BUNDESRECHTSANWALTSKAMMER

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Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (Corporate Sustainability Due Diligence Directive)

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The Bundesrechtsanwaltskammer (The German Federal Bar, BRAK) is the umbrella organisation of the self-regulatory bodies of the German *Rechtsanwälte*. It represents the interests of the 28 German Bars and thus of the entire legal profession in the Federal Republic of Germany, which currently consists of approximately 165,000 lawyers[1], vis-à-vis authorities, courts and organisations - at national, European and international level.

[1] In the interest of better readability, no explicit distinction is made in gender-specific personal designations in this document. The masculine form chosen in the following includes all genders equally.

Position

The German Federal Bar (BRAK) comments on the proposal currently discussed in the ordinary legislative procedure for the creation of a Corporate Sustainability Due Diligence Directive (CSDDD). The position is based on the Commission's proposal of 23 February 2022[2] the Council's general approach of 30 November 2022[3] and the position of the European Parliament of 1 June 2023[4]. At the time of publication of the present position paper, the text of the provisional political agreement of 14 December 2023[5] was not available yet.

In view of the status of the legislative procedure, this position paper is limited to a single, from the legal profession's perspective decisive point, which is the draft Directive's applicability to legal services. Further comments, in particular on the structure of the liability provisions, will be made, where appropriate, after publication of the text version of the political agreement.

The BRAK welcomes the initiative to legally establish human rights due diligence obligations for companies that are integrated into global procurement and sales markets. Irrespective of the willingness and ability of states to guarantee the protection of human rights, companies are also obliged to uphold protection standards in their business activities.

However, the BRAK is highly critical of the fact that, as far as foreseeable, the Directive could also apply to legal services provided by lawyers under obligation of professional secrecy. Corresponding review and disclosure obligations are entirely incompatible with the legal profession's core values and, in particular, with professional secrecy. A disruption of the special relationship of trust between lawyer and client would massively impair access to justice as stipulated by the rule of law. The BRAK therefore calls on the legislative institutions to provide for an exemption, so that legal services provided by lawyers are beyond any doubt not part of the chain of activities or value chain. Or, in the alternative, at least a recital should clarify that legal services provided by lawyers under obligation of professional secrecy do not fall within the scope of the Directive.

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Applicability of the Directive to legal services

The BRAK calls on the European legislator to exclude the professional activities of lawyers from the scope of the Directive. This applies both to the direct inclusion of legal services provided by lawyers, still potentially provided for in the Commission and the Parliament Proposals, as well as to the potential indirect inclusion of legal services provided by lawyers, put forward in both of these proposals as well as in the Proposal presented by the Council. The applicability to legal services provided by lawyers under obligation of professional secrecy is diametrically opposed to the lawyer's tasks and duties and leads to a violation of rule of law principles, such as the right of access to justice, the freedom to choose a lawyer and the protection of professional secrecy.

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[2] https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:52022PC0071&from=EN

[3] https://data.consilium.europa.eu/doc/document/ST-15024-2022-REV-1/de/pdf

[4] https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_DE.html

[5] https://www.consilium.europa.eu/de/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/, last accessed on 18/12/2023.

The primary task of lawyers is to represent the interests of their clients and to help enforce the law. A simultaneous duty to monitor them - in particular to ensure compliance with extensive and sometimes "soft" requirements relating to their business activities - is not compatible with this task. This would generally contradict the special relationship of trust between client and lawyer, which is characterised, among other things, by the fact that lawyers may in principle trust the information provided by their clients, at least insofar as the incorrectness of the information is not obvious to them. An obligation to verify information cannot be reconciled with this. Rather, as a result of such an obligation, companies that are accused of having violated the provisions of the Directive may not be able to obtain legal representation against this accusation (e.g. in defence against claims for damages) if, in the opinion of the lawyers instructed, there is a suspicion that the accusations could be well-founded. The mandated lawyers would have to carry out their own investigations and, in case of doubt, refuse or terminate the mandate. This would significantly restrict the company's defence options; it would be deprived of its access to justice in the form of the right to be advised, defended and represented (Article 47 sentence 3 CFR), which is guaranteed by Article 13 ECHR, Article 8 UDHR and Article 47 CFR, among others.

In the BRAK's view, an obligation of lawyers to act against the interests of their clients, in particular by not (further) handling the case, can only be reasonably linked to the fact that the lawyer is openly aware of unlawful behaviour on the part of the client and that, in addition, processing the case would serve to promote this behaviour.

While the above problem arises, as already mentioned, only on the basis of the Commission and Parliament Proposals, but not on the basis of the Council's Proposal, where the term "value chain" was replaced with the narrower term "chain of activities", the following problem arises under all three Proposals.

As service providers within the value chain and the chain of activities, lawyers would be indirectly affected by the proposed Directive. The mandating company would have to carry out a due diligence review of the mandated law firm, which is incompatible with the protection of professional secrecy, as this would include the review of other cases.[6]

This follows from the fact that, according to the current definition of the term "value chain" in the Commission and Parliament Proposals, or "chain of activities" in accordance with the Council's general approach, it can be assumed that lawyers, as suppliers to their clients, would be covered by the term and thus by the scope of the Directive. According to Art. 3 g) i) of the Council draft, "chain of activities" means

> *activities of a company's upstream business partners related to the production of goods or the provision of services by the company, including the design, extraction, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service.*

There is no definition as to what an "upstream business partner" is, and the term lacks any clear-cut contours. The wording "related to" is also as broad as possible and it cannot be ruled out that lawyers contribute to the development of a product or service through their advice. At this point, which is crucial for determining the scope of application, the Directive is therefore vague and undefined. This will foreseeably lead to practical difficulties and is furthermore not called for with regard to the subject-

[6] Furthermore, according to legal systems such as the German one, this is contrary to the position of lawyers as an organ of the administration of justice.

matter. (National legislators that already have a corresponding law have defined the scope of application more clearly and narrowly, which could also serve as a model at European level.)

The term "value chain" in the Commission and Parliament Proposals is defined even more broadly, so that the above problem arises all the more here. Article 3 (1) (g) of the Commission Proposal thus covers

> *activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company.*

The value chain concept is also defined very broadly in the Parliament Proposal and covers, in Article 3 (1) g) i) and ii)

> *(i) activities related to, and entities involved in, the production, design, sourcing, extraction, manufacture, transport, storage and supply of raw materials, products or parts of a company's product and the development of a company's product or the development or provision of a service, and*
>
> *(ii) activities related to, and entities involved in, the sale, distribution, transport, storage, and waste management of a company's products or the provision of services, and excluding the waste management of the product by individual consumers.*

It follows, in accordance with Article 6 (1) of the Directive, that companies must take appropriate measures to identify actual and potential negative effects that could result from the business activities of the law firms they mandate, in accordance with paragraphs 2, 3 and 4. Such an investigation begins with a request for information about the activities of the law firm, which the law firm is not permitted to provide under the professional law applicable to it, as these activities relate almost exclusively to work for other clients. It ends with conducting inspections of the law firm's offices, which the law firm is also not permitted to allow under the applicable professional law, as the offices of a law firm almost exclusively contain documents that are subject to professional secrecy.

It is therefore obvious that the obligations of the Directive can only be reconciled with the professional duties of lawyers if it is made clear that legal services provided by lawyers are under no circumstances part of the so-called chain of activities or value chain.

The required exemption for lawyers should, of course, also cover the constellation in which a law firm - e.g. as part of an international case - engages another law firm as a subcontractor. Law firms should generally not be regarded as suppliers or part of the chain of activities or value chain, regardless of whether they are mandated by commercial enterprises or other law firms.

It is interesting in this respect that legal services are not mentioned at all in the entire Directive. This is all the more astonishing as the area of financial services takes up a great deal of space and the question of whether or not the financial sector should be covered is highly controversial in the ongoing negotiations, according to reports from observers.[7] As far as we can see, however, there is no such discussion regarding legal services, even though, as explained above, there are also clear legal

[7] Cf. for example: https://www.euractiv.de/section/finanzen-und-wirtschaft/news/lieferkettengesetz-eu-staaten-erwaegen-einbeziehung-des-finanzsektors/, last accessed on 18/12/2023.

arguments against their inclusion. One gets the impression that the European legislator did not want to include legal services at all, but did not see this aspect.

In the BRAK's opinion, it is therefore imperative that the draft Directive provide for a comprehensive exemption of the client-related activities of lawyers from the scope of application.[8]

The problem of including lawyers in the scope of the Directive is further exacerbated by the vagueness of the obligations according to the Proposal. It does not adequately define the limits of dutiful behaviour, but largely leaves it up to the companies concerned to implement the requirements of international conventions. Further specifications of these obligations by national legislators is out of the question, as they must ensure that the obligated companies fulfil the far-reaching and vague obligations provided for in the draft Directive (Art. 4 in conjunction with Art. 5 et seq. of the draft Directive). This leaves no room for concretisation, which would have a restrictive effect. However, such concretisation is the legislator's very own task.

The vagueness of the regulations is further emphasised by the fact that the scope of application of the proposed Directive is very broad and not clearly defined. This results from the fact that the annex to the proposed Directive includes an extremely extensive catalogue of international conventions and declarations. In addition, however, as can be seen from recital 25, the violation of a prohibition or right not expressly listed in the Annex to the Directive should also be able to constitute an infringement and thus give rise to sanctions. In this respect, the wording in Parliament's first reading has been extended once again compared to the Commission's proposal and the limits of possible infringements have been further watered down.[9]

From the point of view of the rule of law, such an indefinite extension of the obligations of companies does not appear to be acceptable for the obligated companies in general,[10] or for lawyers in particular. The BRAK urges strict adherence to the principle of certainty. This is particularly the case with regard to the possibilities provided for in the draft to interfere with the rights of the obligated companies due to the civil liability provided for in the draft, as well as the official supervision with possibilities to impose fines and other sanctions.

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[8] Similar to, for example, Article 3(3)(b) of Directive (EU) 2019/1937 of 23 October 2019 on the protection of persons who report breaches of Union law (Whistleblower Directive).

[9] While the Commission's proposal stated that 'the fulfilment of due diligence obligations under this Directive should include adverse human rights impacts with regard to protected persons resulting from ***the violation of any of the rights and prohibitions set*** out in the international conventions listed in the Annex to this Directive ... In order to ensure that human rights are comprehensively covered, a breach of ***a prohibition or*** right not explicitly listed in that Annex which results in a direct adverse effect on a legal interest protected by those conventions should also be considered to have an adverse effect on human rights within the meaning of this Directive;" the text as amended by the European Parliament at first reading states: "In fulfilling the due diligence obligations under this Directive, adverse human rights impacts with respect to protected persons should include those arising from ***any activity that deprives or restricts an individual or a group from enjoying the rights or being protected by prohibitions*** enshrined in the international conventions ***and instruments*** listed in the Annex to this Directive, ***and which include subsequent jurisprudence and the work of treaty bodies in relation to those conventions, trade union, labour and social rights***. In order to ensure that human rights are comprehensively covered, an ***adverse effect on the exercise of a*** right which is not explicitly ***listed*** in that Annex, and which results in a direct adverse effect on a legal interest protected by those conventions ***and instruments*** should also be considered as an adverse effect on human rights for the purposes of this Directive;' see synopsis, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_DE.html.

[10] Strict compliance with the principle of certainty must be demanded, particularly in view of the possibilities for encroaching on the rights of the obligated companies due to the provisions on fines, sanctions and damages provided for in the draft.

With regard to the clarification that legal services provided by lawyers under obligation of professional secrecy are not covered by the Directive, we propose the following additions (green) in connection with the definitions of the terms "chain of activities" and "value chain":

In the Council Proposal:

> *"chain of activities*
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> *(i) the activities of an undertaking's upstream business partners in connection with the production of goods or the provision of services by the undertaking, including the development, extraction, manufacture, transport, storage and supply of raw materials, products or parts of products and the development of the product or service; and*
>
> *ii) [...].*
>
> *iii) The activities of upstream or downstream business partners do not include legal services provided by lawyers."*

In the Commission Proposal:

> *"value chain*
>
> *Activities in connection with the production of goods or the provision of services by a company, including the development of the product or service and the use and disposal of the product as well as the associated activities in the context of upstream and downstream established business relationships of the company. Activities in connection with the production of goods or the provision of services do not include legal services provided by lawyers."*

In the Parliament Proposal:

> *"value chain*
>
> *activities relating to the production, design, procurement, extraction, manufacture, transport, storage and supply of raw materials, products or parts of a business product and the development of a business product or the development or provision of a service, as well as the undertakings involved therein, and*
>
> *Activities related to the sale, distribution, transport, storage and waste management of a company's products or the provision of services, with the exception of the waste management of the product by the individual consumer, and the facilities involved.*
>
> *The aforementioned activities do not include legal services provided by lawyers."*