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Improving Corporate Accountability Through Mandatory Human Rights and Environmental Due Diligence

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Abstract. The last decades are indicative of an increasing global attention on the negative externalities that come from business operations: human rights violations and environmental harms related to business operations. Globalization has led to increasingly complex, dynamic and non-transparent global supply and value chains, thus making the burden of protecting human rights and environment even more difficult. The concept of mandatory human rights due diligence has been increasingly endorsed and proclaimed as a necessary solution to address these issues. This research aims to assess the ability of such a regulatory tool to serve as an instrument to protect human rights and the environment throughout the supply chain. The first part dives into examining recent developments in human rights due diligence adopted in the European Union. The second part of the research comprises an indepth assessment of the most recent legislative Draft proposed by the European Commission which aims to introduce an EU-wide mandatory sustainability due diligence corporate duty. The last part is a doctrinal analysis of Corporate Governance which proves its important role in addressing human rights and environmental issues, as it is a tool for integrating the mandatory due diligence into the organisational culture of a business. The assessment of current national mandatory due diligence regulations shows that companies are not incentivized to develop a holistic approach but rather to focus on specific issues that are targeted through legislation. Moreover, they often apply only to certain categories of companies based on domicile or country of operation and number of employees or turnover which leads to fragmentation and discrepancies between states. The European Proposal is revolutionary in many aspects as it introduces a comprehensive human rights due diligence mechanism for companies. However, the provisions of the current draft have many weaknesses and loopholes that are likely to jeopardize the Directive's effectiveness.
Keywords: *mandatory due diligence; corporate accountability; corporate governance; human rights; environmental issues*

1. Introduction

Member States of the United Nations ratified at least one of the nine treaties with binding provisions that have been influenced by the Universal Declaration of Human Rights, committing to defend and respect fundamental human rights and freedoms and to create national mechanisms to prevent violations and abuses. Most developed European companies have published statements showing their concerns regarding human rights and environmental protection and their ambitious efforts in developing and

implementing policies and mechanisms to address the human rights and environmental issues. These official commitments create the illusion that, at least in theory, the major economic actors have understood the importance of respecting human rights and how the consequences of their own actions influence the society and the environment. However, the reality looks completely different.

The last decades are indicative of an increasing global attention on the negative externalities that come from business operations: human rights violations (e.g. forced and child labor) and environmental harms (e.g. land grabbing, global warming, pollution) related to business operations. These adverse impacts are further aggravated by intensive globalization which facilitates integrated economic relations among distant countries and causes companies to have a large number of suppliers and customers in various parts of the world. Consequently, this has led to increasingly complex, dynamic and non-transparent global supply and value chains. In this context where large economic operators have acquired increased power and economic operations have reached a high level of complexity due to the possibilities of carrying out activities in different jurisdictions with more favorable legislation, the protection of human rights and the environment has become much more difficult and has social, political and economic implications.

Currently, there is a lack of a comprehensive framework ensuring uniform implementation of human rights due diligence requirements across European countries. There are several national initiatives on regulating this matter as a result of an increased attention to sustainable corporate behavior. However, regulations usually differ among jurisdictions or cover only specific issues, such as modern slavery or child labor. These current practices are ineffective as they do not provide the incentive for companies to develop a holistic approach rather than to focus on specific issues that are targeted through legislation.

Also, many of the existing mandatory human rights due diligence legislations fail to properly take the complexity of supply chain relations into account and to specify how to deal with complex, international trade chains of large companies, which often have several hundred business partners. It is therefore not clear to what extent companies are required to map out the adverse effects in their entire trade chain and whether human rights and environmental impacts are properly mitigated.

In the light of the realization of such gross violation of human rights that have occurred in supply chains in the last decades and might still occur if the situation is not addressed, it is the concept of **mandatory human rights due diligence** that is glorified as able to close the legal gap in the corporate accountability for human rights abuses. As described in the UN Guiding Principles on Human Rights and Businesses, human rights due diligence refers to "the processes and activities by which businesses identify, prevent, mitigate, and account for how they address their adverse human rights impacts" (UN Office of the High Commissioner for Human Rights, 2011). Thus, European Union's ambition to introduce mandatory human rights due diligence requirements for corporations has received strong support and its release and implementation is eagerly awaited by several actors. This research aims to evaluate the ability of such a regulatory tool to serve as an instrument to protect human rights and the environment throughout the supply chain. Our **aim** is to conceptualize the possible outcome of the introduction of EU legislation on the mandatory duty of due diligence for companies when assessing human rights and environmental impacts of their operations, throughout the supply chain.

2. Research Methodology

The research methods used in this work are doctrinal and comparative. Using doctrinal research methodology, the thesis provides a descriptive and detailed analysis of legal rules in the field of mandatory due diligence found in primary sources (cases, statutes, or regulations) in order to describe the law and provide commentary with regards to it. Furthermore, ambiguities and criticisms of the law have been identified while also offering solutions, where applicable. In addition, a comparative approach has been used in order to assess the laws from different jurisdictions, to find common ground and to determine best practices and solutions.

This work contributes to the literature on due diligence requirements by examining recent developments in human rights due diligence requirements adopted in the European Union. Furthermore,

the second part of the research comprises an in-depth assessment of the most recent legislative Draft proposed by the European Commission which aims to introduce an integrated EU-wide framework on due diligence requirements regarding adverse human rights and environmental impacts.

The main research question is:

Will the introduction of a mandatory EU-wide human rights due diligence legislation create a consistency that benefits its partners and European companies, solving the deficiencies of current national and EU legislation and, thus, preventing further violations of human rights by companies?

3. Results and Discussions

3.1. National and Sectorial Mandatory Due Diligence Legislation

Since the introduction of the UNGPs in 2011 and based on the concept of due diligence enshrined in them, there has been an increasing trend in adopting mandatory due diligence requirements in national legislation and industry standards (British Institute of International and Comparative Law (BIICL) in partnership with Civic Consulting and LSE Consulting , 2020). This tendency is noticed in the growing use of due diligence to establish additional obligations in the field of international environmental law – this time also upon private actors.

These developments happened also due to the existence of strong support from both the civil society and the business community that have been advocating for legislation on responsible business conduct and creating movements worldwide (Figure 3). In the figure below, the European States that have already adopted or commenced several actions in this regard can be observed. While in some of the countries there are already legislative acts in force (e.g. France, Germany and Norway), in other countries there is considerable society action or political processes that are currently in preparation of future legislative deployments. For instance, Switzerland participated in a referendum to determine if the country would amend its constitution to require human rights due diligence from Swiss companies but failed to win the required majority of the country's 26 largely autonomous cantons, or member states (Worden, 2022).

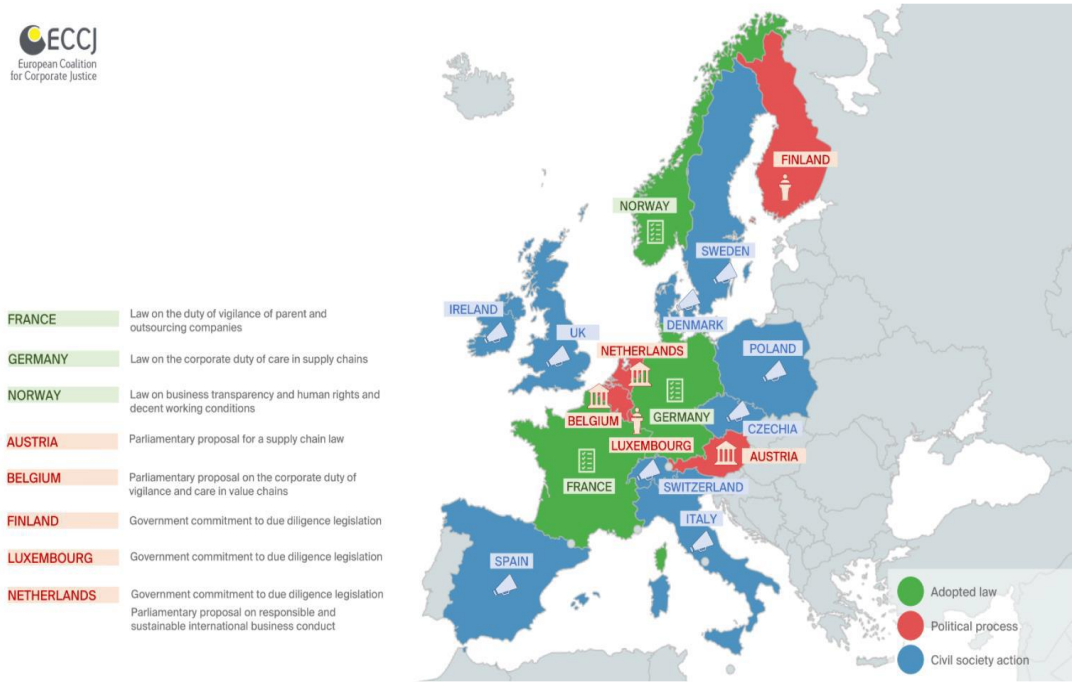

Figure 1. Movements around due diligence legislation
Source: European Coalition of Corporate Justice (2021)

This chapter offers an overview of current relevant events and regulations adopted in some of the European countries regarding human rights due diligence legislation. Furthermore, the efficiency of these regulatory measures as well as their weaknesses are assessed.

3.1.1. French Duty of Vigilance Law

One such domestic legislative measure is the French Duty of Vigilance law that was adopted in 2017. The law introduces a general mandatory due diligence obligation regarding human rights and environmental impacts on large French companies (employing 5000 employees in France, or 10,000 globally). The law specifically states that the duty of vigilance also extends to the activities of French companies' subsidiaries and subcontractors and business enterprises in the supply chain "with which the company maintains an established commercial relationship". This approach shows the transnational application of the law as companies are required to report and monitor on activities which they have conducted outside their national territory, as well.

The law requires companies to set up a "vigilance plan" including adequate measures of identifying risks and preventing serious violations of human rights and the environment. The company's vigilance plan must include "severe impacts on human rights and fundamental freedoms, on the health and safety of persons and on the environment" (Legislative Decree n. 81 Consolidated Text on Health and Safety at Work, 2008, p. para. 3).

Regarding the monitoring and enforcement of the law, the French Vigilance Law does not have a specific monitoring body. However, in case the company breaches its own vigilance obligations, the law provides for the possibility of engaging civil liability under tort law (French Commercial Code, art. 225-102-5). There are three main conditions that have to be fulfilled for civil liability under French tort law. These conditions are: a) "the existence of damage" b) "a breach of or the failure to comply with the vigilance obligation", and c) "a causal link between the damage and the breach" (French Civil Code, art.1240-1241).

As this law is relatively new, there are not yet any court decisions to interpret how the law is being executed by companies in practice. However, various legal actions have been already instituted with regards to the vigilance plan obligation enshrined in the law. More specifically, French NGOs have been using the duties imposed by the French Duty of Vigilance Law to request corporations that are not ambitious enough on their plans and targets to update their vigilance plans. For example, Sherpa and Notre Affaire à Tous together with 14 local authorities sent a formal notice to Total in June 2019 to amend its vigilance plan with regards to its climate change impacts (Notre Affaire A Tous, Sherpa, Les Eco Maires & ZEA, 2019). Total received another formal notice on 25 June 2019 from NGO les Amis de la Terre and Ugandan NGOs for not meeting the requirements of the Law due to their negative impacts on local communities in Uganda.

Having a duty to conduct due diligence so as to avoid adverse human rights violations enshrined in the law opens opportunities for the victims of abuse (either in person or represented by NGOs) to keep corporations accountable for the lack or reduced amount of effort in preventing such situations.

3.1.2. The Dutch Child Labor Due Diligence Law

The Netherlands introduced in May 2019 the Dutch Child Labor Due Diligence Law which is intended to solve the issues of child labor in supply chains. The law obliges companies to publish a statement in which they verify and assert, through the exercise of due diligence, that their goods and services are not being made with the use of child labor. The obligation applies to all companies (Dutch and others) operating in the Netherlands. According to the Act:,, [t]he company that … investigates whether there is a reasonable presumption that the goods and services to be supplied have been produced using child labor, and that draws up and carries out an action plan in case there is such a reasonable presumption, conducts due diligence" (The Netherlands Child Labour Due Diligence Act, art.5(1)). There is no further definition or guidance on to what this due diligence requirement implies.

In comparison to the French Duty of Vigilance Law, this law has wider application, as it includes companies registered outside the jurisdiction of the Netherlands and which supply goods or services to Dutch end-users, even if the Netherlands is not their principal place of business or central administration.

In contrast with the French Duty of Vigilance Law, under art. 1(d) of the Child Labor Due Diligence Act a complaint can be filed with the public supervisor "by any natural or legal person (such as a consumer or competitor) whose interests have been affected by the (in)actions of a company in complying with the provisions of the Act". In case of noncompliance, companies may be fined. (The Netherlands Child Labour Due Diligence Act, art. 7(1-3)).

However, the Act does not include rules with regards to access to remedy for the actual victims of child labor due to the fact that the main aim is to protect Dutch consumers (and not victims of child labor) (British Institute of International and Comparative Law (BIICL) & Civic Consulting and LSE Consulting, 2020). As a result, any remedy with respect to child labor victims would be dependent on general Dutch tort law.

3.1.3. United Kingdom's Modern Slavery Act

The UK Modern Slavery Act was imposed in 2015 in order to tackle the issue of businesses being knowingly or unknowingly complicit to modern slavery related illicit activities. According to section 54 of UK Modern Slavery Act, companies that have a global annual turnover of £36m or more that and are conducting their "business or part of a business" in the UK are obliged to report annually on the measures the company has implemented, if any, in order to assure that slavery and human trafficking practices are not part of their supply chains or of their own business. It is also mandatory to report if no measures have been taken on this matter.

The Act does not specifically mention what should be included in the statement, and does not impose a positive obligation to conduct due diligence. According to the former Home Secretary of UK, Amber Rudd, this Act establishes a transparency mechanism in order to encourage businesses to take serious and effective steps to identify and prevent contemporary slavery which can exist in any supply chain, in any industry. However, even if a company complies with its transparency obligations that does not necessarily mean the company is actively engaging in meaningful actions in order to eliminate slavery practices. This is mainly because the Act is enforcing transparency requirements rather than mandatory due diligence obligations. Nevertheless, the fact that the Act allows companies to state the lack of any existing steps to address modern slavery in their supply chains without facing negative consequences raises serious questions concerning the effectiveness and the power of the Act from the very beginning of his enforcement (NYU Stern Center for Business and Human Rights, 2019). Moreover, the Act only refers to measures taken in relation to slavery, forced labor and human trafficking, leaving other human rights or environmental impacts out of its scope (Macchi & Bright, 2019).

According to section 54(11) of the UK Modern Slavery Act, if a business fails to declare a slavery and human trafficking statement for a particular financial year the Secretary of State is able to file an injunction through the High Court requiring the organization to comply. If the organization fails to comply with the injunction, they will be in contempt of a court order, which is punishable by an unlimited fine. Nevertheless, the independent review of the Act conducted by experts and stakeholders in 2019 (updated in December 2021) stated that "this has not been used and there have been no penalties to date for non-compliant organizations". Moreover, the report concluded that despite the Act's contribution to raising awareness of modern slavery in companies' supply chains, the obligations of the act are often treated as a tick-box exercise, and it is estimated that almost 40 per cent of eligible companies are not complying with the legislation at all (UK Home Office, 2018).

In the UK Government Guidance, it is noted that a statement that an organization has taken no steps towards eradicating modern slavery in their activities may damage the reputation of the business. Further, the Government clearly stated that "it will be for consumers, investors and Non-Governmental Organizations to engage or apply pressure where they believe a business has not taken sufficient steps"

(UK Government, 2021). This shows that the Act is lacking proper enforcement and that by only relying on transparency requirements is hard, or even impossible, to acquire the change in corporate behavior that is desired.

All in all, the lack of guidance, clarity, monitoring and enforcement in this Act is raising questions related to the efficiency and the quality of the Act. The ineffectiveness of the Act especially regarding mitigating human rights violations in the supply chain resides in the essence of a hollow reporting exercise with no state control to it, which is rather left to the civil society and NGOs to monitor and make use of this information. There is no mandatory obligation to undertake real actions, thus, reporting requirements are proven to be only suitable for providing valuable information to investors and consumers, but they are not even remotely the proper means of ensuring an appropriate response in terms of business conduct or of guaranteeing access to justice for victims.

3.2. European Commission's Proposal on Mandatory Due Diligence

Acknowledging the need for a larger scale improvement that seeks to tackle the faults of existing fragmented or voluntary standards, the European Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence on the 23rd of February 2022. The proposal's aim is to stimulate sustainable and responsible corporate behavior throughout global value chains by establishing a corporate sustainability due diligence duty for companies.

More precisely, the requirements the proposal brings out could mean an effective avoidance of adverse human rights and environmental impacts if properly designed and implemented (Business & Human Rights Resource Centre, 2022). However, changing companies' behavior, across all sectors of the economy, entails a synergetic collective effort. Thus, the commitment that companies will show to respecting human rights and to reducing their environmental impact is of equal great importance. Companies' progress in incorporating human rights and environmental due diligence into corporate governance processes remains ultimately at the essence of their capability of understanding and embracing the spirit of the law, rather than just obeying its letter and treating it nothing more than a tick-box exercise (Wilde-Ramsing, et al., 2022).

3.2.1. Personal Scope

The Directive will establish obligations for both EU and non-EU companies operating in the EU, leading to a level playing field where companies of similar size will have to adhere to the same requirements for integrating corporate due diligence in their internal management systems. According to article 2, the companies that are under the scope of the Directive split into two categories: (1) Group 1 companies "with more than 500 employees and a net turnover of more than EUR 150 million generated worldwide in the last financial year" and (2) Group 2 companies "with more than 250 employees and a net turnover of more than EUR 40 million generated worldwide" in only three sectors (textiles, agriculture and extraction of minerals).

Overall, only small percentage of EU-operating businesses would be subject to the proposal's requirements. Even though the range of companies covered under it is wider than the French and the German due diligence laws (ECCJ, 2022), the high thresholds imposed on the turnover and employee number for companies renders it applicable to a small number of very large companies (European Coalition for Corporate Justice, 2022). In the view of several civil society organizations working on corporate accountability, the substantially reduced number of companies covered by the Directive can undermine the Directive's ability to properly mitigate environmental and human rights risks.

3.2.2. Material Scope

Article 1 of the draft Directive limits the scope of due diligence to "a company's own operations, the operations of their subsidiaries and its 'established business relationships.

'Established business relationships' are defined as "lasting' relationships based on the 'intensity' or 'duration of the relationship,' and which are not a 'negligible or merely ancillary part of the value chain" (Corporate Sustainability Due Diligence Directive, Art. 3).
'Business relationships' are defined to include an entity "with which the company has a commercial agreement of some kind or one that 'performs business operations related to the products or services of the company for or on behalf of the company" (Corporate Sustainability Due Diligence Directive, Art. 3).

This limited and rigid approach creates the prospect that in practice the focus of due diligence will be determined not by where the most serious risks and impacts materialize in a company's value chain, but by whether or not a business relationship can be defined as 'established' according to the concept introduced in the Proposal (Shift, 2022). Most likely, this will incentivize companies to search for risks and impacts mainly among their strategic suppliers and other proximate relationships, and to overlook impacts in short, unstable or informal relationships where they are often more severe (Corporate Sustainability Due Diligence Directive, Recitals at (17)).

Furthermore, this narrow scope can incentivize companies to embrace legal or tactical strategies of value chain management which would prevent them from creating business relationships that would come into scope (e.g. avoiding relationships categorized as 'lasting', switch suppliers more regularly).

Thus, using the concept of „established business relationships" to define the scope of the duty to conduct due diligence can be problematic. As a potential solution, the directive should align the scope of the duty with UN and OECD standards and adopt a risk-based approach, under which companies are responsible for any negative impact at any point in their value chain that is connected to companies' operations, products and services, without differentiating between different types of business relationships (Shift, 2022).

3.2.3. Due Diligence Obligations

The proposal lays down general obligations to prevent or mitigate potential abuses and to end or minimize actual ones. Thus, there is a list of specific measures that need to be adopted by corporations in order to comply with those duties. These obligations are:

- Integrate due diligence into the company's policies
- Have in place a due diligence policy that shall contain all of the following:

(a) "A description of the company's approach, including in the long term, to due diligence";
(b) "A code of conduct describing rules and principles to be followed by the company's employees and subsidiaries";
(c) "A description of the processes put in place to implement due diligence, including the measures taken to verify compliance with the code of conduct and to extend its application to established business relationships".

- Identify actual or potential adverse human rights and environmental impacts arising from their own operations or those of their subsidiaries and, where related to their value chains, from their established business relationships;
- Prevent or mitigate (if prevention is not possible) potential impacts that have been, or should have been, identified pursuant to Article 6;
- Bring to an end or minimize actual impacts;
- Establish and maintain a complaints procedure;
- Monitor the effectiveness of the due diligence policy and measures;
- Publicly communicate on due diligence.

3.2.4. Climate Change Obligations

According to the Proposal, Group 1 companies are expected to adopt a climate transition plan in order to ensure alignment with the limiting of global warming to 1.5 °C entailed in the Paris Agreement (Corporate Sustainability Due Diligence Proposal, Art. 15(2)). However, these climate change obligations included in the proposal are rather limited in scope as they do not apply to Group 2

companies in high impact sectors (e.g. extraction of mineral resources) which can create extremely damaging situations for the climate, as well. The narrow scope of these obligations is jeopardizing the ability of the Directive to make a real impact to the global efforts of mitigating climate change (European Coalition for Corporate Justice, 2022, p. 18).

Moreover, the proposal entails the duty to adopt specific emission reduction targets "if climate change is identified as a 'principal' risk or impact of the company". This provision might bring confusion to companies due to a lack of a definition of 'principal risk or impact' in the Directive, and is further narrowing the scope of the obligations. In addition, in Article 15 (2), when referring to the duty to adopt emission reduction targets, the proposal refers exclusively to the climate impacts of "the company's operations", which could be understood as not including indirect emissions. This formulation of the text is further narrowing the scope of the obligations and confusing companies as well, by being opposed to UN and OECD standards and to the conclusion of the Dutch court ruling against Royal Dutch Shell which entail that both direct and indirect emissions should be explicitly taken into consideration (Landmark ruling: Shell ordered to slash CO2 emissions throughout its global value chain, 2021).

Nevertheless, even though including climate change related provisions are an important first step in achieving climate responsible business conduct, they can turn into weak, limited in scope and formal requirements especially due to the fact that the Proposal fails to include methods to hold companies liable for noncompliance (Friends of the Earth Europe, 2022). The civil liability regime enshrined in the provision is applying only for noncompliance with human rights and environmental due diligence obligations and does not apply to the failure to comply with climate transition duties. In addition, this encourages the perpetuation of greenwashing manifested by corporations that will advertise their non-binding climate commitments and fails to ensure that these corporations can be held accountable in courts for their climate disinformation. Thus, the extension of the civil liability regime is necessary "to ensure affected stakeholders can challenge climate plans before courts as well, not only supervisory authorities" (European Coalition for Corporate Justice, 2022).

3.2.5. Director's Duties

The proposal seems to recognize the necessity of involving directors in making due diligence part of the whole functioning of companies (White & Case, 2020). More precisely, art.26 of the proposal introduces directors' duties "to set up and oversee the implementation of due diligence and to integrate it into the corporate strategy". Moreover, when complying with their duty to act in the best interest of the company, directors must consider the human rights, climate change and environmental consequences of their decisions. However, it offers no clarification on how exactly directors are expected to comply with the aforementioned duty of care and specifically what it means to „take into account the human rights, climate change and environmental consequences of their decisions". Therefore, even though this is a valuable addition, the provision needs further clarification in order to be able to create positive effects.

Moreover, one particular concern among NGOs is the lack of a mandatory obligation in linking directors' variable remuneration to their participation to the company's sustainability (Hawker, 2022). Even though in Article 15 regarding climate change obligations for companies, the Directive states that „companies shall duly take into account the fulfillment of the obligations when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability'', it does not require companies to mandatory align incentives. The Directive only states that in the eventuality that a company has already voluntarily linked remuneration with sustainability, then the climate change targets and obligations should be also taken into consideration when evaluating a director's performance. Thus, the fact that aligning variable remuneration to the attainment of sustainability targets is still voluntary and non-binding will cause that this provision will have little effect in practice, due to the fact that companies that haven't already linked remuneration with sustainability are not required to do so (European Coalition for Corporate Justice, 2022, p. 22).

3.2.6. Liability and Enforcement

In terms of enforcement, the Proposal includes provisions establishing two complementary approaches: an administrative liability regime and a civil liability regime. First, it includes the establishment of national supervisory authorities appointed by Member States with the power to request information, investigate and impose sanctions in case of non-compliance. In addition, the Proposal introduces the opportunity for victims to take legal action for damages that could have been avoided with proper due diligence processes by including a civil liability regime.

When it comes to the administrative liability, supervisory authorities are able to check compliance with the Directive's provisions through information requests and investigations. In case of a violation of national provisions concerning the company's due diligence duty, national authorities are required to grant the company concerned time to take remedial action. In addition, they can "order the cessation of the infringement, abstention from any repetition of the conduct and proportionate remedial action, pecuniary sanctions, and interim measures" (White & Case, 2020).

Administrative supervision can definitely be a crucial factor in ensuring wide corporate compliance with due diligence duties, while also having a "key educational and advisory function in supporting companies' understanding of the legal standard that they are expected to meet, which can include developing guidance materials or providing targeted advice to companies" (Shift and OHCHR, 2021). Nevertheless, one of the key components of the administrative supervisory regime is the power of the authorities to apply sanctions in case of non-compliance.

However, the proposal leaves the sanction regime to be established by each Member State at their own volition, without establishing minimum pecuniary sanctions across the European Union. Without proposing a detailed criteria for the establishment of sanctions, the only guidance that the Proposal offers for Member States and Supervisory authorities is that the sanctions regime has to be ''effective, proportionate, and dissuasive, and take into account a company's efforts to comply". This lack of guidance can create huge discrepancies between Member States (European Coalition for Corporate Justice, 2022, p. 19).

The proposed Directive lays down a civil liability regime which is, indeed, a mandatory component of ensuring corporate accountability, advancing judicial remedy for victims and incentivizing compliance. Under this regime, remedy is owed directly to those affected (the victims) and can be obtained by filing private legal proceedings in courts (Shift and OHCHR, 2021). However, it is still not clear if victims of corporate abuse will be able to properly obtain judicial remedy, partly because of the challenge to prove in court the company's infringement of its duties, and partly because of the challenge to prove "the causal link between the violation of a human right or environmental standard and the harm suffered by the victim" (White & Case, 2020).

To conclude, the complementary approach consisting of both the administrative liability regime and civil liability regime could be a smart mix in attempting to ensure proper corporate accountability for human rights and environmental harms. On one hand, enforcement through administrative supervision can be effective on a large scale and scope as it can address a larger number of companies and throughout the entire value chain, not only those giving rise to liability (Shift and OHCHR, 2021). On the other hand, the civil liability regime is giving victims a venue to hold specific companies accountable and to ask for remedies.

3.3. Relationship Between Mandatory Due Diligence and Corporate Governance

"It is very important that European companies demonstrate the highest responsibility, both towards their employees and shareholders, and towards society in general. Corporate governance and corporate social responsibility are key elements for building citizens' trust in the single market. They also contribute to ensuring the competitiveness of European businesses, as well-run and sustainable businesses are the most highly rated" (European Commission, 2011). With this statement, the European Commission

enshrines the strong relationship between the financial performance of corporations and their responsibility towards human rights and the environment. Also, corporate governance is considered a "key element" in solving problems of the nature of human rights and environmental protection.

To fulfil its responsibility to protect human rights within the meaning of the provisions of the Guiding Principles on Business and Human Rights, any company must show due diligence regarding human rights protection in the economic activity carried out. To be effective, this duty of care should be embedded in the organizational culture through effective leadership, which is strongly based in corporate governance. Therefore, the real protection of human rights by a company can only be carried out by integrating the duty of care into corporate governance (Sherman, 2021, p. 1).

Traditionally, corporate governance has been defined as a system by which companies are managed and controlled or as a set of relationships between management, the board of directors, shareholders and other stakeholders (The Committe on the Financial Aspect of Corporate Governance, 1992, p. 15), also referring to the norms and practices by which the board of directors ensures accountability, fairness and transparency in the company's relationship with any interested party (Mihaila & Radvan, 2018, p. 55).

The initial version of the Corporate Governance Principles was published by the Organization for Economic Co-operation and Development in 1999 and has since become an international reference point for policy makers, investors, corporations and other stakeholders. Following an extensive revision and adaptation process that led to the publication of new editions of the OECD Principles in 2004 and 2015 respectively (OCDE, 2015, p. 3), they now reflect the global consensus on the importance of good corporate governance in the efforts to revitalize and stabilize the economy and, indirectly, society (Jesover & Kirkpatrick, 2005, p. 2).

Corporate governance has an important role in solving or mitigating human rights and environmental issues, by being a genuine tool for integrating the due diligence obligation of companies. In this sense, the role of corporate governance is to draw a clear and practical direction for the company, establishing rules, procedures, objectives, strategies, and explicit responsibilities for the organization and for each management and supervisory body, so that the mandatory due diligence to be fulfilled to the standards imposed by the European Union.

4. Conclusions

This research aimed to analyze whether we can achieve proper protection through mandatory due diligence. Starting from the hypothesis that until this moment, the solutions proposed by the legislators have not achieved the desired result, and the mandatory due diligence might be just an illusion, this paper analyzed the current state of the due diligence national legislation. The analysis of different legal instruments has revealed that states and the EU have not used the potential of regulatory force to properly attain human rights and environmental protection.

Another central objective of the research was the Proposal for a Directive of the European Parliament and of the Council on mandatory due diligence. The research revealed that the European Proposal is revolutionary in many aspects as it introduces a comprehensive human rights due diligence mechanism. However, the provisions of the draft have many weaknesses and loopholes that are likely to jeopardize the Directive’s effectiveness.

This paper also offered a brief analysis of the concept of corporate governance, aiming to examine the relationship of this concept with the mandatory due diligence. Finally, the study showed that corporate governance has a special role in solving or reducing human rights and environmental issues, by being a genuine tool for integrating the mandatory due diligence.

Strengths of the European Proposal

The European Commission’s Proposal finally recognizes that corporations are responsible for, besides their own operations, for their subsidiaries as well as their direct and indirect suppliers. This recognition could be particularly relevant for bringing cases to Court against parent companies which have responsibility for the acts and omissions of their subsidiaries abroad when they relate to negative

human rights and environmental impacts. In addition, the Proposal includes an obligation for Group 1 companies to adopt a plan asserting that their business model and strategy are compatible with a transition to a sustainable economy and with the Paris Agreement in terms of limiting global warming to 1.5 °C. The plan would have to identify the extent to which climate change is a risk for, or an impact of, a company's operations, as well. This disclosure requirement can be a strong driver to push companies to adopt ambitious climate policies. This is going to be creating an additional tool for society in steering corporations to be more sustainable by supervising how this obligation is implemented especially by fossil fuel corporations, while also being aware of greenwashing.

Furthermore, the Proposal specifically included among the rights that need to be respected by corporations in complying with their due diligence obligations: "the people's right to dispose of a land's natural resources and to not be deprived of means of subsistence", "the prohibition to unlawfully evict or take land, forests and waters when acquiring, developing or otherwise use land, forests and waters, including by deforestation" and "the indigenous peoples' right to the lands, territories and resources which they have traditionally owned or occupied". The recognition of these rights as mandatory for corporations to respect when pursuing their activities gives more grounds and legitimacy for non-governmental organizations to ask for the fulfillment and respect of indigenous' peoples' rights whenever corporations are violating them. This could be of particular importance in cases concerning the protection of indigenous peoples' rights in the mining and extractive sector, where corporations often damage the land and houses of local people as a result of hydrocarbon exploration and production activities in the proximity of their lands. Moreover, this recognition is also highly relevant for the adverse impacts in the field of deforestation in global supply chains, and large-scale imports of deforestation goods into the European Union. Considering that the European Union is one of the largest importers of products resulting from illegal deforestation, importing large amounts of soy, beef, leather and palm oil grown on land illegally cleared of forests in the tropics, the express prohibition to unlawfully evict or take land, forests and waters when acquiring, developing or otherwise use land, forests and waters, including by deforestation could be used by non-governmental organizations in order to intimidate companies well known for such practices, supervise how these corporations put in place due diligence practices that would ensure fulfilment and protection of these rights and last but not least, use the recognition of these rights as a legal basis in Courts to motivate corporate accountability.

With regards to the liability regime, the Commission introduces a mechanism of two systems for liability: A civil liability regime and an administrative enforcement system that would include sanctions applied at national level by national authorities. The civil liability regime is of particular importance for victims as it opens up possibilities for suing corporations if they did not comply with their obligations enshrined in Article 7 and 8. Communities together with NGOs could supervise in what way corporations are fulfilling their obligations and intimidate companies with the possibility of starting proceedings in courts.

Advocacy opportunities to strengthen the European Commissions' Proposal

After entering European Parliamentary and Council negotiations, the draft can create an opportunity for debate to ensure the final law effectively protects the rights of workers and communities along global value chains. In order to further strengthen its provisions, the following recommendations are suggested:

- Extending the scope of the due diligence duty to SMEs operating in high-impact sectors and to medium and large financial undertakings falling into the category of Group 2 companies (more than 250 employees but less than 500 employees and an annual turnover between EUR 40-150)
- Aligning the scope of the duty with UN and OECD standards and adopt a risk-based approach, under which companies are responsible for any negative impact at any point in their value chain that is connected to companies' operations, products and services, and not only for the negative impacts occurring in their 'established business relationships'
- Extending climate change obligations also to Group 2 companies operating in high impact sectors

- Extending the civil liability regime also to the failure to comply with climate change related obligations (not only for failure to comply with Article 7 and Article 8)
- Including a mandatory obligation for companies to align director's remuneration with performance regarding sustainability

Can we achieve proper protection through mandatory due diligence?

The realm of relations and contracts throughout the supply chain is an overwhelmingly thing to control. Without the proper incentive, monitoring the entire spectrum of activities and adverse implications over the value chain is very easy to overlook due to the complexity and difficulty of the relations that it implies. Whether mandatory human rights due diligence is the proper incentive in this case is not an easy task to determine. However, the preventive requirements of conducting due diligence are at least trying to require common sense analysis on how to organize and manage value chain relations in order to convert them into manageable units.

In the end, it cannot be doubted that each of the actors in the value chain can properly see only part of the picture. The supplier sees one, the intermediate another, the producer a third, the merchant a fourth, the consumer a fifth and so on. Value chain knowledge and power is rarely contained in one party nowadays. There is not a party that is or can be in charge of everything. However, in the face of such complexity, the power resides in the relationships created between each other and the leverage that can be exercised because of the position acquired in the chain. Mandatory due diligence is about exploiting that position and pushing everyone to do their part.

Nevertheless, between the legal theory and proper human rights and environmental protection there will always be a gap. No system of law can comprehend the complexity enshrined in human experience and relations intertwined with business exploitation. In the quest of designing perfect law systems, we should not overlook our ability to make moral judgements. The regulatory crowding-out effect shows that when there are much more dense rules, people stop thinking about the consequences of their behavior as they start to think only about the compliance with those rules. Social norms, such as feelings of guilt and responsibility, are replaced by the feeling that if there is compliance with the due diligence standard required by law, any additional actions are not needed. Moreover, companies will not act out of responsibility and intrinsic motivation anymore but out of the need to comply with the rule like any other. In our constant struggle to design flawless systems, we end up being shallow human beings that don't use their cognitive skills and judgment abilities anymore. However, the duty to avoid adverse environmental and human rights abuses ultimately remains the province of moral judgement.

By all means, mandatory human rights due diligence is a very good asset to the legal system. However, it is not sufficient by itself to solve the social issue of businesses oppressing humans and the environment. We want to encourage businesses to do more, not just because they are legally obliged to, but also because they recognize it is the right thing to do, because they have acquired the moral responsibility of being accountable for their actions – is that possible though? That could be indeed, an interesting matter for future research after some years of implementation of mandatory due diligence mechanisms.

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