Italian Labour Law e-Journal
Issue 1, Vol. 17 (2024)
ISSN 1561-8048
https://doi.org/10.6092/issn.1561-8048/19692

The European directive on 'corporate sustainability due diligence': the potential for social dialogue, workers' information and participation rights

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1. The Due Diligence: from CSR practices to hard law. 2. The civil liability regime. 3. Information, transparency and stakeholders' involvement. 4. The perspectives of participation for workers and their representatives.

Abstract

The directive on "corporate due diligence for sustainability purposes", approved on 24 May 2024, follows international attempts by some national legal systems to transfer due diligence to the level of hard law. The proposal obliges large companies to structure a risk management system against social and environmental externalities related to their activities along the entire global supply chain, requiring States to adopt monitoring and control mechanisms and a system of sanctions. To safeguard this process, the introduction of an obligation to involve a qualified list of stakeholders, including workers and their representatives, and an unprecedented civil liability of companies and directors are envisaged. Starting from these premises, the paper focuses first of all on the introduction of the civil liability regime for companies linked, among other things, to the failure to prepare such information and participatory protocols. The paper then analyses the critical issues and potential of the directive with particular reference to the prospects of a participatory governance of corporate risk and the role that, in its implementation, workers' participation and social dialogue can assume. This is also in light of the progressive emergence of new collective rights, including those of self-employed workers and platform workers, provided for by the most recent initiatives of the European Commission.

Keywords: Due diligence; Civil liability; Workers participation; Workers representation; Pevention

1. The Due Diligence: from CSR practices to hard law.

The proposal for a EU directive on Corporate Sustainability Due Diligence[1] aims to impose sustainable production models on multinationals along the chains of partners,

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[1] Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending directive (EU) 2019/1937 (Brussels, 23.2.2022, COM(2022) 71 final 2022/0051 (COD). On the topic of sustainability in the labour law debate *see* Caruso B., Del Punta R., Treu T., *Il Diritto del*

suppliers and subcontractors.[2] Its legal basis is in fact Articles 50 and 114 TFEU in combination, with the aim of remedying regulatory fragmentation in this area that can distort competition in the Internal Market.

The proposed directive represents the culmination of a broader regulatory process of Corporate Social Responsibility practices - unilateral (codes of conduct, corporate reporting, etc.) and negotiated (International Framework Agreements - Ifa, European Framework Agreements - Efa)[3] - that, over time, have guided big companies in adopting standards of behaviour that respect human rights.[4]

As is well known, the due diligence was first defined by the 2011 UN Guiding Principles on Business and Human Rights[5] as that obligation of companies to identify, prevent and mitigate human rights risks and impacts arising from their business and business relationships in the value chain, and to account for actions taken to remedy them[6] . Its application therefore consists of the adoption of a trans-company and trans-national risk management system anchored to the respect of internationally sanctioned human rights; an appealing mechanism but not without critical implementation issues in terms of proceduralisation, scope of rights to be protected and effectiveness of action.

In recent years, there have been some national experiments that, with varying degrees of intensity, have attempted to transfer due diligence to hard regulation. This has happened in particular in California,[7] the United Kingdom,[8] the Netherlands,[9] Norway[10] and, above all, in

lavoro nella giusta transizione. Un contributo "oltre" il manifesto, in *CSDLE "Massimo D'Antona"*, 2023. Sul tema cfr. anche Bevivino G., *Dalla "responsabilità sociale di impresa alla "sostenibilità: andata e ritorno*, in *Lavoro e Diritto*, 3, 2023, 490; Ponte V. F., *Catene di valore, diritti dei lavoratori e diritti umani: riflessioni intorno alla proposta di direttiva relativa al dovere di diligenza delle imprese ai fini della sostenibilità*, in *AmbienteDiritto*, 1, 2024, 1-11. From a business law perspective, Libertini M., *Sulla proposta di Direttiva UE su "Dovere di diligenza e responsabilità delle imprese"*, in *Rivista delle società*, 2-3, 2021, 325-335; Libertini M., *Un commento al manifesto sulla responsabilità sociale d'impresa della Business Roundtable*, in *Orizzonti del Diritto Commerciale*, 3, 2019, 627-636.

[2] Among all, Perulli A. (ed.), *La responsabilità sociale delle imprese: idee e prassi*, Il Mulino, Bologna, 2013; Montuschi L., Tullini P. (eds.), *Lavoro e responsabilità sociale dell'impresa*, Zanichelli, Bologna, 2006; Giovannone M., *La tutela dei* labour standards *nella catena globale del valore*, Aracne editrice, Roma, 2019.

[3] For a framing of CSR practices in the international scenario, Brino V., Perulli A., *Diritto Internazionale del Lavoro*, Giappichelli, Turin, 2023, 197-243. For an analysis of the value and different aspects of CSR, Gottardi D., *CSR da scelta unilaterale datoriale a oggetto di negoziazione collettiva: la responsabilità sociale contrattualizzata,* in Guarriello F., Stanzani C. (eds.), *Sindacato e contrattazione nelle multinazionali. Dalla normativa internazionale all'analisi empirica*, Franco Angeli, Milan, 2018, 58-75.

[4] On the topic *see* Treu T., Perulli A., *Sustainable Development, Global Trade and Social Rights*, Wolters Kluwer, Milan, 2018.

[5] On the Guiding Principles and other institutional initiatives at the international level, Brino V., *Diritto del lavoro e catene globali del valore*, Giappichelli, Turin, 2020, 43 ff.; Partiti E., *Polycentricity and polyphony in international law: interpreting the corporate responsibility to respect human rights*, in *International and Comparative Law Quarterly*, 70, 1, 2021, 133-164. On the interpretation of the Guiding Principles, Ruggie J. G., Sherman J. F., *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, in *European Journal of International Law*, 28, 3, 2017, 921-928. Among the first legal instruments that developed the concept of duty of care were those on *conflict minerals*, Pertile M., *Gli obblighi di diligenza delle imprese e i minerali provenienti da zone di conflitto: riflessioni sull'origine e sulla rilevanza del concetto di* conflict minerals, in *Giornale di diritto del lavoro e di relazioni industriali*, 171, 3, 2021, 391-420.

[6] Principle 15, Guiding Principles.

[7] *California Transparency in Supply Chains* of 2010.

[8] *Modern Slavery Act* of 2015.

[9] *Child Labour Duty of Care Act* of 2019.

[10] *Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act)* of 18 June 2021.

France[11] and Germany.[12]. Likewise, at the international level, a treaty is being negotiated that aims to recognise direct corporate liability for the violation of fundamental rights along the supply chain.[13].

At present, in Italy and at the European level, due diligence remains a legal duty under construction[14] that requires companies to internalise wide and varied social risks placed outside their own legal availability, leveraging the economic and contractual power of companies. Through this power, companies can exert control over satellite companies and supplier firms in the context of business relationships that unfold along the supply chain through tender contracts, subcontracts and other types of commercial contracts.[15] It follows that the consolidation of the regulatory "hardening" of this duty, inaugurated by the proposed European directive, is bound to have a pervasive impact on corporate strategic choices. Firstly, because it pushes national legal systems towards the operational and not just ideological introjection of sustainability, through prescriptions with precepts and sanctions. Secondly, and instrumentally, the proposal completes the apparatus of those new-generation duties of transparency, communication and information outlined by the recent European Union regulations,[16] projecting them onto a very wide range of stakeholders for whom new rights of participation are speculatively envisaged.

There are several interesting aspects of the proposal,[17] as well as some critical aspects[18] relating to the size and turnover parameters used to circumscribe the due diligence obligation, to the choice of taking into account only business relations between the company and

[11] *Loi n° 2017-399*.

[12] *Lieferkettensorgtfaltgesetz* of 2021. For a comparison of the German and Norwegian models, Krajewski M., Tonstad K., Wohltmann F., *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, in *Business and Human Rights Journal*, 6, 3, 2021, 550-558.

[13] OEIGWG, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, Third Revised Draft, 17 August 2021.

[14] Moreau M. A., Morin M. L., *La chaîne de sous-traitance internationale: une catégorie juridique en émergence*, in Jeammaud A., Le Friand M., Lokiec P., Wolmark C. (eds.), *A droit ouvert: mélanges en l'honneur d'Antoine Lyon-Caen*, Dalloz, Paris, 2018, 659-678; also referred to by Brino V., *Lavoro dignitoso e catene globali del valore: uno scenario (ancora) in via di costruzione*, in *Lavoro e Diritto*, 3, 2019, 564.

[15] According to Brino V., *Dentro e oltre le delocalizzazioni: prove di responsabilizzazione delle imprese nello scenario "glocale"?*, in *Lavoro Diritti Europa*, 4, 2021, 10-28, for the emergence of responsibility the "azione imprenditoriale organizzativa e gestionale [che] è svolta entro confini sempre più ampi rispetto a quelli giuridico-organizzativi formali dell'impresa" is relevant. On the imbalance of bargaining power Greco L., *Capitalismo e sviluppo nelle catene globali del valore*, Carocci, Roma, 2018, 81-82.

[16] These obligations are also to be found in Directive 2014/95 on the disclosure of non-financial and diversity information by certain large undertakings and groups, adopted in 2014. It is subsequently updated with the approval of Directive 2022/2464 on corporate sustainability reporting, which requires certain categories of companies to disclose a range of information on risks and impacts related to sustainability issues of their business activities on the basis of common sustainability parameters developed by the *European Financial Reporting Advisory Group* (EFRAG).

[17] Particularly interesting is the reference it makes (in the annex) to numerous ILO conventions; a reference that could open unprecedented scenarios of direct legal operativeness of international labour standards along the supply chain, even in the absence of the status of fundamental rights (core labour standards), of a formal ratification at the national level and of a jurisprudential use as interposed parameters. G. Orlandini's speech seems to be oriented in this direction at the presentation event of the study he edited with S. Borelli e M. Tufo, *Le fonti OIL nella giurisprudenza italiana,* held on 13 October 2023 at the ILO headquarters in Rome.

[18] On this point, numerous insights came from the debate that emerged in the context of the Second International Seminar on *Diligencia debida y derechos humanos laborales: experiencias y propuestas*, held at the Universidas D Salamanca, Facultad de Decrecho on 26 and 27 October 2023.

"established" partners, to the difficulties of access to justice by non-EU employees against European companies.[19] However, what is most interesting here is to understand how the possible introduction of a civil liability regime for the company – as a result of which due diligence enters fully into the hard law of command and sanction – is doubly linked with the potential development of new rights of information and participation of workers and their representatives. In fact, the draft directive obliges large companies to structure a risk management system against social and environmental externalities (directly and indirectly) related to their activities along the entire global supply chain, requiring states to adopt monitoring and control mechanisms and a system of sanctions to protect against this obligation. The objective is to prevent the negative impacts that the activity of the company and its direct and indirect partners may have on a natural or legal person causing damage to human rights, including workers' rights, and the environment and provided that the respective legal situations are protected by national law (Art. 22 of the proposal). The *trait d'union* between these mechanisms, as will be seen, is the provision of specific duties of information and involvement of a wide range of stakeholders among which workers and their representatives stand out.

2. The civil liability regime.

Proceeding with a preliminary analysis of the text of the proposal fired by the Commission on 23 February 2022, Article 22 establishes the civil liability of the company in the event that it fails to adopt a risk management system against negative social and environmental externalities (Arts. 7-8), i.e. in the event that, as a result of such failure, a harmful negative impact occurs consisting of conduct detrimental to human rights (including workers' rights) or the environment "that should have been identified, prevented, mitigated, brought to an end or its extent minimised" through specific preventive measures (para. 1). In the event that the negative impact is caused by an indirect partner (i.e. an entity in the supply chain with which the company does not have a direct contractual relationship), the liability of the company that has complied with these obligations is excluded "unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken, including as regards verifying compliance, would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact". In this circumstance, those preventive and remedial

[19] For a review of the main critical issues, Bonfanti A., Brino V., *Verso una Direttiva europea sulla due diligence in materia di diritti umani lungo la catena globale del valore: riflessioni di diritto internazionale privato*, in Sanguineti Raymond W., Vivero Serrano J. B. (eds.), *Diligencia Debida y trabajo decente en las cadenas globales de valor*, Aranzadi, Navarre, 2022, 1-12; Brino V., *Governance societaria sostenibile e due diligence: nuovi orizzonti regolativi*, in *Lavoro Diritti Europa*, 2, 2022, 6-19. On jurisdictional conflicts limiting access to justice, Brino V., *Diritti dei lavoratori e catene globali del valore: un formante giurisprudenziale in via di definizione?*, in *Giornale di diritto del lavoro e di relazioni industriali*, 167, 3, 2020, 451-70; Bonfanti A., *Accesso alla giustizia per violazioni dei diritti umani sul lavoro lungo la catena globale del valore: recenti sviluppi nella prospettiva del diritto internazionale privato*, in *Giornale di diritto del lavoro e di relazioni industriali*, 171, 3, 2021, 369-390; Mongillo V., *Imprese multinazionali, criminalità transfrontaliera ed estensione della giurisdizione penale nazionale: efficienza e garanzie "prese sul serio"*, in *Giornale di diritto del lavoro e di relazioni industriali*, 170, 2, 2021, 179-213.

initiatives, initiated by the company, that are directly related to the damage in question must be assessed (para. 2).

The Council's amendments, dated 30 November 2022,[20] made substantial changes to these provisions. In particular, a company would be held liable for damage caused to a natural or legal person if it "intentionally or negligently failed to comply with the obligations" of due diligence (Art. 22(1)(a)) and, as a result of this failure, "damage to the natural or legal person's legal interest protected under national law was caused" (Art. 22(1)(b)). In any case, "a company cannot be held liable if the damage was caused only by its business partners". Therefore, the conditions under which liability is triggered - the damage, the breach of the duty of due diligence, the causal link between the damage and the breach, the specification of fault (malice or negligence) - have been clarified, and the relevant law, the domestic law of the Member States, has been specified in order to avoid undue interference in national law on the right to compensation for a tort or delict.[21] The position of the European Parliament, dated 1 June 2023, also proposes a similar approach.[22] In particular, civil liability would be triggered when, as a result of a breach of due diligence obligations, "the company caused or contributed to an actual adverse impact that should have been identified, prioritised, prevented, mitigated, brought to an end, remediated or its extent minimised through the appropriate measures laid down in this Directive and led to damage". The four conditions defined by the EU Council are thus re-proposed - although the reference to national law is removed - with the clarification of the due diligence requirements that satisfy the fulfilment.[23] Lastly, the final text of the directive, approved on 24 May 2024, also maintains the Council's approach.[24] It definitively provides that the civil liability exists when (i) the company intentionally or negligently failed to comply with the obligations; (ii) as a result of that failure, a damage to the natural or legal person's legal interests protected under national law was caused (Article 29, para. 1).

With respect to directors' liability, on the other hand, the original proposal included no less than two provisions (Articles 25 and 26). In the discussion process, however, the EU Council removed the two articles altogether because they risked "undermining directors' duty to act in the best interest of the company"[25] and, thus, the maximisation of company profits. Similarly, the European Parliament, without prejudice to the right of solicitude under Article 25, deleted the directors' liability regime in Article 26 from the original text, adopting a more

[20] Council of the European Union, General Approach to the Proposal, Brussels, 30 November 2022, 15024/1/22 REV 1.
[21] *Ibid.* sec. III(E)(27).
[22] European Parliament amendments, adopted on 1 June 2023, to the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (P9_TA(2023)0209).
[23] In both negotiating positions, little attention is paid to the obstacles related to access to justice for victims. On this point, 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*, 3, 2023, 511-512.
[24] Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (Brussels, 13 May 2024 (OR. en), 2022/0051(COD), PE-CONS 9/24).
[25] *Ibid.,* sect. III(F), paras. 30-32.

tempered position than in the past.[26] References to the director's civil liability have been completely eliminated in the final text.

The proposal to establish a liability regime for companies (and possibly directors) meets with much resistance. First and foremost, because it evokes the unresolved debate on the social purpose of the company and the need for the interests of shareholders to be balanced with those of stakeholders,[27] given that sustainable development should by definition take into account the interests of those who may be harmed by the productive activity - workers, trade unions, local communities - by involving them in a transparent manner in certain phases of the decision-making and production process. As is well known, the issue has ancient roots - in commercial law - in the opposition between the institutionalist and contractualist models.[28]

Then there are some more specific remarks. First of all, there is the fear that this regulation would generate a process of de-responsibility on the part of the State with respect to its task of imposing standards of protection as external limits to economic initiative; a prerogative that would in this way be borne by the company which, instead, must be obliged to respect regulatory constraints and certainly not to produce higher protection than that established by the law.[29] Secondly, the obligation to take into account interests other than the maximisation of profit could problematically expand the managerial discretion of the director who can more easily sacrifice profit to satisfy third party interests.[30] But above all, and this is

[26] Indeed, in the resolution of 10 March 2021 that launched the legislative debate, the European Parliament called for members of the company's administrative, management and supervisory bodies to be responsible for the adoption and implementation of its sustainability and due diligence strategies (recital 45 of the draft directive contained therein).

[27] Montalenti P., *Società, mercati finanziari e fattori ESG: ultimi sviluppi*, in *Rivista di Corporate Governance*, 1, 2022, 12, speaks of "equilibrato bilanciamento". On the topic of corporate social purpose *see* also Libertini M., *Economia sociale di mercato e responsabilità sociale dell'impresa*, in *Orizzonti del Diritto Commerciale*, 3, 2013, 1-27; Libertini M., *Dalla responsabilità sociale all'impresa sostenibile,* in the context of the conference *L'impresa sostenibile* held at the Department of Law of the University of Catania on 16 December 2022, as well as the paper entitled *Lo scopo sociale dell'impresa: sostenibilità delle attività economiche e tutela dei lavoratori*, held in the context of the seminar *Salute e sicurezza, rischi emergenti e nuovi ambienti di lavoro*, at the Department of Economics of the University of Roma Tre, 30 November 2023; Amatucci C., *Responsabilità sociale dell'impresa e nuovi obblighi degli amministratori. La giusta via di alcuni legislatori*, in *Giurisprudenza Commerciale*, 4, 2022, I, 612; Keay A., *The corporate objective*, Edward Elgar Publishing, Cheltenham, 2011, 70 ff.; Barcellona E., *La* sustainable corporate governance *nelle proposte di riforma del diritto europeo: a proposito dei limiti strutturali del c.d.* stakeholderism, in *Rivista delle società*, 1, 2022, 1-52; Kun A., *How to Operationalize Open Norms in Hard and Soft Laws: Reflections Based on Two Distinct Regulatory Examples*, in *International Journal of Comparative Labour Law and Industrial Relations*, 34, 1, 2018, 39; Richter M. S., *Long-Termism*, in *Rivista delle società*, 1, 2021, 30-31. About the "*hegemony*" of *shareholderism*, also Vitols S., *What is the Sustainable Company?*, in Vitols S., Kluge N. (eds.), *The Sustainable Company: a new approach to corporate governance*, I, Etui, 2011.

[28] While this is not the place to delve into the theoretical nuances underlying the two models, it is sufficient to recall that the institutionalist perspective opens up the purpose of business to the interests of stakeholders (*stakeholderism*), also in function of profit maximisation (*enlightened shareholder value*), against the contractualist thesis that recognises the shareholders' interest in profit as the sole purpose of business (*shareholder primacy*). For the latter position, reference must be made to Friedman M., *The social responsibility of business is to increase its profits*, The New York Times, 13 September 1970, and to the predominance of this assumption relaunched, at the beginning of the new century, by Hansmann H. B., Kraakman R., *The End of History for Corporate Law*, in *Georgetown Law Journal*, 89, 2001, 439 ff. In Italian doctrine, recently, Montalenti P., *L'interesse sociale: una sintesi*, in *Rivista delle società*, 2-3, 2018, 303-319; Perulli A., *La responsabilità sociale dell'impresa: verso un nuovo paradigma della regolazione?*, in Perulli A. (ed.), *La responsabilità sociale dell'impresa: idee e prassi*, Il Mulino, Bologna, 2013, 39.

[29] Gatti M., Ondersma C., *Can a broader corporate purpose redress inequality? The stakeholder approach chimera*, in *Journal of Corporate Legal Studies*, 46, 2020, 1 ff.

[30] Rossi S., *Il diritto della «Corporate Social Responsibility»*, in *Orizzonti del Diritto Commerciale*, 1, 2021, 124 ff.

the most legally complex and at the same time most interesting issue, there is the fear of imprinting a form of civil liability for failure to comply with social and environmental safeguards that is too general, because it is anchored not to legal norms but to principles and rights without sufficiently prescriptive content, enshrined in international acts addressed to States called upon to implement them. In fact, the annex to the proposal contains a list of principles and rights enshrined in specific international acts that should guide the performance of due diligence, including the International Covenant on Economic, Social and Cultural Rights and the ILO Conventions:[31] the exempting significance of compliance with the duty of due diligence would then become ambiguous with the consequence of determining a possible objectification of civil liability on the part of entities and directors.[32] In other words,[33] one glimpses the risk of indeterminateness of the mechanisms for detecting civil liability, considering, moreover, the particularly afflictive repercussions that the same could have on the practice of jurisprudence to which is entrusted the delicate function of protecting the certainty of law together with the other fundamental values underlying the discipline in question.

On the other hand, however, it is important to emphasise how the proposal invites companies to supplement the minimum standards of protection enshrined in national and international sources with virtuous organisational and management protocols. The duty of diligence, in fact, does not translate into an obligation to "do more" than the provisions of the law, but rather into a duty of risk management through an instrumental preventive apparatus of the negative effects caused by the company along the value chain. In this logic, therefore, civil liability reinforces the organisational virtuosity of the company in a primary preventive key.[34] It is, in essence, a civil liability for one's own deeds that derives from an obligation of means and not of result; an obligation that translates into a duty to prepare an organisation suitable for preventing upstream the negative externalities of the production activity. For this reason, the list of international acts contained in the annex represents a support in identifying the social and environmental risks to be prevented, certainly not an

[31] On the shortcomings of the list that operates a discretionary selection of international acts, incompatible with the interdependence and indivisibility of human rights, O'Brien C. M., Martin-Ortega O., *Commission proposal on corporate sustainability due diligence: analysis from a human rights perspective*, In-depth analysis requested by the European Parliament's Subcommittee on Human Rights (EP/EXPO/DROI/FWC/2019-01/Lot6/1/C/16), 18. *See* also the criticism by Murgo M., *La proposta di direttiva sulla* corporate sustainability due diligence *tra ambizioni e rinunce*, in *Diritto delle relazioni industriali*, 3, 2022, 946.

[32] On the risk of incurring (almost) strict liability, Ventoruzzo M., *Note minime sulla responsabilità civile nel progetto di direttiva Due Diligence*, in *Rivista delle società*, 2-3, 2021, 381 ff.

[33] Calvosa L., *La governance delle società quotate italiane nella transizione verso la sostenibilità e la digitalizzazione*, in *Rivista delle società*, 2-3, 2022, 314. Similarly, Presti G., *La sostenibilità nel diritto dell'impresa e delle società: l'auspicabile ritorno della regolazione pubblica*, in *JUS*, 3, 2022, 394; Carella G., *La responsabilità civile dell'impresa transnazionale per violazioni ambientali e di diritti umani: il contributo della proposta di direttiva sulla* due diligence *societaria a fini di sostenibilità*, in *Freedom, Security & Justice: European Legal Studies*, 2, 2022, 27, according to which the annex contains expressions so vague as to risk making it almost impossible to prove liability, especially if the relative burden is placed on the plaintiff. Highlights the same critical issues Mark C., *Corporate sustainability due diligence: More than ticking the boxes?*, in *Maastricht Journal of European and Comparative Law*, 29, 3, 2022, 302-303.

[34] Although Bevivino G., *Nuovi inputs euro-unitari. La sostenibilità come ponderazione normativa degli interessi di shareholders e stakeholders*, in *Analisi Giuridica dell'Economia*, 1, 2022, 127, emphasises how the remedy solution in this area is "new" and, therefore, its effectiveness is still to be assessed.

exhaustive evaluation parameter of the fulfilment of the duty of diligence.[35] And it could not be otherwise, since the global due diligence cannot be based on mere compliance with disparate national laws imposing different standards of protection.[36]

This interpretation is also supported by the liability established for the company in Article 22, as amended by the EU Council, and lastly in Article 29 of the definitive text. Indeed, it is explicitly excluded if the company has fulfilled its due diligence obligations, in the event of a damaging event caused exclusively by a business partner.[37] Liability is thus based on an organisational fault, if not for wilful misconduct, then for negligence (i.e. for failing to comply with the duty of due diligence), and not for the direct violation of human rights and environmental protection, removing the risk of objective liability. In this way, due diligence should not expand the already questionable hypotheses of strict liability, in which the obligation to compensate damages is independent of fault and, therefore, of the assessment of the diligence of conduct.[38] It is in these terms that the company seems to be called upon to comply more rigorously with the canons of professional diligence and fairness in a perspective of desirable strengthening of good corporate governance through appropriate enterprise risk management policies",[39] which do not change the company's social purpose but impose the conditions for achieving it.[40] Read in this sense, therefore, the proposal appears more persuasive insofar as it promotes, in favour of the company and of the persons who hold primary positions of managerial guarantee, an organisational culture of sustainability in spite of a culture of guilt, through the introduction of obligations of a preventive nature entrusted, as will be seen shortly, to participatory protocols.[41]

As a preventive measure and for compliance with the duty of due diligence, especially for the purposes that are relevant here, the proposal for a directive is, moreover, destined to affect the internal legal mechanisms of procurement and subcontracting contracts and, in general, of commercial contracts in which labour services are directly or indirectly involved. Once implemented, in fact, due diligence will have to interact with the social clauses and, more generally, with all those strongly protective devices - such as the joint liability regime -

[35] Nogler L., Lieferkettensorgfaltspflichtengesetz: *perché è nata e quali sono i suoi principali contenuti*, in *Giornale di diritto del lavoro e di relazioni industriali*, 173, 1, 2022, 17, interprets the list contained in the German law in the same way.

[36] Private regulation instruments in the CSR arena themselves have taken international protection standards as a reference because consistency with all national laws "is virtually impossible". *See* Scheltema M., *An assessment of the effectiveness of international private regulation in the corporate social responsibility arena: legal perspective*, in *Maastricht Journal of European and Comparative Law*, 21, 3, 2014, 383-405.

[37] *See* also Bonfanti A., *Catene globali del valore, diritti umani e ambiente, nella prospettiva del diritto internazionale privato: verso una direttiva europea sull'obbligo di diligenza delle imprese in materia di sostenibilità*, in *JUS*, 3, 2022, 298.

[38] Borelli S., Izzi D., *L'impresa tra strategie di* due diligence *e responsabilità*, in *Rivista giuridica del lavoro e della previdenza sociale*, 4, 2021, 554 ff. who instead propose the use of joint and several liability of an objective nature, which disregards culpable conduct, as a remedial technique, alongside due diligence which instead is at the preventive level.

[39] Cerrato S. A., *Appunti per una via italiana all'ESG. L'impresa costituzionalmente solidale (anche alla luce dei nuovi artt. 9 e 41, comma 3, Cost.)*, in *Analisi Giuridica dell'Economia*, 1, 2022, 93.

[40] In fact Tombari U., *Riflessioni sullo statuto organizzativo dell'impresa sostenibile tra diritto italiano e diritto europeo*, in *Analisi Giuridica dell'Economia*, 1, 2022, 143, concludes that "se attendevamo una risposta a livello europeo in tema di «scopo della società» e doveri degli amministratori siamo destinati a rimanere delusi".

[41] Brino V., *La governance societaria sostenibile: un cantiere da esplorare per il diritto del lavoro?*, in *Lavoro e diritto*, 3, 2023, 445.

through which our legal system has for some time already been addressing the problem of extending the liability of supplier firms towards workers and, ultimately, also towards the environment. In this respect it is no coincidence that the European Commission is expected to adopt guidelines in the future to introduce voluntary standard contractual clauses in order to make it easier for companies to comply with their due diligence (Art. 19 of the definitive text). These clauses, although voluntary and with a more or less wide-ranging and pervasive scope, will in fact necessarily have to be commensurate with the mechanisms of a similar tenor already envisaged by national regulatory systems in order to enrich them with new nuances and prescriptions or to be possibly absorbed, all in the logic of greater favour for workers and the environment.

3. Information, transparency and stakeholders' involvement.

Another relevant aspect is the fact that the stakeholders' contribution hovers over the due diligence design and implementation process. In fact, the "due diligence and responsibility" pair postulated above is conditional on the extensive participation, *ratione materiae*, of the various stakeholders (including employees and their representatives), whose demands must be duly taken into account by the company. The scope of beneficiaries of these information and participation rights is broad and includes "company's employees, the employees of its subsidiaries, trade unions and workers' representatives, consumers and other individuals, groupings, communities or entities whose rights or interests are or could be affected by the products, services and operations of the company, its subsidiaries and its business partners, including the employees of the company's business partners and their trade unions and workers' representatives, national human rights and environmental institutions, civil society organisations whose purposes include the protection of the environment, and the legitimate representatives of those individuals, groupings, communities or entities" (Article 3(n) of the definitive text). The distinction between "affected stakeholders"[42] and "vulnerable stakeholders",[43] desired by the European Parliament, has been eliminated. However, recital 65 underlines that companies must pay particular attention to vulnerable stakeholders when take appropriate measures to carry out effective engagement with stakeholders. This clarification extends the exact and exhaustive identification of those who are to be involved and informed on a case-by-case basis. Just as such a wide range of stakeholders could entail the need to mediate between potentially conflicting demands,[44] in respect of which

[42] Which refers to "individuals, groups or communities that have rights or legitimate interests that are affected or could be affected by the adverse impacts […] and the legitimate representatives" (Art. 3(n) EP amended text).

[43] "Affected stakeholders that find themselves in marginalised situations and situations of vulnerability […] and includes stakeholders living in conflict-affected and high risk areas" (Art. 3(n) EP amended text).

[44] As has often been the case between labour and environmental protection. The reference to the Italian "Ilva case" is obvious. See, among others, Tullini P., *I dilemmi del caso Ilva e i tormenti del giuslavorista*, in *Ius17*, 3, 2012, 163-169. For a historical reconstruction of the case, Laforgia S., *Se Taranto è l'Italia: il caso Ilva*, in *Lavoro e diritto*, 1, 2022, 29-52.

companies will have to selectively recognise rights of *voice* and action, as well as the related representation procedures.[45]

With particular regard to employees, however, a more specific reflection should be made on the notion accepted by the proposal since, in the context of stakeholders, it only mentions employees of companies or their subsidiaries, without any specification of the type of contract considered for this purpose. Consequently, if the reference to subordinate employment in its various forms seems to be almost taken for granted, the same cannot be said for self-employment, including the (Italian) coordinated and continuous work. On this point, recital 34 of the definitive text is of little prescriptive value and limited in scope. It provides that businesses should be responsible "for using their influence to contribute to an adequate standard of living in chains of activities", including "a living income for self-employed workers and smallholders".

It is also true that the subsequent reference to "trade unions and workers' representatives" suggests a potential enlargement of the subjective scope of the rights in question to include not only trade union but also direct representation, expressed by groups and categories of workers (not already employees) broadly understood. Moreover, and more generally, it seems to be consistent with the most recent European provisions on transparency in labour relations set out in Directive (EU) 2019/1152, with the regulations on whistleblowing (EU Directive 2019/1937) and, above all, to remain in the specific field of sustainability, with the definition of stakeholders accepted by Directive (EU) no. 2022/2464 on corporate sustainability reporting, which will be discussed below.

On the other hand, if the integration of sustainability in business activities is to be translated into rules of conduct and organisation, one must be prepared to selectively universalise the number of stakeholders in the production system in order to find joint and realistically viable organisational solutions, in a socially transactional logic. On the other hand, the more extensive the participation, the more the risk of externality can be socialised and the afflictiveness of the remedial system mitigated, except in cases of serious individual faults.

From this point of view, then, particularly interesting and definitely improvable is the mechanism of stakeholder involvement in management choices and the relevance of the same for compliance with the due diligence. In fact, in the original text, workers and other stakeholders may be consulted to gather information on actual and potential negative impacts only "where relevant" (Art. 6(4)). Moreover, they must indeed be consulted when the company draws up the prevention action plan, but the latter must only be drawn up if the nature or complexity of the necessary prevention measures so requires (Art. 7(2)(a)). It follows that in the preventive phase, which is the most important for the emergence of potential risks and the deterrence of actual damage, workers, their representatives and all other stakeholders are granted consultation rights (in itself, a form of soft participation) that are entirely conditioned by the management discretion of companies. A foothold for their involvement also at this stage, however, is provided by the text amended by the European Parliament, which would introduce an obligation on the part of the company to involve

[45] Cian M., *Clausole statutarie per la sostenibilità dell'impresa: spazi, limiti e implicazioni*, in *Rivista delle società*, 2-3, 2021, 497, which offers interesting reflections on the ability of statutory autonomy to impose "sustainable" management conduct on directors.

potentially affected stakeholders in a meaningful way for the collection of information on negative impacts and their identification and assessment.[46]

Moreover, the due diligence policy is updated "with due consideration of relevant information from stakeholders" (Art. 10(1)), who also have the right to activate the company complaints procedure - with a special mention of workers' representatives (Art. 9(2)(b)) - which in any case, in the EU Council's position, obliges the company to generally follow up the complaint and to meet with the representatives concerned to discuss only the "severe" negative impacts that are the subject of the complaint.[47] The European Parliament also attempted to introduce stronger provisions on this aspect, such as the right of complainants to "to engage with the company's representatives at an appropriate level" and to "to request that companies remediate or contribute to the remediation of actual adverse impacts". Companies, for their part, would be obliged to give reasons as to whether or not the complaint is justified and to inform complainants of the action taken, in a timely and appropriate manner.[48]

In addition to these rights, there is also the possibility for natural and legal persons to submit to the supervisory authority a detailed report on non-compliance with the due diligence obligation as transposed at national level (Art. 19) or, for some stakeholders, the prerogative to bring legal actions on behalf of victims (Art. 22(2a), as amended by the European Parliament).

There is no doubt that, in that state of the regulatory process, stakeholders' rights refer mainly to the executive, monitoring and control phase of due diligence procedures downstream of the risk management system. This approach, in turn, seems to echo the *rationale* of the recent directive (EU) No. 2022/2464 on corporate sustainability reporting in which the obligation to disclose sustainability policies is embodied in a duty of information that supports internal management choices and has as its direct beneficiaries investors and stakeholders, so that information sharing with these actors accompanies companies towards a risk management of negative impacts on stakeholders.[49] The new directive, which was adopted to remedy the effectiveness problems[50] of Directive 2014/95/EU on non-financial disclosure,[51] thus seems to be intended to complement the proposal under comment. Indeed, it introduced a more stringent disclosure obligation for the benefit of stakeholders, including trade unions and employee representatives, with the aim of bridging the corporate

[46] Amendment 154 (Article 6 - paragraph 4).

[47] In this regard, the proposal as amended by the EU Council at least encourages a proactive attitude on the part of these actors, providing that "collaborative complaints procedures, including those established jointly by companies, through industry associations or multi-stakeholder initiatives" may be established (Art. 9(5)).

[48] Amendment 216 (Article 9 - paragraph 3c (new)), Amendment 217 (Article 9 - paragraph 4 - introductory part)

[49] As in Directive 2014/95/EU on non-financial disclosure. *See* Rescigno M., *Note sulle regole dell'impresa sostenibile. Dall'informazione non finanziaria all'informativa sulla sostenibilità*, in *Analisi Giuridica dell'Economia*, 1, 2022, 165-184; Faleri C., *Diritti di informazione e principio di trasparenza per una governance societaria sostenibile*, in *Lavoro e diritto*, 3, 2023, 545 ff.

[50] Recital 13, Directive (EU) 2022/2464 (OJEU, L 322/15, 16.12.2022).

[51] "Manicotti verbali" is the description of reporting obligations by 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 di relazioni industriali*, 166, 2, 2020, 180.

accountability gap and promoting social dialogue[52] in a multi-stakeholder logic.[53] What is more, it imposes a reporting obligation that seems to correspond to the last stage of the due diligence, i.e. that of disclosure.[54] Once again, however, this happens downstream of the risk management system and without the involvement of stakeholders - conceived as passive beneficiaries of the disclosure obligation - in the design of internal sustainability policies.

4. The perspectives of participation for workers and their representatives.

In light of what has been said so far, there is no doubt that the proposed due diligence directive is part of the broader regulatory framework of transparency and information obligations placed on companies for the operational introduction of sustainability.[55] Equally evident is the fact that these new-generation duties correspond, specularly and prospectively, to new rights of participation, action and negotiation (direct and indirect) of workers and their representatives. Particularly innovative is then the fact that the cogency of this due diligence system is entrusted to a stringent civil liability regime that is unprecedented compared to the milder regulatory mechanisms of CSR and, precisely for this reason, of more complex transnational legal operability.

The prospective repercussions of this system are important and ambivalent, for workers and for the company, and it is precisely in this twofold direction that the extension of stakeholder participation rights in the stages of preventing and halting negative impacts is hoped for. In this regard, the final text strengthens the participatory mechanisms. In particular, the entire due diligence policy shall be developed in prior consultation with the company's employees and their representatives (Article 7, para. 2). The policy must include: a description of the company's approach; a code of conduct with rules and principles to be followed; and the processes put in place to integrate due diligence into the company's relevant policies and to implement due diligence. Furthermore, Article 13 provides for the obligation to consult stakeholders at multiple stages of the due diligence process. Among these, prevention moments are also included. Above all, the consultation is foreseen at the time of collecting the information useful for identifying, assessing and prioritizing adverse impacts (lett. a). Also, consultation is expected for developing prevention (and corrective) action plans (lett. b). However, there is a possible "loophole". When it is not "reasonably possible" to consult stakeholders, companies shall avail themselves of expert advice to obtain "credible insights into actual or potential adverse impacts" (Article 3, para. 4). Therefore, it seems possible to replace participation mechanisms with the involvement of external experts in a rather discretionary way.

[52] Recital 14, cit.
[53] Strampelli G., *L'informazione non finanziaria tra sostenibilità e profitto*, in *Analisi Giuridica dell'Economia*, 1, 2022, 157, points out that this multi-stakeholder approach has the shareholders as final recipients, in the sense that directors must consider the interests of stakeholders in order to create long-term shareholder value.
[54] Report on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, European Commission, p. 5.
[55] On the prospects for the involvement of the social partners in the current transition processes *see* Caruso B., Del Punta R., Treu T., nt. (1).

In any case, it seems appreciable that the involvement of stakeholders in the development of the due diligence policy includes the drafting of codes of conduct. In fact, it is desirable that the procedures for the prevention of negative impacts - a fundamental yardstick for assessing liability for wilful misconduct or negligence and a picklock for the actual success of due diligence policies - be entrusted not to unilateral instruments, but to negotiated devices capable of overcoming the limits of traditional codes of conduct.

The impression is therefore that, especially in the regulation of the preventive apparatus of the due diligence system, hand can be put on a corporate governance inclined to adopt sustainable strategic choices that are as negotiated and participated in as possible.[56] This presupposes that the definition of a broad field of stakeholders corresponds to the attribution of a more structured and preventive right of participation in top management decision-making processes, in direct relationship with shareholders and institutional investors, so as to remedy the information asymmetries concerning the negative social and environmental impacts of entrepreneurial activity, suffered not only by stakeholders but also by the company representatives themselves.[57] It is here that the role of workers' representatives emerges in guiding the strategies and management choices of the company operating at transnational level, given that they already direct the standards of behaviour of companies and workers towards general interests,[58] which are superior and global, and which are beyond the protective frameworks of individual national legal systems.[59] In fact, although in the draft directive workers and their representatives are virtually equated with other stakeholders, and despite the fact that in the field of due diligence the values at stake (human rights, including workers' rights, and environmental protection) are conceived as con-priority,[60] in most national legal systems, workers' representatives are already, in fact, privileged interest bearers because they are more institutionalised subjects than others within the company. This is particularly true in Italy where, in the face of the robust instruments of protection of trade union representation and the consolidated system of industrial relations, attempts to enhance the participation of other stakeholders in the management of the company, in company law reforms, have been few and not very effective.[61] On the other hand, it is precisely the role of bargaining autonomy to urge the company to respect the rules of the statutory system,

[56] According to Sanguineti Raymond W., *Le catene globali di produzione e la costruzione di un diritto del lavoro senza frontiere*, in *Giornale di diritto del lavoro e di relazioni industriali*, 166, 2, 2020, 187-226, among the shortcomings that have contributed to the ineffectiveness of self-regulatory instruments is the legitimacy deficit caused by the lack of involvement of workers and their representatives.

[57] Strampelli G., *La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e* stakeholders, in *Rivista delle società*, 2-3, 2021, 371 ff.

[58] Tombari U., *Corporate purpose e diritto societario: dalla «supremazia degli interessi dei soci» alla libertà di scelta dello «scopo sociale»?*, in *Rivista delle società*, 1, 2021, 3. On the subject of worker participation, among others, Ales E., *Libertà sindacale vs partecipazione? Assenze, presenze e possibilità nello Statuto dei lavoratori*, in *Rivista giuridica del lavoro e della previdenza sociale*, 1, 2020, 129-147; Perulli A., *Workers' Participation in the Firrn: Berween Social Freedom and Non-Domination*, in *Working Papers CSDLE "Massimo D'Antona" - INT*, 2019, 149. Critics on the point Calvosa L., nt. (33), 314, according to which the need to select the stakeholders with some form of corporate power extends the director's managerial discretion too much.

[59] Marchetti P., *Il bicchiere mezzo pieno*, in *Rivista delle società*, 2-3, 2021, 344.

[60] As underlines Ferrante V., *Diritti dei lavoratori e sviluppo sostenibile*, in *Jus*, 3, 2022, 359, workers' organisations are equated with other intermediate bodies.

[61] For a review, Malberti C., *L'*environmental, social, and corporate governance *nel diritto societario italiano: svolta epocale o colpo di coda?*, in *Giornale di diritto del lavoro e di relazioni industriali*, 168, 4, 2020, 661-680.

contractual constraints and practices of conduct that act as external limits to the exercise of private economic initiative. And not only to protect workers but, in the most recent experiments,[62] also to safeguard the (eco)sustainable conversion of enterprises in the broadest sense, through an "atypical social bargaining"[63] that not only regulates the private interests of the contractual parties but also identifies and pursues objectives of general interest beyond the labour field.

Rather than exhausting itself in the cyclical dialectic on the company's social purpose, it therefore seems that the regulatory debate on due diligence should focus on the search for legal and negotiated devices that make due diligence effective within the company organisation, in the complex procedures of risk mapping, prevention and preparation of remedial actions. These are instruments that must bring together the skills and information background of the company and stakeholders in order to draw up a credible action plan because it is concerted, making up for the lack of legitimacy and effectiveness of unilateral instruments.[64] It is in these terms that the upstream and downstream information and participation of workers and their representatives can contribute to preventing the harmful social externalities of production activity and to delimiting the company's civil liability, while easing the evidentiary burden of compliance with the duty of diligence placed on companies in court.

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[62] On this topic *see* Barca S., *On working-class environmentalism: a historical and transnational overview*, in *Interface*, 4, 2, 2012, 75. Doorey D.J., *Just Transitions Law: Putting Labour Law to Work on Climate Change*, in *Journal of Environmental Law and Practice*, 30, 2, 2017, 201-239.

[63] Piglialarmi G., *La contrattazione sociale territoriale: inquadramento giuridico del fenomeno attraverso l'analisi contrattuale*, in *Diritto delle relazioni industriali*, 2, 2019, 713 ff.

[64] This is underlined by Patz C., *The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment*, in *Business and Human Rights Journal*, 7, 2022, 291-297. The author recalls the case of 259 workers who died as a result of a fire in a factory belonging to the supply chain of the German company Kik. The company had adopted a code of conduct, extended to the activity of the burnt-out factory and recently certified as compliant with the industry standard (SA8000). This code, which was totally inadequate in preventing the conditions that led to the fire, was adopted without consulting workers' representatives and other stakeholders.

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