, Comparison and Complementarity' (Friends of the Earth 2022) 24 <https://friendsoftheearth.eu/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf> accessed 31 August 2023.

[144] For further analysis of the CSDDD's relationship with private international law, see Eduardo Silva de Freitas and Xandra Kramer, 'The Corporate Sustainability Due Diligence Directive: PIL and Litigation Aspects' (*Conflict of Laws*, 20 May 2024) <https://conflictoflaws.net/2024/the-corporate-sustainability-due-diligence-directive-pil-and-litigation-aspects/> accessed 3 December 2024.

[145] For a detailed explanation of the changes between the Third Draft and the Updated Draft on these issues, see Markus Krajewski, Stephanie Regalia and Otgontuya Davaanyam, 'Analysis of the UN 2023 Updated Draft Legally Binding Instrument on Business and Human Rights' (CIDSE 2023) 11-12 <https://www.cidse.org/2023/10/19/analysis-of-the-un-binding-treaty-updated-draft/>.

The previous LBI draft explicitly rejected the doctrine of "*forum non conveniens"*, whereby a court can decline competence to hear a case on the ground that another jurisdiction is better placed to hear the case. This doctrine, often found in common law jurisdictions, has in practice been used by businesses to lengthen legal proceedings or to have the case decided in a less favourable jurisdiction for the claimant. The Updated Draft no longer explicitly rules out the doctrine of "*forum non conveniens"* but requires State Parties to ensure that the rights of victims laid out in Article 4 of the LBI are respected in the other more suitable jurisdiction (Article 9.3). As previous commentary on the issue explains,[146] a proper application of this provision would mean that victims are essentially guaranteed the same rights across all jurisdictions, whether they incorporate the defence of *forum non conveniens* or not, but in practice this opens the door to lengthy judicial proceedings on the question of jurisdiction.

The Updated Draft LBI now also excludes any reference to the doctrine of "*forum necessitates"*, where a court can consider itself competent to hear a case in exceptional circumstances where no other court is reasonably available to the victim. The Third Draft had previously provided such a ground for jurisdiction when there was a sufficient link with the State Party seized (forum State) under former Article 9.5.

The CSDDD does not touch on the issue of jurisdiction. Therefore, rules of jurisdiction from the Recast Brussels I Regulation will determine which courts are competent for civil liability claims brought by victims under the CSDDD.[147] Article 4.1 of the Recast Brussels I Regulation sets a general rule that defendants domiciled in a Member State shall be sued in the courts of that Member State. Practically speaking this means that victims seeking to bring a civil liability claim against an EU company will need to bring that claim before the courts of the Member State where that company is domiciled.[148] However, the CSDDD also includes in its scope non-EU domiciled companies ('third country companies'). In those cases, the national law of the Member State where the claim is brought will determine whether that State is competent to hear the case or whether another jurisdiction is competent,[149] which can lead to very different results across EU countries. This also raises the question whether courts from non-EU countries would come to implement the CSDDD in such situations. This oversight, which had already been highlighted in 2022,[150] begs the question whether enforcement of the civil liability provision against third-country companies will be successful in practice. It is possible, depending on Member States' national rules on jurisdiction, that there might not be an available ground for jurisdiction to bring a civil liability case based on the CSDDD's liability provision against a third-country company before an EU court.

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146 Ibid.

147 Nadia Bernaz and others, 'The UN Legally Binding Instrument and the EU Proposal for a Corporate Sustainability Due Diligence Directive; Competences, Comparison and Complementarity' (Friends of the Earth 2022) 26 <https://friendsoftheearth.eu/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf> accessed 31 August 2023.

148 A company is deemed domiciled at the place where it has its statutory seat, central administration, or principal place of business (Article 63.1 Recast Brussels I Regulation). It should be noted that this definition does not match the way in which competence is distributed between supervisory authorities for the public enforcement of the CSDDD. Supervisory authorities are competent when an EU company has a registered office in that Member State or in the case of a third-country company when it has a branch in a Member State or where it generated the most of its net turnover, see Articles 24.2 and 24.3 CSDDD. This means that the Member States where civil liability claims can be brought before courts are not necessarily the same as the Member States where substantiated concerns can be communicated to supervisory authorities.

149 See Article 6.1 Recast Brussels I Regulation.

150 Nadia Bernaz and others, 'The UN Legally Binding Instrument and the EU Proposal for a Corporate Sustainability Due Diligence Directive; Competences, Comparison and Complementarity' (Friends of the Earth 2022) 27 <https://friendsoftheearth.eu/wp-content/uploads/2022/10/Complementarity-study-on-EU-CSDDD-and-UN-LBI-October-2022.pdf> accessed 31 August 2023.

Comparison between the Updated Draft LBI and the CSDDD:

The LBI provides more grounds for jurisdiction compared to the current EU rules under the Recast Brussels I Regulation, and in that respect increases the choice of jurisdictions available to victims. Where a case is filed has important implications on the likelihood of success, both in terms of substantive law (for example the rules on applicable law, see section 4.2.2 below) and in terms of means and capacity of courts to deal with complex transnational claims.

4.2.2. Applicable law

Article 11 of the Updated Draft LBI distinguishes between the law applicable to matters of procedure and the law applicable to matters of substance. For matters of procedure, the law of the competent court applies (Article 11.1). For matters of substance, the LBI provides victims with a choice of law between the law of the State where acts or omissions occurred or produced effects and the law of the State where the natural or legal person alleged to have committed the acts or omissions is domiciled (Article 11.2). Offering a choice of law enables the victim to choose the most protective law which will best meet the victim's needs in regards to liability and remedy. At the same time, the two options offered under the Updated Draft LBI are easily predictable options as standards for accountability for businesses.

Here again the CSDDD does not provide an explicit provision on the applicable law to civil liability claims, which in any case would not have been expected in light of the legal basis upon which the CSDDD was negotiated under EU law.[151] Referring to the rules set out in the Rome II Regulation for tort-based litigation is therefore necessary. However, Article 29.7 of the CSDDD anticipates the scenario where the law designated is that of a third country (non-EU State), which would therefore not include the corporate obligations and liability regime set out in the CSDDD. In such cases, Member States must ensure that "*the provisions of national law transposing [Article 29] are of overriding mandatory application*." This means that victims bringing claims in front of EU jurisdictions will always be able to rely on the provisions on civil liability of Article 29. Recital 90 explains that Member States should ensure that matters of civil procedure, including statute of limitations and the disclosure of evidence are also of overriding mandatory application. Resorting to overriding mandatory provisions can sometimes have unintended consequences, such as making certain provisions mandatory even in cases where the law otherwise designated might provide more a more protective regime for victims (including for example in the case of stronger regulatory developments that could emerge outside of Europe in the future).[152] This risk, however, is largely tempered by Article 29.6 which specifies that the civil liability rules under the CSDDD are "*without prejudice to Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than this Directive*." Therefore, if the law applicable to the claim provides for a more protective liability standard than the CSDDD, the rules of liability of the designated law should apply.

[151] Articles 50(1), 50(2) point (g) which relate specifically to freedom of establishment and conditions for access to the internal market for companies; and 114 of the Treaty of the Functioning of the European Union (TFEU).

[152] "FIDH and its members warn against the risk that such a provision could transform the EU Directive into a de facto global regulatory instrument that trumps other national regulations, present or future. This can be useful only if the European legislation is strong and effective in preventing and redressing abuses committed by corporations. However, we are worried that this could prevent a stronger national regulatory framework from emerging outside Europe." FIDH, 'Europe Can Do Better, How EU Policy Makers Can Strengthen the Corporate Sustainability Due Diligence Directive' (2022) N°794a 8 <https://www.fidh.org/IMG/pdf/duediligence.pdf> accessed 4 December 2024.

The possibility of offering a choice of law to victims and amending the Rome II Regulation accordingly had been explored by the European Parliament in its 2020 draft report on the due diligence directive, but did not reappear in any of the official CSDDD drafts afterwards. The Updated Draft LBI in its current form would require the EU to reconsider this course of action and amend Rome II.

Comparison between the Updated Draft LBI and the CSDDD:

The LBI provides stronger guarantees to victims by giving them a choice of law option compared to the rules on applicable law which apply in the EU. Although the CSDDD secures victims' rights to bring civil liability claims in line with Article 29 of the directive by making these provisions of overriding mandatory application, this solution is only advantageous in a scenario where the civil liability provisions are most protective of victims' needs in the CSDDD (and more specifically the Member States' domestic law provisions transposing Article 29) compared to the designated third country law.

4.3 Access to evidence

The most important evidence to link a business to a human rights or environmental harm is often actually held by the business itself. For example, information on the kinds of internal policies and directives top management gave to employees on the ground, or purchasing prices of buying companies that can not reasonably allow a supplier to produce goods while respecting living wage and health and safety standards. Questions relating to access to evidence held by business and public authorities are therefore central to ensure human rights claims brought by victims have any chance of succeeding in practice. The following sections look at requests for disclosure of evidence held by businesses and evidential burdens of proof.

4.3.1. Disclosure of evidence held by businesses

The Updated Draft LBI addresses the issue of evidence under Article 7 (Access to Remedy).

Article 7.3 (b) requires State Parties to put in place policies to ensure victims have access to reliable sources of information *"including by facilitating request for disclosure of relevant information of business-related activities or relationships linked to a human rights abuse.*" In addition, Article 7.4 (e) requires State Parties to adopt measures to ensure fair and timely disclosure of evidence relevant to litigation or enforcement proceedings. The LBI therefore makes ease of access to evidence an important issue but leaves it to State Parties to determine the opportunity of such measures and their exact content depending on their national laws and the obstacle in question.

The CSDDD in turn does address this issue in two distinct ways. First, supervisory authorities have the power to carry out investigations and can require companies to provide information (Article 25.1). The extent to which this information is then shared publicly or more specifically to victims remains largely uncertain and therefore will depend on supervisory authorities' practices and national law. The CSDDD's enforcement model in this respect is largely inspired by the powers of the BAFA, the competent authority under the German Supply Chain Act.[153]

[153] Under Section 17 of the German Supply Chain Act, enterprises are obliged to provide to the competent authority information and surrender documents upon requests. However, it is unclear to what extent this information can then

Second, access to evidence is also mentioned under the provisions relating to civil liability in the CSDDD. Article 29.3(e) requires Member States to ensure that courts can order companies to produce evidence "*when a claim is brought, and a claimant presents a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of their claim for damages and has indicated that additional evidence lies in the control of the company*." The text specifies that national courts must determine whether the disclosure of this company-controlled evidence is necessary and proportionate to support the claim, and in so doing take all necessary measures to protect confidential information.

Comparison between the Updated Draft LBI and the CSDDD:
The Updated Draft LBI and the CSDDD both try to improve access to evidence for victims. The CSDDD's approach on paper seems more restrictive than the general provisions that feature in the Updated Draft LBI, but this is still difficult to determine without evaluating outcomes in practice.

With respect to requests for company-held evidence during civil proceedings, the CSDDD requires many conditions to be met. This approach evidently tries to strike a balance between protecting business-sensitive information for competitive purposes and overcoming difficulties for victims to access corporate information. From a practical perspective, however, it might be challenging for victims to gather all the information required to support this kind of claim without actually having in their possession the corporate information they are seeking to access. It is difficult from the victim's perspective to argue how reasonable or proportionate access to certain sensitive information is, or even to appreciate what constitutes confidential information from the business' perspective. The LBI could play an important complementary role in guiding judges deciding these claims by ensuring victims' needs are given due consideration compared to what currently features in the CSDDD on this matter.

Regardless, it is worth noting that Article 29.3(e) marks an improvement compared to the French Duty of Vigilance Law, which contained no special provisions relating to access to evidence and therefore has only left claimants with the possibility of relying on standard French civil procedure law.

4.3.2. Evidential burdens of proof

The Updated Draft LBI explicitly lists reversal of the burden of proof as an example of measures State Parties can adopt to facilitate the production of evidence under Article 7.4 (d), though this is not a mandatory measure which States have to put in place. Article 8.5 on legal liability nevertheless requires State Parties to ensure "*an appropriate allocation of evidential burdens of proof […] that takes account of differences between parties in terms of access to information and resources*".

Civil society has recurrently campaigned in favour of reversing the burden of proof in the context of business and human rights litigation precisely because it would require companies to prove that they exercised all required due diligence when human rights violations can be evidenced. The argument is that reversing the burden of proof can help address the asymmetry of power between victims, who typically do not have access to internal corporate documentation, and businesses who are best able to document their own decisions. Reversal of the burden of proof can take different forms, at times through the use of strict liability standards, presumptions of control, or partial reversals of the burden of proof.

be shared by other interested persons, such as victims of human rights and environmental harms that fall under the scope of the law.

The CSDDD does not explicitly provide for any strict liability standards contrary to other corporate liability regimes in EU law,[154] nor does it provide special rules on the reversal of the burden of proof in certain situations. Recital 81 explicitly states that the issue of burden of proof remains governed by national law, meaning that Member States may choose to facilitate burdens of proof for victims, but are not required to do so.

To some extent, Article 29.3(e) previously mentioned serves a similar functional purpose of enabling victims to access information when they can reasonably justify that additional evidence could support their claim for damages. However, under that provision the defendant company is only required to share evidence, it does not have to prove that it respected all its obligations. In other words, this provision does not explicitly state which party has the burden to prove a breach of corporate obligations or their fulfilment.

Comparison between the Updated Draft LBI and the CSDDD:

The Updated Draft LBI and the CSDDD both fall short of explicitly mandating the reversal of the burden of proof. We can therefore anticipate that certain jurisdictions may be more favourable to victims than others on this question, and that consistency across Member States in the EU, or State Parties if an instrument like the current Updated Draft were adopted, would be difficult to achieve on this question.

4.4. Support to victims

The cost of legal action is one of the biggest obstacles for victims seeking remedies for human rights violations and environmental harm. The experience with the French Duty of Vigilance Law shows, for example, that lawsuits filed under new human rights due diligence legislation can take many years to proceed through courts, which means that victims and civil society organisations supporting victims' claims need to have access to the necessary financial and technical support needed to sustain litigation for years.[155]

The Updated Draft LBI provides explicit guidance to State Parties on alleviating procedural costs for victims. Article 7.3 (a) mentions the need to provide "*appropriate, adequate, and effective legal aid throughout the legal process*" as an example of policy to promote accessibility to relevant State agencies. Article 7.4 (a) provides further examples of measures relating to financial costs, including waiving court fees in appropriate cases, or granting exceptions to claimants from obligations to pay the costs of proceedings of other parties at the conclusion of proceedings.

The CSDDD does acknowledge the weight that costs of proceedings in civil liability cases can carry for claimants. Article 29.3 (b) requires Member States to ensure that the cost of proceedings is not "*prohibitively expensive*" for claimants but does not otherwise provide more specific guidance.

[154] Strict liability plays an important role in liability for defective products under EU law for example. The EU is also currently revising its product liability regime to accommodate claims linked to artificial intelligence, the proposed Artificial Intelligence Liability Directive includes rebuttable presumptions to facilitate proving a causal link between the damage suffered by a claimant and a high-risk artificial intelligence system, see https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0496.

[155] Financial risks are one of the main barriers in initiating and sustaining litigation against businesses based on human rights claims, see European Union Agency for Fundamental Rights, 'Business and Human Rights – Access to Remedy' (2020) 73–76 <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf>.

The LBI could play an important complementary role here thanks to its more specific guidance on the matter, which provides more concrete examples of useful measures for State Parties to consider in ensuring that access to justice remains affordable for victims.

Procedural costs should also not be solely associated with civil liability claims and access to courts. Article 7.2 of the Updated Draft LBI refers more generally to "*State agencies*" when requiring domestic legal and administrative systems to implement policies to improve accessibility to State agencies for victims seeking an effective remedy. These State agencies naturally include courts, but they must also be understood as including State administrative authorities, such as the supervisory authorities in charge of overseeing corporate compliance with the obligations set out in the CSDDD. Article 26 of the CSDDD does require Member States to put in place "*easily accessible channels*" to enable persons to submit substantiated concerns to supervisory authorities. An interpretation in line with the main State obligations set in the Updated Draft LBI would require ease of access to include the financial component of submitting substantiated concerns. This would include any administrative processing fees, but a more holistic approach might also consider indirect costs such as translation of relevant evidence, potential documentation and travel costs for victims, or the possibility of providing forms of legal aid to victims throughout the administrative enforcement process.

In theory, part of the appeal of administrative oversight is precisely to rely on the staff and resources of administrative authorities, in contrast to relying solely on privately funded strategic lawsuits. In practice it remains to be seen whether practical barriers for victims of human rights harms remain in accessing State administrative authorities.

4.5. Forms of remedy beyond compensation

The Updated Draft LBI guarantees victims an array of remedies such as "*restitution, compensation, rehabilitation, reparation, satisfaction, guarantees of non-repetition, injunction, environmental remediation, and ecological restoration*" (Article 4.2 (c) LBI). This array of remedies is much broader conceptually than simply compensating a victim for the harm they suffered.

The CSDDD logically provides for compensation of damages suffered under Article 29 on civil liability, following a traditional functional understanding of civil liability in Europe, excluding the possibility of punitive damages (Article 29.2). However, the range of remedies offered under the CSDDD is broader than that.

Article 29.3 (c) CSDDD entitles claimants to seek injunctive measures, such as summary proceedings. However, the experience under the French Duty of Vigilance Law has shown courts' reticence to accept claims for injunctive relief, particularly in the context of transnational claims.[156]

[156] For example, the first case filed under the French Duty of Vigilance Law against oil company TotalEnergies regarding an oil and pipeline project in Uganda and Tanzania sought injunctive measures under summary proceedings but ended in a decision of inadmissibility after 3 and half year of litigation. Other cases filed under summary proceedings are still ongoing at the time of writing, though the proceedings have there too been lasting for years. One example exists of successful injunctive proceedings in a case filed by a labour union against the French company La Poste. See Les Amis de la Terre France, 'Total's Tilenga and EACOP Projects: the Paris Civil Court dodges the issue' (28 February 2023) <https://www.amisdelaterre.org/communique-presse/totals-tilenga-eacop-projects-paris-civil-court-dodges-issue/> accessed 2 January 2024; Chloé Baily and others, 'From Rights to Reality, Ensuring a Rights-Holder-Centred Application of the French Duty of Vigilance Law' (ECCHR, CCFD Terre Solidaire, ProDESC 2023) <https://www.ecchr.eu/en/publication/from-rights-to-reality>; Anne Stevignon and Brice Laniyan, 'Devoir de vigilance : les contours de la recevabilité des actions en injonction sont (enfin) fixés' (*Le droit en débats*, 21 June 2024) <https://www.dalloz-actualite.fr/node/devoir-de-vigilance-contours-de-recevabilite-des-actions-en-injonction-sont-enfin-fixes> accessed 13 July 2024; Charlotte Michon, 'Devoir de Vigilance : Mise à l'honneur Des Parties Prenantes Dans La Première Décision de Condamnation d'une Entreprise' (*Dalloz actualité*, 19 December 2023).

It remains to be seen whether the CSDDD provisions which are much more detailed and provide more interpretative guidance to judges might change that situation in the future.

Under Article 12 of the CSDDD, companies are required to provide remediation in cases of actual adverse impacts (see Section 3.1.6 above on Remedy under Corporate obligations).

With respect to administrative liability, Article 25.5 of the CSDDD empowers supervisory authorities to order a company to cease infringements, refrain from repetition of the relevant conduct and provide remediation (paragraph (a)). Supervisory authorities can also impose penalties and adopt interim measures in the event of imminent risk of severe and irreparable harm (paragraphs (b) and (c) respectively). Looking specifically at the kind of remediation supervisory authorities can order companies to provide, it is worth noting that Article 3.1 (t) defines remediation as the "*restoration of the affected person or persons, communities or environment to a situation equivalent or as close as possible to the situation they would have been in had an actual adverse impact not occurred, in proportion to the company's implication in the adverse impact, including by financial or non-financial compensation provided by the company to a person or persons affected by the actual adverse impact and, where applicable, the reimbursement of the costs incurred by public authorities for any necessary remedial measures*". This means that under the administrative enforcement regime, the type of remediation which can be ordered to a company by a supervisory authority encompasses more diverse measures than simply paying financial compensation. Forms of remedy such as restitution, rehabilitation, guarantees of non-repetition, environmental remediation and ecological restoration could fit the definition of remediation provided under the CSDDD, especially given this definition applies not only to affected persons, but also to communities and the environment in a broader sense.

<u>Comparison between the Updated Draft LBI and the CSDDD</u>:

The Updated Draft LBI and the CSDDD both provide a wide array of remedies in cases of violations or adverse impacts respectively that go beyond financial compensation. In the case of the CSDDD, a lot will depend on the actual practices of supervisory authorities when exercising their powers to order companies to comply with the provisions of the CSDDD or issuing penalties.