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**THE CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE: A
COMPARATIVE ANALYSIS OF EUROPEAN EXPERIENCES**

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STATE OF THE ART

The impact of economic activities carried out by larger corporations on various spheres of social life and on the environment is undeniable and the idea that the aforementioned processes must be sustainable is not a recent invention. Indeed, a credit for creation of the Corporate Social Responsibility ('CSR') notion is generally attributed to the economist Howard R. Bowen, which already in 1953 raised an issue whether and to which extent companies have responsibilities *vis-à-vis* civil society.¹ From that point on, this subject was at the center of discussion for a number of authors, both from an economic² and legal standpoint.³

However, recent years may have seen the most interesting advancements on this subject in the legal literature. The problem of corporate sustainability and responsibility has been examined through the lens of human rights, with particular attention to the safe and healthy working conditions; due consideration was given also to the environmental implications of the issue. The reason of growing interest to the problem at stake is twofold.

First off, the general level of awareness on the topics of human rights' protection and global warming combating has grown exponentially, making it such that many businesses now view adherence to ECG⁴ standards as a competitive advantage with customers and investors. Therefore, many businesses adopted due diligence strategies on a voluntary basis.

On the other hand, international organizations, in compliance with their objectives, adopted soft law tools in order to offer some guidance to the companies willing to carry out sustainable activities and to map out what the latter can be actually required. For instance, United Nations Guiding Principles

¹ H. R. BOWEN, *Social responsibilities of the businessman*, Harper, New York, 1953 (1st ed.).

² See A. B. CARROLL, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, in *Business Horizons*, Vol. 34, n. 4, 1991, pp. 39-48; M. E. PORTER, M. R. KRAMMER, *Corporate social responsibility – Creating Shared Value – How to Reinvent Capitalism and Unleash a Wave of Innovation and Growth*, in *Harvard Business Review*, January-February 2011; J. WIATKOWSKA, *Corporate Social Responsibility: Selected Theoretical and Empirical Aspects*, in *Comparative Economic Research*, Vol. 19, n. 1, 2016, pp. 27-43.

³ See N. BOSCHIERO, *Giustizia e riparazione per le vittime delle contemporanee forme di schiavitù - Una valutazione alla luce del diritto internazionale consuetudinario, del diritto internazionale privato europeo e dell'agenda delle nazioni unite 2030*, G. Giappichelli Editore, 2021, pp. 135-140; H. KRIEGER (ed.), A. PETERS (ed.), L. KREUZER (ed.), *Due diligence in the International Legal Order*, Oxford University Press, 2020; L. CALAFÀ, *Dialogo sociale, CSR e governance europea*, in *Lavoro e Diritto*, Vol. 1, n. 1, pp. 99-133.

⁴ Environment, Social, Governance ('ESG') are standards which not only provide for implementation of sustainable business practices by the companies but make the business' efforts in this sense measurable. See P. GUPTA, *Understanding and adopting ESG – an Overview*, available at <<https://www.lexology.com/library/detail.aspx?g=80bbe258-a1df-4d4c-88f0-6b7a2d2cbd6a>> (last access 11.05.2023).

on Business and Human Rights,⁵ OECD Guidelines for Multinational Enterprises⁶ and ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy⁷ may be mentioned.

Notwithstanding with these adherences which occurred voluntarily, it is of common understanding that shared goals of effective protection of human rights included in international conventions and the destiny of global warming cannot be left at the mercy of large corporations' discretion.

Indeed, several European countries have already adopted legislation that aim to establish human rights due diligence obligations in global supply chains. The two 'early birds' in question are Germany with its Supply Chain Due Diligence Act⁸ and France with The Duty of Vigilance Law⁹. Also, Belgium, the Netherlands,¹⁰ Luxembourg and Sweden are planning to introduce similar legislation. However, the most recent and significant development in the sector occurred when, on February 23, 2022, European Commission has adopted a Proposal for a Directive on Corporate Sustainability Due Diligence ('CSDD').¹¹ Given that voluntary action does not appear to have resulted in large scale improvement, and that certain EU companies have been associated with adverse human rights and environmental impacts, the goal of CSDD is to establish horizontal framework which would foster the contribution of businesses to the respect of the human rights and environment in their own operations and through their value chains.¹²

⁵ United Nations, Office of the High Commissioner for Human Rights, *Guiding principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 2011, available at <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf> (last access 11.05.2023).

⁶ OECD, *Guidelines for Multinational Enterprises*, 2011 updated edition, available at <https://www.oecd.org/daf/inv/mne/48004323.pdf> (last access 11.05.2023).

⁷ International Labour Organisation ('ILO'), Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 204th Session (Geneva, November 1977) as amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions ('ILO MNE Declaration').

⁸ Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz – LkSG), BGBl. I, 2959 ff, 2021. An English translation is available at the website of the Federal Ministry of Labor and Social Affairs (Bundesministerium für Arbeit und Soziales – BMAS) at <https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=2>. On this topic see G. RÜHL, *Cross-border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act*, in Borg-Barthet, Živković et al (eds), *Gedächtnisschrift in honor of Jonathan Fitchen* (forthcoming 2022), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4024604> (last access 11.05.2023).

⁹ Loi n. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n. 0074 du 28 mars 2017.

¹⁰ At the present moment, the Netherlands, while planning to adopt a law that would encompass different declinations of business' due diligence, however, has already implemented legislation which scope covers only instances involving child labour.

¹¹ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM (2022) 71 final, 2022/0051 (COD).

¹² *Ibid.*, Explanatory Memorandum, pp. 2, 3.

The provisions of the aforementioned Directive are applicable *ratione personae* to the companies which meet the requirements of its Article 2.

More precisely, the company formed in accordance with the legislation of a Member State should comply with the obligations laid down by the CSDD whereas it has more than 500 employees and a net worldwide turnover of more than EUR 150 million in the last financial year. Alternatively, the companies that did not reach said criteria, but had more than 250 employees and had a net worldwide turnover of more than EUR 40 million in the last financial year, are still obliged to carry on the obligations provided by the Directive when at least 50% of this net turnover was generated in so called ‘high impact’ sectors enlisted in Article 2(1)(b) (i) through (iii).¹³

Moreover, the CSDD extends its applicability also to the companies formed in accordance with the legislation of a third country, when the latter generated a net turnover of more than EUR 150 million in the Union market in the financial year preceding the last financial year or, alternatively, generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the Union market provided that at least 50% of it originated from the ‘high impact’ sector.¹⁴

According to the provisions of said Directive, the companies which fall under its scope would need to integrate due diligence into policies,¹⁵ identify actual or potential adverse human rights and environmental impacts,¹⁶ prevent or mitigate potential impacts,¹⁷ bring to an end or minimize actual impacts,¹⁸ establish and maintain a complaints procedure,¹⁹ monitor the effectiveness of the due diligence policy measures²⁰ and publicly communicate on due diligence.²¹

This document’s importance cannot be overestimated. The Directive in question would be crucial in order to fulfill the European Union’s various existing and planned measures. For instance, the CSDD, whereas entered in force, would help to achieve the goals of European Green Deal, as Article 15²² of Directive requires Member States to ensure that certain companies adopt a plan to ensure that the

¹³ *Ibid.*, Article 2(1)(a) and (b).

¹⁴ *Ibid.*, Article 2(2)(a) and (b).

¹⁵ *Ibid.*, Article 5.

¹⁶ *Ibid.*, Article 6.

¹⁷ *Ibid.*, Article 7.

¹⁸ *Ibid.*, Article 8.

¹⁹ *Ibid.*, Article 9.

²⁰ *Ibid.*, Article 10.

²¹ *Ibid.*, Article 11. These public communications would comprehend reports further to those established by Directive 2013/34/EU.

²² *Ibid.*, Article 15.

business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1,5°C in line with the Paris Agreement.²³

DEFINITION OF THE PROBLEMATIC ISSUES

The CSDD is seeking to regulate a very delicate field, where many conflicting legal (and sometimes also political) interests are in balance. On the one hand, it is undeniable that intervention aimed to better protect human rights and avoid negative environmental impact not only within but also outside of European Union through the value chain of European and non-European market operators to which the Directive is applicable *ratione personae* is needed. On the other hand, however, such an intervention may bear a risk of higher costs for companies, distortions in competition and, *in extremis*, it may lead to companies' withdrawal from emerging and developing markets where maintain the internationally accepted level of human rights and environmental protection may appear particularly challenging.²⁴

Apparently, in the light of these considerations European Commission has chosen Directive and not Regulation as a tool of enactment. Since directives normally do not contain provisions that are directly applicable and they must first be transposed into national law, that would probably secure the Council components' major willingness to finally adopt the legislative act. However, this choice of act's form also leads to various difficulties.

Primarily, one of the CSDD's declared purposes is that of avoiding fragmentation of due diligence requirements in the single market and creating legal certainty for businesses and stakeholders as regards expected behavior and liability. Nonetheless, given the need of transposition, the possibility to achieve this goal seems to be quite elusive. In this regard, the broadness of some Directive's provisions must be considered.

Firstly, the obligation of due diligence is required with respect to the companies own operations, the operation of their subsidiaries, and the value chain operations carried out by 'established business

²³ Paris Agreement to the United Nations Framework Convention on Climate Change, December 12, 2015, T.I.A.S. n. 16-1104.

²⁴ On this topic see B. BRUNK, *A step in the right direction, but nothing more – A critical note on the Draft Directive on Mandatory Human Rights Due Diligence*, available at <<https://conflictoflaws.net/2020/a-step-in-the-right-direction-but-nothing-more-a-critical-note-on-the-draft-directive-on-mandatory-human-rights-due-diligence/>> (last access 11.05.2023). See also G. VAN CALSTER, *First analysis of the European Parliament's draft proposal to amend Brussels Ia and Rome II with a view to corporate human rights due diligence*, available at <<https://gavclaw.com/2020/10/02/first-analysis-of-the-european-parliaments-draft-proposal-to-amend-brussels-ia-and-rome-ii-with-a-view-to-corporate-human-rights-due-diligence/>> (last access 11.05.2023); H. KERSTEN, S. RIETVELD, V. VAN 'T LAM, B. BIER, T. BARKHUYSEN, A. ZWANENBURG, *The EU Corporate Sustainability Due Diligence Directive*, available at <<https://www.stibbe.com/publications-and-insights/the-eu-corporate-sustainability-due-diligence-directive>> (last access 11.05.2023).

relationships’,²⁵ where ‘established business relationship’ means ‘*a business relationship, whether direct or indirect, which is, or which is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain*’.²⁶ It is difficult to evaluate all the subjects covered by the duty of due diligence since the term is so ambiguous. It would presumably result in further explanations being provided by single Member States at the time of transposition, which would result in using of different approaches. Moreover, the Council expressed its position in the matter and affirmed to prefer the definition of ‘business partner’ to that of a ‘established business relationship’, since the former has a broader impact and scope. Final implementation of the term ‘business partner’ would clearly make the necessity of introduction of further criteria by national legislators even more urgent.

Secondly, it should be taken into consideration, that for the purposes of the Directive ‘value chain’ ‘means activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company’.²⁷ Activities ‘related to the production of goods or the provision of services’ may encompass a very broad spectrum of operations. Moreover, in the cases of multinational corporations that may have more than 50 000 Tier 1 suppliers, frequently do not even know how long and broad their value chains actually are. In order to make it clearer, the Council Position states that it is desirable to replace the term ‘value chain’ with the phrase ‘chain of activities’. It is debatable whether it fully resolves the interpretational issues.

Thirdly, Article 22 of the Directive gives card blanche to the Member States in laying down the rules of civil liability in cases in which the obligations set forth by the Directive itself are not complied with. Since civil liability suits are one of the main instruments in ensuring the compliance with the CSDD provisions, the potential for substantial differences in the instruments actually adopted by the national lawmakers is particularly relevant.

OBJECTIVES OF THE RESEARCH

In the light of the problematics emphasized above, the Research herein proposed aims to two main objectives to guide its development.

²⁵ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, *supra* note 11, Article 1(1)(a).

²⁶ *Ibid.*, Article 3(f).

²⁷ *Ibid.*, Article 3(g).

First of all, the project is intended to compare the existing and perspective legislations addressing the Corporate Social Responsibility and Value Chains in different European Countries in order to clarify the legal approaches developed and adopted during the last years. The Research intends to provide a matrix framework collecting all major contributions on the theme by said legislation in correlation to the interpretative interactions on a European Union's level and the influence of existing EU instruments on the same or related subjects. This section of the analysis will also include a substantive survey of the most prominent national doctrine and jurisprudence on the point for each State addressed, to ensure that the matrix framework would act as a reliable picture of the existing legal approaches to the subject, highlighting differences and diffused tendency, and relating perspective problematics.

Secondly, also moving from the abovementioned matrix framework, the research will follow the adoption procedure of the Directive in the EU Member States, in order to provide a reliable prevision on the approaches that Countries could reasonably undertake in future in interpreting and applying CSDD.

Ultimately, this Research aims to uncover the existing strengths and vulnerabilities of the multiplicity of legal instruments at EU and national level addressing Social Corporate Responsibility and Value Chain and to try to foresee to which extent the adoption of the Directive will impact such landscape, to the positive and to the negative.

PRACTICAL IMPLICATIONS

The interest demonstrated by public opinion, which translated in a number of different impulses, more and more pervasive, such as international guidelines with possibility to adhere on voluntary basis, insurgence of dedicated national legislations and, finally, the Proposal for the adoption of the Directive, makes it particularly clear how social corporate responsibility is becoming one of the most interesting frontiers for the development of legal sciences. As the new field of interest is opening, the need for a specific competencies and framework instruments to interpret the multiplicity of the legal landscape is becoming more and more significant. Far from pretending to single-handedly fulfill this role, this Research intends to complement the pioneering works on the subject to accelerate and facilitate the creation of said frameworks and competences. This Research would also be of use to the insurgent professional position called to consult multinational corporations on the matter of due diligence and social corporate responsibility.

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