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HACIA UN MODELO EUROPEO DE DILIGENCIA DEBIDA EN MATERIA DE DERECHOS HUMANOS LABORALES

Comunicaciones presentadas al Seminario Internacional
«La Directiva de diligencia debida y los derechos humanos
laborales tras la Propuesta Ómnibus»

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THE CIVIL LIABILITY OF THE COMPANY FOR NON-COMPLIANCE OF ITS DUTY OF CARE AND THE NEW DRAFT DIRECTIVE

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Summary: **1.** Obligations of due diligence in French law and in directive 2024 / 1760 / EU. **2.** The approach of the *Lieferkettensorgfaltspflichtengesetz*. **3.** The new draft directive. **4.** The role of civil liability in the directive system.

1. The regulation of corporate liability in French law and directive 2024/1760/EU

The recognised need to impose obligations on parent companies to supervise the activities of their subsidiaries or suppliers located in other Countries is rooted in the attempt to frame current social issues within traditional institutions. The production process based on transnational relations between enterprises leads us to consider innovative forms of civil liability as desirable¹.

We must ask ourselves who the injured parties are², affected by the activities of Western multinationals. This economic phenomenon concerns a considerable number of geographically and politically distant contexts and therefore has an

¹ See W. SANGUINETI RAYMOND, *Teoria del derecho transnacional del trabajo*, Editorial Aranzadi, Cizur Menor, 2022, 20 ff.; J. A. BAZ TEJEDOR, *Acerca de la certidumbre jurídica del trabajo decente en las cadenas globales de valor*, in W. SANGUINETI RAYMOND, J. B. VIVERO SERRANO, *Diligencia debida y trabajo decente en las cadenas globales de valor*, Editorial Aranzadi, Cizur Menor, 2022, 90 ff..

² See M. A. LUPOI, *Tutela giurisdizionale e foro della parte debole*, in *Riv. trim. dir. proc. civ.*, 2025, 267 ff.

impact on a sphere of recipients that cannot be predetermined. The problem is not only about the conditions of workers in Countries with a recent capitalistic culture, given the need to ensure that minimum levels of social protection should be afforded; above all, the spread of industrial production also threatens shared values, primarily environmental ones. Therefore, unlawful conduct takes on a multi - offensive dimension³ and is capable of harming anyone, simply by worsening the quality of life.

There is a well - known dependence of companies in Countries with more fragile economies on those in dominant ones, a phenomenon that is not countered by the legal systems of the former, which are discouraged by the fear of losing foreign investments⁴. The involvement of operators from different States in the production of final goods requires uniform regulations capable of overcoming the obstacles associated with identifying the applicable law and the court with jurisdiction, especially given the need to sanction violations of workers' fundamental rights and environmental ones, with effective forms of safeguard. In fact, the economic system is so complex that it is difficult to identify the author of the offence, if traditional civil liability is taken into account⁵. In other words, the company's activity is broken down into various autonomous functions, attributable to the authority of a dominant corporate, without it being possible to identify a single responsible for the offence⁶. These constraints on collaboration also expose the commercial image of the multinational enterprise, which often sells the finished goods under its own brand names, to risks.

The response of national legal systems has been based on the concept of "due diligence". This expression, which appeared for the first time in the Guiding

³ See M. A. LUPOI, *Tutela giurisdizionale e foro della parte debole*, loc. cit., 270 ff.. On this point, with reference to the issue of climate litigation, see G. GHINELLI, *Le condizioni dell'azione nel contenzioso climatico: c'è un giudice per il clima?*, in *Riv. trim. dir. proc. civ.*, 2021, 1273 ff.

⁴ See G. GEREFFI, F. MAYER, *Globalization and the demand for governance*, in G. Gereffi, *The new offshoring of jobs and global development*, International labour organisation, 2006, 47 ff.

⁵ See M. MURGO, *Global value chains e diritto del lavoro: problemi e prospettive*, Cedam, Padova, 2021, 45 ff.; J. A. BAZ TEJEDOR, *La responsabilidad civil de las empresas transnacionales por impactos negativos en los derechos humanos laborales*, in W. SANGUINETI RAYMOND, J. B. VIVERO SERRANO, *La dimensión laboral de la diligencia debida en materia de derechos humanos*, Editorial Aranzadi, Cizur Menor, 2023, 86 ff.

⁶ See J. A. BAZ TEJEDOR, *La responsabilidad civil de las empresas transnacionales por impactos negativos en los derechos humanos laborales*, loc. cit., 87 ff., who speaks of a frustration of the traditional discipline of civil liability. In fact, this institution would lose its original reparative function in order to fulfil the objective of achieving distributive justice. See also J. A. GARCÍA AMADO, *El fundamento del derecho de daños. Una propuesta*, in *Revista jurídica de la Universidad de Palermo*, 2019, 18 ff..

Principles on Business and Human Rights⁷, refers to the duty of the parent company, by virtue of its dominant position, to adopt processes that not only pursue profit, but also limit negative impacts on third parties, particularly in terms of labour relations and environmental safeguard⁸. The power wielded by certain corporates imposes on them an obligation to monitor all stages of production, so that the scope of their analysis extends to the activities of subsidiaries, contractors or regular suppliers⁹. There is a link between the initiatives of Western companies and the possible violation of fundamental rights, and any damage may result in liability for the former, provided that the event can be traced back to their activities or omissions¹⁰.

The aim is to prevent harmful events¹¹. Thus, entrepreneurs are liable for damage caused by subsidiaries or permanent collaborators if they do not put in place a structure capable of reducing risks¹². This principle underpins French Law n. 399 of 27 March 2017 “*relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*”, the first European attempt to codify liability for non - compliance with diligent control obligations¹³. In fact, the requirement for companies to draw up a plan is governed by a dual liability regime. The corporate

⁷ See M. MURGO, *Global value chains e diritto del lavoro: problemi e prospettive*, cit., 83 ff.; K. BUHMANN, *Business and human rights: understanding the United Nations guiding principles from the perspective of transnational business governance interactions*, in *Transnational legal theory*, 2015, 399 ff..

⁸ See R. McCORQUODALE, *Corporate social responsibility and international human rights law*, in *Journ. bus. eth.*, 2009, 392 ff..

⁹ For an examination of these mechanisms that encourage the development of a corporate culture, see M. FERRARESI, *Ladempimento datoriale degli obblighi giuslavoristici: strumenti volontari e incentivi tra diritto e responsabilità sociale dell’impresa*, in *Variaz. temi dir. lav.*, 2018, 443 ff.; W. SANGUINETI RAYMOND, *Teoría del derecho transnacional del trabajo*, cit., 44 ff.

¹⁰ See L. LOEVE, *Etude sphère d’influence versus due diligence*, 2010, available at https://www.diplomatie.gouv.fr/IMG/pdf/1_2PESP_1_Etude_sphere_dinfluence_versus_due_diligence_cle874ee9.pdf.

¹¹ For an application of this principle in other contexts, see Trib. Bologna, 9 July 2025, ord., unpublished, pursuant to which the Municipality of Bologna was required to set up a guarantee fund of 3,600,000.00 euros to compensate residents for damage that may occur in the future due to the flooding of the Ravone river, on the basis of foreseeable events, as happened in June 2023. On this point, see M. BETTAZZI, *The Ravone order: what is the feared damage from flooding and its consequences*, available at https://bologna.repubblica.it/cronaca/2025/07/13/news/ordinanza_ravone_alluvione_professore_diritto_civile_al_mureden_universita_bologna-424728245/.

¹² See J. GORELLI HERNÁNDEZ, *Bases para la armonización de la diligencia debida en derechos humanos. Análisis de la directiva sobre diligencia debida*, in *Rev. min. trab. econ. soc.*, 2025, 105 ff.

¹³ See I. DAUGAREILH, *La legge francese sul dovere di vigilanza al vaglio della giurisprudenza*, in *Giorn. dir. lav. rel. ind.*, 2021, 162 ff.; T. SACHS, J. TRICOT, *La loi sur le devoir de vigilance: un modèle pour (re)penser la responsabilité des entreprises*, in *Droit soc.*, 2020, 683 ff.; P. BARRAUD

is not only liable for any damage caused to third parties, even if attributable to the work of subsidiaries or contractors, if it depends on a failure to exercise its supervisory powers correctly; above all, if a company does not adopt the programme or does not comply with the prescriptive indications on its content, it may be forced to remedy the situation, following legal action¹⁴.

Thus, while the determination of the nature and scope of preventive measures remains within the discretion of the enterprise, the “*loi de vigilance*” not only requires the adoption of a plan, but also imposes its adequacy in relation to plausible threats. Therefore, a system must be put in place to reduce the negative impacts of cross - border activities, provided that the dangers are foreseeable on the basis of a prognostic assessment¹⁵. In this sense, there is a liability for negligence; it is up to the entrepreneur to analyse the risks, so that he is held responsible if the event is attributable to a failure to identify a proportionate remedy¹⁶. However, the focus of French case law¹⁷ on the “*caractère raisonnable des mesures de vigilance*”¹⁸ suggests the extent of the effort required, which postulates the search not for the best solutions in absolute terms, as proposed by a scientific point of view, but for those sufficient to reduce the expected dangers, excluding those far removed from the ordinary dynamics of the economic sector.

DE LAGERIE, É. BETHOUX, A. MIAS, É. PENALVA - ICHER, *La mise en œuvre du devoir de vigilance: une managérialisation de la loi?*, *ibid.*, 2020, 699 ff.

¹⁴ Cf. A. LYON - CAEN, *Verso un obbligo legale di vigilanza in capo alle imprese multinazionali*, in *Riv. giur. lav.*, 2018, I, 246 ff.; V. BRINO, *Diritti dei lavoratori e catene globali del valore: un formante giurisprudenziale in via di definizione?*, in *Giorn. dir. lav. rel. ind.*, 2020, 451 ff.

¹⁵ See Tribunal judiciaire de Paris 5 December 2023, No. 21 / 15827, in *Dal. act.*, 2023. For a commentary on this ruling, see L. LOMBARDI, *La prima sentenza di condanna in relazione al c. d. devoir de vigilance delle società francesi*, in *Riv. soc.*, 2024, 229 ff.. This ruling was upheld on appeal, see Cour d'appel de Paris, 17 June 2025, No. 24 / 05193, in *Dal. act.*, 2025.

¹⁶ See L. D'AMBROSIO, *Le devoir de vigilance: une innovation juridique entre continuités et ruptures*, *loc. cit.*, 643 ff..

¹⁷ See Cour d'appel de Paris 18 June 2024, n. 23 / 14348, in *Dal. act.*, 2024; Cour d'appel de Paris 18 June 2024, n. 23 / 10583, *ibid.*, 2024; Cour d'appel de Paris 18 June 2024, n. 21 / 22319, *ibid.*, 2024.

¹⁸ See Tribunal judiciaire de Paris 28 February 2023, no. 22 / 53942 – 53943, in *Dal. act.*, 2023, ruling that refers in its reasoning to the company's defences, according to which “*l'obligation de vigilance est de moyens, et non de résultat, et que l'ensemble des moyens ont été mis en place, les atteintes ou risques d'atteintes au droit humains et à l'environnement n'étant soit pas avérées, soit ayant été prises en considérations et atténuées autant que de possible, par des mesures adaptées*”, that is “the obligation of vigilance is one of means, not of results, and that all means have been put in place, the infringements or risks of infringements of human rights and the environment being either unproven or having been taken into account and mitigated as far as possible by appropriate measures”.

The approach was borrowed from Directive 2024/1760/EU, designed with the aim of smoothing out differences between individual European legal systems and defining clear obligations¹⁹. The safeguarding of workers' rights and the protection of the environment are linked to the early detection of threats, with larger companies being required to exercise their organisational power. As suggested in recital 19, "the main obligations (...) should be (...) of means"²⁰ and their purpose is to create an organisation capable of anticipating and averting threats. According to approaches consistent with French law²¹, under the directive companies should not prevent any harm whatsoever, but reduce the likelihood of its occurrence, considering the ability of the larger corporate to influence its subsidiaries²². Therefore, when damage occurs, it is necessary to determine whether it could have been avoided and whether the measures taken were sufficient²³.

Article 29 of the directive envisages liability for fault, and compensation is due if the intentional or negligent breach of the obligations of Articles 10 and 11 infringes one of the fundamental rights referred to in the Annex and affects subjective positions protected by national law. The focus is on the causal link between the infringements and the damage²⁴. Therefore, it is not sufficient to complain of having suffered damage, but it must be proven that it is attributable to the conduct of the parent company and its failure to introduce sufficient preventive

¹⁹ See F. GUARRIELLO, *Take due diligence seriously: commento alla direttiva 2024 / 1760*, in *Giorn. dir. lav. rel. ind.*, 2024, 249 ff.; S. ADDAMO, *Le novità del testo finale della corporate sustainability due diligence directive: un cambio di passo per la politica di sostenibilità dell'Unione europea*, in *Nuove leggi civ. comm.*, 2024, 1259 ff..

²⁰ The expression "obligations of means" also appears in German law, which defines prevention obligations as *Bemühungspflichten* and not as *Erfolgspflichten*, with the exclusion of forms of *Garantiehaftung*, i. e. strict liability of the company for the occurrence of damage. See F. BORDIGA, A. DE MARIA, *Tutela dei diritti umani nelle catene di approvvigionamento nell'ordinamento tedesco: la Lieferkettensorgfaltspfichtengesetz*, in *Riv. soc.*, 2022, 971 ff..

²¹ See L. D'AMBROSIO, *Le devoir de vigilance: une innovation juridique entre continuités et ruptures*, *loc. cit.*, 645 ff.; T. SACHS, *La loi sur le devoir de vigilance des sociétés mères et sociétés donneuses d'ordre: les ingrédients d'une corégulation*, in *Rev. droit trav.*, 2017, 384 ff.

²² See M. VENTORUZZO, *Note minime sulla responsabilità civile nel progetto di direttiva due diligence*, in *Riv. soc.*, 2021, 381 ff.; G. RACUGNO, D. SCANO, *Il dovere di diligenza delle imprese ai fini della sostenibilità: verso un green deal europeo*, *ibid.*, 2022, 736 ff..

²³ See E. DEL PRATO, *Sostenibilità, precauzione, sussidiarietà*, in *Contr. impr. Eur.*, 2023, 412 ff.; E. ORLANDO, *Sviluppo sostenibile, catene di valore e responsabilità ambientale di impresa: evoluzione del quadro normativo a livello internazionale e prime riflessioni sui nuovi sviluppi in diritto*, in *Ianus*, 2023, 68 ff.

²⁴ See F. GUARRIELLO, *Take due diligence seriously: commento alla Direttiva 2024/1760*, *loc. cit.*, 288 ff.

measures²⁵. The directive does not require the identification of all possible precautionary rules, but rather the conscious effort of a careful operator, so that the materialisation of a risk does not in itself entail liability, but it is necessary to assess whether the damage is facilitated by the culpable ineffectiveness of the measures introduced.

2. The approach of the *Lieferkettensorgfaltspflichtengesetz*

Both in the French model and in the directive, the nature of the activity affects the civil liability of the parent company, which must organise itself in such a way as to limit negative consequences on workers' rights and on the environment. This marks the transition from social to legal liability²⁶, as multinational corporates are required to adopt certain virtuous behaviours that were once left to their discretion. In other words, their power over subsidiaries or regular suppliers recognises their position of guarantee and thus imposes on them a general obligation to monitor the proper conduct of the entire production process²⁷.

This approach simplifies the criteria for identifying the responsible party; therefore, not only the actual author of the offence is relevant, but it is sufficient to establish whether, by virtue of its influence, the parent company would have had the opportunity to avoid the event. However, some national regulations have deviated from this model, and the so - called *Lieferkettensorgfaltspflichtengesetz*²⁸ is

²⁵ See S. ADDAMO, *Le novità del testo finale della corporate sustainability due diligence directive: un cambio di passo per la politica di sostenibilità dell'Unione europea*, loc. cit., 1281 ff.; G. D. MOSCO, R. FELICETTI, *Prime riflessioni sulla proposta di direttiva dell'Unione europea in materia di corporate sustainability due diligence*, in *Anal. giur. econ.*, 2022, 195 ff.; M. LIBERTINI, *Gestione "sostenibile" delle imprese e limiti alla discrezionalità imprenditoriale*, in *Contr. impr.*, 2023, 63 ff.

²⁶ See H. MUIR WATT, *Devoir de vigilance et droit international privé. Le symbole et le procédé de la loi du 27 mars 2017*, in *Rev. int. comp. eth. aff. – Int. rev. comp. bus. eth.*, 2017, 48 ff., according to whom "la ratio legis du dispositif ne s'agit pas de se constituer, grâce à l'autorégulation, une défense de bonne foi, ou d'organiser l'évitement de la responsabilité juridique judiciairement constatée, mais bien de retourner ce qui relevait d'un engagement volontaire en obligation juridiquement opposable", that is "the ratio legis of the mechanism is not to establish, through self - regulation, a defence of good faith, or to organise the avoidance of legally established liability, but rather to transform what was a voluntary commitment into a legally enforceable obligation".

²⁷ See W. SANGUINETI RAYMOND, *La construcción de un nuevo derecho transnacional del trabajo para las cadenas globales de valor*, in W. SANGUINETI RAYMOND, J. B. BAUTISTA SERRANO, *Diligencia debida y trabajo decente en las cadenas globales de valor*, Editorial Aranzadi, Cizur menor, 2022, 31 ff., esp. 81 ff.; J. A. BAZ TEJEDOR, *La responsabilidad civil de las empresas transnacionales por impactos negativos en los derechos humanos laborales*, loc. cit., 91 ff..

²⁸ The so - called *Lieferkettensorgfaltspflichtengesetz* of 16 July 2021 is the law on due diligence obligations in supply chains and is concerned with protecting the rights of foreign workers and the environment from risks associated with cross-border business relationships. See A. C. MITTWOCH, *Die Notwendigkeit eines Lieferkettengesetzes aus der Sicht des Internationalen*

the most significant example²⁹. Without prejudice to the precise identification of control obligations with due diligence according to a logic not far removed from the French idea³⁰, German law has classified their violation as an administrative offence, excluding any obligation to pay for compensation. Thus, pursuant to Article 3, third paragraph, LkSG³¹, the violation of obligations does not give rise to civil liability on the part of the parent company, without prejudice to the possibility of acting on the basis of a different institution³².

Any infringements are punished with administrative fines, while compensation cannot be claimed under the *Lieferkettensorgfaltspflichtengesetz* itself. The contradiction between the recognition of rights and the limitation of judicial protection can be explained by legislative policy reasons. In fact, the French model can impose high costs on the company organisation, and the governance of the parent corporate has been considered in Germany to be an idea with too vague boundaries to establish liability for the actions of other subjects, such as

Privatrechts, in RIW, 2020, 397 ff.; G. RÜHL, C. KNAUER, *Zivilrechtlicher Menschenenschutz? Das deutsche Lieferkettengesetz und die Hoffnung auf den europäischen Gesetzgeber*, in JZ, 2022, 106 ff.; T. KREBS, *Menschenrechtliche und umweltbezogene Sorgfaltspflicht: der Wettlauf zwischen europäischer und deutscher Rechtssetzung*, in ZUR, 2021, 396 ff..

²⁹ See L. NOGLER, *Lieferkettensorgfaltspflichtengesetz: perché è nata e quali sono i suoi principali contenuti*, in *Giorn. dir. lav. rel. ind.*, 2022, 2 ff.; A. GUERCINI, *La legge tedesca sugli obblighi di due diligence nella supply chain (Lieferkettensorgfaltspflichtengesetz – LKSG)*, in *Riv. dir. soc.*, 2022, 391 ff.; F. BORDIGA, A. DE MARIA, *Tutela dei diritti umani nelle catene di approvvigionamento nell'ordinamento tedesco: la Lieferkettensorgfaltspflichtengesetz*, in *Riv. soc.*, 2022, 971 ff.; F. PISTELLI, *Obblighi di cura e responsabilità nella legge tedesca sulle catene di fornitura*, in *Nuove leggi civ. comm.*, 2024, 1042 ff..

³⁰ See Section 3, first paragraph, LkSG, according to which “*Unternehmen sind dazu verpflichtet, in ihren Lieferketten die in diesem Abschnitt festgelegten menschenrechtlichen und umweltbezogenen Sorgfaltspflichten in angemessener Weise zu beachten mit dem Ziel, prevent or minimise human rights or environmental risks or to end violations of human rights or environmental obligations*”, that is “companies are obliged to diligently observe in their supply chains the due diligence obligations described in this title concerning the protection of fundamental human rights and the environment, with the aim of preventing or reducing threats to fundamental human rights or the environment or ending violations of obligations to protect human rights or the environment”.

³¹ See Section 3, third paragraph, LkSG, according to which “*eine Verletzung der Pflichten aus diesem Gesetz begründet keine zivilrechtliche Haftung. Eine unabhängig von diesem Gesetz begründete zivilrechtliche Haftung bleibt unberührt*”, that is “a breach of the obligations imposed by this law does not give rise to any form of civil liability. Civil liability for acts unrelated to breaches of this law remains unaffected”.

³² This preserves the contractual liability between the company and its suppliers. See C. FRANK – FAHLE, *Nominated Sub – Contractor - Klauseln im Lichte des Lieferkettensorgfaltspflichtengesetzes: Die Wahl zwischen Pest und Cholera?*, in *ZfBR*, 2023, 6 ff.; C. GEHLING, N. OTT, C. LÜNEBORG, *Das neue Lieferkettensorgfaltspflichtengesetz – Umsetzung in der Unternehmenspraxis*, in *CCZ*, 2021, 235 ff..

subsidiaries³³. Legal duties impose such varied and complex obligations that a broad interpretation could place excessive burdens on companies, even disproportionate to their financial capabilities, given the need to develop a system able to prevent risks associated with overall activity, concerning structures present in different legal systems and economic contexts.

Above all, the danger feared by some trade associations³⁴ was that a new form of *Gefährdungshaftung*, or strict liability for the exercise of dangerous activities³⁵ would be introduced. Therefore, Article 3, second paragraph, LsKG prevents the *Lieferkettensorgfaltspflichtengesetz* from being classified as a *Schutzgesetz*, *i. e.* a law protecting the interests of third parties, with the associated preclusion for the injured one from invoking Article 823, second paragraph, BGB³⁶, which sets forth compensation for any damage attributable to the violation of a protective rule³⁷.

³³ See G. RÜHL, C. KNAUER, *Zivilrechtlicher Menschenenschutz? Das deutsche Lieferkettengesetz und die Hoffnung auf den europäischen Gesetzgeber*, loc. cit., 108 ss., according to whom “mit der Feststellung, dass die Verletzung der durch das LkSG begründeten Pflichten keine zivilrechtliche Haftung begründet, macht der Gesetzgeber deutlich, dass sich aus dem LkSG selbst keine Schadensersatzansprüche ergeben. Dies folgt freilich bereits aus dem Fehlen entsprechender Haftungstatbestände”, that is “by stating that a breach of the obligations under the Supply Chain Act does not give rise to any civil liability, the legislator makes it clear that no claim for damages can be derived from the Act itself. This can already be inferred from the absence of significant elements constituting liability”.

³⁴ See P. TSCHÄPE, D. TREFZGER, *Die Sorgfaltspflicht des Lieferkettengesetzes – Rechtsnatur, Inhalt und Haftung*, in *ZfBR*, 2023, 429 ff., according to whom “der Gesetzgeber sah sich offenbar aufgrund der Kritik von Interessenverbänden, z. B. die Bauindustrie, die eine Gefährdungshaftung befürchteten, gezwungen, diese Regelung in das LkSG aufzunehmen”, that is “the legislator was apparently forced to include this provision in the LkSG due to criticism from interest groups, such as the construction industry, which feared strict liability”.

³⁵ This concept covers all cases of liability for the exercise of a dangerous activity and includes a limited number of cases, expressly provided for, with a strict liability regime for the holder of the position of guarantee. On this point, see C. W. CANARIS, *Grundstrukturen des deutschen Deliktsrecht*, in *VersR*, 2005, 577 ff. and, by the same Author, Sub art. 823 BGB, in K. LARENZ, *Allgemeiner Teil des bürgerlichen Rechts*, C. H. Beck, Munich, 2004, 76 ff..

³⁶ See Section 823, second paragraph, BGB, according to which “die gleiche Verpflichtung trifft denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetzes verstößt. Ist nach dem Inhalt des Gesetzes ein Verstoß gegen dieses auch ohne Verschulden möglich, so tritt die Ersatzpflicht nur im Falle des Verschuldens ein”, that is “the same obligation (to compensate for damage) applies to anyone who violates a law intended to protect another person. If, based on the content of the law, it is possible to violate it even without fault, the obligation to pay compensation only arises in the event of fault”.

³⁷ See B. SCHNEIDER, *Deliktische “Lieferkettenhaftung” unter Geltung des Lieferkettensorgfaltspflichtengesetzes*, in *ZIP*, 2022, 406 ff.; G. SPINDLER, *Verantwortlichkeit und Haftung in Lieferantennetzen – das Lieferkettensorgfaltspflichtengesetz aus nationaler und europäischer Perspektive*, in *ZHR*, 2022, 94 ff..

Thus, instead of developing an autonomous concept of diligence consistent with the complexity of control, German regulation has prioritised corporate interests over the claims of injured parties and reserved a marginal role for civil liability, limited to cases where it is possible to prove a causal link between the conduct and the damage caused to one of the assets of life listed exhaustively in Article 823 BGB. Regardless of the attempt by some³⁸ to reconstruct the parent company's liability in the light of the theory of *Verkehrssicherungspflichten*³⁹, the choice is contrary to the original idea of the directive. In fact, the emphasis is on the precise description of the object of supervision, marked by defined operations, rather than on the introduction of remedies for compensation. In order not to weaken the position of German entrepreneurs, the *Lieferkettensorgfaltspfichtengesetz* preferred a work of *Konkretisierung*⁴⁰, i. e. delimiting the scope of control, and made any form of compensation unlikely; for these reasons, it has been aptly described as “a paper tiger without teeth”⁴¹.

3. The new draft directive

On 26 February 2025, Commission proposal 2025/81/COM was published, aimed at introducing amendments to recent measures on sustainability reporting and due diligence. The initiative is part of the so - called “*omnibus* simplification package”⁴² and expresses the need to boost the competitiveness of European companies by streamlining their decision - making processes. Thus, while the

³⁸ See V. TSCHÄPE, D. TREFZGER, *Die Sorgfaltspflicht des Lieferkettengesetzes – Rechtsnatur, Inhalt und Haftung*, loc. cit., 430 ff.; M. P. WELLER, L. NASSE, *Menschenrechtsarbitrage als Gefahrenquelle in Lieferketten*, in ZGR - Sonderheft, 2020, 107 ff.; F. PISTELLI, *Obblighi di cura e responsabilità nella legge tedesca sulle catene di fornitura*, loc. cit., 1050 ff.

³⁹ This approach would not be unanimously supported, as *Verkehrssicherungspflichten* (duty of care) are imposed on the entity exercising control over a source of danger and postulate a close connection between the threat and the position of guarantee, which is lacking in the case of damage caused by subsidiaries. On this point, see D. LEUERING, D. RUBNER, *Lieferkettensorgfaltspflichtengesetz*, in NJW – Spezial, 2021, 400 ff.; G. WAGNER, *Haftung für Menschenrechtsverletzungen in der Lieferkette*, in ZIP, 2021, 1100 ff.

⁴⁰ See F. PISTELLI, *Obblighi di cura e responsabilità nella legge tedesca sulle catene di fornitura*, loc. cit., 1052 ff.

⁴¹ The reference is to the essay by E. M. KIENINGER, *Miniatur: Lieferkettengesetz – dem deutschen Papiertiger fehlen die Zähne*, in ZfPW, 2021, 252 ff.

⁴² The *omnibus* legislative package consists of two European Commission proposals for directives, of which 2025/80/COM concerns the postponement of the deadlines for the implementation of the directives in national legal systems by one year, while 2025/81/COM introduces substantial changes to the structure of obligations and the liability regime. For an initial comment on this, see U. TOMBARI, E. VERDELLI, *Il pacchetto Omnibus: una analisi delle principali modifiche alla corporate sustainability reporting directive e alla corporate sustainability due diligence directive*, accessibile sul sito esg.giuffrefrancislefebvre.it.

codification of pervasive supervisory obligations has enhanced values that do not respond to the logic of profit, such as workers' rights and environmental protection, this has come at the expense of business efficiency⁴³. The tension between stakeholderism and shareholderism complicates the coexistence of the interests of shareholders, concerned with the economic return on their investment, and those of third parties involved, promoters of diverse social causes and eager to be considered by the company's management⁴⁴. Moreover, the concept of the contemporary enterprise is torn between these opposing demands, and European law alternately emphasises both visions, depending on the changing conviction as to which are the priority objectives⁴⁵.

Thus, while the so - called sustainability of production processes was initially promoted with greater emphasis, this value may now give way to a desire to boost the growth of undertakings, especially medium - sized ones. The emphasis is on their ability to withstand international competition in a worrying economic and political context. Therefore, the aim is to rationalise and simplify the obligations introduced by recent directives, without compromising their original function, but in a way that is compatible with competitiveness goals. As it was considered on the basis of a strategy not dissimilar from that of the German legislator, more flexible rules would encourage better spontaneous implementation, and ecological transition strategies would enable companies to attract risk capital⁴⁶.

⁴³ See E. PEDERSOLI, *Gli obblighi informativi sulla sostenibilità della catena del valore e responsabilità degli amministratori di società per azioni*, in *Nuove leggi civ. comm.*, 2025, 234 ff., esp. 242 ff.; M. CAMPOBASSO, *Gli amministratori, il successo sostenibile e la pietra di Spinoza*, in *Banca borsa tit. cred.*, 2024, 1 ff.; E. RIMINI, *Sostenibilità e nuova governance delle imprese azionarie nel diritto interno e comunitario tra realtà, criticità e prospettive*, in *Giur. comm.*, 2024, 298 ff.

⁴⁴ See M. CIAN, R. SACCHI, *A proposito del diritto commerciale. In occasione della riedizione del Tractatus de mercatura di Benvenuto Stracca*, in *Riv. dir. civ.*, 2023, I, 1134 ff.; M. STELLA RICHTER Jr., *Corporate sustainability due diligence: noterelle semiserie su problemi serissimi*, in *Riv. soc.*, 2022, 716 ff.; P. MARCHIETTI, *Il bicchiere mezzo pieno*, *ibid.*, 2021, 336 ff.

⁴⁵ See G. STRAMPELLI, *La strategia dell'Unione europea per il capitalismo sostenibile: l'oscillazione del pendolo tra amministratori, soci e stakeholders*, in *Riv. soc.*, 2021, 365 ff.; S. BRUNO, *Il ruolo della s. p. a. per una economia giusta e sostenibile: la proposta di direttiva dell'Unione europea su "corporate sustainability due diligence". Nasce la stakeholder company?*, in *Riv. dir. comp.*, 2022, 303 ff.; G. BEVIVINO, *Nuovi inputs euro - unitari. La sostenibilità come ponderazione normativa degli interessi di shareholders e stakeholders*, in *Anal. giur. econ.*, 2022, 115 ff.

⁴⁶ See F. D'ALESSANDRO, *Il mantello di San Martino, la benevolenza del birraio e la Ford modello T, senza dimenticare Robin Hood (divagazioni semi - serie sulla cosiddetta responsabilità sociale dell'impresa e dintorni)*, in *Riv. dir. civ.*, 2022, 449 ff.; A. M. BENEDETTI, *Oltre il profitto: assetti organizzativi adeguati - sostenibilità - impresa*, in *Riv. trim. dir. proc. civ.*, 2025, 241 ff., esp. 251 ff.

Firstly, with regard to directive 2024/1760/EU, it has been proposed to impose the gradual fulfilment of obligations on a growing number of companies⁴⁷. Thus, initially, only those with more than five thousand employees and an annual net turnover of more than 1.5 billion euros would be bound, and smaller structures would be involved progressively. This solution is based on the analysis of the objective difficulties of companies of different types in complying simultaneously with such significant regulatory constraints and would therefore grant smaller enterprises more time to react.

The proposal also aims at redefining the scope of the control, with an idea of avoiding negative consequences on medium - sized companies. Thus, with an amendment to Article 8, second paragraph, letter b), the selection of relevant risks would be limited to those inherent in relationships with direct suppliers⁴⁸ and the assessment of the negative impacts of relationships with indirect suppliers would be reserved for exceptional situations, in the presence of reliable information on previous violations or their imminent commission⁴⁹. Similarly, the frequency of monitoring the adequacy⁵⁰ and effectiveness of the measures introduced in the plan would be reduced and, above all, with a view to coordination with the financial reporting regulation, suppliers with fewer than five hundred employees would not be required to provide information beyond that demanded by the so - called voluntary sustainability reporting principle, unless the information itself cannot be

⁴⁷ See the explanatory memorandum attached to the directive: “entry into application is envisaged in three waves: as from July 2027, the rules would start applying only to the largest EU companies, *i. e.* those that have more than 5000 employees and report a net annual (worldwide) turnover of more than 1.5 billion euro, as well as to non - EU companies that generate more than 1.5 billion euros net turnover in the EU. In the second wave, EU companies with more than 3000 employees and more than 900 million euros net turnover, as well as non - EU companies generating such net turnover in the EU would need to comply with the new framework as from July 2028. Last, in July 2029, all other companies falling under the general scope would have to start applying the (national rules transposing the) Directive”.

⁴⁸ See Article 4, fourth paragraph, letter a), of the proposed directive.

⁴⁹ See Article 4, fourth paragraph, letter b), of the proposed directive, according to which “the following paragraph 2a is inserted: where a company has plausible information that suggests that adverse impacts at the level of the operations of an indirect business partner have arisen or may arise, it shall carry out an in - depth assessment. The company shall always carry out such an assessment where the indirect, rather than direct, nature of the relationship with the business partner is the result of an artificial arrangement that does not reflect economic reality but points to a circumvention of paragraph 2, lett. b). Where the assessment confirms the likelihood or existence of the adverse impact, it is deemed to have been identified”.

⁵⁰ See Article 4, eighth paragraph, of the proposed directive.

obtained otherwise⁵¹. Again, with the aim of favouring medium - sized companies, it has been proposed to consider the termination of the relationship with the parent one as a last resort for eliminating serious negative impacts of the activities of subsidiaries⁵². Finally, there is a desire to reduce the role of stakeholders in defining measures⁵³, in contrast to the French model, which is based on a “*dialogue entre les parties prenantes de la société et l'entreprise*”⁵⁴.

The most significant change concerns liability⁵⁵, governed by Article 29 of directive 2024 / 1760 / EU, with the repeal of the first paragraph and, consequently, the elimination of the rules on civil liability. Thus, the aim is to replace uniform notions of fault and diligence with a general duty on States to ensure effective judicial protection for those who suffer damage. As stated in recital 28 of the draft, “where a company is held liable for failing to fulfil its duty of care (...) and where that failure has caused damage”, Member States should ensure that victims “receive full compensation (...) in accordance with the principles of effectiveness and equivalence”.

In other words, the change would be a return to a differentiated system of liability, so that there would not be a single model, but each member State would be given the possibility of configuring its own remedies. Therefore, the case

⁵¹ See Article 4, fourth paragraph, letter d), of the proposed directive, which states that “the following paragraph 5 is added: member States shall ensure that, for the mapping provided for in paragraph 2, lett. a), companies do not seek to obtain information from direct business partners with fewer than 500 employees that exceeds the information specified in the standards for voluntary use referred to in Article 29a of Directive 2013/34/EU”.

⁵² See Article 4, fifth paragraph, of the proposed directive.

⁵³ See recital 24 of the proposed directive, which states that “to reduce burdens on companies and make stakeholder engagement more proportionate, companies should only have to engage with workers, their representatives including trade unions, and individuals and communities whose rights or interests are or could be directly affected by the products, services and operations of the company, its subsidiaries and its business partners, and that have a link to the specific stage of the due diligence process being carried out (...). Moreover, stakeholder engagement should only be required for certain parts of the due diligence process, namely at the identification stage, for the development of (enhanced) action plans and when designing remediation measures”.

⁵⁴ See T. SACHS, *La loi sur le devoir de vigilance des sociétés mères et sociétés donneuses d'ordre: les ingrédients d'une corégulation*, loc. cit., 384 ff.; K. MARTIN - CHENUT, R. DE QUENAUDON, *La responsabilité sociale des entreprises saisie par le droit*, Paris, 2016, 26 ff.

⁵⁵ See Article 4, twelfth paragraph, lett. b), of the proposed directive, according to which “paragraph 2 (of art. 29) is replaced by the following: where a company is held liable pursuant to national law for damage caused to a natural or legal person by a failure to comply with the due diligence requirements under this Directive, Member States shall ensure that those persons have a right to full compensation. Full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages”.

outlined in Article 29 of the directive would not disappear altogether, but would be transformed by each individual State. Thus, the original goal, namely, to coordinate and generalise the French model, would be abandoned, and an opposite approach would be promoted, with the coexistence of different regulations.

4. The function of civil liability

In the Greek tragedy inspired by the myth of Ajax, Sophocles wrote: “it is a painful thing to look at your own trouble and know that you yourself and no one else has made it”⁵⁶. This is the situation of the directive after the proposed amendment, which is about to betray the basis of the harmonised rules on diligent control less than a year after the original text came into force. In such a complex economic situation, the search for a causal link between the conduct of the parent company and the damage is lost in the complexity of the intermediate actions, which are the result of the intervention of several operators. Consequently, fundamental rights can be better safeguarded by encouraging self - responsible behaviour, informed by control over production activities⁵⁷.

This assumption, shared by recent European regulatory interventions, is not openly contested in the new draft. There is no debate about the appropriateness of prescribing supervision of the entire process, but rather about the content of the obligations and the nature of the remedies. The focus shifts from the imposition of duties to the way they are imposed and, therefore, to the diligence required to comply with them. In fact, the degree of supervision called for has an impact on the organisational and financial effort required, because should be imposed the duty to avoid any possible danger, the likelihood of linking any harmful event to a failure to exercise control increases⁵⁸. In a recent English ruling, despite the fact that the pollution resulting from the mismanagement of an oil pipeline located in Nigeria and owned by a United Kingdom company was attributable to the actions of the subsidiary, the parent company’s liability was not excluded, as it had failed in its duty to protect, because of the implementation of the guarantee position, which consisted of a “shielding and caring obligation (...), imposing (...) to protect the pipelines and ancillary installations from general wear and tear, including corrosion”, and an “obligation to guard or protect the pipelines from the malicious acts of third parties”.

⁵⁶ See SOPHOCLES, *L'Aiaïce*, Biblioteca universitaria Rizzoli, Milan, 2017, 34 ff.

⁵⁷ See N. SCHOCH, J. MÖLLER, Quo vadis CSDDD? *Inwieweit vereinfacht das Omnibus – Paket der Europäischen Kommission die Sorgfaltspflichten in der Lieferkette*, in RIW, 2025, 397 ss..

⁵⁸ See High Court of Justice, King’s Bench Division, 20 June 2025, [2025] EWHC 1539 (KB).

This ruling was handed down following a preliminary judgement, *i. e.* proceedings that did not decide on the merits of the case, but assessed whether the necessary conditions for continuing the trial were met. Consequently, no final decision was taken on the extension of the duty of care, but this reflection helps to clarify how an extension of supervision affects the organisation of a company. In particular, the decision examined the content of the duty of protection under Nigerian law, applicable on the basis of the relevant connecting factors under private international law. Thus, with regard to vicarious liability, *i. e.* the one for the actions of a subsidiary, the decision did not rule out the possibility of including malicious and unforeseeable acts concerning “illegal refining by criminal gangs of crude oil (...) taken from pipelines which have been broken”⁵⁹. Such a very broad principle could give rise to concerns.

The proposed directive responds to these ones, and fears of an overly strict system explain why there is a desire to abandon the harmonised civil liability regime. However, this solution is not convincing, as it does not eliminate the underlying problem, but rather accentuates it. In fact, the enhancement of the deliberative space of national legal systems is counterbalanced by the loss of certainty, due to shared rules implemented according to predictable criteria, as would be the case with uniform regulations. In fact, the French model anchors the liability of the parent company to its national system, interpreted and applied mostly by judges from the same Country. Therefore, although enterprises may appear to be in difficulty due to the continuing risk of being held liable for the unlawful acts of their subsidiaries, contractors or suppliers, they have good prospects in the long term, as they can bring disputes before judges in their own States. Thus, the decision will be based on known standards and defined rules, with possible consistent guidelines.

On the other hand, equal certainty does not apply to systems such as the German one, which focus on specifying in detail the measures to be taken, without addressing effective judicial remedies. Not only is there no stable connection with the jurisdiction of the courts of the Country, but the assessment of the effectiveness of the plan is left solely to the administrative authority. As feared by some⁶⁰, the lack of liability regulations leads to the violation of the precautionary rules established by the *Lieferkettensorgfaltspflichtengesetz*, being assessed on the basis of different parameters, so that, in the event of damage attributable to the subsidiary or supplier, the assessment of the adequacy of the procedures may have unpredictable outcomes. Above all, actions to protect workers’ rights and the environment will

⁵⁹ V. High Court of Justice, King’s Bench Division, 20 June 2025, *cit.*

⁶⁰ See G. RÜHL, C. KNAUER, *Zivilrechtlicher Menschenrecht? Das deutsche Lieferkettengesetz und die Hoffnung auf den europäischen Gesetzgeber*, *loc. cit.*, 109 ff.

not be decided mainly by German courts, even if the disputes are brought against the parent company, and disparate national regulations, designed for other contexts and unsuitable for governing a phenomenon of this magnitude, would have to be applied.

The ultimate goal of a law on diligent control is not to create obstacles to the development of the entrepreneurial system in Western Countries, but, in accordance with priority values and fundamental rights, to ensure a uniform regulatory framework and the centralisation of dispute resolution in the State of the parent company, with the consequent advantage of predictable decisions and, as a result, the smooth running of the production process. As Ajax might have commented, a directive without immediate and uniform regulation of the liability regime loses its meaning and leaves the States with a deliberative power that would be better to limit. Not all Countries seem convinced that they want to follow the French example; this law is not designed to prejudice the principles of European capitalism, but rather to facilitate its progressive self - reform, aided by the prior definition of substantive rules and the most likely venue for legal debate.