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The EU proposal for a Due Diligence Directive: the link between civil liability and workers' representation

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"Hardening" process of Due Diligence

The proposal for an EU directive on Corporate Sustainability Due Diligence (Brussels, 23.2.2022, COM(2022) 71 final) aims to impose sustainable production models on multinationals along the supply chains. A provisional agreement was reached on 15 March 2024. The proposal represents the culmination of a regulatory process of Corporate Social Responsibility practices – unilateral (codes of conduct, corporate reporting, etc.) and negotiated (Ifa, Efa) – that have guided big companies in adopting standards of behaviour respecting human rights.

Due diligence remains a legal duty under construction that requires companies to internalise wide and varied social risks placed outside their own legal availability. However, the regulatory "hardening" of this duty completes the apparatus of those new-generation duties of transparency,

communication, and information outlined by the recent European Union regulations, projecting them onto a very wide range of stakeholders[1].

The civil liability regime

Among some critical aspects of the proposal, it is most interesting to understand how the possible introduction of a civil liability regime for the company is linked with the potential development of new rights of information and participation of workers and their representatives[2]. In general, 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. More in detail, Article 22 establishes the civil liability of the company in the event that it fails to adopt the risk management system (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. The Council's amendments, dated 30 November 2022, made substantial changes to these provisions: 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. Also, 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. The position of the European Parliament, dated 1 June 2023, also proposes a similar approach.

The proposal to establish a liability regime for companies 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. In fact, 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, in commercial law, the issue has ancient roots in the opposition between the "institutionalist" and "contractualist" models. Above all, there is the fear of imprinting a form of civil liability too general, because it is anchored not to legal norms but to principles and rights without sufficiently prescriptive content, enshrined in international acts contained in the annex to the proposal. In this way, there may be a risk ofobjectification of civil liability.

However, the duty of diligence 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. It is, in essence, a civil liability that derives from an obligation of means and not of result. On the other hand, 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 exhaustive evaluation parameter of the fulfilment of the duty of diligence. 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 standards.

The participation model being defined

The proposal appears more persuasive insofar as it promotes an organisational culture of sustainability in spite of a culture of guilt, through the introduction of obligations of a preventive

nature entrusted to participatory protocols. In fact, the “due diligence and responsibility” pair postulated above is conditional on the extensive participation, *ratione materiae*, of the various stakeholders: employees and their representatives, but also consumers, other individual, groups, etc. Such a wide range of stakeholders could entail the need to mediate between potentially conflicting interests, in respect of which companies will have to selectively recognise rights of voice and action, as well as the related representation procedures. On the other hand, the more extensive the participation, the more the risk of externality can be socialised. Furthermore, the punitive effect is mitigated, except in cases of serious individual faults.

From this point of view, particularly interesting is the mechanism of stakeholder involvement in due diligence management. 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 and their representatives are granted consultation rights that are entirely conditioned by the management discretion of companies. However, the text amended by the European Parliament would introduce an obligation on the company to involve potentially affected stakeholders in a meaningful way for the collection of information on negative impacts and their identification and assessment (Amendment 154 – Art. 6, para. 4).

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)). In the EU Council’s position, this right obliges the companies 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. The European Parliament 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 (Amendments 2016 and 217).

In addition, 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).

The potential of “preventive participation”

There is no doubt that, in the current 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 fact, it imposes a reporting obligation that seems to correspond to the last stage of the due diligence, i.e. that of disclosure. Once again, this happens downstream of the risk management system and without the involvement of stakeholders in the design of internal sustainability policies. Rather, they are conceived as passive beneficiaries of the disclosure obligation.

The new Article 8d proposed by the European Parliament seems particularly innovative, according to which companies are obliged to establish a “meaningful engagement” with workers and their representatives, who must be informed and consulted in all phases of prevention, as well as remediation, envisaged for the fulfilment of the due diligence obligation (Amendment 206). In this regard, it is desirable that the procedures for the prevention of negative impacts be entrusted not to unilateral instruments, but to negotiated devices capable of overcoming the limits of traditional codes of conduct (Art. 5) and prevention action plan (Art. 7(2)(a)). In fact, these procedures are a fundamental yardstick for assessing liability for wilful misconduct or negligence and a picklock for the actual success of due diligence policies.

This presupposes 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 both by stakeholders and the company representatives. Workers’ representatives already direct the standards of behaviour of companies and workers towards general interests, which are superior and global. Despite in the field of due diligence the values at stake (human rights, including workers’ rights, and environmental protection) are conceived as con-priority, in most national legal systems, workers’ representatives are already privileged interest bearers because they are more institutionalised subjects than others within the company.

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. In these terms, 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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References

[1] Lastly, directive 2022/2464 on corporate sustainability reporting.

[2] For an in-depth analysis, please refer to M. Giovannone, *Responsabilità, informazione e partecipazione nella proposta di direttiva europea sulla* due diligence, in *Federalismi.it*, no. 3, 2024, pp. 233-247.

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