The EU's CSDDD: Lawful Extraterritoriality or Jurisdictional Overreach?

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Abstract: The European Union (EU), in the continuous effort to assert itself as a global regulatory power, is attempting to regulate Corporate Sustainability Due Diligence through a Directive proposed by the European Commission in February 2022 (CSDDD), and currently under consideration by the co-legislators. Such Proposal envisages obligations for both EU and non-EU companies falling under its personal scope to identify, mitigate, and bring to an end all adverse effects to human rights and sustainability arising out of the company's own operations, its subsidiaries, and value chain regardless of the location, pending sanctions and civil liability in the EU. Given the far-reaching obligations regulating conduct abroad, it is essential to ascertain whether the EU is engaging in a lawful exertion of extraterritorial jurisdiction, or if the CSDDD Proposal would be too far of a jurisdictional encroachment into other States' sovereignty. After reviewing the relevant triggers of application of the Directive both under international and EU law, it is submitted that the Proposed Directive does not appear to be manifestly violating international law, without prejudice to discussions on the current amendments in the course of the ordinary legislative process.

Keywords: CSDDD; Jurisdiction; Extraterritoriality; International & EU Law; International Corporate Law.

1. *Introduction*

In an increasingly multi-faceted, multi-polar, and interconnected world, the European Union (EU) is emerging as a global regulatory power attempting to set worldwide standards of conduct. With a view towards extending its global leverage vis-à-vis other world powers, the EU has been increasingly using access to the Single Market as a tool to exert its regulatory power towards third countries[1]. As stated by Advocate General (AG) Jacobs, "the EU is based exclusively on law, not on power… over the past sixty years or so, law has made a unique contribution to the European story"[2]. However, this reliance on law can be increasingly seen, according to Scott, as power in its international relations[3]. This trend has been surging given the globalisation, digitalisation, and interconnection of different markets and issues: the 2008 financial crisis, climate change, COVID-19, and Russia's aggression on Ukraine are only a few

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[1] Lena Hornkohl, 1, *The Extraterritorial Application of Statutes and Regulations in EU Law*, at 3, ELECTRONIC JOURNAL, (2022)

[2] Marise Cremona & Jonathan Scott, *Introduction*, 1, in Oxford University Press eBooks, at 1, (2019).

[3] See *Ibid*.

examples of cross-border instances that have affected and shaped the EU within the last fifteen years. To prevent negative effects in the Union and in view of the current Commission's effort to be geopolitical[4], the EU has resorted to legislation that has extraterritorial application, or at least extraterritorial effects. The difference between extraterritorial application and territorial extension will be discussed in the following sections; notwithstanding such differentiation, the application of EU legislation beyond its territory must, in any case, be consistent not only with EU law, but also with the relevant laws of jurisdiction stemming from international law.

Against this backdrop, this article focuses on the Proposal for a Directive on Corporate Sustainability Due Diligence (hereinafter, 'CSDDD' or 'Proposal')[5]. The contentious and long-awaited European Commission's Proposal of 2022 establishes far-reaching due diligence obligations on companies concerning the protection of human rights and the environment in their own operations, subsidiaries, and along their value chain, including civil liability for any adverse impact resulting from failure to comply.[6] Under the Proposal, both EU and non-EU companies would be subject to the application of the Directive, provided they meet certain criteria relating to their net turnover and number of employees (for EU companies), and net EU turnover for non-EU companies[7].

While the precise delimitation of the application criteria will be further discussed in detail, the relevance of this legislation is

[4] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *The European Economic and financial systems: fostering openness, strength, and resilience*, 32 final, at 1, COM(2021)

[5] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, final (Proposal), COM/2022/71.

[6] Articles 5-11, Proposal (n 5).

[7] Article 2, Proposal (n 5).

represented by the Commission's estimate that around 13,000 EU companies and 4,000 non-EU companies would fall under the scope of the Directive, and therefore would have to comply with its obligations concerning their operations, subsidiaries, and value chain, regardless of where they are located[8]. Given its width in scope, obligations, and impact outside of the EU, it is essential to assess whether this piece of legislation consists in an extraterritorial legislation and, if so, whether it is an assertion of extraterritorial jurisdiction consistent with international law.

To do so, firstly extraterritoriality under international law and EU law will be discussed (Section 2). Following, the CSDDD will be analysed (Section 3), including a brief history of the Proposal (Section 3.1), its personal scope (Section 3.2), and obligations (Section 3.3). Furthermore, an analysis of its effect will be made (Section 3.4) and it will be discussed whether it constitutes a piece of extraterritorial legislation under EU law (Section 4). Section 5 will point out certain considerations on the concept of reasonableness in extraterritoriality, before drawing overall conclusions (Section 6).

2. *Extraterritoriality in International and EU Law*

2.1. *International Law*

Extraterritoriality can be defined as the ability of a State, via its legal, regulatory, and judicial institutions, to exercise authority over actors and activities outside its own territory[9]. This notion stems from the concept of jurisdiction, which is in turn a manifestation of sovereignty. While sovereignty, in relation to States, entails the power

[8] Explanatory Memoranda to the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, final, at 16, COM/2022/71

[9] Jennifer Zerk, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory area,* Working Paper No. 592010, Corporate Social Responsibility Initiative, at 14, (2010).

to rule over oneself, jurisdiction is, essentially, the extent of that legal power exerted by States[10]. Jurisdictions of States are, in fact, not unlimited: the fundamental principle of international law of sovereign equality of states, namely *par in parem non habet imperio*[11], presupposes that States cannot exert jurisdiction upon another State's territory. This principle was iterated by the Permanent Court of International Justice (PCIJ) in the seminal Lotus case: "failing the existence of a permissive rule to the contrary… [a State] may not exercise its power in any form in the territory of another State"[12].

Jurisdiction as sovereignty presupposes the three powers of the State: legislative or prescriptive (to establish rules), judicial or adjudicative (to establish procedures and adjudicate disputes), and administrative or enforcement (to impose consequences for breaches of the rules)[13]. It is worthy to note that, in the context of the present paper, only prescriptive jurisdiction is relevant – as the enactment of legislation is an act falling within the ambit of prescriptive jurisdiction. Generally, prescriptive jurisdiction – namely, to legislate – needs to be associated with one of the recognised bases of jurisdiction under public international law: territorial principle, nationality principle, passive nationality principle, protective principle, universality principle, and effects doctrine. While a detailed discussion of the abovementioned bases and their status under public international law falls out of the scope of this article, it must be underlined that the precise delimitations and scope of the jurisdictional bases are not clearly established, thereby leaving customary international law uncertain and in development in

[10] Julia Hörnle, *Territorial Sovereignty, Jurisdiction, and the Territorial Detachment of the Internet*, in INTERNET JURISDICTION LAW AND PRACTICE, at 7, (Oxford University Press 2021).

[11] Alex Ansong, *The Concept of Sovereign Equality of States in International Law*, 2(1), in Gimpa Law Review, *14-34,* (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171769 (last visited May 2, 2024).

[12] Judgment No 9 (Decision No) PCIJ Series A No 10.

[13] Rudolf Binschedler, "*Treaties, Reservations*" at 512, Encyclopedia of Public International Law, Rudolf Bernhardt, 2003.

such regards[14]. It remains uncontended that the territorial principle is the main basis of jurisdiction under customary international law: a State is normally able to assert jurisdiction within its territory[15]. All other assertions of jurisdiction outside one's territory can be considered as 'extraterritorial', and therefore an exception to the leading territorial principle[16]. A developing doctrine instead is the so-called 'effects doctrine', whereby if an occurrence in another State has substantial effects in a third State, the latter is allowed to exert prescriptive jurisdiction on the former occurrence. While its status is contested, it has increasingly been used, especially in competition law instances – where the discerning criteria for applicability is the relevant conduct's effect in the EU's internal market competition, not the location of the companies[17].

Pertaining to extraterritoriality, academic literature has delimited the distinction that can be drawn between 'direct extraterritorial jurisdiction' and 'domestic measures with extraterritorial implications'. Direct extraterritorial jurisdiction entails that a State regulates directly over a conduct occurring abroad that is not triggered by a territorial or other connection. Domestic measures with extraterritorial implications, instead, entail that a State regulates conduct, occurring also abroad, on the basis of its territorial jurisdiction over private actors, including companies.[18] Arguments have been advanced[19] suggesting that exertion

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[14] For an overview of jurisdiction under public international law, see: Cedric Ryngaert, Jurisdiction in International (2015).

[15] Directorate-General for External Policies of the Union (European Parliament), Robert Dover & Justin Frosini, The extraterritorial effects of legislation and policies in the EU and US (2012), https://op.europa.eu/en/publication-detail/-/publication/f1ca25fb-ed09-423f-9381-73bab0789184 (last visited May 2, 2024), at 9.

[16] Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?*, 117 JOURNAL OF BUSINESS ETHICS 493 (2012), at 495.

[17] For a discussion of the effects doctrine under international law, see: Jason Coppel, *A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law*, 6 Leiden Journal of International Law 73 (1993).

[18] Zerk (n 9), at 15.

[19] Rachel Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct Jurisdictional dilemma*

of direct extraterritorial jurisdiction may amount to an intrusion into the jurisdiction of another State, and potentially to a violation of the principle of non-intervention in another State's affairs[20]. However, domestic measures with extraterritorial implications tend to be less controversial[21]. Although they still have extraterritorial implications, they may not be such a substantial intrusion as to interfere in another State's affairs. Such a distinction between the two types of measures can also be drawn by the Lotus case; while a State may not, failing the existence of a permissive rule, exercise its power in any form in the territory of another State, "it does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad…"[22]. Therefore, much of the assessment on the legitimacy of the measure, in practice, will depend on its jurisdictional basis, trigger of jurisdiction, its design, and obligations.

While the distinction between the two categories may not always be crystal clear, practice suggests that domestic measures with extraterritorial implications are increasingly being used, such as an import ban on products using unacceptable environmental standards[23], and prohibition of export on local companies investing in projects obtained by corruption are just practical instances of domestic measures with extraterritorial implications[24]. More specifically, there has been an increasing tendency of States to adopt domestic measures with extraterritorial implications regulating the conduct abroad of companies economically present within a State's jurisdiction – the scope of action

raised/created by the use of the extraterritorial techniques, 14 Utrecht Law Review 22 (2018), at 29.

[20] For a discussion on the principle of non-intervention, see: Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 Leiden Journal of International Law 345 (2009).

[21] Zerk (n 9), at 15.

[22] *SS Lotus* (n 12), at 19.

[23] For an instance, see: American Clean Energy and Security Act, ACES, H.R. 2454.

[24] For an instance, see: US Department of Justice, Lay-person's Guide to the FCPA, http://www.justice.gov/criminal/fraud/docs/DoJdocb.html (last visited May 2, 2024).

set out in the CSDDD[25]. While the regulation of business' human right conduct abroad is set out in the UN's non-binding Guiding Principles on Business and Human Rights[26], a leading standard of conduct, the existence of an obligation to regulate business' human rights conduct abroad is not settled under international law and is beyond the scope of this article[27]. However, it is worthy to point out that States are faced with a dilemma when deciding whether or not to regulate business' human rights conduct abroad: on the one hand, extraterritorial regulation may incur in violation of other States' exclusive jurisdiction, while, on the other hand, limiting regulation to events wholly within the territorial State may create a regulatory vacuum in transnational behaviours, where the host States of companies' operations are unable or unwilling to regulate[28].

Against the backdrop of regulating business' human rights conduct abroad, as well as in fields other than corporate due diligence[29], resort to 'parent-based' regulation is often used. That entails imposing requirements on the parent company, settled within the regulating State's jurisdiction, which, in turn, has to apply the requirements also to their foreign subsidiaries[30]. This raises the question of how can the traditional jurisdictional principles be applied to legal persons such as multinational companies: while there is no single test on corporate nationality under international law, and much of the rules depend upon

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[25] Bernaz (n 16), at 494.

[26] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc A/HRC/17/31, at 7.

[27] For a discussion of the developments in the business and human rights discourse, see: Irene Pietropaoli, *Business, human rights and transitional justice* (Routledge 1st ed 2020).

[28] Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct Jurisdictional dilemma raised/created by the use of the extraterritorial techniques* at 23 (cited in note 19).

[29] For an example of parent-based regulation, see the anti-bribery OECD scheme: Keith Loken, *The OECD Anti-Bribery Convention: Coverage of Foreign Subsidiaries*, 33 The George Washington International Law Review 325 (2001).

[30] Zerk, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas*, at 14 (cited in note 9).

the respective States, jurisdiction over companies tends to be based on domicile, namely the place of establishment[31]. Furthermore, States generally do not consider foreign subsidiaries of parent companies domiciled within their jurisdiction as their own nationals[32]. The following section will shed light on the EU's approach to jurisdiction over companies, though arguments have been advanced that the exercise of jurisdiction over a parent company's foreign subsidiaries may raise extraterritorial jurisdictional issues[33].

2.2. *EU Law*

Firstly, it must be ascertained, by means of art. 3(5) Treaty on the European Union (TEU), that the EU is bound by international law[34]. Therefore, following the tenets laid out in Lotus, the EU's legislative jurisdiction may be extended to acts which have taken place outside of the Union insofar as prohibitive rules of international law do not stand in the way[35]. When territoriality is not the principle of jurisdiction upon which the relevant EU measure is based, it will then need to be justified under a different principle of jurisdiction[36].

2.2.1. *Extraterritoriality and Territorial Extension*

In the analysis and discussion on the EU's extraterritorial measures, the leading academic reference is the one of Scott, where a

[31] See *Id*. at 22.
[32] See *Ibid*.
[33] Vivian Grosswald Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17(2) *Chicago Journal of International Law* 407, 413 (2016).
[34] Art. 3(5), TEU.
[35] P. J. Kuyper, *European Community Law and Extraterritoriality: Some Trends and New Developments*, 33(4) The International and Comparative Law Quarterly 1013, 1014 (1984).
[36] Joanne Scott, *The new EU extraterritoriality*, 51 Common Market Law Review 1343, 1345 (2014).

distinction is drawn between extraterritoriality and territorial extension[37]. This distinction is based on the determination of the conduct that effectively triggers the application of EU law and the assessment of whether that trigger is territorial or not. 'Extraterritoriality' – in this context – is defined as "the application of a measure triggered by something other than a territorial connection with the regulating state"[38], while 'territorial extension' is defined as "the application of a measure triggered by a territorial connection, but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad"[39].

This categorisation is consistent with the previous international law distinction between direct extraterritorial jurisdiction – namely, extraterritoriality – and domestic measures with extraterritorial implications – namely, territorial extension. Therefore, a measure that regulates foreign conduct of EU citizens can be an extraterritorial measure – as its trigger of application is EU nationality, and not a territorial connection[40]. By contrast, a measure that regulates conduct abroad on the basis of having legal presence within the EU, is considered as a territorial extension, and therefore not extraterritorial[41]. As discussed below, the concept of territory is increasingly being remodelled and used to fit modern-day developments, to the point that in globalised economic and

[37] Marise Cremona and Joanne Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* at 22-23 (Oxford University Press 1st ed. 2019).

[38] Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62(1) The American Journal of Comparative Law 87, 90 (2014).

[39] See *Ibid*.

[40] For an example concerning natural persons, see Art. 10 para. 1, EU Dir. 5 April 2011 no. 2011/36 on combating and preventing tracking in human beings and protecting its victims,. For an example concerning legal persons, see EU Dir. 8 June 2011 no. 61/2011 on alternative investment fund managers.

[41] Scott, *Global Reach of EU law* at 24 (cited in note 37).

communicative relations, territorial connections can be established much more often[42].

Such territorial extensions can be established at different levels: transaction-level, firm-level, and country-level territorial extensions[43]. For instance, Council Regulation 1099/2009 that prohibits suffering for the killing of animals at the time of killing, established that such requirement is also applied to animals imported into the EU[44]. The trigger, therefore, is the specific commercial transaction importing the animal into the EU's territory, which extends territorially the scope of EU law to the process of killing the animal. A firm-level territorial extension, instead, is exemplified by the Regulation on standards for ship inspection, by which organisations need to comply with EU law criteria in order to be certified to conduct ship inspections – and empowering the European Maritime Safety Authority (EMSA) to conduct inspections also abroad[45]. In this case, the relevant trigger is the operations of the company on Member States' ships (an extension of territory under the flag principle[46]), that therefore needs to comply with the requirements at a firm level. Furthermore, a country-level territorial extension occurs when access to the EU market is denied for goods originating from countries whose laws are deemed not to be in conformity with EU standards. For instance, in the financial domain, the Regulation on OTC derivatives trading provides that, in order for a third-country OTC service provider to access the EU's market, that third-country's

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[42] Nico Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance*, 33 EUROPEAN JOURNAL OF INTERNATIONAL LAW 481 (2022) at 496, available at https://academic.oup.com/ejil/article/33/2/481/6647799 (last visited May 2, 2024).

[43] Scott, *Global Reach of EU law* at 25 (cited in note 37).

[44] Art. 12, Council Reg. 1099/2009 on the protection of animals at the time of killing [2009].

[45] Arts. 2(c)-4(3), Reg. 391/2009 of the European Parliament and the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations [2009].

[46] For a discussion of the Flag Principle under international law, see Jörn-Ahrend Witt, *Obligations and Control of Flag States* (2007).

laws must be recognised by the EU to be equivalent.[47] In this case, the territorial trigger is access to the EU's market, which is subject to the recognition of the country's legislation as equivalent to the EU's – therefore, territorially extending the scope of EU law.

2.2.2. *Triggers of Application*

The characterisation of a measure as extraterritorial or territorial extension depends upon the identification of its trigger of application. Scott has identified six triggers for the territorial extension of EU application, namely conduct, nationality, presence, effects, anti-evasion, and transacting with EU persons or property[48]. Only the first four aforementioned triggers are relevant to the analysis of the CSDDD, and therefore the following discussion will focus only on those.

'Conduct' refers to conduct within the EU, with the most prominent example being market access: importation of a product, marketing of a service, or the performance of a commercial act within the Union are triggers of application of EU law[49].

'Nationality', instead, is a trigger by which the EU imposes obligations on natural and legal persons having EU nationality. Art. 54 TFEU provides for the criteria to ascertain whether a company can be defined as having 'nationality' of a Member State, namely if it is formed in accordance with the laws of a Member State and has its registered office, central administration, or principal place of business within the Union[50]. Nationality of a company is a different notion than establishment, which entails having a real and effective activity exercised through stable arrangements, falling short of nationality.

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[47] Arts. 4-9, Reg. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012].

[48] Scott, *The New EU Extraterritoriality* at 1348 (cited in note 36).

[49] Hornkohl at 17 (cited in note 1).

[50] Art. 54, Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016]

Nationality, following Scott's definition, is an extraterritorial trigger as such, given that it relies on a consideration which is not the territory. However, it is uncontended as a matter of customary international law that States (in the present case, the EU as empowered by States) can regulate the conduct of their own nationals abroad[51].

Establishment constitutes the main instance of 'presence' for legal persons: a business can be established in the EU even though it is engaged in activities outside of the EU. In addition to establishment, recent developments have led to including the carrying out of economic activity as a 'presence' in the EU[52]. This trigger, particularly relevant to the CSDDD Proposal, entails that the exercise of economic activity in at least one Member State is sufficient to establish obligations on companies. However, arguments have been advanced on the legitimacy of this trigger being dependent on threshold criteria, such as the extension of economic activity or the number of employees, for otherwise the definition of economic presence would be too stretched[53].

The 'effects' trigger is predominantly being used in competition law[54]. However, often not only substantial effects are required to trigger EU law application, but also meeting requirements of EU and worldwide net turnover[55].

Another relevant notion discussed by Scott is that of 'safety valves': these are mechanisms included in legislation using the abovementioned triggers, with the purpose of preventing

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[51] Scott, *The New EU Extraterritoriality* at 1352 (cited in note 36).

[52] Haut Comité Juridique de la Place Financière de Paris, *Rapport Sur L'Extraterritorialitè Du Droit De L'Union Européenne* (May 2022) at 50, available at https://www.banque-france.fr/system/files/2023-10/rapport_46_f.pdf (last visited May 2, 2024).

[53] See *Id.* at 51.

[54] Hornkohl at 21 (cited in note 1).

[55] Arts. 1-3, Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004]

jurisdictional overreach and facilitating cooperation[56]. Such mechanisms, denominated 'contingency' and 'contextuality', entail a certain jurisdictional restraint on the EU's part and can be viewed as expressions of the principle of proportionality. Contingency refers to the disapplication of EU law when the foreign conduct has been satisfactorily regulated by the other State, such as with equivalence decisions[57]. Contextuality, instead, refers to the application of EU law being conditional on a case-by-case basis contextual assessment of whether open-ended standards have been met in specific circumstances, such as with the EU's monitoring of derivatives transactions also outside the EU's markets, to identify cases posing systemic risks[58]. As previously stated, the design and triggers of extraterritorial or territorial extension of legislation are, in practice, relevant to the assessment of the legitimacy of extraterritoriality and its acceptability for foreign states: that is why, when there are doubts that the triggers of application of EU law are in conformity with international law, safety valves are frequently incorporated as a red line or emergency break.

2.2.3. *Precedents and Court of Justice's Stance*

A seminal precedent instance of extraterritorial legislation from the EU is the provision within Directive 2013/36 on the Bonus Cap[59]. The EU, in the context of follow-up to the global financial crisis, regulated the maximum bonus remuneration that can be paid to certain staff employed by banks and investment firms at group, parent company, and subsidiary levels – including staff in third

[56] Scott, *The New EU Extraterritoriality* at 1364 (cited in note 36).

[57] See *Id.* at 1366.

[58] See *Id.* at 1367.

[59] Art. 92(2), Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013].

countries. Consequently, the legislation would also apply to a third-country employee's relationship with a third-country company being a subsidiary of an EU company, with the trigger of legislation being the economic presence in the EU of the parent company, thereby exemplifying an instance of parent-based regulation[60]. Notably, such a reach was challenged by the UK in front of the Court of Justice of the European Union (CJEU) for not being compliant with customary international law, but the claim was withdrawn following the Opinion of the Advocate General[61]. The latter rebutted the UK's claims on the basis that the Lotus judgement did not contain a general prohibition on extending a State's legislative jurisdiction beyond its territory, and that the existence of a prohibitive rule was not proven by the UK[62]. Against this case's background, the CJEU has been found to be generally permissive towards territorial extension and not having a presumption against extraterritoriality. Although being mindful of the danger that territorial extension can cause to third-country laws[63], the Court also has deferred a margin of discretion to assess its norms' compliance with customary international law to the EU's institutions, given the lack of delimited precision of the principles of customary international law[64].

In conclusion, there does not appear to be any universal practice on extraterritorial application of EU law[65]. Its context varies on the basis of the respective sub-field of EU law and subject matter, and its degree is assessed on a case-by-case basis with regard to the legislation's objective and the design of the instrument. Therefore, the

[60] Scott, *The New EU Extraterritoriality* at 1353 (cited in note 36).

[61] United Kingdom of Great Britain and Northern Ireland vs European Parliament and Council of the European Union, ECLI:EU:C:2014:2394, Opinion of AG Jääskinen, CJEU (2013).

[62] See *Id*. at paras. 36-41.

[63] Scott, *Global Reach of EU law* at 36-37 (cited in note 37).

[64] William S. Dodge, *Extraterritoriality of Statutes and Regulations*, SSRN Electronic Journal (2022) at 11.

[65] Hornkohl at 7 (cited in note 1).

existence of international standards as precedent for certain extraterritoriality is not, in practice, a precondition for extraterritorial exercise of EU law[66].

3. *The CSDDD Proposal*

3.1. *Brief History of the Proposal*

Following the adoption of the 2011 UN Guiding Principles on Business and Human Rights, several States have begun adopting legislation implementing these principles, including EU Member States such as France and Germany. After the European Parliament's requests[67] to introduce due diligence obligations and the Commission's own mandate to do so[68], the EU's executive commenced in 2020 a study to create a mandatory due diligence framework[69]. Such a study was, however, rejected twice by the European Commission's Regulatory Scrutiny Board (RSB) – the Commission's own control organ for legislation – specifically for criticism on excessive regulation of directors' duties and the role of small and medium enterprises (SMEs) in the context of the Proposal[70]. Eventually, after the due modifications, the Commission published the Proposal for a Directive on Corporate Sustainability Due

[66] See *Id.* at 9.

[67] European Parliament, *Report on Sustainable Finance* A8-0164/2018 (2018), available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0164_EN.html (last visited May 2, 2024).

[68] European Commission, *Communication from the Commission Action Plan: Financing Sustainable Growth*, COM(2018) 97 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0097 (last visited May 2, 2024).

[69] Directorate-General for Justice and Consumers, Torres-Cortés et al., *Study on Due Diligence Requirements Through the Supply Chain: Final Report* (2020) https://data.europa.eu/doi/10.2838/39830 (last visited May 2, 2024).

[70] Regulatory Scrutiny Board Opinion on Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937, (SEC (2022) 95, 26/11/2021).

Diligence on February 23rd, 2022. Subject to ordinary legislative procedure, at the time of writing this Proposal has undergone the Council's agreement on a General Approach in December 2022[71], and the EP plenary vote on amendments on June 1st, 2023[72]. Later on, the Council and European Parliament reached a provisional agreement on the text of the Directive[73], which is tabled for discussion at the time of writing[74]. Considerations on the amended Directive are beyond the scope of the present article.

3.2. *CSDDD's Personal Scope*

The scope of application of the CSDD Directive Proposal comprises two different kind of company, based on the legislation of their formation: first, companies formed in accordance with the law of a Member State; and second, companies formed in accordance with the legislation of a third country.

For what concerns the first kind, EU companies included in the scope of the Directive are more specifically:

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[71] Council of the European Union, *Council adopts position on due diligence rules for large companies* (2022), https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/ (last visited May 2, 2024).

[72]European Parliament, *Texts adopted - Thursday, 1 June 2023*, (2023), https://www.europarl.europa.eu/doceo/document/TA-9-2023-06-01_EN.html (last visited May 2, 2024).

[73] Council of the European Union, *Corporate Sustainability Due Diligence: Council and Parliament strike deal to protect environment and human rights* (2023), https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/ (last visited May 2, 2024).

[74] Jon McGowan, *Vote On EU Corporate Sustainability Due Diligence Law Scheduled For February 28*, Forbes (2024), https://www.forbes.com/sites/jonmcgowan/2024/02/26/eu-corporate-sustainability-due-diligence-law-vote-scheduled-for-february-28/ (last visited May 2, 2024).

> Companies having a net worldwide turnover greater than €150 million and employing more than 500 employees, and Companies having a net worldwide turnover greater than €40 million and employing more than 250 employees, provided that 50% of their net worldwide turnover was generated in the textile, agriculture, or extraction of mineral resources sector[75].

While Non-EU companies included in the scope of the Directive are "Companies having a net EU turnover greater than €150 million, and Companies having a net EU turnover greater than €40 million, provided that 50% of their net worldwide turnover was generated in the textile, agriculture, or extraction of mineral resources sector"[76].

Uniform rules for employee and net turnover calculations are provided, and companies are subject to the Directive if they fulfil the criteria for the preceding financial year for which statements have been prepared[77]. According to the European Commission's study, such personal scope will cover around 13,000 EU companies and 4,000 non-EU companies[78].

3.3. *Obligations in the Directive*

The Directive establishes obligations on the companies to which it is applicable, namely to integrate due diligence into the companies' policies[79], to thereby identify actual and potential adverse impacts to human rights and environmental standards[80], and consequently take appropriate measures to prevent, adequately mitigate[81], and bring

[75] See n. 5, Art. 2(1) Proposal.
[76] See n. 5Art. 2(2) Proposal.
[77] Explanatory Memoranda (n 8), at 16.
[78] See *Ibid*.
[79] See n. 5Art. 5 Proposal.
[80] See n. 5Art. 6 Proposal; this obligation is applicable to the company's own operations, those of their subsidiaries, and established business relationships.
[81] See n. 5, Art. 7 Proposal.

actual adverse impact to an end[82]. For the purposes of taking such measures, the companies should also establish and maintain a complaint procedure[83], with respect to activities of their own operations, subsidiaries, and value chain, as well as monitoring the effectiveness of their due diligence policies[84] and report publicly on them[85]. Only for companies with more than €150 millions of turnover (EU or non-EU), the CSDDD imposes an obligation to adapt their business model to the Paris Agreement on Climate Change[86].

The proposal also establishes civil liability for companies for failure to comply with art. 7 and 8[87], directors' liability[88], corporate governance obligations for overseeing due diligence,[89] and administrative sanctions for non-compliance[90]. These aspects, mainly related to private law and company law[91], will not be explored in the present article, which focuses on extraterritoriality.

3.4. *Effects of the Directive*

[82] See n. 5, Art. 8 Proposal; the company is required to seek contractual assurances from their established business partners that they will comply with the company's code of conduct, including by seeking contractual assurances from its own partners. The company is further required to temporarily suspend or terminate commercial relations with the business partner in connection to which the adverse impact has arisen.

[83] Art. 9 Proposal.

[84] Art. 10 Proposal.

[85] Art. 11 Proposal.

[86] Art. 15 Proposal.

[87] Art. 22 Proposal.

[88] Art. 25 Proposal.

[89] Art. 26 Proposal.

[90] Art. 20 Proposal.

[91] For a complete review of the CSDD under private international law, see: Emeric Prévost, *Achieving Climate Change Justice: Some Private International Law Issues*, Social Science Research Network (2023), https://ssrn.com/abstract=4450102 (last visited May 2, 2024).

The far-reaching effects of the obligations laid out in the Directive extend far beyond the EU. Firstly, the adaptation of a large corporation's own operations to due diligence requires extensive mechanisms to be put in place – and that would apply not only to the company's operations in the EU but also its operations abroad. Secondly, the extension of the obligation to a company's subsidiary, regardless of where they are located, entails a direct transposition of EU law towards third-country subsidiaries, subject to a wholly different jurisdiction, which would need to comply with EU law pending sanctions or civil liability of the parent company in the EU. Furthermore, the whole value chain (i.e. established business relations)[92] of the parent company and subsidiary are subject to the due diligence obligations, adopting the parent company's code of conduct, and seeking contractual assurances from their business partners for due diligence obligations[93]. This would create a contractual cascade involving several companies, even SMEs, across the EU and foreign jurisdictions – which may end up impacting negatively on small-sized companies that base their activities on supplying large companies caught by the Directive, specifically in less developed countries[94]. While a comprehensive discussion of the merits of the Proposal is outside the scope of this article, the far-reaching effects of the CSDDD need to be emphasized: due to its large and consequential implications, it becomes even more relevant to establish its status in extraterritoriality and discuss whether the EU has engaged in an overreach of jurisdiction.

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[92] Art. 3(f) Proposal.

[93] Luca Enriques & Matteo Gatti, *The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention* (2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate (last visited May 2, 2024).

[94] Yenkong Ngangjoh-Hodu et al., *The proposed EU Corporate Sustainability Due Diligence Directive and its Impact on LDCs*, (2023).

4. *Is the Scope Extraterritorial?*

For the purposes of establishing whether the measure can be considered extraterritorial, regard must be had to the reasoning of the European Commission. In its explanatory memoranda, the Commission does not justify the application of the measure to EU companies, but it does so for third-country companies – in the context of explaining the different criteria applied to EU and non-EU companies[95]. Specifically:

> The EU turnover criterion for third-country companies creates a link to the EU. Including only turnover generated in the Union is justified since such a threshold, appropriately calibrated, creates a territorial connection between the third-country companies and the Union by the effects that the activities of these companies may have on the EU internal market, which is sufficient for the Union law to apply to third-country companies[96].

In Recital 24 to the CSDDD, the Commission states that "turnover is a proxy for the effects that the activities of those companies could have on the internal market. In accordance with international law, such effects justify the application of Union law to third-country companies"[97]. Therefore, the Commission justifies the application of Union law to third-country companies due to their economic presence in the Union (i.e. the turnover), which is representative of the effects that the activities of the companies have on the Union's internal market. It is, therefore, necessary to establish what is the trigger in the CSDDD that makes EU law applicable – and to evaluate whether this trigger has a territorial connection, rendering

[95] Explanatory Memoranda (n 8), at 15.
[96] See *Ibid*.
[97] Recital 24, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

the measure a territorial extension, or whether the trigger relies on another connection which is not territorial, rendering the measure extraterritorial. The analysis will first be made on third-country companies, and then on EU companies.

Therefore, the trigger of application of the CSDDD to third-country companies is their EU turnover, as – in fact – they are not formed in accordance with the laws of a Member State. The Directive applies both to companies that are established within the Union, and those which are not, but pursue an economic activity there, making their net EU turnover above the thresholds indicated. EU turnover, by itself, can be considered a trigger of 'presence': exercise of an economic activity in at least one Member State suffices to render EU law applicable to that entity. Whether the third-country companies are established in the Union and pass the EU turnover thresholds, or they are not established but have such an economic activity to exceed the EU turnover thresholds, they can be considered present within the Union. Therefore, the trigger of the CSDDD towards third-country companies is their presence in the Union, which can be seen as a territorial connection to EU law. Pertaining to the effects trigger mentioned in Recital 24, it is not clear what effects are being discussed, as the effects doctrine is used mostly in competition law instances[98]. While it cannot be contended that such big companies with such a large EU turnover produce tangible and substantial effects into the Union, effects can be understood, in this case, as an *a fortiori* explanation of the EU turnover criterion. In fact, qualifying the effect such companies have on the EU's internal market by means of an EU turnover threshold demonstrates the EU's – presumed – attention not to exert overreaching jurisdiction. In such a way, only companies with a substantial economic presence would be subject to this EU legislation. The EU turnover criteria may also be seen as a proxy for conduct, namely market access: the high EU turnover of such companies is particularly indicative of a wide access to the EU's

[98] Scott, *The New EU Extraterritoriality* at 1352, cited in note 36.

market and benefit therefrom. Therefore, their conduct in the EU – namely wide access and benefit from the EU's market – suffices to render them subject to prescriptive jurisdiction. As previously mentioned, the blur between these categories of triggers is herewith exemplified.

Pertaining to EU companies, the trigger can be seen in both their EU nationality and their turnover. However, in the present case, the turnover is considered worldwide: it can be assumed that the reason to insert a turnover criterion for EU companies is that of limiting the scope of application of the CSDDD to companies that actually have the means and responsibility to use due diligence – excluding, for instance, SMEs. In fact, worldwide turnover is not a proxy for EU effects, as was the case with third-country companies; the turnover, in fact, may be generated elsewhere, falling short of a territorial connection. Therefore, the trigger must be considered as the fact that such companies are formed under the law of a Member State, therefore having EU nationality. As the companies' EU nationality is the relevant trigger, the measure is extraterritorial within the meaning given by Scott, namely that it relies on another trigger which is not territorial. It remains uncontested that States (in the present case, the EU as empowered by States) can regulate the conduct of their own nationals abroad as a matter of customary international law[99]. All the aforementioned considerations are without prejudice to the controversial status of regulating foreign subsidiaries of a parent company.

As a final note, this territorial extension can be considered as a firm-level extension, since compliance is required for the whole company's operations, subsidiaries, and value chain, and not simply

[99] Hornkohl, *The Extraterritorial Application of Statutes and Regulations in EU Law* at 17, cited in note 1.

related to an individual transaction, or to other countries' compliance[100].

5. *Reasonableness in Extraterritoriality*

Following the discussion on extraterritoriality of the CSDDD, it is important to make a few remarks. Firstly, it appears that the triggers on which the Commission based its proposal, namely economic presence and nationality, are accepted and already used triggers under EU law. Secondly, it does not necessarily follow that those triggers are legitimate exertions of jurisdiction under customary international law: being a field of law in development and often without precise demarcations, it is difficult to ascertain whether the CSDDD would be too far of an encroachment into other States' jurisdictions. However, much of the assessment on whether the CSDDD is extraterritorial jurisdiction encroachment into other States' jurisdictions will depend on their reactions – should it be adopted. Such can manifest after the approval of the measure by means of calls for imperialism and colonialism, diplomatic protests, non-recognition of laws, blocking statutes, or even retaliatory measures – thereby shaping customary international law[101]. That is why, in asserting extraterritorial jurisdiction, the concept of reasonableness becomes key[102]. First introduced by Roth, it was suggested that, to exert jurisdiction, it does not suffice that the conduct has direct, substantial, and foreseeable effects in that State. Exertion of jurisdiction over acts carried out in a foreign State should be in

[100] Scott, *Global Reach of EU law* at 25 cited in note 37.

[101] Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct Jurisdictional dilemma raised/created by the use of the extraterritorial techniques* at 23, cited in note 19.

[102] P. M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests,* 41 No. 2 The International and Comparative Law Quarterly 245 (1992).

accordance with 'reasonableness' in the particular case, on the following basis:

> First, to what extent does that foreign State encourage or support the conduct in question? Second, how close are the connections of the defendants and their conduct to the forum State? On that basis, the critical question can be considered: is the strength of those connections such that, notwithstanding the degree of conflict with the interest of the foreign State, extraterritorial jurisdiction is justified?[103]

Although the demarcation of these questions was grounded on adjudicative jurisdiction, they can also be seen in light of prescriptive jurisdiction. Firstly, to what extent do the foreign States encourage or support the conduct in question (i.e. conduct of companies, subsidiaries, or value chains that counters sustainability and human rights)? Secondly, how close are the connections of the companies and their conduct with the EU? On that basis, is the strength of that connection such that, notwithstanding the degree of conflict with the interest of the foreign State, extraterritorial jurisdiction is justified? Concretely answering these questions poses difficulties as, already with the first matter, foreign States should support with great extent the imposition of human rights and sustainability standards. As a matter of fact, the obligations imposed through the Annex are referenced to widely accepted international treaties, some of which have become part of customary international law[104]. However, in practice, some jurisdictions in which companies operate are unable or

[103] See *Id.* at 274.

[104] Annex Part I and Part II, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

unwilling to concretise enforcement in upholding such standards[105]. Thus, while foreign States may publicly support such standards of conduct, in practice their concrete application may go against their interests.

Furthermore, the connection between the EU and the companies subject to the CSDDD has been extensively discussed before. While under EU law the trigger of jurisdiction due to economic presence may be accepted, we cannot necessarily conclude that international law prohibits or permits such exertion. Therefore, the considerations will depend much on the reactions of foreign States that will develop and consolidate customary international law on the matter. Anyhow, the extensive effect that the CSDDD would have outside of the EU cannot be contended. As analysed previously, it is precisely in the goals of the Commission to have such a far-reaching external effect and uphold sustainability and human rights abroad[106]. Given such ambition and far-reaching effects, considerations on the reasonableness of the CSDDD application should be made. The wide extent of the obligations included makes this paper prone to comment that the EU could have tried to insert the concept of reasonableness into the CSDDD. For instance, safety valves may be seen as a concretisation of reasonableness in extraterritorial legislation within EU law. However, the EU did not include any mechanism in the CSDDD by which account of third-country legislation should be taken, and, after an equivalence assessment, the CSDDD could be disapplied when those companies are already obliged in the third country to comply with those strict standards – so-called contingency. It further does not include any mechanism by which different contexts in different countries are monitored and the application of the CSDDD would be triggered

[105] Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct Jurisdictional dilemma raised/created by the use of the extraterritorial techniques* at 23, cited in note 19.

[106] *Explanatory Memoranda* at 3-4, cited in note 8.

only if the operations in those countries would no longer benefit from the human rights and sustainability standards – so-called contextuality. Given the absence of such safety valves that limit jurisdictional overreach and demonstrate to other States a willingness to exert jurisdictional restraint, the CSDDD can be said not to be incorporating the concept of reasonableness, key in exerting extraterritorial legislation.

6. *Conclusions*

This paper has analysed the international and EU law background to extraterritoriality. The distinction between direct extraterritoriality and domestic measures with extraterritorial implications, or territorial extension, has been drawn, to conclude that the EU generally has a permissive stance towards extraterritoriality, and that international law offers few guidance to assess the assertions of extraterritorial jurisdiction.

Against this backdrop, the CSDDD proposal was examined. The trigger of jurisdiction for EU companies is their nationality, which makes the CSDDD an extraterritorial measure in the sense that it relies on another connecting factor other than territory. However, the trigger of jurisdiction for non-EU companies is their economic presence as a proxy for effects in the EU, making the CSDDD a measure of territorial extension, as the economic presence consists of a link to the EU territory. Although it cannot be necessarily concluded that the scope will be accepted by other States under international law, it also cannot be said to be manifestly exceeding the EU's jurisdictional remits. It remains to be seen whether the amended version, when and should it be adopted, will be subject to the same conclusion.

Although the EU's jurisdictional exertion cannot be definitely said to be illegitimate, we can conclude that the EU could and should have included the concept of reasonableness through the usage of

safety valves to avoid jurisdictional overreach – given the wide extent of effects the CSDDD would have in other States.

In essence, precise conclusions over the legitimacy of the CSDDD are difficult to be drawn, but it is likely that this type of exertion of extraterritorial legislation will increasingly be used in the future. Extraterritoriality is, generally, not a black-and-white issue, but it is a matter of degree[107]. In fact, this extraterritorial legislation does not only raise issues concerning the legitimate exertion of jurisdiction, but it also poses several questions as to its different consequences from a private international law standpoint. Namely, where would companies be sued for their civil liability for adverse consequences on environmental and human rights, should they occur outside of the EU? On which basis of the EU's private international law regime could the plaintiffs have jurisdiction – and how would it impact the doctrines on the place where damages occurred and where damages had consequences? While these questions are outside the scope of the present article, they shed light on the prospective developments that the CSDDD, and future akin extraterritorial legislation, would bring about both from a public and private international law perspective.

While under international law the issue of the CSDDD and other extraterritorial legislation is presented as an issue of jurisdiction, in practice, the underlying problem is one of State interest and politics[108]. The example of the CSDDD within the framework of business and human rights can be seen as an instance of 'jurisdictional assemblage'[109], by which a multiplicity of States have valid jurisdictional claims, yet having no hierarchy or priority over them – a necessary corollary to the fundamental transformations

[107] B& Zerk, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas* at 15, cited in note 9.

[108] Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests* at 273, cited in note 102.

[109] Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance* at 482, cited in note 42.

occurring in a globalised, digitalised, and interconnected world. Against such a backdrop, as the EU aims at establishing itself as a global actor and asserting its regulatory power in its international relations, it also needs to be wary of the opposite counterreactions from other States: as the EU exercises such extraterritorial overreach in other jurisdictions, other States may then exert such extraterritorial overreach in the EU themselves.