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The Road to Mandatory Due Diligence: Tracing the EU Directive's Legislative Journey

O caminho para a obrigatoriedade do dever de diligência das empresas em matéria de sustentabilidade: traçando o percurso legislativo da diretiva da UE

Ricardo Fernandes*

Abstract: International and EU law contain many instruments designed to protect human rights and the environment, each different in nature and imposing (or not) different obligations. In order to provide a legal context for the discussion on a Directive on Corporate Sustainability Due Diligence, this paper briefly analyses some of these instruments. The political context in the Institutions of the European Union will also be outlined. Finally, we will discuss the need for new legislation on this issue from the Union's perspective.

Keywords: Corporate Sustainability; Due Diligence; legislative context; political context.

Resumo: O Direito Internacional e o Direito da União Europeia dispõem de diversos instrumentos voltados à proteção dos direitos humanos e do ambiente, que se distinguem quanto à sua natureza jurídica e ao grau de obrigatoriedade das normas que estabelecem. Com o objetivo de fornecer um enquadramento jurídico à discussão em torno da Diretiva relativa ao dever de diligência das empresas em matéria de sustentabilidade, este artigo analisa brevemente alguns desses instrumentos. Também se examina o contexto político e interinstitucional da União Europeia, no âmbito do processo legislativo em curso relativo à Diretiva. Por fim, nesse contexto, discute-se a necessidade de uma nova legislação europeia sobre o tema, a partir da perspectiva da própria União.

Palavras-chave: Sustentabilidade Corporativa; diligência devida; contexto legislativo; contexto político.

Summary: 1. Introduction; 2. At international level; 3. At EU level; 3.1. Non-legislative acts; 3.2. EU Legislative Acts; 4. A new supply chain due diligence instrument; 4.1.

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Horizontal approach with supply chain due diligence? 4.2. What kind of instrument? 4.3. At national level – Corporate sustainability due diligence; 4.4. Fragmentation of the internal market; 4.5. Proportionality; 4.6. Non-discrimination; 4.7 Freedom of establishment; 4.8 Approximation of provisions regulating the internal market, 5. EU strategic autonomy; 6. The political process; 7. Conclusion.

1. Introduction

The starting point for a discussion on a legislative act of the European Union on corporate sustainability due diligence has to be the recognition that economic activities are necessary for human existence, but they can also negatively impact human rights and environment. We can think of several ways in which economic actors' impact on human rights such as forced labour, child labour, inadequate health and safety at work, and exploitation of workers. Environmental issues include greenhouse gas emissions, pollution, loss of biodiversity and degradation of ecosystems. From an economic perspective, the negative consequences of an activity may represent externalities that are borne by third parties, society as a whole or the planet, while the profits remain private. While some prominent economists and thinkers in these areas, including Milton Friedman, emphasized the role of corporations in maximizing shareholder value¹, Amartya Sen, advocated for a broader perspective that considers the impact of economic activities on society as a whole².

It is well known that those who reap the benefits (such as profits) should bear the consequences of their activities (externalities). Scholars and economists who have contributed to the development of this idea include Arthur Pigou, who introduced the concept of externalities in the early 20th century. Pigou argued for the need for government intervention to correct market failures caused by externalities³.

The idea of creating new obligations is to ensure that companies covered by the law, as well as their supply chains, activities related to sales, distribution and transport, including in third countries, comply with international best practice on human and environmental issues.

¹ MILTON FRIEDMAN, The Social Responsibility of Business Is to Increase Its Profits, in *Corporate Ethics and Corporate Governance*, Walther Ch Zimmerli, Markus Holzinger, Klaus Richter (eds.), Berlin, 2016. Available in (last consulted on 11th March 2024).

² AMARTYA SEN, *Development as freedom*, Oxford, 1999.

³ WILLIAM J. BAUMOL, *On Taxation and the Control of Externalities*, "The American Economic Review", 62(3), 1972, pp.307–322.

In a globalised economy, it would not be fair to apply environmental or human rights rules only to economic actors located inside the European Union Member States, as this could give an unfair advantage to those outside the Union who could produce and export to the Member States without the same burdens as those producing in the Union. New legislation can contribute to a level playing field for companies inside and outside the Union.

Although this raises interesting questions about the extraterritorial application of European Union law (one can imagine cases where a European company to which the law applies may have to fulfil certain obligations towards suppliers of third country companies when importing goods or services), this issue will not be discussed in this paper⁴.

This article discusses the background to new European Union legislation on corporate sustainability due diligence: the legislative and political context. We will briefly look at the international instruments that serve as a source for the European Commission's proposal in terms of what the legislation considers to be a negative impact⁵ that needs to be addressed. We will not go into detail on these instruments, as they are analysed in great detail in other books and research papers.

Next, we will look in more detail at the European Union instruments (non-legislative and legislative, as well as some instruments that are already in the legislative process and not yet in force) related to human rights and environmental protection. The analysis will not be exhaustive, but we will try to focus on the relationship between different instruments and the corporate sustainability due diligence law at European Union level.

Following this analysis, and still at European Union level, we will look at whether, even with the instruments we discuss, another horizontal instrument is needed. Is this instrument needed at European Union level or would it be appropriate to leave the decision to the Member States, in accordance with the principle of subsidiarity? Then, before concluding, the paper will discuss the proposal made by the European Commission and the legislative process within the Institutions so far. Given the elements presented, it will be concluded that the proposed legislation in this area will help close the circle on the issue. The debate on the economic advantages or disadvantages of this legislation from a European Union perspective is left to scholars of law and economics.

⁴ On this issue: LENA HORNKOHL, *The Extraterritorial Application of Statutes and Regulations in EU Law*, "MPILux Research Paper", 1, 2022. Available here (last consulted on 11th March 2024).

⁵ The proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 of 23rd February 2022 is available here (last consulted on 11th March 2024).

2. At international level

The way to address human rights and environmental issues is to mitigate or eliminate these negative impacts. But how?

At the international level, there are several instruments that seek to address or mitigate the negative impacts of economic activity on human rights and the environment, such as the United Nations' Sustainable Development Goals⁶, the Organisation for Economic Co-operation and Development's Due Diligence Guidance for Responsible Business Conduct⁷, the International Labour Organisation's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy⁸, or the United Nations' Guiding Principles on Business and Human Rights⁹, among many others. These Guiding Principles are now informing the development of national and supranational hard law requirements in a growing number of jurisdictions. However, their global reach must be balanced by their non-binding nature. The European Commission's proposal relies on these and other instruments to guide the performance of economic operators. In fact, the legislative proposal from the Commission comes with an annex containing the description of several international law instruments: "The lists contained in the Annex specify the adverse environmental impacts and adverse human rights impacts relevant for this Directive, to cover the violation of rights and prohibitions including the international human rights agreements (Part I Section 1), human rights and fundamental freedoms conventions (Part I Section 2), and the violation of internationally recognised objectives and prohibitions included in the environmental conventions (Part II)"¹⁰.

3. At EU level

3.1. Non-legislative acts

The European Union has been addressing human rights and environmental concerns in a number of ways, within the limits of the Union's powers as defined by the Treaties and the European Court of Justice. At the non-legislative level, the

⁶ The United Nations dedicated website is available here (last consulted on 12th March 2024).

⁷ Available here (last consulted on 12th March 2024).

⁸ Available here (last consulted on 12th March 2024).

⁹ Available here (last consulted on 12th March 2024).

¹⁰ Point 5 of the Explanatory Memorandum of the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 of 23rd February 2022 is available here (last consulted on 11th March 2024).

European Union has developed a number of instruments aimed at mitigating or eliminating the negative impacts of the activities of economic operators. One can think of Commission communications such as the European Union communication on decent work worldwide¹¹ or the European Union strategy on combating trafficking in human beings 2021-2025¹². The European Union communications do not have a binding legal value but they certainly outline future policies, such as the last one mentioned which foresees a legislative proposal on corporate sustainability due diligence.

The European Council has also produced conclusions on these issues, such as the European Union strategy on the Rights of the Child¹³ or the European Union action plan on human rights and democracy 2020-2024¹⁴. These conclusions “do not intend to have legal effects. The Council uses these documents to express a political position on a topic related to the European Union’s areas of activity. These types of documents only set up political commitments or positions – they are not foreseen in the treaties. Therefore, they are not legally binding”¹⁵.

3.2. EU Legislative Acts

In this section, we will summarise some of the legal instruments that the EU already has in place to address human rights or environmental concerns:

- Directive 2011/36/EU of the European Parliament and of the Council of 5th April 2011, on preventing and combating trafficking in human beings and protecting its victims.

This Directive sets up a broadband legal framework to fight all forms of exploitation in the Union, in particular forced labour, sexual exploitation, begging and slavery.

¹¹ European Commission, *EU Communication on decent work worldwide*, 23rd February 2022. Available here (last consulted on 11th March 2024).

¹² , European Commission, *EU Strategy on Combatting Trafficking in Human Beings*, 14th April 2021. Available here (last consulted on 11th March 2024).

¹³ European Council, *EU Strategy on the Rights of the Child*, 9th June 2022. Available here (last consulted on 11th March 2024).

¹⁴ European Council, *EU Action Plan on Human Rights and Democracy 2020-2024*, 18th November 2020. Available here (last consulted on 11th March 2024).

¹⁵ Information obtained from the website of the Council. Available here (last consulted on 11th March 2024).

- Directive 2009/52/EC of the European Parliament and of the Council of June 18th, 2009, providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals (employers sanctions Directive)

This European Union law instrument excludes the employment of victims of traffic and other irregular staying third countries nationals.

- Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27th November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937

This legislation aims to ensure that products made with forced labour are banned from the internal market. The European Parliament states that “National authorities or, if third countries are involved, the Commission, will investigate suspected use of forced labour in companies’ supply chains. If the investigation concludes that forced labour has been used, the authorities can demand that relevant goods be withdrawn from the European Union market”¹⁶. Brussels gains a central role in investigating forced labour outside the European Union, while Member States will investigate suspicions when situations occur on their territory.

- Regulation (EU) 2023/956 of the European Parliament and of the Council, of 10th May 2023, establishing a carbon border adjustment mechanism

With this recent legislation “EU importers will buy carbon certificates corresponding to the carbon price that would have been paid, had the goods been produced under the EU’s carbon pricing rules. (...) [the instrument] will help reduce the risk of carbon leakage by encouraging producers in non-EU countries to green their production processes”¹⁷.

¹⁶ Available here (last consulted on 11th March 2024).

¹⁷ *European Commission Carbon Border Adjustment Mechanism: Questions and Answers*, 2021. Available here (last consulted on 13th March 2024).

- Directive (EU) 2022/2464 of the European Parliament and of the Council, of 14th December 2022, amending Regulation (EU) 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting

With this instrument, large companies “need to disclose information on their risks and opportunities arising from social and environmental issues, in order to help investors, civil society and consumers to evaluate the sustainability performance of the companies”¹⁸.

- Regulation (EU) 2019/2088, of the European Parliament and of the Council, of November 27th 2019, on sustainability-related disclosures in the financial services sector (sustainable finance disclosure Regulation).

Regulation (EU) 2019/2088 is a legal instrument that aims to promote sustainability in the financial services sector, by requiring financial market participants and financial advisors to disclose information about the environmental and social impact of their investments. This regulation helps investors make more informed decisions by providing them with information on how sustainable their investments are.

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

The taxonomy Regulation is a framework developed by the EU to establish a classification system for sustainable economic activities. It creates a classification system establishing a list of environmentally sustainable investments. It aims to provide clarity on what can be considered environmentally sustainable, helping investors, businesses, and policymakers make informed decisions that support sustainability goals. The taxonomy covers a range of sectors, including energy, transportation, agriculture, and more, by defining criteria for activities that contribute to environmental objectives.

¹⁸ *European Commission. Corporate sustainability reporting*, 2022. Available here (last consulted on 13th March 2024).

- Regulation (EU) 2023/1115, of the European Parliament and of the Council, of 31st May 2023, on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation, and repealing Regulation (EU) No 995/2010 (deforestation-free supply chain)

The EU's new deforestation Regulation requires companies trading in cattle, cocoa, coffee, oil palm, rubber, soya and wood, as well as products derived from these commodities, to conduct extensive due diligence on the value chain to ensure the goods do not result from recent (post December 31st, 2020) deforestation, forest degradation or breaches of local environmental and social laws¹⁹.

- Regulation (EU) 2023/1542, of the European Parliament and of the Council, 12th July 2023 (batteries Regulation)

The new batteries Regulation 2023/1542 covers the whole lifecycle of batteries, from production to reuse and recycling. It is divided into 14 chapters and addresses topics including sustainability (sustainable design and production of batteries), recycling, responsible sourcing (sets minimum requirements for supply chain due diligence disclosures), carbon footprint reduction, European battery market competitiveness and extended producer responsibility (reinforcing the obligations of battery producers by holding them accountable for the environmental impacts across the lifecycle of their products).

- Regulation (EU) 2017/821, of the European Parliament and of the Council, of 17th May 2017, laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (conflict minerals Regulation)

The conflict minerals Regulation sets a regulatory framework aimed at addressing the issue of conflict minerals, which are minerals sourced from conflict-affected and high-risk areas where revenues may be fuelling armed conflict and human rights abuses. The regulation requires companies importing tin, tantalum, tungsten, and gold into the EU to carry out due diligence to identify and address those risks.

¹⁹ Available here (last consulted on 11th March 2024).

- Regulation (EU) 2024/1781 of the European Parliament and of the Council of 13th June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Directive (EU) 2020/1828 and Regulation (EU) 2023/1542 and repealing Directive 2009/125/EC

This initiative, presented by the European Commission in March 2022, revises the eco-design Directive. This Institution says that “Consumers, the environment and the climate will benefit from products that are more durable, reusable, repairable, recyclable, and energy-efficient. The initiative will also address the presence of harmful chemicals”²⁰. The initiative requires a mandatory sustainability information disclosure in the form of a digital passport and new EU rules for public procurement.

4. A new supply chain due diligence instrument

4.1. Horizontal approach with supply chain due diligence?

As we have seen, the European Union has a range of instruments, from non-legislative to many legally enforceable mechanisms, aimed directly or indirectly at protecting human rights and the environment at European Union level. The question was whether this was enough. The mentioned instruments address human or environmental rights in a direct or lateral, broad or specific sectoral way, with consequences within the European Union or for third countries (extraterritorial effect). However, no instrument was able to address the issue of supply chains in a broad approach. As a consequence, in the European Union strategy on combatting trafficking in human beings, the Commission foresaw a new legislation on corporate due diligence.

Do we need a horizontal approach to supply chain due diligence? From a logistics perspective, the legislators have to prove that it is more beneficial to legislate on the issue than to not act.

Public debates have questioned the consequences of globalisation without concern for human and environmental rights. Rana Plaza was one of the events that raised public awareness of the impact of products bought by consumers in one part of the world (for example, a European Union Member State) on another

²⁰ Available here (last consulted on 11th March 2024).

region (for example, Asia). The collapse of the eight-floors commercial building in Bangladesh, built without proper permits, and used by the Irish brand Primark, raised awareness among public opinion and academics such as Wieland and Handfield²¹. These authors began to discuss the need to regulate supply chains.

Awareness of the problem created a sense that there was a need to accelerate the pace of environmental change and human rights concerns. There was a need for legislative action.

4.2. What kind of instrument?

Then another question arose: Would this be a mechanism at European Union level or at Member States level? If it is decided that the main subject of the proposal can be included in the internal market framework, according to Article 4(2)(a) of the Treaty of Functioning of the European Union, it can be concluded that it would be a shared competence between the European Union and the Member States. This article must be coordinated with Article 5(3) Treaty of the European Union, which refers to the principle of subsidiarity: “In areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”. Will this be the case for corporate sustainability due diligence?

4.3. At national level – Corporate sustainability due diligence

There are many examples of third countries that already have mechanisms in place to address human and environmental rights issues. On child labour and slavery, the United Kingdom or Australia come to mind. Japan, on the other hand, has finalised the Guidelines on Respecting Human Rights in Responsible Supply Chains (2022)²², which are the first in that region but are still non-binding. United States companies are subject to various federal and state laws and regulations relating to human rights and environmental issues (air and water quality, endangered species). Child labour and slavery are addressed in California. On a different level,

²¹ ANDREAS WIELAND / ROBERT HANDFIELD, *The Socially Responsible Supply Chain: An Imperative for Global Corporations*, “Supply Chain Management Review”, 17(5), 2013, pp. 22-29.

²² *Guidelines on Respecting Human Rights in Responsible Supply Chains*, 2022. Available here (last consulted on 11th March 2024).

under certain circumstances, victims of violations of norms of international law are able to present civil actions for damages against the perpetrators in the United States under the United States Alien Tort Claims Act²³.

In the European Union, there are some national examples with a broader view of human rights and the environment. One can think of France (Loi relative au devoir de vigilance, 2017²⁴), Germany (Sorgfaltspflichtengesetz, 2021²⁵) with a horizontal due diligence law, or Belgium, Netherlands, Luxembourg and Sweden which had legislative processes underway but stalled, perhaps waiting for a common system at European Union level.

4.4. Fragmentation of the internal market

All Member States declare their intention to respect existing international standards (United Nations Guiding Principles on Business and Human Rights and Organisation for Economic Co-operation and Development Standards for Responsible Business Conduct). However, in practice there may be some differences in the implementation of these standards. A situation in which some Member States have systems in place with different characteristics, while other Member States have not seen the need to legislate on due diligence obligations, creates fragmentation in the internal market.

Indeed, there are several consequences for economic operators and the Union as a whole. The fragmented situation leads to additional costs or complexity for companies, as they have to spend time and financial resources to comply with administrative burdens in each Member State. The simple fact that economic agents wishing to operate in more than one Member State need to understand whether they fall within the scope of a Member State's legislation on due diligence obligations creates an additional administrative burden for investors. It may be necessary to engage legal expertise in each Member State where the requirements would be different. The scope of persons covered, the substantive due diligence requirements, the enforcement regimes and the related duties of directors are divergent and may become even more so in the future.

²³ About this subject, see J. ROMESH WEERAMANTRY, *Time limitation under the United States Alien Tort Claims Act*, "Revue Internationale de La Croix-Rouge/International Review of the Red Cross", 85(851), 2003, pp. 627–636.

²⁴ Loi n.° 2017-399 du 27 mars 2017, relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 2017. Available here in French (last consulted on 11th March 2024).

²⁵ *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*, 2021. Available here in German (last consulted on 11th March 2024).

Another consequence of this fragmentation is the cross-border impact. If an economic operator is subject to stricter obligations in its home Member State, it may move to another Member State where it is subject to weaker obligations or no due diligence at all. Think of pollution, for example. As a result, the Member State without due diligence will attract more investment in what can be called a race to the bottom. These investors, who move to a Member State because of its lack of standards or softer standards on environmental, social or human rights due diligence in their value chain, will be able to import goods or services into the Union without carrying out due diligence in the supply chain. However, as economic operators benefit from the freedoms of the internal market, these goods or services may well end up in Member States with due diligence obligations, which could be described as unfair competition between economic operators from Member States with and without due diligence obligations.

Indeed, goods and services should move freely within the European Union and in order to combat unfair competition (distortion of competition) and to promote a level playing field due to services or goods from third countries, Member States may adopt measures that would constitute obstacles to free movement. Non-existent or divergent national legislations in the Union leads to disruption of the internal market.

4.5. Proportionality

We have already discussed the principle of subsidiarity (Article 5(3) Treaty of the European Union) but one cannot escape discussing as well the principle of proportionality (Article 5(4) Treaty of the European Union): “The content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties”. The proposal shall not be broader than the necessary to achieve its objectives.

4.6. Non-discrimination

Can this fragmentation of the internal market be justified under the principle of non-discrimination? European Union law uses the Aristotle standard: Respect for the principle of equal treatment requires that comparable situations should not be treated differently and that different situations should not be treated in the same way unless such treatment is objectively justified.²⁶

²⁶ See Judgment of 19 October 1977, *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. Contre Hauptzollamt Hamburg-St. Annen; Diamalt AG v Hauptzollamt Itzehoe*, Joined Cases

As we have seen, there are legal instruments at Union level that address human rights and environment. But these instruments are not broad. They deal with specific sectors, such as the carbon border adjustment mechanism, which deals with the problem of carbon. So, there is a need to treat all sectors of activity in a non-discriminatory way. However, there may be sectors of particular concern that need more attention and special rules, but that's justified by the high risk to human and environmental rights.

4.7. Freedom of establishment

Article 50(1) Treaty of Functioning of the European Union, and in particular Article 50(2)(g) Treaty of Functioning of the European Union – referring to the freedom of establishment – provide for the Union's competence to act in order to attain freedom of establishment as regards a specific activity, in particular “by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or forms within the meaning of the second paragraph of Article 54 Treaty of Functioning of the European Union with a view to making such safeguards equivalent throughout the Union”.

The European Commission understood this norm as a legal basis to move forward with a legislation on corporate sustainability due diligence. In fact, making such protection equivalent, as stated in the text of the law, may constitute a protection of interests of companies. “Recourse to this provision is possible if the aim is to prevent the emergence of current or future obstacles to the freedom of establishment resulting from the divergent development of national laws”²⁷. This understanding is reinforced with the idea that the Directive covers corporate directors' duties and corporate management systems to implement due diligence.

4.8. Approximation of provisions regulating the internal market

On the other hand, the European Commission bases the proposal on the obligations given by the Treaties to the European Parliament and the Council to approximate the legislations (and other provisions) related to the establishment and functioning of the internal market (Article 114 Treaty of Functioning of the European Union).

117/76 & 16/77, EU:C:1977:160, para. 7 (the first limb of this formula is the most classic expression of the principle, but the second limb is also of practical relevance).

²⁷ Point 2 of the Explanatory Memorandum of the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 of 23/2/2022 is available here (last consulted on 11th March 2024).

5. EU strategic autonomy

In the beginning of her term in 2019, President von der Leyen announced a “geopolitical Commission”²⁸. The will to have a stronger Union on the global stage came at a time of tensions caused by the rise of China and the election of President Trump in the United States. The geo-economic competition and the consequent geopoliticisation of trade and investment led, for example, to the use of economic instruments by China. The European Commission’s 2021 Trade Policy Review²⁹ has developed the concept of Open Strategic Autonomy. In short, this concept envisages an EU that cooperates in the multilateral forum when possible, and acts autonomously when necessary.

At the EU level, in addition to the above-mentioned mechanisms tackling directly human rights and the environment, other instruments took shape contributing to the EU’s strategic autonomy. These instruments are indirectly connected to the respect of human rights and environment.

Perhaps more distant from a direct relationship with the prevention or protection of human or environmental rights than the instruments we have just analysed, there are several other initiatives that we can relate to this issue in an indirect way.

- Regulation (EU) 2019/452, of the European Parliament and of the Council, of 19th March 2019, establishing a framework for the screening of foreign direct investments into the Union

The Directive on screening of foreign direct investments into the Union is a framework established by the European Union to create a mechanism for the screening of foreign investments that may affect security or public order within the bloc. The Directive aims to ensure that foreign direct investments do not pose risks to critical infrastructure, technologies, or sensitive information in the European Union Member States.

Under this Directive, while keeping authority to review and potentially block foreign investments that raise concerns about security or public order in the Member States, European Union countries have ways to cooperate regarding the potential harmful effects of third countries investments into the Union. By implementing

²⁸ European Commission, *The von der Leyen Commission: for a Union that Strives for More*, Press Release, 10th September 2019. Available here (last consulted on 11th March 2024).

²⁹ European Commission, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy. 18th February 2021. Available here (last consulted on 11th March 2024).

this framework, the European Union seeks to safeguard its strategic interests and protect critical assets from potential threats posed by foreign investments.

- Regulation (EU) 2021/821, of the European Parliament and of the Council, of 20th May 2021, setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast).

The Union regime for the control of exports, brokering, technical assistance, transit, and transfer of dual-use items is a regulatory framework established to control the trade of dual-use goods and technologies – can be used for both civilian and military purposes [for example, navigation and avionics systems that can be used in both civilian aircraft and military drones or unmanned aerial vehicles (drones) that have civilian uses, like aerial photography and military applications for reconnaissance and surveillance]. It is intended that these items are not used for purposes that could harm security, human rights, or international peace.

- Regulation (EU) 2023/1781, of the European Parliament and of the Council, of 13th September 2023, establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 (chips act).

The aim of the Regulation is to strengthen the European semiconductor ecosystem – key for a green and digital transition of the European Union economy. So, the Regulation will increase the security of supply of semiconductors in the EU and develop new markets for leading-edge European technologies.

- Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11th April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020.

In a context of global uncertainty in the international relations, this Regulation tries to ensure a secure and sustainable supply of critical raw materials that are key to our society life and to a green and digital transition. Reducing dependence of these materials and simplifying procedures for companies that are affected by bureaucratic obstacles. The Regulation also aims to increase research and innovation, which in turn will lead to an increase in the production of materials that can replace

strategic raw materials, through for example, extraction from waste products, and to promote the use of alternative materials. Thus, the aim is to limit the increased demand for critical raw materials in the European Union, in order to make greater use of secondary raw materials, as well as raw materials recycled for consumption in the European Union. For this reason, the metals and minerals demanded will be recycled to a greater extent in the European Union.

Moreover, legislation on corporate sustainability due diligence may be a tool to prevent competitors from taking advantage of the EU (an anti-cohesion mechanism has also been adopted³⁰) and to stress the importance of competitive sustainability. The adoption of the legislation tries to reinforce the EU as a global policy leader (Brussels effect) but other economic blocs will need to follow the EU on due diligence obligations for companies. If not, European Union companies risk losing competitiveness.

Although this Directive is portrayed by most industries as an additional burden, it could prove to even boost the international competitiveness of some sectors. As the mining sector stands at the beginning of the supply chain, European mining companies are far less burdened by the monitoring obligations in the due diligence Directive. The mining sector can benefit from a system that imposes due diligence obligations to unfair competitors in third countries. Furthermore, given the need to reinforce the EU strategic autonomy, in order to make green and digital transition possible, tackling unfair competition can be a positive measure for the whole of the EU, boosting the production of needed raw material inside the EU³¹.

6. The political process

For a long time, the Commission was under pressure from the other Institutions to present a legislative proposal on the issue. The Council called “on the EC to table a proposal for an EU legal framework on sustainable corporate governance, including cross-sector corporate due diligence obligations along global supply chains”³².

On the other side, the European Parliament adopted a resolution with recommendations to the Commission on corporate due diligence and corporate

³⁰ Regulation (EU) 2023/2675 of the European Parliament and of the Council, of 22nd of November 2023, on the protection of the Union and its Member States from economic coercion by third countries. Available here (last consulted on 11th March 2024).

³¹ OLIVER NOYAN, *LEAK: EU Commission wants 10% of critical raw materials mined in Europe*, “Euractiv”, 9th March 2023. Available here (last consulted on 11th March 2024).

³² *Conclusions from the Council on Human Rights and Decent Work in Global Supply Chains*, 1st December 2020. Available here (last consulted on 24th March 2024).

accountability where it “Requests that the Commission submit without undue delay a legislative proposal on mandatory supply chain due diligence”³³.

The Commission launched a stakeholder consultation, to which 473461 people responded – the vast majority in favour – and carried out a number of activities, such as conferences and meetings with business associations, individual companies, civil society and international organisations³⁴.

Against this background, the Commission presented a proposal containing obligations for companies with regard to actual and potential adverse impacts on human rights and the environment in relation to their own operations, the operations of their subsidiaries and the operations of entities in the value chain with which the company has an established business relationship, as well as liability for breaches of the above-mentioned obligations.

The proposal included a commitment for the Union and Member States to strengthen their engagement to actively promote the implementation of international standards on responsible business conduct, such as the United Nations’ Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development’s Guidelines on Multinational Enterprises and Due Diligence.

As in many situations the political process was not smooth. The file followed the ordinary legislative procedure – Article 294 of the Treaty of Functioning of the European Union. By the time of the first reading, the proposal had been referred to the Committee on Legal Affairs (JURI) of the European Parliament.

In the European Council, Member States agreed on a general approach (Council’s position prior to the first reading opinion in the Parliament) which called for a relaxation of the rules. There was criticism that the Council text was not bold enough (in particular because France and other Member States wanted to carve out the financial sector from the scope of the Directive).

The legislative procedure moved on the other direction in the Parliament, with stricter rules in order to make the obligations applicable to more companies (with fewer employees and less turnover than those included in the Commission’s proposal³⁵). The file moved forward to the trilogues so the negotiators could find

³³ European Parliament resolution with recommendations to the Commission on corporate due diligence and corporate accountability [2020/2129(INL)] of 10th March 2021.

³⁴ Point 3 of the Explanatory Memorandum of the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, and amending Directive (EU) 2019/1937 of 23rd February 2022 is available here (last consulted on 11th March 2024).

³⁵ European Parliament, Amendments adopted by the European Parliament on 1st June 2023 on the proposal for a Directive on Corporate Sustainability Due Diligence (first reading). Available

a common text. An interinstitutional deal has been reached in December 2023. The next step would normally be the formal adoption of the text in first reading by the European Parliament in Plenary Session and the Council in Permanent Representatives Committee³⁶. However, in January, the Member States support to the work of the negotiators began to waver. A ‘qualified majority’ of 55% of Member States (15 countries) representing 65% of the European Union population was needed for the text to go forward and it was not obtained at Permanent Representatives Committee meetings. Germany and other countries applied the no-vote/abstention and no qualified majority was reached. With the political struggle³⁷ and while some said that European Union’s corporate sustainability due diligence Directive is too big to fail³⁸, it was unclear if the majority of Member States wanted to renegotiate the text or to drop it. Regarding the possibility of France being also requesting for changes to the text, in order to narrow down the scope of the accorded text, Lara Wolters, Rapporteur with the file on the European Parliament said that “French employers [have] the President on speed dial”³⁹.

One of the reasons for the need to adopt a text on corporate sustainability due diligence related the fact that separate but closely interconnected legislation – the forced labour Regulation for example – had as well been approved by colegislators as we saw before, reducing the political room to justify resistance to this law. While forced labour Regulation aimed at banning goods linked to forced labour from European markets, as we have previously seen, failure to pass this legislation would send an incoherent message to businesses and would make the forced labour Regulation weaker “given due diligence is everywhere in the text”⁴⁰. The success of other legislative texts that impose obligations on companies will benefit from the implementation of this new Regulation: a broader scope will make economic agents more aware of the need to tackle environment and human

here (last consulted on 11th March 2024). See Amendment 89 to the proposal: Article 2 – paragraph 1 – point a.

³⁶ The topic was in the agenda of the meeting of COREPER I of 28th February 2024. Available here (last consulted on 11th March 2024).

³⁷ JONATHAN PACKROFF, *German liberals want to renegotiate EU due diligence law, blame Spain*, “Euractiv”, 12th February 2024. Available here (last consulted on 11th March 2024).

³⁸ JONATHAN PACKROFF, *Food corporations call for EU corporate due diligence law to be finalized*, “Euractiv”, 21st February 2024. Available here (last consulted on 11th March 2024).

³⁹ LARA WOLTERS, *Press conference of the Rapporteur on Corporate Sustainability Due Diligence Directive at the European Parliament*, 22nd February 2024, Brussels. Available here (last consulted on 11th March 2024).

⁴⁰ ANNA BRUNETTI, *Scope of EU supply chain rules cut by 70% ahead of key Friday vote*, “Euractiv”, 15th March 2024. Available here (last consulted on 21st March 2024).

rights issues. One can think about the corporate sustainability reporting or the sustainable finance disclosure Regulation, for example.

As so, on 15th March 2024, under the Belgian Presidency, the Council approved a compromise text with a lighter version of the initial proposal⁴¹: the scope of EU supply chain rules was cut by 70%⁴² being applied by 0.05% of the total companies of the EU.

In accordance with Article 294(3) of the Treaty of Functioning of the European Union, the European Parliament adopted its position in first reading with the new text of the Council, and the Council, in accordance with Article 294(4), approved the Parliament's position. 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) 2023/2859⁴³ was adopted.

The notions of “adverse environmental impact” and “adverse human rights impact” are key and are completed with a definition on Article 3(b) (“ ‘adverse environmental impact’ means an adverse impact on the environment resulting from the breach of the prohibitions and obligations listed in Part I, Section 1, points 15 and 16, and Part II of the Annex to this Directive, taking into account national legislation linked to the provisions of the instruments listed therein;”) and 3(c) (“ ‘adverse human rights impact’ means an impact on persons resulting from: (i) an abuse of one of the human rights listed in Part I, Section 1, of the Annex to this Directive, as those human rights are enshrined in the international instruments listed in Part I, Section 2, of the Annex to this Directive; (ii) an abuse of a human right not listed in Part I, Section 1, of the Annex to this Directive, but enshrined in the human rights instruments listed in Part I, Section 2, of the Annex to this Directive, provided that: the human right can be abused by a company or legal entity; the human right abuse directly impairs a legal interest protected in the human rights instruments listed in Part I, Section 2, of the Annex to this Directive; and the company could have reasonably foreseen the risk that such human right may be affected, taking into account the circumstances of the specific case, including the nature and extent of the company's business operations and its chain of activities, the characteristics of the economic sector and the geographical

⁴¹ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 – Analysis of the final compromise text with a view to agreement of 13th March 2024. Available here (last consulted on 21st March 2024).

⁴² See footnote number 40.

⁴³ Available here (last consulted on 21st March 2025).

and operational context;”). These annexes contain several international instruments considered essential in the human rights and environmental fields.

The proposal brought companies the obligations of identifying actual or potential adverse impacts, preventing and mitigating those impacts or minimizing them, and bringing them to an end, establishing and maintaining a complaints procedure, monitoring the effectiveness of their due diligence policy and measures, and publicly communicating on due diligence (Article 5). The European Parliament states that “Companies will have to identify, assess, prevent, mitigate, bring to an end to and remedy their negative impact and that of their upstream and downstream partners, including production, supply, transport and storage, design and distribution on people and the planet. To do so, they will be required to make investments, seek contractual assurances from the partners, improve their business plan or provide support to their partners from small and medium-sized enterprises”⁴⁴.

By the time of writing and under the proposed “Omnibus Simplification Package”, one of the objectives of the Commission is to simplify companies’ obligations under many legal instruments⁴⁵. One of the affected instruments will be Directive (EU) 2024/1760.

7. Conclusion

As demonstrated in the preceding pages, the European Union is already equipped with numerous binding legal instruments designed to protect human rights and the environment. However, given the non-binding nature of international instruments and the limited scope of Union instruments, it can be concluded that this legislation will be instrumental in addressing the gaps in the protection of human and environmental rights within large companies and their supply chains. The introduction of such legislation in this area will bring the issue full circle. A number of issues require elucidation, including the potential administrative burden that the instrument may impose on the private sector, which could compromise its international competitiveness, and the possibility that the ‘Brussels effect’ may be ineffectual, with companies in third countries opting not to export to the EU rather than comply with international standards on the protection of human and environmental rights. The debate on the economic advantages or disadvantages of this legislation from a European Union perspective is left to law and economics scholars.

⁴⁴ European Parliament, *Corporate due diligence rules agreed to safeguard human rights and environment*, 14th December 2023. Available here (last consulted on 11th March 2024).

⁴⁵ European Commission, *Commission proposes to cut red tape and simplify business environment*, 26th February 2025. Available here (last consulted on 11th March 2025).