Corporate Due Diligence Between the Needs for the Implementation of Sustainability and Protection of Human Rights

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Abstract

The implementation of the 2030 Agenda is a shining example of the need to transcend the traditional divide between public and private law, requiring a mixed approach in which State regulation is necessarily combined with forms of self-regulation. The EU Directive on Corporate Sustainability Due Diligence, which employs soft law techniques, serves as a prime example of this interplay between State regulation and international standardization processes. The Directive, embedded in sustainable transition law, addresses corporate responsibility, by invoking the principle of solidarity and affecting civil liability. It mandates the protection of human rights throughout the production chain. The European regulation, which aims to harmonize the market, prompts reflection on the level of protection of the person, which in systems such as the Italian one raises the problem of overcoming compensatory logic and leads to the search for preventive measures to safeguard individual interests.

Keywords

Due Diligence, Global Value Chains, Sustainability, Brussels Effect, Liability, Personal Rights.

I. The Implementation of the UN's 2030 Agenda Between State and Self-Regulation. Supply Chain Due Diligence as a Case Study. Reasons and Relevance of the Analysis

There is wide debate on the best and fastest way to implement the UN's 2030 Agenda[1] within markets globally.

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[1] See, among others, S. Atapattu, 'International Environmental Law and Soft Law: A New Direction or a Contradiction?', in C.M. Bailliet ed, *Non-State Actors, Soft Law and Protective Regimes from the Margins* (Cambridge: Cambridge University Press, 2012), 202; E. Giovannini, *L'utopia sostenibile* (Bari-Roma: Laterza, 2018), 35; L. Floridi, *Il verde e il blu* (Milano: Raffaello Cortina Editore, 2020), 255; C. Coglianese, 'Environmental Soft Law as a Governance Strategy' 61 *Jurimetrics*, 19-51 (2021); R. Michaels, V. Ruiz Abou-Nigm and H. van Loon, *The Private Side of Transforming our World. UN Sustainable Development Goals 2030 and the Role of Private International Law* (Cambridge: Intersentia, 2021), 9.

In very general terms, it can be said that this topic addresses two main opposing approaches:[2] on the one hand, authoritative intervention, made up of state legislation or international treaties,[3] which impose obligations and outline responsibilities; on the other hand, the adoption of commercial practices[4] and uniform rules which, on a voluntary basis,[5] promote the pursuit of the objectives of the Agenda.[6]

At first glance, legislative action seems to have the greater impact because it is characterized by cogency, generality, and completeness, while relying on spontaneous adoption by companies would seem to offer fewer guarantees.[7] On the other hand, the implementation of an international normative instrument, such as the UN Agenda, presents numerous problems[8] resulting from different regulatory approaches adopted by each State, the timing of adoption, which is difficult to synchronize, and cultural differences

[2] K.W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance' 54 *International Organization*, 421-456 (2000).

[3] The adoption of an international treaty dedicated to the respect of human rights by businesses will be discussed by the IGWG of the UN Human Rights Office during the 10th working session scheduled in Geneva in October 2024. On the troubled process of adoption of the Treaty, see: R. Vecellio Segate, 'The First Binding Treaty on Business and Human Rights: A Deconstruction of the EU's Negotiating Experience Along the Lines of Institutional Incoherence and Legal Theories' 26 *International Journal of Human Rights*, 122 (2022). The regulation of value chains fuels the debate on the neo-colonialism of developed countries towards developing countries. In this sense, see, among others, C.O. Lichuma, '(Laws) Made in the "FirstWorld": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains' 81 *Heidelberg Journal of International Law*, 497-532 (2021).

[4] The UN's action to develop a sustainability-driven business culture is intense. On this point, see 'The Ten Principles of the UN Global Compact'. See also E. Bani, 'Regole di solidarietà e diritto dei mercati', in M. Passalacqua ed, *Diritti e mercati nella transizione ecologica e digitale* (Padova: CEDAM, 2021), 161-162. The relationship between sustainable development, the market, and contractual relationships is outlined by E. Caterini, *Sostenibilità e ordinamento civile* (Napoli: Edizioni Scientifiche Italiane, 2018), 96; M. Pennasilico, 'La "sostenibilità ambientale" nella dimensione civil-costituzionale: verso un diritto dello "sviluppo umano ed ecologico"' *Rivista quadrimestrale di diritto dell'ambiente*, 185 (2020) and S. Zuccarino, 'Sostenibilità ambientale e riconcettualizzazione del contratto' *Annali della Società Italiana degli Studiosi del Diritto Civile*, 65-84 (2022).

[5] D. Vogel, 'Private Global Business Regulation' 11 *Annual Review of Political Science*, 261-282 (2008).

[6] See M. Bartl, 'Toward Transformative Private Law: Research' *The Italian Law Journal*, 413-423 (2023).

[7] See, in this regard, European Commission, *Study on Due Diligence Requirements Through the Supply Chain. Final Report* (Brussels: Publications Office, 2020), 48.

[8] The UN Agenda is the basis of a transition law in which the general and abstract normative model is often too rigid with respect to the transformative thrust. On the subject, see S. Grassi, 'Environmental Protection in International, European and Internal Sources' 13 *federalesmi.it*, 1, 4-46 (2023).

which, inevitably, have repercussions on internal legislative processes. The creation of uniform rules spontaneously adopted by market operators ends up, therefore, being a strong option because it has the effectiveness of soft law,[9] a regulatory technique that has proven successful in promoting market globalization[10] and overcoming the obstacles posed by legislative fragmentation.

To outline the advantages and disadvantages of the two approaches and to understand how sustainability is pursued by the European Union, a useful case study seems to be the Corporate Sustainability Due Diligence Directive (CSDDD),[11] which entered into force on 25 July 2024. The corporate sustainability due diligence transfers to companies the obligations to respect human rights in the transnational value chain under the application of the Directive to be transposed into the 27 legal systems of the Member States. Analysing it allows us to reflect on a relevant issue such as the level of individual protection offered by European Union law, with specific focus on the Italian system characterized by a rigid, personalist-based Constitution.

As clearly stated in the Communication on the Green Deal,[12] to achieve sustainable development, which is a priority for the Union,[13] synergic action between public authorities and private actors is necessary: sustainability that includes human rights, environment, and climate therefore requires the full involvement of all market players including companies. The CSDDD can hence be interpreted as a market governance tool, but also as an expression of Art 191 TFEU, which calls for a high level of protection and the promotion of European fundamental values. The impact of the CSDDD is significant because due diligence affects entire contractual supply chains in a variety of markets, leading to their sustainability-driven transformation. This is an indirect transformation resulting from a process of regulatory osmosis that constitutes one of the European Union's greatest bets on the path to sustainability.

[9] G.C. Shaffer and M.A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' 94 *Minnesota Law Review*, 706-799 (2010).

[10] Soft law in the commercial field has generated the so-called new *lex mercatoria*. F. Galgano, *Lex mercatoria* (Bologna: Il Mulino, 2016), 32.

[11] European Parliament and Council Directive 2024/1760/EU of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L series.

[12] European Commission, 'The European Green Deal' (Communication) COM(2019) 640 final.

[13] Sustainable development is at the heart of the Green Deal. It is mentioned in several European Union legislative instruments: Art 3 TEU, Art 11 TFEU, Art 37 EU Charter.

II. Sustainable Production and Value Chains. The European Regulatory Approach Between the So-Called Brussels Effect and International Standardization

The transnational nature of supply chains requires a cross-border approach since the goods or services traded in a given national market are often the result of multiple economic exchanges involving a plurality of States, often third countries with respect to the European Union. The phenomenon known as value chains is widespread and of considerable importance given that the OECD[14] notes that 70% of international trade takes place through Global Value Chains (GVCs).[15] GVCs are based on fragmented production which exploits the advantages offered by new communication technologies and reduced transport costs. However, to develop, they require open markets that do not hamper the free movement of goods, people, and capital.[16]

The pandemic[17] and wars have destabilized the economic model of value chains[18] and fuelled debate[19] on their survival or elimination. Despite the progressive emergence of protectionist norms,[20] the European Union proposes a model of value chains governance that identifies sustainability as a tool for competition

[14] The data are provided by OECD and can be consulted at https://www.oecd.org/en/topics/policy-issues/global-value-and-supply-chains.html.

[15] On the phenomenon of Global Value Chains and their relevance in world trade, see F.E. Traverso, 'Catene globali del valore: vantaggi e problemi del commercio mondiale' *Orizzonti politici*, 1 April 2021, available at https://www.orizzontipolitici.it/catene-globali-del-valore-vantaggi-e-costi/.

[16] On this point see, World Bank Group, WTO, Ide-Jetro, OECD and UIBE, *Measuring and Analyzing the Impact of GVCs on Economic Development*. *Global Value Chain Development* (Washington, DC: The World Bank, 2017).

[17] For an analysis of the effects of the pandemic on international value chains, see C. Arriola, P. Kowalski and F. van Tongeren, *Understanding Structural Effects of COVID-19 on the Global Economy: First Steps* (Paris: OECD Publishing, 2022), 21.

[18] The shocks that wars caused to production and trade are the subject of an analysis by C. Arriola, P. Kowalski and F. van Tongeren, *Shocks in a Highly Interlinked Global Economy* (Paris: OECD Publishing, 2024), 31.

[19] B. Milanovic, *Global Inequality* (Cambridge: Harvard University Press, 2016); D. Danielsen, 'Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law Is Needed to Address Global Inequality and Economic Development', in U. Mattei and J.D. Haskell eds, *Research Handbook on Political Economy and Law* (Cheltenham: Edward Elgar Publishing, 2017), 195; K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019), 13.

[20] On the subject, see Th. Christakis, *'European Digital Sovereignty': Successfully Navigating Between the 'Brussels Effect' and Europe's Quest for Strategic Autonomy* (Multidisciplinary Institute on Artificial Intelligence, Grenoble Alpes Data Institute, 2020), 41, available at https://ssrn.com/abstract=3748098.

and resilience, also applicable to third-country companies with significant operations in the European Union.[21]

The creation of a homogeneous regulatory ecosystem informed by European policies generates the so-called Brussels effect[22] which expands European governance beyond its borders by involving companies rooted in third countries.[23]

The aim of due diligence is the adverse human rights and environmental impacts caused by companies of significant size,[24] 'with respect to their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies' (Art 1 CSDDD). A top-down regulatory approach[25] imposes obligations on companies, introduces specific responsibilities, and attributes powers of oversight to public authorities. The European legislator also requires companies to adopt a transition plan for climate change mitigation,[26] making explicit the mandatory nature of the Paris Agreement which, being a programme that binds the governments of various states, takes on the value of a shared commitment also with private actors.[27]

The European path to corporate sustainability due diligence is, however, only apparently the result of choices made autonomously in Brussels because the role assigned to uniform standards and the guiding principles developed at international level is significant in the CSDDD. The identification of adverse impacts and the methods

[21] Recital 29 CSDDD.

[22] A. Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford-New York: Oxford University Press, 2020), 15 and M. Di Donato, 'The Brussels Effect of the European Union's External Action: Promoting Rule of Law Abroad through Sanctions and Conditionality' *The Italian Law Journal*, 91, 105 (2022).

[23] On this topic, see the possible interactions between the Brussels effect of the CSDDD and Delaware Corporate Law analysed by W.J. Moon, 'The Brussels Effect and the Extraterritoriality of Delaware Corporate Law' 35 *European Business Law Review*, 367-382 (2024).

[24] As established by Art 2, the CSDDD binds large undertakings established in the European Union or undertakings established in third countries which 'generated a net turnover of more than EUR 450 000 000 in the Union in the financial year preceding the last financial year'.

[25] The choice to regulate supply chain due diligence was motivated by the failure of forms of self-regulation by European companies. See European Commission, n 7 above.

[26] See Art 1, letter (c) CSDDD which introduces 'the obligation for companies to adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, compatibility of the business model and of the strategy of the company with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement'.

[27] On the topic, see N. Bueno, N. Bernaz, G. Holly and O. Martin-Ortega, 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise' *Business and Human Rights Journal*, 2 (2024).

of developing climate change mitigation plans depend to a large extent on the implementation of best practices adopted at a global level. Furthermore, these are based on uniform rules devised by international trade. The top-down approach of the CSDDD is, therefore, characterized by the broad use of soft law techniques which make European legislation flexible and open to the contribution of non-state sources which can be included in the phenomenon of the so-called new *lex mercatoria*.[28]

This is made explicit in Recital 14 CSDDD, which states that it is a priority to strengthen 'the Union's commitment to actively promote the global implementation of the UN Guiding Principles and other relevant international guidelines such as the MNE Guidelines, including by advancing relevant due diligence standards'.

From a content point of view, the Directive is therefore based on guiding principles developed by the UN and the Organization for Economic Cooperation and Development (OECD), thus proving to be a regulatory instrument aimed at aligning European companies with standards adopted in international trade. The CSDDD can therefore be conceived as an instrument of internal harmonization within its own market, but also, and perhaps above all, as an instrument of alignment with an international system in which the UN and OECD have already worked to identify the duties and responsibilities of companies.[29]

The CSDDD confirms a legislative policy trend already adopted in the Corporate Sustainability Reporting Standard Directive (CSRD)[30] which introduced 'sustainability reporting' based on the

[28] On the subject, see G. Alpa, 'Le "fonti" del diritto civile: policentrismo normativo e controllo sociale', in *Il diritto civile oggi. Compiti scientifici e didattici del civilista* (Napoli: Edizioni Scientifiche Italiane, 2006), 107-157; F. Criscuolo, *Autonomia negoziale e autonomia contrattuale* (Napoli: Edizioni Scientifiche Italiane, 2008), 5.

[29] Significantly, many contents or approaches of the CSDDD are based on international standards. Consider, for example, the six approaches to corporate responsibility adopted by the OECD in the Due Diligence Guidance for Responsible Business Conduct, which have been adopted and re-proposed by Art 4, letters (a), (b), and (f), Art 8, letters (c) and (d), and Arts 9 and 11 CSDDD. See OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018), 20-35, available at https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm. For a comparative perspective on the implementation of international standards in the United States and the European Union, see M. Morros Bo and S. Garrido Vallespí, 'Human Rights Due Diligence in the United States and the EU: Differences, Tends, and a Corporate and Dispute Resolution Critique' *ESADE Law Review*, 62 (2024).

[30] This is the European Parliament and Council Directive 2022/2464/EU, which modifies the non-financial reporting regime, with an extension of the responsibility of companies in terms of sustainable economy. On the subject, see N. Bueno and C. Bright,

'double materiality' of sustainability. This refers to 'financial materiality', expressed by the business model that the company adopts to pursue ESG objectives, and 'impact materiality' of the business activity on the environment and, more generally, on the local community in which it operates.[31] The European Sustainability Reporting Standards,[32] the Forced Labour Regulation,[33] and the EU Regulation on Deforestation-Free Products (EUDR)[34] are regulatory acts that impose duties and obligations on companies in their GVCs. The contents of these are the result of efforts that go beyond the borders of Europe, involving third countries. It follows that the so-called 'Brussels effect' is more apparent than real, given that standardization is mainly conducted by non-EU organizations and, in any case, by those who do not express exclusively European demands. However, undoubtedly, having adopted a specific set of rules dedicated to corporate liability for failure to comply with due diligence and making these rules mandatory (Art 29, para 7 CSDDD) indicates that many of the problems that arise from the transnational nature of GVCs have been overcome.[35]

III. Harmonization as a Possible Tool for Reducing the Scope of Protection

The problematic harmonization of due diligence in legal systems such as the Italian one emerges in a complex article on the topic of the level of harmonization.

'Implementing Human Rights Due Diligence through Corporate Civil Liability' 69 *International & Comparative Law Quarterly*, 789-818 (2020).

[31] On the subject, see J. Carungu, 'Evoluzione della standardizzazione contabile', in J. Carungu and M. Molinari eds, *Analisi e linee evolutive degli standard di rendicontazione finanziaria* (Milano: Wolters Kluwer, CEDAM, 2023), 10.

[32] The drafting of the European Sustainability Reporting Standards was entrusted to EFRAG. This led to the adoption of Commission Delegated Regulation 2023/2772/EU of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards.

[33] Approved by the European Parliament on 23 April 2024, this regulation applies to every company and every type of market by introducing the prohibition of the use of forced labour in the company's value chain. The United States has also intervened to combat this phenomenon by adopting the Uyghur Forced Labor Prevention Act, applicable to trade relations between the US and China.

[34] The EU Regulation on Deforestation-Free Products came into force on 29 June 2023 and has a broad scope of application, including cocoa, palm oil, soybean and paper production.

[35] In this sense, see S. Koos, 'Civil Law, Conflict of Laws, and Extraterritoriality in the European Supply Chain Due Diligence Law' 10 *Hasanuddin Law Review*, 144-170 (2024).

The adoption of the Directive cannot lead to a lowering of the level of protection of human rights, or of employment, social, environmental and climate rights, which cannot be lower than the protection already provided for in the legislation of a given Member State or ensured by collective agreements. In implementing the Directive, each Member State must respect the definitions given in Art 3, including those relative to the impact on human rights, without prejudice to its application which must be uniform within the markets affected by the Directive. Harmonization therefore passes through a series of Euro-unitary notions of impact on human rights that States must respect. However, these notions, however, in the Italian State cannot be preclusive.

In a complex provision that seeks to respect the Union's regulatory competences while avoiding encroaching on areas traditionally attributed to the States, Art 4 provides that 'Member States shall not introduce, in their national law, provisions within the field covered by this Directive laying down human rights and environmental due diligence obligations diverging from those laid down in Article 8(1) and (2), Article 10(1) and Article 11(1)'. It is clear from this provision that the 'hard core' of the Directive is a set of rules, with which domestic legislation must then comply. In each State it is necessary to ensure that companies 'identifying and assessing actual and potential adverse impacts' should 'take appropriate measures to map their own operations' and 'carry out an in-depth assessment of their own operations, those of their subsidiaries and, where related to their chains of activities, those of their business partners, in the areas where adverse impacts were identified to be most likely to occur and most severe'. Art 10, para 1 is also exempt from full legislative discretion, meaning that in any Member State the companies to which the Directive applies must 'take appropriate measures to prevent, or where prevention is not possible or not immediately possible, adequately mitigate, potential adverse impacts'. Equally 'compliant' is the part of the Directive governed by Art 11, para 1, which requires companies to 'bring actual adverse impacts to an end'.

Given these indications, which are mandatory for the States, the concrete level of protection can be adjusted upwards by the individual States as demonstrated by the CSDDD in the complex system of liability outlined in Art 29. Not by chance, the article does not preclude the application of the rules specific to each legal system in terms of civil liability. According to Art 4, para 2, Member States

may adopt 'more stringent provisions'[36] or 'provisions that are more specific in terms of the objective or the field covered, in order to achieve a different level of protection of human, employment and social rights, the environment or the climate'. In essence, harmonization restricts the purposes of the protection intervention to those set out in the Directive both in the group of rules which constitute its founding part and in the purposes which establish its aim. In this sense, the level of protection, although adjustable upwards, has a scope and a range limited by the higher demands of harmonization on which an agreement was reached with some difficulty.

Combining the level of protection with the needs of harmonization is not easy because at the same time the European legislator must ensure a level playing field for companies in the internal market while avoiding the choices of national States regarding the levels of protection converging in a framework that is as little fragmented as possible. On this delicate issue, the Directive provides for a possible change that could be introduced in 2030 during the review of the legislation.[37] Upward protection therefore remains difficult because this Directive must also comply with Art 114 TFEU. Member States may adopt different rules aimed at extending protection, but always in compliance with Art 114 TFEU, which gives the Commission the power to monitor the validity of the protection measure. This provision then allows the Commission or any other Member State to bring an action before the Court of Justice alleging abusive use of the derogation from harmonization. The protection of the environment and health may lead a Member State to adopt derogating measures if duly supported by scientific evidence, but the Commission retains the power to reject these measures 'whether they are a means of arbitrary discrimination or a disguised restriction on trade between Member States and whether they shall constitute an obstacle to the functioning of the internal market' (Art 114, para 6 TFEU).

[36] Some Member States, including Germany and France, already have specific sustainability due diligence regulations in place. The German regulatory experience is the subject of interesting studies that highlight how regulation has influenced the relationship between companies and stakeholders. On this subject, see L. Buttke, S. Schötteler, S. Seuring and F. Ebinger, 'The German Supply Chain Due Diligence Act: Impacts on Sustainable Supply Chain Management from a Stakeholder Perspective' 29 *Supply Chain Management*, 909-925 (2024).

[37] See Art 36, letter (g) CSDDD. For an analysis of the '*Loi de Vigilance*' and the German Supply Chain Due Diligence Act of 2021 ('Lieferkettensorgfaltspflichtengesetz' LkSG) and for a comparison with the CSDDD, see S. Koos, n 35 above, 144.

IV. The Significant Role of Codes of Conduct

When looked at closely, the framework of obligations and responsibilities imposed by the CSDDD remains highly generic. It is grounded in the concept of 'due diligence', a general principle whose specific content can be determined case by case, based on the decisions made by each individual company. Art 5 CSDDD does not define what due diligence consists of, limiting itself to imposing that 'companies conduct risk-based human rights and environmental due diligence'. The rules and principles 'to be followed throughout the company and its subsidiaries, and the company's direct or indirect business partners' are described in a code of conduct, which represents an essential regulatory instrument.

Therefore, if formally due diligence is a duty imposed with top-down policies, from a substantial point of view it will be the individual company with its subsidiaries and partners to concretely establish what the 'adverse impacts' are and how to manage the risk related to them. On a substantial level, the supply chain is governed by the choices made by the companies that operate within it: it is therefore self-regulated sustainability. The code of conduct is a regulatory tool widely used by the European Union because it allows for a flexible alignment of top-down policies with market self-governance needs. Furthermore, its regulatory reference gives the self-regulation contained therein significant legal value and effectiveness.

As established by Art 7, letter (c) CSDDD, the verification of due diligence compliance will have as a reference point the rules and obligations of due diligence described in the code of conduct.[38] According to Art 10 CSDDD, the company will have to add specific clauses to the contracts stipulated with direct commercial partners. With these, the partners will guarantee adherence to the code of conduct.[39] If small and medium-sized enterprises operate in the supply chain and compliance with the code of conduct is economically unsustainable, the company should provide targeted support to ensure that this type of partner also complies with the

[38] In Italy, the compliance system is linked to the concept of 'adequate assets' that companies are required to have. On the subject, see P. Sanfilippo, 'Tutela dell'ambiente e "assetti adeguati" dell'impresa: compliance, autonomia ed enforcement' *Rivista di diritto civile*, 993 (2022).

[39] The CSDDD provides for the adoption of 'guidance about voluntary model contractual clauses' (Art 18). This is a very important form of support within the current contractual forms, as it will facilitate potentially justified termination of the contract based on the violation of due diligence.

due diligence described in the code of conduct.[40] According to Art 8, para 4 CSDDD, in the event of 'potential adverse impacts that could not be prevented or adequately mitigated by the appropriate measures the company may seek contractual assurances from an indirect business partner, with a view to achieving compliance with the company's code of conduct or a prevention action plan'. Effective compliance with due diligence therefore revolves around the code of conduct, but also the ability/willingness of companies to invest in their contractual supply chain. The CSDDD, in fact, assigns a significant role to verification by independent third parties with experience and expertise in environmental or human rights matters regarding the full implementation of the due diligence obligations assumed in the code of conduct.[41]

The importance of the code of conduct as a tool that defines the rules of due diligence and identifies the obligations that companies operating in the supply chain are required to comply with mitigates the top-down nature of legislation. Despite the cogency of the due diligence duties, the concrete implementation of the Directive is entrusted to a self-regulation tool whose content can be developed autonomously by the company.

Each company's code of conduct, explained and discussed with the company's workers and shareholders, will contain rules and principles that will be binding on the company throughout its supply chain, including its direct or indirect business partners. The code is the source that actually specifies and outlines the due diligence of the company and its supply chain, making the European regulatory approach significantly hybrid: it is, in fact, conceivable as a mix of Union and national rules whose content is supplemented by the rules resulting from the self-regulation of companies subject to due diligence obligations.

The code of conduct is also a key tool for informing and sharing company policies with stakeholders,[42] who have notification rights

[40] Recital 46 CSDDD.

[41] Art 20 CSDDD.

[42] According to Art 1, letter (n) this includes employees, trade unions, 'national human rights and environmental institutions, civil society organizations whose purposes include the protection of the environment' and, more generally, any subject 'whose rights or interests are or could be affected by the products, services and operations of the company'. The Code of Conduct as a tool 'to safeguard the interests of all stakeholders' and 'balance the conflicting interest of the stakeholders' is widely used in the Indian Corporate Law (see Companies Act 2013). For a comparative analysis of legal tools adopted in several jurisdictions of the Global South, such as India, Brazil, South Africa, to enhance the corporate social responsibility with particular attention to the protection of human rights, see M. Pargendler, 'Corporate Law in the Global South: Heterodox

and complaint powers that make the due diligence commitments undertaken by the company efficient.

The due diligence obligations are part of a sustainability transparency process sealed by the Regulation on Sustainability-Related Disclosures in the Financial Services Sector (SFDR),[43] and aimed at by the Proposal for a Green Claims Directive[44] and by the Proposal for a Directive as regards empowering consumers for the green transition through better protection against unfair practices and better information.[45]

In this sense, the adoption of standards on due diligence and sustainability reporting prepares the ground for launching a reform of remedies.[46] Such a reform would take into account the standardization carried out at an international level,[47] as GCVs transcend European borders and involve third countries.[48]

In this scenario characterized by sustainability becoming a duty for companies, it is important to ask about the nature of the due diligence obligations contained in codes of conduct, the latter referring to internationally recognized standards.

The code of conduct is developed by the company in a participatory and communication process that involves a broad and

Stakeholderism' *European Corporate Governance Institute Law Working Paper no 718/2023*, 1 (2023).

[43] This is the European Parliament and Council Regulation 2019/2088/EU of 27 November 2019 on sustainability-related disclosures in the financial services sector [2019] OJ L317/1.

[44] European Parliament and Council Proposal for a Directive on substantiation and communication of explicit environmental claims and environmental labels (Green Claims Directive) COM(2023) 166 final. The text is available in the document published by the Council of the European Union, Brussels, 17 June 2024 (OR. en), 11312/24.

[45] European Parliament and Council Proposal for a Directive amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and better information COM(2022) 143 final.

[46] For an examination of the concept of remedy, see F. Piraino, 'La categoria del rimedio nel sistema del diritto civile a partire dagli studi di Enrico Gabrielli' *Giurisprudenza italiana*, 212-244 (2024).

[47] The UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises are the reference points of European standardization.

[48] Pushing due diligence outside its borders is not easy, as demonstrated by the French experience in the case of importing soy produced in Brazil. The largest soy importing groups preferred to abandon Brazil rather than invest in ensuring that Brazilian production was respectful of the environment and human rights. On this subject, see the in-depth study by M.G. Bastos Lima and A. Schilling-Vacaflor, 'Supply Chain Divergence Challenges a "Brussels Effect" from Europe's Human Rights and Environmental Due Diligence Laws' 15 *Global Policy*, 268 (2024).

complex category of stakeholders.[49] It is designed to include those 'whose rights or interests are or could be affected by the products, services and operations of the company, its subsidiaries and its business partners'.

It presents itself as a contractual act, a source of duties and obligations that the company is required to respect by virtue of a principle of solidarity which informs its operations. This is one of the most significant profiles of the UN's 2030 Agenda which, especially in systems characterized by liberalism, has sparked profound debate on the transformation of the statute of the company.[50] The logic of profit is now accompanied by a new one:[51] the logic of the impact that economic activity has on the environment, animals, climate and, more generally, on human rights.

The Directive's reference to codes of conduct and the possibility for companies to invoke uniform rules drawn up by trade organizations have been subject to ample criticism.[52] It questioned the level of democracy of the standards referred to and the degree of accountability of the organizations that develop them,[53] especially whenever standardization comes from non-state entities.[54]

Therefore, the standardization of due diligence presents a challenge when integrating uniform rules within the hierarchy of

[49] The notion of stakeholder is contained in Art 3, para 1, letter (n) CSDDD. Stakeholders 'are company's employees, the employees of its subsidiaries, trade unions and workers' representatives, consumers and other individuals, groupings, communities or entities whose rights or interests are or could be affected by the products, services and operations of the company, its subsidiaries and its business partners, including the employees of the company's business partners and their trade unions and workers' representatives, national human rights and environmental institutions, civil society organizations whose purposes include the protection of the environment, and the legitimate representatives of those individuals, groupings, communities or entities'.

[50] On the subject, see R. Rolli, *L'impatto dei fattori ESG sull'impresa. Modelli di governance e nuove responsabilità* (Bologna: Il Mulino, 2020), 35 and P. Montalenti, 'Impresa, sostenibilità e fattori ESG: profili generali' *Giurisprudenza italiana*, 1190 (2024).

[51] See U. Tombari, 'Lo "scopo della società": significati e problemi di una categoria giuridica' *Rivista delle società*, 338 (2023).

[52] The importance of having shared and measurable standards is highlighted in S. Landini, 'Clausole di sostenibilità nei contratti tra privati. Problemi e riflessioni' *Diritto pubblico*, 360 (2015).

[53] On the subject, see M. Rajavuori, A. Savaresi and H. van Asselt, 'Mandatory Due Diligence Laws and Climate Change Litigation: Bridging the Corporate Climate Accountability Gap?' 17 *Regulation & Governance*, 944-953 (2023).

[54] On this subject, see the considerations developed for the agri-food sector by F. Albisinni, 'Comparazione, Soft Law e Hybritization', in L. Costato and F. Albisinni eds, *Trattato breve di diritto agrario italiano e dell'Unione europea* (Padova: CEDAM, 4th ed, 2023), I, 68.

legal sources.[55] It is essential to consider whether the references made in Directives or other Euro-unitary regulatory instruments establish binding parameters that judges must observe.[56] The combination of top-down and bottom-up approaches opens up new frontiers for legal interpretation. A standard legitimately invoked by the parties, because it aligns with European Union rules, could serve as a basis for granting financing, assessing compliance with due diligence, and even establishing grounds for liability in judicial proceedings.[57]

V. Code of Conduct and Corporate Responsibility. Due Diligence as a Source of Obligations of Means. The Relationship Between Due Diligence, Solidarity, and Civil Responsibility. Damages Due to Omitted or Inadequate Due Diligence

Sustainability is combined with the precautionary principle,[58] which underpins every transformation, whether ecological or digital. This integration introduces evaluation parameters for potential investors in companies and for the production chains to which these companies belong. Awareness is gradually but steadily increasing regarding the impact of adopting sustainability standards on the standing of companies that commit to them. In this context of soft law, the primary challenge lies in determining the nature of the

[55] On the subject, see F. Criscuolo, *L'autodisciplina. Autonomia privata e sistema delle fonti* (Napoli: Edizioni Scientifiche Italiane, 2000), 55; U. La Porta, *Globalizzazione e diritto. Regole giuridiche e norme di legge nell'economia globale. Un saggio sulla libertà di scambio e sui suoi limiti* (Napoli: Liguori Editore, 2005), 26; R. D'Orazio, 'Codici di condotta e certificazione, sub Art. 40 Reg. Europeo 2016/679', in A. Barba and S. Pagliantini eds, *Commentario del codice Civile. Delle persone* (Torino: UTET, 2019), II, 807, 815.

[56] The 'constitutional' nature of principles contained in Directives is a matter of debate. These principles are outlined as 'constitutional', but essentially binding only on legislators, as is well observed by L.K. Weis, 'Constitutional Directive Principles' 37 *Oxford Journal of Legal Studies*, 916-945 (2017).

[57] The issue of the role of international organizations and their regulations was famously addressed in Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA* v *TUK Consultancy BV* and *Assco Gerüste GmbH and Rob van Dijk* v *Wilhelm Layher GmbH & Co. KG and Layher BV*, Judgment of 14 December 2000, available at www.eur-lex.europa.eu. For a commentary see, among others, J. Kokott and K.-G. Schick, 'Parfums Christian Dior Sa v. Tuk Consultancy Bv, and Assco Gerüste GmbH v. Wilhelm Layher GmbH & Co. KG. Joined Cases' 95 *American Journal of International Law*, 661-666 (2001).

[58] F. De Leonardis, *Il principio di precauzione nell'amministrazione di rischio* (Milano: Giuffrè, 2005), 37; M. Renna, 'Il principio di precauzione e la sua attuabilità' *Forum di quaderni costituzionali*, 340-350 (2023).

obligations arising from sustainability, as companies must navigate a delicate balance between the mandatory nature of the principle and flexibility in its implementation.

This is made evident by point 4, para 58 of the General requirements of the Commission Delegated Regulation 2023/2772/EU containing the European Sustainability Reporting Standards. The principles adopted by the company regarding sustainability reporting, although having the aim of 'embedding due diligence in governance, strategy and business model', 'do not impose any conduct requirements in relation to due diligence; nor do they extend or modify the role of the administrative, management or supervisory bodies of the undertaking with regard to the conduct of due diligence'. Reporting would operate only on a procedural and formal level to inform investors about the measures undertaken by the company to 'identify, prevent, mitigate and account for how companies address the actual and potential negative impacts on the environment and people connected with their business'.

The legislator's distinction between procedural aspects and expected behaviours does not alter the responsibilities typically attributed to a company's governance, nor does it impose specific behavioural obligations. However, identifying the financial impacts of sustainability and the company's environmental footprint will inevitably influence its actions. To maintain its standing, the company will need to adopt appropriate strategies. Reporting is closely linked to the company's ability to embark on the path of sustainability. Once the strengths and weaknesses of the company have been identified, it will be difficult to exclude liability for inaction or insufficient action. Sustainability reporting, for example, determines the reliance of qualified third parties such as investors on a programme of actions aimed at achieving sustainability objectives, with consequences also in terms of liability for any intentional or negligent failure to comply with the programme.

Even in the CSDDD, the European legislator attempts to keep due diligence on a procedural level by classifying it as a source of obligations of means.[59] The topic is complex and deserves further investigation because, as the spread of climate change litigation shows, in many cases the prediction of an objective can give rise to forms of liability.[60]

[59] Recital 19 CSDDD.

[60] For an analysis of the intermediate obligations arising from climate protection and the identification of concurrent result obligations, see M. Carducci, 'Natura, cambiamento climatico, democrazia locale' *Diritto costituzionale*, 67-98 (2020).

To better understand this delicate passage, it is worth remembering that sustainability due diligence, even at an international level,[61] involves identifying measures aimed at preventing, ceasing or minimizing actual and potential adverse human rights and environmental impacts and, above all, monitoring and assessing the effectiveness of measures. As can be seen, due diligence consists of behaviours that companies describe as measures useful for pursuing sustainability, identified in full autonomy, but certainly binding in terms of their adoption.

The very reference to the category of obligations of means does not appear to be decisive in excluding forms of liability for omissions or inappropriate conduct. The distinction between obligations of means and obligations of result[62] is the fruit of an era in which certain categories of professionals, the so-called liberal professions, were protected due to the particular difficulties with the activities they carried out. This was developed to provide a special status to doctors, lawyers, notaries and other professionals who use their knowledge to provide services without being able to guarantee in any way that the service is able to satisfy the expectations of the patient (the recovery) or the client (the victory of the case).[63] The distinction, although old, is currently the subject of profound revision:[64] if, in fact, the obligation is based on the loyal collaboration of the debtor and the creditor, the pursuit of the creditor's purpose represents an essential obligation also for the professional of this type. It can therefore be noted that in an era in which many legal systems, such as the Italian one, have seen the decline of the distinction between obligations of means and obligations of result,[65] the use of this dichotomy seems to suggest an exemption from liability. This, however, is difficult to reconcile with the principles of solidarity and the protection of human dignity.

[61] See Guidance for Responsible Business Conduct.

[62] In this context, very relevant are the studies conducted by R. Demogue, *Traité des obligations en général* (Paris: Rousseau, 1925), V, e da L. Mengoni, 'Obbligazioni "di risultato" e obbligazioni "di mezzi" (Studio critico)' *Rivista di diritto commerciale*, I, 317-318 (1954).

[63] See the criticism of the distinction developed by E.L. Perriello, *Professione forense e responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 2023), 38.

[64] For a perspective on medical liability, see R. Franco, 'La disputa intorno alla distinzione tra obbligazioni di mezzi e di risultato si rinnova: dalla dogmatica al nesso di causalità. L'"esatto" adempimento e gli obblighi di protezione' *Rassegna di diritto civile*, 92 (2023).

[65] G. D'Amico, 'Responsabilità per inadempimento e distinzione tra obbligazioni di mezzi e di risultato' *Rivista di diritto civile*, 157 (2006).

In the obligatory relationship, diligence is not merely a formal criterion to determine whether a required behaviour has been followed. Rather, it is a 'substantial' parameter to evaluate the extent to which the required behaviour has been adopted.[66] The risk that the formally carried out due diligence does not lead to results therefore falls on the company's stakeholders, but they can still demonstrate that the company, despite having carried out an impact assessment, has not then adopted adequate measures. In other words, impact assessment – whether aimed at mitigating negative effects or enhancing positive ones of business activities – is a mandatory process for companies subject to the CSDDD. This process must be formally ensured and is not exempt from oversight. As a result, it can still serve as a potential source of liability under the civil liability rules established by each legal system.[67]

The following is a very delicate passage: the independent and voluntary projection of behaviours aimed at achieving sustainability objectives, as outlined in codes of conduct, does not mean that such projections can automatically be invoked as a justifiable exemption from liability in the event of damage.[68]

The topic is highly complex and common to many regulatory instruments in which liability is based on a risk assessment such as, for example, the General Data Protection Act and the AI Act.[69] Compliance with sustainability guidelines voluntarily adopted by companies does not necessarily exempt them from liability. Even if such measures are in place, any resulting damage is still subject to the general rules based on the principle of *neminem laedere*, as enforced by each national legal system.[70] We are therefore witnessing a sort of categorization of the steps of corporate

[66] S. Rodotà, 'Diligenza (diritto civile)' *Enciclopedia del diritto* (Milano: Giuffrè, 1964), 542.

[67] On the causal link in its various meanings, see P. Speziani, 'Il nesso causale nell'evoluzione degli orientamenti della giurisprudenza di legittimità sull'inadempimento delle obbligazioni. Le ragioni per ravvivare il "dialogo" con Cesare Massimo Bianca', in M. Bianca ed, *La responsabilità. Principi e funzioni* (Milano: Wolters Kluwer, CEDAM, 2023), 327.

[68] On the subject, see F. Laus, 'Corporate Sustainability Due Diligence e amministrazione del rischio' *Le società*, 942 (2024).

[69] See S. Koos, n 35 above, 159. On the liability based on risk management used in the AI ACT, see M.L. Gambini, 'Nuovi paradigmi della responsabilità civile per l'Intelligenza artificiale' *Rassegna di diritto civile*, 1292 (2023).

[70] Art 29, para 6 of the Directive, in fact, expressly establishes that 'the civil liability rules under this Directive shall not limit companies' liability under Union or national legal systems and shall be without prejudice to Union or national rules on civil liability related to adverse human rights impacts or to adverse environmental impacts that provide for liability in situations not covered by or providing for stricter liability than this Directive'.

sustainability, understood as a mandatory goal to be achieved, but never as a certain cause for exclusion from liability. It is no coincidence that, in such a scenario, a different distinction has been proposed. This distinction is no longer based on the debtor, but rather on the performance: obligations would therefore be discernible as 'governable' and 'non-governable' depending on whether they involve objectively realizable aspects that can serve as both a possible object of a promise and a possible source of liability in the event of non-fulfilment.[71]

When the supply chain involves companies rooted in third countries, the application of due diligence becomes truly delicate, as demonstrated by the Volkswagen case,[72] and with significant consequences. In the Volkswagen case, the employment of workers from the Uyghur minority at a Chinese plant resulted in significant repercussions for the company. These included investment restrictions and the blockage by U.S. customs of thousands of cars produced in China, due to violations of the Uyghur Forced Labor Prevention Act of 2021. The CSDDD prescribes various forms of liability for companies that fail to comply with due diligence: they range from a fine to a public statement indicating the company responsible for the infringement and the nature of the infringement (Art 29 CSDDD).[73]

Sustainability can only be concretely achieved incompliance with the principle of solidarity. Actions taken to enhance a company's sustainability or mitigate its negative impacts are part of the company's duties of solidarity toward the community. However, even if the effectiveness of these measures is uncertain, they can certainly not absolve the company of liability for any damages it may cause.

The damage related to due diligence goes beyond environmental harm to include any potential damage to legally protected interests, fully aligned with sustainability objectives that encompass not only the environment but also, more broadly, fundamental human rights.[74]

[71] G. Sicchiero, 'Dalle "obbligazioni di mezzo e di risultato" alle "obbligazioni governabili e non governabili"' *Contratto e impresa*, 1391, 1420-1421 (2016).

[72] The issue is particularly complex as in the Volkswagen case, where the company was held responsible for the use of forced Uyghur minority labour in China and was consequently blocked.

[73] On the concerns about the effectiveness of sanctions of this type, see M.G. Bastos Lima and A. Schilling-Vacaflor, n 48 above, 260.

[74] Recital 24 CSDDD.

To fulfil due diligence, the company must adopt measures that can improve sustainability by intervening not only in behaviour that causes harm to the environment or human rights, but also in behaviour that can contribute to determining the harm. Hence the adoption of a concept of causal link that also includes facts such as the influence on one's own supply chain to ensure that it adopts such measures that eliminate or, in any case, mitigate the risk of harm.[75] Although the Directive does not include specific provisions on civil liability, it raises important questions about the consequences of failing to implement due diligence, particularly regarding damages that proper adherence could have prevented or mitigated.[76] On this point, the debate that preceded the adoption of the Directive was intense.

The Directive limits the chain of compensation for damages only to those that are a direct and foreseeable consequence of the failure to carry out due diligence. For example, if harm causes a person to experience financial difficulty that prevents them from regularly fulfilling obligations contracted with a third party (a landlord, a tenant or a borrower), the indirectly caused damage is not compensable and the third party may not take legal action as an injured party.[77]

In Art 29, specifically dedicated to civil liability for damages caused by an intentional or negligent omission of due diligence, the legislator takes care to exclude any form of overcompensation for the damages suffered, be they punitive or multiple damages. This provision highlights the compromising nature of the Directive: the typification of due diligence could open the way to the application of national rules on compensation for damages which in some countries, precisely because of the general nature of *neminem laedere* and the value-based foundation of the protection of the person, have led to an open interpretation of the unlawful act accompanied by a multifunctional conception of liability.[78]

[75] Recitals 45 and 53 CSDDD.

[76] It is about finding the causal link by evaluating the due diligence carried out in the supply chain. In obligations of means, the creditor has the burden of proving that the debtor has not taken adequate diligence to achieve the purposes of the obligation.

[77] Recital 79 CSDDD.

[78] On the multifunctional nature of civil liability, see P. Perlingieri, *Il diritto civile nella legalità costituzionale. Attività e responsabilità* (Napoli: Edizioni Scientifiche Italiane, 2020), IV, 326.

VI. The Impact on Human Rights. The Problem of the Level of Protection in the Italian Legal System

The CSDDD contributes to the transformation of the markets of individual Member States into environments where corporate finance and economic initiative are permeated by the achievement of ESG objectives. Indeed, it is part of a sequence of actions that are progressively transforming the European commercial area, orienting it towards green policies and forms of just transition.

It is an approach that marks a legislative paradigm shift that aims to ensure a more effective[79] pursuit of sustainability objectives: with the CSDDD, the European Union seems to acknowledge that rigid compliance rules do not always generate the expected impact, while bottom-up approaches could be more effective.[80] The legislative strategy adopted with the CSDDD values collaboration within the chain of activities: in other words, it seeks to encourage consultation between companies receiving due diligence and all operators, upstream and downstream, who interact with them.

As we have seen, the determination of due diligence measures is not totally free in the sense that it should be conducted in such a way that the measures identified are truly the result of an accurate analysis attentive to the achievement of sustainability. In their identification, companies must therefore take into account specific documents, including those at international level. These outline contents and targets regarding the protection of the environment and human rights,[81] adhering to a One Health vision[82] which considers the well-being of people and animals and the protection of the environment and ecosystems as a whole.[83]

The CSDDD, originally intended to be applied to the entire value chain, is applicable in its final version to a much smaller part of the value chain which essentially coincides with the supply chain only. This is a significant reduction in due diligence work that excludes the downstream part, the one that links the supply chain to the final

[79] On the concept of effectiveness, see G. Vettori, 'Effettività delle tutele (diritto civile)' *Enciclopedia del diritto* (Milano: Giuffrè, 2017), 281.

[80] H.-J. de Kluiver, 'Towards a Framework for Effective Regulatory Supervision of Sustainability Governance in Accordance with the EU CSDD Directive. A Comparative Study' 20 *European Company and Financial Law Review*, 203-239 (2023).

[81] For example 'The corporate responsibility to respect human rights', cited in Recital 37 CSDDD.

[82] M.A. Sandulli, 'Introduzione. Reflections on the One Health approach in light of recent changes to the constitutional provision', in F. Aperio Bella ed, *One Health: la tutela della salute oltre i confini nazionali e disciplinari* (Napoli: Editoriale Scientifica, 2022), 21.

[83] Recital 35 CSDDD.

consumer. Undoubtedly, it is a European failure in the adoption of Goal no 12 dedicated to sustainable production and consumption because it does not allow the final consumer to be able to impact compliance with due diligence. However, at a national level, it does not seem to exclude the use of forms of protection offered to the consumer by other regulatory instruments.

The due diligence control system remains entrusted to market surveillance authorities[84] and the interaction between businesses and stakeholders,[85] the bearers of interests linked to compliance with due diligence. However, it does not allow for widespread control and does not determine a direct connection between the final user/consumer and companies in the production chain.

Violation of human rights or their non-respect deserves a broader and more effective range of remedies.[86] In this sense, one of the knots still to be untied in the supply chains is the low monetary value given to people. An example of this is the agreement reached after the Rana Plaza tragedy. It led to compensation by most of the textile companies that employed the 1,338 people who died in Dhaka when the building in which they worked collapsed. Under the Convention drawn up under the auspices of the ILO, the victims of Rana Plaza benefited from compensation from the companies that profited from their work. However, the wage base on which the compensation was calculated was low and not in line with the standards of the economies in which the leading textile companies operate, and the compensation excluded damages for pain and suffering, with a downward assessment of personal injury.

The CSDDD leads us to explore new ways of protecting individuals. This can be done through tools that impose certain forms of responsibility on those who use a value chain. These favour prevention in light of international case studies that demonstrate how valuable prevention measures are. Consider the Shell/Nigeria

[84] Art 28 CSDDD foresees a European Network of Supervisory Authorities.

[85] On the subject, see F. Denozza, 'Due concetti di stakeholderism', in M. Callegari, S.A. Cerrato and E.R. Desana eds, *Governance e mercati. Studi in onore di Paolo Montalenti* (Torino: Giappichelli, 2022), 78.

[86] The right remedy is the subject of much debate in Italy. P. Perlingieri, 'Il "giusto rimedio" nel diritto civile' *Il giusto processo civile*, 1-23 (2011); E. Navarretta, 'Diritti inviolabili e responsabilità civile' *Enciclopedia del diritto* (Milano: Giuffrè, 2014), VII, 375; A. Di Majo, 'Rimedi e dintorni' *Europa e diritto privato*, 703-741 (2015); P. Grossi, 'Dalle "clausole" ai "principi": a proposito dell'interpretazione come invenzione' *Giustizia civile*, 5 (2017) and G. Vettori, 'Il diritto ad un rimedio effettivo nel diritto privato europeo' *Rivista di diritto civile*, 666-694 (2017).

case in this regard.[87] The compensation paid by Shell to Nigerian farmers for damage caused by the oil spill has been modest and the result of complex and lengthy processes, while the obligation to instal a monitoring system for oil pipelines capable of promptly reporting leaks has proven much more effective.[88] The compensatory route is not the ideal path even with regard to damage to the environment and the climate[89] caused by companies because it very often leads to crushing liability,[90] the bankruptcy of the company concerned, and, ultimately, the absence of effective compensation.[91] However, the same difficulties persist in this context, mirroring those already highlighted in the areas of environmental and climate protection, where European remedies continue to be unsatisfactory.[92]

In transition law, the transformative nature of the rules requires a rethinking of the categories of interest in acting[93] and more

[87] The case is described at the following link https://www.reuters.com/article/business/environmentalists-farmers-win-dutch-court-case-over-shell-nigeria-spills-idUSKBN29Y1LH/. For an analysis of the complex controversy, see S.M. Bartman and C. De Groot, 'The Shell Nigeria Judgments by the Court of Appeal of the Hague, a Breakthrough in the Field of International Environmental Damage? UK Law and Dutch Law on Parental Liability Compared' 18 *European Company Law*, 97-105 (2021).

[88] In this sense, see H.-J. de Kluiver, n 80 above, 213.

[89] On the forms of protection and responsibilities linked to the right to climate, see M.C. Zarro, *Danno da cambiamento climatico e funzione sociale della responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 2022), 77. For an examination of the possible forms of protection, see V. Conte, 'Per una teoria civilistica del danno climatico. Interessi non appropriativi, tecniche processuali per diritti trans-soggettivi, dimensione intergenerazionale dei diritti fondamentali' *DPCE online*, 671 (2023).

[90] In this sense, see H.-J. de Kluiver, n 80 above, 214.

[91] The *Ilva* case in Taranto is a good example of this.

[92] The complex nature of legal interests makes it necessary to explore new paths to identify appropriate forms of protection in a law that is increasingly attentive to interests held by a plurality of subjects, communities, and present and future generations. See P. Femia, 'Transsubjektive (Gegen)Rechte, oder die Notwendigkeit die Wolken in einen Sack zu fangen', in A. Fischer-Lescano, H. Franzki and J. Horst eds, *Gegenrechte. Recht jenseits des Subjekts* (Tubingen: Mohr Siebeck, 2018), 350-351.

[93] Consider the evidentiary difficulties and the costs borne by the victims. The CSDDD, like other transition regulatory instruments, in Art 29, para 3, letter (d) allows Member States to entrust 'a trade union, non-governmental human rights or environmental organization or other non-governmental organisation, and, in accordance with national law, national human rights' institutions, based in a Member State' the task 'to bring actions to enforce the rights of the alleged injured party, without prejudice to national rules of civil procedure'.

For a reflection on the system of protection of interests, see U. Mattei, 'I rimedi', in G. Alpa, M. Graziadei, A. Guarneri, U. Mattei, P. Monateri and R. Sacco eds, *La parte generale del diritto. Il diritto soggettivo* (Torino: UTET, 2001), II, 107.

generally of the procedural instruments.[94] It is a change that is also necessary in the context of sustainability due diligence. This is needed to ensure that the entire value chain, extending beyond the place where it operates, is in line with the values expressed by the European Union and the constitutions of its Member States.

Due diligence delineates the scope of applicable values, as the sustainability standard is presumed to be upheld when the rights listed in the annex of the European Parliament and Council Directive 2024/1760/EU are not violated. This Directive provides an essentially exhaustive list of existential situations deemed worthy of due diligence. In other words, we are witnessing a typification of existential aspects worthy of protection, where violations by companies can lead to forms of liability.

It is necessary to consider how constitutional systems based on personal rights can adequately and appropriately transpose the Directive. In this regard, useful reflections can be made by taking the Italian legal system as a point of observation. The Italian Constitution is characterized by a general clause for the protection of the individual, which excludes a typification of existential situations worthy of protection. Pursuant to Art 2 of the Constitution the person becomes a founding value of the constitutional system.[95] As such, the individual is protected in any form and degree regardless of a specific legislative provision of protection or a taxonomy of due diligence conduct.[96] Overcoming the typicality of individual rights[97] has, in fact, represented one of the key steps for the improvement of living conditions in Italian society thanks to the

[94] See D. Bertram, 'Judicializing Environmental Governance? The Case of Transnational Corporate Accountability' 22 *Global Environmental Politics*, 117-135 (2022). For an analysis of the topic, see D. Castagno, 'Le procès pour l'environnement et le climat en droit italien: potentialités, limites et alternatives dans un cadre de contentieux "stratégiques"' *Revue internationale de droit comparé*, 583-598 (2023). With regard to the forms of procedural protection that can be applied in cases of greenwashing, see F. Cesareo and G. Pirotta, 'Il greenwashing nella lotta al climate change. Fondamenti sostanziali giusprivatistici e tutela risarcitoria collettiva' *BioLaw Journal*, 217, 227 (2023).

[95] P. Perlingieri, 'Principio personalista, dignità umana e rapporti civili' *Annali della Società Italiana degli Studiosi del Diritto Civile*, 1 (2020).

[96] G. Perlingieri, '"Sostenibilità", ordinamento giuridico e "retorica dei diritti". A margine di un recente libro' *Il foro napoletano*, 101 (2020), according to which 'only development that has the person and social cohesion as its reference point is sustainable'.

[97] See in this regard, P. Perlingieri, *La personalità umana nell'ordinamento giuridico* (Camerino-Napoli: Edizioni Scientifiche Italiane, 1972), 175 and 183.

direct application of the constitutional provisions that contain protection of the person.[98]

In sustainability due diligence, the approach is reversed, as emerges from Art 3, para 1, letter (c) of the Directive which limits the concept of 'adverse human rights impact' to an impact on persons 'resulting from an abuse of one of the human rights listed in Part I, Section 1, of the Annex to this Directive', as those human rights are enshrined in the international instruments listed in Part I, Section 2, of the Annex to this Directive or 'an abuse of a human right not listed in Part I, Section 1, of the Annex to this Directive, but enshrined in the human rights instruments listed in Part I, Section 2, of the Annex to this Directive'. This approach entails adopting a protection model designed for optimal alignment with the international context in which supply chains operate. However, it results in a reduced level of protection, as it relies on concepts and categories that are recognizable and accepted beyond the borders of the European Union.

On closer inspection, therefore, the protection of the person is based on international regulatory standards and is limited to typical profiles (see Art 3, para 1, letters (c) and (i)) or can be deduced from a closed number of international normative acts listed in the Annex to the Directive. Harmonization, the ultimate goal of commercial legislative policies, is therefore adopted in one field – the protection of the person. Its results, however, remain problematic. Due diligence is required, but at the same time limited in its level and in the extent of its impact on the protection of the person.

VII. Concluding Remarks. The Persistence of Typifications, the Reduction of the Scope of Protection and Compensation Logics as Obstacles to the Full Protection of the Person. Due Diligence Based on Risk Assessment as an Attempt to Overcome Purely Compensatory Logics

[98] In Italian law, the issue of the direct application of principles by legal scholars is the subject of a long-standing and in-depth debate. On the subject, ibid 417; P. Rescigno, *Introduzione al Codice civile* (Roma-Bari: Laterza, 1993), 62; S. Morelli, 'L'applicazione diretta della Costituzione nei rapporti interindividuali' *Giustizia civile*, 337 (1996); G. D'Amico, 'Problemi (e limiti) dell'applicazione diretta dei principi costituzionali nei rapporti di diritto privato (in particolare nei rapporti contrattuali)' *Giustizia civile*, 443-508 (2016); E. Navarretta ed, *Costituzione, Europa e diritto privato. Effettività e Drittwirkung ripensando la complessità giuridica* (Torino: Giappichelli, 2017), 211; P. Femia, *Principi e clausole generali. Tre livelli di indistinzione* (Napoli: Edizioni Scientifiche Italiane, 2021), 30.

The analysis of the CSDDD highlights that the sustainable transition of European origin remains an expression of the regulation of the market based on the principles of competence and subsidiarity.[99] The European measures dedicated to the transition are measures that aim to approximate the legislative, regulatory, and administrative provisions of the Member States. Sustainability is therefore regulated in accordance with the proper functioning of the internal market, as established by Art 114 TFEU.

It is clear that limiting the promotion of sustainability, such as the protection of the person, the environment, and the climate, to the competitiveness of the European market means limiting the scope of the principles of dignity and solidarity[100] that are firmly rooted in European constitutional traditions.

The taxonomy of the positive or negative impacts of economic activities on human rights and the environment in the Italian legal system cannot be used to create zones free from duties to protect people and the environment.[101] This is especially true now that the environment and the protection of the interests of future generations have been expressly included in the Constitutional Charter.[102]

From this perspective, it is difficult for the protection of the person to expand because it too remains the object of harmonization and standardization. At this point, it becomes important to promote an axiological interpretation that leads back to entire national and European legal systems and their interaction[103] – the implementation of sustainability. By leveraging the values that form the basis of the Lisbon Treaty, enshrined in the Charter of

[99] For a critical reflection on the European Union's attempt to impose its own common framework of protection, beyond the principle of subsidiarity, see G. Zarra, 'Tra "Diritto privato dell'Unione europea" and "Diritto privato degli Stati europei". Riflessioni a margine di un recente colloquio' *Rassegna di diritto civile*, 192-230 (2024).

[100] On the subject, see A. Lener, 'Ecologia, persona, solidarietà: un nuovo ruolo del diritto civile', in N. Lipari ed, *Tecniche giuridiche e sviluppo della persona* (Roma-Bari: Laterza, 1974), 333-334 e P. Perlingieri, 'I diritti umani come base dello sviluppo sostenibile. Aspetti giuridici e sociologici', in Id, *La persona e i suoi diritti. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), 71.

[101] On the subject, see P. Perlingieri, 'Persona, ambiente e sviluppo', in M. Pennasilico ed, *Contratto e ambiente* (Napoli: Edizioni Scientifiche Italiane, 2013), 322.

[102] The Italian Constitution was amended in 2022 with significant innovations. In Art 9 of the Constitution, 'the protection of the environment, biodiversity and ecosystems, also in the interest of future generations' was expressly provided for. The new Art 41 of the Constitution provides that economic initiative cannot be carried out in a way that causes harm 'to health, the environment, safety, freedom, human dignity'.

[103] The sectoral nature of European Union law is highlighted by P. Perlingeri, by proposing a unitary Italian-European legal system in *Diritto comunitario e legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 1992), 35.

Fundamental Rights and expressed in the European Convention for the Protection of Human Rights, an interpretation can be provided that results in solutions aimed at expanding the protection of the individual.[104] Art 6 of the Lisbon Treaty allows for common constitutional traditions to be valued as general principles that can justify choices of high protection.

It is clear that this process is difficult to implement if there remain interpretations of the European Union legal system separate from those of the individual States and if the harmonization referred to in Art 114 TFEU continues to be applied in a strictly literal manner. Any deviation by an individual Member State from the harmonization legislation adopted at the European level is considered an exception that requires a rigorous basis and is subject to strict scrutiny. Consequently, advocating for an interpretation that prioritizes the promotion of the individual is challenging, as it would face significant hurdles in legislative procedures and in standardizations that must be authorized by the European legislator and periodically monitored by the relevant market authorities.

This approach, however, in legal systems such as the Italian one, which is characterized by a rigid Constitution centred on the protection of the person, cannot be considered in any way to preclude merit-based judgments made in light of constitutional values.[105] The typification of the parameters of violation of human rights made by the Directive is, therefore, compatible with interpretation solutions which, using constitutional values, lead to

[104] The impact of the protection of fundamental rights on private law has given rise to a broad debate on the so-called constitutionalization of private law. For all this, see S. Grundmann ed, *Constitutional Values and European Contract Law* (The Netherlands: Kluwer Law International, 2008); H. Micklitz ed, *The Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014); Ch. Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (The Netherlands: Kluwer Law International, 2008), 1; V. Trstenjak and P. Weingerl eds, *The Influence of Human Rights and Basic Rights in Private Law* (Switzerland: Springer, 2016), 3.

[105] The European Union rules concerning the market have given rise to a broad debate in Italy with regard to the Constitution and in particular to the applicability of Art 41 of the Constitution. On the subject see N. Irti, *L'ordine giuridico del mercato* (Roma-Bari: Laterza, 1998), 28. On the subject of market limitations determined by the needs of environmental protection, see G. De Ferra, 'La responsabilità sociale dell'impresa' *Rivista delle società*, 649 (2008) and M. Libertini, 'Impresa e finalità sociali. Riflessioni sulla teoria della responsabilità sociale dell'impresa' *Rivista delle società*, 27 (2009). On the importance of a constitutional legality control of market regulation in compliance with a constitutional legality also integrated by European constitutional principles, see P. Perlingieri, 'I principi giuridici tra pregiudizio, diffidenza e conservatorismo' *Annali della Società Italiana degli Studiosi di Diritto Civile*, 13 (2017).

an extension of protection.[106] Harmonization, in this sense, does not prevent the Member State from arriving at a solution which raises the level of protection. This is in line with the current drafting of Art 3 CSDDD, but, more generally, a limitation of the level of protection of the individual would be incompatible with the current Italian constitutional framework. In this context, the exclusion of due diligence in the downstream part of the value chain may not necessarily lead to an exemption of liability of the company with regard to the activities performed downstream by its commercial partners. Liability could, in fact, remain on the basis of principles and rules that arise from the system understood as a whole. In other legislative acts of European and international origin, there is a control of the value chain as a whole. More generally, the principle of sustainable production and consumption constitutes an evaluation parameter that is also applicable in the commercial chain.

It is clear that the rules of responsibility based on the principle of solidarity continue to be applicable also for activities that are carried out in the downstream part of the activity chain. Consequently, while due diligence is limited to the upstream part, it will be difficult to exclude liability for violations of human rights, the environment, and the climate if the activity that gives rise to the damage is downstream in the supply chain.

One of the most interesting aspects of the CSDDD is the provision of measures that seek to mitigate the risk of negative impacts on people and the environment.[107] In general, in fact, the monetization of damage in value chains has often been prioritized over its prevention. The reason is essentially economic: investing in prevention, and channelling funding into risk mitigation, is a fixed and high cost. However, paying to compensate in the event of a negative impact on economic activity is a less certain occurrence whose assumption of risk is still considered more convenient.

The CSDDD therefore, promotes a business culture that requires the ex-ante evaluation of the risks that economic activity entails for human rights and for the environment. In this respect, the CSDDD is in line with the AI Act, a regulatory instrument guiding the

[106] In Italy, the protection of the individual serves as the foundation for an interpretative approach that treats patrimonial rights as instrumental to the pursuit of existential interests. See in this regard P. Perlingieri, '"Depatrimonializzazione" e diritto civile' *Rassegna di diritto civile*, 1 (1983).

[107] Risk management characterizes transition law. On the subject, see F. Laus, n 68 above, 915.

technological transition that imposes a Fundamental Rights Impact Assessment on companies (Art 27).[108]

The protection of the person requires a paradigm shift that is increasingly based on the preventive assessment[109] of the impacts that the legislation will have. However, even in the ecological and technological transition, there is a need to ask whether the standardized evaluation of the impact of the production of goods and services on the person can be considered satisfactory.[110] On the other hand, it could be considered a stage on a journey that should lead to a rethinking of harmonization rules for markets that are highly focused on the person and their rights, aspiring to a sustainable transition that is also 'just'.[111]

[108] On the subject, see A. Kriebitz and Chr. Lütge, 'Artificial Intelligence and Human Rights: A Business Ethical Assessment' 5 *Business and Human Rights Journal*, 84 (2020).

[109] G. De Gregorio, M. Fasciglione, F. Paolucci and O. Pollicino, 'Compliance through Assessing Fundamental Rights: Insights at the Intersections of the European AI Act and the Corporate Sustainability Due Diligence Directive' *Medialaws*, 30 July 2024, available at https://www.medialaws.eu/compliance-through-assessing-fundamental-rights-insights-at-the -intersections-of-the-european-ai-act-and-the-corporate-sustainability-due-diligence-directive/. Preventive protection is a strongly felt need in digital and ecological transitions based on precautionary logics. On the subject, see P. Perlingieri, n 78 above, 324.

[110] Even in international trade governed by standardization, the ethical problem posed by the protection of the individual is becoming increasingly relevant. On this subject, see I. Schwenzer and B. Leisinger, 'Ethical Values and International Sales Contracts', in R. Cranston, J. Ramberg and J. Ziegel eds, *Commercial Law Challenges in the 21st Century* (Uppsala: Iustus, 2007), 249.

[111] On the subject, see L. Sandmann et al, 'The European Green Deal and Its Translation into Action: Multilevel Governance Perspectives on Just Transition' *Energy Research and Social Science*, 3 (2024). The just transition in terms of sustainable development is the subject of recent studies based on sustainability indicators: M. Htitich, P. Krylová and J. Harmáče, 'Just Transition Score: Measuring the Relative Sustainability of Social Progress' *Environmental and Sustainability Indicators*, 1 (2024).