



Brief Comments on

***The Brussels Effect and the Extraterritoriality  
of Delaware Corporate Law***

by William J. Moon

**UCL – ECGI Biennial Law and Ethics Symposium**

10 November 2023

# Initial comments

- An excellent and thought-provoking paper on the **reach** of the EU's Directive on Corporate Sustainability Due Diligence but also of Delaware's Corporate Law
- Important insights on how **extraterritoriality** is evolving – all the more relevant in a context of growing fragmentation and multipolarity
- A relevant contribution regarding **what the Brussels Effect might** (and might not) **entail**
- (And very much looking forward to the next article on **extraterritorial corporate governance**)

# Some suggestions/questions (1)

- References to *transplanting international law norms into the corporate boardrooms of non-European corporations* and *backdoor implementation of international law*.
  - Section III suggests PIL → Art. 3 and Annex I to the CSDD
  - But CSDD – and CSRD, SFDR, NFRD – will arguably impact even more of/through (a) PIL (b) SSBs and (c) the Brussels Effect

# Some suggestions/questions (1)

- For PIL – CSDD Recitals:
  - (25) In order to achieve a meaningful contribution to the sustainability transition, due diligence under this Directive should be carried out with respect to adverse human rights impact on protected persons resulting from the violation of one of the rights and prohibitions as enshrined in the international conventions as listed in the Annex to this Directive. **In order to ensure a comprehensive coverage of human rights, a violation of a prohibition or right not specifically listed in that Annex which directly impairs a legal interest protected in those conventions should also form part of the adverse human rights impact covered by this Directive**, provided that the company concerned could have reasonably established the risk of such impairment and any appropriate measures to be taken in order to comply with the due diligence obligations under this Directive, taking into account all relevant circumstances of their operations, such as the sector and operational context. (...)

# Some suggestions/questions (1)

- **SSBs** – *e.g.*, FSB/BCBS/IOSCO/IAIS/ISSB
- **“Traditional” Brussels Effect in EU Law** – *e.g.*, GDPR
- Arguably produce even more “violent” transplants via backdoors.
- Is the CSDD fundamentally different from other types of unilateral action (or backdoors of extraterritoriality)?
- Any parallels in case law from other statutes with extraterritorial effects – *e.g.* anti-corruption?

# Some suggestions/questions (2)

- The “Mission Critical” Jurisprudence
- Highlight that *the Directive does not technically consider any given firm’s proportionate reliance on Europe for its revenue* – may have to have a reasonably high nexus to any given firm’s long-term success
- So, likelihood of high nexus = higher likelihood of “mission critical”?
- If that’s the case, would that affect the ***other limiting principles*** – i.e., those related to the ***foreign corporate subsidiary***

# Some suggestions/questions (3)

- **Enriques/Gatti (2022)**
  - *The (...) parent must have safeguards in place for purposes of the Proposed Directive also as to the ways it conducts its own business so long as its business is part of the value chain of the CSDD Subsidiary*
- A similar point here: some of the limitations you are discussing (evidence, rights to challenge the decision-making of subsidiaries) ***seem to be in relation to a failure by a CSDD Subsidiary*** to comply with the Proposed Directive that would reverberate upstream
- Is the scenario for the parent's obligations any different?

# Some suggestions/questions (4)

- Very relevant practical limitations in Delaware regarding ***thresholds*** (such as bad faith on the part of directors) and ***evidence*** (due to limitations on the right of discovery)
- And potentially important practical limitations in the EU due to the different context of ***shareholder litigation/thresholds*** and difficulties arising from ***corporate groups*** and/or ***different ownership profiles***
- Practical implementation of the CSDD will be one of the key challenges, especially with arbitrage due to it being entity-based
- Could we see a ***Delaware Effect?***





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