Access to Supply Chain Justice?

Some procedural spotlights on Art. 29 para. 3 CSDDD

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One of the novel features of the Corporate Sustainability Due Diligence Directive (CSDDD) is a private law liability for damages caused upstream in the supply chain. However, as *Wolfgang Zöllner* once described it, substantive law is only half the truth: a liability under substantive law is worthless without procedural rules that allow for its enforcement. Within the context of supply chain liability there are at least two major procedural problems. First, victims affected by supply chain mishandlings might be unable to afford proceedings in Europe. Typically, they do not have access to the same level of legal expertise as potential (corporate) defendants. Second, proving that a company has not exercised a sufficient level of diligence can be difficult. Vital pieces of evidence will often lie within the defendant's sphere, while the burden of proof falls on the claimant.

Art. 29 para. 3 CSDDD seeks to address those issues. However, due to the attention (both celebratory and condemning) the substantive rules on the private law liability got (e.g. here), procedural law elements got little time in the limelight so far (for an overview on Private International Law and Litigation Aspects see here). This article aims to explore these procedural law elements.

Affordability

A key aspect of access to justice is its affordability, which Art. 29 para. 3 lit. b CSDDD seeks to ensure by prohibiting Member States from making supply chain liability lawsuits "prohibitively" expensive. This is an important starting point, but it will likely neither require changes to German law nor will it suffice to eliminate the structural imbalance between the parties.

Under German law, parties (foreign as well as domestic) with insufficient means have a right to assistance with the court costs (Sec. 114 et seqq. of the German Code of Civil Procedure – CCP). In effect, the court can waive its fees as well as the security deposit that can usually be demanded of foreigners (Sec. 110 CCP). The destitute party is also provided with a free lawyer (Sec. 122 CCP). It is unlikely that the CSDDD requires changes to that system which at least prevents costs from having a prohibitive effect. While assistance with the court costs does not shield claimants from having to reimburse defendants for their lawyers' fees, this is not incompatible with the CSDDD because such reimbursement is only owed by the losing party. Its extent is also limited to the (rather moderate) statutory fee rates as provided by the Act on the Remuneration of Lawyers (Sec. 91 para. 2 CCP).

However, assistance with the court costs does not completely level the playing field. Defendants will likely hire the best lawyers money can buy and commission extensive expert opinions, if only because they fear that one successful lawsuit will open the floodgate for many more. Destitute claimants on the other hand are provided with a free lawyer, but – at least in principle – only with one that is willing to represent them. This creates problems rooted in the fee system: the state remunerates respective lawyers rather poorly. Given the factual and legal difficulties of international supply chain cases, the remuneration granted is inadequate. It stands to reason that claimants will have a hard time finding a lawyer with the necessary expertise, time, and willingness to take on the liability risks.

While the CSDDD ensures that claimants can afford proceedings, it cannot ensure equality in terms of legal representation. I do not want to suggest state

assistance should match big law firm fees, nor do I propose putting a cap on the amount defendants may spend on legal representation. But I do think it is important to keep in mind that parties in supply chain proceedings do not meet as equals in terms of money.

Authorization of organizations to enforce rights

The aforementioned imbalance among the parties makes it all the more important that Art. 29 para. 3 lit. d CSDDD allows (alleged) injured parties to authorize certain organizations, especially NGOs, to help enforce their rights. The expertise of respective organizations, their financial means and their access to lawyers will probably help claimants significantly. The fact that the CSDDD allows organizations to enforce injured parties' rights in their own name could turn out to be the proverbial stone hitting two birds. Several problems in contemporary human rights litigation stem from the injured person being the claimant himself, even when a (human rights) organization is the actual driving force behind the lawsuit.

Art. 29 para. 3 lit. d CSDDD has gone through various changes in the drafting process, especially when compared to the Commission Proposal and the Council Mandate. Neither contained a provision of that kind.

The changes from the EP Mandate to the final version seem quite sensible, are in large parts cosmetic in nature and do not create major hardship for injured parties. The key part is that the eligible types of organizations (e.g. trade unions or environmental organizations) are spelled out in detail, whereas the parliament mandate version just spoke of "relevant actors acting in the public interest". Moreover, a second paragraph was added to the provision. As the first paragraph demands "reasonable" conditions for authorizations, Member States may not impose overly strict limitations. The new second paragraph names certain types of organizations which can generally be barred from authorization. Especially the possible exclusion of organizations engaging commercially seems sensible. It allows Member States to prevent the evolution of a human rights litigation industry capitalizing on destitute injured persons. This restriction seems practically relevant. Human rights incidents in supply chains will often have many victims with substantial damages. This means they create many similar cases with rather high volumes, which could make pursuing them a lucrative business model.

The provision strives to achieve a system in which injured parties do not need to go through the long and arduous process of enforcing their own claims. At the same time, it permits member states to prevent business models based on human rights litigation. All in all, it allows for a well-balanced involvement of organizations. However, it gives the Member States substantial leeway in designing their national rules. It hence remains to be seen how generous or restrictive those national rules will turn out to be.

Evidence

A third aspect of the access to supply chain justice is the access to evidence. The directive "does not regulate who should prove the fulfilment of the conditions for liability" (Recital No. 81). Therefore, national law applies and Member States are free to implement presumptions in favor of alleged injured parties. If they do not do so, then claimants will bear the burden of proof, i.e. they have to prove the fulfilment of all conditions under the procedural law of most jurisdictions.

Given that most documents and witnesses for breaches of companies' duty of care will be held by the companies themselves, this could pose a major problem: under German procedural law, the party which has to prove a fact also has to produce the necessary evidence. The German procedural code stipulates some exceptions from this rule. For example, it allows for the court to order any party to produce documents and records (Sec. 142 para. 1 CCP) – but only if the other party refers to those specific documents. Given that claimants in supply chain lawsuits will typically be unable to identify documents necessary for their case in advance, they would have little chance to succeed.

The CSDDD tries to rectify this problem by introducing an institute that has long been rejected by the vast majority of (non-brexited) EU member states: discovery. According to Art. 29 para. 3 lit. e CSDDD a court may order defendants to disclose evidence in

their possession, thereby providing claimants with evidence. Such a court order only requires the claimant to provide reasonably available facts and evidence that make his claim plausible and to indicate that further evidence lies in the defendant's control.

This sounds good in theory but is bound to cause issues in practice: *First*, the aforementioned prerequisites for discoveries are overly vague. *Second*, discoveries can be highly expensive. While the directive requires courts to be mindful of costs, it provides no details on who should eventually bear the costs of discovery procedures. *Third*, the provision might give claimants the opportunity to embark on so-called *fishing expeditions*, forcing the defendant to disclose documents containing information, which is useless for the procedure at hand, but may lay the foundation for future lawsuits. This is even more likely when injured parties authorize NGOs to enforce their rights. Once an NGO acquires information via disclosure, it can search for further potential claimants. Defendants can thereby be forced to reveal information that might lead to a plethora of new lawsuits against them.

The drafters of the directive recognized this issue. It seeks to prevent fishing expeditions by demanding courts to limit the disclosure to what is "necessary" for the present claim. Moreover, courts must consider "the legitimate interests of all parties, *including preventing non-specific searches for information* which is unlikely to be of relevance for the parties in the procedure". Only time will tell if those safeguards suffice to prevent fishing expeditions. Whether Art. 29 para. 3 lit. e CSDDD will be useless, effective or overly investigative mostly depends on how courts handle its requirements and limitations. Predictions are hard to make as most European courts do not have experience with discovery proceedings.

Conclusion

The CSDDD strengthens the access to justice. It limits the costs of proceedings which can be vital in member states that, for example, do not yet provide aid with court costs to foreigners. The option to authorize an organization to conduct proceedings in its own name will be a major improvement in terms of creating a level playing field. Finally, the introduction of a discovery mechanism to solve problems of evidence could be effective, but it is not without risk. In any case, it is meritorious (and unfortunately not a given) that the EU did not simply overlook the procedural side to the issue of supply chain liability.

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