Leverage, Control and Power Relationships in Transnational Supply Chains: Towards a New Doctrine of Supply Chain Liability

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12th December 2024

Introduction

Sustainability due diligence (SDD) has taken centre stage in the European Union's (EU) policy framework for sustainable development and, as such, it has garnered global attention. The enter into force of the Corporate Sustainability Due Diligence Directive (CSDDD)[1] is the culmination of more than a decade-long institutionalisation process which has seen SDD go from an operational set of soft-law-based voluntary guidelines within the context of the United Nations Guiding Principles on Business and Human Rights (UNGPs),[2] to a hard-law-based binding rule, now harmonised across the EU legal system.[3]

SDD can be broadly defined as a company's responsibility to identify, prevent, mitigate and address human rights and environmental impacts derived from (or linked to) their business operations.[4] When it was first introduced in the UNGPs – at the time named "human rights due diligence" – it was a novel concept born out of an innovative and paradigm-shifting policy

[1] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, PE/9/2024/REV/1, OJ L, 2024/1760, 5.7.2024, ELI: http://data.europa.eu/eli/dir/2024/1760/oj.
[2] UN, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>.
[3] The process will fully be completed following the transposition of the CSDDD in the national legal system of the EU Member States.
[4] UNGP Principle 17. OECD (2023), *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*, OECD Publishing, Paris, para. 15 on page 17 and para. 50 page. 27.

design process.[5] Following its consolidation as an authoritative international soft law rule, SDD underwent further transformation through its entrenchment as a binding rule.

The institutionalisation of a norm from soft law into hard law has interesting implications. First and foremost, positive law comes with jurisdictional delimitations and a very precise scope of application. Both bounds from which soft law instruments are free. In addition, binding rules require an enforcement mechanism. The case of sustainability due diligence is especially interesting because, in the legal systems that have transposed it into hard law, it has been applied with a distinct extraterritorial character. Indeed, all of the national SDD laws, CSDDD included, expressly seek to regulate not only a company's business operations but those of their business partners, with a marked emphasis on a company's transnational "value chains".[6] The inherent extraterritorial reach of SDD laws poses a unique design challenge, especially when it comes to the questions of scope and enforcement.

This paper investigates the legal design of SDD rules in their application to the regulation of transnational value chains, delving into the operational principles that are at the very basis of SDD as a normative archetype, and then pointing out some of the challenges of SDD-binding legal design. In this sense, the paper takes an inductive approach aimed at discovering the theoretically optimal way to design and enforce transnational SDD policy. The paper's conclusions – which, at the time of writing are still rather preliminary – can thereafter serve as a point of reference for the critical evaluation of the design choices made by the EU (and other regulators) in their implementations of SDD laws.

The analysis relies on a law and economics framing of SDD as a regulatory tool aimed at the internalisation of the negative "sustainability" externalities of transnational value chain production. The paper concludes by setting the groundwork for a doctrine of supply chain liability that is able to reflect the economic dynamics that are at the basis of SDD compliance.

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[5] See generally John Ruggie, 'Chapter 4: The Social Construction of the UN Guiding Principles on Business and Human Rights', *Research Handbook on Human Rights and Business* (Elgar 2020) <https://doi.org/10.4337/9781786436405.00009>.

[6] See *inter alia* the *Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz - LkSG)*; and the *LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (*Loi de Vigilance)*.

1. Sustainability Due Diligence for Externality Internalisation

SDD essentially refers to a standard of care that a company must meet when carrying out its business operations, which is broadly articulated in the identification, prevention and mitigation of adverse human rights and environmental risks and harms.[7] This standard of care is not only confined to the company's own activities but it also extends to how a company manages and carries out its business transactions with other economic actors.[8] In most SDD instruments and laws, this extends to a company's subsidiaries, suppliers, contractors and so on. Because of this outward-looking character of the SDD obligation, sustainability due diligence policy has consistently been applied in an effort to address the "unsustainability" of transnational value chain production.[9] The logic unfolds in the following way.

A regulator that is pursuing sustainability (understood as human rights and environmental protection) as an overarching policy goal will introduce heightened standards of sustainability production within its jurisdiction. Through value chain production disaggregation, transnational corporations are able to outsource the most unsustainable segments of their production cycle to suppliers and contractors in different jurisdictions in which environmental and human rights protections are lower, which allows them to produce and sell goods and services at markedly lower prices than they would in the jurisdiction of origin. The regulator understands that, instead of internalising the social cost of adverse environmental and human rights impacts, it is incentivising the outsourcing of these negative externalities to different countries and parts of the world. The regulator thus seeks to fill this gap by introducing an obligation requiring its companies not only to comply with sustainability standards but make sure that said standards are respected along its entire value chain.[10]

By taking this as the baseline underlying logic behind the hard law implementations of SDD-type rules, this section unpacks some of the fundamental ways in which SDD works in theory and illuminates some of the more practical implications and potential limitations of SDD compliance.

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[7] See UNGP Principles 17-24.

[8] UNGP Principle 17(a) states: "Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, *or which may be directly linked to its operations, products or services by its business relationships*;"[emphasis added].

[9] See for example Recital 9 of the CSDDD.

[10] For a more detailed overview of the EU's supply chain regulation policy through a law and economics framing see Silvia Ciacchi and Michael Faure, 'From Corporate Social Responsibility to Supply Chain Regulation in Europe: Economic Perspectives' in Klaus Mathis and Avishalom Tor (eds), *Law and Economics of Corporate Governance: Shareholders, Stakeholders, and Beyond* (Springer 2024).

1.1. Understanding Sustainability Due Diligence

The normative archetype of sustainability due diligence is informed by a series of operational and normative principles, which shape its different iterations in soft and hard law. These primarily derive – either explicitly or implicitly – from the original conceptualisation of SDD within the UNGPs.

1.1.1. Risk and Leverage as the Core Operational Principles

This paper identifies the risk-based approach and the concept of leverage as two core operational principles of SDD.

The risk-based approach refers to the idea that, when complying with sustainability due diligence, companies should undertake a risk assessment of their business operations and determine which segments of their value chain pose the most risk.[11] Companies are then allowed to prioritise the allocation of their compliance resources based on this evaluation.[12] The risk-based approach functionally provides a built-in mechanism and a principled set of parameters that guide companies in their compliance trade-offs.

The concept of leverage serves a similar function. The commentary to UNGP Principle 19 describes leverage this way: "Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm."[13] In the UNGPs, leverage is used to express the dimension of a company's responsibility to undertake SDD. The more leverage a company has in a given relationship, the higher the responsibility to intervene.[14]

Risk and leverage act as core operational principles of SDD, because they are parameters of proportionality in the attribution of responsibility with respect to a company's value chain and business operations. The *risk + leverage* paradigm provides reasoned metrics to delineate a regulatory framework able to encapsulate the complexities of transnational value chain production externalities enabling the legal system to broaden the typical spectrum of causation, which might find companies liable only for damages which have personally and directly caused.

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[11] In the SDD space risk is conceptualised as severity and likelihood, Moreover "sustainability risk" carries a different connotation than traditional "business risks". See OECD, 'Translating a Risk-Based Due Diligence Approach into Law' (2022) <https://mneguidelines.oecd.org/translating-a-risk-based-due-diligence-approach-into-law.pdf> accessed 27 July 2024.

[12] See the commentary to UNGP Principle 17 p. 18.

[13] UNGP Principle 19, Commentary.

[14] This is complemented by the dimension of causation which, in the Principles, is articulated in the "causation, contribution or direct link" paradigm. See *inter alia* <https://gbihr.org/business-practice-portal/using-leverage>.

This paper argues that, for SDD laws to work in the way that they are intended to, the *risk + leverage paradigm* should be appropriately integrated into their legal design. As further explored in a later section, the application of this paradigm points to the intuition that a proportionate and effective approach to transnational SDD policy design, ought to account for context-specificity, and thus seek to institute a flexible or fluid set of incentives.

1.1.2. The Normative Preference for Meaningful Engagement

Another important element at the core of SDD is the normative preference for meaningful engagement with high-risk business partners, over the termination of business relationships. This paradigm informs the baseline assumption at the foundation of SDD.

The UNGPs, as well as virtually all other SDD instruments and laws, tend to stress that, when it is found that a business relationship entails the presence of high sustainability risks or even ongoing harm, the termination of said relationship should be kept as a last resort.[15] The laws and instruments typically emphasise that it is more desirable for the company to keep engaging with high-risk scenarios even when sustainability issues cannot fully be solved, as long as the company is able to achieve improvements.

This normative preference answers the question of why the regulator may choose to apply SDD policy instead of, for example, completely banning transnational value chain production. In other words, SDD norms carry the underlying assumption that the socially desirable level of transnational value chain activity is certainly above zero, and there should be safeguards against the excessive restriction of transnational business transactions.

Whether this assumption is justified, either from a normative or empirical perspective, is outside the scope of this paper. However, acknowledging that this normative preference exists is necessary in order to investigate the best principles of SDD policy design.

1.2. The Implications of Institutionalisation

Having understood some of the fundamental characteristics of the SDD normative archetype, this section sheds light on some of the implications of institutionalisation, that fundamentally shape the challenges of SDD policy design.

1.2.1. Jurisdictional Scope and Regulated Targets

[15] See for example Articles 10 (6) and Art. 11(7) of the CSDDD on "responsible disengagement".

The most immediate implication of the move from a soft law instrument to a positive law is the presence of jurisdictional delimitations. In this case, the analysis focuses on specific applications of SDD policy for the internalisation of transnational – as in "extra-jurisdictional" – externalities. It follows that the regulatory targets of the SDD law that is to be designed are understood to be "local" companies (with respect to the regulator) that are operating with business partners outside of the jurisdictional reach of the law.

For the purposes of this analysis, the regulated targets are assumed to be large companies that occupy a leading position in a transnational value chain. From here on out, regulated targets will also be referred to as "chain leaders".

1.2.2. SDD as Cascading Delegation

SDD inherently relies on the idea of introducing a cascading incentives framework, fuelled by the exercise of economic power in firm-to-firm business relationships. This derives from the soft law iterations of SDD but is especially important in its hard-law applications, precisely because of the issue of jurisdiction.

The jurisdictional limitation of binding SDD laws implies the need for the introduction of a cascading delegation framework, for which enforcement duties are delegated from the public regulator to the regulated company and then to its business partners.

Under SDD, regulated targets are not only tasked to meet a standard of care themselves but are also required to enforce that standard against their tier-one (T1) business partners (including subsidiaries and direct suppliers), whilst also inducing those T1 parties to carry out enforcement against the tiers below theirs. Under the above logic, all value chain participants that fall within the "business relationship sphere" of a regulated company are expected to fulfil a dual role: one of compliance and one of enforcement. The difference is that the incentives of regulated companies are to be provided by an enforcement regime that is designed and implemented by the legal system itself, whilst all tiers below should be induced to do so by private ordering.

By creating an incentive framework that targets chain leaders, SDD policy seeks to indirectly enforce a standard of care upon the chain leader's business partners. This paper argues that this quintessential element of SDD policy consists of the primary design challenge of a binding SDD legal rule.

2. Leverage as the Primary Design Challenge of Binding SDD Laws

Whilst the integration of the "risk-based approach" in legal design is rather straightforward and has been done before in several other legal regimes, the creation of cascading incentives in transnational supply chain structures requires considerations that pertain to the realm of leverage, understood as the ability to control and influence.

This section explores this aspect as the primary challenge to binding SDD legal design.

2.1. The Matter of Power Distribution in Supply Chain Relationships

Cascading compliance and the delegation of enforcement are necessary for SDD to work as a transnational externality internalisation tool. Without this mechanism, the SDD obligation becomes inconsequential as soon as the jurisdictional boundaries are crossed.

This raises the question of whether the functioning of this cascading delegation mechanism is realistic. Are chain leaders actually able to exercise sufficient control and influence over the value chain so as to meaningfully comply with the normative precepts of a binding SDD obligation? An investigation of the literature on value chain management reveals a mixed picture.

2.1.1. The Powerful Chain Leader Assumption

One of the first key developments in global value chains (GVC) literature was the observation that GVC governance could be categorised into two types: buyer-driven and producer-driven. In the 1990s and early 2000s, influential literature developed on the role of big "global buyers" in driving forward globalisation.[16] Thereafter, buyer-driven GVCs became associated with chain leaders in developed countries relying on outsourcing production to developing countries to gain a competitive advantage in their local markets.

This literature arguably contributed to cementing a generalised conceptualisation of transnational supply chains as hierarchical, centralised inter-organisational structures conducive to patterns of human rights and environmental exploitation. This idea became entrenched in public perception and was only bolstered by public scandals confirming the prevalence of these exploitative dynamics in certain industries (e.g. see the Rana Plaza collapse scandal). The chain leader focus is also noticeable in the institutionalisation patterns of GVC

[16] See for example Gary Gereffi and Miguel Korzeniewicz (eds), *Commodity Chains and Global Capitalism* (Praeger 1994).

matters in EU law, which have predominantly aligned with this implicit characterisation of GVC organisation and hierarchy.[17]

However, important developments in the literature have contributed to paint a more accurate understanding of the complex and nuanced reality of GVCs and their governance.

2.1.2. Nuances and Insights form the Theory

Consider, for example, the theory of market linkages ("linkage theory"). From a certain perspective, linkage theory represents the next evolutionary step of the "buyer/producer GVC dichotomy". By introducing a more complex lens of analysis, literature on this theory has been able to uncover a much more varied array of "governance types" in transnational buyer-supplier relationships.

The theory observes three factors in buyer-supplier relationships: transaction complexity, codifiability of transactions and information, and supplier capability. Depending on whether these attributes are high or low, and their combination, linkage theory proposes five GVC governance modes: market; modular; relational; captive; and hierarchy. These different types reflect varying degrees of power asymmetry and, consequently, different levels of power centralisation in GVCs.[18]

Linkage theory is only one part of what is now a large stream of literature on power distribution in transnational value chains. For example, other important contributions have explored the compounding nuances and additional complications of the power relationships within multi-tier value chains, beyond the chain leader-supplier dyad.[19]

Whilst extremely limited, this short overview is still sufficient to derive two important takeaways. First, the very centralised and hierarchical idea of a "transnational buyer-driven chain" which is so often taken as the norm, is just one of many. Secondly, any given chain in any given industry can change its governance mode at any point in time. Power distribution in

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[17] See more in Anna Beckers, 'Global Value Chains in EU Law' (2024) 42 Yearbook of European Law 322, 328.
[18] See *inter alia* Gary Gereffi, John Humphrey and Timothy Sturgeon, 'The Governance of Global Value Chains' (2005) 12 Review of International Political Economy 78; Stefano Ponte, Timothy J Sturgeon and Mark P Dallas, 'Governance and Power in Global Value Chains' in Stefano Ponte, Gary Gereffi and Gale Raj-Reichert (eds), *Handbook on Global Value Chains* (Edward Elgar Publishing 2019) <https://china.elgaronline.com/view/edcoll/9781788113762/9781788113762.00013.xml>; Timothy J Sturgeon, 'From Commodity Chains to Value Chains. Interdisciplinary Theory Building in an Age of Globalization' in Jennifer Bair (ed), *Frontiers of Commodity Chain Research* (Stanford University Press 2008) <https://www.degruyter.com/document/doi/10.1515/9780804779760-008/html>.
[19] See, *inter alia* Giovanni Beccari Gemente and others, 'Pressures, Power Relationships and Governance Mechanisms: A Multi-Tier Supply Chain Approach' (2024) 35 The International Journal of Logistics Management 1; Gale Raj-Reichert, 'The Role of Transnational First-Tier Suppliers in GVC Governance' [2019] Chapters 354.

transnational supply chains is fluid, constantly changing and is not necessarily industry-specific.

These realisations illuminate the magnitude of the design challenge posed by a hard-law-based sustainability due diligence policy approach.

2.2. Why Operationalising Leverage Matters

The centrality of leverage within the functioning of SDD is arguably the source of the major design flaw of existing binding SDD laws, precisely because of the fluidity of power distribution within transnational value chain organisations.

The chain leader is not always in the most powerful position within the chain, therefore, it would be disproportionate to design a liability system that attributes to the regulated targets the legal responsibility for the behaviour of all of his value chain business partners, in any given situation. The ideal solution would be to design an enforcement system that requires a case-by-case assessment of leverage for each business relationship that falls under the scope of the law. However, the legal systems that have implemented hard-law-based SDD policies have not been able to do that.

These legal systems, a good example being the EU, have typically resorted to mismatched design choices, aimed are creating a compromise between the far-reaching scope of the substantive SDD obligation with the risk of over-burdening regulated targets that *de facto* lack of compliance capacity. This is why, for instance, the CSDDD requires companies to enact due diligence on both direct and indirect business partners along their chain of activities but, under its civil liability regimes, companies cannot be held liable for any damages that the company itself is not directly responsible for causing.[20] In one way, the law wishes for in-scope chain leaders to influence their business partners to act more sustainably, but in practice, it is unable to institute an incentive framework that links the business partner's behaviour to the in-scope company's bottom line.

The Directive's public enforcement regime comes with the same limitations. Enforcement authorities under the CSDDD will be able to monitor a company's internal compliance policies and check whether measures were put in place to fulfil the SDD obligations requirements.[21]

[20] See CSDDD Articles 8, 10 and 11 on the SDD obligation and 29(1) on the civil liability regime.
[21] See CSDDD Articles 24-26.

However, because there is no space for an assessment of leverage, the same standard will be applied to every in-scope company in every case. This will inevitably result in a lowest-common-denominator approach in which companies that hold a lot of power and leverage over their supply chain will be held to the same standard of due diligence as those with very little sway over their business partners' behaviour. Only the *prima facie* suitability of companies' due diligence policies will be assessed, generating no incentives for meaningful and proactive compliance.

2.3. Tackling the Challenge: The Fluid Rule Compromise

The issue with designing an enforcement system perfectly tailored to the existence of leverage in business relationships is that it is a very difficult thing to do. As established before, power fluctuates rather heterogeneously in global value chain relationships at any given time, therefore it is impossible to establish what relationships are subject to what power balances *ex-ante*. Undertaking this assessment *ex-post* is more doable, but it would still be difficult to enforce a legal standard that perfectly corresponds to the degree of leverage in any given relationship every single time.

This paper proposes that where a perfect assessment of leverage and the enforcement of a perfectly corresponding standard of care in any given business relationship is impossible, a fluid rule enforcing a sliding standard of care may provide the next-best option for the creation of optimal incentives. When control and influence are high, the chain leader should be held to a higher standard of care. When control and influence are lower, so should the enforced level of care. This way, the rule will enforce a baseline standard of care against all regulated targets, but also reserve a specially heightened standard in cases of high-power imbalances.

The next and final section of this paper explores how the design of such a rule could be approached in practice, providing preliminary considerations about the doctrinal basis and tests that might work for the SDD regulator's purpose.

3. From Leverage to Supply Chain Liability: Laying the Groundwork

On the basis of the insights and principles identified in the previous sections, the paper concludes by laying the groundwork for the design of a liability doctrine fit for the purpose of enforcing a hard-law-based SDD policy.

3.1. Surveying the Existing Doctrines

First and foremost, it should be noted that there are existing liability doctrines that impose a standard of care or attribute liability based on the existence of control or influence in a relationship. Examples include vicarious liability, veil piercing, and even applications of the single economic entity doctrine in EU competition law.

However, an overview of these doctrines reveals that none is quite suitable for the type of incentives that are required in order to achieve optimal SDD enforcement.

Many of these doctrines are rigid and restrictive in their assessment of control. For example, consider vicarious liability. *Respondeat superior* is the doctrinal basis for vicarious liability regimes in which "control" is understood as an absolute authority, such as that found in "master-servant"-like relationships. The applicability of vicarious liability according to *respondeat superior* is a fully binary decision, meaning that there is no differentiation between degrees of control.[22] As such, vicarious liability is applied in very specific cases, such as when employees take actions within the scope of the role assigned to them by their employer, or the activities of subsidiaries that are fully owned by their parent.[23] The single economic entity doctrine, similarly, identifies the presence of "decisive influence" when a subsidiary is fully unable to make independent decisions, and simply carries out the parent company's instructions.[24] Veil piercing is also applied in very restricted and specific cases.

These doctrines entail a very strict assessment of control because they enforce a uniform legal standard. Either one entity is fully liable for another's actions or not. What is required for the

[22] For more on vicarious liability see Reinier Kraakman, 'Economic Policy and the Vicarious Liability of Firms' in Jennifer H Arlen (ed), *Research Handbook on the Economics of Torts* (Edward Elgar Publishing 2013) <https://china.elgaronline.com/view/edcoll/9781848441187/9781848441187.00018.xml> accessed 5 August 2024.

[23] In case law, landmark cases like Vedanta (2019), Oguru (2021) and Okpabi (2021), are paving the way for the application of parent company liability on the basis of "control and influence", rather than formal vertical integration.

[24] Akzo Nobel Chemicals Ltd v European Commission (2009), + Mogollon, Ana, Blood is Thicker Than Water: Sister Liability as Part of the Single Economic Unit Doctrine in Light of the Sumal Case (2023). p. 12-13.

operalisation of leverage is instead the attribution of a proportionate dimension of responsibility ~~or, in the simplified version proposed by this paper, the delineation of two different legal standards that depend on the circumstances of each specific relationship.~~

In a way, the standard that this paper seeks to find here is more akin to a regime of contributory negligence, in which different entities are held liable in proportion to the degree to which they have contributed to causing the damage. However, instead of an assessment based on causation, the decisive variable should be control.

Because of the absence of a doctrine or legal regime to draw from, it is necessary to start from scratch.

3.2. Parametrising Control and Influence

In order to integrate the above idea into the legal design, the regulator must identify actionable parameters for control and influence that are relevant to SDD compliance. The value chain management literature can help identify the determinants and indicators of control and influence.

In broad terms, the ability of a chain leader to control its supply chain is expressed in the ability to exercise bargaining power against them. The distribution of power is ultimately determined by two interrelated macro-factors:

(1) endogenous transaction costs of the business transaction (related, but not limited to the degree of interdependence that exists between the two parties);
(2) economic power that is exogenous to the market transaction (including the relative market power of all supply chain participants and the individual companies' size and access to resources).

Assessments of whether the chain leader owns any shares of the business partner, as well as an assessment of whether a significant percentage of the business partner's turnover derives exclusively from the chain leader are two potential indicators of the existence of a power relationship between them. Additional information in this sense could be derived from the pre-existing exercise of control by the chain leader, in the form of having imposed a supply chain code of conduct over the business partners in the past.

Ultimately, a holistic assessment of such parameters can enable the legal system to assess the degree of control for the purposes of legal enforcement.

3.3. A Presumption of Control for Fluid Incentives

Where the legal system is able to parametrise the presence of control and influence based on factors like those described in sub-section 3.2., it will be possible to establish a presumption of "high control" in cases that present the signs of captive relationships.

As long as companies are able to self-assess the level of control in their relationships according to the parameters set by the legal system, they will pre-emptively try to meet the corresponding legal standard.

Companies with very high control over their business partners will seek to exercise that control to its full extent, in order to minimise the chances of being found negligent under the heightened standard. Companies without the ability to exert meaningful leverage will be able to keep engaging with their business relationship, without fearing being overly sanctioned by the enforcement regime. This meets the operaliasation of leverage, as well as the normative preference for meaningful engagement.

Ultimately, such a regime can lead to companies across the board to exercise a level of care that is proportionate to the degree of leverage that they hold.

Next Steps, Limitations and Concluding Remarks

This paper has sought to identify, explore and begin to tackle the question of the design of binding SDD rules, for the purpose of transnational externality internalisation.

Having identified the integration of leverage in the legal rule as the primary design challenge for hard law SDD policy, the paper has sought to lay the conceptual and doctrinal groundwork for the delineation of a liability rule capable of instituting an incentive framework best tailored to the underlying operational purpose and normative precepts of SDD laws.

This paper is limited to a purely theoretical approach to the breakdown of SDD as a normative archetype and the evaluation of some of the implications of its institutionalisation into hard law. In this sense, it fails to capture some of the

practicalities of legal design and enforcement, including the cost of regulation and compliance. In this sense, the paper leaves a lot of questions open.

Will adjudicators be able to reliably enforce a fluid legal standard? Would the legal system be able to bare the costs of such a complex enforcement regime? What are the potential perverse effects of the proposed rule on compliance patters, dyadic business relationships and international trade relationships? Etc.

The analysis is hereby presented as a first step towards the investigation of optimal SDD policy design, to be complemented by further conceptual work on the proposed topics, as well as the integration of a broader perspective on the more practical challenges of lawmaking, value chain management and compliance.