Council of the European Union
General Secretariat

Brussels, 14 October 2024

WK 12842/2024 INIT

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NOTE

From:	European Commission
To:	Working Party on Human Rights
Subject:	UN Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises ('LBI') legal analysis of the current draft LBI (updated July 2023) against the existing EU acquis

Please find attached a non-paper, containing a legal analysis of the draft Legally Binding Instrument (LBI) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, against the existing EU acquis.

This document has been prepared by the Commission services at the request of the Member States, for the purpose of preparing the EU position at the 10th negotiation session on the draft LBI in Geneva on 16-20 December 2024.

UN LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES ('LBI') LEGAL ANALYSIS OF THE CURRENT DRAFT LBI (UPDATED JULY 2023) AGAINST THE EXISTING EU ACQUIS

This document has been prepared by the Commission services at the request of the Member States, for the purpose of preparing the tenth negotiation session on the draft LBI in Geneva on 16-20 December 2024. It does not in any way reflect a position of the College or the EU.

Background

In 2014, the UN Human Rights Council adopted Resolution 26/9 by which it decided "to establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises." Since then, the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIWG) has sought to elaborate such a legally binding instrument (LBI), with a 'zero draft' circulated in 2018 and further, updated drafts circulated in subsequent years. The proposed instrument would establish, in particular, (i) mandatory international human rights due diligence rules for businesses as well as (ii) rules on legal accountability aimed at establishing legal liability of businesses for human rights violations and ensuring effective access to justice for victims. On 25-30 October 2023, the OEIWG held its ninth session, with around 30 active State participants. In preparation for that session, an updated draft of the LBI was circulated ('draft LBI').

So far, while the engagement of the EU (represented by the EU delegation to the UN) has been constructive, it has not formally participated in the negotiations, highlighting ongoing legislative procedures covering human rights due diligence (namely, the CSDD Directive) and products made with forced labour. At the ninth negotiation session, the EU made a statement[1] signalling that the adoption of the CSDDD could provide a basis for a future (formal) engagement. On 25 July 2024, the CSDDD entered into force.

This document provides a legal analysis by the Commission services and the EEAS of the key provisions of the draft LBI against the EU acquis, in particular the CSDD Directive. This includes an outline of the likely implications of the LBI.

[1] See EXCO note for the meeting on 20 September 2023.

Legal analysis of the draft LBI against the EU acquis

Definitions – Article 1

Definition of human rights abuse/adverse human rights impact

While the draft LBI does not contain a definition of human rights, its scope provision (Article 3(3)) provides that the LBI shall cover 'all **internationally recognized human rights** and fundamental freedoms' binding on the State Parties of the LBI.[2] In this regard, the LBI's Preamble specifically recalls the 'nine core international human rights treaties adopted by the United Nations'[3] and the 'eight fundamental conventions adopted by the International Labour Organization'[4], 'other relevant international human rights treaties and conventions adopted by the United Nations and by the International Labour Organization' (PP2) as well as the Universal Declaration of Human Rights and 'other internationally agreed human rights Declarations'[5] (PP3). This suggests that internationally recognized human rights are understood as all those enshrined in existing international treaties and declarations, in particular those agreed within the United Nations ('UN') and International Labour Organization ('ILO'), although this is not fully clear.

On this basis, the LBI defines 'adverse human rights impacts' as harm which corresponds to a **reduction in, or removal of, a person's ability to enjoy** an internationally recognized human right, and 'human rights abuse' as any **act or omission** that takes place **in connection with business activities** (itself a defined term) and results in such an impact. The latter is a core concept used throughout the LBI text.

As the analysis in the following sections shows, large parts of the LBI commitments are already covered by the recently adopted CSDD Directive. This Directive defines 'adverse human rights impact' as an impact on persons resulting from **abuse** of either the human rights specifically listed in Part I, Section 1, of the Annex (insofar as those human rights are enshrined in the international instruments listed in Section 2), or of other human rights enshrined in one of the human rights instruments listed in Part I, Section 2, of the Annex (under certain conditions, as

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[2] There is an inconsistency in the draft LBI in that the definition of 'adverse human rights impact' only refers to harm for an 'internationally recognized human right', without reference to 'fundamental freedoms'. The UN Guiding Principles on Business and Human Rights (UNGP) refer to 'internationally recognized human rights' but not to 'fundamental freedoms'.

[3] International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; International Covenant on Civil and Political Rights of 16 December 1966; International Covenant on Economic, Social and Cultural Rights of 16 December 1966; Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; Convention on the Rights of the Child of 20 November 1989; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990; International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006; Convention on the Rights of Persons with Disabilities of 13 December 2006.

[4] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111). This leaves out the two latest ILO conventions that have been declared as fundamental (namely, the Occupational Safety and Health Convention, 1981 (No. 155) and the Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)).

[5] See Preamble, (PP2) and (PP3). See also (PP15) (on gender-related international instruments) and (PP18) (noting the ILO Declaration on Fundamental Principles and Rights at Work).

set out in Article 3(c)(ii) of the Directive). The CSDD Directive includes internationally recognized human rights that have been ratified by all Member States, so its approach is largely the same as the LBI. In comparison, it defines its scope through a list of human rights instruments that only includes UN and ILO conventions, not declarations. While the relevant human rights are thus not all explicitly listed, the Directive is nevertheless based on a **closed catalogue of human rights as well as human rights conventions** that have been ratified by all EU Member States. The CSDD Directive also includes, among the covered human rights abuses, any environmental degradation that impacts persons (e.g., by impairing the natural bases for the production of food, or by harming a person's health or normal use of land), or that substantially affects ecosystem services contributing to human wellbeing. This latter concept is similar to the 'right to a healthy environment' as an emerging international human right (see also recital 35 of the Directive). Recital 32 of the Directive clarifies that the term 'abuse' shall be **interpreted in line with international human rights law**. According to Articles 10(1), 11(1) of the Directive, adverse human rights impacts are covered by the core due diligence obligations if they are caused or jointly caused by the company in scope, 'through **acts or omissions**'.

Albeit unlikely, if the LBI's reference to internationally recognized human rights 'binding on the State Parties' would mean that only the abuse of **rights in instruments ratified by all State Parties** would qualify as 'adverse human rights impact', this would seriously limit the scope of application of the LBI. It would also differ from the approach taken in the CSDD Directive, according to which a company's due diligence duties do not depend on the country in which the adverse impact might arise, or has arisen, as long as it concerns a human right that is covered by the list of human rights instruments included in its Annex. In particular, it does not matter whether such country has, or has not, (yet) ratified the respective human rights instrument. The difference is likely owed to the fact that trying to agree on a minimum catalogue of human rights instruments would be very difficult – or such a catalogue would be very limited – as even like-minded countries might take very different approaches (e.g., the US has not ratified the International Covenant of Economic, Social and Cultural Rights or the Convention on the Rights of the Child).

Conversely, if this reference means that the scope of application has to be determined for each State Party individually, depending on the international law commitments it has made, this could result in a very low level of protection in some States (and potentially a significant variety in the level of protection across State parties). Moreover, it would need to be clarified what this would mean for companies. If companies – for their own operations and across their value chains – would only have to protect human rights enshrined in instruments that are binding in their **'home' State**, this could result in a very uneven level of protection.

A third interpretation would be that both the human rights binding on the 'home' State of the company and any additional human rights that are protected under the local law of the **host State where** its **subsidiary or business partner operates** are meant to determine the extent of the company's responsibility. Since no country would be required to ensure the respect for human rights recognized in instruments that it did not ratify, this should not create conflicts with international law. Also, although the CSDD Directive does not require checking the local law of the host State, it is unlikely that in third countries the level of protection of internationally recognized human rights would be (significantly) higher compared to the list included in the Annex to the CSDD Directive. This being said, under its due diligence duty the company would be required to check whether its business partners respect the internationally recognized human

rights protected only by the law of the State in which it operates, which could be a complex undertaking in case of value chains extending into multiple jurisdictions.

While the references to 'environmental remediation' and 'ecological restoration' in Article 4(2)(c) of the draft LBI (as well as to 'groups and organizations that promote and defend human rights and the environment' in Article 5(2) of the draft LBI) suggest that the notion of human rights also covers those that are environment-related, including perhaps the emerging 'right to a healthy environment', this point is for the moment not expressly clarified in the text (including the Preamble).

While subject to interpretation, the LBI's approach to cover 'all internationally recognized human rights and fundamental freedoms binding on the State Parties of the LBI' is similar to the approach of the CSDD Directive (which covers rights and conventions binding on all Member States), yet such approach in the LBI may lead to a more uneven protection globally.

The CSDD Directive expressely covers environment-related human rights while the draft LBI is rather unclear at this stage.

Other definitions

As regards other definitions, such as 'business activities', 'business relationship', 'human rights due diligence', 'remedy', or 'relevant State agencies', the LBI broadly covers aspects that are also covered by the CSDD Directive, despite some differences.

The definition of '**business activities**' is unclear as regards 'other activit[ies]' (i.e., other than economic activities), in particular whether this is meant to refer to not-for-profit activities or something else. It includes activities that typically happen downstream, such as 'commercialization' and 'marketing'. This aligns with the CSDD Directive which, among others, covers 'distribution practices' (Articles 10(2)(d), 11(3)(e)) and activities 'related to' the distribution of products (Article 3(g)(ii)). Compared to the definition of the term 'company' in the CSDD Directive, the LBI also covers natural persons (and any legal person, not limited to LLCs and partnerships).[6] As regards the definition of '**business relationship**', while the concepts under the LBI and the CSDD Directive align with regard to the coverage of the value chain (including the CSDDD concept of 'business partner' as 'an entity', understood broadly), the LBI approach is both potentially broader ('any relationship' compared to the notion of 'business partner' in the CSDD Directive, Article 3(f)) and potentially narrower due to the apparent discretion of each State Party to define the concept of business relationship ('as provided under the domestic law of the State').

While the terminology differs slightly (in particular as regards the 'mitigation' of impacts, which under the LBI appears to also cover measures to address/remedy actual impacts), there is broad alignment between the concept of '**human rights due diligence**' in the LBI and the core due diligence duties as set out in the CSDD Directive (Articles 7 to 16).[7] While certain due diligence aspects under the CSDDD such as company level grievance mechanisms and

[6] It should also be noted that in some places (e.g., Articles 3(2), 6), the draft LBI refers to the notion of 'business enterprise', which however is not a defined term. See also the preliminary title of the LBI and the Preamble (e.g., (PP7)). To address this, these passages should either be aligned with the defined terms in Article 1 or a further definition of 'business enterprise' should be added.

[7] Likewise, the approach aligns with the due diligence steps envisaged under the voluntary international frameworks, in particular the UNGPs.

stakeholder engagement are not specifically mentioned in the definition (Article 1(8) of the draft LBI), Article 6(4)(d) covers the element of stakeholder engagement. In any event, the draft LBI makes clear that it is not meant to affect more protective national or regional regimes (see Article 14(3)).

At the same time, it is unclear which type of 'involvement' (see Article 1(8)(a)) triggers a company's due diligence duty when it comes to impacts in/through business relationships, in particular whether this concept is broadly aligned with the notion of (joint) causality used in EU/Member States law. Finally, when it comes to the LBI notion of '**effective remedy**', it goes beyond what is covered under the CSDD Directive (see Articles 3(1)(t), 12, 29(2),(3)(c): injunctions, remediation, compensation) as it also covers for instance apologies and 'guarantees of non-repetition' that by themselves may not result in effective restoration of the *status quo ante* (and thus appear to be contrary to the definition of 'remedy' in the draft LBI itself). It is also unclear what Article 1(1) means when it states that '[t]he **term 'victim'[8] may also include** the immediate family members or dependents of the direct victim' (in particular, whether the *LBI itself prescribes* a broad definition (in which case it it is not clear whether this only applies where such family members or dependents have themselves suffered a human rights abuse), or whether it means that *State Parties* would have *discretion* ('may ... include') to expand the notion of 'victim' to such family members of dependents.

While the approach is very similar, some technical differences compared to CSDDD definitions remain.

Scope – Article 3

The scope provision of the latest LBI draft (Article 3(1)) has been aligned with the long standing ask by countries of the 'Global North' (including EU Member States) for the LBI to cover all business activities instead of only business activities of a transnational character (i.e., of multinational enterprises). While the draft LBI, unlike the CSDD Directive, does not include any thresholds to determine the personal scope of application, for instance in terms of turnover or employee numbers, the text allows State Parties to limit the discharge of the prevention obligations (including the due diligence duty) based on the companies' size, sector, operational context and the severity of impacts. This provides a certain flexibility to State Parties, even though it is not fully clear whether this also allows for the exemption of companies of a certain size from the scope of application of the LBI (or at least the due diligence duties).[9]

It is likely that some third countries will continue to push for limiting the scope of application to MNEs only, which would not be in line with the CSDD Directive. Furthermore, the CSDD Directive sets out various safeguards which aim at protecting SME business relationships from undue burden when they are indirectly impacted by the due diligence measures of the large

[8] The term 'victim' is in itself not perfectly suitable since the draft LBI also addresses situations *before* a determination regarding a human rights abuse (e.g. a court ruling) has been made. A more appropriate term might be 'rightsholder'.

[9] The Preamble (PP12) raises doubts in this regard by underlining that business enterprises 'regardless of their size' have the responsibility to prevent human rights abuses or mitigate human rights risks linked to their operations, products or services by their business relationships.

company in scope. The LBI does not include such safeguards that would protect SMEs from the indirect (and possibly direct[10]) impacts of due diligence.

The approaches of the LBI and the CSDD Directive are very similar, however the LBI allows State Parties to also differentiate the obligations based on sector and operational context, which is different.

Furthermore, the LBI does not contain provisions aiming to protect SMEs from (in)direct impacts of discharging the due diligence obligations by large companies.

Victims' Rights – Articles 4 and 5

Articles 4 and 5 are focused on protecting victims of human rights abuses in the context of business activities and related proceedings (such as remedial actions). According to Article 5(3), (4), State Parties shall **investigate human rights abuses** effectively (promptly, thoroughly) and impartially, and where appropriate **take action** against the perpetrator, including interim measures in case of urgency (*ex officio* or on request of the victim). They shall also guarantee a **safe environment for human rights defenders**, in particular protecting them against intimidation, harassment or reprisals (Article 5(2)).

In addition, Article 4 stipulates specific **rights of victims**.[11] In particular, they shall be guaranteed:

- **access to information** 'provided in relevant languages' and 'accessible formats' (including for children and people with disabilities) held by relevant State agencies or business enterprises (Article 4(2)(f))[12];
- effective (prompt, non-discriminatory, gender-sensitive) **access to justice and remedies**, including the right to submit claims through a representative or class action 'in appropriate cases' and the right to individual or collective reparation (Article 4(2)(c), (d)) with full participation in reparation processes (Article 4(2)(g));
- **access to legal aid** (Article 4(2)(f)); and
- **protection from** unlawful interference with their privacy, from **intimidation and reprisals**, and from **'re-victimization'** in the course of proceedings (Article 4(2)(e)).

There is a certain overlap between Articles 4 and 5 and these two articles could easily be merged and streamlined. Likewise, there is a certain overlap with Articles 7 and 8.

Overview

The EU *acquis* includes several elements that are relevant in this context:

[10] Third countries may use the flexibility in the current drafting of the LBI in their national legislation to cover SMEs and large companies that do not fall under the scope of the CSDD Directive. If EU SMEs and large companies outside the CSDDD scope would engage in business activities in those jurisdictions, they would have to comply with additional obligations that may limit their ability to scale up in those countries. This is a possiblity that could even materialise in case the EU/Member States do not engage and ratify the LBI.

[11] The article does not specify whether these are rights against the State or business enterprises, although it appears that it is the former.

[12] See also the corresponding provision in Article 7(3)(b) of the draft LBI in relation to State agencies.

When it comes to business-related human rights abuses that qualify as crimes under national law, the Victims' Rights Directive (2012/29/EU)[13] applies. It establishes a set of procedural rights for victims of crimes, including the right to be heard, the right to legal aid in accordance with national law and the right to a decision on compensation by the offender in the course of criminal proceedings. The legislative process for a revision of the Victims' Rights Directive([14]), based on the Commission's proposal of 12 July 2023, is ongoing and aims to further strengthen the rights of victims of crime in the EU.

In addition, EU law regulates related aspects such as public access rights with regard to environmental information (Directive 2003/4/EC) and documents held by EU institutions (Regulation 1049/2001), safeguards for the right to data protection (GDPR, LED), or rules on representative actions for the protection of the collective interests of consumers (Directive 2020/1828, see below). As regards safeguards against intimidation and reprisals, the EU Anti-SLAPP Directive[15] protects persons engaged in public participation against groundless or exaggerated court proceedings initiated with a view to intimidate the defendant and to drain his or her resources. The CSDD Directive also includes rules aimed at protecting the identity of the victim, thereby lowering the risk of intimidation or reprisals (see below, Article 7).

As for the law of the Member States, in line with guarantees enshrined in national constitutions, the EU Charter of Fundamental Rights ('Charter', in particular Article 47) and the European Convention on Human Rights ('ECHR', Articles 6(1), 13 and Protocol No. 12), it ensures various safeguards for victims in both criminal and civil proceedings. In the future, where not already the case, Member States will also have to ensure access to justice safeguards under the CSDD Directive in civil liability actions brought against companies intentionally or negligently failing to conduct due diligence, specifically related to the cost of proceedings, injunctions, the disclosure of evidence, and the possibility for the representation of the victim by certain entities such as NGOs.

Specific aspects

While the **catalogue of victims' rights** provided in Articles 4 and 5 of the draft LBI is detailed (respect of human dignity, personal integrity, freedom of opinion, right to access to justice, protection from intimidation and reprisals during proceedings, access to information, right to precautionary measures), it reflects the basic values and safeguards enshrined in the ECHR, the EU *acquis* (including the Charter and the EU Strategy on victims' rights (2020-2025)[16]) and national law. Neither should these guarantees create conflicts with EU/national laws, given the overall high standards of human rights protection, guarantees for access to justice and procedural safeguards ensured in the Member States. The principles included in Articles 4 and 5 are rather targeted towards countries where victims of human rights abuses in the context of business activities, including human rights defenders, are prevented from access to justice, intimidated or even prosecuted for bringing legal action against the perpetrator(s).

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[13] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

[14] COM(2023) 424 final, 12.7.2023.

[15] Directive (EU) 2024/1069 of the European Parliament and of the Council of 11 April 2024 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ('Strategic lawsuits against public participation').

[16] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM/2020/258 final, EU Strategy on victims' rights (2020-2025).

Neither do these articles contradict the safeguards in the CSDD Directive, which provides various procedural guarantees for individuals to facilitate their compensation claims against companies. In fact, some elements set out in the draft LBI are explicitly covered by the CSDDD (e.g. stakeholder participation in due diligence, environmental remediation and ecological restoration in case of adverse impacts on environment-related human rights, non-judicial grievance mechanisms, protection of complainants, including their privacy/confidentiality, access to justice, including through representative action, reasonable statute of limitations, power of courts to order the disclosure of evidence from companies, effective remedies such as restitution, compensation, injunctions, etc.).

This being said, compared to the EU acquis, the requirement in the draft LBI on ensuring **access to information 'provided in relevant languages' and 'accessible formats'** (including for children and people with disabilities) held by relevant State agencies or business enterprises (Article 4(2)(f)) appears to be far-reaching as currently formulated and it lacks reasonable limitations to ensure proportionality, in particular where access requests would be directed against companies (e.g. with a view to protect certain type of confidential information). Under the CSDD Directive, companies may be required to disclose evidence under their control when this is necessary and proportionate to support the victim's (plausible) claim in court.

Questions are also raised by the reference in the draft LBI to possible '**class actions**'. Although that concept is not defined in the LBI – and the reference to a right of victims to submit claims '*including by* a representative *or* through class action' is not fully clear – if meant as a possibility to act in a collective manner within a single legal procedure, or to be represented in a legal action seeking a collective remedy for a group of victims, the current wording would go beyond EU law. Although the CSDD Directive allows victims to appoint a representative in their civil liability claims – as it provides that any alleged injured party may authorise a trade union, NGO or national human rights institution to bring a legal action to enforce his/her rights –, it does neither require nor ensure that other victims of the same breach could automatically or via an 'opt-in procedure' join that legal action . In EU law, legal actions protecting victims' interests in a collective way are referred to under the terms of 'collective redress' (as in the 2013 Recommendation on common principles for injunctive and compensatory collective redress mechanisms[17]) and 'representative actions' (as in the Representative Action Directive[18]). The latter applies to infringements by traders of certain EU laws (as enumerated in Annex I to the Directive) that harm or may harm the collective interests of consumers. EU Member States may decide to apply the mechanism of representative action as set out in the Directive in other areas of law, for the protection of all interests, including a victim's interest not to be harmed by traders (or representatives of public power) in his or her human rights. Currently (July 2024), out of 21 Member States that have transposed the Directive, only few (such as The Netherlands and Portugal) allow for collective actions in all areas of law.

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[17] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013, p. 60–65. In this Recommendation, the Commission acknowledged that **collective redress**, meeting appropriate standards, could be an effective tool for the enforcement of rights granted under EU law and facilitate access to justice. The recommendation applies horizontally to all relevant policy fields.

[18] Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC.

Therefore, while the guarantee to act in a collective manner is also relevant in the context of human rights abuses[19], a general requirement to allow victims of such abuses to act through collective actions at this point does not exist in most EU Member States. Neither is it likely that a generalized system of collective actions for human rights claims would be created at EU level in the near future, although it could perhaps be considered when the Representative Action Directive ('RAD') will be evaluated, at the earliest in 2028.

As regards the question of **legal aid**, this is not an absolute right available to all victims in the EU. That should not create a problem if the text in Article 4.2.(f) of the draft LBI is interpreted, in line with Article 7(3)(a)[20], as a concept which (only) applies to those in need of legal aid (see also Article 47(3) of the Charter and Article 6(3)(c) of the ECHR for criminal proceedings), but this would require further clarification.

The LBI text lists, among victims' rights, certain rights that should be granted to all persons, including the **victim's family members** (general human rights protection, privacy protections, protection against intimidation during proceedings, etc.), as well as rights to access to justice and compensation that will typically be limited to the direct victim. In EU law, a broader understanding (only) applies for criminal offences under the Victims' Rights Directive, where a victim is defined both as a natural person who has suffered harm that was directly caused by a criminal offence and the family member of a person whose death was directly caused by a criminal offence and who has suffered harm as a result of such death. In any event, human rights protections under EU/national law are afforded to anybody, be it the direct victim, his/her family members or representative(s).

EU law and the draft LBI's ambition as regards the protection of victims rights and human rights defenders are similar and that ambition appears higher than the protections in many third countries.

EU law appears to be more limited on class actions than the draft LBI.

Prevention (including due diligence) – Article 6

The updated draft of the LBI includes a requirement for States to adopt legislative, regulatory and other measures to ensure respect by business enterprises for human rights, prevent their involvement in human rights abuse and ensure that businesses carry out human rights due diligence. However, the elements and steps of the due diligence process are no longer regulated in this provision, as they have instead been incorporated into the new definition of 'human rights due diligence' in Article 1(8) (see above).

Article 6 requires State Parties:

- to **'regulate effectively'** the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control, including those that undertake activities

[19] The 2020 Report of European Union Agency for Fundamental Rights called on the EU and the Member States to make it possible and simpler for individuals to use **collective redress or representative action** by extending laws on collective actions to cover business-related human rights abuse, Business and human rights – access to remedy (europa.eu).

[20] According to that provision, State Parties shall ensure that the procedures (and facilities) for access to justice/remedies are 'responsive to the needs of the people whose use they are intended', including by providing 'appropriate, adequate, and effective legal aid'.

of a transnational character, and to **prevent** their **involvement in human rights abuse** (Article 6(1), (2)(b));

- to adopt appropriate measures, including legally enforceable requirements, to **ensure** that business enterprises carry out **human rights due diligence** (Article 6(2)(c), (4)), taking into account the needs of vulnerable persons and differentiated risks in terms of gender and age (Article 6(4)(b),(c)); this includes **human rights impact assessments** prior and throughout business operations as well as **meaningful stakeholder consultations** (Article 6(4)(a),(d)); where indigenous peoples are concerned, human rights due diligence shall be undertaken in accordance with the standard of free prior and informed consent (Article 6(4)(f));
- to ensure that business enterprises **prevent human rights abuse by third parties that they control, manage or supervise** (including, as appropriate, through the imposition of a legal duty 'in appropriate cases');
- to ensure that **competent authorities** involved in ensuring these measures have the necessary **independence** (Article 6(3)).

As emerges from Article 6(4) of the draft LBI, the obligation of State Parties to 'prevent the involvement of business enterprises in human rights abuse' and to 'ensure respect by business enterprises' for human rights is essentially about company due diligence, even though State Parties are expected to take certain 'supporting or ancillary measures'. The requirement to 'ensure the practice of **human rights due diligence**' (within the meaning of Article 1(8)) – including through legally enforceable duties – has already been enacted by the EU through the CSDD Directive. While the **due diligence obligations in the CSDDD** are, by comparison with the LBI, more precise[21], the core elements in both texts are aligned with each other and the international due diligence framework as set out in the UN Guiding Principles on Business and Human Rights (UNGPs)[22], which are broadly recognised as the global standard and to which the EU and its Member States subscribes. As already mentioned, the CSDDD requires EU Member States to ensure that companies conduct human rights and environmental due diligence by integrating due diligence into all corporate policies and have in place a due diligence policy that is updated annually (Article 7). They must **identify and assess** actual or potential **adverse impacts** in their **own operations**, those of their **subsidiaries**[23] and their **business partners in their value chain(s)** (Article 8).[24] Moreover, companies must take **appropriate measures to prevent** or at least adequately **mitigate** potential adverse impacts, including by seeking

[21] This does not itself create a problem given the explicit recognition in Article 14(3) of the draft LBI that '[n]othing in the present [LBI] shall affect any provisions in the domestic legislation of a State Party or in any regional or international treaty or agreement that is more conducive to the respect, protection, fulfillment and promotion of human rights in the context of business activities and to guaranteeing the access to justice and effective remedy to victims of human rights abuses in the context of business activities, including those of a transnational character.'

[22] As well as the OECD Guidelines for Multinational Enterprises and OECD Due Diligence Guidance for Responsible Business Conduct.

[23] According to Article 3(e) of the CSDD Directive, 'subsidiary' within the meaning of the Directive means a legal person (i) as defined in Araticle 2(10) of Directive 2013/34, or (ii) through which the activity of a controlled undertaking as defined in Article 2(1)(f) of Directive 2004/109 is exercised. According to Article 6(5) of the draft LBI, each State Party shall take necessary measures to ensure that business enterprises take appropriate steps to prevent human rights abuse by third parties where the enterprise controls, manages or supervises the third party, including through the imposition of a legal duty to prevent such abuse in appropriate cases. In contrast, Article 6 of CSDDD envisages the possibility for parent companies falling under its scope to fulfil the due diligence obligations set out in Articles 7 to 11 and Article 22 on behalf of companies which are subsidiaries of those parent companies and fall under the scope of this Directive, if this ensures effective compliance. This is, however, without prejudice to such subsidiaries being subject to the exercise of the powers of supervisory authorities and to their civil liability under the Directive.

[24] This is akin to the 'human rights impact assessments' stipulated in Article 6(4)(a) of the draft LBI.

contractual assurances and verifying compliance (Article 10), and they must **bring to an end** actual adverse human rights and environmental impacts or at least **minimize** their extent, including through remediation (Articles 11, 12). For certain important steps of the due diligence process, such as the identification of adverse impacts, the development of action plans, or remediation, companies must ensure **meaningful stakeholder engagement** by providing them with relevant information and carrying out effective consultations (Article 13). Also, companies must provide for the possibility to submit notifications and complaints in case of legitimate concerns regarding those potential or actual adverse impacts (Article 14). Finally, companies must **periodically assess** the implementation of their due diligence measures (Article 15) and **publicly report** on the overall process (Article 16). Compliance with these obligations will be ensured by **independent supervisory authorities** (Article 24).

According to recital 33 of the CSDD Directive, '[d]epending on the circumstances, companies may need to consider additional standards. For instance, taking account of specific contexts or intersecting factors, including among others, gender, age, race, ethnicity, class, caste, education, migration status, disability, as well as social and economic status, as part of a **gender- and culturally responsive approach to due diligence**, companies should pay special attention to any particular adverse impacts on **individuals who may be at heightened risk** due to marginalisation, vulnerability or other circumstances, individually or as members of certain groupings or communities, including indigenous peoples, as protected under the UN Declaration on the Rights of Indigenous Peoples, including in relation to free, prior and informed consent (FPIC).' While these elements (which align with requirements under the draft LBI) are not part of the operative text of the CSDDD, they inform its interpretation. Also, the operative text includes the protection of certain rights which require consultation and consent (such as the right to land) and provides for a general requirement of meaningful stakeholder engagement.

CSDDD and the draft LBI broadly align, exept for prior informed consent for indigenous people beyond certain rights expressely protected in the CSDDD (e.g. the right to land) and the requirement to conduct stakeholder engagement

Access to Remedy – Article 7

According to Article 7(1) of the draft LBI, State Parties shall provide their 'relevant State agencies' – a defined term that includes **courts**, **public authorities** (both regulatory and enforcement) and State-based **non-judicial mechanisms**, Article 1(10) – with the necessary competence to enable **effective access by victims to justice/remedies**. More specific requirements are set out in Article 7(2) and the corresponding paragraphs 3 to 5. In particular, State Parties shall:

- implement effective policies to **promote** the **accessibility** of its relevant State agencies, including through (i) appropriate **legal aid** (responsive to the needs of victims); (ii) **access** by victims **to** reliable sources of **information** (in relevant languages and accessible formats) as well as **appropriate support** to victims; (iii) addressing imbalances of power and risks of reprisals (Article 7(2)(a), (3));
- **reduce** legal, practical and other relevant **obstacles**, including (to the extent necessary) by (i) **reducing** the **financial burden** on victims (e.g. through financial assistance, waiving of court fees), (ii) **facilitating the production of evidence**, 'when appropriate and as applicable', such as through the reversal of the burden of proof and the 'dynamic

burden of proof', (iii) ensuring the 'fair and timely **disclosure of evidence**', and (iv) providing for the possibility of **group actions** (Article 7(2)(b), (4));
- ensure that relevant State agencies deliver **effective remedies** by adopting, as necessary, measures to (i) ensure that **victims** are **meaningfully consulted** with respect to the design and delivery of remedies, (ii) enable those agencies to **monitor a company's implementation** of remedies (Article 7(2)(c), (5)).

By referring to the 'relevant' State agencies, the draft LBI appears to grant flexibility to State Parties in the implementation of these requirements, namely whether to confer 'competence' (jurisdiction) to courts, public authorities/agencies or non-judical mechanisms, as long as this ensures effective access to justice/remedies.

At EU and Member States level, civil liability regimes, including in the future the national rules transposing the CSDD Directive and national civil procedural law, ensure **effective access to remedies** for victims of human rights abuses. It should be noted, however, that both Article 1(9) (definition of remedy) and Article 7 refer to the restoration of victims of **human rights abuse in general** without explicitly mentioning those harmed due to **insufficient due diligence measures**, be it in a company's own operations or in its value chain(s), as is the case in the CSDDD.

The **CSDD Directive** ensures two types of remedies for a failure by companies in scope to comply with their due diligence duties:

– First, Member States shall ensure that natural (or legal) persons are entitled to submit substantiated concerns, through easily accessible channels[25], to any of the **independent supervisory authorities** which must then prepare a timely assessment of the concerns (using their investigatory powers) and, where appropriate, exercise their enforcement powers under Article 25, including the power to issue injunctions, adopt remediation orders[26] and provide interim relief. Persons raising concerns shall be informed of the result of the assessment and underlying reasons and, where they have a legitimate interest in the matter, shall also have access to a court or other independent and impartial public body competent to review the decision of the supervisory authority (Article 26; see also Article 25(7)). Where a pecuniary penalty (fine) is imposed on the company and it fails to comply with such a decision, the supervisory authority may issue a public statement in this regard ('name and shame', Article 27(3)(b)). The CSDD Directive protects victims from risks of reprisals during the proceedings by providing that, where persons submitting substantiated concerns to the supervisory authority so request, the authority takes the necessary measures for the appropriate protection of the identity of that person and their personal information, disclosure of which would be harmful to that person.

– Second, victims of non-compliance with due diligence duties have a right to full compensation of damages in **court** (Article 29(2)). To ensure the right to an effective remedy, the CSDDD in this context also addresses certain practical and procedural

[25] See also recital 75 of the CSDDD, according to which such a mechanism shall be free of charge or only subject to a fee limited to covering administrative costs.

[26] Among the (procedural) requirements that supervisory authorities may enforce is the duty for companies in scope to consult with stakeholders "when adopting appropriate measures to remediate adverse impacts" (see Article 13(3)(d) in conjunction with Articles 25(1), 26(1) CSDDD).

barriers to justice, *inter alia* by partially harmonising the applicable limitation periods, allowing for certain entities to represent a victim in court, requiring that courts must have the power to order the disclosure of evidence in certain cases and mandating that the costs of proceedings must not be prohibitive (Article 29(3)). Thereby, it also addresses imbalances of power between the company and the victim.

To the extent Article 7 of the draft LBI would also cover the use of **mediation**, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters seeks to facilitate access to alternative dispute resolution ('ADR') mechanisms and to promote the amicable settlement of disputes, by encouraging the use of mediation and by ensuring a sound relationship between mediation and judicial proceedings.[27] Negotiations are ongoing on the review of the Alternative Dispute Resolution Directive to ensure that out-of-court dispute resolution is fit for the digital age. The expectation is that quality ADR mechanisms for cross-border disputes will help boost consumer trust and trader participation in ADR. The proposal aims at covering a wider range of consumer rights, simplifying cross-border ADR, incentivising the use of digital tools to improve consistency whilst safeguarding vulnerable consumers and the Commission providing a user-friendly digital tool to inform consumers of effective redress mechanisms.

While there is therefore broad alignment between the LBI and EU law, differences exist in certain areas:

As already indicated (see above, Article 4), the right granted to victims under the CSDD Directive to resort to representative action does not include the requirement to provide for **representative/group actions**.[28]

As for the specific issue of the **burden of proof**, referred to in Article 7(4)(d) of the draft LBI, it should be noted that, while a reversal of the burden of proof is rather exceptional in civil proceedings, most European legal systems do provide for some degree thereof, for instance in cases related to discrimination or in labour law cases. In EU law, the preamble of Directive 2006/54/EC on equal treatment between men and women emphasizes that 'the adoption of rules on the burden of proof pays significant role in ensuring that the principle of equal treatment can

[27] Among others, the Directive ensures effective quality control mechanisms concerning the provision of mediation services, that mediation takes place in an atmosphere of confidentiality and information given or submissions made by any party during mediation cannot be used against that party in subsequent judicial proceedings if the mediation fails, the enforceability of agreements reached in mediation, and that parties that have recourse to mediation are not be prevented (through prescription rules) from going to court as a result of the time spent on mediation. In 2016, the Commission adopted a report on the application of the Directive (COM(2016)542). It concludes that, overall, the Directive has provided EU-added value by raising awareness amongst national legislators on the advantages of mediation, introducing mediation systems or triggering the extension of existing mediation systems.

[28] Concerning specifically consumer matters, Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers requires Member States to make available a collective redress mechanism by enabling qualified entities designated by Member States to bring representative actions as a claimant party on behalf of a group of consumers. Possible remedies include interim and definitive measures to stop and prohibit a trader's practices (injunctive measures) and redress measures such as a price reduction, contract resolution or compensation (as appropriate and available under EU or national law, depending on the circumstances of the specific case). The Directive applies to representative actions brought against infringements by traders, to the extent such infringements harm or may harm the collective interests of consumers. It applies to domestic and cross-border infringements in different areas of law such as the environment, data protection, tourism, transport or financial services as far as the collective interests of consumers are concerned.

be effectively enforced […] provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts'. The Racial Equality Directive, the Employment Framework Directive, the Pay Transparency Directive and the recast of the Gender Equality Directive require Member States to introduce a shift in the burden of proof in their domestic non-discrimination regulations. In any event, a possible reversal of the burden of proof (or rules on the 'dynamic burden of proof') are only mentioned in Article 7(4)(d) of the draft LBI as examples of the overarching requirement to 'adop[t] measures to facilitate the production of evidence, when appropriate and as applicable' (and only 'to the extent applicable to the State agency in question', see the introductory part of Article 7(4)).

Regarding the **disclosure of evidence**, aside from the aforementioned CSDD Directive (Article 29(3)(e)), EU law provides for only limited harmonised procedural rules on evidence in civil[29] or criminal matters (although it has competence to do so under Article 81(2) (d) TFEU on cooperation in taking evidence, and Article 81(2)(e), (f) on effective access to justice and elimination of obstacles to the proper functioning of civil proceedings), such as in the Anti-SLAPP Directive . Overall, given the rather general wording of the LBI ("adopting measures to facilitate the production of evidence and ensuring fair and timely disclosure of evidence"), it does not appear to conflict with EU law, including the rules of the CSDD Directive.

Finally, according to general rules on access to justice applicable in the EU/Member States, victims in need will have access to **legal aid** under certain conditions (see already above, Article 4). Specifically, Council Directive 2003/8/EC[30] seeks to promote the application of legal aid in cross-border disputes. To this end, the Directive grants rights to persons who lack sufficient resources and entitles them to receive appropriate legal aid where this is necessary to secure effective access to justice. It establishes, inter alia, what type of legal costs should be covered by legal aid and the conditions relating to the financial situation of the applicant and the substance of the dispute. However, the Directive applies only in cross-border disputes which means that the party applying for legal aid must be domiciled or habitually resident in a Member State other than the Member State where the court is sitting. It should also be noted that only natural persons are granted rights by the Directive, not legal persons such as NGOs.

[REQUEST TO MEMBER STATES: please inform the Commission whether/how other aspects such as the waiving of court fees/exceptions for victims to pay the costs of the other party, or the consultation of victims with respect to the design and delivery of remedies, are covered in national law.]

The large majority of provisions of this article are covered by the CSDD Directive.

Some provisions are not fully covered by EU or national law, such as group/class actions, legal aid, and some civil procedural aspects are not harmonized (e.g., consultation of victims).

Legal Liability - Article 8

[29] Regulation (EU) 1206/2001 on the Taking of Evidence deals only with judicial cooperation in this field.

[30] Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ L 26/41 of 31.1.2003.

The draft LBI requires State Parties to establish, as necessary, a "comprehensive and adequate **system of legal liability** of legal and natural persons conducting business activities […] for human rights abuses that may arise from their business activities or relationships, including those of transnational character" (Article 8(1)). Given the scope of the terms 'business activities', 'business relationship' and 'human rights abuse', this includes liability for any act or omission in connection with a company's business activities that results in an adverse human rights impact in the company's **value chain.**

According to Article 8(2), such liability shall be **criminal**[31]**, civil or administrative**, **"as appropriate to the circumstances"** and "[s]ubject to the legal principles of [each] State Party". Consistent with its domestic legal and administrative systems, the type of liability shall be commensurate to the gravity of the human rights abuse and responsive to the remedial needs of victims.

Article 8(3) provides that the liability of legal and natural persons shall be established for conspiring to commit human rights abuses as well as **aiding and abetting**, facilitating and counselling the commission of human rights abuses. While it appears that those are additional forms of responsibility for harm that build on 'classical' notions of instigation and abetment, their relationship with the question of a company's responsibility for human rights abuse in its value chain, namely when it fails to comply with its due diligence duties, is not entirely clear.

According to Article 8(5), each State Party is required to ensure, "consistent with its domestic legal and administrative systems" and as appropriate to the circumstances, an **appropriate allocation of the evidentiary burden of proof** that takes account of differences between the parties in terms of access to information and resources, including through the measures referred to in Article 7(4)(d). It must also ensure that persons held liable are subject to effective, proportionate and dissuasive **penalties** or other sanctions (Article 8(6)).

Member States' criminal and civil liability regimes as well as administrative law – partly based on EU law (e.g. EU Directives related to occupational health and safety) – provide for the liability of natural and legal persons for human rights abuses within the EU. As regards human rights abuses in connection with the activities of subsidiaries and business partners, the **CSDD Directive** requires Member States to ensure the **civil liability** of companies in scope – not: natural persons – where they intentionally or negligently fail to comply with their core due diligence duties (to prevent or at least mitigate potential human rights impacts, and to bring to an end actual impacts or minimize their extent) and this leads to damage. **Administrative enforcement** – **including** the imposition of **penalties** under Article 27 CSDDD – is triggered by non-compliance with any of the due diligence duties set out in the Directive (Articles 7 to 16); penalties imposed on that basis shall be effective, proportionate and dissuasive (Article 27(1)). Both types of remedies can be applied in parallel (see Article 25(9)) and the civil liability of the company in scope shall be without prejudice to that its subsidiaries or business partners in the value chain (Article 29(5)). Also, civil liability under the Directive shall not limit the company's liability under Union or national law and shall be without prejudice to Union or national rules on civil liability related to adverse human rights impacts that provide for liability in situations not covered by, or providing for stricter liability than, the CSDDD (Article 29(6)).

While Article 8(1) of the updated LBI draft imposes liability for **human rights abuses that may arise from business activities or relationships**, unlike the CSDD Directive it does not

[31] The concept of "criminal" liability appears to be understood broadly, as indicated by the reference to "criminal liability or its functional equivalent" in Article 8(4)(b).

expressly link such liability to the obligations under Article 6 (namely, the due diligence duty). Furthermore, as already indicated, the link between Article 8(3) regarding liability for certain forms of instigation or abetment of human rights abuses and the scope of Article 8(1)when it comes to business relationships and thus harm in the value chain is not entirely clear. Under the CSDDD, the 'contribution' to human rights abuse is a form of (direct) responsibility for adverse impacts arising at the level of business partners and thus in the context of human rights due diligence.

Liability under the draft LBI shall be – subject to the legal principles of each State Party – 'criminal, civil, or administrative, as appropriate to the circumstances'. In this respect, State Parties shall ensure, consistent with their domestic legal and administrative systems, that the type of liability shall be 'responsive to the needs of victims as regards remedy' and "commensurate to the gravity of the human rights abuse" (Article 8(2)). State Parties thus have a certain **flexibility** to decide on the **type of liability**, for both natural and legal persons, with the caveat that the choices made have to be 'appropriate'. Such flexibility is important from the perspective of the EU *acquis*, which for instance does not require Member States to impose criminal liability on legal persons, even less so in cases where the damage giving rise to liability occurs at the level of a business partner. While several EU directives[32] require Member States to establish responsibility of legal persons for the violation of certain criminal laws, the EU *acquis* does not require that such responsibility must be criminal in a strict sense as long as administrative law sanctions have similar consequences for legal persons as criminal law would have in other Member States. The Member States' approach in this regard varies. As for the CSDD Directive, it does not provide for criminal liability either. At the same time, EU and Member States' criminal law[33], civil liability regimes and administrative law, together with the CSDDD, establishes a liability regime for human rights abuses that arise in companies' own operations, those of their subsidiaries and at the level of their business partners that is more ambitious than most, if not all third country laws and liability regimes. It can be considered as fulfilling the obligations under the draft LBI, given that the latter allows such liability regime to be "appropriate to the circumstances" and thus leaves a certain margin for States parties.

Regarding the appropriate allocation of the **evidentiary burden of proof** in judicial and administrative proceedings, which State Parties shall again ensure "consistent with [their] domestic and legal systems" (Article 8(5)), see already above the analysis for Article 7. As the text requires an "appropriate allocation of evidence", this could be considered fulfilled by the CSDDD's requirement to facilitate the discovery of evidence (as well as evidentiary rules applicable for instance under Member States' civil liability regimes).

EU and national legal liability regimes for human rights abuses by businesses, including in connection with the activities of business partners, are more ambitious than most, if not all third country regimes. The liability regime of the draft LBI for adverse impacts is similar to national liability law and, for impacts in the value chain, the CSDD Directive, but the LBI is less precise about the liability regime regarding value chain impacts.

Jurisdiction – Article 9

[32] See e.g. Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC.

[33] In particular, criminal liability of natural persons (e.g. company directors) exists for certain serious human rights violations, including where those are linked to business activities.

Article 9 contains rules on the exercise of jurisdiction in respect of human rights abuses.

According to Article 9(1), a State Party shall take measures to establish **jurisdiction in 4 cases**, namely where: (1) the **abuse** took place (at least partly) in the territory of that State Party, (2) the **harm** was sustained (at least partly) in that territory, (3) the alleged **perpetrator** (and thus **defendant**) is a legal person domiciled in that territory, or a natural person who is a national, or has a habitual residence in the territory, of that State Party, or (4) the **victim** seeking a civil law remedy is a national, or has a habitual residence in the territory, of that State Party. Article 9(2) defines the **concept of "domicile"** with respect to legal persons and in this respect refers to 4 connecting factors, namely place of incorporation/registration, principal assets/operations, central administration/management, and principal place of business/activity.

Article 9(3), (4) contain complementing requirements, namely the obligation for the relevant State agencies of one State Party to **consult** the relevant State agencies of another State Party (with a view to coordinating their actions) in case the former has learned of judicial proceedings taking place in the latter "relating to the same human rights abuse" (or any aspect thereof) (Article 9(4)), and to "**respect the rights of victims**", including in the context of such coordination or when considering the discontinuation of proceedings on the grounds that there is "another, more convenient or more appropriate forum" (Article 9(3).

It is unclear whether Article 9 is meant to apply to jurisdiction in civil matters only or also to jurisdiction in criminal matters.

At EU level, the **Brussels I Regulation (recast)** contains jurisdictional rules for civil or commercial disputes in cases having cross-border implications. To the extent that these rules allocate jurisdiction in **intra-EU civil or commercial disputes**, including business and human rights cases, they are only relevant in case the LBI would also apply in this context. Usually, this is avoided through a disconnection clause that excludes the application of this instrument in intra-EU cases.

As regards **defendants domiciled in third States**, the Brussels I Regulation (recast) does not regulate the jurisdiction of EU courts over them (subject to some exceptions such as claims brought by consumers and by employees, or choice of courts agreements).[34] This means for instance that the Regulation's rules on jurisdiction are in principle not applicable in disputes against third country subsidiaries of EU parent companies. Neither does the CSDD Directive contain jurisdictional rules, notwithstanding the fact that its scope of application also covers certain non-EU companies when they generate significant turnover in the EU. Jurisdiction for such cases is therefore determined by the domestic law of the Member States.[35] In the absence of harmonised rules in the CSDDD giving jurisdiction to EU courts when it comes to non-EU defendants falling under the scope of the CSDDD, non-EU companies active on the EU market

[34] In 2010, the Commission, in its proposal of the revision of Brussels I Regulation, included a provision aimed at harmonising subsidiary jurisdiction rules and creating two additional fora for disputes involving defendants domiciled outside the EU. First, the proposal provided that a non-EU defendant can be sued at the place where moveable assets belonging to him are located provided their value is not disproportionate to the value of the claim and that the dispute has a sufficient connection with the Member State of the court seized. In addition, the courts of a Member State would have been able to exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned ("*forum necessitatis*"). The European Parliament and the Council did not support this proposal upon its adoption in 2015. The Brussels I Regulation will be subject to an evaluation ('application report') in 2025.

[35] For example, some EU Member States provide for jurisdiction of their courts over third-state defendants if they have assets within that Member State or on the basis of "forum necessitatis" rules.

might potentially be subject to a weaker enforcement regime for CSDDD violations than EU companies.

The possible application of other international instruments, such as certain bilateral or multilateral conventions (like the Lugano Convention), as well as the ongoing work in the framework of the Hague Conference on Private International Law for rules on parallel proceedings[36] might also be relevant.

As for the **specific jurisdictional grounds** included in the draft LBI, the following is worth noting:[37] Under the Brussels I Regulation (recast), tort jurisdiction (Article 7(2)) refers to "the place where the harmful event occurred or may occur" and is interpreted by the CJEU as providing for 2 alternatives to the claimant, the **place of the event giving rise to damage**[38] and the **place of (direct) damage**. According to the CJEU's case-law, in addition, in case of infringements of personality rights via the Internet, the claimant can also decide to bring an action before "the courts of the Member State in which the centre of his interests is based". The ground of jurisdiction set out in the draft LBI based on the **domicile (habitual residence) of the victim** is similar to this kind of interpretation, as this would in practice lead to the jurisdiction at the plaintiff's domicile, but this is not the case in other situations. Indeed, it should be noted that the jurisdiction of the courts at the place of habitual residence or nationality of the plaintiff is not considered acceptable internationally, in particular because the rights of defendants are not always respected in such fora and, therefore, the resulting judgment would be difficult to enforce in other countries. As mentioned above, except for the specific interpretation of Article 7(2) of the Brussels Ia Regulation, jurisdiction at the place of habitual residence as well as in the State of nationality of the victim is (strictly speaking) not aligned with the EU *acquis*. It could also increase the risks for EU companies as they might become subject to litigation in non-EU countries with insufficient due process protections. Conversely, the ground for jurisdiction based on the **domicile of the defendant** is in principle in line with the Brussels I Regulation (recast).

Regarding the criteria in the draft LBI for the **notion of "domicile"**, certain of them correspond to the criteria in the Brussels I Regulation (recast) for determining the domicile of a company (or other legal person). According to its Article 63(1), relevant criteria are the statutory seat, place of central administration and principal place of business.[39] Likewise, the Judgments Convention in its Article 3(2) refers to the statutory seat, the country of incorporation or formation, the place of central administration and that of the principal place of business.

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[36] As a follow-up to the Judgments Convention, work has begun on a project that will address matters relating to direct jurisdiction, including parallel proceedings and *forum non conveniens*. This strand of work in the framework of the Hague Conference is supported by the EU. The work currently focuses on rules on parallel proceedings, which would probably include reference to jurisdictional rules.

[37] The Brussels I Regulation (recast) also provides for other grounds of jurisdiction that could be relevant for this type of litigation, like the possibility to sue at the place of the branch, agency or other establishment in case of disputes arising out of the operations of that branch, agency or other establishment, or the joining of defendants according to Article 8. Also, Article 7(3) of the Brussels I Regulation (recast) could be relevant, since it lays down a ground of jurisdiction allowing civil actions to be brought before the courts seized for criminal proceedings, if this is admissible in accordance with the *lex fori*.

[38] At international level, the Judgments Convention provides for a limited indirect jurisdictional ground, namely the place of the act or omission causing the harm (thus without inclusion of the place of damage).

[39] Article 63(2) specifies that: "For the purposes of Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place."

Conversely, the territory where a legal person has its "principal assets or operations" is not among the Brussels Ia criteria.

The draft LBI thus includes certain 'connecting factors' that go beyond EU law. Some of these raise concerns from the perspective of defendants' rights. At the same time, even if the victim would have a choice, there might be strong incentives (e.g. proximity, language) to bring legal action at the place of the victim and cases brought in jurisdictions that lack strong enforcement or do not properly ensure victims' rights could undermine substantive protections granted in the CSDDD. Furthermore, the LBI regime could lead to situations where the rules on jurisdiction and applicable law point into different directions, unlike for example linking the forum to the applicable law (forum legis) would do.

The LBI rules on jurisdiction are not in line with EU law and the objectives of the CSDDD.

Statute of limitations – Article 10

Article 10(1) of the draft LBI requires that State Parties adopt such measures as may be necessary to ensure that **no limitation period** shall apply to the commencement of legal proceedings in relation to 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. The "most serious crimes of concern to the international community as a whole" are subject to the jurisdiction of the International Criminal Court, for which the Rome Statute expressly provides that prosecutions "shall not be subject to any statute of limitations". Rules on the non-applicability of limitation periods for this type of offences can also be found in the criminal laws of the EU Member States (some of which have also ratified the Council of Europe Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (ETS No. 082)).[40]

More relevant appears to be Article 10(2) of the draft LBI, according to which for **other human rights abuses** (not falling within the scope of Article 10(1)) each State Party shall adopt such measures as may be necessary to ensure that limitation periods for such proceedings: (a) are of a duration that is **appropriate in light of the gravity** of the human rights abuse; (b) are **not unduly restrictive** in light of the context and circumstances, including the **location** where the relevant human rights abuse took place or where the relevant harm was sustained, and the length of **time needed for relevant harms to be identified**; and (c) are determined in a way that **respects the rights of victims** in accordance with Article 4.[41]

In this respect, Article 29(3)(a) of the CSDD Directive establishes – as part of the access to justice safeguards – that national rules on the beginning, duration, suspension or interruption of limitation periods shall **not unduly hamper** the bringing of actions for damages. The limitation period for bringing actions for damages under the CSDDD shall be **at least five years** (and, in any case, not shorter than the limitation period laid down under national general civil liability

[40] However, it appears that all crimes that qualify as 'most serious crimes of concern to the international community as a whole' are already included in the list of Article 10(1) of the draft LBI. It is not clear which other offences could also be qualified as such (as suggested by the word 'including').

[41] It is not fully clear what point (c) is meant to add to point (b) and how, beyond the need to ensure an effective access to justice which is already covered by point (b), the rights of victims relate the statute of limitation. Possibly, this is a reference to cases of representative or class action, or to situations in which the victim would first want to access certain information before starting litigation, both of which could involve delays in bringing a case in court. However, even those cases could already be covered by point (b).

regimes) and shall **not begin to run** before the infringement has ceased and the claimant knows, or can reasonably be expected to know (i) the behaviour and the fact that it constitutes an infringement; (ii) the fact that the infringement caused harm to him or her; and (iii) the identity of the infringer.[42] The national laws transposing these rules will be of overriding mandatory application in cases where the law applicable to civil liability claims is not the national law of the Member State where the claim is adjudicated (Article 29(7) with recital 90).[43]

There thus appears to be broad alignment of the rules on limitation periods between the draft LBI and the EU *acquis* at least as far as actions for damages are concerned.

Broad alignment of the rules on limitation periods between the draft LBI and the EU acquis as regards actions for damages.

Applicable law – Article 11

Article 11 contains rules on the applicable law. It distinguishes between:

- **matters of procedure**, which according to Article 11(1) are governed by the *lex fori* ("All matters of procedure regarding claims before the competent court … shall be governed by the law of that court seized on the matter");

- **matters of substance**, which according to Article 11(2) may, upon the request of the victim, be governed by the law of another State (than the law of the competent court) where (i) the **acts or omissions** have occurred or produced **effects**; (ii) the natural or legal **person alleged to have committed the acts or omissions** is **domiciled**.

In both cases, these rules on the applicable law shall only apply to matters 'which are not specifically regulated in the [LBI]', which for instance means that the rules in the LBI regarding civil liability (Article 8) and victims' rights (Articles 4, 7) would not be covered.

At EU level, when a court in a Member State has jurisdiction in a case with a cross-border element, it has to determine which country's law is applicable to the dispute. The respective EU rules regarding civil and commercial matters have been harmonised by the Rome I Regulation for contractual obligations and by the Rome II Regulation for non-contractual obligations (also referred to as torts or delicts). Furthermore, the possible application of international instruments needs to be taken into account within this framework.[44]

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[42] This is also broadly in line with rules on limitation periods in other areas of the EU *acquis* and with the case law of the Court of Justice. For example, the Court has consistently held that the principles of equivalence and effectiveness (according to which the application of the limitation period must not in practice make it impossible or excessively difficult to exercise the rights to access to justice) must be observed with regard to limitation periods concerning claims arising from EU law, and the time limits must be reasonable. In addition, in Joined Cases C-776/19 to C-782/19 *BNP Paribas Personal Finance* the Court has emphasised that the starting point of the limitation period must allow the claimant an opportunity to become aware of his or her rights before that period begins to run or expires (also taking into account the potential weaker position of claimants in certain cases, such as consumers).

[43] See also Articles 15 lit. h), 16 and 27 of the Rome II Regulation.

[44] See Article 25 of the Rome I Regulation and Article 28 of the Rome II Regulation for their (respective) relationship with existing international conventions.

The **Rome I Regulation** can be relevant whenever corporate human rights violations occur vis-à-vis parties with whom the European parent company or a third- country subsidiary has a contractual relationship, e.g. its suppliers or its employees. It generally allows the parties to choose the applicable law; in the absence of choice, the applicable law must be determined according to different specific rules depending on the type of contract. In the case of employment contracts, the employees are protected under the law of the country where they habitually carry out their work. This can also be the law of a third country. Irrespective of the law applicable in a given dispute, the court will be able to apply the overriding mandatory provisions of the law of the forum.

According to the general rule of the **Rome II Regulation**, the applicable law is that of the **country where the damage occurred**[45], i.e. where the human rights violation produced damage, irrespective of the country in which the event giving rise to the damage occurred (Article 4(1)). This is the main principle subject to certain exceptions[46]. Also, the Rome II Regulation in general allows the choice of law (Article 14)[47] and establishes a set of specific rules for some torts or delicts, for instance for **environmental damage** (Article 7)[48]. As regards non-contractual obligations arising out of a violation of privacy and rights relating to personality, they are excluded from the scope of the Rome II Regulation (Article 1(2)(g)) and thus governed by the domestic law of the Member States, subject to possible application of international instruments containing conflict of laws rules.

Under both Regulations (Rome I and Rome II), courts may refuse to apply foreign law on the ground that it is manifestly incompatible with the **public policy** (*ordre public*) of the forum. This may, for example, be the case if the foreign law legitimises manifest breaches of human rights.

A number of Member States' laws already contain overriding mandatory provisions relating to the protection of human rights and environmental protection, but often require a connection between the claimant and the Member State concerned. To ensure that victims of human rights and environmental harm can bring an action for damages and claim compensation for damage caused when the company intentionally or negligently failed to comply with the due diligence obligations stemming from the CSDD Directive, its Article 29(7) now requires Member States to ensure that the provisions of national law transposing the civil liability regime provided for in the Directive are of **overriding mandatory application** in cases where the law applicable to such claims is not the national law of a Member State, as could for instance be the case in accordance with private international law rules, such as Article 4(1) of the Rome II Regulation, when the damage (jointly) caused by a company subject to due diligence duties occurs in a third country. Accordingly, Member States must ensure that the requirements in respect of which natural or legal persons can bring the claim, the statute of limitations and the disclosure of evidence are of overriding mandatory application (recital 90). There is some alignment here

[45] Under the Rome II Regulation, unlike the Brussels Ia Regulation, there is no choice between the place where the event giving rise to damage occurs (*Handlungsort*) and the place where the damage occurs (*Erfolgsort*).

[46] In particular, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply (Article 4(2)).

[47] Similar rules as under the Rome I Regulation apply with respect to rules that cannot be derogated from by agreement, see Article 14(2), (3).

[48] According to Article 7, the law applicable to a non-contractual obligation arising out of environmental damage, or damage sustained by persons or property as a result of such damage, shall be the law determined pursuant to the **general rule**, unless the person seeking compensation for damage chooses to base his or her claim on the **law of the country in which the event giving rise to the damage occurred**.

with the draft LBI (Article 11(2)) in that both seek to exclude the liability rules specifically set out in the respective text from the choice of the parties.

As mentioned earlier, at EU level, the Rome Regulations provide for a certain autonomy for *both parties* to agree on the applicable law (in contracts and, with certain temporal limitations, in torts). A specific rule in the Rome II Regulation covers environmental torts where the *party seeking compensation* (victim) can choose to base his or her claim on the law of the country in which the event giving rise to the damage occurred (which means that either the law of the event or of the damage could apply to claims related to environmental damage). Allowing the weaker party the **choice** between several applicable laws, or allowing him or her to benefit from the mandatory protection of a State with which the case has a strong connection, are means to increase the victim's protections.

The LBI's objective is to allow a choice for the victim to rely on the most protective law. The liability rules in the CSDD Directive have the same objective, but seek to achieve this through the overriding mandatory application of the (more detailed) liability rules in the CSDDD. Whether this results in a tension between the LBI and the CSDDD depends on the extent to which the LBI rules on liability will align with the CSDDD liability regime.

International cooperation and mutal legal assistance – Articles 12 and 13

According to Article 13(1) of the LBI, State Parties shall **cooperate "in good faith"** to enable the implementation of their obligations under the LBI and the fulfilment of the LBI's purposes. As regards the latter, Article 13(2) sets out that States Parties "undertake appropriate and effective measures" to cooperate with each other, as appropriate in partnership with relevant regional/international organisations and civil society. That reflects the duty to cooperate as a principle of general international law. The text contains a list of obligatory measures, ranging from research and information sharing to the exchange of best practices to technical cooperation and capacity-building. These are 'classic' soft forms of cooperation that the EU/Member States regularly commit to in international agreements (e.g., in Partnership Agreements). Importantly, they leave a large margin of discretion to State Parties in choosing the specific forms of international cooperation best suited to the identified issue(s). A more critical obligation, from a budgetary perspective, is the establishment of an "International Fund for Victims" to provide legal and financial aid for victims when they seek access to remedies, and to which State Parties are expected to contribute "within their available resources" (see Article 13(2)(e) in conjunction with Article 15(7)). Such a fund would be in line with the objectives of Article 29(3) of the CSDD Directive, in particular its letter (b) (according to which Member States have to ensure that the costs of proceedings are not "prohibitively expensive" for claimaints to seek justice). However, it is not clear how this fund would interact with other provisions in the draft LBI according to which State Parties are obliged to provide financial assistance and/or legal aid to victims. The LBI makes clear that the "relevant provisions for the functioning of the Fund" will have to be defined and the fund established by the Conference of State Parties (see Article 15(7)).

Specific rules for the cooperation between State Parties with respect to the enforcement of measures referred to in Articles 6 to 8 are included in Article 12 on **mutual legal assistance**. The obligations of State Parties in this regard are set out in Article 12(1) and (3), respectively:

According to Article 12(1), State Parties shall afford one another the "**greatest measure of assistance**" **in connection with criminal, civil and administrative proceedings**. While a combined reading of Article 12(2) and 12(4)(a), (b) could suggest that this is not meant to create

new obligations – as State Parties are required to carry out their obligations under Article 12(1) "in conformity with" any already existing arrangements on mutual legal assistance, while they only have to "consider" entering into (new) bilateral or multilateral arrangements, or to enhance existing ones (Article 12(4)(b)) – the legal implications of Article 12(1), (2) are not fully clear. However, in light of the objective of Article 12(1) to ensure the "greatest measure of assistance", the provision – including the requirement to **expedite requests from private parties for the transmission and service of documents and for the taking of evidence in civil proceedings** – probably must be interpreted broadly, while Article 12(2) is likely meant to indicate that, where States Parties have already entered into MLA arrangements, the latter shall govern their mutual legal assistance.[49]

Article 12(3) sets out an obligation for State Parties to "**cooperate closely**" to enhance enforcement, in particular by establishing, maintaining and enhancing **channels of communication** between their State agencies (in particular to facilitate the secure and rapid exchange of enforcement information) and facilitating **effective coordination** between them. Like Article 12(4)(a), this appears to be mostly complementary to the core obligation in Article 12(1), (2) to afford the "greatest measure of assistance".

For the analysis against EU law, the following points are noteworthy:

As regards the **relationship between EU Member States**, no questions of compatibility would arise in case an explicit disconnection clause for EU-internal relationships could be agreed, as in this case only the EU-external cooperation would be affected by the LBI. In any event, Article 12(2) can likely be interpreted as authorising them to apply existing EU rules in the relations between them. Those rules include, in the area of civil law, Regulation (EU) 2020/1784 (Service of Documents) and Regulation 2020/1783 (Taking of Evidence) and, in the area of criminal law, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, its Protocol, and Directive 2014/41/EU regarding the European Investigation Order in criminal matters[50].

As regards the **mutual legal assistance between, on the one hand, the EU and its Member States and, on the other hand, non-EU States Parties**, no EU-level MLA arrangements exist in the area of civil law. Indeed, judicial cooperation in civil matters between the EU and third States is carried out mostly within the framework of the Hague Conference on Private International Law of which the EU, along its Member States, is a Member. Concerning specific instruments, 84 States (including all EU Member States) are parties to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Service Convention)[51], and 66 States (including all EU Member States

[49] Even in this case, State Parties under Article 12(4)(a) have to ensure that relevant State agencies "have access to the necessary information, support, training and resources to enable personnel to make effective use of the [existing] treaties and arrangements".

[50] The Directive provides a comprehensive system based on the principle of mutual recognition for the taking of evidence in the EU, laying down rules for cross-border requests to carry out investigative measures in another Member State, with a view to gathering evidence (or for obtaining evidence which is already in the possession of the competent authorities of another Member State).

[51] The Service Convention provides for the channels of transmission to be used when a judicial or extrajudicial document is to be transmitted from one State Party to the Convention to another State Party for service in the latter. The Convention deals primarily with the transmission of documents; it does not address or comprise substantive rules relating to the actual service of process.

with the exception of Austria, Belgium and Ireland[52]) are parties to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Evidence Convention)[53]. In the criminal law area, several EU level MLA arrangements exist, such as for instance the EU-US Agreement on Mutual Legal Assistance, the EU-Japan Agreement on Mutual Legal Assistance in Criminal Matters (which both complement bilateral agreements, where they exist), the Agreement between the EU, Iceland and Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and its 2001 Protocol, and Title VIII on mutual assistance of the Trade and Cooperation Agreement between the European Union and the United Kingdom . Judicial cooperation in criminal matters between Member States and third countries also takes place within the framework of the Council of Europe, such as under the 1959 Convention on Mutual Assistance in Criminal Matters and its additional protocols, the 2001 Convention on Cybercrime and its additional protocols (the EU is not a party to those agreements), and under thematic UN Conventions. In addition, there are bilateral agreements between Member States and third countries.

[REQEST TO MEMBER STATES: please inform Commission about existing MLA/cooperation arrangements relevant for the measures referred to in Articles 6 to 8]

Legal requirements fairly general and comparable with those in similar international treaties.

Consistency with international law – Article 14

Article 14(1) and (4) refer to and acknowledge recognised general principles of international law, such as those of State immunity[54], sovereign equality[55], territorial integrity[56] and the

52 Due to the fact that the area is covered by EU exclusive external competence, those States need to be authorised by the EU in order to be able to ratify the Evidence Convention.

53 The Evidence Convention establishes methods of co-operation for the taking of evidence abroad in civil or commercial matters. The Convention, which applies only between States Parties, provides for the taking of evidence (i) by means of letters of request, and (ii) by diplomatic or consular agents and commissioners. The law of the State addressed applies to the execution of the letter of request. As to pre-trial discovery, see explanations in https://assets.hcch.net/docs/ec1fc148-c2b1-49dc-ba2f-65f45cb2b2d3.pdf.

54 State immunity is a principle of customary international law that is based on the mutual respect of States for sovereign equality and state dignity. It means that one sovereign state cannot be sued before the courts of another sovereign state without its consent. International law characterizes the immunities of states (and their officials) as procedural rules that prevent the adjudication of a dispute in a particular forum without speaking to the merits of the claim or absolving any underlying responsibility of the State and its officials. See also the United Nations Convention on Jurisdictional Immunities of States and Their Property.

55 See Article 2 lit. 1 of the UN Charter: "The Organization is based on the principle of sovereign equality of all its Members." See also the Declaration of Principles of International Law, Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970): "All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature." It further elaborates on the principle of sovereign equality of States as including the elements of juridical equality of States, the enjoyment by States of the rights inherent in full sovereignty, the duty of States to respect the personality of other States, the inviolability of the territorial integrity and political independene of the State, the freedom of each State to choose and develop its own political, social, economic and cultural systems, and the duty of States to comply fully and in good faith with their international obligations.

56 See Article 2 lit. 4 of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

international responsibility of States[57]. Article 14(4) also refers to Article 30 of the Vienna Convention on the Law of Treaties concerning the application of successive treaties relating to the same subject matter. The rule expressed in this respect, that the earlier treaties "shall apply only to the extent that their provisions are compatible with [the LBI]", appears to be in line with Article 30(3), (4)(a) of the Vienna Convention[58].

A related provision is Article 14(2), which stipulates that nothing in the LBI entitles a State Party to exercise such jurisdiction in the territory of another State or to perform in such territory functions for which the authorities of that other State have exclusive jurisdiction. This is an expression of the sovereign power of each State Party over its territory and should not create conflicts with EU law and/or the law and practice of Member States. As regards the exercise of **enforcement jurisdiction**, for instance through *binding* "production orders" in criminal proceedings addressed to companies in another State Party, the binding effect of such measures will typically follow from existing regional or international agreements. Such agreements would be covered by Article 14(3) which clarifies that nothing in the LBI "shall affect any provision in the domestic legislation of a State Party or in any regional or international treaty or agreement that is more conducive to the respect, protection, fulfillment and promotion of human rights in the context of business activities".

Finally, Article 14(5) stipulates a 'coordination clause' that seeks to ensure that other, existing bi- or multilateral agreements, irrespective of geographic coverage and including trade and investment treaties, shall be **interpreted and implemented** in a manner that does **not undermine or restrict States' capacity to fulfill their obligations** under the LBI as well as other relevant human rights conventions and instruments.[59] While the provision does not require an alignment of existing agreements with the LBI, but rather an interpretation and implementation of such agreements that 'does not unermine or restrict' the implementation of the LBI, the text raises some questions. This includes whether the rule in Article 14(5) would only apply in case of identity between the State Parties to both the earlier agreements and the LBI (which is likely the premise), and what are 'issues relevant to this [LBI]'. In addition, its scope of application is not limited to the LBI but also covers 'other relevant human rights conventions and instruments'. This being said, EU law recognises the primacy of human rights (as guaranteed by the EU Charter of Fundamental Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States) and the actions of EU Member States have since 1950 been subject to the European Convention on Human Rights. In line with this, EU trade agreements take into account human rights aspects, in particular through their human rights clauses (which provide that respect for human rights is an essential element of the agreement) and TSD chapters (which include commitments to ratify and effectively implement

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[57] State responsibility is a fundamental principle of international law which provides that whenever one State commits an internationally unlawful act against another State, international responsibility is established between the two. A breach of an international obligation gives rise to a requirement for reparation. See also International Law Commission, Responsibility of States for Internationally Wrongful Acts (2001).

[58] See Article 30 of the Vienna Convention: "3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

[59] This is different from the rule of interpretation in Article 31(3)(a) of the Vienna Convention on the Law of Treaties, according to which 'any subsequent agreement between the parties regarding the interpretation of [an earlier] treaty or the application of its provisions' shall be taken into account with respect to that earlier treaty.

fundamental ILO labour standards and to promote international RBC standards, including regarding due diligence).

LBI rules do not appear to conflict with EU or international law but rather promote an effective implementation of the LBI rules. Questions are raised by the provision in Article 14(5) which lacks clarity on certain aspects.

Institutional arrangements – Article 15

In its Article 15, the draft LBI contains organisational clauses with regard to the Conference of State Parties and Committee of Experts that do not appear to raise particular concerns. This being said, the rules on the replacement of experts in Article 15(1)(f) do not seem to be aligned with the procedure for their original election/appointment, and the legal effect of the "general comments and normative recommendations on the understanding and implementation of the [LBI]" is not clear.

Regarding the International Fund for Victims, see already the assessment under Article 12.

Rules comparable to those in similar international conventions.

Implementation – Article 16

The article regulates various aspects related to the implementation in national law, interpretation and application of the LBI. As regards implementation, State Parties commit to take "all necessary legislative, administrative or other action, including the establishment of adequate monitoring mechanisms" (Article 16(1)), and to protect related public policies and "decision making spaces" from "undue political influence by businesses". Special attention shall be given to business activities in **conflict-affected areas**, and to assess and address the heightened risk of human rights abuses in those areas (Article 16(3)). This latter requirement aligns with the approach taken in the CSDD Directive (see recital 42). The same applies to the focus on **individuals or groups that are at a heightened risk of human rights abuse** (Article 16(4); see recital 33 of the CSDDD). Article 16(5), finally, recalls that the interpretation and application of the LBI articles shall be consistent with international law, including international human rights law, and shall be without discrimination of any kind. None of this appears to raise legal questions.

Rules align with the CSDDD approach and are comparable to those in similar international conventions.

Relations with Protocols – Article 17

The article regulates the possible supplementation of the LBI by one or more protocols. A State Party to the LBI will not be bound by such a protocol "unless it becomes a Party to the protocol" (Article 17(3)). There is therefore **no automatism**, and the article overall does not raise legal concerns.

Rules comparable to those in similar international conventions.

Settlement of Disputes – Article 18

Article 18 contains rules on the settlement of disputes between State Parties. Given the broad discretion retained by State Parties – both under paragraph 1 ("shall seek a solution by negotiation **or by any other means** of dispute settlement acceptable to the parties to the dispute") and paragraph 2 ("a State Party **may** declare … that … it accepts one or both of the following means of dispute settlement as compulsory"), the provision does not raise legal concerns.

Rules comparable to those in similar international conventions.

Signature, Ratification, etc. – Article 19

The article contains important clarifications as to the openness of the LBI towards **regional integration organizations** (such as the EU), including the fact that the LBI shall apply to such REIOs "within the limits of their competence" and that they may exercise their right to vote (in the Conference of States Parties) "with a number of votes equal to the number of their member States that are Parties to [the LBI]" (which implies that both the REIO and its member States can become parties, and that the REIO does not automatically represent the votes of all its member States).

While Article 19(3) provides that the REIO should inform the depositary of any substantial ***modification*** of its **competence**, there is no reference to any declaration of the ***existing*** competence (although this aspect is covered by the definition of 'regional integration organization' (see Article 1(7)).

Rules comparable to those in similar international conventions.

Remaining provisions – Articles 20 to 24

These are standard provisions that do not appear to raise legal questions.

Rules comparable to those in similar international conventions.