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Accountability in the EU for corporate human rights and environmental harm: A tale of two systems or non-identical twins?

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Overview

The draft article as it currently reads:

- an outline of overall challenges in regard to accountability and access to remedy for business-related human rights abuse
- explanations of the concepts of risk-based and corporate sustainability due diligence
- key features of accountability and remedy under the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD system and the CSDDD
 - UNGPs and OECD Guidelines: OECD National Contact Points
 - CSDDD: civil liability and national administrative supervisory authorities
- Focus on the CSDDD's proposal for an administrative supervision: the extent to which this will result in two parallel systems of which the NCPs will be the other, the potential drawbacks of such a system for accountability and remedy for victims; and how complementarity might be attained
- conclusion draws up main points and perspectives (currently arguing that: integration and complementarity between the two types of institutions in individual EU Member States (NCPs and admin supervision) holds potential for advancing the implementation of due diligence and the situation of victims in regard to accountability and access to remedy.

Thoughts after submission of draft: shifting focus from victims to corporations (currently under-researched)

Discuss accountability implications for business of the dual system, including strengths and weaknesses of both for

- legal certainty
- corporate learning on risk-based due diligence
- implementation of risk-based due diligence (a proactive rather than re-active approach; in line with the do-no-harm aim of the UNGPs)
- social license to operate and wider societal implications of (in)adequate risk-based due diligence

The problem (1)

Access to remedy for victims of business-related human rights abuse: well recognised problem

Distinction: procedural vs substantive remedy

also recognised by UN Guiding Principles on Business & Human Rights (UNGPs, 2011) and UN 'Protect, Respect and Remedy' Framework (2008)

Access to procedural remedy >< delivery of substantive remedy

Underlying causes:

Access to procedural remedy for rights-holders/victims of business-related human rights abuse in companies' host countries:

limitations due to the jurisdictional limits of courts in companies' home states

Access to procedural remedy for rights-holders in companies' host and home countries:

significance of resources:

- economic (to pay court fees),
- time,
- loss of income when pursuing case/damages due to frequent distance between location and court

The problem (2)

Substantive remedy: assumes access to procedural remedy, but actual delivery depends on the outcome of the procedure => a variety of **resources** needed

- legal knowledge: applicable law; case law; experience in presenting and arguing a case at court, etc.
- finances: resources to cover court fee and fees of legal counsel; to be absent from work and still provide for family; child care, ...
- Legal counsel expertise: market based good, with price determined by market

=> risk of power disparity between the parties

A solution so far: OECD NCPs

UNGPs: refer to OECD NCPs as key remedy mechanism for (risk of)/(allegation of) harm related to transnational business operations

OECD Guidelines for Multinational Enterprises: National Contact Points = state-based non-judicial remedy mechanisms (2000+)

NCP charge:

- promotion of OECD GL
- handling grievances, including through the provision of good offices

State-based => considerable diversity across NCPs (the UK one is among the stronger ones, along with NL, Norway, DK)

Criticism of acceptance rates and outcomes of NCP grievance handling (mainly from CSOs; academics less skeptical)

[In many cases, NCPs do actually deliver substantive remedy within the broad range recognised by the UNGPs, in particular based on **good offices and transnational powers**]

=> strengthening victims' access to remedy = part of aim underlying draft CSDDD

Additional solution through the CSDDDD?

Corporate Sustainability Due Diligence Directive (CSDDDD) – proposed by the EU Commission 2022

Hard law following earlier international soft law:

UNGP: human rights DD (recommendation)

OECD Guidelines for Multinational Enterprises: 1976; 2011: Risk-based DD ← UNGP (applied across GL issues)

CSDDDD Aims to advance responsible business conduct in value chains and corporate accountability through:

- Mandatory risk-based due diligence for human rights and environment (requiring companies to have specific policies and risk & impact management processes in place)
 - Covering companies own operations, their subsidiaries and upstream business partners
- monitoring and administrative enforcement by Member States' supervisory agencies
- Civil liability for victims (assuming access to courts in EU Member States)

Scope: Large EU (ca. 14.000) and non-EU companies (ca. 4.000) must undertake HREDD throughout their global operations provided they meet specific benchmarks (Number of employees & annual net turnover in the EU / worldwide)

Cascading ambitions/assumption (DD will permeate global value chains, including SMEs in the EU)

But: all businesses not currently covered by the CSDDDD will be subject to the OECD NCPs => a dual system

But another problem for victims to obtain remedy

Civil liability

- CSDDD: absence of distinction between procedural and substantive aspect of remedy
 - civil case: based on the arguments of the parties
- => imbalance of resources (victims >< companies)
- => risk of imbalances that the court cannot do much to address

>< criminal case: judge has higher degree of responsibility and leeway to ensure balance between parties (equality of arms thinking/analogy)

=> Key question: risk that civil liability under the CSDDD may provide formal access to remedy only in the form of procedural remedy, but at risk of determination that no substantive remedy

=> risk that victims will not, after all, obtain improved access to (substantive) remedy through CSDDD (and perhaps the opposite – a slight due to rejection of case/claim based on inadequate litigation powers/resources)

=> implications for companies? Winning in court >< societal perception and construction of 'victory' or exploitative practices that do not take risk-based due diligence seriously (e.g., French Loi Vigilance)

NCP potential under CSDDD (administrative supervision)

CSDDD: relative silence on OECD NCPs implicitly recognises NCP's (my reading)

- (legislative history:) underscores benefits of OECD system; benefits of complementarity
 - EU as organisation and legal system >< OECD [=> CSDDD silent]
 - administrative supervision: except for administrative sanctions, many tasks resemble those of NCPs
 - but:
 - national administrative bodies (may) lack legitimacy when exploring allegations in foreign jurisdictions
 - Directive => uniformity not ensured => risk of forum/jurisdiction shopping (for companies)
 - CSDDD reach: many companies will not be covered => NCP system will still co-exist
- => lack of legal certainty for companies (>< claim spurring CSDDD drafting process)

CSDDD recognises that administrative supervision may be charged on more than one national body

=> in principle, NCPs could assume roles not involving sanctioning powers

CSDDD Implementation => legislative steps required in EU Member States

=> opportunity to also introduce other legislative changes, e.g. to strengthen OECD NCPs (statutory basis with expanded power; resources/national budget; qualifications ; procedures; etc)

NCP potential under CSDDD: legal certainty?

Potential options (partly complementary):

- NCP may examine case (no fee!) Expertise! (e.g. antropologist, local knowledge etc – which admin agency may lack)
- NCP's: extraterritorial powers (that national authorities lack)
- NCPs: coordination, built-up expertise and institutional memory
- Mediation, ADR: preserving relationships that still matter to the parties
- Better suited to some types and severity of business-related harm than others

Implications for companies of the dual system?

Weaknesses for victims' substantive remedy => the NCP system may still have its benefits for them, also at the pre-litigation stage

And: NCPs will still be the paramount remedy mechanism available for harm related to many types of business, and beyond human rights, the environment (and climate)

EU national supervisory authorities: to build up capacity (and cannot just assume experts from NCPs as they have their own tasks)

How to understand 'legal certainty'?

- statutory requirement => compliance, and the 'get on with doing business'
 - societal expectations, social license to operate: risk-based due diligence as ongoing management process
- => in corporate sustainability, 'legal certainty' is not just clear compliance obligation, but broader guidance (pro-active management processes)

Summing up

CSDDD ambitions to advance corporate sustainability due diligence + enforcement (administrative, liability)

NCPs still in existence and be *the* remedy mechanism

=> A dual system will be a fact

=> how to make the most of it, and for whom?

Victims: weaknesses and challenges fairly well established

Companies: under-debated

Distinction: Those covered by the CSDDD >< those not covered directly by the CSDDD

Differences in legal situation under CSDDD and NCPs in regard to remedy, case handling, outcomes

=> Need to pay attention to unintended legal certainty sideeffects of CSDDD administrative supervisory and monitoring set-up

Topic exceeds conventional business law – but so does corporate sustainability due diligence in its origin

Thanks for your attention!

Comments welcome:

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