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CORPORATE DUTY OF VIGILANCE IN EUROPE: TOWARDS A SEMBLANCE OF UNITY

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Abstract: *Since the 1970s, the idea has emerged that the protection of human rights and the environment should not be the sole responsibility of States. Private actors, and in particular companies, also have a role to play. Despite a number of setbacks on the international stage, corporate due diligence has gradually gained ground. This is particularly true in Europe. Faced with the diversity of responses proposed by Member States, on June 1, 2023, the European Parliament voted in a directive on corporate due diligence with regard to sustainability. A Europe-wide unification of the subject thus seems to be underway.*

Key words: *duty of vigilance, corporate law, human rights, environmental law, due diligence plan.*

1. Introduction

The first thoughts on corporate regulation emerged in the 1970s, but on an international scale. As early as 1974, a Code of Conduct for multinational companies was being considered by various organizations (ILB, OECD and UNO). Breaking with the ultra-liberal theories advocated by the Chicago Boys, this initiative was described as "*a veritable storm breaking over multinationals*" (Vernon, 1977). This strategy of developing binding standards continued into the 2000s, with the publication of standards on the responsibility of transnational corporations and business enterprises with regard to human rights. In view of the failure of these various initiatives, the subject remained on the back burner for several years before re-emerging in the 2010s. A paradigm shift can be observed, as it is no longer a question of drawing up hard law texts, but rather of mobilizing soft law instruments. The strategy is based on the notion of reputational risk, and on a voluntary basis, companies are invited to respect codes of conduct and carry out audits with the aim of obtaining certifications. The idea that these various elements will have an influence on the consuming choices of individuals and, consequently, in order to attract customers, companies will naturally move towards this non-binding regulation. However, this strategy did not have the desired effects, and it

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was not until 2015 that a third phase was designed, based on stringent, state-level regulations.

The above-mentioned stages are also reflected in the European construction of corporate due diligence. This is why, as of 2017, several states have incorporated these concerns into their bodies of legislation. The difficulty lies in the fact that regulation is carried out at local level, and is often disparate from one state to another. Diversity is the result of two distinct parameters. On the one hand, the sectors in which duty of vigilance is imposed. Some states have opted for broad regulation, while others have favoured sector-specific regulation (notably in the fields of labor, timber and minerals). On the other hand, the strength of the constraint imposed on companies also differs insofar as some states are content to impose a simple obligation of transparency, while others regulate a genuine duty of vigilance. If we take a brief tour of Europe, Denmark was the first European country to regulate a corporate due diligence, requiring companies to report on their actions to protect human rights and combat global warming as early as 2014. France followed suit in 2017 by imposing the implementation of a vigilance plan for certain companies and the engagement of their civil liability in the event of failure to comply with the new obligations. These regulations are intended to be general and cover the whole range of human and environmental rights. A similar regulation can be found in Belgium with the adoption of a law dated September 3, 2017 on these issues. In 2019, the Netherlands enacted a law in the specific area of child labor, and a bill is underway to extend the obligations imposed on companies to other human rights. In 2020, Norway passed a Consumer Protection Act, which entrusts an independent authority - the Consumer Protection Agency - with the task of ensuring compliance with the duty of vigilance. Germany has put in place various measures leading to the introduction of a duty of vigilance with a flagship regulation in 2021 in the area of supply chains. Although there is no real duty of care in Italy, the civil and criminal codes provide for a presumption of liability on the part of directors for environmental offences committed by the company, as well as disclosure obligations for shareholders.

This brief tour of European regulations brings us to a first conclusion: the responsibility of companies for the harmful effects they may have on society has become a reality. Some authors have spoken of a legalization of the social concept of Corporate Social Responsibility (CSR). While this shift from soft law to hard law is to be welcomed, the method used raises questions. This dispersal of national legislation is hardly desirable, as it creates fragmentation of the internal market and a risk of unequal competition between companies (Articles 50 and 114 of the Treaty on the Functioning of the European Union). It is for this reason that the European Commission has taken up the problem, and has undertaken a two-stage process: firstly, through the European CSRD (Corporate Sustainability Reporting Directive, Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022), and secondly, through the European Sustainability Reporting Standards (ESRS), which will apply progressively from January 2024. This text contributes to transparency through the establishment of extra-financial reporting for over 50,000 companies located in Europe on their CSR implications. A second step was taken on February 23, 2022, with the European Commission's proposal for a directive on the introduction of a Europe-wide duty of

vigilance. This eminently ambitious text was passed by the European Parliament on June 1, 2023. Compared with national regulations, several questions can be raised concerning both the content of this duty of vigilance (I) and the tools for implementing it (II).

I) The ambivalent content of the duty of vigilance

While the directive seems bold as regards the scope of the future duty of vigilance (A), it remains relatively imprecise as regards the obligations imposed on companies (B).

A) Promoting a broader scope of application

It was intended to apply to all types of company. In this sense, the text uses the term "company" to cover a wide variety of economic players. The double threshold technique was chosen to implement the listed obligations, and a distinction was made according to the company's sector of activity.

Article 2 targeted companies with 500 employees and sales in excess of €150 million (Group 1). A second, more restrictive threshold was imposed on companies generating at least 50% of their sales in a sector identified as being at risk (group 2). These sectors were listed in a separate document. The proposed list was relatively comprehensive, with the exception of the construction sector (public works and infrastructure), which should have been added, as human rights violations are sometimes widespread in this sector. For this second group, the future duty of vigilance should have applied when the thresholds of 250 employees and 40 million euros in sales were exceeded. The text also foresaw the extraterritorial scope of the measures, since they were intended to apply to companies in tlehird countries, with sales of over 150 million euros in the European Union, and those with sales of over 40 million euros in the EU, provided that at least 50% of these sales are generated in high-risk sectors.

Members of the European Parliament have taken a more ambitious view of the future duty of vigilance, eliminating the distinction by sector and selecting the lowest thresholds. Henceforth, when a company has its head office on European territory, the thresholds retained are those of group 2, i.e. more than 250 employees and sales in excess of 40 million euros, whatever the sector of activity. According to some authors, while this change may be disturbing at first sight, the practical consequences are to be put into perspective, since the list of risk sectors proposed by the European Commission was so extensive that many of the companies concerned would in any case have been subject to the Group 2 thresholds (Lecourt, 2023, p. 706).

The European Parliament has also opted for a consolidated approach to setting thresholds, as provided for in French law (Art. L. 225-102-4.-I French Commercial Code), whereas the European Commission favoured reading companies on an individual basis. In other words, when a parent company does not meet the above-mentioned thresholds, but belongs to a group of companies generating sales in excess of €150 million and employing more than 500 people, the provisions of the directive will apply (Amendment no. 90, art. 2, § 1, point b).

Finally, the European Parliament has retained the extraterritorial application of the

measures envisaged, but has again extended it. Amendment n° 94, art. 2, § 2, point a), refers to companies from countries outside the European Union, 150 million euros, of which 40 million in the European Union, including sales generated by third-party companies with which the company and/or its subsidiaries have concluded a vertical agreement in the Union in exchange for royalties. The reference to high-risk sectors is once again dropped. This choice is intended both to protect European companies from exposure to unbalanced competition, and to promote European values (Burlaud & Niculescu, 2023, p. 15).

This logic of lowering thresholds calls for two comments. Firstly, we are a long way from the requirements imposed in other Member States as regards the number of employees, since in France the obligations of vigilance come into play from 5,000 employees upwards, and in Germany this threshold is set at 1,000 employees. On the other hand, while the promotion of human rights and environmental protection can only be encouraged, this policy has a monetary cost that some of the more fragile companies may find hard to bear (Gerard, 2023, p. 3).

But it was above all the inclusion of the financial sector within the scope of the future directive that was the focus of debate. Whereas the European Commission had excluded this sector, the European Parliament advocates its inclusion. The Spanish presidency, which begins in July 2023, has announced that it shares the European Commission's point of view on this issue.

B) Lack of details on the obligations expected of companies

A cursory reading might lead one to believe that the comments made on the scope of the future directive, i.e. a strengthening of constraints, could be transposed to the obligations expected of companies. In fact, the European Parliament has once again tightened up on the content envisaged by the European Commission.

The initial text set out three requirements. Firstly, the company must draw up a risk map. This is intended to describe the company's approach to vigilance. It is expected to be presented not only in the short term, but also in the medium term, with data updated frequently. In addition, the company must draw up a code of conduct setting out the rules to which the parent company and its subsidiaries adhere in terms of human rights and environmental protection. Finally, it is the company's responsibility to describe the procedures it intends to put in place to integrate the duty of care into its political strategy.

The European Parliament has taken up these various obligations, but has given them a broader scope, since MEPs consider that they apply not only to the parent company, but also to subsidiaries and all business partners along the entire value chain. While this strengthening of constraints seems appropriate to make the duty of vigilance effective, two obstacles, which have not yet been clarified, remain and could undermine the efforts made by the European legislator.

The first difficulty lies in defining the notion of "*negative impact*", a central element of the risk mapping referred to in Article 6 of the proposed directive. The directive provides guidance on the meaning of the term. A negative impact would be deemed to have

occurred if a breach of national regulations or of the European texts listed in the appendix were to occur. This reference to an annexed list poses a problem, as certain fundamental texts seem to have been omitted. For example, in the field of labor law, only the fundamental conventions of the International Labor Organization (ILO) have been included, which excludes certain issues that are prevalent in European societies, such as harassment in the workplace (Gaudemet & Stevignon, 2023). European parliamentarians have tried to overcome this difficulty by adding certain fundamental texts that had been neglected, such as the Paris Agreements. Still, the list appears incomplete to many observers. Moreover, many of the annexed texts are considered soft law instruments. How, then, are we to reconcile binding regulations with the soft law texts to which they refer in order to impose obligations on companies? Added to this is the fact that some of the annexed texts have not been ratified by all the member countries of the European Union (Maurel, 2023).

The second point that attracts the attention of the legal expert is the use of contractual instruments to implement the obligations imposed on companies. Article 7 of the draft directive, dedicated to the prevention of potential negative impacts, requires companies to "*endeavour to obtain **contractual guarantees** from commercial partners with whom the company has a direct commercial relationship, obliging **them to comply with the company's code of conduct** and, where necessary, a prevention action plan, including by endeavouring to obtain the corresponding contractual guarantees from its partners, insofar as their activities form part of the company's value chain (contractual cascade)*". The same wording is used in Article 8, whose aim is to ensure that real negative impacts are eliminated. This mobilization of the tools of contractual law should come as no surprise, given that this approach is generally shared by European Member States, as well as on the international scene (Baroncelli & Valle, 2022, p. 1). The reasoning is twofold. First, we try to contain the negative impacts through contractual clauses. Secondly, if the negative impact persists, the draft directive provides for an obligation not to contract for any future contracts, and for termination of the contract that caused the negative impact in the first place.

While these measures are generally satisfactory, the European legislator can be criticized for not taking sufficient account of the issue of climate change. Admittedly, certain provisions of the directive, supplemented by the European Parliament, refer to the development of a climate strategy, but these remain minor in comparison with the growing importance of this issue. On the one hand, it cannot be denied that climate change is at the root of violations of human rights (e.g. health rights) and the environment. On the other hand, recent court cases in various European countries demonstrate that this subject is more than topical. However, the European Commission has preferred to deal with this issue through special texts, some of which already have a recognized normative scope (Gaudemet & Stevignon, 2023).

The content of the duty of vigilance as described in the proposed directive seems ambitious insofar as it goes far beyond what is provided for in national legislations. However, there are a number of regrets to be expressed, in particular concerning the inclusion of the financial sector in the scope of the directive, and the fight against climate change, which appear to be the major absentees from the future duty of

vigilance. Such shortcomings can also be found with regard to the tools required to implement the duty of vigilance.

II) Tools for implementing the duty of vigilance fall short of expectations

The tools needed to make the duty of vigilance effective can be divided into two categories. Firstly, a preventive strategy is envisaged (A). Secondly, breaches of the obligations imposed are sanctioned by the introduction of a specific liability regime (B).

A) An unambitious preventive strategy

Prevention is based on two major pillars, which have not been fully exploited in the draft directive proposed by the Commission. Firstly, there is the question of promoting dialogue between the various players in the company, notably by including stakeholders in the construction of the vigilance plan. International institutions also advocate for the inclusion of stakeholders in the development of due diligence policies, giving them a prominent role. Article 3 of the proposed directive defines stakeholders as "*the employees of the company, the employees of its subsidiaries and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and activities of the company*". Four articles in the proposal refer to the roles of stakeholders. With regard to the identification of actual or potential negative impacts, stakeholders may be consulted on an optional basis (Article L. 225-102-4, I, para. 4 of the French Commercial Code also takes this line). Stakeholder participation is also left to the discretion of the company, as is the case for the development of coercive measures. On the other hand, stakeholders are obliged to take part in drawing up the prevention plan. However, Article 7, which provides for such involvement, remains unclear as to the practical details, and it is to be feared that the role of the latter will be severely restricted. Lastly, Article 9 of the proposed directive targets trade unions and workers' representatives, proposing to include them in the complaints mechanism. The wording of this provision, however, tends to limit their action, since it only states that they will be informed of procedures in progress. Generally speaking, the integration of stakeholders in the due diligence policy, as provided for in the draft directive, seems to involve too many to be considered “limited”. The authors regret, for example, that trade unions, the European Works Council and other employee representatives are not more closely involved (Gaudemet & Stevignon, 2023). Similarly, it would have been desirable to set up a stakeholder committee (Lecourt, 2023, p. 706) along the lines of the PACTE Act in France, with the creation of a mission committee to guide the company's activities (Article L. 210-10 French Commercial Code). It is above all with regard to the mechanism for receiving complaints that the text appears lacking. Germany provides an excellent example of employee involvement, in line with national legislation, by allowing employees to anonymously report any behavior that violates human rights or the environment, both within the company and along the value chain, via an independent system.

A second measure, which can be described as preventive, consists in providing

guidance and support for the smallest businesses. As mentioned above, the implementation of due diligence obligations generates a considerable cost, which may prove difficult for smaller structures to cover. Article 14 of the proposed directive envisages the establishment of aid for SMEs. The measure is welcomed and is in line with the German model, which has established a help portal to enable small businesses to comply with due diligence requirements. However, the final text could be more precise, as it only states that the support provided will be both financial and in the form of information (websites, platforms, portals). The text is not much more detailed, and could have included useful information that could be disseminated.

B) The lack of a liability regime

The question of vigilance penalties remains the most debated point. As noted above, the idea of sanctions is not in the DNA of the subject. Instead of restrictive measures, legislation has always favored education, information and encouraging compliance (Malecki, 2015, p. 35). The shortcomings of this strategy have been pointed out on several occasions. The United Nations recently stated that "*companies operating in the global economy regularly violate the right to a clean, healthy and sustainable environment, as well as other human rights*", and that victims "*rarely obtain effective remedies*". Those days are long gone. The draft directive breaks with this logic to impose a model based on sanctions. Following the example of French, Spanish and Italian regulations, it provides for companies to be held liable for damage caused by their failure to comply with due diligence obligations. In addition to the innovative nature of this approach, there are three major points that draw our attention. On the one hand, the causal basis for liability is extremely broad. Article 22 is intended to apply when a company, by disregarding its obligations, "*has caused or contributed to an actual fault that should have been identified, prioritized, avoided, mitigated, eliminated, remedied or minimized by the appropriate measures provided for by the directive and has resulted in damage*". This broad definition of causality is to be welcomed, as it makes it easier to enforce the penalties imposed.

The second advantage of the plan is the dual level of responsibility. In fact, two forms of liability have been designed into the text. The first, known as direct liability, applies to damage caused by the negligence of a specific company. The second is considered indirect. It applies when a specific company is sued for breaches committed by its subsidiaries, subcontractors and suppliers (Francois, 2023, p. 595). In addition, there are more specific rules governing the liability of company directors. This system increases corporate vigilance with regard to both subsidiaries and contractors. Imbued with a sense of pragmatism and prevention, this choice inevitably favors the repair of damage and thus strengthens the position of victims. The final advantage concerns the extension of the limitation period for actions. The proposed directive encourages Member States to ensure that the limitation period for bringing an action for damages is at least 10 years. This limitation period is extremely extended compared with national regulations. In France, Italy and Spain, the time limit is 5 years (Article 2224 French Civil Code; Article 2947 Italian Civil Code).

Despite all these levers facilitating the implementation of liability actions, some authors have pointed out the difficulties linked to the system of proof, which could limit the success of liability claims. French regulations, which are fairly close to those set out in the proposed directive in terms of liability, show the inadequacies. In many cases, proving the loss and the causal link between it and the company's breach of duty proves to be an insurmountable task, limiting the award of damages.

In conclusion, the proposed directive offers a number of advantages, not least the implementation of a unified corporate due diligence across Europe. The text is relatively ambitious in terms of scope and obligations. On the other hand, it is lacking in tools enabling companies to comply with their obligations (whether preventive or punitive). In addition, a number of issues remain open to debate, notably the inclusion of the financial sector and the definition of the breaches for which companies can be held accountable.

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