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1. THE EP RESOLUTION ON A DIRECTIVE ON CORPORATE DUE DILIGENCE AND ACCOUNTABILITY: HIGH EXPECTATIONS AND POSSIBLE OUTCOMES

1. *Introduction*

On 10 March 2021, the European Parliament (EP) adopted with 504 votes in favour, 79 against and 112 abstentions the resolution with recommendations to the Commission on corporate due diligence and corporate accountability. The European Commission is, therefore, expected to submit an official legislative proposal in order to implement mandatory human rights, environmental, and good governance due diligence legislation.
The European Union has shown interest in addressing the negative impact of business activities on human rights and environment and promoting respect for environmental, social and governance standards, in the last years. The Commission's willingness to introduce rules for mandatory corporate environmental and human rights due diligence has been anticipated by the declaration of the European Commissioner for Justice, Didier Reynders, on 30 April 2020. The legislative proposal is part of the Commission's Sustainable Corporate Governance initiative, which also includes an inception impact assessment and consultations with several stakeholders, and aims to help companies to address sustainability-related matters in value chains, such as human rights, environment and climate change.
In addition, in February 2020, the European Commission published an external study on due diligence requirements through the supply chain, exploring different options for improving companies' due diligence efforts.
Moreover, the EU framework for global supply chains also counts on the support of the Council, which approved conclusions calling on member States and the Commission to promote human rights in global supply chains and decent work worldwide, on 1 December 2020.
Therefore, aware that a new European initiative in relation to corporate due diligence in supply chains is extensively demanded, in September 2020, the European Parliament Committee on Legal Affairs issued a draft report with recommendation to the Commission on corporate due diligence and corporate accountability and the Members of the European Parliament (MEPs) drafted the official European Parliament position, which eventually resulted in the 10 March 2021 resolution.

2. *Current UN due diligence framework*

Before moving to the analysis of the possible outcome of the Commission's legislative proposal, let us briefly assess the current international and European framework in the field of corporate due diligence in supply chains.
The international legal order is still creating a human rights regime able to provide an effective protection of individuals and communities against human rights violations and environmental harms caused by corporations.
It is undeniable the sensitivity and relevance of opposite interests that legislators in this field need to balance: on the one hand, business is a global source of economic growth which may contribute to the reduction of poverty, to the development of a human rights culture and the increase of the demand for rule of law in developing countries, on the other hand, such a powerful force produces adverse consequences, namely environment wrongful acts and human rights violation by companies, without adequate sanctioning or reparation. For instance, the April 2013 Rana Plaza disaster in Bangladesh, where a garment factory with over 5,000 workers collapsed killing over 1,100 workers and injuring over 2,000, put the spotlight on poor working conditions and labour rights abuses in factories producing for global apparel and footwear brands.
In order to address the human rights responsibilities of businesses, the UN Special Representative of the Secretary-General on Business and Human Rights, Professor John Ruggie, issued the "Protect, Respect and Remedy" Framework for Business and Human Rights, in 2008. Furthermore, in 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights (UNGPs), establishing the first international framework, which identifies the responsibilities of both governments and business enterprises to prevent, address and remedy the impact of globalized business activities on human rights. According to the UNGPs, due diligence is defined as a process that includes four components. First, business enterprises should identify and assess the actual and potential impacts on human rights. Second, they should integrate and act upon these findings by taking appropriate action to prevent potential adverse human rights impacts or to end actual ones. Third, business enterprises should track the effectiveness of these actions. Finally, whether they identify having caused or contributed to adverse impacts, they should provide for remediation.
Although the UNGPs represent the first international instrument addressing the relation between corporate due diligence and human rights, they have not escaped criticism. In this regard, it is my intention to highlight the main criticisms raised by the legal literature.
In the first place, the use of the term 'due diligence' in the Guiding Principles has been criticized for being inconsistent. In Ruggie's final report to the Human Rights Council, a brief introduction to the Guiding Principles suggests that due diligence should be understood as a standard of conduct that businesses must meet to discharge their responsibility to respect human rights. Thus, in the light of this interpretation, Guiding Principles 17–21 describe "human rights due diligence as a range of processes and procedures that business should have in place to identify, avoid and monitor their human rights impacts". However, Principles 11, 12 and 13, the 'foundational' Guiding Principles that elaborate the meaning and scope of the corporate responsibility to respect human rights, do not refer to due diligence, avoiding specific standards of conduct (see R. BONNITCHA, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, *Eur. Jour. Int. Law*, vol. 28, no. 3, 2017, pp. 899–919, p. 908-909).

Furthermore, the UNGPs have been accused of mixing legal and non-legal dimension of due diligence, namely the legal meaning of due diligence in international law, on one side, with its understanding in the corporate sector when it comes to the assessment of commercial risks, on the other side (see M. BUSCEMI, N. LAZZERINI, L. MAGI, AND D. RUSSO, *Legal Sources in Business and Human Rights*, Boston, 2020, p. 19). Moreover, the UNGPs do not prescribe extraterritorial human rights obligations and the extent to which States are required to regulate the extraterritorial activities of companies domiciled in their jurisdiction (see *S. BESSON, Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!, ESIL Reflections*, vol 9, no.1, 2020).
Finally, it is necessary to conclude this analysis highlighting that, in the UNGPs, due diligence is pictured as a *voluntary* process and that the UN Guiding Principles do not elaborate on the issue of legal liability for failure to meet such responsibility.
The UNGPs have therefore proved to be not enough. It is a non-binding instrument and so, it does not create new obligations on states or corporations under international law or domestic law. Furthermore, it does not provide for the possibility for states to implement their existing duty to protect. Therefore, in 2018, the UN Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (OEIGWG), created by the UN Human Rights Council resolution 26/9, issued the so-called "Zero Draft". This document represents an attempt to translate the UNGPs into a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (G.M. RUOTOLO, *A Litthle Hate Worldwide! Di libertà d'opinione e discorsi politici d'odio on-line nel diritto internazionale ed europeo, Dir. um. dir. int.*, vol. 14, 2020, n.2, pp. 549-582.). The Zero Draft raised strong opposition from business groups, civil society and human rights defenders' organizations, especially in relation to the enforcement mechanisms provided (for a critical reflection on the monitoring mechanism envisaged under the Zero Drafts see M. FASCIGLIONE, *An International Mechanism of Accountability for Adjudicating Corporate Violations of Human Rights? Problems and Perspectives. Judicial Power in a Globalized World.* Cham, 2019, pp. 179-95.). Following these reactions, the OEIGWG produced a revised draft in July 2019. The revised draft elaborates on the rights of victims of business-related human rights violations (see at this regard Article 4) and on the duties of states to regulate companies operating on their territory for compliance with human rights law and to provide civil and criminal liability (Art. 11). The revised draft also includes new articles on implementation (Art 15) and settlement of disputes (Art 16). (S. R. RATNER, *Introduction to the Symposium on Soft and Hard Law on Business and Human Rights*, in *AJIL unbound*, vol.114, 2020 pp.163–167).

3. *Current European due diligence framework*

Moving on to the analysis of the current European Union legal framework, the concept of due diligence is object of specific legislative instruments.
First, the Regulation (EU) No 995/2010, also known as the EU Timber Regulation, requires companies or persons placing timber or timber products on the EU market to conduct due diligence in order to determine the source of the timber and its legality. At this regard, the recent national case law has demonstrated that an environmental due diligence jurisprudence is emerging. For instance, a French tribunal is investigating a number of companies importing timber from the Democratic Republic of Congo, after Greenpeace France filled a criminal complaint against them, for having violated the EUTR obligations (C.M.

PONTECORVO, *The EU Legal Framework on Trade in Timber and Timber Products: Recent Developments in the Implementation and Enforcement of the Timber Regulation*, in *Eur. YB Int. Ec. Law*, 2018, pp. 229–259).

On the other hand, the European Union has recently asked for the creation of a panel in order to verify the compatibility of the ban measure on timber adopted by Ukraine in relation to the relevant Association Agreement. Ukraine has partly justified the ban on environmental grounds. Thus, the EU position regarding environmental concerns and timber trade is not clear. Although the EU is aware of the environmental relevance of the timber marketing sector, the position adopted in relation to Ukraine seems to show that the EU is ready to sacrifice environmental interests in favour of economic ones (G.M. RUOTOLO, *Knock on wood. Il contenzioso UE/Ucraina sul divieto di esportazione di legname tra tutela ambientale e libera circolazione delle merci, SIDIBlog*, 2019)

Second, the Regulation (EU) 2017/821, also known as the EU Conflict Minerals Regulation, lays down supply chain due diligence obligations for EU importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas. Finally, the Directive 2014/95/EU, also called the Non-Financial Reporting Directive (NFRD), requires companies to report annually on their principal risks regarding, among others, environmental impacts and respect for human rights, as well as on the due diligence policies implemented to address these risks and their outcomes. However, the non-financial reporting obligations prescribed in the Directive fall short of changing corporate behaviour. For this reason, NGOs have constantly drawn towards the necessity to approve mandatory human rights due diligence legislation at EU level. Furthermore, as part of the regular ongoing revision process of the Non-Financial Reporting Directive, the European Coalition for Corporate Justice (ECCJ) has highlighted evident shortcomings of the Directive. For instance, in relation to the report monitoring the situation in Italy, article 3 of the legislative decree 254/2016, the relevant Italian law transposing in the Italian national system the human rights due diligence obligations of the NFRD, presents a discrepancy in its scope of application: a publicly traded company which is based in an external market, not covered by the NFRD, is excluded from the supervisory body of the Italian financial market, the Commissione Nazionale per le società e la borsa (CONSOB), leaving space for uncontrolled and unpunished human rights violations.

From the aforementioned analysis of the EU framework in relation to corporate due diligence, it results that the EU has strict due diligence obligations at cross-sectoral level, for minerals and timber, alongside the obligations of disclosure provided for in the NFRD. However, this system has demonstrated to be inadequate. The lack of a comprehensive legislative instrument at EU level on due diligence in the supply chain may also affect the legal certainty of the EU legal system, the process of harmonization of corporate obligation at EU level and the functioning of the single market. Weaknesses in these voluntary efforts have long been reported anecdotally by stakeholders, and now research also demonstrates that commonly used due diligence tools are not very effective at improving respect for rights (see M. CURLEY, *Human Rights Due Diligence: Making it mandatory and effective, EUIdeas*, 2020). Thus, the voluntary approach proposed by the international frameworks, namely the UNGPs and the EU framework are insufficient.

Finally, in order to complete the picture of corporate due diligence in supply chains, it is worthwhile to mention the OECD Guidelines for Multinational Enterprises (MNE) and the Due Diligence Guidance for Responsible Business Conduct, which aim to promote sustainable development, including the protection of human rights and provide practical

support to enterprises on the implementation of the MNE. Furthermore, at national level, European States have been forerunners in tackling the issue. In this regard, Italy has adopted the legislative decree 231/2001, introducing criminal liability for companies and providing for a due diligence process regarding both specific human rights violations and major environmental impacts. Beside Italy, other member States have adopted legislative instruments in the field, such as Dutch Child Labour Due Diligence Act and the French 2017 law on the duty of vigilance.
Finally, it is worthwhile to mention the recent ruling of the Court of Appeal of The Hague, which found Shell Nigeria liable for oil pollution and thereby, provided for compensations for the applicants, namely four Nigerian farmers and Friends of the Earth (Milieudefensie). This ruling represents a milestone in the field of corporate accountability, since for the first time a transnational corporation was held accountable for breaching its duty of care abroad. However, it may also represent an emerging tendency. On 21 February 2021, the UK Supreme Court issued a judgment ruling that oil-polluted Nigerian communities can sue Shell in English courts, after that in 2017 the English Court of Appeal denied jurisdiction.

4. *Towards an EU Directive on corporate due diligence in supply chains*

The concept of due diligence as emerging from the aforementioned framework has developed on the two levels simultaneously. On one side, the concept of due diligence plays an important role in international human rights law in defining the extent of States' obligations to prevent and respond to infringements of human rights by private actors within their territories or jurisdictions. On the other side, at European level, due diligence in relation to environmental harm has contextually arisen.
The EP required the Commission to move forward the current international and EU system of corporate due diligence in supply chains, also taking into account the evolution of the concept in relation to the environment and climate change.
Moreover, the aforementioned European Commission's external study identifies four alternative options to tackle the uneven and inadequate current regulation in the field: 1) no change; 2) new regulations but still voluntary; 3) new corporate reporting requirements; 4) new mandatory supply chain due diligence. The latter option has been preferred by the European Parliament in its legislative initiative, paving the way for a more comprehensive EU law that would require companies to address human rights and environmental standards within their value chains.
So, the objectives set by the legislative proposal are highly ambitious. The future legislation on corporate due diligence and corporate accountability for European undertakings is expected to produce extraterritorial effects. This inclination to the EU legislator to regulate conducts that take place outside the EU's borders is not new. This tendency has been labelled 'territorial extension'. The EU has developed a range of legislative techniques at this regard, such as trigger mechanisms that extends the application of EU law by the fact that a company is incorporated in the EU or by the fact that a company is listed on a financial market situated within the EU (J. SCOTT, *The new EU "extraterritoriality*, in *Common market law review*, 51(5), 2014, pp. 1343–1380).
In particular, the EU seems to be interested in affecting the social, economic and environmental development of developing countries and their prospects of achieving their Sustainable Developments Goals (SDGs) as well as other not European developed countries. It is evident that the EU intends to use its economic leverage to promote a more sustainable

and human rights-oriented global economy. Moreover, this trend may represent a new form of conditionality beside the traditional regimes of conditionality part of the foreign economic policy of the EU (S. WEBER, *European Union Conditionality*, in B. EICHENGREEN, J. FRIEDEN, J. VON HAGEN (eds) *Politics and Institutions in an Integrated Europe*, European and Transatlantic Studies, 1995, Berlin, Heidelberg). Therefore, the EU is picturing again itself as a new key actor in the global economy willing to promote human rights, the environment and good governance. To such an extent that the increasing relevance of non-economic values in the EU's trading activity, through its effects on the non-EU member States and partners' legal systems, could also influence the WTO system (G.M. RUOTOLO, *Gli accordi commerciali di ultima generazione dell'Unione europea e i loro rapporti col sistema multilaterale degli scambi*, in *St. integr. eur.*, 2016, p. 329 ss.)
Finally, the EU supply chains' regulation plays a key role for the green ambitions of the EU and for the success in the fight against climate change. According to EU Commissioner for Justice, Didier Reynders, such an initiative would be intrinsically linked to the Green Deal as a central component of sustainability. The 2021 proposal for a legislation of the European Commission is expected to include «*the obligation to respect human rights and the environment in their own domestic and international activities*» and to ensure «*that business enterprises have an obligation to identify, prevent, mitigate, monitor and account for potential and actual human rights abuses and environmental harm in their entire global value chains through ongoing due diligence processes, and to publicly report on such processes, their effectiveness and results*».
In conclusion, the EU, which is already a world leader in the field of environmental protection and human rights, through the adoption of its own mandatory due diligence legislation, intends to confirm and strengthen its position in the field.

5. *Possible outcomes of the Commission's legislative proposal*

In the drafting of the official Directive scheduled for spring 2021, the Commission is expected to present an innovative legal instrument in this field.
In relation to the scope of application, the studies commissioned by the Commission and the Parliament identify different options. In relation to the companies covered, the Directive is expected to include not only EU-based companies, namely undertakings governed by the law of a member State or established in the territory of the Union, but all companies operating in the EU, since paragraph 9 of the EP resolution affirms «*that the framework should also cover undertakings which are established outside the European Union but are active on the internal market*».
Furthermore, the rules should also apply to publicly listed small and medium-sized enterprises (SMEs) and high-risk SMEs, which should receive technical assistance to comply with the requirements.
For due diligence legislation to be consistent with the EU Green Deal, concrete obligations for companies in order to reach environmental standards need to be created. The EU due diligence rules should guide companies when conducting due diligence, and administrative and judicial authorities when determining liability.
The second controversial point is how to practically prevent, protect and enforce due diligence in the supply chain. Different options for improving companies' due diligence have been explored. The EP resolution affirms that due diligence remains primarily a preventive mechanism that requires undertakings to take the appropriate measures to identify and assess their potential or actual adverse impact. At this purpose, companies, as part of their business strategy, should be required to produce a document in which they publicly communicate

their due diligence strategy to prevent, mitigate and monitor their impact on human rights and environment. Secondly, in order to protect and enforce corporate due diligence responsibility, undertakings should provide grievance mechanisms to allow any stakeholder to raise reasonable concerns regarding the existence of a potential or actual adverse impact on human rights, the environment or good governance. Furthermore, the remedial proposal by an undertaking should not prevent the possibility to bring civil proceedings in accordance with national law. Therefore, effective remedies with substantive and procedural dimensions should consist of internal grievance mechanisms, administrative sanctions as well as civil liability for the consequences of due diligence failures.

Another crucial element of the EP resolution is the necessity for member States to designate national competent authorities responsible for the supervision with the authority to carry out investigations to ensure that undertakings comply with the obligations set out in this Directive. Furthermore, as part of the 'due diligence strategy', member States should also lay down rules to ensure that «*undertakings carry out effective due diligence with respect to potential or actual adverse impacts on human rights, the environment and good governance*» and undertakings «*to make all efforts within their means to identify and assess […] severity and urgency of potential or actual impacts on human rights, the environment or good governance*».

Finally, it remains to wonder how the new legislation may impact companies operating in different sectors, and how internationally active small and medium-sized businesses will implement the due diligence requirements. Both the UNGPs and the OECD Guidelines state that the nature and extent of due diligence depend on the size, nature and context of a company's operations.

The future EU mandatory due diligence legislation aims to influence upstream sectors, turning human rights and environmental standards to a competitive advantage. The EP proposal requires member States to guarantee specific support for small and medium-sized undertakings, in particular, creating *ad hoc* forms of financial support to perform their due diligence obligations. The Commission's external study takes into account also the impact that these new market regulations would have on small and medium-sized enterprises. It is evident that these new market regulations will have an impact on the operativity of SMEs. Nevertheless, following evaluations as reported in the external study on due diligence requirements through the supply chain, on one hand, enterprises may benefit from a number of factors relevant to a company's overall business success and competitiveness, such as competitive advantage in attracting, motivating and retaining talented employees, and consumer loyalty.

On the other hand, EU companies' global competitiveness would decrease in comparison with companies established or headquartered in third jurisdictions where non-financial disclosure is not regulated. Nevertheless, the overall limitation of administrative burdens is expected to outweigh the cost and eventually to make EU companies relatively more competitive on a global level.

6. *Conclusions*

In conclusion, the Commission's legislative proposal is expected to set new rules for corporate due diligence in relation to EU companies as well as to undertakings which are governed by the law of a third country and are not established in the territory of the Union when they operate in the internal market selling goods or providing services. Those undertakings shall fulfil the due diligence requirements established in this Directive as

transposed into the legislation of the member State in which they operate and be subject to the sanctions and liability regimes established by this Directive as transposed into the legislation of the member State in which they operate.
The future Directive is required to provide measures which will address human rights and environmental risks and harms, through the evaluation of the impact of companies' supply chains. The necessity to provide for an effective and enforceable protection of both human rights and environment results from the fact that potential violation of human rights and environmental harm may occur in every step of the supply chain.
Although the right to an effective remedy before a tribunal is considered a fundamental right in most States, there are several obstacles to the attribution of legal responsibility, in these cases: for instance, the possibility to prove the legal accountability of members of a corporate group and so, holding parent companies for human rights harms arising out of the activities of their subsidiaries may be obstructed by denial of justice in the host State and difficulties in accessing home State courts. Furthermore, victims of corporate human rights abuses do not have access to any remedy against multinational companies, since the violations occurred in the host developing State, where accessing legal remedies is practically impossible.
The international and EU framework on corporate due diligence in the supply chain has demonstrated that beside the voluntary process and some specific legislative instruments at EU level and national level, there is currently not a general duty requiring companies to undertake due diligence for human rights and environmental harm caused by their supply chains. The Commission legislative proposal is therefore asked to move forward the limits of the current legal framework.
Moreover, it is nowadays hard to give an exact assessment of the possible outcomes and benefits of the future European due diligence in supply chain Directive.
In terms of potential positive effects, under the European added value assessment on corporate due diligence and corporate accountability issued by the European Parliamentary Research Service (EPRS), the adoption of corporate social responsibility (CSR) will have a positive impact on corporate performance in relation to cost reduction, strengthening legitimacy and reputation, building a competitive advantage, and synergistic value creation.
Furthermore, according to the report 'Quantifying the Costs, benefits and Risks of Due Diligence for Responsible Business Conduct' issued by OECD in collaboration with Columbia SIPA, due diligence for responsible business conduct brings a number of 'intermediate' benefits.
The main 'bottom-line' benefits of engaging in due diligence are improved transparency, better governance and relationships with all stakeholders, and lower risk, in particular with regard to disruption in the value chains thanks to increased operational knowledge. In relation to the possible content of the Directive, it is likely that the Commission will provide for human rights and environmental protection.
However, it is more contested whether and to what extent, the aforementioned recommendations and studies will be taken into account. The Commission is asked to balance environmental interests with the necessity to preserve the competitiveness of corporates, especially the SMEs. Finally, in relation to the mechanism of control and enforcement it will be interesting to evaluate whether the legislative proposal will provide for a more positive protection than that already present in some of the EU member States.

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