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Neglecting the Involvement of Trade Unions in Due Diligence processes? A Critical Appraisal of the EU's Corporate Due Diligence Directive

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1. *Introduction*

In recent decades, global value chains – whereby goods that used to be produced within one country are now fragmented and distributed across global networks of production – have become an integral part of the global economy, changing the patterns of trade, investment and production in global industries. They operate as a result of the liberalisation of trade, the substantial reduction of trade costs and the evolution of technologies that allow the organisation and remote control of production processes¹. With this strategy, multinational companies exercise control and coordination power over the entire global process. By contrast, they often take advantage of a regulatory void in developing countries, when it comes to provide remedies for victims

¹ SANGUINETI, *La Construcción de un Nuevo Derecho Transnacional del Trabajo para Las Cadenas Globales de Valor*, in *MREL*, 2021, p. 298; LEE, *Global supply chain dynamics and labour governance: Implications for social upgrading*, in *ILO Research Paper*, International Labour Office, 2016, p. 6.

of human (labour) rights violations. The rise of global value chains poses, thus, a challenge for national governments and international organisations to enforce labour standards in such cross-national activities.

On this matter, due diligence has become a central element in the current debate on how to prevent and respond to the issue of human rights violations committed by companies along global supply chains, which explains the emergence of soft and hard law instruments based on this preventive mechanism. Several studies and international institutions point out the advantages of an effective participation by employees and their representatives in the adoption of human rights due diligence processes. This paper is aimed at verifying whether, and to what extent, this objective can be said to be achieved in the EU's Directive on Corporate Sustainability Due Diligence, which aims to enhance the protection of the environment and human rights in the EU and globally.

The paper consists of four sections. The first section explains the background of the EU's Directive on Corporate Sustainability Due Diligence, recalling the negative impact of global value chains on human labour rights, the failure of traditional remedies and new approaches based on corporate due diligence process (soft law and regulatory options). Section two focus on the Directive and its draft. It provides a brief overview, giving a few examples of controversial issues, mainly, the specific matter we will address, the involvement of trade unions and workers' representatives in corporate due diligence processes. The third section looks into the concept of "employee participation" in the decision-making of an organisation and its importance, notably the advantages of an effective participation by employees and their representatives in the adoption of due diligence processes for human rights, according to the most relevant international documents/instruments. Section four returns to the Directive and examines the participation of the employees' representatives at all stages of the due diligence process under the proposed Directive and the EU legal instrument adopted, providing some conclusions.

2. *The background: the negative impact of global value chains on human labour rights; the failure of traditional remedies; new approaches based on corporate due diligence process*

In global value chains, companies – many of them multinational companies – restructure their operations internationally through outsourcing and offshoring of activities, by locating the various stages of their production processes across different countries, usually in developing and emerging countries where labour-intensive production stages are more likely to be offshored.

The adverse economic and social impacts of global value chains in those economies are widely pointed out in literature²: developing countries may be trapped in a “race to the bottom” to attract multinational companies and induce foreign investment, deregulating labour regulations³, exacerbating the risk of violation of labour human rights, in particular, insufficient occupational safety and health, lack of fair wages, irregular or excessive working time, discrimination, including repugnant forms of violation such as forced labour or child labour.

The growing awareness that supply chains could have a negative impact on environment and labour rights of local populations of those countries has led to search remedies for a sustainable social upgrading in GSCs. However, it must be mentioned that the answer seems quite complex. Indeed, regarding abuses committed abroad, the corollary obligation that States assume under the right to remedy is often deemed to be confined to violations committed by state actors, not abuses committed by on-state actors such as companies⁴. Furthermore, EU Private International Law does not contain general

² For more developments, see MARCATO, TRONCOSO BALTAR, *Economic and social upgrading in global value chains: concepts and metrics*, Instituto de Economia - UNICAMP (2017), available at: <https://www.eco.unicamp.br/images/arquivos/artigos/3557/TD318.pdf>; HOLLWEG, *Global value chains and employment in developing economies, Technological Innovation, Supply Chain Trade, and Workers in a Globalized World*, 2019, available at: https://www.wto.org/english/res_e/booksp_e/gvc_dev_report_2019_e_ch3.pdf. In most of the literature, this type of analysis has been conducted mainly for developing economies, and the problems considered have been those typical of low-income countries. See, however, GUNNELLA, HASCHIMI, BENKOVSKIS, CHIACCHIO, SOYRES, LUPIDIO, FIDORA, FRANCO-BEDOYA, FROHM, *The impact of global value chains on the euro area economy*, in *Occasional Paper Series*, European Central Bank, 2019.

³ SANGUINETI, *cit.*, p. 300.

⁴ TIRUNEH, *Providing remedy for Corporate Human Rights Abuses committed abroad: the extra-territorial dimension of home states' obligation under ICESCR*, in *UJIEL*, 2023, p. 15.

procedures for suing non-EU companies in Member States' courts and it does not allow victims to call for the application Member States' substantive legislation as, in tort claims, the applicable law is the law of the place where the damage occurs⁵.

In this context, corporate due diligence process has become a central element on the current debate: a range of processes⁶ that business should have in place to identify, avoid and monitor human rights impacts over certain third parties along the value chains with which they are involved. That means that independently of states' abilities and/or willingness to fulfil their own human rights obligations, business enterprises have a responsibility not to infringe human rights by their own actions but also a duty to act with reasonable diligence to prevent, mitigate and address any potential adverse impacts that their operations may have on human rights – even when those activities are carried out by other actors in the value chains.

On this last matter, it is indeed clear that the implementation of such mechanism has suffered a significant evolution in recent years.

If, at a first level, corporate due diligence process emerged as a voluntary compliance model adopted by companies (responding to the concerns of external stakeholders such as consumers, environmental associations and NGOs, rather than employees)⁷, gradually there have been various efforts from inter-governmental organisations to provide guidelines for social responsibility that encourage companies to improve their human rights due diligence process. In 2011, the United Nations Human Rights Council unanimously endorsed the “Guiding Principles on Business and Human Rights: Implementing the UN ‘Protect, Respect and Remedy’ Framework”. In the same year, the OECD published the OECD Guidelines for Multinational

⁵ GUALANDI, *Addressing MNEs' violations of workers' rights through Human Rights Due Diligence. The proposal for an EU Directive on Sustainable Corporate Governance*, in this journal, 2022, I, p. 84.

⁶ According to BONNITCHA, MCCORQUODALE (*The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, in *TIJL*, 2017, p. 899), the concept of due diligence is normally understood to mean different things by human rights lawyers and by business people. Whereas business people normally understand “due diligence” as a process to manage business risks, human rights lawyers understand “due diligence” as a standard of conduct required to discharge an obligation, an external, “objective” standard of conduct to take reasonable precaution to prevent, or to respond to, certain types of harm.

⁷ GUARRIELLO, *Il ruolo del sindacato e delle rappresentanze del lavoro nei processi di due diligence*, in *RGL*, 2021, p. 581.

Enterprises, and since then it has published several guidelines for companies to fulfil their due diligence recommendations – the most general being the Due Diligence Guidance for Responsible Business Conduct (2018). In 2017, the ILO adopted the Tripartite Declaration of Principles concerning Multi-national Enterprises and Social Policy (MNE Declaration).

More recently, the growing awareness that private voluntary standards alone and soft law instruments are insufficient to advance labour standards in global value chains⁸ has led to search hard law solutions on coherence with the existing international standards and their broad achievements. Consequently, the corporate responsibility to respect human rights is gradually moving from a “soft” law standard set in international law to “hard” legal obligations developed in either national statutes or case law applying across borders⁹. In some countries, courts have embraced the concept of due diligence in cases related to underlying human rights violations. Case law developments have been particularly significant in England. In others, there have been legislative developments serving the same purpose. Examples of such legislation are: the French¹⁰ Duty of Vigilance Law in 2017; the “Child Labour Due Diligence Law” from Netherlands, in 2019; or the German Supply Chain Act, in 2021¹¹.

3. *The Proposal and the Directive on Corporate Sustainability Due Diligence: a general approach*

Against this evolving global regulatory environment and in order to avoid fragmentation, the European Union has started in 2021 a long process

⁸ On this topic, explaining the reasons for this lack of progress, SPINELLI, *Regulating Corporate Due Diligence: from Transnational Social Dialogue to EU Binding Rules (and Back?)*, in this journal, 2022, I, p. 104.

⁹ For a more general perspective of this case law, see COSLIN, NAIDOO, RENARD, *Duty of Care and Vigilance in Human Rights Matters: From an International Impulse to European Implementations*, in RED, 2020, p. 73.

¹⁰ For a general approach of the French statute, see COSLIN, NAIDOO, RENARD, *cit.*, p. 79; LYON-CAEN, *Verso un obbligo legale di vigilanza in capo alle imprese multinazionali?*, in RGL, 2018, pp. 240–241.

¹¹ For a critical examination of the German legislation, see NOGLER, *Ley alemana de obligaciones de cuidado en la cadena de suministro: por qué nació y cuales son sus principales contenidos*, in SANGUINETI (coord.), VIVERO SERRANO (coord.), *Diligencia debida y trabajo decente en las cadenas globales de valor*, Aranzadi, 2022, pp. 141–182.

for the adoption of a new directive¹² on corporate sustainability due diligence obliging companies to integrate their human rights and environmental impact into their management systems. The process, which started with the European Parliament Resolution of 10 March 2021, a proposal for a directive issued by the European Commission on February 2022, followed by multiple rounds of negotiations and material amendments submitted by all EU institutions¹³, has recently been concluded when the European Council formally adopted the Corporate Sustainability Due Diligence Directive (CSDDD) on 24 May 2024¹⁴.

If we look at the proposal and at the final text of the Directive, one can observe that there are several issues certainly deserving careful consideration and that could raise some shortcomings or future difficulties. For instance, the final compromise has a much narrower personal scope than what was initially proposed, applying to EU companies and parent companies with over 1000 employees and a worldwide turnover higher than 450 million euro and Non-EU companies, reaching the same turnover thresholds in the EU. The Directive can also be questioned from the point of view of the list of human rights included in international human rights whose violation form

¹² It must be recalled that the Directive is just one element of a much more comprehensive EU agenda to promote environmental sustainability, decent work and human rights worldwide (see the Corporate Sustainability Reporting Directive (CSRD), the new Regulation (EU) 2023/1115 on deforestation-free products, the new EU Batteries Regulation 2023/1543), as noted by BRINO, *Governance societaria sostenibile e due diligence: nuovi orizzonti regolativi*, in *LDE*, 2022, p. 5; and MARQUÉZ CARRASCO, *Todos los ojos puestos en Bruselas: las claves de la futura directiva sobre diligencia debida en materia de sostenibilidad empresarial*, in *REEDH*, 2023, pp. 13–14. In any case, the new proposal stands out from the other initiatives because it is a more general approach and not so much a sectoral one, as observed by LANTARÓN BARQUÍN, *Derechos humanos y cadenas de suministro: conclusiones a partir de una lectura comparada de legislaciones estatales anglosajonas y continentales*, in SANGUINETI, VIVERO SERRANO (coord.), *cit.*, p. 202.

¹³ The Council reached a political agreement on a general approach in December 2022 and the Parliament adopted its report on the Commission proposal in April 2023 and voted on it on June 2023. On December 2023, the Council and the European Parliament have reached a provisional agreement, but until the very end it was unclear how the Members States would position themselves in the decisive vote in the Council's Corepor on March 2024.

¹⁴ On 24 May 2024, the European Council formally adopted the Corporate Sustainability Due Diligence Directive (CSDDD). This was the last step in the decision-making procedure: following the approval of the European Parliament which voted in favour of the CSDDD on 24 April 2024 and the agreement that was reached on 15 March 2024 between the EU member states on the final text of the directive.

part of the adverse human rights impact covered by the Directive, since it surprisingly omits certain particularly important international instruments and European and regional texts (EU Charter of Fundamental Rights, the Council of Europe European Convention on Human Rights, the European Social Charter and the International Convention on the Protection of Migrant Workers)¹⁵.

Among these many issues, the specific matter we will address concerns precisely the involvement and participation of trade unions and workers' representatives in corporate due diligence processes. According to the EU legal instrument, what role do workers and their representatives organisations shall have as stakeholders throughout due diligence process? Are they considered as mere passive subjects of the implementation of the process? Or, in contrast, are they involved in all stages of this relevant process? And if so, what kind of involvement or participation?

4. *The concept of workers' participation and the advantages of workers' participation in the adoption of corporate due diligence processes for human rights*

Before looking at the advantages of corporate due diligence processes for human rights supported by adequate workers' involvement, some preliminary comments need to be made concerning the use of the concept of workers' participation, in general terms.

It should be stressed that employee participation in companies, in decision process (not participation in income, profits or assets)¹⁶ can be analysed from different perspectives. One can distinguish between situations in which workers are directly involved, that is forms of direct participation, and those in which they are involved through their representatives, that is forms of indirect participation¹⁷. On the other hand, one can use the term "participation" in a broader or strict sense. In a broader sense, it¹⁸ tends to refer to any

¹⁵ See BRINO, *cit.*, p. 12; MARQUEZ CARRASCO, *cit.*, p. 17.

¹⁶ About this distinction, see PEDRAZZOLI, *Partecipazione, costituzione economica e art. 46 della costituzione: chiose e distinzioni sul decline di un'idea*, in RIDL, 2005, p. 431.

¹⁷ See REIS, *Envolvimento e participação dos trabalhadores na empresa, Vinte Anos de Questões Laborais*, Coimbra Editora, 2013, pp. 146–147.

¹⁸ PEDRAZZOLI, *cit.*, p. 439, explores the difference between participation on decision making, on one side, and information-consultation, on the other side. The Author argues that the latter plays a preparatory role regarding participation *hoc sensu*.

mechanism through which employees, directly or indirectly, can influence the organisation and decision-making of the company, covering modalities, with different intensities, such as: (i) the right of workers or their representatives to request information; (ii) the right of workers or their representatives to be consulted, establishing dialogue and exchanging opinions with company bodies; (iii) the right to participate in and exert influence on the company's activities. In this sense the term "participation" is considered equivalent to "involvement", used in EU social law¹⁹. In a strict sense, it refers to the right to participate in and exert influence on the company's activities. For the purposes of this article, we will use the expression "participation" to refer to employees' involvement through their representatives – especially trade unions – and in its broader sense, even in a much broader and less technical sense, including, meetings, discussions, hearings or consultation proceedings, information, and participation.

That said, one could ask what the importance of an active involvement of workers' representatives is, particularly trade unions, in the due diligence process, understood as an ongoing process that companies should implement to prevent, mitigate and address any potential adverse impacts that their operations may have on human rights even when those activities are carried out by other actors in the value chain.

In international literature, Wilfredo Sanguinetti²⁰ point out the advantages of an effective participation by employees and their representatives in the adoption of due diligence processes for human rights. Firstly, while the processes is exclusively designed by companies, that increases the risk that it will only take into account the interests of companies, addressing only the violations with the greatest negative impact on their image, instead of prioritising workers' interests²¹. Secondly, it is recognized how difficult it is for

¹⁹ See, for instance, the Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees and the Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Co-operative Society with regard to the involvement of employees. For a more general and critical perspective of the EU law concept of employees' involvement, see GOMES, *Direito à informação e à consulta dos trabalhadores na empresa*, in *Carta dos Direitos Fundamentais da União Europeia Comentada*, Almedina, 2013, p. 331, and also ALAIMO, *Il coinvolgimento dei lavoratori nell'impresa: informazione, consultazione e partecipazione*, in ALAIMO et al., *Diritto del Lavoro e Diritto Sociale Europeo, Temi Selti*, Giappichelli, 2009, pp. 130–131 and WEISS, *La partecipazione dei lavoratori nella comunità europea*, in *DRJ*, 2004, pp. 153–171.

²⁰ SANGUINETTI, *cit.*, p. 345.

²¹ GUARRIELLO, *cit.*, p. 588.

companies to reach the different links in the value chains, with their different locations, either to identify risks or to detect possible violations, or to adopt corrective measures and carry out their monitoring work effectively. The consultation and involvement of trade unions can help undertakings to identify potential and actual adverse impacts more precisely and to set up a more effective due diligence strategy. Actually, local trade unions can play a pivotal role in monitoring the working conditions at suppliers. This is because workers and their representatives are well aware of where possible misconduct may occur, they have direct knowledge of the reality of working conditions and are therefore in a position to act as the “eyes and ears” of supervisory systems. Furthermore, the very coordination that exists between trade union organisations in different parts of the world can allow violations committed in any area to be brought to the attention of the main company for the purposes of taking corrective action.

On this basis, several recommendations provided by inter-governmental organisations, and consultative bodies also highlight corporate due diligence process as an ongoing process which requires the discussion with and involvement of stakeholders at all stages of the process, particularly trade unions and other workers’ representatives.

The UN Guiding Principles²² provide for “meaningful consultation with potentially affected groups and other relevant stakeholders” in the context of due diligence, considering that such consultation is an integral part of the due diligence function as an aid for companies to understand impacts on specific people, in a specific context of operations. To this end, companies should consult stakeholders “directly in a manner that takes into account language and other potential barriers to effective participation”.

Under the OECD Due Diligence Guidance for Responsible Business Conduct²³, meaningful stakeholder engagement is a key component of the due diligence process. In line with the OECD Guidance that “meaningful stakeholder engagement” should: 1) involve two-way communication and consultation, 2) be conducted in “good faith” on both sides, 3) be responsive and timely, and 4) be on-going, which means that stakeholder engagement

²² P. 18, available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

²³ Pp. 27, 28, 29, 30, 32, 34, 48 and 49, available at: <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

activities continue throughout the lifecycle of an activity, 5) be inclusive and adapted to the needs and rights of marginalised and vulnerable groups; 6) take into account the potential barriers to participation faced by affected stakeholders and 6) be context-sensitive and safe with adequate safeguards in place to protect participants from intimidation, retaliation or retribution, “including by maintaining confidentiality or anonymity”. Therefore, engaging with impacted and potentially impacted stakeholders and rightsholders may be especially relevant when an enterprise is identifying adverse impacts in the context of its own activities, devising prevention and mitigation responses to risks, identifying forms of remedy for adverse impacts, tracking and communicating on how human rights impacts are being addressed. In all those stages, the guidance recommendation is to consult and engage impacted or potentially impacted stakeholders, including “workers, workers’ representatives and trade unions”.

According to ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy²⁴, enterprises – including multinational enterprises – should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should involve meaningful consultation with potentially affected groups and other relevant stakeholders including workers’ organisations, as appropriate to the size of the enterprise and the nature and context of the operation.

Hence, the European Economic and Social Committee²⁵ underlines the importance of involving workers’ representatives and trade unions in the process of setting up (risk mapping) due diligence processes, as well as in monitoring it (implementation) and reporting breaches (alert mechanisms). Only with a fruitful social partnership can the transformation towards a more social and ecological sustainable economy be managed.

Against this, the last section will analyse whether, and to what extent, this objective of engagement with trade unions in due diligence processes can be said to be achieved in the EU’s Directive on Corporate Sustainability

²⁴ P. 10, available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

²⁵ Opinion of the European Economic and Social Committee about the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability, Due Diligence, 2022, available at: <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/sustainable-corporate-governance>.

Due Diligence. In this way, it will start with a brief account of the concept of stakeholders adopted by the proposed directive. Then it will examine in detail the participation granted to employees' representatives in the various steps that companies have to take to comply with the due diligence duty under the Proposal and the Directive.

5. *The participation granted to employees' representatives under the Proposal and the Directive: positive steps and gaps*

As a preliminary point, it is important to make some comments about the concept of stakeholders. According to the Proposal, stakeholder (Article 3 (n)) means the company's employees, 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 operations of that company, its subsidiaries and its business relationships. This broad definition gave cause for criticisms for two reasons²⁶. Firstly, it did not differentiate between "rights-holders", whose human rights may be directly impacted, and "relevant stakeholders". As outlined in the OECD Due Diligence Guidance for Responsible Business Conduct, "not all individuals and groups considered as stakeholders will have interests that can be affected by a specific activity carried out by an enterprise". The UNGPs and the UN Guiding Principles clearly make a distinction between "affected groups" (rights-holders) and "other relevant stakeholders", that means, the legitimate representatives of rights-holder interests. The Proposal didn't account this crucial distinction. Secondly, the Proposal does not refer to workers' representatives (trade unions) as stakeholders, in contrast with the position adopted by the OECD Guidance²⁷ and the formula used by the European Parliament's 2021 Resolution²⁸. Certainly one can say that the broad formula used in the proposal – groups, communities or entities – already covers the trade unions themselves²⁹. How-

²⁶ In addition, it must be noted that as for the legal basis for the proposal, no reference was made to Article 153(1)(e) TFEU (information and consultation of workers) and Article 154 TFEU (structured consultation of management and labour), as noted by GUALANDI, *cit.*, p. 95.

²⁷ See the OECD *Guidance for Responsible Business Conduct* (Q.8).

²⁸ See the Resolution (article 3 (1)) – available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021IP0073>.

²⁹ MARTÍN HERNÁNDEZ, *La perspectiva de la Unión Europea sobre la diligencia debida empre-*

ever, since the importance of this particular group of representatives, it would be a contribution to the right direction an explicitly reference to worker representatives. One could see for instance the European Parliament's report of June 2023³⁰, which proposed a concept of interested parties including workers and their representatives: "affected stakeholders" means those individuals, groups or communities that have rights or legitimate interests that are affected or could be affected by the adverse impacts stemming from a company's activities or actions or the activities or actions of entities in its value chain, and the legitimate representatives of such individuals or groups, including the workers and their representatives and the trade unions of the company, of its subsidiaries and throughout its value chain, or in cases where there are no individuals, groups or communities affected by an adverse impact on the environment, credible and experienced organisations whose purpose includes the protection of the environment". Following this last recommendation, the final text of the Directive explicitly mention trade unions and other workers' representatives. "Stakeholders" means the company's employees, the employees of its subsidiaries, trade unions and workers' representatives, consumers; and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business partners, including the employees of the company's business partners, trade unions and workers' representatives, national human rights and environmental institutions, civil society organisations whose purpose includes the protection of the environment, and the legitimate representatives of those individuals, groups, communities or entities". However, to better align with the rights-holder centred approach provided in the international documents, it should clearly distinguish stakeholders in general from rights-holders in particular.

Concerning trade unions' involvement throughout all phases of the due diligence process and analysing the shortcomings of the Proposal in comparison to the final text of the Directive, one can anticipate that several improvements have been made. While the Commission draft didn't mention stakeholder consultations as a general obligation to be fulfilled at all stages

sarial en materia de sostenibilidad tras la aprobación de la propuesta de directiva, in SANGUINETI (coord.), VIVERO SERRANO (coord.), *cit.*, p. 292.

³⁰ https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.

of the due diligence process, the final version creates a new article 8d, including a clear reference to “Meaningful Stakeholder Engagement”.

Regarding the step of identifying potential or actual negative effects on human rights, article 6 of the Proposal merely mentioned that companies should also, where relevant, carry out consultations with potentially affected groups including workers and other relevant stakeholders to gather information on actual or potential adverse impacts. With this option, the proposal rejected the mandatory nature of stakeholder consultation (only “where relevant”, which could be read as providing “a degree of discretion to companies to elect when to engage in such consultation”), and it was not aligned with the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD recommendations. According to the new Directive, in contrast, consultation should be undertaken by companies with all stakeholders, including trade unions, to gather the necessary information on actual or potential adverse impacts, in order to identify, assess and prioritise adverse impacts (article 8d (2a) (a)).

Concerning prevention and mitigation of potential negative effects on human rights, the proposal suggested that Member States should ensure that companies take appropriate measures to prevent, or where prevention was not possible or not immediately possible, adequately mitigate potential adverse human rights impacts and adverse environmental impacts that have been, or should have been, identified (article 7 (1) and 8 (1)). Such measures include the adoption of prevention action plans and corrective action plans; contractual assurances from a business partner with whom the company has a direct business relationship with a view to achieving compliance with the company’s code of conduct and with preventive or corrective action plans; suspension of commercial relations with the partner in the value chain of which the negative impact has arisen; termination of the business relationship with the partner in question if the potential adverse impact is severe; payment of damages to the affected persons and of financial compensation to the affected communities. Nevertheless, the consultation with affected stakeholders was only explicitly mentioned in case of the adoption of prevention action plans and corrective action plans (art. 7 (2) (a); 8 (3) (b)), not concerning the other preventive and corrective measures³¹. The final version of the Directive has improved this point, by extending consultation of stakeholders to the

³¹ See MARTÍN HERNÁNDEZ, *cit.*, p. 293.

decision to terminate or suspend a business relationship (article 8d (2a) (b) (c)), which is certainly a good starting point, but it should have been strengthened to include the other measures.

Under article 10 of the proposal, Member States should ensure that companies carry out periodic assessments to verify if that risk mitigation measures were being pursued or to validate that adverse impacts have actually been prevented or mitigated. Surprisingly, at this relevant stage of monitoring and tracking the effectiveness of the companies' due diligence activities, workers' participation was completely absent, once again not consistent with the OECD guidelines, as explained in the previous section. A welcomed improvement has been reached in the final version adopted making stakeholder consultation compulsory at this stage (article 8a (2a) (e)).

Finally, a special consideration should be made concerning grievance or complaints mechanisms³². According to the Proposal, companies should provide the possibility for trade unions and other workers' representatives to submit complaints where they have legitimate concerns regarding actual or potential adverse human rights impacts (article 9). Despite this good starting point, the Proposal presented three significant shortcomings.

Firstly, according to the Proposal, companies should inform the relevant workers and trade unions of the procedures for dealing with complaints. In contrast, as outlined in the UN Guiding Principles, trade union participation should not be limited to the right to be informed. A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. Thus, engagement with stakeholder groups, namely, trade unions, about the design and performance of the mechanism can help to ensure that trade union will use it in practice and create a common interest in its success³³. No measure is included in the Proposal with this purpose. By contrast, the European Parliament's report of June 2023 suggested that Member States should ensure that "when companies establish or participate in notification and grievance mechanisms, those mechanisms are legitimate, accessible, predictable, equitable, transparent, rights-compatible, gender- and culturally responsive, and based on engagement and dialogue". In addition, notification and grievance mechanisms should "be designed and

³² MARTÍN HERNÁNDEZ, *dit.*, p. 294.

³³ P. 31, available at: https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

operated in a manner that is informed by the perspectives of stakeholders and adapted to the needs of people who may be most vulnerable to adverse impacts³⁴.

Secondly, the Proposal also fails to include a reference to grievance mechanisms set forth in global framework agreements concluded between groups of companies (or multinational companies) and global union federations or European union federations. According to Guarriello³⁵, one of the most innovative aspects of the recent global framework agreements is to include specific provisions regarding workers' rights at suppliers and subcontractors. Most global framework agreements applicable in the global value chain make reference to the ILO instruments – mainly those concerning fundamental principles and rights at work, such as freedom of association/collective bargaining, non-discrimination, child labour, and forced labour. Some global framework agreements include procedural mechanisms for monitoring and verifying the obligation to respect fundamental labour rights through global chains such as training for workers' representatives and local management, site visits to subsidiaries of the company in different countries, definition of complaints procedures, etc.³⁶.

Lastly, the Proposal didn't recognise two important key instruments to enable workers' representatives to carry out their monitoring work effectively. On the one hand, the trade unions' right to request information on the composition of the networks of suppliers and contractors³⁷ and other additional information. As described above, stakeholder engagement is characterised by two-way communication. It involves the timely sharing of the relevant information for stakeholders to make informed decisions³⁸. To enable trade unions to monitor the working conditions at the suppliers and the adherence to the labour standards, it is of crucial importance that information

³⁴ https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.

³⁵ GUARRIELLO, *cit.*, p. 511.

³⁶ Less frequently they go beyond the core labour standard, dealing with wages and working time; health and safety; training, and restructuring, as pointed out by SPINELLI, *cit.*, p. 106. Furthermore, regarding some specific issues, such as environmental issues, these agreements still have serious limitations, as noted by GIOVANNONE, *Le nuove dinamiche della contrattazione collettiva per la Just Transition: prospettive regolative per la convergenza tra interessi economici, sociali e ambientali*, in *RGL*, 2021, p. 646.

³⁷ SANGUINETI, *cit.*, p. 347.

³⁸ By contrast, see the European Parliament's proposed amendment, art. 8 d (4), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html.

is provided by the lead company in the first instance about the companies in its global supply chain. On the other hand, an effective protection against possible retaliatory measures for the often whistleblowing role that workers' representatives play. For that reason, in its report of June 2023, the European Parliament proposed an amendment establishing that "In informing and consulting affected stakeholders, companies shall identify and address barriers to engagement and shall ensure that participants are not the subject of retaliation or retribution, including by maintaining confidentiality or anonymity. Companies shall pay particular attention to the needs of vulnerable stakeholders, and overlapping vulnerabilities and intersecting factors, ensure a gender-responsive approach, and fully respect the United Nations Declaration on the Rights of Indigenous Peoples".

The majority of these limitations have been successfully overcome in the new Directive. In fact, concerning trade union's right to request information, this key instrument is now explicitly recognised on article 8d (2): "consulted stakeholders shall be allowed to make a reasoned request for relevant additional information, which shall be provided by the company within a reasonable period of time and in an appropriate and comprehensible format". Regarding complaints' procedures, article 9 (6) include a specific reference to the complaint mechanisms provided for in global framework agreements describing that "companies are allowed to fulfil the obligations by participation in collaborative complaints' procedures and notification mechanisms, including those established jointly by companies, through industry associations, multi-stakeholder initiatives or global framework agreement". Moreover, it also states that "companies shall take reasonably available measures to prevent any form of retaliation by ensuring the confidentiality of the identity of the person or organisation submitting the complaint, in accordance with national law" (article 9 (3)). Finally, the new directive calls for companies to establish a fair, publicly available, accessible, predictable and transparent procedure for dealing with complaints. Despite this positive reference, it would be useful an explicitly reference to the role of stakeholders in conceptualising the complaints mechanisms themselves, as described above.

In conclusion, it seems fair recognized that the Commission Proposal clearly fell short of international standards, in what concerns trade unions' participation throughout corporate due diligence process. According to those recommendations, while stakeholders' involvement, in particular trade

unions' involvement, is a key component of the due diligence process, this involvement should be interactive, covering information, consultation, and comprehensive/structural, it means an ongoing process. To the contrary, in the proposed directive, trade unions were not explicitly mentioned as stakeholders. A clear obligation to consult stakeholders was only referred when enacting preventive or corrective action plans. In some stages, it was clearly non-existent. In others, it was limited to a passive role, far away from a constructive cooperation between companies and workers' representatives. Thanks to specifically recommended changes (particularly from the European Parliament), the final version of the directive adopts wide-ranging amendments that introduce a systematic approach to stakeholder participation in order to cover all stages of human rights due diligence, in line with international standards. Despite some minor shortcomings – regarding the subsets of stakeholders or the involvement of workers' representatives in the design of grievance mechanisms – the new piece of legislation entails almost all the principles that should be followed for stakeholder engagement to be characterised as meaningful.

Abstract

After a brief reconstruction of the various steps that have emphasised the role of human rights due diligence, the article examines the role of trade unions and other forms of employee representation in the implementation of due diligence processes. More specifically, it aims to verify whether, and to what extent, this objective can be said to be achieved in the Directive on Corporate Sustainability Due Diligence. With this purpose, the article looks into the concept of “employee participation” in the decision-making of an organisation and the advantages of an effective participation by employees and their representatives in the adoption of human rights due diligence processes pointed out by several studies and international institutions. Then, it analyses the participation granted to employees’ representatives in the various actions that companies have to take to comply with the due diligence duty under the proposed directive and the legal instrument adopted. The limits and shortcomings found in the proposal have been significantly overcome in the final version, which leads to an overall positive judgement despite some minor gaps.

Keywords

Global value chains, Labour protection regulations, Due diligence, trade unions, EU Directive.