

# EU AS PROPONENT OF SUSTAINABLE DEVELOPMENT: CONVERGENCES AND DIVERGENCES IN TIME OF CRISIS

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**Abstract:** *Adherence to sustainable development as overarching principle of the EU policies and actions has been considered one of the main strengths of the European integration model. But the times of financial, social, health and security crisis have brought divergences from the original ambitions. It is argued that to overcome the polycrisis while maintaining legitimacy, the Union must realize its commitments enshrined in the EU Treaties and the Charter of Fundamental Rights by providing materially dignified, socially just and environmentally sensible life for all. Effective corporate sustainability due diligence can be a contributing factor to this end. The analyzed proposal for a directive, however, displays several conceptual and systemic weaknesses that may undermine the declared intentions.*

**Key words:** *EU, sustainable development, (poly)crisis, corporate sustainability due diligence*

## 1. Introduction

Apart from representing a major post-World War II peace and integration project aimed at economic and social prosperity, sustainable development has been probably the third most cited characteristics to define the European Union. Used for the first time in Brundtland report “Our Common Future” in 1987, sustainable development became one of the key concepts of international law and development in the following decades. With the following conferences dedicated to transnational environmental issues in Stockholm in 1972 and Rio de Janeiro in 1992, it also inaugurated era of intense evolution and disciplinary establishment of the International Environmental Law, including international regime addressing climate change. Attempting to integrate the economic, social and environmental dimension of human existence, sustainable development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (Schrijver, 2008, p. 23). Speaking of *needs*, not consumerist aspirations, economic growth nor Western lifestyle, sustainability as a concept foresees *dignified life for all*, in societies

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where material sufficiency serves as a necessary precondition rather than an end of human flourishing. It therefore includes an array of socio-economic rights - such as the right to water, food, housing, healthcare, work, education, meaningful community participation and the right to a clean, healthy and sustainable environment which has been nonetheless formally recognized only fifty years after its first international conceptualization, in 2022 (UNHRC 2021, UNGA 2022). Having been defined in 1987, shortly before the global victory of neoliberal capitalism that introduced market rules to all areas of life including vital public services, the commons and fundamental rights, the original aspirations of proponents of sustainable development were focused on reconciliation of human needs with the environmental and planetary limitations. Three decades later, due to market fundamentalism as operational mode of neoliberal globalization, additional challenge of rising inequalities and corresponding questions of social cohesion have gained exigence also in Europe. Financial crisis of 2008 followed by global pandemic have deprived a vast majority of people the deserved benefits of human development, which declined two years in a row erasing the gains of the preceding five years (UNDP, 2022, p. 4). And while only during the pandemic the ten richest businessmen in the world doubled their multimillion assets, 120 million of the most vulnerable - majority of them being women and children, was sent to extreme poverty. Such scope of disparities and systemic injustice “signal a broken social contract, leaving behind far too many” and given that it is predominantly the lifestyle of the top 1 to 10% of the world’s most affluent ones that consumes the nature, also “failing to protect our planet” (UNRISD, 2022, p. 2). Yet another - energy and cost-of-living crisis stemming from the Union’s alienation from Russia in response to the armed conflict in Ukraine has exposed 50 to 125 million Europeans to energy poverty, with dramatic social and health consequences (Cornelis, 2022).

## **2. Sustainable development at the world level**

Addressing issues of human rights and environment from its onset, while realizing its mandate across the economic, social and environmental aspects of development on a global scale, in 2015 the United Nations General Assembly adopted the most comprehensive and aspiring programme of sustainable development, framed as a collection of seventeen goals for the world peace, people, planet, prosperity and partnership - known as Sustainable Development Goals or SDGs, to which all countries of the world including the EU, subscribed. The aim of SDGs is to *improve the quality and sustainability of life in each country and the world at large*, in an integrated manner and all relevant areas - from elimination of hunger and extreme poverty (as defined nationally, in the EU context usually determined by the subsistence or living minimum), through improved health, education, gender equality, access to energy and decent work, reduced inequalities, promotion of sustainable consumption and production and combating climate change, to protection of oceans and biodiversity, strengthening of the rule of law and building of international partnerships (UN, SDGs). This is an inherent recognition of both exigence and high complexity of building a system of economically resilient, socially fair and environmentally sensible society. The progress in this respect is

to be measured by a set of 169 indicators, using disaggregated data collected on the ground. Despite multiple efforts, positive traits and SDGs being declared “a compass for the EU” (UNRIC), no country has achieved the desired level of progress in all goals within its environmental boundaries by 2019 (GSDR, 2019, p. 22).

### 3. The EU Legislative Framework

The EU law as a legal system *sui generis* did not attempt to define sustainable development itself but works with the definition introduced by the Brundtland report. It mentions sustainable development in the Preamble of the EU Treaties *as one of the objectives of the EU actions and policies* in both internal and external relations. Internally, pursuant to Article 3.3 of the Treaty on the European Union (TEU), “...the Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States.” This clearly states political and legal commitment to *social and environmental orientation of the European integration* that was further reinforced by the adoption of the Charter of Fundamental Rights of the EU guaranteeing the people of Europe a relatively extensive set of rights.

Equally ambitious has been the EU external relations vision enshrined in the Article 3.5 of TEU: “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.” This provision reminds us of the original orientation and Union’s commitment to act as a global supporter of the world peace, that became particularly problematic within the EU-NATO coordinates, regime-change in Libya and current armed conflict in Ukraine. Human suffering, destruction with long-term environmental consequences and channeling of public resources into production and purchase of arms, even for declared purpose of defense, are in clear contradiction to the principle of sustainable development.

Internally and more frequently, sustainable development in the EU law is referenced according to the Article 11 of the Treaty on Functioning of the EU - as an *integration principle*, meaning that environmental considerations are to be given due attention at the earliest stage of the legislative process, and that environmental protection must be integrated into the definition and implementation of the Union's policies and activities. Reiterated in the Article 37 of the Charter of Fundamental Rights, the “*three D*” nature of sustainable development as a legal and operational principle requires art of careful

balancing and holistic approach, harmonizing environmental protection with prosperity to be enjoyed equitably by all, (re)connecting our societies and humans with nature.

The procedural aspects of sustainable development are being realized especially through environmental assessment and reporting in which the Strategic Environmental Assessment Directive 2001/42/EC plays a key role, quite recently substantiated by the EU Regulation on Disclosures relating to Sustainable Investment 2019/2088, according to which investors are required to disclose environmental, social and governance (ESG) impacts of their investment projects. This brings an obligation to fulfill a number of specific substantial requirements in line with the main guiding principles for sustainability and environmental protection in the EU law of 1) promotion and protection of human rights including labour rights 2) involvement of businesses and social partners - i.e. the principle of democratic dialogue and 3) the principle of civil liability “making the polluters pay”.

Substantially, the EU Green Deal as the action plan to Europe’s sustainable future, including transition towards the EU as carbon neutral region by 2050, comprises of five framework areas covering circular economy, eco-design and sustainable products, “farm to fork” EU agricultural strategy, biodiversity strategy and the above mentioned zero pollution action plan (EC, Switch-to-Green Initiative). In all these, the Union recognized a need to engage and regulate large business actors, and to assess and prevent risks and harms of their corporate activities to human rights and environment. The EU legislation in this respect appears after more than a decade of operational existence of the UN Guiding Principles on Business and Human Rights endorsed by the EU as well, and after more than four decades of the adoption of the OECD Guidelines for Multinational Enterprises, updated in 2011. The legislative form in which the EU decided to foster sustainability through more responsible corporate actions and governance is a Directive on Corporate Sustainability Due Diligence.

#### **4. Proposal for a Directive on Corporate Sustainability Due Diligence**

Proposal for a Directive on Corporate Sustainability Due Diligence adopted by the European Commission on 23 February 2022 sets in its Article 2.1 obligations of due diligence for large and high-impact sectors companies concerning actual and potential impacts of their activities on human rights and environment. This concerns large EU companies that have 500+ employees and a net turnover of at least 150 million euros worldwide (Group 1) and companies operating in the high-impact sectors - such as extraction of minerals, agriculture, textile and garment industries, with 250+ employees and a net turnover of at least 40 million euros worldwide (Group 2). This classification is to cover around 9400 companies in the first, and 3400 in the second group, with additional 2600 non-EU companies with turnover threshold generated within the EU of 150 or 40 million euros, aligning with the above group 1 and group 2 (EC, 2022). Such legislative framework is more benevolent than that of the OECD and the UN standards, which proportionately apply to companies of all sizes and possible impacts. The directive, on the other hand, is exempting smaller business actors and small and medium enterprises from the new due diligence rules, regardless their impact on human

rights and environment. The proposal in fact entails supporting measures for them to mitigate indirect effects. And while the intention of the Commission to spare small and medium enterprises excessive economic burden may be a good one, this approach may also create incentives for large companies to modify their structures to avoid the above-mentioned thresholds and corporate liability. The listing of the so-called “high impact sectors” is also too narrow - contouring the sectors for which the OECD standards already exist, omitting an array of sectors of possible negative impact and concern - such as construction, infrastructure and energy-production, logistics, transport or electronics. Limited obligations are also set towards the financial sector that is required to conduct due diligence only in the initial stage - i.e. before granting of corporate credit or loan, but not throughout their duration, and complete realization of funded projects towards their conclusion (EC, 2022, paragraph 30 of the proposal).

According to Articles 3 and 4 to 8 of the proposal, the obligations of due diligence are to apply to both EU and non-EU companies operating in the EU, and not only to mother or core companies but also to their subsidiaries and global value chains, with which the company has an established business relationship (EC, 2022). However, the proposal of the directive does not contain a clear definition of “an established business relationship”, which has appeared in the EU *acquis* as a legal transplant from the French Due Diligence Law, failing to state how long and intense a relationship should be to fulfill the criteria of being considered as “established”. Such legal construction also means that subsidiaries in an *ad hoc*, short term or informal relationships are likely to fall outside the scope of the directive, which may substantially weaken the system, given a heightened risk of violation precisely within semi-formal and informal parts of the global value chains often relying on home-based and self-employed, ununionized workers. The approach therefore seems contradictory *vis-à-vis* the declared ambition to bring benefits of protection of human rights and environment and improved working and living conditions also to the less privileged parts of Europe and Global South (EC, 2022).

The material scope or material standards in relation to which the due diligence is to be performed are set forth in Article 3 of the proposed directive in combination with relatively long Annex. Despite the above, possible human rights impacts defined in the Annex still provide more of a tentative than a complete list of human rights instruments, omitting for instance the ILO Convention 190 on Violence and Harassment in the World of Work, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the ILO Convention 169 on the Rights of Indigenous and Tribal Peoples who are often victims of exploitative corporate practices. Explicit reference to relevant ILO instruments on occupational safety and health are also missing, as are key environmental conventions - including the Paris Agreement, the UN Convention on the Law of the Sea, the International Convention for the Prevention of Pollution from Ships and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Conceptually, the Annex insufficiently reflects the basic tenets of the human rights approach including indivisibility and interdependence of all rights, and omits reference to general principles of environmental law - the principle of prevention and precaution (or precautionary principle), address and rectification at source, and polluter pays

principle, which all corporate and business actors should respect. The proposal also fails to explicitly spell out obligations to cut emissions in accordance with the Paris Agreement and expects only the largest companies to adopt climate transition plans.

The due diligence obligations as foreseen in Articles 4 to 8 and 10 of the proposed directive, relate to general obligation to prevent and mitigate potential violations and negative impacts, and to minimize the actual ones. Due diligence measures should extend upstream and downstream to company's subsidiaries and global value chains, but as already mentioned - only to those in established business relationships. At the same time, prominence given to contractual assurances pursuant to Article 7.2.b) of the proposal, creates risk of shifting responsibilities from the lead company on its business partners. A risk-based approach, more in line with the UN and OECD standards, focusing on probability and severity of human rights and environmental impacts rather than the type of business relationships, would therefore be more effective. In fact, a definition of "adverse impact" according to the Article 3 b) and c) of the proposal as action or activity leading to *violation of human rights or environmental standards* is a reductionist one, going against the spirit and purpose of international human rights, that use the term of "adverse or negative impact" more broadly as *diminishing or removing the ability of people to enjoy their human rights*. This concerns not only a failure of respecting one's rights by violating them, but also contributing to, or creating conditions in which fulfillment and enjoyment of human rights - typically socio-economic, cultural, labour and environmental, is diminished or hampered. In global value chains this shall cover fair purchase and price-setting - i.e. paying all suppliers a price that enables them to produce with full respect to human rights and protection of the environment. But despite having been given due recognition also by the European Parliament (EP, 2021, Article 4.8), no reference to fair pricing appears in the text of the discussed proposal.

The procedural aspects of the due diligence stand on several pillars - one of them being stakeholder consultation. But as foreseen in the Articles 6, 7 and 8 of the proposal for a directive, it provides for a limited role of the stakeholders including employees and trade unions - as legitimate representatives of workers, and their right to negotiate human and labour rights due diligence and responsible business conduct with their respective company, as proposed by the European Parliament (EP, 2021, Article 5) and advocated by the European Trade Union Confederation (ETUC, 2019). The proposal's phrasing of "*where relevant* companies shall consult stakeholders in identifying impacts and developing of prevention and correction action plans", *effectively discards stakeholder consultation as a general rule* and an integral part of every step of the due diligence process as set forth by existing international standards. The explicit reference to quality standards of a consultative process - that shall be conducted in good faith, timely, informatively, effectively and meaningfully, ensuring safe participation and respecting the needs and rights of all, especially the most vulnerable ones, is also missing. The same type of weakening of the proposed framework concerns corporate action plans that are not required universally, but for prevention of the negative impacts only "*where necessary* due to the nature or complexity of the measures required for prevention", and for correction of negative impacts only "*where relevant*" (EC, 2022, Articles 7.2 and 8.3 of the proposal). Article 8.2 of the proposal also introduces a

nebulous term of “*minimization* of extent of a possible adverse impact” in cases when the actual ending of such adverse impact is not possible. Reporting obligations - set out by a proposal for a Directive on Corporate Sustainability Reporting and applicable to EU companies, are to be complemented by a parallel obligation applicable to non-EU companies, which according to the discussed proposal for a Directive on Corporate Sustainability Due Diligence, shall take the form of publishing of an annual statement. But for the purpose of equal treatment the reporting requirements for both types of companies should be aligned, ideally demanding that the companies’ reports are uploaded to the *centralized platform* serving as the *European single access point* designed and managed under the auspices of national supervisory authorities, and when appropriate making corporate due diligence documentation also accessible to courts and other public authorities (EP, 2021, Article 6.3).

As a matter of redress of arising violations, pursuant to Articles 9 and 23, companies shall establish complaints procedures with a possibility to raise concerns anonymously and confidentially (EC, 2022). While being required by the UN Guiding Principles, to be safe, transparent, legitimate, accessible, predictable, equitable, rights-compatible and ensuring timely and effective response, the complaints procedures should not preclude victims or other claimants from access to the courts and other judicial mechanisms. *The civil liability regime* relying on judicial remedy is indeed foreseen in the Article 22. Under more analytical or practitioners’ scrutiny, it naturally opens up questions of barriers to justice - often faced by the claimants in corporate liability cases - including access to justice and legal costs in light of the vast disparity of resources between the parties, possibility of collective claims and redress, and reasonable limitation periods for bringing the claims. In recourse, the directive counts only on payment of damages, but no criminal liability neither injunctive relief to be applied with the aim of preventing a harm, continuing or repetitive violation, for instance. The *burden of proof* that the company’s action was “reasonably adequate” to remain under the coordinates of the member states’ national law (EC, 2022, para. 58 of the proposal) may constitute additional barrier to justice - as the obligation to release corporate documentation in a respective national law may not exist, be limited or very difficult to realize given the power disparities between non-corporate victims and large foreign companies operating especially in more peripheral EU member states. The directive should therefore *shift the burden of proof on business actors* - demanding evidence that they have taken all appropriate measures to prevent or mitigate possible negative impacts on human rights and environment. In addition, as the Fundamental Rights Agency of the EU and others advocate, to overcome situations when the application of foreign law may lead to dismissal of a case, the EU Regulation No. 864/2007 on the Law Applicable to Non-Contractual Obligations - known as Rome II Regulation, should be modified to allow the victims of corporate violations to choose the applicable law, and sue under the law that provides them the best possible recourse (FRA, 2020, p. 16).

As already mentioned, remedies for possible violations in the proposed directive are reduced to financial compensation within a civil liability regime. Unlike the UN business and human rights standards - non-pecuniary compensation, remedies in the form of apology, restitution / *restitutio in integrum*, rehabilitation and guarantees of non-

repetition are not foreseen. On the positive, to reinforce the legal framework, the proposal suggests inclusion of reporting of due diligence breaches or failures into extended provisions of the Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons Who Report Breaches of the Union Law - known as the Whistleblower Protection Directive. The Commission, however, did not go far enough in systemic pressure for *good corporate governance*. This is obvious from the companies' directors' obligations to address impacts on human rights and environment spelled out in the Article 25 of the proposal, with a vague phrasing of duty "to take into account the consequences of their decisions for sustainability matters". It is therefore not a surprise that it has been subject to critique even by stakeholders and investors who themselves joined pro-sustainability initiatives calling, among other, for strengthening and clarification of directors' obligations (Investor Alliance for Human Rights, 2021, p. 2).

Finally, to secure public enforcement of due diligence corporate sustainability, according to the Article 17, the member states are to designate *independent supervisory authorities* with a competence to initiate investigations, issue orders, impose sanctions and adopt preliminary or *interim* measures. The national authorities are to be associated in the *European network of national supervisory authorities* and expected to set up the centralized platform for companies' reporting (EC, 2022, Article 21 of the proposal). Consequently, only companies with clear due diligence record will be allowed to apply for public support, while the same requirement to be applied in relation to the public procurement - as proposed by the European Parliament, has not been included so far.

## 5. Conclusion

Representing an important and long-awaited piece of legislation, the proposal for a Directive on Corporate Sustainability Due Diligence should represent a stronger and legislatively more precise, elaborated and systemic commitment to the principle of sustainable development. Not only human rights and environmental organizations, but also an alliance of nearly hundred large investors has called for *more rigorous human rights and environmental due diligence* that would be "cross-sectoral and cover *all business enterprises and financial institutions*, public and private, domiciled or based in, operating, or offering a product or service within the EU, which should *use their leverage* to ensure that human rights and the environment are respected across their global value chains" (Investor Alliance for Human Rights, 2021, p. 2).

Taking due diligence seriously is an opportunity for *reversing "the race to the bottom"* by upholding the human rights and environmental standards and to rebuilding basic trust in economic activities of large business actors. Rather than focusing on growth, sustainability due diligence - especially when respecting the workers, communities and other non-corporate stakeholders as *legitimate co-creators in shaping of corporate strategies*, can shift the focus on *quality of production, work and lives* of all concerned. Even during the current (poly)crisis as a possible crossroad or turning point, the EU should stay truthful and committed to the provisions and spirit of the EU Treaties and its Charter of Fundamental Rights. Representing *social-democratic* more than neoliberal



model of integration to which ten East European countries subscribed in 2004, a critical reflection through the lens of sustainable development can offer a litmus test of the original promise of a dignified life for all, in harmony with nature. Having this European social contract re-modelled *from above*, as in the case of Greece and other countries of euro-zone subject to austerity, and other top-down policies imposed in the name of necessity, without due consideration of long-term impacts on the most vulnerable ones, goes against the spirit of democracy that (re)united Europe in 1989.

Out of the same ideal of a dignified life for all on a world-wide scale, the SDGs were inaugurated at the United Nations, promising not to leave anyone behind. Humanity pledged to come together and work for people, planet, peace, prosperity and partnerships. Sustainable development in Europe shall therefore go hand in hand with the SDGs – including, for instance, SDG 7 as a commitment to not only clean but also *affordable* energy and SDG 10 specifically dedicated to reduction of inequalities between as well as within the countries. These, together with the need to bail the banks after 2008 financial crash, and the adoption of the EU Green Deal are an inherent recognition and proof that the neoliberal model has been economically exhausted, socially and environmentally harmful, and unsustainable. At the same time, a meaningful qualitative transition can only be achieved through revived trust and *democratically renewed social contract*. This will both require and shall promote fairness and democracy not only in the political but also the economic and environmental sphere. Because only the people, not abstract legal entities - often serving narrow and selfish private interests, are legitimate actors in designing our common future. Effective corporate sustainability due diligence can be a positive step towards this direction.

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