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The Slow Approval Process of the Due Diligence Directive and the Different Paths for the Involvement of Trade Unions.

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Abstract

In this article, we highlight the different positions expressed by the European Parliament and the European Commission on the need to provide for the involvement of trade unions in the new directive on Company Due Diligence. The Parliament's position tends to emphasise the importance of prior consultation with trade unions. In the opposite direction, the European Commission's draft directive, from a management perspective, understands due diligence compliance as a governance constraint decided unilaterally by companies. Considering these processes, we try to ask whether trade unions can autonomously contribute to the ecological transition of companies and the protection of human rights, considering the advantages and disadvantages of their involvement.

Keywords: Corporate due diligence, Trade unions involvement, Proposal for a European directive.

1. Introduction.

One of the most significant lines of development to achieve the goals of the transition to a green and climate-neutral economy requires enterprises to introduce self-regulatory mechanisms. These are the due diligence obligations in the value chain, whereby businesses

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take necessary measures to avoid negative impacts on fundamental values, such as environmental protection.

It should be noted that corporate responsibility for environmental negative impacts uses a mechanism that was initially designed to verify the best practices adopted by companies to optimise their economic and financial performance. It is only more recently that there has been an international trend to intend due diligence as a mechanism open 'outside' the company and helpful to achieve first social and then environmental objectives: in the context of this more recent trend, and thus of the international documents on which it was based, that the origins of this institute must be traced.

2. The most relevant international documents on due diligence and the role of trade unions.

The debate on best corporate practices for respecting the human rights of workers arose as early as the 1970s in response to the problem of law shopping, namely the choice to move to territories where minimal rules for the protection of workers are applied.[1]

In the following decades, due to the development of globalisation processes, the need to promote respect for human rights and sustainable development was felt more; several international organisations addressed the problem and, among them, even those not having worker protection as their primary objective (World Bank; World Trade Organization).[2] However, the debate on corporate social and environmental responsibility was not so mature as to require companies to take adequate measures to prevent negative impacts in their own production organisation or among the companies that are part of the value chain.[3]

The concept of corporate due diligence was first used to ensure respect for human rights with the Guiding Principles of UN Resolution 17/4 of June 2011.[4] In the corporate accountability part of this document (Principles 11 to 24 and in particular, Principle 17), due diligence was evoked as a mechanism to prevent incidents of human rights violations in the value chain, adopted by companies to demonstrate that they operate in a socially responsible manner in the market.

[1] Although they are soft law mechanisms (applicable, among other things, only to multinational enterprises), both the OECD Guidelines of 1976 (revised in 2000 and 2011 and currently the subject of public consultation with a view to their further amendment), with which the path of promoting corporate social responsibility for environmental protection and public health (point VI) began, and the ILO Tripartite Declaration on Principles Concerning Social Policies and Multinational Enterprises of 1977 (later supplemented in 2000, 2006 and 2017) were introduced during this period.

[2] *See* the documents cited in Brino V., *Diritto del lavoro e catene globali del valore. La regolarizzazione dei rapporti di lavoro tra globalizzazione e localismo*, Giappichelli, Turin, 2020, 46.

[3] At the beginning of the millennium, for example, Corporate Due Diligence was still not referred to in either the UN Global Compact (2000) or the UN Norms on the Responsibility of Multinational Corporations and Other Business Enterprises Concerning Human Rights (2003).

[4] In this sense *see* Salcito K., Wielga M., *What does Human Rights Due diligence for Business Relationships really look like on the ground?*, in *Business and Human Rights Journal*, 2017, 2, 113; Loeve P., *Etude sphere d'influence versus due diligence*, http://www.diplomatie.gouv.fr/IMG/pdf/1_2PESP_1_Etude_sphere_dinfluence_versus_due_diligence_cle874ee9.pdf, 2010, 6.

This was a key document that was adopted by a large number of companies due to the positive effects on reputational ranking that compliance with such due diligence obligations generates among consumers and investors.[5] Its importance is also linked to the choice of imposing the constraints directly on companies and not on the States in which they are located. Since international law comprises a system of provisions and principles designed to regulate relations between States and their related responsibilities, the choice of defining responsibilities regarding human rights directly towards private economic actors is indeed a relevant innovation.[6]

A second important aspect to consider is that the Guiding Principles also introduce corporate responsibility concerning the choice of business partners. The duty of care is extended to the economic activity itself, regardless of the different corporate articulations that make it up; in other words, exercising control over possible violations committed outside the enterprise is envisaged.

The framework of Corporate Due Diligence outlined in the Guiding Principles is further complemented by Oil's Tripartite Declaration on Multinational Enterprises and Social Policy, last updated in 2017.[7] The main new feature of this document is the due diligence provisions (paragraph 10). It cites the United Nations Guiding Principles on the responsibility of enterprises for the violation of human rights at work and the extension of this responsibility to the entire value chain, but more importantly it values the consultative role of stakeholders and potentially affected organizations in identifying risks of violation.

This is a relevant statement – for the first time introduced in an international due diligence document – that confirms the International Organization's focus on trade union freedoms and collective rights,[8] and demonstrates how due diligence measures to prevent risks and negative impacts can be based on more than just reputational objectives.

[5] As well as affecting and having a profound influence on the adoption and use of the concept of duty of care, as a means of verifying the standards required of companies, for the purpose of respecting human rights and environmental sustainability, by international institutions (Oecd, Ilo) and national legal systems (France, Switzerland, Germany). *See* Aa.Vv., *Study on Due Diligence Requirements Through the Supply Chain: Final Report*. A study requested by the European Commission, Directorate-General for Justice and Consumers. Publications Office of the European Union, 2020, 160-161.

[6] V. Brino V., nt. (2), 56.

[7] Also in 2011, however, the OECD Guidelines approved in 1976 were updated. The updated version assigns central importance to due diligence and the role of trade unions in guaranteeing workers' fundamental rights – *see* Chapter 5 entitled "Employment and Industrial Relations", on which *see* Tergeist P., *The OECD Guidelines for Multinational Enterprises,* Kluwer Law Intl, 2016, 45 ff. – but nowhere does it relate the need to define the duties of care, risks and negative impacts of production activities to the prior consultation of workers' organizations and, in this respect – which is instead intended to be highlighted here – it is less advanced than the ILO Tripartite Declaration in the 2017 updated version.

[8] Specifically, paragraph 10(e) of the Declaration states "Such a process [of assessing the risks of human rights violations] should include in-depth consultation with potentially affected groups and other relevant stakeholders, including workers' organizations, taking into account the size of the enterprise and the nature and context of the activities. In order to achieve the objectives enshrined in the Declaration on Multinational Enterprises, this process should take into account the central role of trade union freedom and collective bargaining, as well as industrial relations and social dialogue as an ongoing process". From the standpoint of enforcement, the Declaration has been referred to in numerous global framework agreements entered into by multinational corporations: *see* the findings on ILO data by Murgo M., *Global value chains e diritto del lavoro. Problemi e prospettive*, Cedam, Padova, 2021, 124 and ch. IV.

This was followed by OECD recommendations and guidelines,[9] European initiatives prior to Parliament's 2021 resolution,[10] and, at the national level, the experience of France, which passed the first general law on human rights and environmental obligations and became a regulatory 'laboratory' followed by other States where Due Diligence for Sustainability has been at the centre of policy debate or has been approved more recently (Netherlands, Germany, Switzerland).[11]

3. The limits of the French experience.

The French experience deserves attention because the law of 27 March 2017 uses rules like those used by the European Commission in the proposed Due Diligence Directive. Therefore, their examination is helpful to establish the space and support the European legislator should give workers' organisations, in the elaboration of risks and negative impacts caused by companies.[12]

As known, the 2017 French Duty of Vigilance law is the first legislative example in which a general mandatory due diligence requirement for human rights and environmental impacts is imposed.[13] The law lays down a duty of vigilance on certain large French companies (employing 5,000 employees in France or 10,000 globally). It extends to the activities of French companies' subsidiaries, subcontractors, and business enterprises in the supply chain "with which the company maintains an established commercial relationship."

To discharge their legal duty, companies must implement a 'vigilance plan', which should include reasonable measures to adequately identify risks and prevent severe violations of human rights and the environment within their company and with their subcontractors and suppliers. This plan must include a 'mapping' of these risks, "appropriate mitigation actions [...] to prevent serious harm", and a "warning and reporting mechanism". In case of a breach,

[9] Apart from the 2011 update to the 1976 OECD Guidelines (on which *see* previous footnote), the OECD Due Diligence Guidance for Responsible Business Conduct, approved in 2018, with cross-sectoral application, and the OECD Sector Guides, which are added to the former, to determine the typical specificities of different production areas *see*, in this regard, Addo M., *An external view of the OECD Working Party on Responsible Business Conduct and its Chair*, in Mulder H., Scheltema M., van 't Foort S., Kwant C. (eds.), *OECD Guidelines for Multinational Enterprises: a Glass Half Full. A Liber Amicorum for Dr. Roel Nieuwenkamp*, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018, Oecd, 2018, 40 ff., but also the references to the guidelines for some productive sectors proposed by Murgo M., *ibid*, 114 ff.

[10] For detailed examination of the interventions in the European context prior to the proposed directive *see* Aa.Vv., nt. (5), 165 ff.

[11] On the Dutch experience, which focused on preventing the risk of child labor, *see* Erkens Y., *Sustainable business agreements in the Netherlands: search for the missing link*, in *Giornale di diritto del lavoro e delle relazioni industriali,* 2021, 19 ff.; on Germany, *see* Nogler L., *Lieferkettensorgfaltspflichtengesetz: perché è nata e quali sono i suoi principali contenuti*, in *Giornale di diritto del lavoro e delle relazioni industriali,* 2022, 1 ff. and Murgo M., nt. (8), 184 ff.; on Switzerland, *see* Brino V., nt. (2), 112, and the bibliography cited there, as well as, on the instruments introduced in non-European countries (*see* in particular the United Kingdom and California), *see* Aa.Vv., nt. (5), 165 ff.

[12] In this sense *see* Pollet M., *EU corporate due diligence law to learn from the French example*, Euractiv, Feb. 21, 2022.

[13] French Law No. 2017-399 of March 27, 2017 on the "Duty of Care of Parent Companies and Ordering Companies". More recently, about the new law on human rights and environmental sustainability of German legislators, *see* Nogler L., nt. (11), 1 ff.

the company may be prosecuted "by any person who can show an interest in acting to that end."

Many issues have been raised about these regulations,[14] but we are interested in those about the involvement of trade unions. In this regard, the hope of a well-known French labor law scholar that French companies, obligated to draw up the Vigilance Plan, would involve unions in the drafting of the document, because they were interested in avoiding litigation and/or being found guilty, has been disproved.[15]

Without a specific legal obligation, most of the Vigilance Plans were drafted with little or no prior sharing with stakeholders, including trade unions.[16]

Partly due to the lack of clarity and the absence of guidelines on the correct way of drafting,[17] after the law was passed, companies adjusted their Vigilance Plans, ensuring only formal compliance with the law: the legal obligation has often been fulfilled without dedicated documents, but by including additional information in the non-financial information part of the accounting documents required under Directive 2014/95.[18]

In addition – as has been correctly pointed out – in the absence of specific legislative backing,[19] the 'burden' of union participation has been dumped directly on the unions, which have been able to intervene only through other instruments of self-defence. In particular, looking at the French case, it was noted how the lack of detail, if not inertia, [20] that accompanied the drafting of the Supervisory Plans in the first phase of application of the French law was replaced by an attitude of greater rigour when the trade unions, and in

[14] The literature on the subject is vast: *see* among others Savourey S., Brabant S., *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption*, in *Business and Human Rights Journal*, 2021, 6, 141 ff.; Aa.Vv., *Tra attuazione e dibattito: primi insegnamenti dalla legge francese del 2017 sul dovere di vigilanza delle imprese*, in *Giornale di diritto del lavoro e di relazioni industriali*, 2021, 37 ff.; Daugareilh I., *La legge francese sul dovere di vigilanza al vaglio della giurisprudenza*, in *Giornale di diritto del lavoro e di relazioni industriali*, 2021, 2, 159 ff.; Zito M., *La giustizia francese indaga sui colossi dell'industria tessile per "occultamento di crimini contro l'umanità" e lavoro forzato degli Uiguri presso le loro catene di fornitura globali*, in *Giornale di diritto del lavoro e di relazioni industriali*, 2021, 537; Lyon-Caen A., *Verso un obbligo legale di vigilanza in capo alle imprese multinazionali?*, in *Rivista giuridica del lavoro*, 2018, 2, 245.

[15] V. Lyon-Caen A., *ibid,* 245.

[16] From the evaluation reports on the submitted Plans, it was found that only companies with stakeholder committees or employee representative institutions that already existed before the adoption of the 2017 law had decided to make concerted definition of the prevention rules to be introduced with the Plan, *see* Daugareilh I., nt. (14), 168.

[17] On the absence of interpretation guidelines *see* Savourey S., Brabant S., nt. (14), 146.

[18] *See* in particular the report Terre Solidaire - Sherpa, *Le radar due devoir de vigilance. Identifier les entreprises soumises a la Loi*, 2021. It was, not surprisingly, noted that at the stage of first application, no concrete difference in terms of content came to light between the Supervisory Plans and the obligations of listed companies of a certain size to supplement their corporate financial statements with information on the measures taken by the company on social, diversity management and environmental protection v., on this point, Sherpa, *Ne minons pas la transition énergétique. La vigilance dans les chaînes d'approvisionnement en minerais utilisés dans le cadre de la transition énergétique*, 2020, 16 ff.; *see* also Guarriello F., *Il ruolo del sindacato e delle rappresentanze del lavoro nei processi di due diligence*, in *Rivista giuridica del lavoro*, 2021, 585; Baylos A., *Empresas Transnacionales Y Debida Diligencia*, in *Diritti Lavori Mercati International*, 2022, n. 2, 11.

[19] Guarriello F., *ibid,* 586.

[20] A report of Sherpa, CCFD Terre Solidaire and Business and Human Rights Resource Center, *'Duty of Vigilance Radar'* (*see*: https://vigilance-plan.org/) has identified just 265 companies falling into the scope of the Law. Out of those, the report indicated that 27 percent of companies had not published a vigilance plan (including high-profile companies from French or foreign groups).

particular the international trade union federations (in addition to the NGOs), decided to use extrajudicial and/or judicial remedies.[21]

Despite the lack of habit of French trade unions to move against companies by going the judicial route,[22] the choice to use the judicial method, despite the uncertainty in outcomes,[23] had an echo effect on companies, which then started to pay more attention to the document processing stage.[24]

The weak point of French law regarding union participation, however, concerns the limited transparency obligations required. In fact, from the standpoint of union consultation obligations, it must be remembered that the legislature, even having established that companies are obliged to consult with stakeholders before deciding on the alert, collection, and monitoring mechanisms to be adopted,[25] has not also required that some notice be given of the consultation that has taken place.

In particular, the prior involvement of stakeholders and, among them, first and foremost, of workers' organizations, while not provided for on a voluntary basis has remained – as noted by French doctrine – almost unimplemented, both because the law does not indicate the trade union bodies with which companies are obliged to consult for the purpose of drawing up the Plans (national trade unions, European federations, international federations, workers' representatives?) and because the law does not require that the Plan expressly acknowledge the effective participation of the stakeholders with whom the company has consulted prior to the drafting of the Plan itself.

The result was a regulation that did not encourage the involvement of trade unions, and thus was unable to counter the backward, but widespread, opinion of company management that workers' representatives were unable to contribute effectively to the drafting of the Plan

[21] Murgo M., nt. (8), 176.
[22] In this sense *see* Daugareilh I., nt. (14), 168.
[23] We refer to the jurisdictional issues that have animated the litigation against *Total* (Nanterre Court, Order January 30, 2020, rg. 19/022833; Court of Appeal of Versailles, judgment Dec. 10, 2020, rg. 20/01692; Court of Nanterre, preliminary order Feb. 11, 2021, rg. 20/00915), in which the question was raised as to whether it was legitimate for appeals filed against companies for violations of the rules on Vigilance Plans to be decided by commercial (and not civil) judges, even though these judges are not togaes, but are elected judges and, moreover, coming, by training and experience, precisely from the business world. The final word came from the Supreme Court, which ruled in the sense of excluding the exclusive jurisdiction of the commercial court in the case of disputes between a non-business plaintiff and a business respondent over facts related to the management of the business. In particular, the rule that the non-entrepreneur plaintiff has the option to bring the case alternatively in the civil or commercial court was considered to prevail (Court of Cassation, Commercial Sec., Nov. 18, 2020, rg. 19-19463). On the other hand, as far as extrajudicial activity is concerned, the international mediation action initiated before the OECD (within the framework of the OECD Guidelines on Multinational Enterprises) at the request of the French trade unions (Cfdt, Cgt Fapt, Cgt, Fo-Fec) and the international trade union Uni Global Union, against the company Teleperformance, deserves to be mentioned, for failing to comply with norms on the fundamental rights of call center workers during the Covid-19 pandemic, in ten different states, as well as the outcome of the letter of formal notice against XPO Logistic, which in fact procured consultation with the group committee, regarding the subsequent reworking of the Vigilance Plan, cf. Daugareilh I., nt. (14), 167, 168 and 170.
[24] *See* the results of the comparison made from data published at https://planvigilance.org/company/xpo-logistics-europe/ by Murgo M., nt. (8), 180.
[25] According to Article 1 of the law, "The plan is intended to be developed in association with the company's stakeholders, possibly as part of multistakeholder initiatives within sectors or at the territorial level". On this point, *see* Daugareilh I., nt. (14), 169; Aa.Vv., nt. (14), 47.

and that their involvement was a harbinger of an unnecessary lengthening of the decision-making process.[26]

4. The binding nature of due diligence and the European Parliament's proposed regulation.

Examining the issue from a European perspective, the French example has accelerated the debate on the due diligence, highlighting the effects of the absence of legal rules to support the action of trade unions.

The low propensity to promote plural processes open to trade unions and, consequently, the limited positive effects in countering violations of fundamental rights have already been demonstrated by the use of other instruments based on voluntary self-regulation.[27] Think the voluntarist nature of corporate social responsibility (CSR). Although CSR has over time found ample space among soft law techniques for the protection of rights, it often continues to provide only a 'documentary' view of the use of tools to prevent the risks of violation. With it, in fact, companies very often want to demonstrate to consumers only the ethicality of their business practices and, with respect to this end, the involvement of trade unions in the verification of risks is intended as an unjustified lengthening of the risk assessment process.[28]

From this point of view, there is a high risk that Corporate Due Diligence in environmental sustainability will be declined at the European level in the same way, leaving companies free to decide whether or not to involve trade unions in such processes.[29]

The European Parliament's resolution of March 10, 2021, on recommendations to the Commission on due diligence and corporate responsibility (2021/C 474/02), had indeed

[26] Aa.Vv., nt. (14), 47.

[27] In the sense of highlighting how voluntaristically based soft law techniques, such as codes of conduct, social certifications, or corporate social responsibility, can show important limitations in terms of effectiveness and effectiveness *see* Brino V., nt. (1), 41. Emphasizes the need for the socially responsible company to be one that declares its mission and has at its base a system of proper labor relations under which commitments to decision-making processes are maintained and its behavior can be made observable and verifiable Gottardi R., *CSR da scelta unilaterale datoriale a oggetto di negoziazione collettiva: la responsabilità sociale contrattualizzata*, in Guarriello F., Stanzani C., *Sindacato e contrattazione nelle multinazionali*, FrancoAngeli, 2018, 67.

[28] In a critical sense on Corporate Social Responsibility *see* Daugareilh I., *La responsabilité sociale des entreprises en quête d'opposabilité*, in Supiot A., Delmas-Marty M. (eds.), *Prendre la responsabilité au sérieux*, PUF, Paris, 2015, 183-199; Gualandi S., *Addressing MNEs' violations of workers' rights through Human Rights Due Diligence. The proposal for an EU Directive on Sustainable Corporate Governance*, in *Diritti Lavori Mercati International*, 2022, 1, 84; Angelici C., *Divagazioni sulla 'responsabilità sociale' d'impresa,* in *Rivista delle società*, 2018, no. 1, 6. In highlighting the purpose of the instrument to enhance corporate credibility *see* Tullini P., *La responsabilità dell'impresa*, in *Lavoro e Diritto*, 2022, 2, 357; on the international framework *see*, recently, Borzaga M., Mussi F., *Luci e ombre della recente proposta di direttiva relativa al dovere di due diligence delle imprese in materia di sostenibilità*, in *Lavoro e Diritto*, 2023, 500 ff.

[29] Other examples derive from European regulations regarding the duty of care in human rights matters that have already been passed, such as the Regulation on Minerals from Conflict Zones (Regulation (EU) 2017/821), the Directive on Non-Financial Reporting (Directive 2014/95/EU), and the Timber Regulation (Regulation (EU) No. 995/2010).

adopted an apparent enhancement of the prerogatives and possibilities for intervention by trade unions.[30]

It had provided that prior consultation with them was a means to "help undertakings to identify potential and actual adverse impacts more precisely and to set up a more effective due diligence strategy" (Recital 38); moreover, the spaces for trade union involvement had been differentiated and made broader than those intended for other stakeholders:[31] they were recognized for organizations (at the relevant level: sectoral, national, European, global), but also for individual employee representatives of the company (Art. 5). Among other things, such involvement was envisaged not only for the due diligence strategy drafting phase, but also for the implementation phase: consider, for example, the necessity for at least an annual review of the effectiveness and appropriateness of the due diligence strategy (Art. 8(1)) and the need to discuss its revision with interested parties and, in particular, with the involvement of trade unions and workers' representatives (Art. 8(2)).

Confirming the special consideration with respect to the other stakeholders, it was also specified the right of information of employee representatives, in accordance with the European directives on union participation 2002/14, 2009/38 and 2001/86 (Art. 5(4)).

The intention to support, through specific norms, the action of trade unions has been betrayed by the evolution of the legislative process, which has also been affected by the lobbying power of employers' associations. In particular, the studies on how to regulate due diligence, commissioned by the European Commission, showed that the majority of companies and employer associations consulted (67 per cent) were pessimistic about the usefulness of a provision that would allow stakeholders to intervene in the drafting stage of due diligence documents,[32] and this result seems to have influenced the choices made by the Commission in the proposal for a directive.

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[30] Following the approach suggested by the European Trade Union Confederation (ETUC) – invited to give its opinion on the content of the European harmonization rules on due diligence – the European Parliament had called for the approval of a directive with Articles 153(1)(e) and 154 TfEU as its legal basis, so that the legislative process would take place in accordance with the principles of information and consultation of the social partners at the European level. Yet, as will be better seen in the text, this and other indications expressed by the ETUC will remain unfulfilled. Particularly on the choice of legal basis, a significant role was played by employers' associations, which called for regulating the matter with a directive approved under Articles 50 (freedom of establishment) and 114 TfEU (functioning of the internal market). In this regard *see* ETUC Executive Committee, *ETUC Position for a European directive on mandatory human rights due diligence and responsible business conduct*, December 17-18, 2019. For a commentary *see* Gualandi S., nt. (28), 90 ff. The proposed directive can be made part of the European Parliament's actions on governance in Global Value Chains, which include the April 27, 2017, resolution on clothing, the September 12, 2017, resolution on international trade, and the May 17, 2017, Regulation No. 821 on supply chains for Union importers of tin and other minerals from high-risk areas; on the subject *see* Brino V., nt. (1), 91 ff.

[31] Again in Recital 38 of the Resolution there is in fact a reference to trade unions as privileged stakeholders, where it states, "it is necessary that all stakeholders are consulted in an effective and meaningful manner and that *trade unions, in particular,* are adequately involved" (italics mine).

[32] V. European Commission, Directorate-General Justice and Consumers, *Sustainable corporate governance initiative. Inception Impact Assessment*, July 30, 2020 and the summary report of the public consultations, European Commission, Directorate-General Justice and Consumers, *Sustainable corporate governance initiative. Summary report - public consultation*, June 2021. For a commentary on these data *see* Gualandi S., nt. (28), 86 ff., who points out that it was precisely on the intervention of stakeholders in the drafting of due diligence documents that the most striking contrast between the 'corporatist' positions of the employers' organizations and those of the consulted trade unions was consummated, given that the latter were almost unanimously (93 percent) in favor.

5. The Commission's "corporatist" directive proposal and the second phase of the clash: the European Parliament's modifications of 1° June 2023.

It is no coincidence that the European Commission, with its proposal for a directive of 23 February 2022 on companies' duty of care for sustainability (COM(2022) 71 final), subverted the Parliament's resolution on the role of stakeholders (and among them the role of trade unions) by deleting Article 5 of the Parliament's proposal for a directive, expressly dedicated to 'Stakeholder Involvement'. The Commission has framed its proposal for a directive within the framework of rules to prevent national regulatory differences on the exercise of fundamental freedoms from distorting competition.[33] In this sense, a legal basis based on Articles 50 and 114 TFEU was envisaged, and thus in contrast to what was requested in the advisory opinion to the trade unions, which had instead argued for a "social" legal basis based on Articles 153 and 154 TFEU.

Consequently, since the legal basis of the directive was based on the objective of the fair competition between the companies of the Member States, there was no need for the direct involvement of the social partners, as required for the social policy objectives by Art. 154 TfEU. This favoured the corporatist perspective, according to which the observance of duties of care – as was the case with the French law – is a governance constraint decided mostly unilaterally by companies.

In more general terms, on union involvement in corporate governance, as an organisational model to achieve the just transition goals set by the European Green deal,[34] seems to be occurring between the Commission and the European Parliament an ideological clash.[35]

[33] Thus, the proposal of that part of the consulted employers' associations and companies, which joined the legislative initiative in a favourable way, was accepted, stressing the usefulness of an intervention on due diligence because of the need to make the harmonization of the European rules in this matter more adequate and to avoid, consequently, the risk of distorting competition among European companies due to disciplines decided in the different national fora. In any case, it should be noted that a substantial part of the companies and employers' associations consulted highlighted concerns about the impact that the new rules may cause on the supply chains and competitiveness of European companies, calling for deep reflection aimed at withdrawing the proposed directive (*see*, for example, the content of letters sent by the Director General of Europe's largest business association, BusinessEurope, to European Commissioner Didier Reynders (BusinessEurope, *Due diligence and sustainable corporate governance - Letter from Markus J. Beyrer to Didier Reynders*, October 13, 2020) and to European Parliamentarians (BusinessEurope, *Vote on the draft report on corporate due diligence and corporate accountability - Letter from Markus J. Beyrer to the European Parliament Legal Affairs Committee*, January 21, 2021). In general, Employer organizations at the EU level such as BusinessEurope and the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) had expressed fear that European companies might have a competitive disadvantage in the world market because of the EU target of a 20 per cent reduction in CO2 emissions (*see* Eurofound, 2009).

[34] *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, December 11, 2019, COM (2019)640 final.

[35] In the report of December 29, 2021 (European Parliament, *Report on democracy at work: a European framework for employees' participation rights and the revision of the EWC Directive (2021/2005(INI)),* 2021, A9-0331/2021), the European Parliament called on the Commission "to make the necessary improvements to the regulatory frameworks for information, consultation and participation rights of employee representatives, in order to ensure effective and timely information and consultation before business decisions with a major impact on workers are made, and if a fair and equitable green and digital transition is to be achieved [and, in addition,] to

The different views of the two institutions on these issues are well known and represent a trend that has already been demonstrated, for example, with the approval of Directive 01/86/EU, on employee involvement in European companies.

On that occasion, the Commission's more liberal approach, based on Anglo-Saxon-style European company law, according to which the company is conceived on ownership and the managers' obligation to maximise shareholder value,[36] was countered by the European Parliament's approach. This was more in favour of the continental (and, first and foremost, German) model of the stakeholder enterprise, by which governance is understood in a genuine sense, according to a more intense relationship with those who manifest, directly or indirectly, interests (of a varied nature: social, environmental, economic, etc.) related (even if opposed) to the performance of the enterprise's activities.

During the approval process of this directive (although the contrast was also manifested on other occasions, such as the approval of Directive 2003/72/EC on the European Cooperative Society), it was written that it marks "a halt, perhaps a definitive one, in the attempt to link social Europe to the generalisation of the participatory model" and, at the same time, the "consolidation in Community law of the rights of information and consultation".[37]

Mutatis mutandis, the European Commission's recent proposal for a directive on due diligence, raises the theoretical question about the model of transnational labour relations toward which we are moving (or should be moving) to meet the challenges of just transition. This is particularly true if one considers the latest stage of the clash between the two institutions that occurred with the European Parliament's recent attempt to extend the involvement of trade unions further than envisaged in its 2021 resolution.[38] In the plenary session of 31 May 2023, in fact, the European Parliament approved its amendments to the Commission's directive text, among which the new obligation to "carrying out meaningful engagement with affected stakeholders" stands out.[39]

This is a provision that, on closer inspection, goes beyond what was proposed on stakeholder involvement in the 2021 resolution, and thus confirms the absolutely important role that the Parliament intends to play on this issue.

fulfil its commitment to adopt the Due Diligence Directive [that] ensures the full involvement of trade unions and worker representatives throughout the due diligence process".

[36] Santagata R., *Il lavoratore azionista*, Giuffré, 2008, 285.

[37] Pessi R., *Informazione e partecipazione tra esperienze nazionali ed indirizzi comunitari*, in Ficari L. (ed.), *Società europea, diritti di informazione e partecipazione dei lavoratori*, Giuffré, Milan, 2006, 51 ff.

[38] *See* the text approved by Parliament in plenary on 31 May 2023, at: https://www.europarl.europa.eu/doceo/document/A-9-2023-0184_EN.html#_section1.

[39] *See* the text of the new Article 8d, introduced by Amendment 206 to the text of the Commission's proposal for a Directive. *See* also, however, Amendment 122 adding a point 'n.a.' to Article 3 para. 1, and thus introducing the figure of 'vulnerable stakeholders', understood as those "that find themselves in marginalised situations and situations of vulnerability, due to specific contexts or intersecting factors" ..., as well as those "living in conflict-affected and high-risk areas, which are the causes of diverse and often disproportionate adverse impacts, and create discrimination and additional barriers to participation and access to justice". With regard to this category of persons, it is provided that in the information and consultation phase with stakeholders, companies shall take into account their 'specific needs' (Art. 8d, introduced by amendment 206) and, moreover, that States shall ensure that the same needs are safeguarded when introducing complaints mechanisms (Art. 9(3a), introduced by amendment 214).

Analysing the provision in detail, the first paragraph establishes the object and modalities of stakeholder participation: it refers in particular to the right to 'information' and 'consultation' of stakeholders (in line with what was already stated in the 2021 resolution); more precisely than before, it also states that the commitment of companies in making these rights concrete must be "comprehensive, structural, effective, timely, and culture and gender-sensitive".

The second paragraph of the provision deals with the addressees of the 'meaningful dialogue' mentioned above. So-called 'affected stakeholders' are to be involved but, if a "genuine interaction and dialogue" is not possible, 'relevant stakeholders' may be involved. From this point of view, the provision does not specify who decides in which cases the dialogue with 'affected' stakeholders may be replaced by 'relevant' stakeholders, and this could lead to excessive discretion for companies. This ambiguity does not, however, concern the meaningful dialogue that the provision envisages with 'other experts', since their involvement seems to be envisaged as 'additional' to that with affected stakeholders and implemented specifically in case of absence of credible insights on potential or actual negative impacts.

In the paragraphs following the second one, the concrete ways of exercising the right to information and involvement are dealt with,[40] and the extent of the contrast with the Commission's position in its proposal for a directive is also fully understood. It is clarified that the right to information of stakeholders is on all news related to the value chain and on all potential or actual negative impacts for the respect of human and environmental rights (with the right of stakeholders to request additional written information, *see* para. 4). With regard to the right to consultation with interested parties (para. 5), it is specified that the involvement of employee representatives must take place at all stages of the due diligence process that the directive will require companies to comply with. It is therefore an involvement that begins when due diligence 'policies' are to be defined, continues when it comes to establishing mechanisms to identify, prevent, and develop plans to counteract adverse impacts (Arts. 6 and 7), and finally ends with monitoring activities (Art. 10).[41]

6. Trade union involvement on a voluntary or binding basis?

After examining the difficulties in providing legal support for the involvement of trade unions in due diligence processes, one may wonder whether trade unions can make a significant contribution to the ecological transition even without the regulatory support of European and/or national legislators. The projection of trade union action towards the management of environmental issues, in fact, has already been manifested by European national sectoral confederations and federations,[42] implementing their own statutes with the

[40] Specifically, Article 8d, paragraphs 4 and 5, introduced by Amendment 206.
[41] Involvement that is then protected by binding companies to ensure that the recipients of the information and consultation "are not subject of retaliation or retribution"(par. 7).
[42] Zito M., *Il ruolo del dialogo sociale e della contrattazione collettiva transnazionale nella gestione delle tematiche legate all'ambiente e alla transizione verde*, in *Diritto delle relazioni industriali*, 2022, 3, 699.

aims related to the realisation of climate change and to a 'green, digital and just' transition.[43] The previous experiences of trade union involvement on a voluntary basis in human and environmental rights suggest, however, a negative answer to the question.

As mentioned above, the need for binding intervention to safeguard human and environmental rights is unavoidable in view of the lack of effectiveness of instruments on a voluntary basis only, but if such intervention did not also promote trade union involvement, the results would be no different from those that have already emerged in the past.[44] If the main objective of companies voluntarily using due diligence is to maintain/enhance their reputation, it is not surprising that this 'defensive' approach to the instrument – i.e. to obtain exoneration from liability in the case of violations of human and environmental rights – could be repeated even if a binding act such as a European directive without support for consultation with workers' representatives were to be approved.[45]

In fact, the move from a voluntary to a binding instrument would not guarantee overcoming the tendency towards the aforementioned 'defensive' use of due diligence, especially if the choice to involve stakeholders remained in the hands of companies and control over risk assessment and prevention of violations was made possible to trade unions only after (as will be discussed in a moment) the due diligence duties had been defined. In this case, in the internal managerial dynamics of companies, the interests to be balanced would continue to be of an economic nature only. In fact, the recognition of negative impacts on human or environmental rights due to corporate practices (or those within the supply chain) and the subsequent organisational reconversion actions to be taken are interventions on which contrasts may arise depending on the particular interests of individual constituents

[43] Even the European Commission, before releasing its proposal for a directive, had on several occasions highlighted the importance of the European social dialogue and "the active involvement of the social partners" as instruments for "the Union's impetus towards a digital, green and fair transition" and "for the social development of a highly competitive market": *see* the Porto Declaration of May 8, 2021; *see* also Commission Communication '*A Strong Social Europe for Just Transitions*' (COM (2020) 14 final).

[44] *See* Recitals 4 ff. of the Parliament resolution of March 10, 2021, where the issue of the lack of effectiveness of voluntary due diligence mechanisms is raised. Also from experiences related to transnational collective bargaining and agreements on the transposition of information and consultation rights in the work of EWCs (on which *see* the recent European Parliament Resolution of February 2, 2023, making recommendations to the Commission concerning the revision of the European Works Councils Directive 2009/38/EC), it appears that in the landscape of EWC agreements and GFAs signed between multinationals and global trade unions, the environmental issue has remained on the margins of social dialogue; it has been pointed out in this regard that "it does not represent, except for aspects concerning occupational health, the subject of information and consultation for workers' representatives, and collective bargaining is never specifically focused on the environmental issue" *see* Zito M., nt. (42), 705.

[45] A key provision of the proposed directive is its applicability also to third-country companies operating in the territory of a European State. This is a highly relevant issue, which is causing much discussion in the legislative process of approving the directive and on which scholars have always highlighted the need for intervention to safeguard fair competition between European and non-European companies. Given the approach of this paper, we will not be able to deal with it specifically: for further discussion *see* Brino V., *Gli ordinamenti nazionali e le misure di governance con implicazioni extraterritoriali: limiti e tendenze*, in Id., nt. (2), 99 ff. In addition, the issue of extraterritoriality arises on which, too, it has been pointed out that in order to ensure that unilateral responsible corporate governance initiatives do not remain mere declarations of intent, the intervention of trade unions and employee representatives in the monitoring and supervisory process is necessary, especially along the global value chain, where violations are most frequently reported, cf. Guarriello F., Nogler L., *Violazioni extraterritoriali dei diritti umani sul lavoro: un itinerario di ricerca tra rimedi nazionali e contrattazione collettiva transnazionale,* in *Giornale di diritto del lavoro e delle relazioni industriali*, 2020, 173 ff.; Zito M., nt. (14), 704.

in corporate governance (shareholders, directors, etc.),[46] but where counterbalancing the economic interest is the reputational interest *vis-à-vis* investors and consumers, which is in practice an indirect economic interest.

Where, on the other hand, decisions in which it is necessary to carefully balance the economic costs of adopting virtuous practices and the resulting social and environmental benefits are made with the involvement of trade unions, the risk of this balancing of interests being occluded and of choices being made based solely on economic interests would be limited.

Trade union intervention could push for a greater reconsideration of workers' human rights and be a driving force for pursuing ecological transition paths based on organisations' growing interest in having a more open role in society.[47] On the other hand, support for union activity ensures that organisations acquire an institutional role that they desire, intending to return to the centre of European and national level debate at a time when environmental issues are on governments' national and international agendas.

7. What contribution from trade unions to just transition?

To highlight then the critical aspects of the approach in the Commission's draft directive, which excludes the involvement of trade unions from the process of preventing violations and assessing risks, it is necessary to make explicit the benefits, for the achievement of European sustainability goals, that, instead, an open and participatory reinterpretation with trade unions of due diligence obligations would entail.

What has transpired about implementing the 2014/95 Directive on Non-Financial Information is a valuable example to understand that, in the absence of union involvement, the disclosure requirements imposed on companies, in social and environmental matters, can become mere compliance obligations managed in a self-referential manner.[48]

As is known, the EU Directive – now replaced by Directive 22/2464 of 14 December 2022 on corporate sustainability reporting – mandates companies to draw up a nonfinancial statement including information related to "environmental, social and employee matters,

[46] On the existence of a 'legal' duty on the part of directors to balance the interests of shareholders and stakeholders *see* Bevivino G., *Dalla "responsabilità sociale di impresa" alla "sostenibilità": andata e ritorno*, in *Lavoro e Diritto*, 2023, 486.

[47] On the institutional role that trade unions can play in environmental issues *see* Eurofound, *Industrial relations and sustainability: the role of social partners in the transition toward a green economy*, 2011, 7.

[48] For a comparative analysis at European level, prior to the approval of the directive *see* Cremers J., *Non-financial reporting beyond the strict minimum: is the workforce a well-informed stakeholder?*, European trade union institute, Working Paper, 2013. Italy was one of the first European States to transpose the directive thanks to Legislative decree 254/2016, in force since 25 January 2017. On the transposition in Italy, *see* Caputo F., Leopizzi R., Pizzi S., Milone V., *The Non-Financial Reporting Harmonization in Europe: Evolutionary Pathways Related to the Transposition of the Directive 95/2014/EU within the Italian Context*, in *Sustainability,* December 2019; Posadas S., Tarquinio L., *Assessing the Effects of Directive 2014/95/EU on Nonfinancial Information Reporting: Evidence from Italian and Spanish Listed Companies*, in *Administrative Sciences*, 2021, 11, 89.

respect for human rights, anti-corruption and bribery matters".[49] In doing so, it created a new European scenario for corporate reporting, in which the disclosure of non-financial information changed from voluntary to mandatory. However, it did not provide – and neither does it the more recent Directive 22/2464, although it leaves more space for stakeholder involvement – for any kind of trade union involvement neither in the preparation of such information, nor when publishing company accounts. Research has shown that, in the years following the entry into force of the national regulations implementing this directive, a statistically substantial number of companies have supplemented their financial statements with information on the measures adopted in social and environmental matters, according to a minimal level of detail,[50] which has made fulfilment of the information obligation merely documentary.[51]

The reasons for companies' opposition to accepting trade union involvement in these activities – which led employers' organisations to exert strong pressure to limit the space for trade union participation in the text of the due diligence directive – are the economic burdens that such involvement could generate. The concerted drafting of due diligence documents, it is said, would lengthen decision-making processes, and more incisive strategies for the defence of human and environmental rights could cause costly changes in organisational and production structures.

On the contrary, without considering reasons other than the purely economic ones, the benefits that a greater awareness of environmental issues among workers through the action of their representative organisations could provide should not be underestimated. Although the shift towards more environmentally friendly forms of production often implies the remodelling of the products to be manufactured (as in the case of the automotive sector),[52] environmental transitions are also generated by policies to reduce waste and with it production costs.[53] The promotion of these through trade unions – which have in their background the ability to interpret the discomforts and needs of the workforce, but also to guide their choices –[54] could take into account the knowledge of workers on the most

[49] EU Commission, *Directive 2014/95/EU of the European Parliament and the Council of October 22, 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups*, Brussels, 2014, par. 1.

[50] Guarriello F., nt. (18), 580.

[51] About the effects of the transposition of the directive in Italy, it was written that "the company's goal in disclosure was not accountability, but only to comply with the letter of the law". Therefore, based on the existing literature on institutional theory and corporate social responsibility, it is reasonable to assume that companies' NFI reporting is only a response to recent pressure from the EU and the Italian government. Moreover, the risk is that companies could "just adapt their current reporting practices to comply with the Directive and maintain a 'business as usual' approach": Tarquinio L., Posadas S., Pedicone D., *Scoring Nonfinancial Information Reporting in Italian Listed Companies: A Comparison of before and after the Legislative Decree 254/2016*, in *Sustainability*, 2020, n. 12, 18.

[52] On the impact for the sector in Italy, *see* Terzano C., *The ecological transition in automotive: risks and opportunities. Report Uilm,* October 5, 2022, www.startmag.it

[53] Tomassetti P., *Diritto del lavoro e ambiente*, Adapt University Press, Modena, 2018, 248.

[54] *See*, in this sense, the company collective agreements referred to in Carta C., *La transizione ecologica nelle relazioni sindacali*, in *Lavoro e Diritto*, 2022, 314, in which there are clauses combining reductions in environmental impact and economic benefits. Since workers are the actors in the productive organization who recognize the risks of business activity and therefore have the opportunity to learn about its effects on the environment, it has been pointed out that increased access to information and their greater participation in decision-making processes can improve the quality of decisions and strengthen their effectiveness *see*, Tomassetti P., *ibid,* 248; on union

functional ways to perform the activity while avoiding waste; in this way, the most material and elementary of convergences could be found between the interest in profit and environmental issues as called for in the Action Plan for the Circular Economy, as a pillar of the European Commission's European Green Deal.[55]

7.1. Spaces of convergence between the European Commission and Parliament: grievance procedures actionable by stakeholders.

Analysing the rules of the draft directive issued by the European Commission, a space of greater convergence with what the European Parliament resolution envisages regarding the prerogatives granted to labour organisations is found concerning the *ex-post* control of due diligence obligations.

These are the compliance procedures regulated in both documents by Article 9. In the European Commission's version, the provision defers the active legitimacy to file complaints to, among others, "trade unions and other employee representatives representing persons working in the value chain concerned".

This is a reference to an expanded number of actors (which is likely to be better circumscribed when the directive is transposed by member states, depending on the typicality of trade union rights at the national level) that gives the possibility of detecting potential or actual adverse impacts on human and environmental rights along any stage of the production process and regardless of whether the responsibility is internal to the company or a business partner of the company.

In this way, we take what is positive from the discipline introduced by the French legislature, in the part in which it extended the responsibility for risk prevention through the Vigilance Plan beyond the traditional perimeter of the company to include the general activity in which it operates.[56]

As we have pointed out concerning the French regulations, the exercise of the complaints power can considerably affect the choice of enterprises to develop appropriate violation prevention and risk assessment strategies.[57] However, it is an instrument that circumscribes its effects depending on the ability of organisations to become aware, from the outside, of the limitations of the due diligence system and therefore prevents an effective and 'structural' control upstream of corporate strategies. Its effects are therefore less incisive than those that

participation in environmental matters *see* generally Etuc, *Una guida per i sindacalisti. Coinvolgere i sindacati nella lotta contro il cambiamento climatico per creare una transizione giusta*, 2018.

[55] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A more ambitious 2030 climate goal for Europe. Investing in a climate-neutral future in the interest of citizens*, September 17, 2020, COM (2020) 562 final.

[56] V., para. 3. In general on the advantages of a due diligence extended beyond the boundaries of the individual company *see*, among others, Brino V., *La governance societaria sostenibile: un cantiere da esplorare per il diritto del lavoro?* in *Lavoro e Diritto*, 2023, 445; on the notion of 'value chain' and the notion of 'chain of activity', cited in the Council's General Guidelines of 1 December 2022, *see* Borzaga M., Mussi F., nt. (28), 500.

[57] In the French case, companies began to adjust their Supervisory Plans, providing more detailed and numerically superior information, only after the unions had exercised their grievance powers against several of them: *see amplius, infra,* para. 3.

could be derived from the constraint of respecting the spaces of union involvement in the broad terms suggested by the European Parliament.

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