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Understanding EU Company Law Politics

The Case of the Proposal for a Directive on Corporate Sustainability Due Diligence

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ABSTRACT

The nature of the firm and the role that it plays in society has become a topic of intense academic and political debate around the world. The European Green Deal, published in 2019, sets out an ambitious collection of policy initiatives linked to the EU Commission's overarching objective of a climate neutral Europe by 2050. Several societal actors are targeted by these initiatives, with companies often taking centre-stage. While company law in the EU is primarily a national affair, the adoption of the Proposal for a Directive on Corporate Sustainability Due Diligence will have far-reaching consequences for member state national company law and corporate governance codes. Indeed, the Proposal envisages not only a responsibility for the business entity to identify, measure, and in some cases interrupt or anticipate and put a stop to human rights and environmental harms, but will also impose new duties on directors in overseeing these activities – an aspect of corporate law that goes to the heart of doctrine. This paper constructs a rational choice institutionalist account of the interchange of tensions and compromises that make up the increasing integration of European company law and corporate governance issues. The causal mechanisms of this phenomenon are further highlighted through the use of process tracing of the Proposal for a Directive in Corporate Sustainability Due Diligence, offering insight not only into the possible outcomes of the final piece of legislation, but for the future of company law in Europe.

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List of Abbreviations

"CSDDD" – Corporate Sustainability Due Diligence Directive

"EU" – European Union

"EC" – European Commission

"ENVI" – Parliamentary Committee on Environment, Public Health and Food Safety

"EP" – European Parliament

"EPP" – European People's Party

"CDU" – Christian Democratic Union

"CSU" – Christian Social Union

"Commission" – European Commission

"Council" – Council of Ministers

"DROI" – Parliamentary Subcommittee on Human Rights.

"ECON" – Parliamentary Committee on Economic and Monetary Affairs

"EMPL" – Parliamentary Committee on Employment and Social Affairs

"Guidelines" – OECD Guidelines for multinational enterprises

"INTA" – Parliamentary Committee on International Trade

"LkSG" – *Lieferkettengesetz*

"MEP" – Member of the European Parliament

"NFRD" – Non-Financial Reporting Directive

"Parliament" – European Parliament

"the Principles" – United Nations Guiding Principles on Business and Human Rights

"RCI" – Rational Choice Institutionalism

"SME" – Small and medium enterprises

"SDGs" – EU Sustainable Development Goals

"SFDR" – Sustainable Finance Disclosure Regulation

"TEU" – Treaty on European Union

"TFEU" – Treaty on the Functioning of the European Union"

"UNGPs" – United Nations Guiding Principles on Business and Human Rights

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Figure 1 - Policy process timeline (Shift Project, 2023)

Introduction

"Nothing is possible without humans, nothing is lasting without institutions" (Monnet, 1976, p. 360)

In 1952, six countries, previously assiduously divided and fiercely opposed, signed a treaty forming the European Steel and Coal Community. The signing of peace accords between nation states after war is an institution that dates back to the time of the historic civilisations of Mesopotamia; however, so does the breaching of these same agreements. The Treaty of Paris was novel in its approach to peace: rather than attempting to broker deals based on empty promises and reparations, it simply took the possibility of war off the table by interlocking the industries of coal and steel across the six economies. Thus began a process of integration which has spanned some seventy-one years, leading to the creation of the European Union, a polity *sui generis* encompassing twenty-seven Member States and one-sixth of global GDP. The idea to interlink neighbouring countries into a regional unit started small, but today, Europe is deeply economically integrated. The numerous successes of the policies comprising the single market, as well as other areas such as the Economic and Monetary Union and eurozone, are testament to this integration. Despite this fact, the main economic actors – companies, remain almost entirely under the ambit of the national laws of each member state. Member States of the EU possess their own national Company Acts and, in some cases, corporate governance codes. While these instruments are increasingly influenced by EU action in the domain of company law and other related policy fields, especially where the single market is concerned, an overhaul of the fragmented national approaches to the internal affairs of companies has never occurred. Instead, EU law impacting companies appears to be limited to small, sectoral changes, formulated in Directives with which Member States may still apply the interpretative lens of their national frameworks and in some cases, exempt application of offensive clauses (Enriques, 2017, p. 767).

The nature of the firm and the role that it plays in society has become a topic of intense academic and political debate around the world. The origins of this debate are perhaps best traced to the Wall Street crash of 1929, an event that inspired the following famous quote by Berle and Means:

> "Corporations have ceased to be merely legal devices through which the private business transactions of individuals may be carried on. Though still much used for this purpose, the corporate form has acquired a larger significance" (1932, p. 3).

The European Green Deal, published in 2019, sets out an ambitious collection of policy initiatives linked to the European Commission (hereinafter "EC", "Commission")'s overarching objective of a climate neutral Europe by 2050. Several societal actors are targeted by these initiatives, with companies often taking centre-stage. The recognition of the role that companies play "reflects an emerging understanding of the weakness of the siloed approach to law and policy" (Sjåfjell, 2022, p. 60). To this end, the Commission envisages key overhauls of the way in which business is being done in Europe, declaring that "sustainability should be further embedded into the corporate governance framework" (Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal, 2019).

Yet, as posited above, integrating Company Law as a policy domain has proven to be surprisingly difficult. While many Directives and other legal instruments of the EU purport to bring change to the fragmented state of corporations across Europe, only a few escape being labelled as "trivial" by scholars for their (small) contributions towards simplifying and harmonising procedural elements in or adjacent to Company Law (Enriques, 2017, pp. 768–769). Indeed, the internal affairs of companies – that is, the true substance of Company Law – have remained within the ambit of the sovereign Member State's jurisdiction.

The Corporate Sustainability Due Diligence Directive (hereinafter "CSDDD"), of which the final version by the Commission was issued in February of 2022, is a new attempt at reopening the conversation on Company Law integration. This Proposal, like the Directives relating to company law that came before it, finds its legal basis in Article 50 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") (Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, 2022, p. 10). It is similarly made clear by the Commission in their Proposal that their intervention in this arena is necessary due to the significant risk, due to some member states legislating on this topic, and others not, of "fragmentation of the internal market" (Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, 2022, p. 11).

There is a shared sentiment by the co-legislating institutions that this Directive is important in order to “enhance the protection of the environment and human rights” (Council of the European Union, 2022c). This being said, several of its provisions have been subject to conflicting amendments by the institutions during the legislative process, illustrating a reservedness by some parties to allow supranational redesign of corporate responsibility. On the other hand, other parties may feel that the Commission’s proposal does not go far enough in this regard. That the Proposal is facing potential deadlock is not necessarily surprising, since its current format is the result of three attempts by the Commission to have the project approved by its Regulatory Scrutiny Board, the former two Impact Assessments having received an express negative opinion (European Commission, 2022a, p. 1; Schaller-Baross & Györi, 2022). The adoption of this Directive will have far-reaching consequences for member state national company law and corporate governance codes. Indeed, the Proposal envisages not only a responsibility for the business entity to identify, measure, and in some cases interrupt or anticipate and put a stop to human rights and environmental harms, but will also impose new duties on directors in overseeing these activities – an aspect of corporate law that goes to the heart of doctrine (European Commission, 2022b; Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, 2022, p. 10). In this respect, it is expected that the tensions surrounding the debate on integration of Company Law, will emerge as part of the policy process.

Literature Review

"The point is that whichever story political scientists want to tell, it will be a story about institutions" (Rothstein, 1996, p. 134)

The manner in which scholars have sought to understand, conceptualise and explain international integration has evolved to a considerable extent over the past century.
Testament to these changes are the many definitions offered by each school, and in some cases, proponents of those schools, of the concept of integration.
In 1958, Ernst B. Haas, a leading authority in international relations, defined international integration as a process "whereby political actors in several, distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states" (2004, p. 16). While the 'shifting' of competences to the supranational entity is one that many different theorists agree upon, the social aspect of transferring loyalty is one that has not been adopted across the academic spectrum (Diez & Wiener, 2018, p. 6). Some years later, another specialist in international relations, Karl W. Deutsch, viewed integration as "a matter of fact, not of time" and defined the concept as "the attainment, within a territory, of a 'sense of community' and of institutions and practices strong enough and widespread enough to assure, for a 'long' time, dependable expectations of 'peaceful change' among its population (Deutsch, 1968, pp. 5–6). Dr Finn Laursen, a political scientist, posited that international integration could be viewed as "a process of joint decision-making" (Laursen, 2002, p. 2), a definition which places far more emphasis on the agency of the actors in the process of integration. The International Monetary Fund, by contrast, defines international integration as "the adoption of policies by separate countries as if they were a single political unit" – yet another understanding that highlights some shared concepts with the former definitions, yet doesn't quite capture the full picture (Streeten, 2001).
Indeed, the many different ways in which (European) integration is explained, studied – and in some cases, promoted – have given rise to a broad body of theoretical work: multidisciplinary 'schools' with varying emphasis on the different variables, outcomes and tools of integration, have emerged across academia, most prevalently over the last thirty years. The coexistence of various theories can also be perceived in the political arena, itself. Diez and Wiener point out that different agents in European integration may make use of different theoretical frameworks to bolster their interests:

"… neofunctionalism itself also became the quasi-official ideology in the Commission and other parts of the EC institutions… it is today often used by so-called Eurosceptics to increase fears of a technocratic, centralised and undemocratic super-state, whereas governments supportive of further integration tend to resort to the intergovernmentalist rhetoric of sovereignty being only 'pooled'…" (2018, p. 18).

Laursen has said that "most integration theorists have probably seen the process [of integration] as a desirable thing" (2002, p. 1). As a precautionary remark, it is important to note that the hypotheses put forth in this paper make no value judgment on the process of European integration as regards the domain of Company Law. This evaluation is outside of the scope of this paper and should be pursued as a primary research question elsewhere.

Understanding the development and state of the art of the literature prior to the pursuit of the key research questions is an essential first step of any research project (Knopf, 2006, p. 127). Indeed, "theoretical literacy" can be viewed as an indispensable condition in order to carry out inquiries into any phenomena. In this particular context, making sense of the various theories that underly European integration, as well as their subfields, applications and shortcomings, is vital to be able to thoroughly and effectively test the selected theoretical framework, rational choice institutionalism ("RCI"), against the case in question. This chapter will therefore embark on a journey to elucidate the historical development of integration theories, with a particular focus on RCI and its applications to European integration. It will also be necessary to visit briefly the domain of Company Law with respect to European integration, in order to harness a better understanding of the elements at play, as well as the reasons for the continued, substantial non-integration of the policy area. A detailed evaluation of this question is, however, outside of the scope of this paper; this particular analysis is interested in understanding the dynamics surrounding the *politics* of Company Law: an inquiry thus far not yet undertaken.

Grand Theories of European Integration

European integration theories have been described as "the apex of liberal thinking" (Suslov, 2020, sc. 0:15); indeed, if democracy, cooperation and free trade are viewed to be the key tenets of liberalism, this is also the case for an integrated Europe. However, as pointed out in the introductory remarks to this chapter, the construction of integration is one that has many blueprints. As a point of departure, it is important to note that the theories of European integration do not necessarily exist in silos, but can rather be described as "flexible bodies of thought" (2019, p. 1113). The validity of one theory therefore does not exclude the validity of

another, nor are they comparable; different theories may be applicable to different contexts. Indeed, the literature stresses the importance of the different starting points of each approach and the way in which their collective contributions to the literature have illuminated and clarified different parts of the integration question, like "stones in an always-incomplete mosaic" (Diez & Wiener, 2018, pp. 21–23). The development of different theories over time is attributed to the fact that the construction of Europe has not proceeded in a linear manner, but has rather been pursued under different approaches according to the needs of the particular actors, as well as the 'material' available to them (Dehousse, 2000, p. 197).

Diez and Wiener present European integration theory as having matured over three "phases": phase one in the 1960s and onwards, called "Explaining integration" focused primarily on the *how* and *why* of integration, and featured most prominently the neofunctionalist and intergovernmentalist theoretical frameworks; phase two in the 1980s and onwards, called "Analysing governance" asked many questions about the EU as an entity and polity, under the frameworks of governance, comparative politics and policy analysis; phase three, "Constructing the EU", which took place in the 1990s and onwards, asked questions relating to the consequences of integration, and analysed these questions through various theoretical frameworks such as social constructivism, poststructuralism and normative political theory, to mention only a few (2018, p. 11). This chapter will focus primarily on the theories advanced under the neofunctionalist and intergovernmentalist frameworks.

Central to the European integration debate are the frameworks proposed by neofunctionalism and (liberal) intergovernmentalism. The formation of the European Coal and Steel Community in 1950 is widely recognised as one of, if not the first concrete event(s) in the European integration timeline (Alter & Steinberg, 2007, p. 89; Rappaport, 1981, p. 151). This cooperation between states, while brokered in the interests of maintaining peace on the continent, was ultimately economic in nature. It follows logically, then, that the first theories of European integration were primarily rationalistic in nature, focusing on the actors and their capacity to shape outcomes.

The success of neofunctionalism in explaining integration, even some decades after its formulation, has secured its place as a 'grand' theory of European integration, and is suggested to be so close to accuracy as to be "virtual synonyms" (Rosamond, 2000, p. 50). In order to fully understand the importance of neofunctionalism and its tenets, it is necessary to first visit the roots of this theory: functionalism.

Functionalism, as the "intellectual ancestor" of neofunctionalism, is rooted primarily in the belief of the importance of societal needs over the sovereignty of the nation state, or any other organised national institution (Rosamond, 2000, p. 33; Taylor, 1994, p. 125). Its fundamental thesis that humans are not condemned to conflict, and that peaceful cooperation between nation states and other groups are possible, were particularly popular at the time of the first seminal works by Mitrany in the war-ridden 1940s (Rosamond, 2000, p. 32). What distinguishes this body of work from the federalist worldview is its lack of normative judgment: Mitrany developed works that focused on the capacities and operations of an integrated society, rather than whether this integration should be pursued (Mitrany, 1933, p. 103). It has been pointed out in the literature that federalism constitutes more a theory *for* European integration, or, as posited by Rosamond: a "political project", rather than a theory explaining or observing integration (Jrgensen, 2015, p. 935; Rosamond, 2000, p. 23). Mitranian functionalism, otherwise known as classical functionalism, viewed the project of peace as being dependent on the ability to unite states around common interests in order to construct interdependencies ('integration') that would ultimately render conflict unfeasible (Devin, 2008, p. 139). Under this framework, ideology is secondary, trumped by the common needs of the cooperating states – a concept that has drawn a fair level of scepticism from academia (Devin, 2008, p. 144, 2018, pp. 15–17; Mitrany, 1944, p. 99; Rosamond, 2000, p. 40). While peace is certainly highlighted as a goal of functionalism, there is no specific endgame as to the form that this peace should take. Instead, institutions aimed at maintaining the cooperation between state actors under functionalism should be "open-minded and flexible" so as to change over time in accordance with the needs of society (Rosamond, 2000, p. 34).

Neofunctionalism emerged in the 1950s as an apparent response to the federalist undertones of the post-war period. For those who supported the underlying architecture of functionalism, but nevertheless disagreed with its applicability to Europe, neofunctionalism was an opportunity to "elaborate on and broaden"[1] integration theory (Saurugger, 2010). In this way, it has been described as a "harnessing of functionalist methods to federalist goals" (Tranholm-Mikkelsen, 1991, p. 3). Neofunctionalism mirrors its ancestor in that the interests of society are ultimately the goal, around which integration objectives should be focused. This interpretation is confirmed by the promotion of what can be likened to technocracy: authorities were concerned with "matters of the satisfaction of welfare and material needs", instead of "actions driven by grand narratives of particular ideologies" (Rosamond, 2000, p. 57).

[1] My translation.

Figures like Jean Monnet and Robert Schuman, two of the 'fathers of Europe', were instrumental in the intellectual birth of neofunctionalism (Rosamond, 2000, p. 51; Saurugger, 2010, p. 80). Ernst B. Haas and Leon L. Lindberg are generally referred to as in the literature as the most prominent scholars of this theory (Niemann, 2021, p. 116; Rosamond, 2000, p. 54; Saurugger, 2010, p. 73).

Lindberg developed a set of conditions that were necessary for integration: shared interests and political projects between the member states to the integration project, central authorities who were endowed with the power and capacity to promote and execute processes of integration, and whose powers and capacities would increase over time (Lindberg, 1963, pp. 7–8).

Like the functionalists, neofunctionalists saw the utility of integrating interests of states in order to ensure cooperation. The targeted interests were to be "low-politics in the first instance, but… key strategic economic sectors" (Rosamond, 2000). This incremental approach is another similarity shared with functionalism. Indeed, (neo-)functionalists were known for promoting approaches to integration that "avoid comprehensive plans for integration and minimise the political, at least initially" (Caporaso & Keeler, 1993, p. 5).

This would, in turn, with the aid of a supranational authority whose responsibility it was to supervise and promote integration, eventually lead to deeper economic integration through what Haas dubbed 'spill-over'. The concept of spill-over, whereunder sectors are incrementally pulled into the scope of integration, is said to be one of neofunctionalism's most prominent (Jrgensen, 2015, p. 937; Niemann, 2021, p. 116; Rosamond, 2000, p. 59). In 1991, Tranholm-Mikkelsen developed from the basis of Lindberg and Haas' writings a taxonomy of spill-overs: "functional", "political" and "cultivated" (Tranholm-Mikkelsen, 1991, pp. 5–6).

Functional spill-overs are so characterised by their automatic nature: when one sector is brought under the ambit of collective policymaking is highly interlinked with another, such as in the case of steel, coal and energy, it becomes necessary to integrate the latter sector in order to avoid issues (Gerbet, 1956, p. 542; Tranholm-Mikkelsen, 1991, pp. 5–6). Indeed, as posited by Laursen, "to do A, you sometimes have to do B" (2002, p. 6). This type of spill-over is also taken to mean the expanding of functions of the supranational entity, as per Lindberg's conditions for integration set out above (Lindberg, 1963, pp. 7–8, 45–46).

Political spill-over, by contrast, is defined as the increasing shift of expectations by groups, organised or not, to the supranational entity. The ways in which individuals, self-interested by nature, would organise themselves to realise their aims, was of particular interest to neofunctionalism, as it was theorised that integration could be identified through the directing of these groups' attention to the supranational level rather than their national governments

(Lindberg, 1963, p. 9). Haas viewed this type of spill-over in cases where states are persuaded to "shift their loyalties" to the more efficient supranational authority (Haas, 2004, p. 16). Lindberg, as set out above, shared much the same view of the above process, though maintaining a more reserved approach to the cultural aspect of 'shifting loyalties', preferring, as in Laursen's definition in the introductory part of this chapter, to focus on the locus of decision-making of actors (Lindberg, 1963, p. 6; Tranholm-Mikkelsen, 1991, p. 4).

The concept of cultivated spill-over was developed after the two initial types discussed above. Rather than an automatic grouping of interdependent sectors or a reorganisation of the way in which societal actors seek to have their needs met, cultivated spill-over occurs at the behest of the central supranational authority, who seeks as its primary aim to further integrate its member states through common policymaking as a means of "upgrading… the common interest". (Haas, 1961, p. 368; Tranholm-Mikkelsen, 1991, p. 6).

Neofunctionalism, unlike its predecessor, was less of a call to action and more of an analytical framework for integration that aimed to "explain, classify and generate hypotheses" (Rosamond, 2000, p. 50). Its study was behavioural in nature, having emerged during the time that political science research focused primarily on the processes underpinning political phenomena rather than the institutions themselves (Rosamond, 2000, p. 54). In contemporary studies, neofunctionalism enjoys less of an authoritative stance, having been applied most prevalently in studies relating to "pre-accession, enlargement and neighbourhood policy" (Jrgensen, 2015, p. 938). Indeed, as pointed out by Lindberg and Scheingold:

> "[neofunctionalism] provides insights into why the European Community *took off* as a venture in political integration, why it was more successful than the other efforts, but it says little about what accounts for variations in success after take off" (Lindberg & Scheingold, 1970, p. 107)

Recent crises, however, might prove as fruitful grounds for further study for neofunctionalist claims to integration. For example, the United Kingdom's exit (referred to colloquially and in the literature as 'Brexit') from the EU – whilst identified as a form of disintegration, had the effect of further solidifying the commitment of the remaining member states to their EU membership, and thus the overall EU cohesiveness and integration (Chopin & Lequesne, 2021, pp. 10–11). Similarly, the COVID-19 pandemic, whilst triggering in member states an initial reaction to pursue their own, separate and sometimes mutually exclusive interests, eventually saw the member states shift their competencies to manage public health policies to the supranational level, signalling a future possibility for (limited) spillover (Brooks et al., 2023, pp. 735–736).

In response to the theories of integration, several scholars also produced work on the limits of integration. One such theorist was Stanley Hoffman, who posited that member states to an international group, such as the EU, would "prefer the certainty, or the self-controlled uncertainty" of national action in certain areas that were deemed significant to their domestic interests (Hoffmann, 1966, p. 882; Laursen, 2002, p. 6). The school that arose from this thinking was called intergovernmentalism, which for a long time, constituted the only real opposition to the theory of neofunctionalism in European integration (Tranholm-Mikkelsen, 1991, p. 8).

The main distinguishing point between (neo)functionalism and intergovernmentalism, is their approach to the nation state (Rosamond, 2000, p. 2). Indeed, this issue goes to the very heart of intergovernmentalism. At the time of the emergence of the theory, former French President Charles de Gaulle hindered a number of Europeanist reform proposals and even withdrew France from joint decision-making for a time, refusing to accommodate further integration at the European level. For critics of neofunctionalism, these acts "represented something… profound about the nature of nationalism and the enduring qualities of statehood" (Rosamond, 2000, p. 75). In studying these events, Hoffman posited that the national state had, in fact, not been superseded by the supranational entity, but had, despite its failures and shortcomings, "survived, and done so in its own distinctive way" (1982, p. 23). In highlighting the role of the state as the actor who not only drives integration, but also has the power to limit it, Hoffman simultaneously reduces the role of the supranational entity, who can only act in accordance with the capacities conferred on them by the member states (1982, p. 30; Jrgensen, 2015, p. 939). Intergovernmentalism distinguishes between areas of 'high' and 'low' politics, the latter being areas that states are generally "prepared to engage in [in an] integrative and cooperative [way]" (Rosamond, 2000, p. 79). As a whole, however, integration is posited by Hoffman as being generally a 'high politics' concept – something that touches at the heart of national sovereignty, and which thus requires a substantial level of convergence between member states in order to achieve (1966, p. 882). While recognising spill-over as an observable phenomenon, Hoffman also raised doubts as to its automatic nature, especially with regards to states who might discover that their interests do not align, whether between themselves or with the new supranational entity (Hoffmann, 1966, p. 886)

In further developing the (liberal) intergovernmentalist framework, Andrew Moravcsik placed more emphasis on the interests of states in bargaining. For example, it was posited that where member states could achieve certain goals under their own national framework, they might pursue integration outcomes (Jrgensen, 2015, pp. 939–940; Moravcsik, 1998, p. 21). However,

in other cases, national sovereignty is protected. This rational weighing-up of options forms a fundamental part of Moravcsik's contribution to intergovernmentalism (1998, p. 18). In order to pursue these bargaining activities, member states also naturally prefer international forums like the Council of Ministers (hereinafter "Council") where their interests ultimately determine the outcome (Moravcsik, 1991, p. 27). Liberal intergovernmentalist decision-making with regards to integration therefore proceeds by way of three steps: firstly, the "formul[ation] of… national preferences" in taking into consideration the possible outcomes; secondly, strategy and bargaining, under which states attempt to align their national interests with those of other states in the hope of finding an actionable common ground for joint action; thirdly, the decision on whether or not to delegate authority to the supranational entities who may perform or enable the joint actions voted upon (Moravcsik, 1998, p. 20).

More recent integration theories have focused on specific elements of the integration process, rather than the phenomenon as a whole. New institutionalism, the key theoretical framework in this category, notably seeks to study integration through the positioning of the institution(s) in the relevant processes and developments (Nugent, 2017, p. 454). This theoretical framework will be discussed in further detail in the next section.

New Institutionalism: Rational Choice

Institutions are defined by Meyer as entities with "a network of rules creating public classifications of persons and knowledge" (1977, p. 55). These and other definitions of institutions are often ambiguous, so as to accommodate for the fact that "institutions have become everything" (Alvesson & Spicer, 2019, pp. 205–206). In their operation, they are viewed as "a critical contextual variable that shapes behaviour and thus collective outcomes" (Ferris & Tang, 1993, p. 4).
In 1977, Meyer and Rowan's seminal work challenged the idea that organisations operating in institutionalised contexts were purely animals of a highly structural nature (1977, p. 360). Indeed, these and other scholars considered themselves as being distinct from the 'old' institutionalists precisely for the fact that their framework included informal institutional concepts such as 'norms' (M. Fiorina, 1995, p. 108; Stinchcombe, 1997, pp. 3–4). The focus was shifted away from the institution and its structure as such, and towards questions of its legitimacy and the effect of institutions on individuals and outcomes (Farrell, 2018, p. 23; Ferris & Tang, 1993, pp. 4–5; Selznick, 1996, p. 273; Stinchcombe, 1997, p. 8).

This 'new' institutionalism has been recognised from the outset as being plural in nature. The different approaches contained in this class of theories emerged from what was initially a focus on the behavioural aspects of institutions in the 1960s and 1970s (Hall & Taylor, 1996, p. 936). The most well-known of these frameworks are rational choice institutionalism ("RCI"), historical institutionalism and sociological institutionalism (DiMaggio, 1998, p. 696; Hall & Taylor, 1996, p. 936).

As with many other theories now widely applied in the social study of human behaviour, rational choice theory first became well-known in the field of economics, where it was

Its first application in political science arose from the study of the American congress, wherein the effects of different institutional frameworks affected the decisions of congressmen (Hall & Taylor, 1996, pp. 942–944). Today, rational choice institutionalism is utilised precisely for its robust economic perspective that can be applied to politics, sociology and other disciplines studying organised cooperation (Abbott, 2007, p. 1). Under this configuration and in particular international cooperation and policymaking, states are viewed as the primary institutional actors, who make use of the institutional framework in order to rationally pursue their interests (Abbott, 2007, p. 1).

It is important not to confuse rationality in the theoretical sense with rationality in the normative sense – the perception of the behaviour of an agent as "irrational" due to our understanding of their preferences and values is a reflection of our own information, not of the agent concerned (Scott, 2000, pp. 126–127). Indeed, rational behaviour is entirely separate from behaviour that is "appropriate" or "truth-seeking" (Pollack, 2007, p. 32). It is also important to distinguish between the type of rational choice theory that is utilised in economics and that of other social sciences. Whilst the economic "thin" interpretation of rational choice may constitute the roots of the theory, as explained above, the framework has been considerably developed since. The main difference between these "thin" and "thick" models is the consideration made for individual motivation and intentionality, as posited by Weber (Hechter & Kanazawa, 1997, p. 194).

Rational choice institutionalism is as multi-faceted as the school of new institutionalism itself. This being said, Hall and Taylor highlight some of the features held constant over the many different perspectives taken by its scholars (Hall & Taylor, 1996, pp. 944–945). First and foremost, this approach makes use of "a characteristic set of behavioural assumptions": that actors display consistent preferences over time, and that actors act in a way strategically designed to increase the chances of bringing about the fulfilment of those preferences. Rational choice institutionalists also tend to view political settings as "a series of collective action

dilemmas" – in that, in acting in accordance with the assumption put forth above, actors ultimately collectively bring about substandard results where (a lack of) institutional frameworks fail to organise reciprocal engagements. The third characteristic relates to these reciprocal engagements and the role of institutions in aiding actors in bringing about more optimal outcomes through collective strategy. Indeed, under this framework of understanding, actors use the information available to them to strategically different approaches of pursuing action, based on which of these are most likely to produce the results desired (Bennett & Checkel, 2015, p. 31). The fourth and final element the consideration that institutions come into existence in order to perform this organising function set out above. By making available neutral information and lowering transaction costs, to name only two examples, institutions facilitate the cooperation of states amongst themselves (Abbott, 2007, p. 2). RCI is primarily concerned with the "preferences and interests of the relevant actor, not the formal rules governing the role of that actor" (Bevir, 2010, p. 700). However, this is not to say that the rules themselves are not important. Indeed, rules go to the very heart of institutionalist theory, as posited by Selznick:

> "The impulse to create a regime of rules stems from the practical requirements of organization, including the efficient use of human resources" (Selznick, 1996, p. 272)

As pointed out by Cross and Hermansson, institutional rules are not necessarily all formal; often, informal rules and structures may better predict outcomes of certain processes (2017, p. 583). Irrespective of the actors' evaluation of the rules that make up the institution, the power of these rules lies in the fact that each actor expects the others to follow them, and so does so himself, too (Meyer, 1977, p. 75). Indeed, the institution is not only created in order to serve the actors but "survives primarily because it provides more benefits to the relevant actors than alternate institutional forms" (Hall & Taylor, 1996, pp. 944–945).

As explored above, actors make (rational) decisions based on the information available to them, and within the rules set out to delimit their behaviour. This environment, external and cognitive, is often less than what would be ideal in order to achieve perfectly optimal outcomes (Pollack, 2007, p. 32). Constraints on the behaviour of an agent in classical rational theory models include "the alternatives open to choice", "the relationships that determine the pay-offs" and "the preference-orderings among pay-offs" (Simon, 1955, p. 100). While some limit on the information held by an agent was theoretically tolerated, agents were generally assumed to have "impressively clear and voluminous" information, at the very least (Simon, 1955, p. 99). However, these 'givens' do not tell a complete story. The concept, of "bounded rationality",

was developed by Herbert A. Simon as a means to more faithfully represent the reality of rational actors (Simon, 1955, p. 114). It is important to point out that while Simon defined these limitations as being "cognitive" in nature, this does not mean that the stimuli causing the constraint exist purely in the mind of the agent, but that they cognitively limit the agent's ability to make optimal rational decisions (Simon, 1987, p. 261, 1990, p. 15). Bounded rationality has enjoyed a prime position in the study of decision-making across several disciplines, with authors recognising that in essence, "rationality" and "bounded rationality" amount to the same thing in practice (Sent, 2018, p. 1371). This is because when evaluating the outcomes of decision-making of agents, economists must either apply the constraints to the agents under study, or to their own thinking of the decisions made (Sent, 2018, p. 1383). To not do so would amount to the ignoring of variables in the equation.

Some scholars claim that rationalism and the cross-disciplinary theories that go along with it rely on overly simplistic understandings of human behaviour. These and other criticisms are visited in more detail in the section below.

Despite these remarks, rational choice has been recognised as having been able to provide strong bases for theory-building and -testing (Hall & Taylor, 1996, p. 950). Indeed, it is said that rational choice theory has made "the greatest headway" in terms of their application to research on the EU (Pollack, 2007, p. 37). This is because its ability to formulate 'models' can help researchers properly evaluate, comprehend and predict future European decision-making, at least in very specific cases (Ershova, 2018, p. 3). The capacity of rational choice theories to produce predictive empirical data, however, should not constitute its primary contribution to social sciences, as explored in the section on criticisms.

Indeed, for these reasons, rational choice stands out today as one of the "most prominent theoretical accounts of human behaviour" (Herfeld, 2022, p. 1).

Criticisms of Rational Choice Institutionalism

Rational choice theory is one that causes stark division in academia, with commentary either validating or renouncing its application – often due to a difference in interpretation of the underlying theory (Herfeld, 2022, pp. 1–2). The critique of rational choice can be divided into two broad categories – endogenous, those arising from the use of the methodology itself, and exogenous, which elaborate on limits of the overall approach (Snidal, 2013, pp. 85–86). This

section will detail some of the criticisms advanced by the literature using this classification system.

In terms of internal critique, it has been proposed that rational choice theorists often engage in activities that undermine the real empirical value of their contributions, such as focusing their analyses on unobservable elements of the study and only seeking out cases that will confirm their hypotheses, or otherwise ignoring evidence in cases that would point to alternative theories (Green & Shapiro, 1994, pp. 33–46). Friedman counters many of these criticisms by positing that the authors' understanding of rational choice is at fault, as well as their insistence that all valuable outcomes of empirical testing must lead to predictions (J. Friedman, 1995, pp. 5, 22). Fiorina equally highlights the fact that universalism is not necessarily an aim of rational choice theorists, who recognise the many variables in each evaluated context may render it inapplicable to another, adjacent context without such variables (M. P. Fiorina, 1995, p. 87). However, it has also been pointed out by Pollack that these critiques could serve as "cautionary" to rational choice theorists wishing to apply this framework to European studies (Pollack, 2007, p. 35).

Another key piece of criticism levied against institutionalism as a whole is its lack of a unified research subject. As exemplified by the definition of institutions above, it has become commonplace, especially under new institutionalism, to consider that all observable phenomena can be studied as institutions (Alvesson & Spicer, 2019, pp. 205–206; Rothstein, 1996, p. 145). The effect hereof is that the key tools used in the study of institutions become less and less defined as they are adapted, and ultimately warped, to each new interpretation of an institution. Lawrence et al. propose a solution to this issue by comparing institutionalism as a 'lens' through which different phenomena may be studied, rather than a defined set of finite research subjects (Lawrence et al., 2013, pp. 1023–1024). In some cases, the use of rational choice in politics is criticised for its presumed "methodological individualism" (Petracca, 1991, p. 293). While this is the standard configuration of the theory in economics, agents are not necessarily always individuals, but can also be theorised as organisations or nation states (Bevir, 2010, p. 11). It is also important to point out that the goal of the study is not to evaluate the outcomes of these individual decisions, but rather their aggregate at the collective level (Hechter & Kanazawa, 1997, p. 192).

External critiques dealing with the substantial approach of rational choice are similarly manifold. The inherent value judgment assumed to be made in proposing rationality at the heart of a model (whether it be economic or political) is often the main victim, due to the fact that rationalism in this case is defined as pursuing ones' own interests (Herfeld, 2022, p. 7; Petracca,

1991, pp. 289-290,296). Indeed, according to these criticisms, the model of the actor that is proposed under rational choice models are “radically individuated and unencumbered…[who] can command, or obey, or exploit, or trade with other selves, but [] cannot engage with them” (Marquand, 1988, p. 266). However, it is important to point out that rational agents are “self-interested, not selfish”, and that the choices inspiring action by the agent may be informed by a vast array of values or aims (D. Friedman & Diem, 1990, p. 517; Hechter & Kanazawa, 1997, p. 194). Indeed, in defending rational choice, Friedman and Diem point out that “acting on values might well lead people to do for others, to give to others in unequal exchanges, and so on” (1990, p. 517). When applying rational choice theory to European studies, several exogenous criticisms can also be identified, namely rational choice’s apparent blindness to the factor of change in Europe, and the institutions’ role in bringing about that change (Christiansen et al., 1999, p. 529). With regards to new institutionalisms as a whole, Stinchcombe argued that “the trouble with the new institutionalism is that it does not have the guts of institutions in it”, meaning that the new approach lacked the emphasis on the structural elements that ‘old’ institutionalism focused on (Stinchcombe, 1997, p. 17).

Applications of Rational Choice Institutionalism in European Integration

Institutions have a profound effect on individuals, and the way in which they interact with one another (Farrell, 2018, p. 24). As highlighted earlier, this same understanding can be expanded to the effects that institutions have on states, and in the case of European integration, *member* states. The “case” for the application of rational choice theory to European studies, and in this case, European integration, is one that is well justified by the literature: firstly, it is pointed out that in the EU, there is a high importance attached to the decisions made by the unit of study (whether an individual or member state), warranting the evaluation of the cost-benefit analysis inherent to rational choice; secondly, there is a wealth of information available to agents, rendering viable the cost-benefit analysis, and thirdly that the institutional rules constraining and directing agent behaviour in EU decision-making are “clearly and formally spelled out” (Ferejohn & Satz, 1995, p. 81; M. P. Fiorina, 1995, p. 93; Pollack, 2007). Indeed, rational choice theory has been growing in prevalence in EU studies, with “virtually every area” having been evaluated through this lens (Pollack, 2007, p. 37).

Where rational choice institutionalism pertains to European integration, the approach draws on intergovernmentalism and institutionalist economics to illustrate the “bargaining, voting and delegation” activities of the relevant policy actors (Ershova, 2018, p. 4). The link between

rational choice institutionalism and intergovernmentalism is perhaps best exemplified by Moravcsik in his seminal work "The Choice for Europe" when defining European integration as "a series of rational choices made by national leaders" (1998, p. 18). While the actor in question under institutionalism is not always the national leader, as explained above, the importance of the place of rational choice, as well as the reference made to a process over time, is key. Indeed, under this framework, member states are viewed as drivers (or hinderers) of integration through their capacities in negotiation and bargaining in order to maintain in their own ambit, or delegate away certain competencies to the supranational entities.
While no institutionalist scholar has explicitly mentioned the link, Niemann highlights the fact that institutionalist and other contemporary approaches to European integration also draw on important concepts from the works of neofunctionalism (Niemann, 2021, p. 120). This link is also pointed out by Haas himself, who encouraged that contributions from institutionalism could improve neofunctionalism (Haas, 2004, p. liii). Nevertheless, in the literature on rational choice, it is generally agreed that the Council constitutes an intergovernmental institution, and the European Parliament (hereinafter "EP", "Parliament") and Commission supranational entities (Ershova, 2018, p. 4). Building on this logic, Ershova also sets out that RCI models of EU integration typically focus their efforts on considering one of three decision-making types: "bargaining, voting and delegation" (2018, p. 4).

The next part of this section will be dedicated to discussing some of the most prevalent contributions to the study of integration relations in the institutions. It is by no means exhaustive, but constitutes a primary overview of the analyses to be conducted into the present case.
The European Parliament has been a particularly fruitful research subject for the application of rational choice institutionalism, especially with regards to studies of the EU legislative procedure (Pollack, 2007, p. 37). Indeed, many studies[2] have shown that the introduction of the co-decision procedure in 1994 have greatly emphasised the Parliament's capacities as a co-legislator. This move to democratise decision-making at the European level through empowering the only majoritarian institution of the EU not only served the interests of providing the citizens of Europe a direct voice, but also proved an effective strategy for holding the increasingly powerful supranational institutions accountable to their member states

[2] Tsebelis & Garrett (2000), Farell and Héritier (2004), Häge (2011), Cross & Hermansson (2017) and Hahm et al. (2020) to name just a few of these studies that are relied upon in this paper.

(Rittberger, 2003). In general, Parliament has been identified as accelerating integration; however, it was also pointed out that the increased empowerment as representatives of citizens could also lead to the bogging down or setting back of European integration (Tsebelis & Garrett, 2000). The way in which the committees of the EP are formed and operate also has important consequences for legislative outcomes. This is due in great part to the representative nature of the committee for purposes of understanding the politics of the chamber (McElroy, 2006). In 2020, Hurka and Kaplaner investigated the features of "powerful" committees and their ability to be representative for the chamber, finding that with the exception of two particular committees, this relationship was confirmed (2020).

While initially not as extensive as studies on Parliament, the Council of Ministers has over time proven an equally interesting arena for theory-testing of rational choice (Pollack, 2007, p. 38) A key theory under rational choice institutionalism as it applies to the Council is that of Aksoy's issue linkage theory, whereunder "legislator[s] agree to give up his or her preferred position on one issue in exchange for a concession on another" (2012, p. 12). The literature in rational choice institutionalism has also shown the Council to be a jealous protector of its competencies (Brandsma & Blom-Hansen, 2016). In 2017, Cross and Hermansson conducted a study of the way in which formal and informal politics affected the process of legislative amendment, a capacity held by the EP and the Council. One such informal institutional 'rule' is that of the early agreement – or, as they are known colloquially, trilogues, which were introduced by the Treaty of Amsterdam. In a prior study by Farrell and Héritier, it was found that trilogue settings ultimately empowered the Parliament's Rapporteur and the incumbent Presidency of the Council (2004, pp. 1208–1209). However, it was also subsequently shown by Rasmussen and Reh that although these individuals might have been empowered vis-à-vis the Commission, their relative bargaining power was nonetheless unaffected and they were unable to substantially shift policy outcomes towards either of their respective preferences (Andersen et al., 2020, p. 1020).
Benedetto and Hix analysed the different scenarios in which the EP would often "win" over the Council and identified five key hypotheses of varying probability: (1) that the member states allow for more gains by the Parliament in order to adjust for the "democratic deficit"; (2) that certain key member states allow for more gains by Parliament as it serves their integrationist interests; (3) that member states allow for more gains by Parliament so as to force Commission accountability and transparency in decision-making; (4) that the Parliament itself plays "hard-ball" to adapt the institutional rules towards more gains for itself; and (5) that the

Parliament simply has more power and thus more gains when it is significantly united (Benedetto & Hix, 2007, pp. 117–120). This latter point is an interesting one, as it builds on Kreppel's theories relating to a united Parliament and the effects that this has on voting on amendments (2002, p. 798)

As regards policymaking and the EU legislative procedure, the Commission is often studied not as an institution acting in a silo, but rather with regards to its relations with the Council and Parliament (Pollack, 2007, p. 38). However, when the attention shifts to the executive politics of the EU, the Commission is a well-studied animal under the framework of rational choice, specifically in reference to the principal-agent relationship it holds with the EU (Pollack, 2007, p. 39). The fact that the Commission holds the right of initiative in terms of policymaking has raised questions as to whether agendas are essentially understood through this supranational lens alone, with its own priorities and preferences, or whether their action is constrained by the preferences of the member states. Two studies were carried out to this effect, firstly by Pollack in 1997, and then in 2011 by Crombez and Hix, with both studies finding that the Commission's influence over policymaking is constrained by the member states in particular, as well as the Parliament since the introduction of the co-decision procedure (Crombez & Hix, 2011; Pollack, 1997). Earlier studies indicated that the Commission would more often support the views of the Council when in clash with the Parliament on a liberal-conservative axis (Tsebelis & Garrett, 2000).

European Integration: A Company Law Problématique

Harmonisation of Company Law as a domain has seen but few inroads in the European Union. These incremental steps towards integration have largely been restricted to sectoral importance, such as accounting and shareholder rights (Deakin, 2000, p. 1). The introduction to this paper briefly touched on the fact that the substance of Company Law, that is, the questions relating to the internal workings of the company, remain within the near-exclusive ambit of the legislative competency of the Member State, and this after seventy-one years of increasing integration in other policy domains. The reasons for this, as set out by the literature on Company Law (non-)integration in the EU, can be reduced to two semi-overlapping categories, which will be briefly treated in this section separately with examples.

National Interests

European Company Law is fundamentally at the beck and call of public and private national interests. These interests may manifest themselves as the capacity of Member States to influence the legislative procedure and in doing so, maintain their ability to "experiment in their search for efficient and workable rules of company law" (Deakin, 2000, p. 1). They may also be presented in the form of the private lobby: corporations who feel threatened by the possibility of integration and thus exert influence on the policymaking process through national governments (Hopt, 2010, p. 21). While some earlier Directives in sectors of Company Law are prescriptive and rigid in nature, increased focus on Member State autonomy resulted in the favouring of Directives which constituted "an articulation of general principles or standards", rather than a set of rules to be applied uniformly (Deakin, 2000, p. 7). However, even under this configuration, Member States continued to push for interpretative freedom and exemptions, notably in the case of the United Kingdom and the draft Fifth Company Law Directive, which after various refusals, was finally definitively withdrawn in 2001 (Deakin, 2000, p. 8; Hopt, 2010, p. 19).

A recent example of these national interests in action can be found in the EU treatment of related-party transactions under the revised Shareholders' Rights Directive[3]. As explained by Enriques in his appraisal of the harmonisation of European Company Law, the Council's general position on the Proposal of the directive significantly reduced the ability of the provisions to be applied uniformly across the bloc in allowing for Member State interpretations of the materiality of a transaction, as well as granting certain exemptions (Enriques, 2017, pp. 770–771). The carving out by Council of discretionary powers of interpretation is a classic strategy when dealing with policy that aims to harmonise; indeed, the rendering of the board neutrality rule as optional in the Takeover Directive[4] has essentially rendered any mandatory application dead in the ground (Mukwiri, 2020, p. 254).
This continued push-back from national interest groups, whether these be private or public, has resulted in the EU "settl[ing] for minimum harmonisation" (Mukwiri, 2020, p. 256).

Differences in the Surrounding Legal Frameworks

While closely interlinked with national interests, differences in the surrounding legal frameworks of Member States can also constitute a separate, independent reason for the lack

[3] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.
[4] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids

of integration of Company Law in the bloc. Part of this reason is practical. Enriques explains that the world of Company Law is made up not only of the fabric of the substantial laws itself, but also "any practice or convention that may entrust individuals, groups or institutions with the power, if only *de facto* but consistently across time, to provide interpretations of the law that are held to be reliable by affected parties" (Enriques, 2017, p. 772). Indeed, if the plurality of corporate cultures was not enough of a hurdle to integration in this domain, the differing approaches to the law and its interpretation is seemingly insurmountable. This issue is best exemplified in the case of the draft Fifth Company Law Directive, whereunder the issue of stakeholders was a key point of irreconcilable division between states who viewed companies as *financial* entities, and *organisational* entities (Deakin, 2000, p. 9).
In sum, it can be posited with some certainty that the continued diversity in the legal cultures of the Member States contributes in no small way to what will be the continued non-integration of Company Law.

Enriques' appraisal concludes with the positive remark that despite the lack of real integration of Company Law in Europe, the different frameworks "fit together well" and do not result in any unreasonable costs or burdens when operating across borders (Enriques, 2017, p. 777). However, this consideration of Company Law and its practical operations do not take into account the type of challenge posed by the role that the EU would like companies to play in society and the achievement of the EU's sustainability goals (Sjåfjell, 2022, p. 60). For this reason, it is posited in the closing of this chapter that *de facto* integration of Company Law is insufficient for the objectives set out above, and that according to this logic, the EU would likely continue to pursue integrationist aims in order to achieve these goals.

Methodological Framework

This chapter is dedicated to a discussion of the research design. In the first section, a brief overview of the research aims, and question(s) is set forth. The theoretical framework utilised in this research having been laid out in the previous chapter, the concepts mentioned in the research objectives now require a more practical treatment in order for them to be fully grasped. The second section will thus tackle methodology: the types used and their underpinnings, as well as the way in which these frameworks were approached, and the tools used in their execution.

Research Aims and Questions

The overarching question to be answered by this paper is the following: To what extent does the rational choice institutionalist theory of European integration explain the current developments in EU company law?

In order to provide insight into this question, the following sub-questions must be addressed:

- What is the rational choice institutionalist theory of European integration?
- What are the current developments in EU company law?
- Why are these developments different from prior developments? What is their importance?
- What has the policy process of the Corporate Sustainability Due Diligence Directive looked like thus far?
- What causal mechanisms can be identified in the different points of conflict during this process?
- How can these causal mechanisms be attributed to the different tenets of the rational choice institutionalist theory of European integration?
- To what extent can these causal mechanisms construct hypotheses of future outcomes of this and other company law policy processes?

Process Tracing

It’s the little things that count.

Events in a timeline can be isolated to present evidence for or against certain theories proposed to explain the outcome of the chronology. Where these events have probative value and are combined with general observations surrounding the outcome and the overall timeline, it is called process tracing (Mahoney, 2012, p. 571).

Bennett and Checkel provide the following simple definition of process tracing:

"the use of evidence from within a case to make inferences about causal explanations of that case" (Bennett & Checkel, 2015, p. 4).

In this paper, evidence from within the legislative procedure relating to the Corporate Sustainability Due Diligence Directive will be tested against the theories of European integration favoured by rational choice institutionalism.

The analysis undertaken in this paper is within-case in nature: it explores the theory behind and tests hypotheses against a single event or phenomenon (George & Bennett, 2005, p. 39). Process tracing methodology is one that is very often employed in within-case analyses (George & Bennett, 2005, p. 110). Indeed, it is described by Bennett and Checkel as being "central" to single-case studies (2015, p. 4). Accordingly, the sources used to study that single case, are "from within the temporal, spatial or topical domain" of the case (2015, p. 8).

While much of the theoretical work of process tracing presumes the analysis of a case from an ex-post position in order to study the relationship between cause and effect, George and Bennett's definition of process tracing puts emphasis rather on the study of whether a given theory's hypothesis aligns with the "sequence and variables" observed in the given timeline (Bennett & Checkel, 2015, p. 6; George & Bennett, 2005, p. 6). In the present case, while the outcome of the specific policy procedure under study is not yet clear, the evidence available at the close of the analytical period of study offers interesting insights for the theoretical domain of European integration, as well as carrying predictive value.

Performing process tracing essentially requires identifying the dependent and independent variables that make up a timeline of events, connecting these causes to their outcomes and isolating the causal mechanisms in order to test, or develop a theory.

The focus on cause in process tracing, as well as the detail offered by its within-case approach, has been cited as the methodology's "strongest contributions" (Tansey, 2007, p. 765).

According to Mahoney, causation is determined by establishing three key facts:

"(1) [that] a specific event or process took place,
(2) [that] a different event or process occurred *after* the initial event or process, and
(3) [that] the former was a cause of the latter" (Mahoney, 2012, p. 571)

The choice of wording is notable. It is not necessary for the researcher to establish that a certain occurrence was *the* cause of an outcome, but merely *a* cause. Indeed, the ability of process tracing methodology to "assess the relative importance of various factors" through the adoption of a "multicausality" approach is an important contribution to the field of social sciences (Moravcsik, 1998, p. 12). This is particularly relevant in cases of inductive, theory-generating process tracing, wherein "it is important that the investigator be open to all kinds of possible explanations and willing to follow the evidence wherever it leads" (Bennett & Checkel, 2015, p. 18). The present research is deductive in nature, aiming to test a given theory – rational choice institutionalism, against a new set of facts, and thereby "develop case-specific observable implications" of the theory (George & Bennett, 2005, p. 18).

An important distinction must be drawn between a *cause* and a *causal mechanism*. Indeed, the latter distinguishes itself from the former in the sense that it is what connects the cause and the outcome (Checkel, 2006, p. 363; Hedström & Swedberg, 1998, p. 25; Waldner, 2012, p. 68). Put another way, it explains the relationship between an event in a timeline and an outcome (Schelling, 1998, pp. 32–33). The causal mechanisms are tied to the events under study – whether these be reduced to the micro-level of individual interactions, or the macro-level phenomena that exist outside of the interlocutors' will. The decision to study one or the other, or both, is a question of the experience and preference of the researcher (Checkel, 2006, p. 363; Tilly, 2001). The tools used to study the process will depend on this choice – statistical analyses may be useful evidence for the study of macro-level phenomena, while interviews are particularly well-placed to provide evidence for micro-level phenomena (Waldner, 2012, pp. 70–71).

The process tracing literature prescribes various tests to be conducted in order to establish the evidentiary value of information established during data collection. The most authoritative of these are the four tests devised by Van Evera in his 1997 seminal work "Guide to Methods for Students of Political Science". The four tests determine causation along the axes of uniqueness and certainty. The "hoop test" is certain but lacks uniqueness. In other words, a theory of causation that fails the hoop test is automatically excluded, but where it succeeds, it only remains viable among other possible theories. The "smoking-gun test", by direct contrast, is unique, but lacks certitude, and a theory of causation that fails the test is not necessarily excluded, but a theory that passes the test is strongly substantiated. "Doubly-decisive tests" are both unique and certain, and a theory that succeeds is strongly substantiated, whereas a theory

that fails the test can be excluded. "Straw-in-the-wind tests" are the most common of the tests, lacking both certitude and uniqueness. A theory of causation that passes or fails this test cannot be excluded or substantiated without further evidence (Van Evera, 1997, pp. 31–32).

Process Tracing in Policy Studies

The use of process tracing is well-known in the social sciences, and particularly in the case of European integration and policy.[5]

…

Kay and Baker offer a three-step guide to conducting process tracing in policy studies: the first step requires the "theori[sation] of variables and [their] empirical proxies", the second step is the data collection period, and the third "hypothesis testing" (Kay & Baker, 2015, pp. 11–14). The researcher must begin the research by analysing the existing theories and identifying the causal mechanisms that espouse each one, so as to be able to link the existence of these phenomena in the case under study back to the theoretical framework. Where theories have not yet covered the specific case under study, analogous "proxies" should be identified (Kay & Baker, 2015, pp. 11–12). Thereafter, the researcher embarks upon the gathering of evidence – that is, the construction of the event timeline and the identification of the causal mechanisms in both the primary and secondary sources, as well as in the counterfactual evidence (Kay & Baker, 2015, pp. 13–14). Counterfactual evidence is a piece of 'non-information': an observation of an event that could have taken place in a given timeline, but did not. This type of evidence cannot simply be dreamt up, however, and must be rooted in theory as well as identified through the primary and secondary sources themselves (Kay & Baker, 2015, p. 14). In the final step of the guide, Kay and Baker summarise the tests put forth by Van Evera to assess the variables against the theory and establish causation (Kay & Baker, 2015, pp. 14–18).

Sources and Tools

This paper relies on documentary analysis as its primary tool in order to execute the process tracing methodology.

Policy documents, such as legislative texts, interinstitutional negotiation documentation, political speeches & discussions, and official European institutional communications

[5] For example, Checkel, 2006; Héritier, 2007; Schimmelfennig, 2003; Schimmelfennig, 2015; Moravcsik, 1998; Parsons, 2003; Pierson, 1996.

constituted the principal sources of information. Official news media, whether published by the European institutions themselves or by external organisations, were also used in order to find links between events and the documents produced as a result. Academic literature was used not only to formulate the basis for the hypotheses advanced on European integration, but also as guidance for the execution of the methodologies and for the interpretation of results.
Research relying entirely on documentary analysis as a source of process tracing can thus easily be bogged down by the simultaneous wealth and dearth of sources. For this reason, a secondary source is employed: expert and elite interviews, the evidence from which is intended to complement and systematise the information gathered during the documentary analysis. As pointed out by Tansey, "documents often conceal the informal processes and considerations that preceded decision making" (2007, p. 767). Interviews, and especially expert or elite interviews, can shed light on the importance and context of certain documents, leading to a better prioritisation and filtration by the researcher (Tansey, 2007, p. 767; Von Soest, 2023, p. 278). On this same note, political elites, with their 'insider' perspective on policy, can often provide insight into links between certain events (some of which produce documents) that may be imperceptible to the external eye (Von Soest, 2023, p. 278).
The use of interviews in order to gain access to the undocumented forms of decision-making and negotiation in the European Union, such as the trilogues, as well as to highlight links between different documents, is thus easily justified.

Interviews, and in particular expert or elite interviews, are powerful tools for exposing and discerning causal mechanisms, a key element of process tracing (Von Soest, 2023, p. 278). Indeed, as highlighted by Tansey below, the combination of these methodologies in the domain of policy is not novel:

> "Particularly in political science, process tracing frequently involves the analysis of political developments at the highest level of government, and elite actors will often be critical sources of information about the political processes of interest" (2007, p. 766)

In his seminal work on interviews in the social sciences, Mears (2009, p. 87) designated a minimum of six and a maximum of nine interviewees as ideal for research that encompasses deep, rather than wide enquiry. However, many published works have utilised only three or four interviews to make their case.[6] The sample size selected for this research encompasses nine respondents, five elites and four experts.

[6] See, for example, Aubrey and Durmaz, 2012; Beech, 2011; Van Gramberg et al., 2013.

The selection of the sample is particularly important. While some research objectives might lend themselves to probability-based sampling, policy tracing rather calls for a careful investigation into the policy arena in order to identify respondents (Mears, 2009, p. 87; Tansey, 2007, p. 765).

It has been suggested that a distinction should be made between "elites" and "ultraelites", the latter of whom "exhibit especially great influence, authority, or power, and who generally have the highest prestige within what is a prestigious collectivity to begin with" (Zuckerman, 1972, p. 159). The current research does not include the testimony of any such person and is accordingly limited only to elites. The definition of an elite has evoked much "confusion and debate" in literature (Harvey, 2010, p. 6, 2011, p. 3). Dexter (2006, p. 18) defined an elite as "any – and stress should be placed on the word 'any'" interviewee for whom the interview is specifically adapted to and in a sense led by. Smith, in part, corroborates this view by placing emphasis on the subjectivity of the definition according to the researcher, and the inconsistency of the status of an elite across "a variety of modalities" (Smith, 2006, pp. 645–646). Others have offered more structured indications of elite status, such as a person's "strategic position within a social network", their "position[] of power of authority… [and] network of other people and institutions" or in the specific case of politics, a person's "close proximity to power or policymaking" (Gillham, 2005, p. 54; Harvey, 2010, p. 6; Lilleker, 2003, p. 207). The elites chosen as part of this sample are so designated partially because of their proximity to the decision-making surrounding the policy file under study, and partially because of their 'insider' knowledge. Possessing 'insider' knowledge, in this case, is not limited to those who hold a job title at one of the European institutions; this study also includes interviews with key members of lobbying organisations.

As pointed out by Littig, expert and elite interviews are not necessarily very different in the practicalities of their methodologies, nor the challenges involved in executing them (2009, p. 99). Indeed, sampling for both of these categories require identifying the same core characteristics: "the knowledge and the power at their disposal" (Littig, 2009, p. 106).
It is notable that, unlike in the elite interview literature, knowledge to be gained from interviewing an expert has been classified by scholars as being either "technical", "process" or "interpretative" (Bogner & Menz, 2009, p. 52). Technical knowledge relates to the specificities and rules of the frameworks within which the events under study take place; Process knowledge relates to the experiential observations and understanding gleaned from the expert's

involvement in the particular event under study; Interpretative knowledge, by contrast, puts together the totality of the subjective ideas of the expert regarding the case under study (Bogner & Menz, 2009, p. 52). The information collected in interviews is not limited to the words transcribed, nor their interpretative value. 'Meta-data' points of interviews, such as body language, tone and pitch of voice, and non-verbal reactions, are similarly important for analytic purposes (Fujii, 2010, p. 233). When analysing these categories, it is simple to see how they could equally be applied to the types of information generated by elite interviews. Indeed, this research primarily makes use of the process knowledge put forth by the experts and elites.

The choice to interview both elites and experts is fundamentally practical at its core: in order to construct a fuller image of the policy process from both insiders, outsiders and those who make it their business to know certain pieces of knowledge key to understanding the process.

Von Soest indicates that sampling should not (by default) exclude "outside experts" – those who study and evaluate decisions rather than those who make them (2023, p. 278). Indeed, as pointed out by Maestas, experts can be drawn from a number of domains and positions; it is their "specialised experience or knowledge" that designates their expertise (2018, p. 585). The experts selected for this study came from various domains, one from the European institutions, one from academia, one from the media and one from the private sector. While these "inside" and "outside" experts may be equally valuable to the research, the information they provide must be interpreted according to their position and context (Von Soest, 2023, p. 280). Care was thus taken to design the interview framework in a way that not only lent itself to the capitalisation of the knowledge of the type of expert, but also facilitated the interpretation of the answers provided.

The interviews used in this study followed a semi-structured framework: an approach that is facilitated through "[guidance] by clear themes, keywords and established questions while simultaneously allowing for follow-up enquiries and probes" (Von Soest, 2023, p. 280). It has been noted that this approach has certain drawbacks, such as its propensity to use open-ended questions, which rely significantly on the respondent's memory (Beyers et al., 2014, p. 177). However, it is also the most adapted interview arrangement for elite and expert interviews due to its unrestrictive nature which allowed flexibility for further talking points (Harvey, 2011, p. 7; Liu, 2018, p. 3; Solarino & Aguinis, 2021, p. 660; van den Audenhove & Donders, 2019, p. 179). Indeed, as posited by Dexter, elite interviews are often characterised by the researcher "let[ting] the interviewee teach him what the problem, the question, the situation is" (2006, p. 19). It is posited by Beyers et al. that these risks can be expected to be minimised where the

topic of the interview is an ongoing policy process; although this does carry the risk of respondents being less willing to share key information (2014, p. 178). In order to buffer against this type of reluctancy, participants were offered the option of anonymity in their responses, both at the beginning of the interview and at a later stage.

Evaluating the Data

The literature suggests various criteria for evaluation of the reliability of information acquired from both documentary and interview sources. George and Bennett, for example, focus primarily on contextual criteria: asking who is speaking, and to whom, for what reason and the circumstances surrounding the information provided (George & Bennett, 2005, p. 136). In the particular case of interviews, Davies suggests a more stringent and technical set of criteria: that the information be delivered on a first-hand account, that the information come from the highest level possible to be accessed by the researcher, and that the interviewee be judged as a reliable reporter overall (Davies, 2001, pp. 77–78).

Triangulation

In order for the burden of proof to be successfully discharged, data should always corroborate or complement over various sources or methodologies, as well as pass certain tests set out to verify their value. The need for this was especially apparent in the conducting of this research, due to the many methodological difficulties, which are discussed in the final section of this chapter.

The documentary analysis preceding the interview stage is vital for the successful conducting of interviews. Indeed, as posited by Beyers et al. (2014, p. 179), in order to ask the right questions, one must have “a precise understanding of what evidence is needed [and] a clear idea of what information is feasible for the intended respondents to provide”. However, it is just as important after the fact when the evidence must be interpreted and analysed (Beyers et al., 2014, p. 176). By employing “across-methods triangulation”, data produced as a result of the interviews is cross-checked against the data procured from documentary sources (Denzin, 1978, p. 302). The designation of the interview tool as ‘secondary’ refers to the wealth of (access to) data available, rather than its importance, or chronology. Indeed, the importance of certain evidence to the research is another matter entirely. As shown by Van Evera’s tests discussed earlier, the “probative value” of information is reliant on the “unique” alignment of

the information with the hypothesis, and the extent to which this is "certain" (Bennett & Checkel, 2015, p. 16; Van Evera, 1997, pp. 31–32). Aside from the employment of multiple methodologies, it is important to introduce various methods of analysis for the same data sets, for example by way of the "inductive-deductive logic process", through which the themes and theories, having been identified from the data, are thereafter tested against the same data (Cresswell, 2013, pp. 82–83, 107; Denzin, 1978, p. 301). The combined use of these various approaches results in what Denzin (1978, p. 304) referred to as "multiple triangulation".

Evaluating the Use of Process Tracing

A "three-part standard" is put forth by Bennett and Checkel in order to evaluate the quality of the use of process tracing in a given study (2015, p. 21). First and foremost, the use of process tracing must be utilised in conjunction with a theoretical framework that not only supports the concepts of causal mechanisms and causation as a whole, but is also underpinned by the belief that all techniques of data collection are valid, and that it matters only what the given researcher does with the given method (Bennett & Checkel, 2015, p. 21; Lamont & Swidler, 2014, p. 3). Secondly, the research makes use of this methodologically pluralist attitude to employ effective strategies that are capable of analysing the given evidence both deeply and broadly (Bennett & Checkel, 2015, p. 21). The research must finally, as is in keeping with the understanding of causation under process tracing, remain open to the possibilities of other explanations and theories coexisting with the researcher's position (Bennett & Checkel, 2015, p. 21).

Challenges

Process tracing, as a whole, poses several challenges which are well-recorded in the literature. The most important of these is that of the "potentially infinite regress": the apparent need to analyse ever smaller pieces of evidence in a specific case in order to be able to reliably test a hypothesis (Bennett & Checkel, 2015, p. 11). This obstacle is particularly prevalent in the current case, not only due to the incredible amount of documentation produced by the European Union's institutions, but also due to the fact that at the time of writing the conclusion to this paper, the case itself, being the legislative procedure of the Corporate Sustainability Due Diligence Directive, is still underway. While the authors acknowledge that no "universal answer" or "simple algorithm" can be offered to these questions, Bennett and Checkel nevertheless offer "best practices" as to the limits drawn by the researcher as to where analyses

start and end (2015, pp. 21, 26, 28). One example of a starting point is that of the "critical juncture at which an institution… was… open to alternative paths" (Bennett & Checkel, 2015, p. 26), and it is this point at which the present study begins its analysis: at the introduction of the European Commission's Sustainable Corporate Governance Initiative in 2020.

A distinction can be drawn between the challenges posed to the process of inference where information is unavailable, and where it is contrary to the hypothesis of the researcher (Bennett & Checkel, 2015, p. 19). While the former offers the opportunity to the researcher to provide predictions of the value of the evidence in relation to the hypothesis – a technique that is actively promoted by Bennett and Checkel, and which is utilised in several instances during the present research, the latter simply decreases the confidence with which a researcher may put forward their hypothesis (2015, p. 19). The decision to stop accumulating evidence is perhaps more challenging – one risks missing out on evidence, as well as losing time on the overall analysis. The "sensible [Bayesian] argument" offered by Bennett and Checkel in this case is to cease collecting data when the information begins to repeat on itself (2015, p. 28). In a recent publication, Verghese favours the application of three "stopping rules": "critical juncture", "necessary and sufficient cause" and "mechanism" (2023, pp. 40–49). The utilisation of the first rule mirrors that of its application to the starting point of the analysis: a researcher should stop where there is an intervening event (Mahoney, 2000, p. 527; Verghese, 2023, p. 41). The "necessary and sufficient cause" rule is relatively self-explanatory: a researcher stops collecting data once a causal mechanism is revealed that is necessary for the outcome, and which sufficiently brings about that outcome (Verghese, 2023, p. 44). Indeed, following the logic of probative value explored earlier in this chapter, it makes sense that identifying a mechanism which is necessary for the outcome would comprise the "gold standard" of establishing causation (Mahoney et al., 2009, p. 124). The "mechanism" rule comprises ending the analysis when no further mechanisms can be identified to link the events to one another (Verghese, 2023, p. 46). In the present study, while some lines of evidence began rendering repetitive results towards the end of the data collection period, the decision to stop was principally motivated by the University of Padova's submission deadlines for the dissertation. In this sense, it can be said that the "necessary and sufficient" cause was identified with the time restriction provided. These start- and stop-dates will be set out in further detail in the chapter on process tracing.

There is also the question of whether the results of process tracing are generalisable to their given field. Are the findings of this paper, which analyses EU integration through the lens of company law, able to be applied to EU integration in other domains of law, or as a whole?

Some authors argue that, specifically in the case of European integration, of which its institutions must be treated as a polity *sui generis*, "efficient" process tracing restricts itself to cases that "promise external validity" (Schimmelfennig, 2015, p. 101). This external validity can be built from, for example, the researcher's own interest in the specific case, or from selecting "hard cases" from the policy domain (Bennett & Checkel, 2015, p. 13; Schimmelfennig, 2015, pp. 116, 124). Additionally, Bennett and Checkel suggest that generalisability may be a misplaced "issue" in processed tracing, given that the uniqueness of a certain phenomenon may only allow for comparability of evidence drawn from its own pool (2015, p. 13).

A unique challenge is presented when marrying the methodology of process tracing to rational choice theory, as this paper aims to do. Indeed, Bennett and Checkel point out that the risk exists that a researcher simply projects onto the observed events "his or her measurement of the actors' preferences so that the chosen outcome [is] a value-maximising one". However, this danger is avoided when taking into account the totality of the actors' choices in the observable timelines in order to ensure consistency and avoid bias (2015, p. 32).

The European Union, in its efforts to foster transparency in the political system, publishes an enormous amount of information relating to specific parts of the policy process. Other parts, however, such as the deliberations of the Council, as well as the interinstitutional trilogues, are often (and accurately) described as the "black box" of the European Union. Despite requests for documentation lodged with AskTheEU.org, a private platform that provides citizens with the ability to exercise their access to information rights[7], the Council replied only by the 29th of August, some 47 days after the request was made, and with only a very limited number of documents containing mainly technical information.

The use of elite and expert interviews as a source for the process tracing methodology was equally challenging.

As highlighted by various researchers, elite interviews with politicians often result in the enlargement or reduction of their role in the particular process (Beyers et al., 2014, pp. 177–178). In order to account for this particular issue, coined as "expansiveness bias" by Feld and Carter (2002), the interview frameworks focused on asking questions grounded in facts that

[7] Article 15 of the TFEU and article 42 of the Charter of Fundamental Rights provide that citizens have the right to request documentation from the EU institutions.

had already been confirmed with documentary evidence, as well as assuming a neutral stance as the interviewer to the political developments.

Selecting a sample for purposes of this dissertation was also tricky. The ongoing nature of the policy process behind the Directive under study, and general issues relating to access resulted in a relatively long interview period, particularly relating to "inside" elite participants. Indeed, if the difficulties in gaining access to elites was an issue recognised by the literature in the 90s, it has certainly persisted until today (Liu, 2018, p. 3; Ostrander, 1993, pp. 8–9). Overall, it was noted that elite participants from the European Parliament were generally quicker to respond to email requests, and also more willing to be interviewed.

Understanding the Corporate Sustainability Due Diligence Directive

The Corporate Sustainability Due Diligence Directive, currently undergoing negotiations in the European Union legislative procedure, aims to establish a uniform, cross-sectoral and Union-wide duty on companies to investigate their business relationships and production sources for actual or possible human rights and environmental harm, and to take steps towards mitigating or putting to an end the actions contributing to those harms. Its Proposal by the European Commission follows similar legislative developments in Member States, yet still produced a large amount of criticism from industry, politicians and certain groups of academics. The extent of the duty to be imposed on corporations, including the scope, measures to be taken and accountability mechanisms, all form part of the main debate. This phenomenon is also present at the European level, where the Parliament and the Council of Ministers (hereinafter "Council") appear to be at odds over these key aspects.

This chapter serves to provide the reader with a high-level understanding of the CSDDD: its background, contents, positioning in respect of other EU legislation, as well as its legal foundation and sources.

A first section will provide key details of the legislative background. A full analysis of the Directive's policy cycle, as it stands at the time of writing, is reserved for the chapter on process tracing. This section is therefore limited to the highlighting of key moments and themes in order to facilitate a deeper understanding of the contents of the CSDDD itself.

The second section examines the legal basis for the Directive – that is, the justification in law for its development, by the EU and as a policy in general. Understanding the legal basis of the Directive allows for identification of similar policy processes for other instruments, as well as key differences between seemingly parallel initiatives.

The third section discusses the various sources of the law: the instruments used as reference for the development of the content of the Directive.

The fourth section will outline the contents of the Directive – that is, the provisions of the law as they apply to the policy targets. While this section will provide a brief overview of the way in which the contents have changed as a result of the EU's legislative procedure, a deeper analysis into the choices underpinning these changes is reserved for Chapter 5.

The fifth and final section will contextualise the Directive in its interaction with other EU instruments designed to achieve similar or related objectives. Understanding the Directive's place in the architecture of current and upcoming EU policy is important, as it enables a fuller

analysis of the operation of the law itself, as well as the relevance of different actors and mechanisms involved in the policy process.

Legislative Background

The 24th of April 2013 marked the most destructive incident in the history of the garment industry; at 08:57 in the morning, the Rana Plaza building in Bangladesh collapsed with 3.122 workers trapped inside. While structural failures in developing (and even developed) countries are not unheard of, this particular incident was of specific interest to the European community. Indeed, of the thirty-one known companies who sourced garments from the five factories in Rana Plaza, twenty-three were registered in the European Union (hereinafter "EU").[8]
While legislative efforts at the EU-level would only follow some six years later, other member states, whose due diligence laws now act as models for the European Commission for the formation of the current Directive, took relatively quick action. One such example is that of France with their *Loi de Vigilance*, whose text was proposed in the French National Assembly only eight months later, and cites the incident directly in its opening paragraphs (Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses à l'ordre, 2013, p. 2). The proposal was put forward by group of parliamentarians primarily from the Europe Ecology – The Greens party, and despite only being adopted four years later in 2017, constituted the first extensive due diligence law in the world (Pietrancosta, 2022, p. 3). Despite the text's direct reference to the Rana Plaza incident, this law had, in fact, been in development through the joint lobbying efforts of NGOs and trade unions since 2011 (Delalieux, 2020, p. 650). Indeed, by the time the disaster occurred, due diligence in corporate supply chains was already a growing topic in political media; Rana Plaza simply accelerated and augmented the general public's adherence, especially considering the fact that various of the implicated companies were French (Delalieux, 2020, p. 654; Evans, 2020, p. 9). Despite heavy opposition from the incumbent executive and industry, as well as a partial censure by the Constitutional Council, the second version of the law (after much revision) was finally adopted in March of 2017 (*Décision n° 2017-750 DC du 23 mars 2017—Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, 2017, p. 10; Loi de Vigilance, 2017; Delalieux, 2020, pp. 654–655; Gustafsson et al., 2022, p. 12). Responses from civil society on the adopted text were mixed; while some organisations focused solely on the positives – that

[8] The companies were registered in Belgium, Denmark, France, Germany, Italy, Spain, Poland, and the United Kingdom. At the time of the disaster, the United Kingdom was still a member of the European Union.

this law was “a step in the right direction”[9], others called to attention the fact that prior versions of the law were more ambitious, blaming (in part) the Constitutional Council for prioritising freedom of enterprise over the common good (Greenpeace France, 2017; Massiot, 2017; Petitjean, 2017). Whether or not the adoption of this law in 2017 qualifies France for ‘first mover’ status, despite the practical shortcomings of the text, is a matter of debate (Ciacchi & Cerqua, 2024).

Another example of an ‘early adopter’ member state is Germany, whose *Lieferkettensorgfaltspflichtengesetz* (hereinafter “*LkSG*”) came into effect in January 2023. As in the case of France, the Act was the result of several years of preparation; notably, its roots can be traced to the German government’s 2016 National Action Plan for the implementation of the UN Guiding Principles for Business and Human Rights (hereinafter “UNGPs” or “The Principles”) (LkSG, 2021; Gustafsson et al., 2022, p. 13). The National Action Plan imposed on German companies a concrete, yet non-binding, expectation from the government on how to implement due diligence. In the event that at least 50% of the companies in scope were not compliant by 2020, the Plan provides that “further action, which may culminate in legislative measures” would be pursued by the government (Federal Foreign Office & Interministerial Committee on Business and Human Rights, 2017, p. 10; Rühl, 2020, p. 4). A subsequent survey conducted by the government revealed that the percentage of companies who actually carried out due diligence as envisaged by the National Action Plan amounted to 13-17%, thus demonstrating the need for a stronger approach (Dreiseitl & Richter, 2020, p. IV). In July 2021, the German Supply Chain Act, as it is known in English, was adopted in Parliament (LkSG, 2021). The German law benefited from a stronger coordinative role by the executive than its French counterpart, which enabled its final version to have very few differences from the initial proposed text (Gustafsson et al., 2022, pp. 13–14). However, as in the case of France, civil society organisations expressed dissatisfaction with the final outcome, citing the obligations’ limited reach in terms of the companies included, as well as their supply chains, the lack of a civil liability mechanism to support corporate accountability, as well as an inadequate inclusion of environmental considerations (Initiative Lieferkettengesetz, 2021; International Federation for Human Rights, 2021; Saage-Maaß, 2021). While organisations pledged to continue pushing for improvements at the domestic level, they also called on the EU to produce "a much stronger and [more] ambitious law" (Saage-Maaß, 2021).

[9] My translation.

Legal Basis of the Proposal in European Union Law

The European Union's capacity to act in terms of policy is limited by Article 2 of the TFEU. According to this provision, legislative competencies may be exclusive to the Union, exclusive to member states with support[10] from the Union or shared between the Union and member states (TFEU, 2009, p. 2).

The right to the freedom of establishment, enshrined under Article 49 of the TFEU, essentially protects the rights of persons to found and operate undertakings in the Union. This provision both limits member states' competency to act and grants the Union several powers in order to ensure the attainment of the right (TFEU, 2009, art. 49). Article 50 justifies EU intervention in these affairs, by empowering the Union in the act of adopting Directives relating to particular economic activities in the EU (TFEU, 2009, art. 50). In conjunction with these provisions, the principles of subsidiarity and conferral also demand that the EU act via Directive in this domain (TEU, 2007, art. 5; Xuereb, 2021, p. 1052). Company law at EU level is thus dealt with solely through Directives, except in the case of complementary instruments[11]. Further testament to this positioning is the fact that each of the four current Directives (and one Implementing Regulation) introduced by the EU on company law have referenced the abovementioned Articles as their legal basis.[12] The Proposal confirms this in their justification of the instrument, supplementing this information with the fact that Delegated Acts, Guidelines and other implementing measures will be adopted in order to provide for more technical provisions (Proposal: CSDDD, 2022, pp. 17–18).

Matters relating to the internal market, its establishment and maintenance, are – as discussed above, one such area in which member states have (partially) conferred their powers of legislation upon the Union. The reasoning for this extension to company law is indisputable. Legal instruments in company law, whether adopted by the Union or by member states themselves, naturally have an impact on the functioning of the internal market, a key element of the EU as enshrined by Article 26 of the TFEU, and subject to shared legislative competency between member states and the EU (TFEU, 2009, art. 4). To this end, Article 114 of the TFEU empowers the EU to take measures in order to achieve what is referred to as the "approximation

[10] "Support" here including the possibility of additional or complementary measures by the Union, provided that this action does not overrule the actions by the member states.

[11] For example, Implementing Regulations or Delegated Acts.

[12] First Company Law Directive (68/151/EEC), Takeover Bids Directive (2004/25/EC), Shareholders' Rights Directive (2007/36/EC), Shareholders' Rights Directive (2017/828/EC), Implementing Regulation (EU) 2018/1212 all refer to Article 50 (Article 44 in the Treaty establishing the European Economic Community) as their legal basis.

of laws"; in other words, harmonisation. This latter concept is an important reason for the adoption of the Directive, as cited by the Proposal (Proposal: CSDDD, 2022, pp. 10–14). Indeed, as explored below in a latter section of this chapter, the current Proposal draws on many pre-existing legal instruments adopted by member states, notably that of France and Germany.[13] The Proposal places emphasis on the possible fragmentation of laws across member states, through divergent approaches to due diligence duties and liability as can be seen in the French and German case, but also through an absence of legislation, as might be the case for other member states (Proposal: CSDDD, 2022, p. 11). Indeed, by harmonising the rules for due diligence across the member states where companies might be implicated by several different jurisdictions, the EU aims to prevent the legal 'breaking up' of the internal market and further promotes cross-border economic interactions (Proposal: CSDDD, 2022, p. 11). Whether this objective is best achieved through a Directive as opposed to a Regulation is a debated issue between scholars and political representatives[14] (Busch, 2021, p. 432). The Proposal highlights the fact that harmonisation measures are not only beneficial for companies, but also play an important role in ensuring fair outcomes for victims of due diligence failures; indeed, where liability operates according to different legal rules or burdens of proof, victims of similar incidents occurring across borders may have different results when claiming for damages in their respective member states (Proposal: CSDDD, 2022, pp. 12–13).

The principle of subsidiarity, as enshrined in Article 5 of the TEU, addresses the extent to which the Union can act in respect of matters partially conferred upon them by member states – that is, "areas which do not fall within its exclusive competence". At the heart of its functioning is the desire by the EU to "ensure that decisions are taken as closely as possible to the citizens of the Union" (Protocol (No2), 2008). According to this principle, the EU's intervention should be limited to areas where member states' actions cannot adequately meet the aims and purposes of the proposed policy. Instead, whether due to the "scale or effects" of the policy, action at the Union-level is required (TEU, 2007, art. 5). Protocol 2 of the TFEU further details the operation of this principle, including, for example, the obligation for the Commission to engage in public consultations regarding the objectives of the proposed policy, as well as for the proposals of legislative acts to be sent to national parliaments during the ordinary legislative procedure (Protocol (No2), 2008, arts. 2, 4). Article 6 of the Protocol provides member states with

[13] *Loi de Vigilance* and *Sorgfaltspflichtengesetz*.
[14] This element will be explored in detail in Chapter 5.

recourse against the proposed policy where it is perceived that the principle of subsidiarity has not been respected.
The Proposal sets out, as obliged by the Protocol, a section dedicated to the alignment of its policy with the principle of subsidiarity, explaining that member states' action in this regard is "unlikely to be sufficient and efficient" (Proposal: CSDDD, 2022, p. 13). This judgment is based on four main reasons: firstly, the need for a unified approach to combating environmental problems, as promoted by other multilateral instruments; secondly, the cross-border and transnational nature of value chains in modern business; thirdly, the need for legal certainty in the internal market; and fourthly, the potential for EU action to promote internationalisation of the policy approach (Proposal: CSDDD, 2022, pp. 13–14). The Commission also provides in the Explanatory Memorandum a detailed breakdown of the consultations conducted with respect to the current initiative, enumerating five types of public engagements and the feedback received from these sessions (Proposal: CSDDD, 2022, pp. 18–19)

In terms of Article 5 of the TEU, action taken at Union-level must also be proportional; that is, its policies should not go further than needed to attain the Treaties' objectives. The abovementioned Protocol Nº2 also deals with this requirement of proportionality, imposing through its Article 5 an assessment of the burdens a proposed action would place on the EU, the member states (at all levels of government), as well as citizens. According to this requirement, all burdens should be "minimised and commensurate" with the policy goals (Protocol (No2), 2008, art. 5). In the Proposal for the Directive on Corporate Sustainability Due Diligence, the Commission justifies their action in terms of the requirement for proportionality by explaining the way in which the scope (material and personal) of the provisions, as well as the mechanisms for enforcement, have been limited. In terms of scope and as detailed in the section on the contents of the Directive, small- and medium enterprises ("SMEs") are excluded from due diligence obligations under the Directive. There are also significant exclusions with regard to the turnover and employee count of an undertaking, for which the criteria also differ with regard to non-EU companies (Proposal: CSDDD, 2022, pp. 14–16). The material scope is also limited to environmental and human rights impacts already identified as harms in international instruments (Proposal: CSDDD, 2022, p. 16). The criteria for liability in the Proposal are limited in order to ensure effective use of the instrument, and avoid vexatious or exorbitant litigation (Proposal: CSDDD, 2022, p. 17). Similarly, sanctions that are issued as a result of the enforcement mechanisms are required by the Proposal to be proportionate, and this in two manners: firstly, towards companies, by, for example, allowing

them first to remedy harms that have been identified as resulting from corporate omissions and in the case of sanctions, ensuring that these are proportionate to turnover, and secondly, towards the member states, in leaving the majority of the enforcement procedure to be determined by the member states in accordance with their own legal system (Proposal: CSDDD, 2022, p. 17). The Proposal also contains, as required by the Protocol, an appreciation of the costs that its operation will impose on the Union and member states (at all levels of government). The omission of a similar statement for citizens is to be expected, given that this Proposal does not impose, as such, any obligations on ordinary citizens. As far as companies are concerned, the Proposal ensures the reduction of compliance costs through the enablement of "industrial schemes and multistakeholder initiatives" (Proposal: CSDDD, 2022, p. 17).

Sources of the current Proposal

In the section of the Proposal setting out its context and objectives, three main sources are expressly identified: the European Green Deal, the UN Sustainable Development Goals, as well as the human rights and environmental objectives of the European Union itself. This section will examine each of these sources in more detail.

European Green Deal

The European Green Deal, published in 2019, sets out an ambitious collection of policy initiatives linked to the EU Commission's overarching objective of a climate neutral Europe by 2050. Several societal actors are targeted by these initiatives, with companies often taking centre-stage. To this end, the Commission envisages key overhauls of the way in which business is being done in Europe, declaring that "sustainability should be further embedded into the corporate governance framework" (The European Green Deal, 2019, p. 17). Currently, it is posited by the Commission in the Green Deal communication, companies do not pay enough attention to their ability to endure over time, especially with regard to their externalities. The European Green Deal includes among its initiatives an Action Plan on Circular Economy, the Biodiversity Strategy and the Farm to Fork strategy, all of which refer to the need to foster a sustainable corporate governance (European Commission, 2020a, p. 21, 2020b, p. 16, 2020c, p. 12).[15]

[15] The Circular Economy Action Plan refers to the Commission's intention to "encourage the integration of sustainability criteria into business strategies by improving the corporate governance framework" ; The EU Biodiversity Strategy sets out that sustainable corporate governance is needed "to ensure environmental and

The central role of the European Green Deal in the Proposal for a Directive on Corporate Sustainability Due Diligence is communicated from the outset of the Explanatory Memorandum. Action 2 of the Green Deal, entitled "Transforming the EU's economy for a sustainable future" enumerates various approaches whereby economic policy will be reformed in order to achieve the Green Deal's objectives, in this case through the "[mobilisation of] industry for a clean and circular economy" (The European Green Deal, 2019, pp. 7–9). Amongst the propositions for practical reforms of various key industries, the Commission includes the need to provide standardised means of measuring companies' impacts on the environment and making this information available to the public (The European Green Deal, 2019, p. 8).

The interconnectedness of these two instruments can further be seen in the language of the documents. For example, one of the key roles of the Proposal is "integrating sustainability into corporate governance and management systems", a phrase which closely mirrors that of the Green Deal's statement that "sustainability should be further embedded into the corporate governance framework" (The European Green Deal, 2019, p. 17; Proposal: CSDDD, 2022, p. 1).

UN Sustainable Development Goals

The Proposal refers to the UN's Sustainable Development Goals (hereinafter "SDGs") in the section detailing the context and objectives of the Proposal. While the instrument is not discussed in further detail in the Explanatory Memorandum, it is mentioned once more in Recital 7 of the Proposal itself, where companies' are identified as partly responsible for the achievement of the SDGs, alongside the European Union and its member states (Proposal: CSDDD, 2022, Recital 7). Another related source is the UNGPs, as explored earlier. While the SDGs and the UNGPs remain separate initiatives, their interconnectedness and mutual reinforcement has been confirmed by the UN (2017; Ruggie, 2016; United Nations Global Compact Germany et al., 2020, p. 4). The Explanatory Memorandum provides examples of how other pieces of EU legislation, for example the Taxonomy Regulation[16], have sought further alignment for companies with the UNGPs (Proposal: CSDDD, 2022, p. 5). Indeed, a

social interests are fully embedded into business strategies" ; The Farm to Fork Strategy involves "improv[ing] the corporate governance framework, including a requirement for the food industry to integrate sustainability into corporate strategies".

[16] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

later section of the Memorandum cites the EU's intention for this Proposal to "actively promote" international instruments such as the UNGPs (Proposal: CSDDD, 2022, p. 9). Recital 26 of the Proposal also indicates the EU's intention to make use of the UNGPs, among other instruments, when formulating guidance for corporations regarding the CSDDD (Proposal: CSDDD, 2022).

The UNGPs, as well as other instruments such as the OECD Guidelines on Multinational Enterprises ("the Guidelines") have been utilised in the development of several separate laws of this nature, with stark differences in the outcomes. These differences, according to Gustafsson et al., expose the "multinterpretability" of these particular soft law devices, which ultimately gives way to the fragmentation of laws across jurisdictions (2022, p. 9). This phenomenon is similarly discussed in the Explanatory Memorandum of the Proposal, where the Commission describes the "significantly different" results of Member States when attempting to translate the elements of soft law guidance to hard law (Proposal: CSDDD, 2022, p. 11).

EU Human Rights and Environmental Objectives

The various treaties setting out the basis for the European Union make several references to the pursuit of environmental and human rights-related goals. Article 11 of the TFEU obliges the integration of sustainable development into EU policies. This particular article notes environmental protection as a key requirement of this integration (TFEU, 2009, art. 11). This same treaty also dedicates an entire article to the precision of environmental objectives, namely that they "[preserve], [protect] and [improve] the quality of the environment", that they "[protect] human health", that they enable a "prudent and rational utilisation of natural resources" and that they "[promote] measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change" (TFEU, 2009, art. 191). It is in this same article that the subsidiary, precautionary- and polluter pays principles are endorsed (TFEU, 2009, art. 191). Article 194, which regulates policymaking on energy, makes express reference to the "need to preserve and improve the environment" (TFEU, 2009).

Article 2 of the Treaty on European Union (hereinafter "TEU") enumerates the founding principles and values of the Union. The "respect for human rights", as well as several other principles that fall under this umbrella, such as "democracy, equality [and] the rule of law" are expressly mentioned (TEU, 2007, art. 2). Similarly, external action by the Union is to be carried

out within the framework of human rights and in accordance with the international instruments that protect them (TEU, 2007, art. 21). Article 3 of TEU sets out the various purposes and ambitions of the EU, of which sustainable development and the environment, form an intimate part (TEU, 2007). These ambitions are not limited to action within the EU itself, but extended, as is the case for respect of human rights, to international relations through Article 21, whereby the global promotion of sustainable development is enshrined (TEU, 2007).

The institutions, in their daily operations, frequently communicate their commitment to these objectives; for example, as cited in the Proposal, the European Parliament resolution of 10 March 2021 and the Council Conclusions of 1 December 2020. Expressions of these objectives can also be found in the several documents published by the institutions, such as cited in the Proposal, the Joint Declaration on EU Legislative Priorities for 2022. Over the period 2019-2024, the Commission's priorities included "A European Green Deal" and "An economy that works for people" – both of which are cited in the Proposal (Proposal: CSDDD, 2022, p. 20).
It is important to note that these objectives related to the environment and human rights are presented as being not only pursued by the institutions themselves, but by the citizens of the EU. The Conference on the Future of Europe is a key source for these contributions, where several ideas submitted by citizens of several Member States emphasised the importance of the corporate sphere's role in the green transition, and notably pushed for further measures combatting "unsustainable business models"(Proposal: CSDDD, 2022, p. 1; Kantar Public, 2022, p. 29).

Other Sources

The Proposal highlights the fact that this Directive should "contribute to" the efforts already made at member state level. Two pieces of national legislation are specifically highlighted throughout the Proposal, namely the French *Loi de Vigilance*, and the German *Sorgfaltspflichtengesetz*, the latter having drawn greatly on the work of the former (Proposal: CSDDD, 2022, p. 1,11,12). Indeed, the modelling of the Directive on the French law is confirmed not only by the Proposal itself, but by the various recommendations by the institutions to the Commission in that regard (European Parliament, 2019, p. 109).

Interaction with Other Instruments of European Union Law

The Proposal amends, as part of its title, the 2019 'Whistle-blower Directive'[17]. This law protects persons who come forward to report breaches of European Union law, whether by anonymising their identity or by preventing retaliative action against them (European Commission, 2019). In particular, the CSDDD expands the material scope of the Whistle-blower Directive, protecting informants who may report infringements of the CSDDD.

Several other legislative instruments aimed at recalibrating the economy towards sustainability have been introduced over the past few years, such as the 'Accounting Directive'[18] which established uniform rules for accounting and reporting for certain types of undertakings in the EU, and the 'Non-Financial Reporting Directive' ("NFRD"), which, as its name suggests obliges companies to report on information related to the environment and social issues, principally, as well as on other non-financial areas (European Commission, 2013; Accounting Directive, 2013). The Proposal sets out that "the Directive will complement" the NFRD, both in its current and future form[19] (Proposal: CSDDD, 2022, p. 4). The 2020 Consultation Document distinguishes between the two policies, explaining that "whilst the NFRD is based on incentives 'to report', the sustainable corporate governance initiative aims to introduce duties 'to do'"(European Commission, 2020d, p. 2). Indeed, in order to provide effective and accurate reporting, the Commission explains that "setting up processes… [for] identifying adverse impacts", as envisaged by the due diligence duty in the CSDDD, is necessary (Proposal: CSDDD, 2022, p. 4). In the same line, the CSDDD is also said to "underpin" the 'Sustainable Finance Disclosure Regulation'[20] (hereinafter "SFRD"), in that it, as with the NFRD, provides the behavioural aspects of due diligence that precede reporting (Proposal: CSDDD, 2022, p. 5). The 'Taxonomy Regulation'[21] is yet another piece of legislation whose reporting requirements will be, according to the Commission, complemented by the CSDDD (Proposal: CSDDD, 2022, p. 5).

[17] Directive (EU) 2019/1937.

[18] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

[19] At the time of the Proposal, the NFRD was undergoing amendment through the enactment of Directive (EU) 2022/2464, colloquially referred to as the 'Corporate Sustainability Reporting Directive', which came into effect in January of 2023.

[20] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.

[21] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088

Several other sector-specific Directives and Regulations, such as the 'Human Trafficking Directive'[22], the 'Employers' Sanctions Directive'[23], the 'Conflict Minerals Regulation'[24] and the 'Deforestation Regulation'[25] and 'Batteries Regulation'[26] proposals, are said to intersect with and be augmented by the CSDDD (Proposal: CSDDD, 2022, pp. 5–6).
The Proposal is also said to be "consistent" with various other policy domains, such as the EU Green Deal, EU climate policies, EU health and safety policies, to name only a few (Proposal: CSDDD, 2022, pp. 8–9). This part of the Explanatory Memorandum concludes by elaborating on the role that the CSDDD will play in expanding on the objectives of the above pieces of legislation – those that it complements, as well as those with which it is consistent – and in actualising these objectives through the adoption of the uniform due diligence framework (Proposal: CSDDD, 2022, p. 10).

Content of the Proposed Directive

This section will sketch the content of the proposed Corporate Sustainability Due Diligence Directive, as well as an outline of how it developed. While certain parts will lightly touch on some aspects of the policy process in order to better elaborate on the progressive development of the content of the Directive, these points will be discussed in further detail in chapter 4, dedicated to the tracing of the policy process.
The Commission's Proposal for the Directive was published on the 23rd of February 2022. The Explanatory Memorandum sets out five objectives of the proposed Directive as follows:

"1. [to] improve corporate governance practices to better integrate risk management and mitigation processes of human rights and environmental risks and impacts, including those stemming from value chains, into corporate strategies;
2. [to] avoid fragmentation of due diligence requirements in the single market and create legal certainty for businesses and stakeholders as regards expected behaviour and liability;
3. [to] increase corporate accountability for adverse impacts, and ensure coherence for companies regarding obligations under existing and proposed EU initiatives on responsible business conduct;
4. [to] improve access to remedies for those affected by adverse human rights and environmental impacts of corporate behaviour;

[22] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.
[23] Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.
[24] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores and gold originating from conflict-affected and high-risk areas.
[25] Proposal for a Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.
[26] Proposal for a Regulation of the European Parliament and of the Council conerning battieries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020.

5. being a horizontal instrument focusing on business processes, applying also to the value chain, this Directive will complement other measures in force or proposed, which directly address some specific sustainability challenges or apply in some specific sectors, mostly within the Union" (Proposal: CSDDD, 2022, p. 3).

The text later focuses these points down to the policy's ultimate goal as "to ensure that companies active in the internal market contribute to sustainable development" (Proposal: CSDDD, 2022, Recital 14). In order to achieve this, the Directive imposes several obligations of due diligence on companies of a certain size. The obligations, summarised in Article 4 and set out in detail in Articles 5 through 11, include the monitoring and scrutiny of company activities for "actual or potential adverse impacts" on the environment and human rights, as well as the taking of company action in order to intercept or alleviate the effects of these impacts. It is also expected of companies to develop a policy for due diligence, as well as incorporate its tenets into other policies held by the company. A company should also take measures to audit and publicly disclose its due diligence measures and its progress (Proposal: CSDDD, 2022, arts. 4–11). Companies are also obliged to set up a system whereby affected persons may submit complaints regarding their activities and their impacts on the environment or human rights (Proposal: CSDDD, 2022, art. 9). It is important to note that a certain responsibility is imposed on Member States to ensure that these obligations are being met by companies who are deemed as falling under their competence – a matter which is dealt with through Article 17(2) and 17(3). The Directive also sets out the activities in terms of which due diligence obligations must be met. In the Commission's proposed text, this scope is outlined as part of the definitions under Article 3 as the "value chain", and involves not only the manufacturing of products or the furnishing of services, but also their "the use and disposal" (Proposal: CSDDD, 2022, art. 3(g)). In this way, the Commission includes as part of the company's due diligence duties not only the 'upstream' activities, but also those categorised as 'downstream'.

The Commission's Proposal applies to several categories of companies as defined under Article 2. Companies established in terms of Member State legislation fall within the scope of the Directive where they have more than 500 employees, and a turnover of more than 150 million, or where they have more than 250 employees and a turnover of more than 40 million, of which half is produced in certain sectors (Proposal: CSDDD, 2022, art. 2(1)). For both of these provisions, the turnover is calculated on a worldwide basis. The second provision acts to ensure compliance by companies operating in 'high risk' sectors, such as the manufacturing and wholesale of textiles, the production of alimentary goods, and sectors operating in mineral extraction (Proposal: CSDDD, 2022, art. 2(1)(b)(iii)). Non-EU companies – that is, enterprises

"formed in accordance with the legislation of a third country" also fall within the scope of the proposed Directive, provided they produce a turnover of more than 150 million in the Union, or more than 40 million, with at least half produced in the sectors outlined above (Proposal: CSDDD, 2022, art. 2(2)).

Aside from the due diligence obligations outlined above, Article 15 of the Proposal also obliges companies to develop a so-called "transition plan" whereby the company must ensure its compliance and compatibility with the Paris Agreement and the overall goal of a sustainable economy. The extent to which climate change is deemed as "a risk for, or an impact of" the company's activities must be determined as part of this plan; in cases where the level of risk or impact is deemed high, the company's plan must include certain goals and targets to reduce emissions. The third part of this Article goes a step further by linking variable remuneration of directors to the achievement of the objectives in the company's "transition plan" It is notable, however, that this connection is conditional on the company's existing linkage between variable remuneration to "the company's business strategy and long-term interests and sustainability" (Proposal: CSDDD, 2022, art. 15(3)).

As a Directive, the obligations listed therein do not apply directly to the companies and must be transposed by way of national legislation. All Articles containing obligations to be imposed on companies are thus phrased in order to require Member States to undertake the necessary actions as set out in the Directive. Through this same mechanism, Member States must also ensure that the directors' duty of care, a classic tool in the Company Law artillery, is adapted in order to reflect the obligations on companies under the Directive (Proposal: CSDDD, 2022, p. 25). The Commission also takes on several responsibilities in order to aid companies and Member States with their respective obligations, such as the publication of guidance for supplier contract drafting and overall due diligence in specific sectors, the provision of "accompanying measures" in order to boost compliance, and finally the establishment of the European Network of Supervisory Authorities (Proposal: CSDDD, 2022, arts. 12, 13, 14, 21).

On the 1st of December 2022, the Council adopted their "general approach" with regards to the proposed text. This version, despite the Council's claim that it constituted a "balanced compromise" was considered by many as a considerable dilution of the Commission's original proposal (Amnesty International, 2022; Council of the European Union, 2022b, p. 11; Gruber, 2023).

While Article 2 defining the scope of the Directive remained intact to a large extent, several provisions were added that changed the functioning of the scope – firstly in relation to EU

companies, who would fall within the scope of the Directive where the criteria are fulfilled for two consecutive years. A second aspect added by the Council enables companies to meet several obligations under the Directive at group level (Council of the European Union, 2022b, p. 4). Member States would be entitled to choose whether or not to apply the Directive to a certain number of financial undertakings, such as 'pension institutions', 'credit institutions' and 'investment banks'. Certain categories of financial products were excluded from the scope entirely.

Article 21 contains a new provision, whereby the Commission would be responsible for the facilitation of information through the already envisaged European Network of Supervisory Authorities in order to determine the Member State competent for purposes of monitoring compliance with the Directive. This new provision is especially relevant in terms of non-EU enterprises without a subsidiary or registered office in a specific Member State, or non-EU enterprises with several branches across different Member States (Council of the European Union, 2022b, p. 4).

The text proposed by the Council also contains new provisions regarding the entry into force of the Directive. While Member States will still have two years to transpose the legislation into their national legal frameworks, the obligations under the Directive will only become applicable another full year later for "very large"[27] enterprises, two years later for large enterprises[28] and three years later for smaller companies[29] (Council of the European Union, 2022b, pp. 5, 63–64, 115).

While the original text included, as per standard practice, a clause setting out the review procedure to be followed by the Commission seven years after the Directive's effective date, the Council's proposed text included additional aspects for review, such as the "individual approach" of the Directive, as well as whether the scope should be broadened to include more types of entities currently not covered by the Proposal (Council of the European Union, 2022b, pp. 5, 114; Proposal: CSDDD, 2022, art. 29).

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[27] Here defined by the Council in their proposed text as an enterprise based in the EU with more than 1000 employees and a net worldwide turnover of more than 300 million euros, or a non-EU enterprise with a net turnover of more than 300 million euros produced in the Union.

[28] Here defined by the Council in terms of Article 2(1)(a) as an enterprise based in the EU with more than 500 employees and a net worldwide turnover of 150 million euros, or in terms of Article 2(2)(a) as a non-EU enterprise with a turnover of more than 150 million euros produced in the Union.

[29] Here defined by the Council in terms of Article 2(1)(b) as an enterprise based in the EU with more than 250 employees and a net worldwide turnover of 40 million euros, of which a minimum of 20 million euros were produced in certain so-called 'high risk' sectors, or in terms of Article 2(2)(b) as a non-EU enterprise with a net turnover of more than 40 million euros produced in the Union, of which a minimum of 20 million euros were produced in certain so-called 'high risk' sectors.

Three key definitions were amended by the Council, namely that of 'business relationship', 'established business relationship' and 'value chain'. In all cases, the Commission's definitions were deleted; a new 'business partner' definition replaced the two definitions relating to business relationships, and 'value chain' was reduced to 'chain of activities'. This latter change is said to have been adopted as a compromise between Member States who supported the Commission's definition, and those who opposed the inclusion of all downstream activities . Notably, the downstream use of the products, and the provision of services, were removed from the definition. Several goods were also excluded from the operation of the Directive, such as "dual-use items and weaponry", due to their "being subject to export control" (Council of the European Union, 2022b, pp. 6–7, 72–73).

Article 15 of the Proposal, dealing with climate change, was amended by the Council in order to improve the text's alignment with another Directive, namely the Corporate Sustainability Reporting Directive, whose scope of application overlaps with that of the CSDDD. The linkage of directors' variable remuneration to climate change objectives was removed from the Council's version of the text, citing divergent views between Member States on corporate governance and the duties of companies to society (Council of the European Union, 2022b, p. 9). To this end, the provisions of Articles 25 and 26 which sought to integrate the due diligence obligations into the directors' duty of care, were similarly deleted.

The final notable amendment by the Council is that of the provisions dealing with liability. In the Commission's text, Article 22 imposed liability where the conditions of damage, a breach of an obligation, and a causal link are met. The Council's text inserted fault as an additional condition, as well as made several simplifications relating to the joint and several liability of companies and their subsidiaries (Council of the European Union, 2022b, pp. 9–10).

Key amendments made to the Commission's proposal of the text by the Parliament in the adoption of their position on 1 June 2023 will be discussed below.

In Article 1, the need for a causal link between the "actual and potential human rights adverse impacts and environmental adverse impacts" and companies was emphasised (CSDDD: Parliament's Position, 2023, no. 85). The fact that liability should follow the breach of obligations (as set out in the Directive) only when damage is caused was also emphasised (CSDDD: Parliament's Position, 2023, no. 86). An addition was made to the final provision of Article 1 to explicitly include workers' rights in the list of current Member State national (and EU) legislation to be maintained, despite the adoption of the Directive (CSDDD: Parliament's Position, 2023, no. 88).

Article 2, which pertains to the personal scope of the Directive, was subject to many important changes. According to the version proposed by JURI, and voted on in Plenary, companies established in terms of member state legislation will be subject to the provisions of the Directive when they employ more than 250 persons (rather than 500 in the original Proposal) and when they have a turnover of more than 40 million euros (instead of 150 million in the original Proposal) (CSDDD: Parliament's Position, 2023, no. 89). By effecting these changes, the Parliament reduces the threshold of applicability, bringing many more companies into the scope of the Directive.

The second provision of Article 2(1) originally brought into the scope of the Directive companies who did not meet the first threshold conditions, but "had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million", at least 50 per cent of which was produced in certain specified sectors. The amendments by Parliament bring into scope, instead, companies who are the "ultimate parent company of a group that had 500 employees and a net worldwide turnover of more than 150 million", irrespective of the sectors that this turnover is generated in. This provision aims to ensure that small holding or "shell" corporations are not able to avoid the obligations of the Directive (CSDDD: Parliament's Position, 2023, no. 90). As discussed above, the Directive does not only apply to companies established in the EU, but also to third country companies. Originally, these companies would only be in scope where they produce a turnover of more than 150 million euros in the Union, or where they produce between 40 and 150 million, 50 per cent of which was produced in certain specified sectors. Parliament's amendments brings into scope third country companies whose worldwide turnover exceeds 150 million, where 40 million is produced in the EU, including turnover of companies with whom the third-party company is vertically engaged in business (CSDDD: Parliament's Position, 2023, no. 94). An additional amendment is made to include in the scope small holding or "shell" corporations of third companies who are in scope (CSDDD: Parliament's Position, 2023, no. 95). Similar to the previous provision applying to EU companies, Parliament's amendments bring into scope many more third-country companies than the original text, as well as that proposed by Council. While the Proposal provided for temporary and part-time workers in the calculation of employees for scoping purposes, these amendments go further to include "other workers in non-standard forms of employment" (CSDDD: Parliament's Position, 2023, no. 96).

The Definitions to be applied to the provisions of the Directive are set out in Article 3. Here again, the scope of the Directive is enlarged by JURI, who add to the definition of 'company' those legal entities set out in Annex II of Directive 2013/34/EU (CSDDD: Parliament's

Position, 2023, no. 98).[30] An important change under this Article is that of the total modification of the definitions of 'adverse human rights impact' and 'adverse environmental impact'. Where the original text, supported by Council, maintained that these were caused by "the violation of one of the rights of prohibitions" in the Directive, the Parliament's position expands this by defining the impact as being "any action which removes or reduces the ability of an individual or group to enjoy… or be protected by" the certain provisions provided by the international instruments set out in the Directive's Annex (CSDDD: Parliament's Position, 2023, nos. 106–107). The definition of a business relationship was similarly expanded in order to provide for "indirect" relationships that might exist between entities (CSDDD: Parliament's Position, 2023, no. 110). Another important definition amended by the Parliament was that of the 'value chain'. While the Commission's text included both upstream and downstream activities, a position which was not supported by Council, as discussed above, the Parliament went further by including these downstream activities also in the case of financial undertakings – for example, lenders would be required to perform due diligence on the activities of borrowers receiving the finance in question (CSDDD: Parliament's Position, 2023, no. 117). An additional "vulnerable" category of stakeholders was also added to the text (CSDDD: Parliament's Position, 2023, no. 122). Several other new definitions were proposed by the Parliament, such as 'leverage', 'to cause an adverse impact', 'to contribute to an adverse impact', 'being directly linked to an adverse impact', 'risk-based', 'risk factors' and 'severity of an adverse impact' (CSDDD: Parliament's Position, 2023, nos. 124–131)

[30] The Accounting Directive ; Annex II sets out types of companies specific to Member State legislation.

Empirical Results

"It would be naïve to expect that the practice of EU law-making is identical to formal Treaty rules" (Roederer-Rynning & Greenwood, 2021, p. 490)

A good theatre script generally starts with a list, and sometimes even a short description, of its characters. In rational choice terms, the literature dictates that the three factors that determine the outcome of any (political) decision are the rules or norms that they are governed by ("institutions"), the goals or aims of the decision maker ("interests") and the knowledge at their disposal ("information") (Ershova, 2018, pp. 2–3). In order to provide a robust analysis of the policy process, a brief discussion of the roles of each of the institutions, and the agents within, in the development of the CSDDD is required. The first section of this chapter will thus be dedicated to that task. More well-known in screenplays, but still utilised in theatre, is the setting of the scene: a few brief phrases to describe the environment the characters find themselves in. The second section, building on the list of characters provided prior, will provide a brief breakdown of the policy process in the European Union. The third section performs the task of process tracing: from agenda-setting to policy adoption, the steps of the policy cycle (partially) covered thus far are anatomised and discussed in detail.

Overview of Roles and Policy Process

The various stages of the present policy process, as they currently stand, are outlined in Figure 1 below. The discussion of the empirical results of the process tracing methodology will follow this timeline.

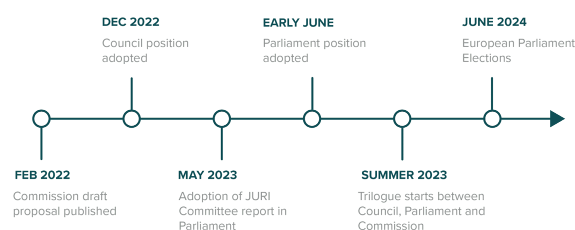

Figure 1: Policy process timeline (Shift Project, 2023)

The three institutions under study in the present paper are the European Commission, the European Parliament and the European Council who together form the key actors of the ordinary legislative procedure of the EU.

The role of the Commission is best described as a "bureaucratic agent" (Ershova, 2018, p. 12). This being said, they have an important position as agenda-setter of the European Union. The EC's competencies and responsibilities with respect to policymaking are set out in Article 17 of the TEU According to the rules put forth, the EC is charged with representing the interests of "the Union" (TEU, 2007, art. 17(1)). This first remark illustrates the role of the EC as the primary supranational entity; it exists 'above' the member states whom it represents not individually, but as a collective. The Commission is also endowed with the right of initiative: "Union legislative acts may only be adopted on the basis of a Commission proposal" (TEU, 2007, art. 17(2)). Indeed, The Commission's role in "steering the direction of [a] policy instrument" was highlighted by one participant, who noted that it was the Commission's "framing" that set the tone for the piece of legislation (*Interview - Julia OTTEN*, 2023). This being said, the Parliament is endowed with the power to recommend action to be taken by the Commission, which they do by way of the 'own initiative procedure': a report detailing legislative recommendations is drawn up by the relevant parliamentary committee, voted on in the full Parliament, and then sent to the Commission (European Parliament, 2019, arts. 45, 46, 52; TFEU, 2009, art. 225). While the Parliament and the Council each respectively have other important roles in the EU, as well as the policy process, their shared utility and focus is that of the trilogues. However, the institutions are said to approach the trilogues differently. In a study published by Roederer-Rynning and Greenwood in 2021, a key difference was highlighted in the perspectives held by Council on the role of trilogues and those of the Parliament. For the former, trilogues counteracted the political nature of the law-making process; for the latter, it was an opportunity to politicise (2021, p. 496). Informal decision-making has, over the course of the years, grown in importance in EU governance (Brandsma et al., 2021, p. 1). There is little debate as to the efficacy of trilogues as a tool in law-making. In the fifth parliamentary term spanning the years 1999 to 2004, only 28% of ordinary legislation was passed on the first reading, with the majority of files being passed either in an early or late second reading (Barley et al., 2021, p. 12). While trilogues have been practiced in European law-making since 1994, their use only started to become "standard" after the adoption of the Amsterdam Treaty in 1999, prior to which legislation could only be adopted after a second reading. Between the years 2019-2021, 70% of legislation was adopted on the first reading (Barley et al., 2021, p. 12). Once the Parliament and the Council have formulated their negotiating mandates, the trilogues

begin. The main documentary item in this process is the four-column document "outlining the Commission proposal, the Parliament position and the Council position" (*Interview - MEP Assistant Renew*, 2023). Trilogues are divided into two types of negotiation meetings: technical and political. The first trilogue to be held is always technical, and is described by one participant as "a meeting to shake hands" where the four-column document setting out the positions of each of the institutions is agreed upon (*Interview - Uku LILLEVÄLI*, 2023). Subsequent technical trilogues require staff-level negotiators to analyse the four-column document "line-by-line for every article" in order to find possible compromises between the institutions (*Interview - MEP Assistant EPP*, 2023). The fourth column is thus developed on the basis of possible compromises. By contrast, political trilogues are characterised by key participants (the Rapporteur and the Presidency of the Council, notably) "try[ing] to agree on some political elements" (*Interview - MEP Assistant Renew*, 2023).

Pre-Proposal

The roots of the CSDDD, as discussed briefly in the chapter outlining its content, can seemingly be traced to the Rana Plaza incident in Bangladesh in 2013. However, evidence suggests that efforts by NGOs and other actors to bring this issue onto the political agenda predate even this disaster. One participant engaged in advocacy indicated that they had been working on the due diligence issue for "over ten years" (*Interview - Julia OTTEN*, 2023). Another participant worked for an organisation where a colleague had worked on the Deforestation Regulation "for twelve years… [with] eight or ten years to put it on the agenda" (*Interview - Uku LILLEVÄLI*, 2023). That the emerging and established national frameworks regarding due diligence encouraged action from the EU is taken to be fact by many. In the Proposal, the "existing and upcoming legislation" is equated to "a clear request by Union citizens" for the Commission to act (Proposal: CSDDD, 2022, p. 1). External expert participants similarly highlighted this connection, positing that the laws in Germany and France "created enough momentum for the EU to say [they] don't want national laws in all of [the] Member States, [and that they] will do something at the European level" (*Interview - Julia OTTEN*, 2023).

The media and lobby attention received by the CSDDD was reported by interview participants to be some of the largest they had ever experienced. Indeed, almost every participant mentioned "lobbying" when answering questions during the interview, even where this had not been brought up by the interview framework (yet) (*Interview - Anne LAFARRE*, 2023; *Interview - MEP Assistant EPP*, 2023; *Interview - MEP Assistant Renew*, 2023; *Interview - Policy Analyst*

EPRS, 2023). This is consistent with the accounts provided by the lobbyists who participated in this study; indeed, these respondents cited their efforts as being targeted at "all stages of the policy process", as well as all involved institutional actors (*Interview - Julia OTTEN*, 2023; *Interview - Uku LILLEVÄLI*, 2023).

In July 2020, the European Commission published an Inception Impact Assessment on Sustainable Corporate Governance, wherein national laws were cited as falling short of what could be expected in the context of modern global supply chains. To this end, the Commission added that despite efforts by several member states to counter the externalities resulting from legislation-incited market failures, "sustainability problems are of a global dimension, [and that] … national action alone is unlikely to tackle corporate short-termism either, which characterises EU capital markets across the board" (DG Justice, A3 Company Law Unit, 2020, p. 2). In October of the same year, the Commission published a Public Consultation on the matter. The section of this document setting out the political context of the Consultation sets out that:

"Sustainability in corporate governance encompasses encouraging businesses to frame decisions in terms of their environmental…, social, human and economic impact, as well as in terms of the company's development in the longer term… rather than focusing on short-term gains" (European Commission, 2020d, p. 1)

The Parliament adopted in December 2020 a non-legislative resolution calling on the Commission to propose legislation improving the incorporation of sustainability into corporate governance affairs. This resolution touched on various other legal texts, such as the NFRD, which the Commission was reviewing at the time, and the Shareholders' Rights Directive (European Parliament Resolution of 17 December 2020 on Sustainable Corporate Governance (2020/2137(INI)), 2020, Recital 24 ; Recommendation 1). While this resolution used much of the same language as the ongoing initiative by the Commission, it differed in scope and was essentially regarded as an expression of support rather than a recommendation, as such (Business and Human Rights Resource Centre, 2020; European Commission, 2021). Although it is less widely publicised than the Parliament's two resolutions, the Council also published a decision calling for Commission to "table a proposal for an EU legal framework on sustainable corporate governance, including cross-sector due diligence obligations along global supply chains" (Council of the European Union, 2020, p. 11).

The Commission's Public Consultation Document sets out twenty-six questions drawing on two studies conducted by the British Institute of International and Comparative Law, Civil Consulting and LSE Consulting, and the consulting firm Ernst & Young, respectively

(European Commission, 2020d, p. 3). The first study, published in January of 2020, analysed the current (voluntary) legal framework for due diligence operations in large companies, and found that two thirds of participant companies do not undertake due diligence on operations impacting on human rights or the environment, and those who do only consider direct suppliers (European Commission et al., 2020, p. 16). The latter study, which dealt specifically with directors' duties, was heavily criticised by academics for its "misrepresent[ation of] fundamental concepts of company law", "fail[ure] to understand how corporate governance works", "biased use of literature", "ill-considered reform proposals", among others (Andersen et al., 2020, p. 2; Möslein & Sørensen, 2021, p. 1; Roe et al., 2020, pp. 134–135). An academic expert respondent illustrated many of the same issues with the Ernst & Young study, adding that it was "sad… that consultancy firms… get these assignments", indicating that civil society organisations or academia were probably better placed to deal with these issues (*Interview - Anne LAFARRE*, 2023). These same studies also evoked a strong response from industry, who used the academic criticism to bolster their own advocacy efforts. This particular point is revisited in the next section.

Feedback on the Commission's Public Consultation was received until February 2021.

In March 2021, the European Parliament adopted a second resolution calling on the Commission to adopt mandatory due diligence law (European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL)), 2021). The resolution included an annex of recommendations taking the form of a draft law, much of which was maintained in the Commission's subsequent preparatory texts and proposal. The publication of this initial 'report' was called "unworkable" by representatives of BusinessEurope, a lobbying group defending industry interests, in a private meeting with the Commission (*Report from VP Jourova Meeting with [Redacted] Business European Commission on 05/05/2021*, 2021). The main arguments put forth by the group was the risk of companies being held responsible for "aspects out of their control", as well as the need to "ensure level playing field" between Member States (*Report from VP Jourova Meeting with [Redacted] Business European Commission on 05/05/2021*, 2021). Indeed, much of the business lobbying effort was targeted at ensuring harmonisation of the text across Europe and elevating this law to the European level rather than allowing further development through transposition in national frameworks. This was cited by one participant as being "in the interests [of] businesses in general" (*Interview - MEP Assistant Renew*, 2023). The goal behind this harmonisation argument has been suggested as more nefarious than simple integration objectives. Indeed, one MEP Assistant explained that while

harmonisation could be viewed as positive in that "it's level playing fields… companies [have] instead of 27 laws to abide by, they have one", he also added that "they wanted to make everyone the same, [allowing] no one [Member State] to go further" in their ambitions (*Interview - Wilf KING*, 2023). Another participant highlighted the role of Germany in bolstering business' voice in calling for harmonisation on this matter, stating that "they felt comfortable enough in terms of influencing other companies in Europe… from the outset, from the very start, [they say] we need to have this at the European level… not at a national level" (*Interview - Julia OTTEN*, 2023).

The Proposal

On the 23rd of February 2022, the Commission published the Proposal for a Corporate Sustainability Due Diligence Directive. Instead of a sustainable corporate governance Directive, which the prior consultation periods and studies had indicated the outcome would be, the Commission decided to double down on elements that were less hotly debated, indicating that they had "lost a degree of ambition and confidence in the project" (Ciacchi et al., 2022, p. 22). Reasons for this recalibration have been discussed *ad nauseum* across the media space, but ultimately come down to the negative reactions on the linked studies received during the public consultation, as well as the negative opinions issued by the Regulatory Scrutiny Board (European Commission, 2022a, p. 1; *Interview - Anne LAFARRE*, 2023; Schaller-Baross & Györi, 2022). These interlinked aspects will be considered in more detail below. Indeed, the aspects of due diligence, which were actually the main focus of the consultations, had "not really [been] part of the discussion" when considering the criticism (*Interview - Anne LAFARRE*, 2023). The Commission's Proposal was initially scheduled for release in June 2021. The seven month delay between this expected date and the actual publication essentially boils down to the two negative opinions issued by the Regulatory Scrutiny Board ("the Board"), an "independent body within the Commission that advises the College of Commissioners" (European Commission, n.d.). Opinions issued by the Board on Impact Assessments ahead of legislative proposals are decisive, binding the Commission to redraft the report and resubmit for another opinion (Rules of Procedure of the Regulatory Scrutiny Board, 2023, art. 7(4)). The first negative opinion noted four key "shortcomings" of the Commission's Impact Assessment: that the problem was not sufficiently clearly set out and that insufficient evidence was provided to show that companies did not already perform due diligence; that the policy options considered were not broad enough, nor was the valuation of

the policy options proposed properly carried out; the mandatory proportionality test was not sufficiently conducted; and finally, stakeholder insight was not sufficiently represented (Regulatory Scrutiny Board, 2021a, p. 1). The Commission was accordingly instructed to revise the Impact Assessment and resubmit it to the Board. After the first rejection by the Board, the Commission revised its strategy, bringing in the Commissioner of Internal Market, Thierry Breton, to join Commissioner of Justice, Didier Reynders, on the leadership of the file (Aarup et al., 2021). The second negative opinion, which is regarded to be final and binding, acknowledged that much of the initial report had been revised in accordance with the Board's recommendations. However, the new report was judged to have the same four shortcomings set out above (Regulatory Scrutiny Board, 2021b, p. 2). At this point, the Commission nevertheless decided to proceed with the Proposal, citing in the Explanatory Memorandum to the Proposal the agreement of the necessary authority that such a Proposal is politically important and urgent (Proposal: CSDDD, 2022, pp. 20–21). Nevertheless, much of the content was changed in line with the Board's recommendations (European Parliamentary Research Service & Girard, 2022, p. 9).

The response to the delay and resulting content of the Proposal from both civil society, MEPs and the Member States was similarly strong. Certain Member States began formulating their own national legislation, such as the case of the Netherlands' *Wet Verantwoord en duurzaam internationaal ondernemen*, which one interview participant described as the result of the Dutch policymakers "threaten[ing] to create [their] own due diligence law if [the] European law didn't move forward fast enough" (*Interview - Trade Journalist*, 2023). However, it is more likely that this bill was developed in tandem with the expectations of the European outcome, considering that its first publication was in March 2021, some four months before the expected publication of the Commission's Proposal, as well as the fact that the Dutch 'Responsible Business Conduct' Covenants, which form the basis of the bill, have been in place since 2014 (Ciacchi & Cerqua, 2024, p. 21,24; Government of the Netherlands, 2020, 2021). European Parliamentarians shared their views with various media outlets, describing the delays as "disappointing", "intensely frustrating" and "a democratic scandal" (Aarup & Moens, 2021). Civil society blamed the lobbying activities of industry at the Regulatory Scrutiny Board for the watering down of the final text proposed by the Commission (Corporate Europe Observatory, 2022; Corporate Europe Observatory et al., 2022). In support of this claim, a letter from a Danish business association to the chair of the Board was publicised, wherein the representative claimed that the policy options put forth in the Commission's underpinning studies were "likely to be counterproductive" (Confederation of Danish Industry, 2021, p. 1).

Another representative of the same association later publicly announced that the rejection by the Regulatory Scrutiny Board of the first Impact Assessment was "good news" (Aarup et al., 2021). The Danish business association, called Dansk Industri, announced their involvement with the Scrutiny Board via a public statement on their website at the end of 2021 (Aarup & Moens, 2021; Madsen, 2021). The role of lobbying at this stage of the policy process has been noted by various interview participants. Business mobilisation, in particular, against the whole of, or parts of the text, were particularly cited as being "bigger than on other files" (*Interview - Julia OTTEN*, 2023). The pervasiveness of this campaign can also be seen at the institutional level, where one respondent involved in the policy process placed a lot of emphasis on the effect the CSDDD would have on Company Law, citing that they had "had this explained to [them] a lot of times by lobbyists" (*Interview - MEP Assistant Renew*, 2023). Indeed, business associations generally supported the Regulatory Scrutiny Board's findings, citing in particular the "punitive nature" of the text on business activities (BusinessEurope, 2022). Most notable of these efforts, as demonstrated above, was recorded from the Nordic countries, and particularly Denmark, whose Minister for Industry, Business and Financial Affairs called on the Commission to "move forward with the part on due diligence and drop rules on corporate governance" (Aarup et al., 2021). Despite the effective watering down of the Proposal – a trend which followed throughout the policy process, the Commission's Proposal was nevertheless viewed positively by many external participants, who called it, for example, "a landmark piece of legislation", important "for future generations" (*Interview - Julia OTTEN*, 2023; *Interview - Trade Journalist*, 2023). In particular, a company law expert noted its novelty in "for the first time addressing some of the internal affairs of companies" (*Interview - Anne LAFARRE*, 2023).

Council Deliberations & General Approach

On the 1st of December 2022, the Council adopted their "general approach" with regards to the proposed text. A participant privy to some of the deliberations described this position as "difficult" to come to (*Interview - Julia OTTEN*, 2023). The decidedly political nature of this Proposal naturally contributed to the complexity of these negotiations. The diversity of Member States is another factor to consider. As pointed out by an advocacy worker, each article of the Directive were like "Pandora's boxes" which had "national considerations that [came] into play", and that "large companies in the Czech Republic are something completely different than they are for Germany… so how they are affected by this is very different" (*Interview - Julia OTTEN*, 2023).

Another participant to the interviews revealed from their lobbying efforts that Member States "oftentimes [needed] more support with understanding what [was] at stake" (*Interview - Uku LILLEVÄLI*, 2023). Indeed, as testament to these difficulties, many Member States mentioned during the public debate prior to voting the general approach that they would have preferred more time to negotiate (Council of the European Union, 2022d). Some months after the first trilogues were underway, a decision was made to renegotiate some of the points set out in 2022 (*Interview - MEP Assistant EPP*, 2023). This is discussed in further detail later in the chapter. One interview participant described the Council's reading phase as working largely by way of coalitions. Advocacy work thus works in consideration of these trends, and in some cases tries to mould them, as explained by one participant:

> "We were in touch with Member States to the extent possible, try to mobilise the more progressive ones, make sure we see how to support [them], that they would kind of stick together and stand by the position." (*Interview - Uku LILLEVÄLI*, 2023)

While some of the larger Member States "have a tendency to push for their own initiatives" another participant highlighted "find[ing] the different coalitions of Member States on different issues" (*Interview - Julia OTTEN*, 2023). This is typically not an easy task. As explained by the same participant:

> "They have to form different coalitions… and then they have to weigh in which issue is more important to them. … [A] Member State will go for a good duty but won't fight for the duty of care and the corporate governance elements because [they] need the Nordic Member States to support [them] on a good duty of diligence." (*Interview - Julia OTTEN*, 2023).

Individual Member States objectives were often controversial. France, in particular, spearheaded a carve-out exclusion of the financial sector from the Directive's scope, as testified to by both elite and expert participants (*Interview - Trade Journalist*, 2023; *Interview - Uku LILLEVÄLI*, 2023). As in other parts of the policy process, lobbying efforts have been identified as a key reason for France's position. Indeed, this carve-out for the financial sector is colloquially referred to as the 'BlackRock exemption' in order to "make [it] very clear who's behind a pushback against the inclusion of investors and asset managers [in the Directive]" (*Interview - Julia OTTEN*, 2023). Indeed, BlackRock and its associated groups declared an annual lobbying budget of around €30 million in 2021, and their presence in Brussels, especially regarding sustainable finance policymaking, has been reported on by various members of civil society (Corporate Europe Observatory, 2020; PetitJean et al., 2021, p. 2,9). The 'receptivity' of these efforts by France are widely attributed to Paris' ambitions of "boost[ing] its position within the financial market, trying to take over some of London's attraction, especially since Brexit" (*Interview - Trade Journalist*, 2023). This view was

corroborated by an advocacy worker, who viewed the exclusion as “one of [France’s] key political strategies… to have Paris as one of the places for the finance industry” (*Interview - Julia OTTEN*, 2023). Indeed, this position is consistent with former French prime minister Edouard Philippe’s announcement during a banking conference in Paris that the government “want[ed] Paris to become Europe’s new number one financial hub” (Thomas & Nikolaeva, 2017). That Macron’s government would take a pro-business stance is also not far-fetched when considering the fact that many academics and civil society members alike have identified Macron’s position as former Minister of Economy as being the main reason for the delay and near-death of the French *Loi de Vigilance* in 2016 and 2017 (Ciacchi & Cerqua, 2024, pp. 18–19; Delalieux, 2020, p. 655; Petitjean, 2023). Another possible reason advanced for France’s support of this carve-out is the involvement of French financial entities in “serious cases of human rights [or] environmental degradation”, a thesis which is seemingly supported by recent climate action pressures on TotalEnergies by shareholders (*Interview - Anne LAFARRE*, 2023; *Interview - Trade Journalist*, 2023; Nasralla et al., 2023). In the public debate of the Council on 1 December 2022, the French representative mentioned that this was a very important text for the former French Presidency of the Council, and reminded the other delegates of the ‘frontrunner’ role played by France in this policy domain. The representative also, however, criticised the Commission’s Proposal, saying that “[their] ambition could have gone further, specifically in the domains of the health and safety of workers, on the parent companies of multinational groups, as well as the civil liability of companies[31]” (Council of the European Union, 2022d).

A lobbyist interview respondent identified France, Spain, Italy and one other fourth country as having formed “a blocking minority” in order to secure the exemption (*Interview - Uku LILLEVÄLI*, 2023). Despite a “better compromise” having been established in earlier negotations, last minute changes in the final week of negotiations where “a few countries [chose to] backstab [one another]” undermined the efforts of the environmental lobby and effectively secured the BlackRock exemption (*Interview - Uku LILLEVÄLI*, 2023). By contrast, several Member States, particularly in Central and Eastern Europe were identified by another participant as having been relatively silent on the majority of initial developments; they attributed this to the complexity of the file in its tendency to “go across many different sectors and so many different industries”, and that “governmental resources” of these countries might

[31] My own translation.

be lacking (*Interview - Trade Journalist*, 2023). This same participant went on to explain that recently, these 'silent' Member States had begun to speak up on several key matters:

> "For Estonia, I think it was on financial services… but Poland [is] also being a bit more cautious about due diligence more generally." (*Interview - Trade Journalist*, 2023)

Poland, in particular, displayed support for the compromise reached on the day of the publication of the Council's general approach, mentioning that the different views of the Member States had been very divergent. They also specifically endorsed the compromise reached on financial institutions (Council of the European Union, 2022d). Recent reporting has indicated that Bulgaria, Luxembourg, Cyprus and the Czech Republic had also chosen to follow France in supporting a financial services exclusion (Council of the European Union, 2022d; Ellena, 2023b). Member States who openly opposed the financial institutions carve-out during the public debate include the Netherlands, Denmark, Ireland, Lithuania, Finland, Slovakia and Portugal (Council of the European Union, 2022d). In particular, Ireland, who along with a handful of other Member States abstained from the vote, attached a statement to the minutes of the public debate expressing their disappointment in the Council's final text, especially concerning the treatment of the financial services sector (Council of the European Union, 2022a). Germany, in particular, was vocal on the administrative burden placed on companies by this and other recent European laws (Ellena, 2023b; Packroff, 2023). As an interview participant involved in the trilogues explained how the CSDDD was generally viewed in Germany:

> "The German [due diligence] law is entirely bureaucratic and does not focus on what has already been out there. They did not really consult the OECD approach, and what they're doing is to ask the biggest companies to do basically just full reporting. So, questionnaires and auditing. [It] is a lot of bureaucracy that oftentimes doesn't lead anywhere. What we [in Europe] are trying to do is that we say yes, you have to go further than your tier one, but that is the only message that travelled in Germany… [that] we're asking even more bureaucracy… That's impossible… Of course, if you're a company that right now has to trace every single one of your supply chain, whether it's risky or not, and try to explain [to] them that they have to have a broader risk assessment, but less bureaucracy, of course, they're still annoyed about it until they've had a conversation of more than five minutes about it. And so, the messaging around this is quite tricky, but yes, so the German law is very, very faulty and draws a bad picture of due diligence." (*Interview - MEP Assistant EPP*, 2023)

Indeed, the incumbent majority in the country, which is composed of the Christian Democratic Union ("CDU") and the Christian Social Union ("CSU"), has taken a decidedly strong stance against the introduction of more obligations for companies after what they say has been increasing "unnecessary and burdensome bureaucracy" (Deutscher Bundestag, 2023, p. 1,2). It is also notable to mention that the current leader of the CDU, Friedrich Merz, is the former Chairman of BlackRock Germany (Henning, 2016). In the public debate of the Council,

representatives from Germany recognised the importance of the EU's taking leadership in this and other 'green' initiatives, but also mentioned that "there were also things [they] didn't like so much in the compromise" (Council of the European Union, 2022d). Sweden echoed these concerns, stating explicitly that "Sweden would have preferred a text that reduces the administrative burden on companies" (Council of the European Union, 2022d). The pressure exerted by leaders in Germany on their delegations in other parts of the policy process are discussed in greater detail later in this chapter.

Addressing the Council during its public debate, Commissioner Reynders reemphasised the important role of the financial sector in managing human rights infringements and specified that the Commission had ensured proportionality in their Proposal through the exclusion of SMEs. Commissioner Breton, who also added to this debate, did not comment on the Council's exclusion of the financial sector, but highlighted the paramountcy of the single market and the harmonisation of measures across the bloc (Council of the European Union, 2022d).

Civil society by and large viewed the Council's general approach negatively. As expressed by one environmental lobbyist in an interview:

> "What can be considered as a success in these lobbying activities [is] the final outcome, and in that particular phase, the Council's approach was the final outcome. And in terms of the final outcome, it was a failure." (*Interview - Uku LILLEVÄLI*, 2023)13/11/2023 18:46:00

Other large NGOs called the approach an "undue limitation", "very disappointing", "significantly diluted", and in the case of particular Member States, a case of "double talk" (Amnesty International, 2023; European Trade Union Confederation, 2022; Global Witness, 2022; Sherpa et al., 2022). On the other hand, by the time that the Council had published its general position, the business lobby appeared to be more settled, claiming that "nobody in the business community is rejecting the legislation", yet still exerting pressure on the issue of full harmonisation "to avoid fragmentation" (*Report from the Meeting with [Redacted] BusinessEurope - 01/02/2023*, 2023).

Parliament Deliberations

There is a gap of more or less seven months between the adoption of the general position of the Council, and that of the Parliament (Council of the European Union, 2022b; CSDDD: Parliament's Position, 2023). A respondent to the process indicated that this delay was in part due to in-fighting of the Parliament on which committees would have shared competency on the file (*Interview - MEP Assistant EPP*, 2023). This element deserves some further attention.

The Parliamentary committees form an important part of the legislative procedure; it is, essentially, where the MEPs conduct the bulk of their work (McElroy, 2006, p. 6). Indeed, parliamentary committees are endowed with the capacity to essentially carry out the amendments of legislative proposals (European Parliament, 2019, rr. 51–52). Parliament's Rules of Procedure sets out that where competences are deemed to be shared between committees on certain elements of a text, these committees would essentially "appeal" to the Conference of Presidents in order to be assigned to those parts of the file (European Parliament, 2019, r. 57). The lead committee in the case of the CSDDD was JURI, the committee on Legal Affairs, with five associated committees with shared competencies (European Parliament, 2023c, p. 1, 2023b). Another three were assigned as Opinion-givers, but without any direct competency. One interview participant described the distribution of competences in this case as follows:

> "So, in some legislative files, some committees have exclusive competence, which means that they have the unconditional right to draft an article or two, but because [this file] was so complicated, and so many different political bargaining chips [existed], it was decided only to have shared competence. And there's also some committees who only had… What's it called? Even less power… So that's Rule 56 in the Rules of Procedure, which… to a large extent, just is pretty useless… Opinions; they ended up giving Opinions, [but] there is no expectation… that their Opinion would be taken into account. It was pretty narrow, the mandate, the competencies given to ECON… There was some fighting here and there between the committees… We knew it was up to JURI in the end. In ENVI, which is a bit more of a left-leaning committee, there were some stronger debates on the articles that ENVI had competence on. [But] if JURI had chosen to completely disregard our Opinion, they would be completely – that would be completely in their right to do that." (*Interview - MEP Assistant Renew*, 2023)

Committees whose Opinions were granted under Rule 57, as in the case of the committee on Environment, Public Health and Food Safety ("ENVI"), the subcommittee on Human Rights ("DROI"), the committee on International Trade ("INTA"), the committee on Employment and Social Affairs ("EMPL") and the committee on Economic and Monetary Affairs ("ECON"), are authorised by the Rules of Procedure to table amendments directly in Plenary should their contributions not be accepted by the lead committee in the final report (European Parliament, 2019, r. 57). The fact that "the CSDDD… covers a lot of different areas… a lot of committees, different committees, want… a bite of the apple" (*Interview - Wilf KING*, 2023). This large number, however, may have a positive angle. As pointed out by the same participant, the Rapporteur "keep[ing] as many political stakeholders involved as possible" through the assignment of Opinion-giving committees meant that at the time of the voting on these particular texts, it became clearer "which compromise[s] can potentially have majorities" (*Interview - Wilf KING*, 2023).

While it was noted that conflicts often happen between committees who want to have shared or exclusive competences on a certain file, one interview respondent close to the policy process noted the length and extent of the conflict in this particular case, saying that JURI in particular "really had to fight with committees over several months" (*Interview - MEP Assistant EPP*, 2023). JURI itself also encountered some hurdles at the beginning of the procedure. It was clear that the Legal Affairs committee should take the lead, considering that "[they] had already done the initiative report, so it would have been unfair to take that away from [them]" (*Interview - MEP Assistant EPP*, 2023). Following on this logic, MEP Lara Wolters was also a natural choice for Rapporteur, as she had played a key role in the resolution and draft law put to the Commission in 2021 (European Parliament Resolution of 10 March 2021 with Recommendations to the Commission on Corporate Due Diligence and Corporate Accountability (2020/2129(INL)), 2021). It was noted that parties had some difficulties in deciding who should join Wolters as Shadow Rapporteur. For the EPP, this was a particularly thorny issue:

> "It's the smallest committee in the Parliament, so there's not that many people to choose from. Back then, nobody really wanted to take the file from EPP… It was quite clear from the start that it would be a very politicised topic because a lot of lobbyists, NGOs and so on would put their focus on that file, and that's not something many MEPs choose to do, you know, to work on files that are highly politicised." (*Interview - MEP Assistant EPP*, 2023).

After these deliberations, MEP Axel Voss was chosen to be Shadow Rapporteur. This was, according to the same participant, also a strategic choice from the German delegation:

> "I think it also played a role that the German government was already drafting the German law, so they wanted to have a German MEP, you know, taking over in order to maybe represent German interests in the discussion in the Parliament" (*Interview - MEP Assistant EPP*, 2023)

JURI was described by a lobbyist as being "a peculiar committee with only 25 members" (*Interview - Uku LILLEVÄLI*, 2023). Entry points for lobbyists are thus lower, and more complicated to navigate. For these reasons, it was highlighted that it was most important to try "preserve as much as [they could] from the… progressive viewpoints… coming from ENVI and ECON" (*Interview - Uku LILLEVÄLI*, 2023). Indeed, ENVI was cited as being "one of the most progressive groups", and that "whatever comes from ENVI, that's the best [one] could get [on environmental matters]" (*Interview - Uku LILLEVÄLI*, 2023).

As with the Council, the decisions made in the JURI report were difficult to come to. Indeed, the final vote which took place in April was originally scheduled for March (Ellena, 2023a). One interview participant describes the internal conflicts of the committee:

> "There were a number of issues that were very – again, very highly politicised, but also very tricky to reach an agreement on. So, one was the scope and the… number of companies that

should be covered by the Directive. Another one was the definition of the value chain, so actually, defining, you know, what parts of the supply or value chain should be covered by this. And then we have an extra article on climate change, which was also a very difficult discussion because there is no precedent on how to deal with climate change due diligence. And the financial services were [also] surprisingly high on the agenda, so like, whether we should cover financial services or not. And I guess that the biggest one was the civil liability. So, I mean, beforehand, like, you have national laws in the EU that don't cover that many companies, and then you have the voluntary OECD Guidelines. But with our Directive, basically the OECD Guidelines become law. And so, the civil liability connected to it was one of the biggest issues for many people." (*Interview - MEP Assistant EPP*, 2023)

Law firm Herbert Smith Freehills suggests that it was the initial position of JURI to exclude financial institutions from the application of the CSDDD, providing the following uncited quote[32]:

> "[d]ue to the specificities of the financial sector, the additional hinderances of tracing their chain of activities beyond the first tier and the regulatory overlap with the CSRD, taxonomy, sustainable finance and other proposals, the financial sector should not be covered here" (Hierro & Kelly, 2023)

The Opinions of the associated committees, however, all strongly advocated for the inclusion of the financial sector (Committee on Economic and Monetary Affairs, 2023; Committee on Employment and Social Affairs, 2022; Committee on Environment, Public Health and Food Safety, 2022; Hierro & Kelly, 2023). In the final JURI report, financial institutions were included as part of the scope.

The deliberations between different committees were said to take a considerable amount of time due to the factors described above. However, once certain hurdles had been overcome, things moved along more swiftly. Indeed, as described by one participant:

> "[The file] was really lagging behind in March – like, [I was thinking], there's no way that [it's] going to get done, and they managed to wrap it up and they managed to get it, bang, bang, bang on time for the committee vote on top of the Plenary vote. It's very impressive." (*Interview - Wilf KING*, 2023)

JURI issued their final report on 1 April 2023. The respondents to the interviews involved in the policy process generally expressed positive sentiments about the final report issued by JURI, especially with regards to how their respective committees' opinions had been taken into consideration (*Interview - MEP Assistant Renew*, 2023; *Interview - Wilf KING*, 2023).

Parliament Plenary

[32] It was also impossible to trace this quote back to an official document. Accordingly, this piece of evidence should be considered as holding only minimal weight.

The Parliament's negotiating mandate was adopted on 1 June 2023 following an eventful Plenary session. The EP was described by a participant working in advocacy as being generally easier to decipher, as divisions generally fell "along party lines" (*Interview - Julia OTTEN*, 2023). However, while this was the case during the negotiation phase in the committees, the Plenary vote took a different turn which very much mimicked the national divisions in Council, and shed light on the ways in which Member States can influence other parts of the policy process.

In the Plenary vote, certain amendments were tabled for a separate vote. What this means is that while the majority of amendments are tabled collectively, political groups or individual MEPs may request a separate vote (European Parliament, 2019, r. 183). These separate votes may also be tabled for amendments made by associated committees that were not accepted as part of the final report, as mentioned above (European Parliament, 2019, r. 57). One participant describes what the former procedure looks like in practice:

> "It means that when they made the deal, the compromise deal in the JURI [committee], it was [agreed] that they will vote separately, on you know, separate issues and whatever doesn't go through will be voted on in the Plenary… because in the Plenary, the votes might differ." (*Interview - Uku LILLEVÄLI*, 2023)

However, some of the amendments tabled at the Plenary came as a shock. Indeed, while MEPs and political groups reserve the right to table separate votes, these submissions are subject to a deadline. In this case, the separate votes were tabled the day before the Plenary (*Interview - Uku LILLEVÄLI*, 2023). Despite the agreements that had been reached in the committees prior, the Plenary vote saw important and possibly deal-breaking amendments tabled by MEPs of the EPP, who had all voted for the JURI report, barring one abstention (Allenbach-Ammann, 2023; *Interview - MEP Assistant EPP*, 2023). In order to better understand these dynamics, it is necessary to cast a deeper glance into one of the amendments tabled during the Plenary. Essentially, what was sought by the delegation of the EPP who cast their weight behind this amendment was the "full harmonisation" of the due diligence law, in essence: an obligation for the Commission to upgrade the Directive to a Regulation some six years after its implementation. The fact that full harmonisation existed as a policy goal of the EPP points towards the advocacy efforts of bodies such as BusinessEurope, for whom, as was discussed earlier, this was a high priority item, as well as the Council. It was argued that if this amendment was not accepted, the party line would be to vote against the text in its entirety (Allenbach-Ammann, 2023; *Interview - MEP Assistant EPP*, 2023, 00:12:54). A participant close to the proceedings notes that "the file [had] been difficult in the EPP from the start" (*Interview - MEP*

Assistant EPP, 2023). To complicate matters further, many who voted against the text in the final vote apparently only used this as an excuse:

> "[W]e wanted the Regulation, not the Directive, from the start, and then we wanted to have a single market clause, meaning that when Member States do implement the Directive, that it should be fully harmonised, and that is a very important point for the EPP, but we just didn't have the majority for it and so they made that a key vote and that is why in the end for the, yeah, several delegations, still actually I think 56 EPP MEPs voted in favour of the Directive. A lot of them abstained, but then those that voted against [it] use the full harmonisation as the reason why they didn't want to vote in favour, but I think from the German perspective, that wasn't really the issue. They wanted to have a scope that's closer to German law, so they wanted only to have companies covered with more than 1000 employees. And most importantly, they wanted to have it tier one approach, like the German law, which is not what we're doing here."(*Interview - MEP Assistant EPP*, 2023).

Indeed, tensions against due diligence in the EPP mainly arose from the CDU delegation of the EPP, who had in 2022 issued a position paper calling for a regulatory slow-down by the EU in order for lessen the burden on companies following the recent crises (CDU, 2022; *Interview - MEP Assistant EPP*, 2023). Support for this moratorium was not unanimous at the group level of the EPP, but was rather concentrated amongst MEPs from Germany due to pressures directly from the national "political overlords", as one participant termed them (*Interview - Trade Journalist*, 2023). A German MEP Assistant corroborated this view, explaining that the opposition to the file that manifested in the Plenary came down to the "opposition from obviously Manfred Weber, but also Friedrich Merz", the latter of whom, as mentioned earlier, was previously a BlackRock Chairman (*Interview - MEP Assistant EPP*, 2023). This conservative turn from some members of the EPP has divided the group, seemingly resulting in the isolation of Axel Voss, the Shadow Rapporteur on the file, who also forms part of the EPP. As posited by a journalist following the case closely:

> "[T]he German faction of the EP really turned against its own Rapporteur on the file, who's also a German member of the EPP. So Axel Voss was, and I think still is, quite isolated in his group." (*Interview - Trade Journalist*, 2023).

Other MEPs from other parties who voted against the text were accused of having "succumbed to the siren songs of the finance lobby"[33] and were solicited to "come over to the good side of power" (European Parliament, 2023e, 2023e).

Despite the upsets and delay, the majority of experts interviewed for this research agreed that the Parliament had "improved" the Commission's proposal, and it was generally agreed that the Parliament was more ambitious than the other institutions (*Interview - Anne LAFARRE*, 2023; *Interview - Trade Journalist*, 2023). Indeed, the international ambitions of the

[33] My own translation.

Parliament's negotiators of the Directive are clear from the outset; as posited by Rapporteur Lara Wolters in her Plenary speech on 31 May 2023, "[the] task [of] Parliament is to set global standards, as [they] have done in the past" (European Parliament, 2023e). One particular interview participant explained the ambitious attitude of the Parliament as "always be[ing] the first to raise the flag" on certain issues, specifically relating to the environment and human rights (*Interview - Policy Analyst EPRS*, 2023).

Trilogues

At the time of the last interview in July 2023, eleven technical trilogues had been conducted, and two political. After the second political trilogue, Commissioner Reynders published on social media that "there [was] good progress, but more discussion [was] still needed" (Didier Reynders, 2023). However, a key negotiator in the trilogues indicated that at this point, they had reached "[no] compromise on any line of the text", and that they would be waiting to "see if the mood is better in September" after the institutional summer break (*Interview - MEP Assistant EPP*, 2023).

The majority view amongst interview participants was that the provisions relating to corporate governance and remuneration would be excluded from the final Directive. Indeed, a participant working in advocacy said that the retention of what is left of the corporate governance articles would be a "really hard fight"(*Interview - Julia OTTEN*, 2023) . When posing the question to an external expert, they were similarly unconvinced of the articles' lifespan in the current policy process, citing difficulties with "political attitudes" (*Interview - Anne LAFARRE*, 2023). As noted in the chapter detailing the content of the CSDDD, the Council had already removed from the negotiating table the inclusion of article 26. The Parliament was not completely on board with these provisions, either. In the JURI committee, article 15(3) apparently narrowly survived a vote of thirteen to twelve of the members, and directors' duties, under article 25, eleven to thirteen (*Interview - Uku LILLEVÄLI*, 2023). However, there were also many participants, internal to the process and external, who highlighted that these debates would aid in "open[ing] up the discussion on directors' duties" for future policymaking (*Interview - Anne LAFARRE*, 2023). This same sentiment was shared by a MEP Assistant who, despite not having any expertise in company law, felt that where the 'corporate governance articles' of the CSDDD were retained, this would "make precedence for interfering another time in the future with company law" (*Interview - MEP Assistant Renew*, 2023). In terms of moving forward with the trilogues, external participants agreed that the "focus [should be] on the due diligence to do it

right", that "the obligations and the duty [should] work as such before" other elements like directors' duties or scope reconsidered, but "not at the expense of due diligence requirements" (*Interview - Anne LAFARRE*, 2023; *Interview - Julia OTTEN*, 2023).

The remainder of this section will illuminate the dynamics of the institutions when going into the trilogues.

While the rotating Presidency of the Council always plays a relatively important role in the legislative files that fall under their term of office, there were certain particularities with regard to the Spanish Presidency and the CSDDD. Technically speaking, the CSDDD has straddled two Presidencies, that of the Spanish and the Swedish. However, as posited by Wolters during a Conference in Brussels to discuss the priorities of the EU institutions ahead of the trilogues, the Swedish Presidency "[left] the real meat to the Spanish" and were overall less invested in the CSDDD (*Corporate Sustainability Due Diligence: Priorities for EU Final Negotiations*, 2023). It is notable that the CSDDD does not appear in the Spanish Presidency's programme, which outlines their main priorities for the six-month term, nor is it mentioned in the agenda for the upcoming informal meeting of the Competitiveness configuration of the Council (Ministry of Foreign Affairs, European Union and Cooperation, 2023; Spanish Presidency of the Council of the European Union, 2023). Two interview participants suggested that this may be due to the fact that the Spanish national elections would take place during the Presidency, and that its outcome had the potential of changing the trajectory of the file (*Interview - Claire DARMÉ*, 2023; *Interview - Trade Journalist*, 2023). One participant helpfully detailed their position on this:

> "A lot of people are looking towards what's going to happen with the Spanish elections because if the centre-right wins in Spain, then that could have a delaying effect on the trilogues. When you're the President of the Council… you don't give your own opinion, but you do have the power over the agenda – so, how fast do things go through? How many meetings are set up? And so that's something that people are going to look out for keenly in September. You know, how many meetings are really being set up. Is it an ambitious agenda, or does it look like they're trying to delay things?" (*Interview - Trade Journalist*, 2023).

While the Spanish national election results maintained the previous government in power, it cannot yet be said whether this Presidency has had any effect on the trilogue schedule (Hernández-Morales, 2023).

The position of the Parliament is particularly interesting due to the 'dichotomy' that can be said to exist between the Rapporteur and the Shadow Rapporteur. As one participant posits:

> "Within Parliament, you'd think that Lara Wolters has a clear mandate and she can negotiate all she ants based on the text that the Parliament voted for, but it still makes more sense to have a strong Parliament voice and for now, the EPP is still going its own way in a certain way because

> whenever the Rapporteur for the EPP, Axel Voss, goes back to his group, they're calling for more concessions and more conservative carve-outs. So, for instance, they want what's called full harmonisation across the law, meaning that it needs to be, like, a Regulation, rather than a Directive… and they're saying, you know, as long as you don't come back with full harmonisation, we're not happy. So, Axel Voss is going to be a dissonant voice in trilogues compared to Lara Wolters. They'll be sitting side-by-side and they're defending the same institution, but in the end, it still creates dissonance" (*Interview - Trade Journalist*, 2023)

Returning to the issue of the high number of committees involved in contributing to the Parliament's negotiating mandate, it is notable that despite the shared competencies held by some committees, only representatives from JURI participate in the interinstitutional dialogues, as confirmed by documents requested directly from the Parliament (European Parliament, 2023a). One participant spoke to the fact that initially, it had been suggested that other parties, in particular committees, would be invited to the trilogues when their topic of shared competency was discussed; however, this was later scrapped (*Interview - MEP Assistant Renew*, 2023). Another respondent, who participates directly in the trilogues, suggested that this decision was to reduce practical complications:

> "So, usually, if you have shared competence, you are also part of the trilogue. But if you go into trilogue with five committees of then seven parties, you can't really book a room, can you? Or like, speaking time would just be too long. So that's why we decided to say, like, OK, you can have those shared competencies, but trilogue is only JURI. It's really just about the fact that it would have been too many cooks in the kitchen" (*Interview - MEP Assistant EPP*, 2023).

When speaking to the strength of the Council versus that of the Parliament going into trilogues, participants were divided on who presented a more united front. While all but one Parliamentary participant often viewed the Council as holding a stronger position, others such as the participants working in advocacy and journalism viewed the Council as being "the more difficult side… [where] they have a harder time keeping all the Member States behind [the] general approach" (*Interview - Julia OTTEN*, 2023; *Interview - MEP Assistant EPP*, 2023; *Interview - MEP Assistant Renew*, 2023; *Interview - Trade Journalist*, 2023; *Interview - Wilf KING*, 2023). However, is important to reiterate that the Parliament's position was reached a full six months after that of the Council. Indeed, the one parliamentary participant who viewed Council as the stronger party pointed out that the Council, in waiting for the Parliament's position, "[had] just been watching the Parliament negotiate amongst themselves"(*Interview - Wilf KING*, 2023). The media, however, appears to support the view that Council is weaker. To cite one media source, "member states are not unified, and the original position agreed upon by the Council late last year did not give its Presidency a firm negotiating mandate for trilogue discussions" (Gambetta, 2023). This argument is corroborated by the fact that the Council has

chosen, under its new Presidency, to informally renegotiate parts of its compromise. This aspect will be discussed in further detail presently.

The Council decided in the summer of 2023 to adjust some of the positions taken in the mandate set forth in December 2022. Indeed, as divulged by an interview participant, shortly after taking up the position of Presidency of the Council, the Spanish representatives "asked for written input from Member States" – however, this request "had no deadline" other than a vague aim "to have a new, revised position by around end-October" (Anonymous, personal communication, 24 August 2023). However, it was also confirmed that this 'new position' would not be a formal process, in that "no new official text [would be] approved and [there would be] no formal vote", and that delegations were requested, rather, to share their views only to the extent "for which it is necessary in order to find a deal with the Parliament" (Anonymous, personal communication, 24 August 2023). One key element of the changes has been the approach to financial institutions. As previously discussed, the Council's prior negotiating position had been to leave the inclusion of the financial sector to the individual Member States (Council of the European Union, 2022b, p. 65). However, according to a media source close to the proceedings, Member States have begun to recognise the impracticality of this type of configuration, which would ultimately fragment the market (Gambetta, 2023). The World Benchmarking Alliance describes the divide in Member States as having "clear support to begin with banks and insurers in scope, and then to cascade in asset managers" (Gambetta, 2023). France, however, along with several 'smaller' Member States, has maintained their position of the "driving force"[34] against inclusion (Ellena, 2023b; Gambetta, 2023; Kokabi, 2023). These and other positions are set to be finalised ahead of the next scheduled trilogues in mid-November (Ellena, 2023b; Gambetta, 2023).

The extent of lobbying efforts during the trilogues is significantly less profound than in other stages of the policy process. One lobbyist called the interinstitutional dialogue phase "one of the most, if not the most difficult parts of negotiation" (*Interview - Uku LILLEVÄLI*, 2023). Nevertheless, they attempt to remain involved:

> "We try to, you know, make sure that, I mean, we have good relations with the negotiators and that's important in order to get intelligence information on what's coming from there. You know, like, what's the latest stage, what's been already agreed, what's still halfway? Making sure we would see the progressive negotiator at the Parliament, the progressive Member Sates that, you know, they would know what's at stake, you know, to know… are they aware of this, what are they doing on this? So, it will really be kind of a bit like [a] reactive phase." (*Interview - Uku LILLEVÄLI*, 2023).

[34] My own translation.

A participant performing advocacy work in this, and other policy processes indicated that "the closer [it] gets to the adoption of [a] law, … the more political the issues become", explaining that, at this point that the external participants become less able to exert influence on the policy process, or alternatively even observe its progression (*Interview - Julia OTTEN*, 2023). Further work would thus have to wait for trilogues to end and for the adoption phase to begin, in order for the advocacy workers to "be back in the picture when it comes to implementation" (*Interview - Julia OTTEN*, 2023).

In general, interview participants displayed confidence in the fact that the negotiations would be wrapped up prior to the end of the parliamentary term. One MEP Assistant said he was "confident that they would get it [by] Christmas [of this year]" (*Interview - Wilf KING*, 2023). Failing this, another participant expressed hope in the fact that "both Council and Parliament want this to be adopted", and that even if it wasn't tied up by December, "they still have six months where they can finish it" (*Interview - MEP Assistant Renew*, 2023). However, a participant who was closer to the process was less optimistic, highlighting a possibility that the file would be abandoned:

> "Unfortunately, I find it quite likely at the moment [that the file will not be adopted], because the Council seems to not have a clear direction, they have the general approach, but apparently a lot of Member States are not happy with that, and now that it has become such a politicised issue, it seems that several governments would actually like to avoid this, um, and what we've seen in the trilogue, there was no progress at all so far… I feel a little bit that there is no willingness in the Council to actually finish this in this mandate, and if we don't finish it in this mandate, then it will get very tricky"(*Interview - MEP Assistant EPP*, 2023).

It is important to note that this opinion was provided before the renegotiation of the Council's position, as discussed above, and that this same participant might answer differently now. However, at the time of writing, there remains only seven months of the current Parliamentary mandate, and as another participant highlighted:

> "[I]f a piece of legislation isn't wrapped up by, you know, January at the latest, like it's just that people want to go home and campaign, you know, people don't want to spend time in Brussels… The problem is that if it doesn't get voted now, it'll never [get adopted]… What happens is that it just kind of gets locked in limbo. I mean, there's one like, the [*redacted*], the E-Privacy Directive or something, it's been negotiated for like, twelve years. It's like… the technology has completely changed. So what happens is that you just, you have a whole new set of Rapporteurs and stuff who come in, but obviously they each have their own political views – the configuration of the Parliament might go more left wing or right wing, you know, and it makes it very, very hard to use that text – you've got to renegotiate it." (*Interview - Wilf KING*, 2023).

Whether or not the renegotiation of the Council's position will bring more complications or more unity between the institutions remains to be seen, and an important piece of legislation hangs in the balance.

Discussion

> *"The effects of myths inhere, not in the fact that individuals believe them, but in the fact that they 'know' everyone else does, and thus that 'for all practical purposes', the myths are true"*
> *(Meyer, 1977, p. 75)*

This chapter is dedicated to discussing some key elements surrounding European integration and company law that arose from the evidence presented in the previous chapter.

The Commission appears at first glance to have an important role in the imagining of the CSDDD. However, it becomes clear from closer study that the Council had called upon the Commission to propose such a law in 2020. Pollack advanced the theory that although the EC enjoys wide influence as the agenda-setter, in doing so, they may also "rationally anticipate the preferences of the member states" in order to ensure adoption of the proposed policy (Pollack, 1997, p. 130). When considering the importance of company law to the sovereign interests of member states, the fact that the directors' duty of care was downgraded from a "specific duty" in the EY Report to a duty that would be open to interpretation by the implementing Member State, this above theory appears to ring true (Proposal: CSDDD, 2022, art. 25; European Commission. Directorate General for Justice and Consumers. & EY, 2020, p. 73). As pointed out by a Company Law expert in the interviews:

> "[I]f you take into account the EY report, they really had a well, of course they provided various options, but the idea was, or the sentiment was, that there would be a more specific directors' duty of care and if you read this article [of the Proposal], it really depends on how it's interpreted at a Member State level, what the impacts would be… They didn't dare to do more… [A]t the Member State level, it's really regarded as a national matter. So, if they would have been stricter, they would not make this something up to the Member States, but they would really have imposed the duty of care at the European level." (*Interview - Anne LAFARRE*, 2023)

The study carried out in 2011 by Crombez and Hix asked much the same question and returned the same results: that a Commission's ambitions for a certain policy space are effectively limited by "the preferences of governments", as well as the Parliament (Crombez & Hix, 2011, p. 311). The fact that the Commission followed the structure and much of the content of the draft law proposed by the Parliament in their resolution in 2021 corroborates this view.

The power of the Commission to essentially pilot the direction of a certain policy should, however, not be overlooked. The agenda-setting of the Commission also comes down to the ontological and legal framework of the policy at hand; one interesting argument advanced by

an interview participant with respect to the limitations imposed on the choice between Directive and Regulation highlights the strategising of the Commission:

> "It's just a legal basis, basically. So if you look at the Treaties, you can, if, yeah, only do a Directive when it's company law. Of course, the Commission could have decided that it's not a company law basis. They could have made it a single market basis and then it could have been a Regulation. So they're, you know, they always know how to play with [the treaties]" (*Interview - MEP Assistant EPP*, 2023).

Indeed, there are clear examples, also in the present case, of the Commission also making supranational considerations a priority in policymaking. This aspect is considered by one participant following the case from a perspective of trade:

> "[The Commission] really brings up this question of the clash between trying to create more green legislation, you know, more rules that would even, you know, the environment globally, from a new perspective, but then at the same time keep your trade partners on board. So, make sure that they're still willing to trade with you and that they don't see it as an affront or as a dispute or as a protectionist mean" (*Interview - Trade Journalist*, 2023).

For this reason, lobbyists are intentional in directing their first efforts towards the Commission in order to ensure that the "first framing" provided by the Commission, is one that they can contribute to (*Interview - Julia OTTEN*, 2023; *Interview - Uku LILLEVÄLI*, 2023).
As the policy process advances, the Commission's position is less influential. Indeed, in the trilogues, participants describe the role of the Commission as a "broker" or "arbiter" role in the trilogues (*Interview - Claire DARMÉ*, 2023; *Interview - Julia OTTEN*, 2023). The Commission has in earlier times been identified as a closer ally to the Council than the Parliament with regards to policymaking aims that divide the institutions along ideological lines (Tsebelis & Garrett, 2000, p. 32). However, in Ershova's more recent writings, it is rather a partnership between the Commission and the EP that is described (Ershova, 2018, p. 13). Indeed, as set out in the chapter detailing the content of the CSDDD, it was shown that the Council's position was reached by deleting or creating exemptions to certain articles, whereas the Parliament's position was primarily reached by clarifying or expanding on the Commission's proposed text. One interview participant suggested that between the Parliament and the Council, whose negotiating mandates go head-to-head on many items, the Commission's position "represents… maybe, the best potential landing zone" (*Interview - Trade Journalist*, 2023).
The fact that the politics of a given Parliamentary committee is representative of the greater chamber is something that is generally taken for granted. This is due in part to the Rules of Procedure that set out that the "political diversity of Parliament in the committees" should be ensured in each parliamentary term (European Parliament, 2019, r. 34). It has also previously

been confirmed in the literature (McElroy, 2006, p. 25). Whether is true, then, that lobbyists could pin their hopes on "progressive" committees such as ENVI and ECON, given the fact that, as explored above, committee politics are generally representative of the entire Parliament, is therefore, open to debate. The particularity of the competent committee in this case also deserves a moment of reflection. According to a lobbyist involved in the process, JURI was the most difficult committee to access, and puts this down to both the size of the file and "the characteristics of this committee" (*Interview - Uku LILLEVÄLI*, 2023). With regards to the latter element, there may be several reasons why JURI stands out as a committee in the EP. Returning to the study of Hurka and Kaplaner, briefly discussed under the literature review, it was shown that with regard to certain sentiments concerning the EU, JURI's ability to represent the views of the Plenary was lower than other "powerful" committees (Hurka & Kaplaner, 2020, p. 4). This is linked to another important feature of this committee, its propensity to deal with legislative proposals that are of a highly technical nature, which is directly correlated to the number of MEPs who choose to participate (Hurka & Kaplaner, 2020, p. 6). Indeed, this points to the fact that the choice of competent committee and its lack of true representation, combined with its internal divisions between its Rapporteur and Shadow Rapporteur, could also have predicted the incidents in the Plenary that nearly sabotaged the CSDDD entirely. Indeed, this case has presented many difficulties concerning the capacity of the Parliament to present a united front. Kreppel highlighted the fact that the European Parliament is more successful in exerting influence over the legislative procedure when united (1999). The disunited nature of Parliament in the current configuration, and particularly with regards to this piece of legislation, was a notable point of commentary across several interviews. Indeed, one participant, an MEP Assistant, noted: "[W]e as the EPP, are more on the Council's side than the Parliament, as such." (*Interview - MEP Assistant EPP*, 2023). While it is commonplace for a single political grouping in the Parliament to have lower numbers than what is needed to establish a majority, the ninth parliamentary term stood out as requiring three political groupings to vote together in order to establish a majority (Barley et al., 2021, p. 6). This diversity of ideology on the Parliament in its ninth term meant that where an absolute majority is required, for example in order to oppose Council's position in a second reading, "more negotiating efforts, compromises and possibly, time would be needed" (Barley et al., 2021, p. 6). One participant involved in the process suggested by some participants to be "pro-business versus pro-human rights" or "centre, left to centre, centre to far right" (Interview - Wilf KING, 2023). However, there may also be larger forces at play than simple ideology when it comes to the disunity in Parliament.

The meddling of national governments and preferences in the EP is a common theme in this file, as evidenced by Germany's political manoeuvring through the EPP. A respondent close to the process said, in connection herewith, that politics, even in the EP, "always depends on which Member State you're from, because every law has different media attention level" (*Interview - MEP Assistant EPP*, 2023). These elements may contribute to the particularly strong national sentiments of an otherwise supranational Parliament in the current case. It is also important to note that the next parliamentary elections for the EU will take place in June 2024, some eight months from the time of completion of this paper (Council of the European Union, 2023). For this reason, many participants noted that opposition to this and other controversial files at the time were "motivated by campaigning" (*Interview - MEP Assistant EPP*, 2023). This aligns with the statements made by the Rapporteur on the file during the debate prior to the Plenary vote, in which she dubbed opposition to the file "electioneering" (European Parliament, 2023d). The dynamics of a Parliament nearing the end of its term were described by a policy analyst in the interviews as follows:

> "[W]e are in a very liquid position here in the Parliament at the moment… The voting on the files in this last year, last months and the coming months, will be based also on how the new majority will be created in the Parliament, so you see more and more votes with the EPP together with the ECR and part of Renew, and they can get the majority… There will [also] be more and more members of the European Parliament who will not be again in the list… Some of these members, they will do what they usually do, they will look for some other job, can be in a board of a company or in a consultancy and things like that. So the votes can also be influenced by this element. So some members, they will even be more free to vote what they like, because they say, anyway, I will not be a candidate anymore, so I will not vote my party line. But even sometimes, it's better to follow [it], because then your party can help you to find some other job… [Or], you know they have already some contact with companies or associations and you know, they vote on the basis of their future interest in working for the private sector" (*Interview - Policy Analyst EPRS*, 2023).

However, it was also pointed out by an MEP Assistant that this file, being as controversial as it was, would probably have resulted in stark divisions irrespective of the upcoming voting cycle and that this proposal in particular "split the house" (*Interview - Wilf KING*, 2023). Speaking to the controversial nature of this proposal, it was mentioned by an MEP assistant working closely on the topic that at the time of the introduction of the file to the Parliament's JURI committee, no members of their party were interested in taking responsibility for it (*Interview - MEP Assistant EPP*, 2023). This same attitude seems to have been reflected in the approach of the Spanish Presidency of the Council, as described by a respondent:

> "[T]hey appeared to be relatively keen to move it along before the start of their [Council] Presidency… It's good to note that it doesn't appear in the Spanish Presidency's agenda for its legislative agenda that's online, so that's a bit of a curious point… Maybe they just have other

priorities. They [perhaps] think that this is a very complicated file to push through"(*Interview - Trade Journalist*, 2023).

A 2018 study conducted by Hix et al., indicates that conflicts in the European Parliament are increasingly along "pro/anti-EU" lines (Hix et al., 2018, p. 52). This observation is interesting when combining it with the thesis that national interests have become increasingly prevalent in the Parliament, as some Member States with pro-EU sentiments may push for a more harmonised text, while others may try to protect their own interests first, such as the case with France and their hopes to become the new financial hub of Europe. "Issue-linkage" is a model under which decision-makers may join together in the process of bargaining, two items for vote in order to increase the chances of reaching an agreement through "side payments" (Aksoy, 2012; Ershova, 2018, p. 9) One participant hinted that a certain Member State might be "[pulling] in" others during the deliberations in order to achieve the financial services sector exemption (*Interview - Trade Journalist*, 2023). While it is not explicitly mentioned or suggested that issue-linkage was at play in this context, it is possible, given the wide array of debated issues in the Council and the fact that otherwise "progressive governments" had joined their voices to this exemption, that these types of bargaining deals had been struck (*Interview - Trade Journalist*, 2023). This same type of activity, in theory, also be considered for interactions between the Council and the Parliament. Indeed, as explored by Hix and Høyland, coordination between these two institutions in order to ensure the adoption of the policy at hand (Hix & Høyland, 2013, p. 171). As previously mentioned, the EPP's position was closer to that of the Council's than the Parliament's (*Interview - MEP Assistant EPP*, 2023). Another participant studying the policy process from the outside suggested that these types of alignments could result in cross-institutional "team[ing] up" in order for parties to build coalitions on issues they feel strongly about (*Interview - Trade Journalist*, 2023). Indeed, taking advantage of the 'divided' nature of Parliament is not a novel concept: Roederer-Rynning and Greenwood identified that Council often strategizes ways to "fragment EP opposition" (2021, p. 496).

The Council's role in trilogues is noted in the literature and by participants to be of particular importance. Indeed, one participant noted that "the Member States' positioning and dialogues is very key and very important on any of the political elements or subjects". In this way, this participant described them as "heavyweights" of the trilogue procedure (*Interview - Julia OTTEN*, 2023). However, Farrell and Héritier posited that the institutional arrangement of trilogues have increased the importance of the role of the Parliament's Rapporteur *and* the

Presidency of the Council at the time of the file's negotiation. Certainly, in this case, respondents who were participating in the policy process often placed much importance on what they thought the Rapporteur would do – whether this was "drop[ping] the directors' duties and corporate governance elements in the trilogues" or "ma[king] sure to keep as many political stakeholders involved as possible" during parliamentary deliberations (*Interview - MEP Assistant Renew*, 2023; *Interview - Wilf KING*, 2023). Similarly, there was much speculation both from spectators and participants to the process as to the effects of the changing national government during the Council Presidency (*Interview - MEP Assistant EPP*, 2023; *Interview - Trade Journalist*, 2023).

Conclusion

A study by Cross and Hermansson that evaluated the effects of institutional structures (formal and informal) on the legislative procedure revealed policymaking to be "a dynamic game between institutional actors with competing policy demands" (2017, p. 598). The politics governing the EU Company Law space appear to move along the same lines, with one important clarification: this game is often run by the Member States.

From the outset of the analysis, Company Law was shown to be a difficult area for further harmonisation, with both formal rules, ideas around national sovereignty and path dependency essentially standing in the way of further harmonisation of corporate behaviour across the bloc. This thesis analysed the (ongoing) policy process of the Corporate Sustainability Due Diligence Directive through the lens of rational choice institutionalism, evaluating the different decisions made at the various levels of the European policymaking machine through the use of process tracing methodology. The evidence of this case was then discussed in the scope of the literature on European integration, keeping in mind the different institutional weights held by the actors and the aforementioned difficulty of the policy domain.

While the Commission was shown to have a relatively important role in the beginning of the process, their influence steadily decreased as the file moved from Proposal to bargaining stage. Indeed, this phenomenon is also attested to by the decreasing attention paid to Commission actors by lobbyists in the run up to trilogues. It is recognised by all parties that their role in the very specific institutional setting of interinstitutional trilogue is limited to arbitration, rather than direct steering. By contrast, the Parliament and Council display a correlated increase in influence and power over the policy process, with the role of each being valorised as important by both external and internal actors to the process. It is important to note, however, that the role of Parliament may be undermined by interfering national interests of the MEPs, a phenomenon which was starkly evident in this case. There are other factors which also undercut the influence of Parliament in the current case.
The apparent lack of cross-party unity in the Parliament, evidenced by the events of the 1 June 2023 Plenary, are particularly worrisome for the bargaining power of the Rapporteur, who, despite being empowered as part of the new institutional structures since interinstitutional trilogues became commonplace, will have to carefully navigate her partnership with her Shadow Rapporteur, whose party lines appear, at the time of writing, to be more in line with

the Council's preferences for the Directive. Whether or not the Parliament will be able to exercise authority on the issues that are important to them will hinge on their ability to foster further unity in their own camp, as well as their ability to strategically link or de-link issues. Items like the articles on corporate governance, which are viewed by both institutions to be politically high-stakes, could be left by the wayside if doing so would ensure the Parliament's vision for the scope of the Directive, and the form of the duty, is adopted at the European level. The Council's influence over the trilogue framework is an equally important issue with regards to bargaining; in essence, this file will move forward at the pace set by the Presidency.

Overall, and in taking the above into consideration, it appears from this evaluation that Member States still exert a high level of influence over the policymaking and the related process of European integration. This is true not only of their influence over the Commission in the agenda-setting phase and in their own deliberations in the Council, but also in the Parliament, where they use political manoeuvring in their Member State delegations of the political groupings. Historically, the Commission has been met with intense resistance from Member States at each attempt to further bring together the ways in which companies operate. However, increasing engagement from economic agents in the legislative procedure, whether this be through lobbying or otherwise, has appeared to shift Member States preferences with regards to integration on Company Law towards rather than away from further harmonisation, though with certain exemptions and reservations. Indeed, it is notable that the area of Company Law that Member States support integration on, once again do not breach the inner sanctum of what national sovereignty generally wishes to protect in Company Law – that is, the inner workings of the company. In this way, there appears to be a certain co-operation between Member States and their corporate actors, who as demonstrated in this paper, wield an important power over the policy process through their lobbying activities. To this point, parts of the CSDDD which did attempt to open the conversation on these matters were quickly shut down by Member States in the Council, and similarly faced a fierce battle in the Parliament, specifically with those groups and MEPs who displayed more nationally correlated preferences. At the time of writing, there remains doubt as to whether the CSDDD, whose preparatory works began in 2020, will be adopted at all. Important intervening phenomena such as the 2024 European Parliamentary elections, and the difficulty with which Member States negotiate the Council's approach, may prove too strong against the will of those who wish to find a compromise. On the other hand, should the CSDDD be adopted, it will nonetheless have begun to regulate the way in which companies interact with society and the environment, and this with effects outside

of the EU, too. Indeed, there are still many questions to be answered with regards to the outcomes of the CSDDD as it continues its political journey through the institutional framework of the EU. In order to have a full understanding of how this, nevertheless, paradigm-shifting law may impact European Company Law, we still need more time.

This dissertation has presented many different, exciting avenues for future research. To name only a few; Firstly, it has begun to shed light on Member State interference in the deliberations of the European Parliament. This is certainly an interesting point to be expanded upon, and could lead to thought-provoking, if not worrisome, conclusions about the future of the European Union's 'most democratic' institution. Another possibility is the extent to which a harmonised framework of Company Law is necessary, or even possible, at the European level. Considering the many important reviews of Company Law adjacent laws that are currently underway, such as the Shareholders' Rights Directive, this is a particularly important, although ambitious and undoubtedly time-consuming topic. In this dissertation, lobbying was also discussed to a great extent. This was made partly possible by the contributions of two active advocacy workers in the interviews, but was also an important consideration when taking into account the policy domain and the preferences of certain Member States. It is certainly a topic that deserves more attention, especially once the outcome of the CSDDD and its contents has become more certain. Finally, an element which was touched on but not fully explored was that of the effect of a changing national government to the political priorities and objectives of a Council Presidency. In this dissertation, it did not require further examination; however, the relative importance of the Council in the interinstitutional trilogues creates an important incentive for this kind of research.

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Annex: Interview Information

The below table details the key information relating to the interviews. Each interview was around one hour long and anonymised on request. Full transcripts are available online until 20 December 2023, and thereafter on file with the author.

#	Interviewee	Designation	Title	Interview Date	Medium
1	Wilf KING	Elite	MEP Assistant	06/06/2023	Zoom
2	Uku LILLEVÄLI	Elite	WWF – Policy Officer	08/06/2023	Zoom
3	[Redacted]	Elite	MEP Assistant	21/06/2023	Zoom
4	Anne LAFARRE	Expert	Company Law Professor	30/06/2023	Teams
5	Julia OTTEN	Elite	Frank Bold – Policy Advisor	06/07/2023	Zoom
6	[Redacted]	Expert	Trade Journalist	07/07/2023	Zoom
7	[Redacted]	Expert	Policy Analyst – EPRS	19/07/2023	Zoom
8	[Redacted]	Elite	MEP Assistant	19/07/2023	Zoom
9	Claire DARMÉ	Expert	Researcher	24/07/2023	Zoom