table of contents

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Addressing MNEs' violations of workers' rights through Human Rights Due Diligence. The proposal for an EU Directive on Sustainable Corporate Governance

Summary: **1.** Introduction. **2.** Sustainable corporate governance: EU political and regulatory context. **3.** Interests at stake: the EU lobbying battle. **3.1.** NGOs. **3.2.** Trade Unions. **3.3.** Joint initiatives. **3.4.** Business. **3.5.** European Parliament Working Group. **4.** An analysis of the European Parliament's proposal in the light of the stakeholders' influence. **5.** Conclusions.

1. *Introduction*

As a consequence of globalisation, multinational enterprises (MNEs) have achieved unprecedented economic as well as political supremacy and influence across the world[1]. However, parent companies can escape responsibility for fundamental labour and social rights violations perpetrated by their local subsidiaries, subcontractors, and suppliers throughout their global supply chains[2].

From a legal perspective, the difficulties of holding parent companies accountable derive from two sets of legal boundaries. First, the "shield" of

[1] STRANGE, *The Retreat of the State. The Diffusion of Power in the World Economy*, Cambridge University Press, 1996, p. 218; CHAVAGNEUX, LOUIS, *Le pouvoir des multinationales*, Puf, 2018, pp. 9-19, pp. 79-93.

[2] WEIL, *The Fissured Workplace. Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard: HUP, 2014; GOLDIN, *Enterprise Transformations, Externalization Processes and Productive Decentralization*, in PERULLI, TREU (eds.), *Enterprise and Social Rights*, Kluwer Law International, 2017, pp. 75-91; PESKINE, *De la solidarité à la vigilance. À propos de la responsabilité dans les organisations pluri-sociétaires*, in SUPIOT (ed.), *Face à l'irresponsabilité: la dynamique de la solidarité*, Paris: Collège de France, 2018, pp. 37-51.

limited liability, which allows the parent company to externalize labour rights costs and risks of litigations to its subsidiaries, subcontractors, and suppliers, while avoiding liability for the damages suffered by workers down the supply chain[3]. Second, the transnationality of supply chains allows MNEs to take advantage of private international law (PIL) issues linked to jurisdiction and applicable law[4]. Indeed, EU PIL does not contain general procedures for suing non-EU companies in Member States' courts[5] and it does not allow victims to call for the application Member States' substantive legislation as, in tort claims, the applicable law is the law of the place where the damage occurs (*lex loci damni*-rule), which often points to the law of a third State[6].

In light of the failure of corporate social responsibility policies[7], policymakers have recently turned their attention to a new regulatory solution: the corporate Human Rights Due Diligence (HRDD). HRDD is a risk management approach imposing on parent companies an ongoing duty to monitor the respect of human rights along their supply chains as well as to prevent, mitigate and account for how they address their adverse human rights impacts[8].

Launched by the 2011 UN Guiding Principles on Business and Human Rights[9] (UNGPs), HRDD experienced a broad support from international

[3] Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, in *Wash. & Lee L. Rev.*, 2015, Vol. 72, No. 1769.

[4] Van Hoek, Aukje, *Transnational Corporate Social Responsibility: Some Issues with Regard to the Liability of European Corporations for Labour Law Infringements in the Countries of Establishment of Their Suppliers*, 2008, available online.

[5] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-recast), Article 4.

[6] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 4.

[7] Daugareilh, *La responsabilité sociale des entreprises en quête d'opposabilité*, in Supiot, Delmas-Marty (eds.), *Prendre la responsabilité au sérieux*, Paris: PUF, 2015, pp. 183-199.

[8] Bonnitcha, McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, in *EJIL*, 2017, Vol. 28, No. 3, pp. 899-919; Ruggie, Sherman III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, in *EJIL*, 2017, Vol. 28, No. 3, pp. 921-928.

[9] Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework*, 2011, Principle 17.

organisations, such as the ILO[10], the Council of Europe[11] and the OECD[12], while a Working Group (OEIGWG) was established[13] at the UNHRC in Geneva with the mandate to draft and negotiate a legally binding instrument to regulate, in international human rights law, the activities of MNEs and other business enterprises (so-called "Binding Treaty on Business & Human Rights"). Indeed, HRDD is at the heart of its third Revised Draft[14], which was released in 2021.

At national level, several legislative and political developments are a testament to this process of mainstreaming, such as the 2017 French Duty of Vigilance Law[15], the 2019 Dutch Child Labour Due Diligence Law[16] and the 2021 Dutch bill on Responsible and Sustainable International Business Conduct[17], as well as the 2021 German Supply Chain Due Diligence Law[18]. As developments taking place in "larger" EU Member States tend to influence the debates and initiatives at the EU level, it is not a surprise that this growing consensus eventually reached EU legislators. Indeed, the recent

[10] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 2017.

[11] Committee of Ministers, *Recommendation on Human Rights and Business*, 2016, CM/Rec(2016)3.

[12] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018.

[13] Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 2014, Resolution 26/9, A/HRC/RES/26/9.

[14] OEIGWG chairmanship, *Third Revised Draft - Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, 17 August 2021.

[15] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n° 0074 du 28 mars 2017 texte n° 1. For an analysis of the law see, *inter alia*, the contributions in: dossier *Droit social n° 10/2017: le devoir de vigilance*, Dalloz, 16 octobre 2017; dossier spécial *Le Big Bang des devoirs de vigilance ESG: les nouveaux enjeux de RSE et de droits de l'homme*, in *RLDDA*, 2015, n° 104. See also Danis-Fatôme, Viney, *La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, in *RD*, Dalloz, 2017; Sachs, *La loi sur le devoir de vigilance des sociétés mères et sociétés donneuses d'ordre: les ingrédients d'une corégulation*, in *RDT*, 2017.

[16] Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen, Staatsblad 2019, 401.

[17] Https://bit.ly/3yAT4il; https://bit.ly/3hThugY.

[18] Https://bit.ly/2U4WJpp ; https://bit.ly/2VF9kzL; for a first analysis of the law, see the Löning briefing and the Initiative Lieferkettengesetz briefing.

European Commission's initiative for a Directive on sustainable corporate governance[19] perfectly embodies this trend.

This paper presents the European political and regulatory context (2), as well as the role of the actors in work and employment relations in the negotiation of this legislative initiative (3), while reviewing the content of the European Parliament's draft Directive in the light of the stakeholders' positions (4). In conclusion, (provisional) "winners" and "losers" of the lobbying battle are identified and the respective influences and points of compromise are assessed, while discussing the litmus tests for the ambition of the upcoming European Commission's proposal to grant effective remedies to victims of fundamental social rights violations (5).

2. *Sustainable corporate governance: EU political and regulatory context*

The European Commission's legislative initiative was announced in July 2020, after Commissioner Reynders expressed his commitment[20] during a high-level webinar hosted by the European Parliament's Responsible Business Conduct Working Group[21]. Later in October 2020, the Commission released its 2021 work programme[22] that includes a legislative proposal for a Directive on sustainable corporate governance to be published in the second quarter of 2021.

The Commission declared its proposal will be based on two DG JUST external studies, namely the BIICL study on due diligence requirements through the supply chain[23] and the EY study on directors' duties and sustainable corporate governance[24]. The stated goal of the Commission's initiative is to improve the EU company law and corporate governance regulatory framework, better aligning the interests of companies, shareholders, managers, stakeholders, and society as well as supporting

[19] Https://bit.ly/30OFsLM.

[20] Speech by Commissioner Reynders on 29th April 2020 in the webinar on due diligence hosted by the RBC Working Group.

[21] https://bit.ly/3fhyFr1.

[22] Communication from the Commission, Commission Work Programme 2021, 19 October 2020.

[23] SMIT *ET AL.*, *Study on due diligence requirements through the supply chain*, 2020, London: British Institute of International and Comparative Law.

[24] ERNST & YOUNG, *Study on directors' duties and sustainable corporate governance*, 2020.

companies to better manage sustainability-related matters in their own operations and value chains as regards social and human rights, climate change and the environment. The EY study supports the Commission in this sense, assessing the causes and identifying possible EU-level solutions to the "short termism" of corporate decision-makers, who are mainly oriented at shareholder value maximisation rather than at the long-term economic, social, and environmental sustainability of the European businesses. However, what is more interesting for the purposes of this article is the BIICL study. It examines four options[25] for EU regulatory proposals through desk research, country analyses, interviews, and surveys with relevant stakeholders[26], in order to make recommendations to EU legislators. Near 70% of respondents consider mandatory HRDD requirements coupled with civil remedy, and coupled with criminal liability and/or fines, as the most effective regulatory option[27]. While it is not astonishing that civil society is united in this call, it is interesting to see a majority of company respondents recognising the value of enforceable EU rules, with 86% of them agreeing on their positive social impacts[28] and 68% on their positive human rights[29]. The preferences of business organisations are, however, in reverse order[30].

As for the progress of the initiative, the Commission's 2020 Inception Impact Assessment[31] showed that the issues to be regulated include a corporate duty of HRDD in companies' operations and value chains. The summary report[32] of the public consultations (26 October 2020 - 08

[25] No change (Option 1), new voluntary guidelines (Option 2), new reporting requirements (Option 3) and mandatory due diligence as a legal standard of care (Option 4). Option 4 includes sub-options limited to sector and company size, and enforcement through state-based oversight or judicial/non-judicial remedies.

[26] SMIT *ET AL.*, *op. cit.*, Executive Summary, p. 16. Survey responses were representative of all sectors, company sizes and Member States and included 334 business survey respondents (from individual companies) as well as 297 stakeholders (including business associations and industry organisations, civil society, worker representations or trade unions, legal practitioners, and government bodies).

[27] SMIT *ET AL.*, *op. cit.*, Survey results statistics, Q15, p. 22.

[28] *Idem*, Q38, pp. 59-60.

[29] *Idem*, Q49, pp. 81-82.

[30] SMIT *ET AL.*, *op. cit.*, Final Report, p. 137.

[31] European Commission, Directorate-General Justice and Consumers, *Sustainable corporate governance initiative. Inception Impact Assessment*, 30/07/2020.

[32] European Commission, Directorate-General Justice and Consumers, *Sustainable corporate governance initiative. Summary report – public consultation*, June 2021.

February 2021), released in June 2021, obtained 473.461 public responses most of which have been submitted through campaigns (see Section 3 – Joint initiatives). As regards the need for developing an EU legal framework for HRDD, most of the respondents expressed support for action (81.8%)[33] with a strong preference for a horizontal approach over a sector specific or thematic approach (92,4%) and for the extension of the new obligations to third-country companies carrying out activities in the EU (97%). As for the enforcement mechanism, overall respondents answering indicated a preference for supervision by national authorities with a coordination at EU level (70.6%)[34] followed by judicial enforcement with liability (49.4%)[35]. On the contrary, the issue of stakeholders' engagement has been more divisive[36]. The outcome of the public consultations will serve as a basis for the Impact Assessment examining the economic, environmental, and social costs and benefits of the future initiative, which is still underway. According to what Commissioner Reynders had repeatedly stated, the proposal for a Directive should have been published in the second quarter 2021, but the press[37] has recently reported that DG JUST postponed its launch at least after summer which was still missing in early 2022. In the meantime, the Commission together with the European External Action Service presented a non-binding document[38] to provide EU companies with practical guidance to implement HRDD practices to address the risk of forced labour in their supply chains, which refers as well to the legislative proposal under preparation.

As for the position of the European co-legislators, the Conclusions[39] released by the Council of the EU in December 2020 supported the initiative,

[33] NGOs supported the need for action with 95.9% (185 respondents), companies with 68.4% (121 respondents) and business associations with 59.6 % (93 respondents).

[34] In favour: 86% of NGOs and 58,7% of companies and business association.

[35] In favour: 84,9% of NGOs but (not surprisingly) only 14,2% of companies and business association.

[36] 93.1% of NGOs respondents were supportive while 68% of companies and business associations disagreed.

[37] https://politi.co/3bVhqtz.

[38] European Commission, European External Action Service, *Guidance On Due Diligence for EU Businesses to Address the Risk of Forced Labour in Their Operations and Supply Chains*, 12.07.2021.

[39] Council of the European Union, *Council Conclusions on Human Rights and Decent Work in Global Supply Chains*, 13512/20, 1st December 2020.

calling for a proposal for an EU legal framework on sustainable corporate governance, including HRDD obligations along global supply chains. On its part the European Parliament, after several reports and resolutions related to responsible business conduct[40], strongly encouraged the Commission to act, by adopting a legislative own-initiative report on corporate due diligence and corporate accountability[41] (see Section 4), in addition to an own-initiative procedure on sustainable corporate governance[42]. These positions are corroborated by an exploratory opinion[43] of the European Economic and Social Committee (EESC) stating that it is time for the Commission to propose a legislation on mandatory HRDD coupled with a liability regime and a revision of the EU PIL resulting in effective remedies for victims of business misconduct and their representatives.

It should be noted that this initiative forms part of a broader reform momentum in favour of the strengthening of duties and responsibilities of MNEs within the EU, including the entry into force of the EU Conflict Minerals Regulation[44] and the Commission's proposal for an EU Corporate Sustainability Reporting Directive[45] (*i.e.*, the Non-Financial Reporting Directive[46] reform), as well as two other HRDD-oriented initiatives, namely the Commission's proposal for a Regulation to modernise EU legislation on sustainable batteries[47] and the Parliament's legislative own-initiative report with recommendations for a legal framework to halt and reverse EU-driven global deforestation[48].

[40] Https://bit.ly/30QvauA.

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

[42] European Parliament resolution of 17 December 2020 on sustainable corporate governance 2020/2137(INI).

[43] European Economic and Social Committee, *Exploratory Opinion on Mandatory due diligence*, INT/911-EESC-2020, 18 September 2020.

[44] Regulation (EU) 2017/821 of 17 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.

[45] Proposal for a Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No. 537/2014, as regards corporate sustainability reporting.

[46] Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

[47] Proposal for a Regulation of 10 December 2020 concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No. 2019/1020.

[48] European Parliament resolution of 22 October 2020 with recommendations to the

3. *Interests at stake: the EU lobbying battle*

3.1. NGOs

Civil society organisations (CSOs) have expressed strong support for a mandatory legislation on HRDD for EU companies. Over 100 NGOs called[49] on the EU to adopt such an act, while NGOs more involved in the lobbying battle released a joint statement[50] in September 2020, setting their key demands for an HRDD mandatory legislation able to promote human rights in business activities. The principal elements of this paper include a business obligation to respect human rights and the environment as well as an obligation to conduct HRDD in their own operations, in their global value chains and within their business relationships. A business "liability for harm", as well as a "liability for failure to carry out due diligence" regime should be put in place in case of own causation, own contribution, or control of the responsible entity, while stricter and joint and several liability options could be considered in specific cases, and the burden of proof should stay with the company. Eventually, the paper calls for amending the EU Regulation Rome II, so that the provisions of this future Directive can apply in cases brought by foreign claimants by virtue of an overriding mandatory provision, regardless of the applicable law (*i.e.*, the law of the place where the harm occurred).

3.2. Trade Unions

As for the trade union front, the European Trade Union Confederation (ETUC) has been calling for an EU Directive on mandatory HRDD and responsible business conduct since 2019[51]. According to the ETUC, Article

Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL)).

[49] Http://bit.ly/3usT0zk.

[50] Action Aid, Amnesty International, Anti-Slavery International, Clean Clothes Campaign, CIDSE, European Centre for Constitutional and Human Rights, European Coalition for Corporate Justice, FIDH, Friends of the Earth Europe, Global Witness, Oxfam, *An EU mandatory due diligence legislation to promote businesses' respect for human rights and the environment*, September 2020.

[51] ETUC Executive Committee, *ETUC Position for a European directive on mandatory Human Rights due diligence and responsible business conduct*, 17-18 December 2019.

153(1)(e) TFEU (information and consultation of workers) and Article 154 TFEU (structured consultation of management and labour) should be included among the legal bases of the initiative. Unions and workers' rights should be considered as main components of the material scope of the future legislation, which should as well empower trade unions and workers' representatives both trough the involvement in the negotiation and enforcement of the HRDD process and the access to justice representing victims. While ETUC did not propose a "liability for harm" regime at EU level, liability should be introduced for cases where companies fail to respect HRDD, without prejudice to other subcontracting and joint and several liability frameworks in force at national and EU level. Above all, companies should not be able to escape liability established in other legal instruments by arguing that they have carried out HRDD (exclusion of the "diligence defence"). In addition, the future HRDD initiative should not weaken other trade union efforts aiming at strengthening business liability in subcontracting chains and should be complemented by renewed initiatives in this area[52]. In terms of procedure, ETUC suggested amending EU Regulation Brussels I-recast to allow victims to submit claims in a Member State's jurisdiction against non-EU companies which conduct business activities or have otherwise a link with that Member State. Moreover, appropriate support schemes for victims should be implemented to facilitate their access to justice within the EU, and interim proceedings should be foreseen to allow the halting of operations violating their rights.

In this framework, ETUC continues its cooperation with the International Trade Union Confederation, which collaborated with Professor Olivier de Schutter to develop its recommendations[53] for effective mandatory HRDD laws. In its study[54], de Schutter warned that HRDD should not degrade into a formalistic exercise, leading companies to adopt a minimalistic approach simply to shield themselves from the risk of liability, buying legal immunity by ticking the boxes (the so-called "due diligence defence"

[52] ETUC suggests deleting the HRDD exception from the subcontracting (joint and several) liability regime in the Enforcement Directive on Posting Workers (Directive 2014/67/EU, Article 12.5).

[53] ITUC, *Towards mandatory due diligence in global supply chains*, June 2020.

[54] De Schutter, *TOWARDS MANDATORY DUE DILIGENCE IN GLOBAL SUPPLY CHAINS. Study prepared at the request of the International Trade Union Confederation*, 2020.

exercise). Therefore, the HRDD (*i.e.*, duty to prevent) and the civil liability for harms occurring in the supply chain (*i.e.*, duty to redress, when preventative measures have failed) should be treated as two separates, albeit complementary, duties.

3.3. Joint initiatives

Nevertheless, the originality of this lobbying battle lies in the alliance between NGOs and trade unions. While a joint statement[55] calling for an EU HRDD legislation had already been signed by over 80 CSOs in October 2019, a few European NGOs and national and European trade unions joined forces early 2021 launching a campaign[56] that collected almost half a million signatures across the globe in support of their joint response[57] to the Commission's consultation on this file.

This exercise proves the growing consensus around the idea that the protection of labour and social rights is an integral part of the protection of human rights[58], and that these are to be considered as fundamental rights within the EU. Moreover, this coalition is a promising example of successful cooperation between human and labour rights organisations[59], that helped strengthening the efforts of both parties.

3.4. Business

As for the business front, employers' associations are lobbying for a less ambitious legislation, if not clearly against it, although the BIICL study from February 2020 showed that a majority of business survey respondents believed there were benefits of EU HRDD legislation. Many of those affirmed that an EU action would ensure a better harmonisation and a level playing field by avoiding fragmentated national approaches harmful to the competitiveness of EU companies, while increasing leverage in their business relationships and the supply chains through a non-negotiable standard.

[55] *A call for EU human rights and environmental due diligence legislation*.

[56] #HoldBizAccountable.

[57] Https://bit.ly/34uCtz7.

[58] On the issue of whether labour and social rights are human rights, see MANTOUVALOU, *Are Labour Rights Human Rights?*, in *ELLJ*, 18 February 2012.

[59] KOLBEN, *Labor Rights as Human Rights?*, in *VJIL*, 2010, Vol. 50, p. 449 and p. 468 ff.

While several business lobbies made no pretence of their hostility towards the mandatory HRDD agenda, many companies presented themselves as supporters while silently trying to weaken and shape the proposal in their own interests[60]. For example, on 2 September 2020, 26 companies (Unilever, H&M, Aldi etc.) released a joint statement[61] calling for an EU-wide, cross-sectoral HRDD legislation. Almost one year before, world's major chocolate manufacturers (Mars, Mondelez, Barry Callebaut etc.) had already encouraged[62] the EU – the largest importer and consumer of cocoa – to adopt an HRDD legislation to promote sustainable cocoa production and support consumer trust.

On the contrary, national and European business associations are openly lobbying against the initiative. After the publication of its letters to Commissioner Reynders[63] and to the European Parliament Legal Affairs Committee[64], BusinessEurope – the biggest business lobby group representing enterprises of all sizes in the EU – has released its reply[65] to the Commission's public consultation on sustainable corporate governance and HRDD. Through these documents, BusinessEurope expressed its strong concerns about the file, trying to push the Commission to radically reconsider the initiative. Key concerns include the critical impact that such a legislation would have on EU business' supply chains' operations and relationships they are engaged in, as well as on their global competitiveness, because of the excessive administrative burden and the exposure to litigation risks. Nevertheless, the employees' association set a list of conditions for a "workable and balanced instrument", should the Commission decide to go ahead. First, any framework should be based on an obligation of means rather than obligation of results. As for the scope, BusinessEurope called for the limitation of the HRDD obligation to the companies' own operations and

[60] Friends of the Earth Europe, European Coalition for Corporate Justice, Corporate Europe Observatory, *Off The Hook? How business lobbies against liability for human rights and environmental abuses*, June 2021.

[61] Https://bit.ly/3fls5IZ.

[62] Https://bit.ly/3fm7ivK.

[63] BusinessEurope, *Due diligence and sustainable corporate governance - Letter from Markus J. Beyrer to Didier Reynders*, 13 October 2020.

[64] BusinessEurope, *Vote on draft report on corporate due diligence and corporate accountability - Letter from Markus J. Beyrer to the European Parliament Legal Affairs Committee*, 21 January 2021.

[65] BusinessEurope, *Sustainable corporate governance and due diligence - BusinessEurope reply to the European Commission public consultation*, 4 February 2021.

first-tier suppliers or subcontractor, excluding the rest of the supply chain. This obligation shall apply to European and third country's large companies only, fully exempting SMEs. Regarding accountability rules, it is not surprising to read BusinessEurope's rejection of any kind of vicarious liability to make parent companies responsible for right's violations committed by separate legal entities along their supply chains. Indeed, the employees' association strongly defended the function and purpose of the "limited liability company" as fundamental principle of national company law. Quite the opposite, BusinessEurope suggested developing the legal notion of "safe harbour"[66], meaning companies should not be held liable for human and labour right's impacts if they demonstrate that HRDD measures were taken (i.e., establishing a "due diligence defence"). Eventually, as for procedural rules, BusinessEurope declared that, by reversing the burden of proof and by reforming EU PIL (Brussels I-recast and Rome II Regulations), the EU would be opening the door of Member State courts to frivolous claims and abusive litigation.

At national level, French employers' associations AFEP[67] and MEDEF[68] are strongly supporting the lobbying efforts of their European representative[69], after having successfully watered down the bill of the French Duty of Vigilance Law before 2017. Recently, the most prominent Dutch industry lobby group VNO-NCW has joined efforts to weaken the future EU legislation[70].

3.5. European Parliament Working Group

In order to organise a dialogue with these diverse stakeholders' groups, the European Parliament Working Group on Responsible Business Conduct[71] (RBC WG) was funded. The RBC WG is an informal cross-party and cross-committees group of Members of the European Parliament (MEPs) interested in promoting responsible business conduct and HRDD at EU level. The RBC WG brings expertise to the Parliament by fostering collaboration with experts

[66] Smit, Bright, *The concept of a "safe harbour" and mandatory human rights due diligence,* CEDIS Working Papers, 2020, VARIA, ISSN 2184-5549, N° 1.

[67] Association française des entreprises privées, *Position sur la Gouvernance Durable des Entreprises et le Devoir de Vigilance*, February 2021.

[68] Https://bit.ly/3wzj63O.

[69] FoEE, ECCJ, CEO, *op. cit.*, pp. 15-18.

[70] Van Teeffelen, *The lobby by VNO-NCW against legislation on corporate accountability*, May 2021.

[71] Https://bit.ly/3cbx8B1.

and stakeholders and it engages in regular discussions within the other EU institutions, CSOs, private sector and other stakeholders on issues related to HRDD. After having launched a Shadow EU Action Plan for implementing the UNGPs within the EU in 2019[72], the RBC WG took the lead of the lobbying efforts to push the Commission to advance a legislative initiative on this issue. MEP Lara Wolters (S&D, Netherlands), one of the most active members of the RBC WG, eventually obtained the role of rapporteur of the legislative initiative procedure on corporate due diligence and corporate accountability[73]. Together with other RBC WG colleagues appointed as shadow rapporteurs[74] in Legal Affairs Committee, MEP Wolters took up the demands of civil society and finally drew up an INL report with recommendations to the Commission which was endorsed by the Parliament Plenary in March 2021. Through the analysis of this report (Section 4) it will be possible to identify the (provisional) winners and losers of the ongoing lobbying battle

4. *An analysis of the European Parliament's proposal in the light of the stakholders' influence*

As for the legal bases for the proposal, provision 32 of the report requests the Commission to base its future initiative on the principle of freedom of establishment (Article 50 TFUE) as well as on the approximation of Member States' criminal laws (Article 83(2) TFUE) and the approximation of legislations which have as object the establishment and functioning of the internal market (Article 114 TFUE), in line with the request of business to strengthen the level playing field and the competitiveness of EU companies. No reference is made, however, to Article 153(1)(e) TFEU (information and consultation of workers) and Article 154 TFEU (structured consultation of management and labour), as ETUC had been invoked for a long time.

The Annex to the report puts in place a detailed HRDD strategy (Article 4, 6, 7, 8 and 9) which is defined as a preventative ongoing process

[72] European Parliament Working Group on Responsible Business Conduct, *Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU*, 19 March 2019.

[73] 2020/2129(INL).

[74] MEP AUBRY Manon (GUE/NGL, France), MEP DURAND Pascal (Renew, France), MEP HAUTALA Heidi (Greens/EFA, Finland).

and obligation of means (Recitals 20, 30 and 34), in line with BusinessEurope's strong warning to avoid any obligation of results.

As for its scope, the obligation shall apply to large EU undertakings and to publicly listed and high-risk EU SMEs, as well as to non-EU undertakings operating in the internal market (Article 2). This provision represents a compromise between the lobbying action of trade unions and NGOs and the one of the business side *i.e.*, between those who wanted all companies covered by the HRDD obligation and those who wanted to exempt all SMEs. The efforts of the right wing of the Parliament (ECR Group and ID Group) to exempt all SMEs from the obligation by means of numerous amendments in the plenary session were finally not successful. The HRDD exercise shall cover all undertakings' own activities as well as those of their value chains and business relationships (Article 1), meaning that the resulting obligation is very wide and in line with the request of the NGOs' and trade unions' calls, despite the BusinessEurope's request to limit its scope to the first-tier supplier or subcontractor. Regarding the normative scope of the obligation, the trade unions' invitation has been taken up as the definitions provision specifies that "adverse impact on human rights" include "social, worker and trade union rights" (Article 3(6)).

What is disappointing for the trade union side, however, is Article 5 on the role of stakeholder engagement, as the provision only provides for an obligation to discuss with relevant stakeholders leaving a lot of company discretion regarding their involvement in the establishment and implementation of the HRDD strategy, while remaining as well unclear on how information requests by workers' representatives will be enforced. On the other hand, both the provision protecting stakeholders participating in these discussions and the provision calling for full respect of collective bargaining rights are to be welcomed.

The report includes a section on public enforcement, according to which Member States shall designate independent administrative authorities for the supervision of the application of the future Directive (Article 12) coordinated by a new European Due Diligence Network (Article 16). Competent authorities shall have the power to carry out undertakings' investigations, to adopt interim measures or temporary suspensions of activities, as well as to impose a ban on the operating in the internal market for non-EU companies (Article 13). Although national authorities would need to be given the power to impose proportionate sanctions with deterrent effect (Article 18 includes

fines, the exclusion from public procurement, from state aid, and from public support schemes), no right of victims to make judicial complaints for HRDD failures (as in the case of the 2017 French Duty of Vigilance Law) or to obtain injunctive relief is provided in this framework.

Special attention shall be paid to Article 19 setting the legal framework for civil liability of companies, which represents the litmus test for the ambition of the proposal. According to Article 19(2), "Member States shall put in place a civil liability regime under which undertakings can (..) be held liable and provide remediation for any harm arising out of adverse impacts on human rights (..) that they, or undertakings under their control, have caused or contributed to by acts or omissions". Standard tort law causality criterion applies therefore, while the narrower scope of liability, which only refers to the "controlled" subsidiaries, suppliers, and subcontractors, as opposed to the broader HRDD obligation, which covers the entire value chain and business relationships, stands out. Moreover, an internal contradiction in the provision should be highlighted. On the one hand, Article 19(1) as well as Recitals 16 and 52, by transposing the commentary of Principle 17 of the UNGPs, states that undertaking respecting HRDD obligations shall *not be absolved of any liability* which it may incur pursuant to national law, in line with ETUC call. On the other hand, Article 19(3) clarifies that "Member States shall ensure that (..) undertakings that prove that *they took all due care* in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, *are not held liable* for that harm", introducing a due diligence defence escape clause in line with the request of BusinessEurope, while adding another layer of confusion with the different concept of "due care". In short, the weakness of the provision lies in the possibility of the companies conducting HRDD along their value chain to be exempted from civil liability, even if an infringement of human or labour rights has occurred, depriving victims of the right to compensation for damage.

Finally, the report contains promising but still insufficient developments in the area of facilitating access to justice for victims. The ambitious reforms of the Brussels I-recast and Rome II Regulations, which trade unions and NGOs have been campaining for on the basis of the recommendations contained in a 2019 Parliament's study[75] and originally proposed in the draft

[75] European Parliament, Policy Department, Directorate-General for External Policies, *Access to legal remedies for victims of corporate human rights abuses in third countries*, February 2019, pp. 110–115.

prepared by the JURI committee[76], were not incorporated in the report approved by the Plenary. This choice resulted from a compromise between S&D, The Left, Greens and Renew parliamentary groups after consultations with the Commission, which made it clear that reforms of PIL regulations were not realistically possible in the context of this proposal, that is to be limited to company law and corporate governance. Regarding issues linked to applicable law and victims' choice of law in EU courts, Article 20 makes it possible to overcome third-countries victims' interdiction to refer to substantive legislation of Member States because it defines the provisions of the future Directive as "overriding mandatory" irrespective of the law otherwise applicable[77] to the non-contractual obligation, in line with Article 16 of Rome II Regulation. This means that if the Member State in which the court sits imposes statutory duties on its corporations with regard to extraterritorial compliance with human and labour rights standards, such duties will override the otherwise third-country applicable law[78]. As for jurisdictional issues, while EU companies can always be sued in EU courts[79], the report does not extend this possibility neither to victims of non-EU companies operating in the internal market nor to victims of non-controlled non-EU subsidiaries and business partners of EU parent companies. While this extension would be complex, as it would oblige the European legislator to amend the Brussels I-recast Regulation, the lack of this reform makes the report's key provision on civil liability non-enforceable for a number of cases[80] of violations perpetrated in third countries. In short, these steps backwards on procedural rules are mainly in line with BusinessEurope's warning that EU would be opening the door to frivolous claims and abusive litigation.

[76] European Parliament's Committee on Legal Affairs, *Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL))*, 11 February 2021, pp. 43-46.

[77] *I.e.*, the general rule contained in Article 5 of the Rome II Regulation, according to which "the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs", which points to the (often less protective) law of a third State.

[78] Van Hoek, Aukje, *op. cit.*, p. 17.

[79] Brussels I-recast Regulation, Article 4: "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".

[80] For an in-depth analysis of a few cases with a focus on the legal, procedural and practical obstacles faced by claimants in accessing legal remedy, see the Parliament's Study *Access to legal remedies for victims of corporate human rights abuses in third countries*, cit., p. 18 ff; see also Skinner, McCorquodale, De Schutter, Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, December 2013, p. 106 ff.

As for other relevant provision in this framework, Article 19(4) of the report recommends Member States to ensure "reasonable time limits" for bringing civil liability claims concerning harm covered by the Directive, while Recital 53 suggests the reversal of the burden of proof from the claimant (the victim) to the defendant (the company). Notwithstanding the weakness of this last provision, given the lack of legal value of the recitals, these rules would constitute an improvement compared to 2017 French Duty of Vigilance Law, and would be in line with NGOs' call as well as with recommendations contained in a 2020 FRA study[81] showing that provisions on the burden of proof and victims' access to evidence are a major obstacle for those who claim an infringement of their rights by businesses. However, the report does not offer effective solutions to practical obstacle such as massive legal costs and disparity of resources between claimants and defendants, and limited availability of collective redress or representative action allowing for legal standing of CSOs and trade unions on behalf of victims[82], to the detriment of their demands.

5. *Conclusions*

In the light of the analysis of the Parliament report in Section 4, it is now possible to draw out conclusions about which actors are the drivers of continuity and change in the field of business and human rights within the EU, as well as to provisionally take stock of who are "winners" and "losers" of this lobbying exercise. Even if the NGOs and trade unions' coalition, as a driver of change in the field of business accountability, has achieved significant progress, some compromise provisions of the report are disappointing, while the text lacks some key elements to ensure the protection of victims, especially in terms of procedural rules and civil liability. This is even more true now that the Commission has delayed[83] the publication of the Directive's proposal at least until the fall 2021, which provoked a prompt reaction from the presidents of the major political groups in the European Parliament[84]. While

[81] European Union Agency for Fundamental Rights, *Business And Human Rights – Access to Remedy*, 2020, pp. 6-8 and 59-63.

[82] *Idem*, pp. 8-9, pp. 12-13, pp. 64-67, pp. 73-77.

[83] June 2021 agenda for College of Commissioners' meeting did not listed the initiative for discussion.

[84] European Parliament Groups' Presidents' Letter To President Von Der Leyen On Sustainable Corporate Governance, 23 June 2021.

it seems that the reason for the delay lies in the fact that the Commission's internal Regulatory Scrutiny Board[85] in charge of quality control gave a negative opinion to the impact assessment of the future proposal, which obliges the Commission to review the file and to resubmit it to the Board before it can proceed, it is impossible not to recognise a big win of the corporate lobby, which has been trying to block and undermine the initiative for a long time. The question arises as to whether the proposal has been questioned as a whole, or whether its preparation simply requires more time and consultation than expected. Notwithstanding these political considerations, it is undeniable that the business lobby, as driver of continuity and the *status quo*, scored a major victory over several key contents of the Parliament report, such as the neglected negotiating and representing role of trade unions, the due diligence defence escape clause weakening the liability regime and the absence of suggestions for EU PIL reforms. Nevertheless, it should not be forgotten that the analysis presented in this paper focuses on a parliamentary report with no proper legislative value. The lobbying game is therefore still open, especially now that the Commission has postponed the publication of the actual legislative initiative. While the HRDD strategy and the prevention provisions of the future text are ground for compromise between the various factions and do not require further negotiation efforts, the NGOs-trade unions coalition will still have to focus on the access to justice and remedy elements of the initiative, asking for support from its national members and the scientific community committed to this cause.

Finally, it is crucial to identify the key elements expected in the future Commission's proposal in order for it to be effective. Indeed, there is still room for scientific research to support the European legislators in this context. First, a strict or vicarious liability regime of the parent company, without any due diligence defence replicating the shortcomings of the 2017 French Duty of Vigilance law, is needed. While part of the scientific community already supports this perspective[86], further research is essential to formulate the most

[85] Https://bit.ly/3yBd6JF.

[86] Skinner, *op. cit.*; Mares, *Legalizing human rights due diligence and the separation of entities principle*, in Deva, Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours*, CUP, 2017, pp. 266-296; Muchlinski, *Limited Liability and Multinational Enterprises: A Case for Reform?*, in *CJE*, 2010, 34(5), pp. 915-928; Daugareilh, *La ley francesa sobre el poder de vigilancia de las sociedades matrices y contratistas: entre renuncias y promesas*, in Sanguineti Raymond, Vivero Serrano (dir.), *Impacto laboral de las redes empresariales*, Comares, 2018, p. 357.

suitable liability scheme for the EU context. As part of this research, it could be interesting to explore the potential of joint and several liability regimes for the regulation of workers' rights in subcontracting chains already in place in some Member States, which proved to be useful tools for circumventing the corporate veil. Second, in order to further support victims from the practical point of view of access to justice, appropriate financial support schemes should be foreseen as well as the reversal of the burden of proof and the availability of collective redress and representative action allowing for legal standing of CSOs and trade unions. Regarding the latter, this would not be a novelty in EU law, as the Posting of Workers Enforcement Directive[87] already provides for the right of trade unions and other third parties which have a legitimate interest to engage, on behalf or in support of the workers or the employer and with their approval, in any judicial or administrative proceedings. Third, a lean and mean reform of the Brussels I-recast Regulation is needed to guarantee victims access to Member States courts even when harms have been perpetrated by non-EU formally autonomous business entities, thus reconstructing the power-profit-responsibility chain of parent companies that will no longer be able to hide behind the shield of limited liability. In addition, once access to the court has been obtained, victim seeking compensation should be able to choose to base his or her claim on the law of the Member State where the trial takes place. As suggested by paragraph 4.4 of the abovementioned EESC exploratory opinion, this would not be a novelty in EU PIL, as for example Article 7 of the Rome II Regulation already allows a victim's choice of laws in cases of environmental damage.

Without these elements, the future Directive risks to prove incapable of enhancing the protection of human, social and labour rights along value chains. Such a scenario will entail the end of the political momentum in favour of the accountability of MNCs, signalling the lack of political will from the EU institutions in playing a leading role in the area of corporate responsibility.

[87] Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System, Article 11(3).

Abstract

This paper presents the current political and regulatory efforts at EU level around the issue of regulating multinational enterprises' subcontracting and supply chains with regard to the violation of human rights, workers' rights and the environment. The spreading of the legal concept of Human Rights Due Diligence has reached the European Commission, which made it the basis of its legislative initiative on sustainable corporate governance. Pending the publication of the official Commission proposal for a directive, the content of the European Parliament's report supporting the initiative is reviewed in the light of the stakeholders' positions, with a focus on the role of the actors in work and employment relations in the current negotiations. The paper concludes with a provisional assessment of the "winners" and "losers" of this lobbying battle regarding the key legal issues of the debate to grant effective remedies to victims of fundamental labour and social rights violations.

Keywords

Human rights due diligence, liability, EU private international law, European Parliament, stakeholders.