

CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE: A HUMAN RIGHTS-BASED ASSESSMENT (*)

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Abstract

Through establishing the obligation for the EU Member States to introduce within their domestic legal systems binding duties of due diligence across global value chains of large European and non-European corporations with respect to sustainability — i.e. human rights and environmental protection — the Corporate Sustainability Due Diligence Directive (CSDDD) represents a fundamental milestone at the global level. The Directive marks the most recent step in the

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long legal evolution of the concept of ‘human rights due diligence’, first introduced in the 2011 United Nations Guiding Principles on Business and Human Rights. Despite some criticism, the Directive is an innovative tool, suitable — if correctly applied — in leading to the effective respect of human rights by corporations along global value chains. This article aims to analyze the Directive, pursuing the main objectives of clarifying some of its most debated and complex legal aspects — especially from the private international law perspective —, highlighting its main potentialities, and examining its most controversial loopholes and shortcomings, in order to assess if and to what extent it will prove to be capable of granting an effective protection of human rights within corporate activities.

1. *Introduction.* — After a lengthy negotiation, the EU Directive on Corporate Sustainability Due Diligence (hereinafter ‘Directive’ or ‘CSDDD’) was adopted on 13 June 2024¹. The final text, deeply different from the Commission’s Proposal published in 2022² and, even more,

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¹ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 (hereinafter ‘Directive’). N. BUENO, N. BERNAZ, G. HOLLY, O. MARTIN-ORTEGA, *The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise*, in *Business and Human Rights Journal*, 2024, p. 1; E. KOJO NARTEY, *Addressing Corporate Human Rights Violations and Environmental Harm: Advancing a Holistic Remedial Framework through Tort Law and the EU Corporate Sustainability Due Diligence Directive (CSDDD)*, in *Athens Journal of Law*, 2024, p. 345; C. MAK, *Corporate Sustainability Due Diligence: More Than Ticking The Boxes?*, in *Maastricht Journal of European and Comparative Law*, 2022, p. 301; V. McCULLAGH, *The EU Corporate Sustainability Due Diligence Directive: Real Change or More of the Same?*, in *European Business Law Review*, 2024, p. 603; A. SCHALL, *The CSDDD: Good Law or Bad Law?*, in *European Company Law*, 2024, p. 56; M. THORENS, N. BERNAZ, O. HOSPES, *Advocating for the EU Corporate Sustainability Due Diligence Directive Against the Odds: Strategies and Legitimation*, in *Journal of Common Market Studies*, 2024-06.

² European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022. A. BONFANTI, *Catene globali del valore, diritti umani e ambiente, nella prospettiva del diritto internazionale privato: verso una direttiva europea sull’obbligo di diligenza delle imprese in materia di sostenibilità*, in *JUS*, 2022, p. 296; M. BORZAGA, F. MUSSI, *Luci e ombre della recente proposta di direttiva relativa al dovere di due diligence delle imprese in materia di sostenibilità*, in *Lavoro e diritto*, 2023, p. 495; N. BOSCHIERO, *L’extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, in *Diritti umani e diritto internazionale*, 2023, p. 661; S. BRABANT, C. BRIGHT, N. NEITZEL, D. SCHÖNFELDER, *Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence*, (Part 1), (Part 11), in *VerfBlog*, 15 March 2022, <https://verfassungsblog.de/due-diligence-around-the-world/>; V. BRINO, *Corporate sustainability due diligence: quali implicazioni per i diritti dei lavoratori?*, in *Diritti umani e diritto internazionale*, 2023, p. 707; M. FASCIGLIONE, *Verso un regime europeo uniforme di responsabilità civile delle imprese per violazioni dei diritti umani: riflessioni sulla proposta di Direttiva europea*

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from the Resolution with which the European Parliament in 2021³ recommended its adoption, represents the final compromise between the positions expressed by the European Council and the European Parliament throughout the different stages of the 3-year negotiation process⁴.

The Directive marks the most recent step in the long legal evolution of the concept of ‘human rights due diligence’ (hereinafter referred to as ‘HRDD’), first introduced in the 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs)⁵. According to UNGP Prin-

sulla corporate sustainability due diligence, in *Quaderni di SIDIBlog*, 2023; S. GIBBONS, *Some Initial Thoughts on the Proposed EU Due Diligence Directive*, in *Cambridge Core Blog*, 25 February 2022, <https://www.cambridge.org/core/blog/2022/02/25/some-initial-thoughts-on-the-proposed-eu-due-diligence-directive/>; R. GRECO, *Corporate Human Rights Due Diligence and Civil Liability: Steps Forward Towards Effective Protection*, in *Diritti umani e diritto internazionale*, 2022, p. 5; C. METHVEN O'BRIEN, O. MARTIN-ORTEGA, *Commission Proposal on Corporate Sustainability Due Diligence: Analysis from A Human Rights Perspective*, Directorate-General for External Policies, Policy Department, European Parliament, May 2022; C. METHVEN O'BRIEN, J. CHRISTOFFERSEN, *The Proposed European Union Corporate Sustainability Due Diligence Directive: Making or Breaking European Human Rights Law*, in *Anales de derecho*, 2023, p. 177; A. M. PACCES, *Supply Chain Liability in the Corporate Sustainability Due Diligence Directive Proposal*, in *Oxford Business Law Blog*, 20 April 2022, <https://blogs.law.ox.ac.uk/businesslaw-blog/2022/04/supply-chain-liability-corporate-sustainability-due-diligence/>; S. VELLUTI, *Labour Standards in Global Garment Supply Chains and the Proposed EU Corporate Sustainability Due Diligence Directive*, in *European Labour Law Journal*, 2024-03; C. PATZ, *The EU's Draft Corporate Sustainability Due Diligence Directive: A First Assessment*, in *Business and Human Rights Journal*, 2022, p. 291.

³ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL), 2021/C 474/02, 24 November 2021.

⁴ The Proposal of the European Commission for a European Directive on Corporate Sustainability Due Diligence was modified on the basis of the amendments presented by the European Parliament and the requests submitted by the Council; then, after the negotiations conducted by the institutions in the form of a trilogue, it was transposed into a political agreement in December 2023; the agreed text was later modified in the voting process within COREPER and then approved by the European Parliament on 24 April 2024. The Council expressed its final positive vote on 13 June 2024. See: Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach, 15024/1/22 REV 1, 30 November 2022; Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence; Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - Letter to the Chair of the JURI Committee of the European Parliament, 6145/24, DRS 13 SUSTDEV 19 COMPET 117 CODEC 27, 15 March 2024.

⁵ OHCHR, UN Guiding Principles on Business and Human Rights, 2011 (hereinafter ‘UNGPs’). M. K. ADDO, *Reality of the United Nations Guiding Principles on Business and Human Rights*, in *Human Rights Law Review*, 2014, p. 133; N. BERNAZ, *Business and Human Rights. History, Law and Policy - Bridging the Accountability Gap*, London-New York, 2017; B.

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principle no. 17, HRDD is conceived as the process through which companies identify, prevent, mitigate and account for their adverse human rights impacts. It is meant to include « assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed »⁶. It should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by means of its business relationships. Pursuant to the UNGPs, HRDD shall be ongoing and vary in complexity depending on the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of corporate activities⁷.

Through establishing the obligation for the EU Member States to introduce within their domestic legal systems binding duties of due diligence across global value chains of large European and non-European corporations with respect to sustainability — i.e. human rights and environmental protection — the Directive represents a fundamental milestone at the global level. Despite some criticism being raised mainly with regard to its limited subjective scope of application, the complexity of its application to third-country companies, and some further aspects which shall be the subject of analysis in the next paragraphs, the author considers the Directive as an innovative tool, suitable — if correctly applied — in leading to the effective respect of human rights by corporations along global value chains. Having acknowledged such, this article aims to analyze the Directive, pursuing the main objectives of clarifying

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CHOUHURY (ed.), *The UN Guiding Principles on Business and Human Rights: A Commentary*, Northampton, 2023; M. FASCIGLIONE, *Impresa e diritti umani nel diritto internazionale. Teoria e prassi*, Torino, 2024; R. MARES (ed.), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, Leiden, 2012.

⁶ UNGP no. 17.

⁷ On the nature, status and content of HRDD: J. BONNITCHA, R. MCCORQUODALE, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, in *European Journal of International Law*, 2017, p. 899; L. CHIUSI CURZI, *General Principles for Business and Human Rights in International Law*, Leiden, 2021, p. 225; M. FASCIGLIONE, *Impresa e diritti umani nel diritto internazionale. Teoria e prassi*, cit.; C. MACCHI, *Business, Human Rights and the Environment: The Evolving Agenda*, The Hague, 2022, p. 91; R. MCCORQUODALE, *Business and Human Rights*, Oxford, 2024, p. 120; R. MARES, *Legalizing Human Rights Due Diligence and the Reparation of Entities Principle*, in S. DEVA, D. BILCHITZ (eds.), *Building a Treaty on Business and Human Rights: Context and Contours*, Cambridge, 2017, p. 266; J. G. RUGGIE, J. F. SHERMAN III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, in *European Journal of International Law*, 2017, p. 921.

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some of its most debated and complex legal aspects (paras. 2, 3 and 4), highlighting its main potentialities (paras. 5, 5.1, 5.2, 5.3) and examining its most controversial loopholes and shortcomings (paras. 6, 6.1, 6.2, 6.3), in order to assess if and to what extent it will prove to be capable of granting an effective protection of human rights within corporate activities (para. 7).

2. *The newly introduced duties and their expected impact on human rights protection.* — According to the Directive, corporate sustainability due diligence aims at identifying and preventing the potential or actual negative impacts of business activities on human rights and the environment, remedying the abuses, monitoring the impact of the undertaken measures, and communicating them publicly⁸. This essay focuses on the impacts on human rights and on the corresponding due diligence duties imposed on corporations, as well as on their public and private enforcement.

The implementation of the articulated sequence of prescribed measures — to be adopted with the meaningful engagement of the relevant stakeholders across all different phases⁹ — implies the attribution of obligations of means on companies, i.e. their obligation to take all appropriate steps in order to make the HRDD duties effective. Indeed it is acknowledged that corporations are not required to guarantee, in all circumstances, that adverse impacts will never occur nor that they will be always stopped; however, businesses must implement their best efforts to reach these objectives. As a clarifying example, the Directive mentions the hypothesis that the adverse impacts relate to the business partners' activities: « in these cases, the company might not be in a position to arrive at such results » of preventing or mitigating them¹⁰. However, according to the Directive, companies should take « appropriate measures which are capable of achieving the objectives of due diligence by effectively addressing [these] adverse impacts, in a manner commensurate to the degree of [their] severity and likelihood »¹¹. Said obligations do not set a fit-for-all standard: in order to comply with them, companies shall take account « of the circumstances of the specific case, the nature

⁸ Directive, art. 5.

⁹ *Ibid.*, art. 13.

¹⁰ *Ibid.*, recital 19.

¹¹ *Ibid.*

and extent of the adverse impact and relevant risk factors, [...] the specificities of the company's business operations and its chain of activities, sector or geographical area in which its business partners operate, the company's power to influence its direct and indirect business partners, and whether the company could increase its power of influence »¹².

One of the most significant features of the due diligence duties, as prescribed by the Directive, concerns their coverage: as so, companies are required to implement the duties « 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 »¹³. The wording of art. 1 and of the other provisions referring to the extension of the HRDD duties to the activities performed by the business partners has represented one of the most highly debated issues during negotiation. Indeed, despite a generic convergence of the European institutions regarding the idea — essential to the concept of HRDD as conceived by the UNGPs — that the newly introduced duties should have included the activities of the contractual partners, their positions significantly diverged when dealing with the coverage of the indirect partners and of both the upstream and downstream value chains.

After removing the Commission's limitation to the only 'established' business relationships — i.e. to the only long-term and not ancillary commercial relationships¹⁴ — the latest version of the Directive provides that the company must exercise its due diligence duties in a way to cover the activities of all partners within its chain of activities, without any limitation. If, on the one hand, the attained solution comes to include the activities of all direct business partners (i.e. those « with which the company has a commercial agreement related to the operations, products or services of the company or to which the company provides services »)¹⁵ and of all indirect business partners (i.e. « not [...] direct business partner[s] but which perform[...] business operations related to the operations, products or services of the company »¹⁶), on the other hand, the reference to the notion of 'chain of activities' has the effect to

¹² *Ibid.*

¹³ *Ibid.*, art. 1.

¹⁴ European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, arts. 1(1)(a) and 3(f).

¹⁵ Directive, art. 3(1)(f)

¹⁶ *Ibid.*

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limit the duties' coverage to some specific portions of the global value chain. Indeed, as literally explained by art. 3(g), the chain of activities covers the upstream partners engaged in the production of goods or the provision of services, including the design, extraction, sourcing, manufacturing, transport, storage and supply of raw materials, products or parts of products and the development of the product or the service, and the downstream partners operating the distribution, transport and storage of the products, therefore with the exception of their disposal¹⁷.

Given that, in line of principle, the activities of both direct and indirect business partners are covered, in order to avoid imposing excessive burdens on companies the Directive allows them to prioritize the most severe and foreseeable identified adverse impacts.¹⁸ Therefore, when companies are unable to contain all impacts, they are allowed to give priority to the most serious and most probable negative ones¹⁹. This selection relies on a diligent mapping of the impacts, taking into account the relevant risk factors and based on the preliminary identification of general areas where negative impacts are more likely to occur and to be more serious²⁰. Once the most severe and most likely adverse impacts are addressed within reasonable time, the company shall address less severe and less likely adverse impacts²¹.

Furthermore, the Directive allows the companies to focus their attention mainly — but not exclusively — on a list of human rights the violation of which more often occurs in practice. Among the rights specifically listed, Part I, Section I, of the Annex to the Directive includes the right to life, to private and family life, to freedom and security and to a clean environment, freedom of thought, conscience and religion, association and assembly, the right to collective bargaining, the prohibition of torture and cruel and inhumane treatment, the right to enjoy just and favorable working conditions, the main rights of children, and the prohibitions of child labor, forced labor, slavery and slave-trade²². However, art. 2(1)(c) adds that an abuse of a human right not specifically mentioned but nonetheless included in one of the fundamental human rights

¹⁷ *Ibid.*, art. 3 (g). - recital 25.

¹⁸ *Ibid.*, art. 9.

¹⁹ *Ibid.*

²⁰ *Ibid.*, art. 8.

²¹ *Ibid.*, art. 9(3).

²² *Ibid.*, Annex.

instruments listed in Part I, Section 2, of the Annex shall be considered as relevant for a company if it « could have reasonably foreseen the risk that such human right may be affected, taking into account the circumstances of the specific case, including the nature and extent of the company's business operations and its chain of activities, the characteristics of the economic sector and the geographical and operational context »²³. Despite not being this approach completely aligned with the UNGPs — according to which human rights likely to be potentially violated by corporations cannot be identified in a closed list²⁴ — the author recognizes that it may be suitable in order to grant corporations a higher level of certainty. It is also worth highlighting that according to the Annex, the standard of protection of human rights to be fulfilled is the international one, regardless of the potentially different — and often diminished — levels of implementation granted within the domestic jurisdictions of some of the countries where the chain of activities operate. This could potentially mean that, under the Directive, companies are obliged to require their subsidiaries and business partners operating in the territory of States that have not ratified the conventions specifically listed or where the level of protection is not in line with the international human rights standards, to nevertheless comply with them.

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3. *A truly limited subjective scope of application?*. — According to the Directive, all industry sectors are attributed with the same obligations. The provision, proposed by the European Commission with the intention of establishing stricter duties on the high-impact sectors — such as agri-food, textile and extractive— was removed from the final text²⁵. The Directive presents only two — but very significant — exceptions. Firstly, its regime does not encompass the chain of activities performing the distribution, transport, storage and disposal of products subject to export control pursuant to EU Regulation (EU) 2021/821 and weapons, munition or war material under national export controls²⁶. This exception is not aligned with the UNGPs and the recommendations of the UN

²³ *Ibid.*, art. 2(1)(c).

²⁴ According to the UNGPs (Commentary to principle 1): « business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights ».

²⁵ European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, art. 1(1)(b).

²⁶ Directive, art. 3(g)(2).

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Working Group on Business and Human Rights, according to which these sectors should not only be covered with HRDD duties, but even required to perform heightened due diligence, given the risks on human rights intrinsically associated with their activities and products²⁷. Secondly, the Directive limits its application only to the upstream chains of activities of the financial undertakings, thus excluding from the coverage of the newly introduced duties the downstream business partners that receive their services and products²⁸. The provision for HRDD duties on financial institutions over their downstream partners would have represented a definitively powerful tool as to incentivize private corporations to comply with human rights standards²⁹. However, their introduction was highly debated in the European institutions, and then rejected by the European Council, due to the opposition of some EU Member States.

With all this being said, it is worth mentioning that only the large companies fall within the subjective scope of application of the Directive. After long debate, the final text provides for the attribution of the duties to the companies — or the ultimate parent companies of groups — formed in accordance with the legislation of an EU Member State and having more than 1000 employees on average as well as a net worldwide turnover of more than EUR 450,000,000 in the last financial year, and to companies or ultimate parent companies of groups with a net worldwide turnover of more than EUR 80,000,000, which have entered into fran-

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²⁷ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Business, human rights and conflict-affected regions: toward heightened action, A/75/212, 17 July 2020. J. APARAC, *Business and Armed Non-State Groups: Challenging the Landscape of Corporate (Un)accountability in Armed Conflicts*, in *Business and Human Rights Journal*, 2020, p. 270; O. UVAROVA, *Responsible Business Conduct for Post-War Reconstruction of Ukraine: Call from Civil Society*, Wageningen Law Series 2023/2, December 18, 2023, <https://ssrn.com/abstract=4668183>; D. NAGAIVSKA, O. UVAROVA, *Companies Operating in Conflict-Affected Environments Without Impacting the Conflict: Between Regular and Heightened Human Rights Due Diligence*, in *Business and Human Rights Journal*, 2024; I. PIETROPAOLI, *Obligations of Third States and Corporations to Prevent and Punish Genocide in Gaza*, expert legal opinion commissioned by Al-Haq Europe and SOMO, 5 June 2024, available at: <https://www.somo.nl/wp-content/uploads/2024/06/Obligations-of-Third-States-and-Corporations-to-Prevent-and-Punish-Genocide-in-Gaza-3.pdf>.

²⁸ Directive, recitals 51 and 26.

²⁹ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Investors, environmental, social and governance approaches and human rights, A/HRC/56/55, 2 May 2024. Taking stock of investor implementation of the UN Guiding Principles on Business and Human Rights. Addendum report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/47/39/Add.2.

chising or licensing agreements in the Union in return for royalties amounting to more than EUR 22,500,000 in the last financial year³⁰. Moreover, the Directive does not cover only European companies, but also the companies which are formed in accordance with the legislation of a third country and comply with the same financial thresholds in the Union in the financial year preceding the last financial year³¹. The Directive applies only to EU and third-country companies which meet the relevant thresholds for two consecutive financial years.

The inclusion of the third-country companies in the scope of application of the Directive represents a fundamental factor of innovation and a key in order to make the European instrument global and suitable for shaping the corporate behaviour of all large companies around the world wishing to do business in the European market. The imposition of HRDD duties on the third-country companies allows us to conclude that the Directive creates a global level playing field suitable to regulate the conduct of the largest European and non-European companies.

Furthermore, as an indirect effect the Directive will also impact the conduct of all entities — including small and medium enterprises (SMEs) — embodied within the value chains of the companies falling within its scope of application. The impact on SMEs is very problematic and was highly debated during negotiations. Upon acknowledgement that companies need SMEs included in their chains of activities to cooperate in order to fulfill their duties, the Directive provides for specific measures to prevent the potential negative impacts on them. Among the specified measures, companies shall provide targeted and proportionate support, where necessary in light of the SME's resources, knowledge and constraints, « including by providing or enabling access to capacity-building, training or upgrading management systems, and, where compliance with the code of conduct or the prevention action plan would jeopardize the viability of the SME, by providing targeted and proportionate financial support, such as direct financing, low-interest loans, guarantees of continued sourcing, or assistance in securing financing »³². Moreover, where measures to verify compliance are carried out in relation to SMEs, the company shall bear the cost of the independent third-party verification,

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³⁰ Directive, art. 2(1).

³¹ *Ibid.*, art. 2(2).

³² *Ibid.*, art. 10(2)(f).

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unless the SME requests to pay a part of it and is thus free to share the results with other companies³³.

In the light of the above considerations and given, in particular, the subjection of the third-country companies to the newly introduced duties, the Directive's extra-territorial reach and its indirect impact on the SMEs involved within the chain of activities, the author believes that the criticism raised against the Directive, based on its limited subjective scope of application, should be refuted and the implementation of the Directive expected to have a major impact at global level.

4. *The enforcement of the HRDD duties: administrative sanctions and civil liability.* — Among the main innovative aspects of the Directive, the introduction of mechanisms explicitly established to ensure its enforcement is certainly worth mentioning. More specifically, the Directive provides for a public enforcement system, entrusted to the competent national supervisory authorities, and a private enforcement, based on the civil liability of corporations that have allegedly violated human rights throughout their chain of activities.

Pursuant to art. 25 the supervisory authorities are empowered to request information from companies and carry out investigations — of their own initiative or as a result of substantiated concerns brought to their attention — with regard to their compliance with the provisions of domestic law transposing the Directive. If the supervisory authority finds that these provisions have not been complied with, it must allow the company a reasonable period of time to remedy the situation. The authority's powers include requiring the company to cease the infringement and to refrain from any repetition, to provide for corrective measures proportionate to it and suitable to bring it to an end, to adopt interim measures and to impose penalties, including fines based on the company's worldwide net turnover, with a ceiling of not less than 5%, as well as adopting statements indicating the company's responsibility for the infringement and the nature of it. Companies shall have the right to an effective judicial remedy against a legally binding decision adopted by a supervisory authority³⁴.

Art. 24 establishes that the competent supervisory authority shall be

³³ *Ibid.*, art. 10(5).

³⁴ *Ibid.*, art. 25.

that in the Member State where the company has its registered office; as regards third-country companies, it shall be that of the Member State where the company has a branch, or, if the company does not have a branch in any Member State or has branches located in different Member States, that of the Member State in which the company generated most of its net turnover in the Union in the relevant financial year³⁵.

The same competent Authority is also charged with the task of receiving and assessing the substantiated concerns submitted to it by natural and legal persons having reasons to believe, on the basis of objective circumstances, that a European or third-country company is failing to comply with the provisions of national law adopted pursuant to the Directive³⁶. This task, despite being only summarily regulated by the Directive, reminds the author of the specific power conferred on the OECD National Contact Points, which are in charge of assessing the specific instances on the correct implementation by corporations of the OECD Guidelines for Multinational Enterprises³⁷, brought to their attention by NGOs and other interested parties³⁸. The Directive leaves to the Member States' discretion the detailed arrangements for the functioning of the supervisory authorities.

With regards to the private enforcement of the duties established by the Directive, since the beginning of the negotiation process, the European institutions agreed on the introduction in Member States' domestic legal systems of civil liability regimes on companies which fail to comply with their HRDD duties and, as a result, cause an adverse impact throughout their value chain³⁹.

In this regard, the main element of disagreement concerned the civil

³⁵ *Ibid.*, art. 24.

³⁶ *Ibid.*, art. 26.

³⁷ OECD Guidelines for Multinational Enterprises, 1976. Last revision: 2023.

³⁸ J. C. O. SANCHEZ, *The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation*, in *Nordic Journal of International Law*, 2015, p. 89; C. SCHLIEMANN, *Procedural Rules for the Implementation of the OECD Guidelines for Multinational Enterprises - a Public International Law Perspective*, in *German Law Journal*, 2012, p. 51.

³⁹ European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, art. 22; Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, General Approach, art. 22(1); Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence, amendment no. 299.

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liability arising from the impacts materially caused by the business partners. Indeed, according to the Commission's proposal, a company should have not been « liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner with whom it ha[d] an established business relationship, unless it was unreasonable, in the circumstances of the case, to expect that the action actually taken [...] would [have been] adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact »⁴⁰. According to the different perspective of the Council — the position of which is followed within the adopted Directive⁴¹ — a company shall be liable for the damages caused, provided that it intentionally or negligently failed to comply with the due diligence obligations and the damage is the result of this failure, being acknowledged that it cannot be held liable if the damage is caused only by its business partners in its chain of activities⁴². Therefore, two main conditions must be fulfilled as to lead a tribunal to adjudicate a company responsible: first, a violation of human rights has occurred within the company, its subsidiaries or the direct or indirect partners in the chain of activities and, second, this violation is the result of the company's intentional or negligent failure to comply with its due diligence duties. If correctly interpreted, this implies that, if the company has diligently implemented its duties, the violation materially caused by the partner does not impinge on its civil liability.

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While rejecting, as we shall see below, the favorable approach to facilitate the victims' access to judicial remedies through the provision for new and tailored conflict of laws rules, the European institutions, considering the unbalanced position of claimants in transnational proceedings brought against multinational corporations, have agreed to require the Member States to introduce some adequate procedural rules to protect their rights. This will determine the need for substantial reforms at the national levels and, to some extent, the uniformization of the procedural laws applied in Europe to disputes on corporate transnational human rights violations. Among the required reforms, the Direc-

⁴⁰ European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, art. 22(2).

⁴¹ Directive, art. 29.

⁴² Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, General Approach, art. 22(1).

tive mentions the introduction of rules to prevent that the beginning, duration, suspension or interruption of limitation periods unduly hamper the bringing of actions for damages and that such limitation periods shall be at least five years. Moreover, national laws shall ensure that the cost of proceedings is not prohibitively expensive for claimants, that they can seek injunctive measures, that where a company is held liable full compensation for the damage is granted, and that courts are able to order the disclosure of evidence by the corporate defendant, if deemed reasonable, necessary and proportionate. Trade unions, NGOs and national human rights institutions shall be allowed to bring actions, while the company's participation in industry or multi-stakeholder initiatives, the use of third-party verification or the introduction of contractual clauses to support the implementation of the due diligence duties shall not exonerate, as such, the company from liability⁴³. It is acknowledged that the civil liability of a company shall be without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the chain of activities and that they shall be jointly and severally liable if the damage is jointly caused⁴⁴. As a final remark, it is worth emphasizing that according to art. 29(7) the national provisions transposing the rules on corporate civil liability shall be overriding mandatory provisions, therefore to be applied regardless if the applicable law to the dispute concerning the corporate extra-contractual obligations for human rights violations is the law of a non-European State⁴⁵. The effects in practice of art. 29(7) will be examined in the paragraphs below.

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Despite not amounting to the most protective solution for victims of corporate human rights abuses — especially if compared with the re-

⁴³ Directive, art. 29(2) and (3). According to art. 29(2) full compensation shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages. On punitive damages: S. BARIATTI, L. FUMAGALLI, Z. CRESPI REGHIZZI (eds.), *Punitive Damages and Private International Law: State of the Art and Future Developments*, Turin, 2019.

⁴⁴ Directive, art. 29(5).

⁴⁵ *Ibid.*, art. 29(7). According to the European Court of Justice: « that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State ». CJUE, Jean-Claude Arblade, Arblade & Fils SARL (C-69/96); Bernard Leloup, Serge Leloup, Sofrage SARL, C-376/96, 23 November 1999, par. 30. A. DICKINSON, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, Oxford 2010, p. 631; G. ZARRA, *Imperativeness in Private International Law. A View from Europe*, TMC Asser Press/Springer, The Hague, 2022, p. 55.

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jected introduction of specifically tailored conflict of laws rules — the required amendments of domestic procedural laws represent significant elements of innovation, suitable to facilitate victims' effective access to justice.

5. *Expected outcomes from the Directive's implementation.* — The introduction of the above described HRDD duties on companies and of the related public and private enforcement will result in significant consequences on corporate accountability within the European legal systems. From the author's point of view, the implementation of the new legal framework will determine three main impacts: first, the establishment of corporate liability for human rights violations occurring along the chain of activities; second, the resort to contractual standards as useful means to implement the HRDD duties; and third, the creation of a level playing field applicable all over Europe, bypassing the current fragmentation of different jurisdictions and encompassing third-country companies doing business in the EU market.

5.1. *An extended regime of civil liability for corporate violations of human rights.* — Starting with the first expected outcome, it is worth bearing in mind that the courts of some European Member States, even before the adoption of the Directive, had started developing a favorable case-law to consider the parent companies incorporated within their territory responsible for the missed or incorrect exercise of their duty of care over the activities of their foreign subsidiaries, materially responsible for the violation of human rights in their countries of incorporation⁴⁶. The leading case, in this regard, *Four Nigerian Farmers and*

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⁴⁶ On the private international law issues of transnational disputes on human rights corporate accountability: A. BONFANTI, *Catene globali del valore, diritti umani e ambiente, nella prospettiva del diritto internazionale privato: verso una direttiva europea sull'obbligo di diligenza delle imprese in materia di sostenibilità*, cit.; N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, cit., p. 661; N. BUENO, C. BRIGHT, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, in *The International and Comparative Law Quarterly*, 2020, 798; G. CARRELLA, *La responsabilità civile dell'impresa per violazioni ambientali e di diritti umani: il contributo della proposta di direttiva sulla due diligence societaria a fini di sostenibilità*, in *Freedom, Security & Justice: European Legal Studies*, 2022; R. DIA, *CSDD and PIL: Some Remarks on the Directive Proposal*, <https://conflictoflaws.net/2022/csdd-and-pil-some-remarks-on-the-directive-proposal/>, 2 June 2022; P. FRANZINA, *Il contenzioso civile transnazionale sulla corporate accountability*, in *Rivista di diritto internazionale privato e processuale*, 2022, 831; M. HO-DAC, *Brief Overview of the Directive Proposal on Corporate Due*

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*Milieudefensie c. Shell*⁴⁷, decided by a Dutch court in 2021, concerns the violation by the Dutch parent company of Shell of its duty of care over the activities of its Nigerian subsidiary causing the pollution of large areas of the Niger River Delta region, with consequent impacts on the plaintiffs' fundamental rights. The jurisdiction of the Dutch court over the parent company of Shell was based on the defendant's domicile general criterion (i.e. the place of incorporation of the company) pursu-

Diligence and PIL, April 2022 <https://eapil.org/>; C. KESSEDIAN - H. CANTÚ RIVERA (eds.), *Private International Law Aspects of Corporate Social Responsibility*, Cham, 2020; F. MARRELLA, *I Principi Guida dell'ONU sulle imprese e i diritti umani del 2021 e l'accesso ai rimedi tramite gli strumenti di diritto internazionale privato europeo: una valutazione critica*, in M. CASTELLANETA, F. VESIA (a cura di), *La responsabilità sociale di impresa tra diritto societario e diritto internazionale*, Naples, 2019, 315; R. MICHAELS, A. SOMMERFELD, *The EU Sustainability Directive and Jurisdiction*, 2023, <https://eapil.org/>; L. ROORDA, *Adjudicate This! - Foreign Direct Liability and Civil Jurisdiction in Europe*, in A. BONFANTI (ed.), *Business and Human Rights in Europe: International Law Challenges*, London, 2019, 195; RUBIO - K. YANNIBAS (eds.), *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union*, London 2017; C. E. TUO, *Rimedi per abusi dei diritti umani da parte delle imprese: profili di diritto internazionale privato*, in F. MARRELLA, C. MASTELLONE (a cura di), *Contratti del commercio internazionale e sostenibilità*, Pisa 2024, 101; G. VAN CALSTER, *The Role of Private International Law in Corporate Social Responsibility*, in *Erasmus Law Review*, 2014 125; V. VAN DEN EECKHOUT, *The Private International Law Dimension of the Principles in Europe*, in F. J. ZAMORA CABOT, L. HECKENDORN URSCHELER, S. DE DYCKER (eds.), *Implementing the U.N. Guiding Principles on Business and Human Rights: Private International Law Perspectives*, Geneva, 2017. See also European Union Agency for Fundamental Rights, *Business and Human Rights. Access to Remedy*, 2020.

⁴⁷ *Gerechtshof, The Hague, Four Nigerian Farmers and Milieudefensie v. Shell*, 29 January 2021. See L. ROORDA, *Wading through the (Polluted) Mud: the Hague Court of Appeals Rules on Shell in Nigeria*, in *Rights as Usual*, 2 February 2021, <https://rightsasusual.com/?p=1388>; W. TIRUNEH, *Holding the Parent Company Liable for Human Rights Abuses Committed Abroad: The Case of the Four Nigerian Farmers and Milieudefensie v. Shell*, in *EJIL:Talk!*, 19 February 2021, <https://www.ejiltalk.org/holding-the-parent-company-liable-for-human-rights-abuses-committed-abroad-the-case-of-the-four-nigerian-farmers-and-milieudefensie-v-she-ll/>. See also the case-law developed by the English courts, especially: UK Supreme Court, *Okpabi and others v Royal Dutch Shell Plc and another*, [2021] UKSC 3, 12 February 2021 (commented in C. BRIGHT, *The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands*, in A. BONFANTI (ed.), *Business and Human Rights in Europe. International Law Challenges*, London 2019, p. 212); UK Supreme Court, *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20, 10 April 2019 (commented in R. MCCORQUODALE, *Vedanta v. Lungowe Symposium: Duty of Care of Parent Companies*, in *Opinio Juris*, <http://opiniojuris.org/2019/04/18/symposium-duty-of-care-of-parent-companies/>, 18 April 2019). For a recent and general perspective: E. ARISTOVA, *Tort Litigation against Transnational Corporations the Challenge of Jurisdiction in English Courts*, Oxford, 2024; M. AHMED, *Private International Law and Substantive Liability Issues in Tort Litigation against Multinational Companies in the English Courts: Recent UK Supreme Court Decisions and Post-Brexit Implications*, in *Journal of Private International Law*, 2022, 57.

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ant to arts. 4 and 63 of Brussels-I *bis* Regulation⁴⁸, while, as concerns the Nigerian subsidiary, it was established on claims' connection, as established by Dutch procedural law⁴⁹. On the merits, the court recognized the violation by the parent company of its duty of care over the activities of the subsidiary and the responsibility of the latter for having materially caused the pollution and the infringement of human rights. The duty of care, a doctrine based in English law, relies on the fulfillment of specific requirements — including foreseeability, proximity and reasonableness — to be assessed on a case-by-cases basis⁵⁰. Since the applicable law to the dispute was identified in Nigerian law, and because Nigerian law was interpreted in light of English law due to their common-law tradition, the duty of care doctrine was assessed to be relevant in the specific circumstances of the case and thus reconducted to Shell. The company was therefore adjudicated responsible for the lack of exercise of its duty of care.

The first effect of the implementation of the Directive will result in the provision within all European domestic laws for parent companies' responsibility for their negligent implementation of the newly introduced HRDD duties, if this leads to the violation of human rights within the activities of the subsidiaries, thus bypassing the need for case-by-case demonstration of the conditions justifying the exercise of the duty of care in the specific circumstances.

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⁴⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereinafter 'Brussels I-bis'). A. MALATESTA (a cura di), *La riforma del Regolamento Bruxelles I: il Regolamento (UE) n. 1215/2012 sulla giurisdizione e l'efficacia delle decisioni in materia civile e commerciale*, Milan, 2016; P. MANKOWSKI, V. LAZIĆ, *The Brussels I-Bis Regulation: A Handbook and Practical Guide*, The Hague, 2023; S. M. CARBONE, C. E. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale: il regolamento UE n. 1215/2012*, Turin, 2016.

⁴⁹ Dutch code of civil procedure, art. 7(1).

⁵⁰ As concerns the duty of care: E. ARISTOVA, *Tort Litigation against Transnational Corporations the Challenge of Jurisdiction in English Courts*, cit.; D. CASSEL, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, in *Business And Human Rights Journal*, 2016, p.179; C. BRIGHT, *The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands*, cit., p. 212; V. BRINO, *Diritti dei lavoratori e catene globali del valore: un formante giurisprudenziale in via di definizione?*, in *Giornale di diritto del lavoro e di relazioni industriali*, 2020, p. 455; L. CHIUSI CURZI, *General Principles for Business and Human Rights in International Law*, The Hague, 2020, p. 225; R. MCCORQUODALE, *Vedanta v. Lungowe Symposium: Duty of Care of Parent Companies*, cit.; J. WOUTERS, C. RYNGAERT, *Litigation for Overseas Corporate Human Rights Abuse in the European Union: The Challenge of Jurisdiction*, in *George Washington International Law Review*, 2009, p. 939.

Not only: the expected outcome of the Directive's implementation is decisively more impactful. Indeed, the same above described effect will extend to all violations of human rights caused also by direct and indirect business partners within the company's chain of activities, unless the measures it enacted in order to implement its HRDD duties were appropriate⁵¹. This might lead to justice cases which, before the adoption of the Directive, were destined to find no legal solution. Exemplary in this regard is the tragic incident which in 2012 devastated Ali Enterprise, a Pakistani textile company, manufacturer of garments distributed by the German company Kik. The claim filed by the Pakistani victims before the Court of Dortmund did not yield significant results, as it was dismissed due to the expiration of statute of limitation pursuant to Pakistani law⁵². Likewise, cases comparable to the well-known Rana Plaza, concerning the collapse in Bangladesh on 24 April 2013 of a commercial building housing garment companies that supplied products to some of the most famous Western fashion brands, causing the death of 1,100 people, might acquire legal relevance and find a satisfactory solution before the domestic courts of the European States of incorporation. Conversely, the claims brought before the courts in Delaware and Canada against the headquarters of the fashion companies involved in the Rana Plaza incident were rejected, respectively due to expiration of the statute of limitation and the lack of provision for the defendant's duty of care in accordance with the applicable law of Bangladesh. The Rana Plaza incident led, only thanks to the intervention of the ILO, to the conclusion of two agreements (respectively on the compensation of the victims and on the safety maintenance of the textile factories in Bangladesh)⁵³, which, however, do not clear-cut indicate of the responsibility of the companies involved. The implementation of the former accord was later challenged in two arbitral proceedings in front of the Permanent Court of Arbitration, filed by IndustriALL Global Union and UNI

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⁵¹ Directive, art. 3(1)(o).

⁵² Information available at: <https://www.business-humanrights.org/en/latest-news/kik-laws-uit-re-pakistan/>.

⁵³ Ontario Superior Court, *Das v. George Weston Limited*, 5 July 2017; Superior Court of the State of Delaware, *Abdur Rahaman et al. v. J.C. Penney Co. Inc., The Children's Place and Wal-Mart Stores Inc.*, 4 May 2016. M. FASCIGLIONE, *Impresa e diritti umani nel diritto internazionale. Teoria e prassi*, cit., p. 260-261; A. BONFANTI, *The Fashion Industry and Human Rights: Towards Corporate Sustainability and Accountability*, in A. DEL VECCHIO, *Fashion and the Law. Current Trends and New Challenges*, Milan, 2024, p. 398.

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Global Union against two global fashion companies, whose identity was kept confidential. The proceedings were terminated following the settlement reached by the parties⁵⁴.

All this said, it is worth specifying again that in these cases the establishment of civil liability on the companies falling within the scope of application of the Directive will depend on the incorrect implementation of their HRDD duties. Civil liability will not automatically be attributed: it will be subjected to the demonstration of the existence of a causal link between the human rights violations occurred in the company's chain of activities and the incorrect implementation of its HRDD duties.

5.2. *The development of contractual standards aligned with HRDD.*

— Pursuant to the Directive, in order to avoid incurring civil liability, companies are required to correctly adopt the several measures listed in Article 5-16, i.e integrate the due diligence into their policies and risk management systems, identify and assess actual or potential adverse impacts, prevent and mitigate the potential ones, bring actual adverse impacts to an end, minimize their extent and provide remediation, carry out meaningful engagement with stakeholders, establish and maintain a notification mechanism and a complaints procedure, monitor the effectiveness of the due diligence policy and measures, and publicly communicate⁵⁵. Among the implementation measures, besides making the necessary financial or non-financial investments, modifications of, or improvements to, the business plan, overall strategies and operations, including the purchasing, design, distribution, trading, procurement and pricing practices⁵⁶, the Directive establishes that companies shall be required to seek contractual assurances from business partners as regards the respect of human rights within the latter's activities⁵⁷.

The use of contractual clauses as a tool to guarantee respect for human rights has constituted a controversial issue during the Directive's negotiation. In fact, some commentators and NGOs highlighted the risk

⁵⁴ Bangladesh Accord Arbitrations Under the Accord on Fire and Building Safety in Bangladesh Between Industriall Global Union and Uni Global Union (As Claimants) and Two Global Fashion Brands (As Respondents). Information available at: Bangladesh Accord Arbitrations, <https://pca-cpa.org/en/cases/152/>.

⁵⁵ Directive, arts. 5-16

⁵⁶ *Ibid.*, recital 41.

⁵⁷ *Ibid.*, arts. 10 and 11.

that, through the exercise of negotiating autonomy, companies could bypass the respect of their due diligence duties, charging with them the business partners, who are frequently SMEs. This effect is prevented thanks to the specifications contained in the text of the Directive: contractual assurances shall be designed to ensure that responsibilities are shared appropriately by the company and the business partners and, when they are obtained from an SME, the terms used shall be fair, reasonable and non-discriminatory⁵⁸. Appropriate measures of assistance and support shall be granted by the company to the SMEs and the costs of independent third-party verification shall be borne by the former⁵⁹. The contractual assurances shall be accompanied by appropriate measures to verify compliance⁶⁰.

Among the most significant legal innovation introduced by the Directive as regards the management of the business partners, it provides that, should a violation of human rights occur within the activities of one of them, the company shall nonetheless be required to 'responsibly exit' the business relationship: this implies that, before suspending or terminating a business relationship, the company shall assess whether the adverse impacts of doing so would be higher, and eventually either decide not to suspend or terminate the contract or to take the appropriate steps to prevent, mitigate or bring to an end the impacts arising from the suspension or termination⁶¹. Therefore, the EU Member States will be required to introduce the needed reforms within their contract laws, in order to grant the companies the option to temporarily suspend or terminate the business relationship and perform the required responsible exit.

The inclusion of the HRDD duties into contracts forms the object of a corporate duty *de negotiando*: as the Directive points out « the company should only be obliged to seek the contractual assurances, as obtaining them may depend on the circumstances »⁶². Despite this clarification, as a matter of fact, the conclusion of HRDD-aligned contracts with business partners certainly represents a relevant tool, even though it does not automatically exonerate companies from civil liability.

⁵⁸ *Ibid.*, arts. 10 and 11.

⁵⁹ *Ibid.*, arts. 10(5) and 11(6), recital 46.

⁶⁰ *Ibid.*, art. 10(5).

⁶¹ *Ibid.*, art. 11(7).

⁶² *Ibid.*, recital 46.

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In the author's view, a contract disregarding the aforementioned requirements — e.g. a contract providing for unreasonable commercial terms and pricing conditions and putting on the SME involved as the business partner the overall duty to respect human rights, without adequately assisting or supporting it — because of the pressure exercised by the company during the contracts' negotiation, or not correctly implemented due to its misconduct, should be considered inadequate to demonstrate the company's effective compliance with its HRDD duties.

With this in mind, international supply contracts between parent companies and business partners deserve specific consideration. Without prejudice to the operation, where applicable, of the 1980 Vienna Convention on the International Sale of Goods (CISG)⁶³ and its uniform substantive rules, pursuant to Rome I Regulation⁶⁴, this type of contracts is governed, in the absence of the parties' choice of law⁶⁵ and except for its closest connection with another State⁶⁶, by the law of the country in which the supplier has his habitual residence⁶⁷. Therefore, should a dispute concerning the alleged lack of implementation of the contract arise — e.g. as a consequence of a reputational scandal on the company, due to the supplier's misconduct — and should the dispute be governed by the law of an EU Member State, this will lead to apply also its domestic provisions transposing the Directive, which will shape the exercise of contractual autonomy limiting the parties' possibility to

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⁶³ United Nations Convention on Contracts for the International Sale of Goods, 1980. See: N. BOSCHIERO, *Il coordinamento delle norme in materia di vendita internazionale*, Padua 1990; F. FERRARI (ed.), *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences*, Milan, 2003; I. H. SCHWENZER, U. SCHROETER (eds.), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford, 2022. Specifically: C. PIRES, *Party Autonomy in the CISG and the New Corporate Sustainability Due Diligence Directive*, in *Internationales Handelsrecht*, 2024, p. 133.

⁶⁴ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (hereinafter 'Rome I Regulation'). N. BOSCHIERO (a cura di), *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Torino, 2009; F. FERRARI (ed.), *Rome I Regulation*, Munich, 2015; P. FRANZINA, *La compravendita internazionale di merci. Competenza giurisdizionale e diritto applicabile*, Padua, 2018; M. MCPARLAND, *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford 2015; F. SALERNO, P. FRANZINA (a cura di), *Regolamento (CE) n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali ("Roma I")*, in *Le nuove leggi civili e commentate*, 2009, p. 521.

⁶⁵ Rome I Regulation, art. 3.

⁶⁶ *Ibid.*, art. 4(3). C. S. A. OKOLI, G. O. ARISHE, *Operation of the Escape Clauses in the Rome Convention, Rome I Regulation and Rome II Regulation*, in *Journal of Private International Law*, 2012, p. 513.

⁶⁷ Rome I Regulation', art. 4(1)(a).

circumvent the respect of the HRDD duties within their business relationship.

The case might be more problematic when it involves a supplier established outside the EU, in the context of a supply relationship with a company incorporated in an EU Member State. In this case, should the tribunal of a Member State have jurisdiction to adjudicate the dispute concerning the implementation of the contract⁶⁸, pursuant to arts. 4(1)(a) and 2 of Rome I Regulation it would be governed by the law of the non-European country where the supplier company has its registered office. This would imply that, in principle and unless the law of the European State of incorporation of the company is chosen by the parties or the contract is more closely connected to it, the provisions established by the Member States' domestic laws transposing the Directive should be irrelevant.

In the author's opinion this outcome can be averted only if the domestic rules transposing the Directive and providing for HRDD-aligned contractual standards are characterized as internationally mandatory provisions, in analogy with what is expressly provided by art. 29(7) with regard to the domestic rules on extra-contractual civil liability. It is worth reminding that art. 9 of Rome I Regulation provides respect for the internationally mandatory provisions of the law of the forum and — where appropriate, to the extent that they render the performance of the contract invalid — of the country in which the obligations arising from the contract must be or have been performed⁶⁹. However, such characterization of the overall framework on HRDD — or at least of its main rules — as introduced within the domestic legal systems as internationally mandatory might be challenged, based on the explicit limitation set forth by art. 29(7) of the Directive. Should it, nonetheless, be feasible, the

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⁶⁸ According to Brussels I-bis Regulation the hypothesis depends either upon the contractual choice of the parties or, in its absence, upon the defendant's domicile in the EU and the place where the goods were or should have been delivered. See Brussels I-bis Regulation, arts. 4, 63, 25, 7(1). If the defendant is not domiciled in the European Union, art. 6 of Brussels I-bis Regulation defers the identification of the relevant criteria to the domestic laws.

⁶⁹ Rome I Regulation, art. 9. Z. CRESPI REGHIZZI, *La « presa in considerazione » di norme straniere di applicazione necessaria nel regolamento Roma I*, in *Rivista di diritto internazionale privato e processuale*, 2021, p. 290; N. BOSCHIERO, *Ordine pubblico internazionale e norme di applicazione necessaria*, in F. PREITE - A. GAZZANTI PUGLIESE DI COTRONE (a cura di), *Atti notarili: diritto comunitario e internazionale. I, Diritto internazionale privato*, 2011, p. 137; G. ZARRA, *Imperativeness in Private International Law. A View from Europe*, cit.

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contractual guarantees could not escape compliance with the European standards introduced by the Directive, even if the contract is governed by the law of a third State, with the effect of preventing that, through its conclusion, companies bypass their HRDD duties.

As it will be shown below, the most problematic issue would arise when supply contracts are entered into between a third-country company and a third-country supplier. Indeed, given the very limited possibility that any arising dispute is decided by a court in an EU Member State and acknowledged that this contract would probably be regulated by the law of a third country, it would be quite infrequent — if not unrealistic — that it is subjected to the European rules on HRDD. However, this lack of compliance with the aforementioned HRDD-aligned contractual standards might practically integrate a violation by the third-country company of its HRDD duties and eventually be sanctioned by the competent supervisory authority.

As a final remark, it is useful to note that the European Commission is expected to provide guidance regarding voluntary model contract clauses by January 2027. In the meantime, these contractual standards have been taken into consideration by the Working Group on European Model Contract Clauses on Business and Human Rights⁷⁰, which has been developing a set of clauses directed at integrating the HRDD duties in supply contracts, in compliance with the requirements established by the Directive⁷¹. To this extent, the Model Clauses emphasize the importance of cooperation between suppliers and buyers, information sharing and fair contractual terms, responsible purchasing practices, human

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⁷⁰ Information about the Working Group on European Model Contract Clauses on Business and Human Rights and about the Model Clauses is available at: <https://www.responsiblecontracting.org/emcs>.

⁷¹ S. DADUSH, D. SCHÖNFELDER, B. BRAUN, *Complying with Mandatory Human Rights Due Diligence Legislation Through Shared-Responsibility Contracting: The Example of Germany's Supply Chain Act (LkSG)*, in S. A. MASLOW, D. V. SNYDER (eds.), *Contracts for Responsible and Sustainable Supply Chains: Model Contract Clauses, Legal Analysis, and Practical Perspectives*, Chicago, American Bar Association, 2023, p. 123; M. SCHELTEMA, *European Model Clauses for Supply Chain Contracts*, ivi; D. V. SNYDER, *Contracts as an Instrument of International Management and Governance*, ivi; D. SCHÖNFELDER, B. BRAUN, M. SCHELTEMA, *Contracting for Human Rights: Experiences from the US ABAMCC 2.0 and the European MCC project*, at: <https://novabhre.novalaw.unl.pt/contracting-for-human-rights-experiences-from-the-us-aba-mcc-2-0-and-the-european-emc-projects/>; M. SCHELTEMA, M. PIA SACCO, *The Proliferation of Contractual Assurances in Environmental and Human Rights Due Diligence in Supply Chains: The Potential Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence*, in F. MARRELLA, C. MASTELLONE (a cura di), *Contratti del commercio internazionale e sostenibilità*, cit., 85.

rights remediation and responsible exit. Their introduction within supply contracts is expected to be a useful tool for companies in order to comply with the HRDD duties throughout the chain of activities.

5.3. *The creation of a global level playing field.* — As concerns the third expected outcome, the adaptation of the EU Member States' legal orders to the Directive and the application of their provisions not only to the European companies, but also to the third-country companies which produce a certain turnover in Europe, will lead to the creation of a level playing field, suitable to all companies having a nexus with the EU.

This effect, on the one hand, will facilitate intra-EU business relationships, since — despite some differences remaining at the domestic level, due to the discretionary power left to Member States in transposing EU Directives — the largest part of the corporate duties and their rationale will coincide across all European legal systems. This will lead to overpassing the current fragmented legal framework in Europe, characterized only by few States that have already adopted relevant pieces of domestic legislation on HRDD, such as France⁷² and Germany⁷³. On the other hand, the extraterritorial reach of the Directive, its application to third-country companies reaching the EU market with their products and services, and the mandatory application of the civil liability provisions even when the applicable law to the extra-contractual obligations arising from violations of human rights is the law of a third country, will make the European Directive a prime model at the global level and the introduced duties standards of conduct globally required. In the author's view, the creation of this global regulatory framework will prevent the risk of social dumping connected to the economic activities of third-

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⁷² Loi n. 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. See: H. MUIR WATT, *Devoir de vigilance et droit international privé. Le symbole et le procédé de la loi du 27 mars 2017*, in *Revue internationale de la Compliance et de l'Éthique des Affaires*, 2017; E. PATAUT, *Le devoir de vigilance. Aspects de droit international privé*, in *Droit Social*, 2018, p. 883; E. SAVOUREY, S. BRABANT, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption*, in *Business and Human Rights Journal*, 2021, p. 141.

⁷³ Act on Corporate Due Diligence in Supply Chains, 16 July 2021. A.-C. MITTWOCH, F. L. BREMENKAMP, *The German Supply Chain Act - A Sustainable Regulatory Framework for Internationally Active Market Players?*, in *Review of European and Comparative Law*, 2023, p. 189; D. WEIHRAUCH, S. CARODENUTO, S. LEIPOLD, *From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act*, in *Regulation & Governance*, 2023, p. 909.

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country companies and discourage the European companies from moving their seat to a third country in order to bypass the application of the EU Member States' laws on corporate sustainability due diligence.

6. *Loopholes and weaknesses of the Directive.* — Despite the undeniable expected positive outcomes of the Directive, some issues may arise. Besides the debated lack of provisions for directors' duties in the field of corporate sustainability⁷⁴, three main weaknesses, mainly concerning the limitations posed on the civil liability regime established by art. 29, can be highlighted: firstly, the difficulties linked to the operationalization of the internationally mandatory provisions on civil liability; secondly, the hybrid status of climate change; and, thirdly, the problematic private enforcement against third-country companies.

6.1. *The difficult operationalization of the internationally mandatory provisions on corporate civil liability.* — As previously mentioned, according to art. 29(7) the national provisions transposing the rules established by the Directive on corporate civil liability shall be overriding mandatory provisions, to be applied regardless if the law applicable to the dispute is the law of a non-European State⁷⁵. This latter hypothesis occurs frequently: in accordance with art. 4 of Rome II Regulation⁷⁶, the applicable law to the non-contractual obligations arising from human rights violations is the law of the place where the damage occurred, unless under art. 4(3) the tort has a significantly closer connection to a different State. Although more protective for the victims — who would

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⁷⁴ The introduction of new duties on directors was proposed by the Commission: see European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, arts. 25 and 26. See also Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach. A. STABILINI, *La futura direttiva sulla corporate sustainability due diligence: profili di diritto societario*, in *Diritti umani e diritto internazionale*, 2023, p. 731.

⁷⁵ Directive, art. 29(7).

⁷⁶ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II Regulation'). A. DICKINSON, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations*, cit., p. 395; P. FRANZINA, *Regolamento (CE) n. 864/2007 del Parlamento europeo e del Consiglio, dell'11 luglio 2007, sulla legge applicabile alle obbligazioni extracontrattuali (Roma II)*, in G. CIAN (a cura di), *Codice civile e leggi collegate - Commento giurisprudenziale sistematico*, 2015, p. 6021; F. MARONGIU BONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Milan, 2013.

obtain that the liability of the company is ruled on the basis of the law in force in the European State in which the parent company is incorporated, rather than in light of the (often less protective) national legal system of the country where the damage occurred, art. 4(3) of Rome II Regulation is generally applied restrictively. The Regulation, moreover, does not provide for the possibility of the claimant to choose the law of the place of the event generating the damage as the applicable law, an option established instead by art. 7 for the environmental wrongdoings⁷⁷. Therefore, in principle, cases such as the aforementioned *Shell, Rana Plaza* and *Kik*, or any disputes that should be brought before a European civil court concerning the violation of human rights along the supply chain would be adjudicated on the basis of the law of the country where the human rights violation occurred. The internationally mandatory *status* of the domestic legal rules implementing the civil liability provisions enshrined in the Directive would have the effect of ensuring that these rules have an imperative impact, possibly also in derogation of what has been established by the applicable non-European national law, with the relevant consequences on the definition of the statute of limitation, the regime of proof, the claimants' right to file collective actions, the establishment of joint liability with the other entities jointly involved, and the attribution of civil responsibility to the company when the abuse depends on its incorrect implementation of the HRDD duties⁷⁸.

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⁷⁷ B. ALBUQUERQUE, *The Interplay Between Environmental Crime and Corporate Sustainability Due Diligence*, in *New Journal of European Criminal Law*, 2024, p. 209; E. ÁLVAREZ ARMAS, *Contentieux du droit international privé pour responsabilité environnementale devant le juge européen: la détermination du droit applicable comme outil de gouvernance globale environnementale*, in *Annales de droit de Louvain*, 2017; M. BOGDAN, *Some Reflections Regarding Environmental Damage and the Rome II Regulation*, in G. VENTURINI - S. BARIATTI (eds.), *Nuovi strumenti del diritto internazionale privato - Liber Fausto Pocar*, Milan, 2009, p. 96; E. GUINCHARD, S. LAMONT-BLACK, *Environmental Law - The Black Sheep in Rome II's Drive for Legal Certainty? Article 7 of Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations in Context*, in *Environmental Law Review*, 2009, p. 161; F. MUNARI - L. SCHIANO DI PEPE, *Liability for Environmental Torts in Europe: Choice of Forum, Choice of Law, and the Case for Pursuing Effective Legal Uniformity*, in A. MALATESTA (ed.), *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations In Europe. The "Rome II" Proposal*, Padua, 2006, p. 173; N. PERRONE, *Perspectives of Extraterritorial Jurisdiction for Environmental Damage in the Proposal of the European Directive on Corporate Sustainability Due Diligence*, in *The Italian Review of International and Comparative Law*, 2023, p. 389; S. SHULMAN, *Corporate Sustainability Due Diligence: Combining Human Rights and the Environment*, in *Columbia Journal of Environmental Law*, 2024, p. 479.

⁷⁸ Directive, art. 29. F. BUCCELLATO, *La responsabilità civile da impatto negativo sui diritti umani di cui alla Proposta di Direttiva UE in materia di Corporate Sustainability Due Diligence: profili di diritto interno funzionali al recepimento*, in *Jus*, 2023, p. 5.

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Although the solution appears favorable to strengthening the Directive's effectiveness, some critical issues cannot be ignored. The most significant concerns the complex interaction between the internationally mandatory provision implementing art. 29 and the law of the third State regulating the extra-contractual liability issues not covered by the Directive. This complexity would have been prevented only through the introduction, within Rome II Regulation, of new criteria for the identification of the applicable law to the extra-contractual obligations arising from these specific violations. The hypothesis was taken into consideration — and rejected — after being explicitly addressed by the Committee on Legal Affairs of the European Parliament within its initial proposal of resolution in 2020⁷⁹. Despite being also recommended by the European Group of Private International Law in its 2021 resolution concerning the Private international Law Aspects of the Future Instrument of the European Union on Corporate Due Diligence and Corporate Accountability⁸⁰, the final text agreed on by the European institutions does not leave space for any amendments of Rome II Regulation and only allows for the mandatory application of the provisions on civil liability transposed, in accordance with art. 29 of the Directive, within the law of the European State where the company is incorporated, with the consequent connected criticalities.

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6.2. *The hybrid status of climate change.* — The implementation of the civil liability regime established under the Directive also raises doubts about the current duties established with regard to climate change mitigation. Art. 22 provides that companies must adopt and put into effect transition plans for climate change mitigation which aim to ensure

⁷⁹ European Parliament, Committee on Legal Affairs, Draft report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL), 11 September 2020. E. ÁLVAREZ-ARMAS, *Some Observations on the Proposed Article 6a on the Law Applicable to Business-related Human Rights Claims*, 2021, <https://novabhre.novalaw.unl.pt/observations-onthe-proposed-article-6a-law-applicable-bhr-claims/>.

⁸⁰ European Group for Private International Law, Recommendation of the European Group for Private International Law (GEDIP/EGPIL) to the European Commission concerning the Private international law aspects of the future Instrument of the European Union on [Corporate Due Diligence and Corporate Accountability], 8 October 2021, <https://gedip-egpil.eu/wp-content/uploads/2021/02/Recommandation-GEDIP-Recommendation-EGPIL-final-1.pdf>, parr. II e IV. In merito G. VALLAR, *Giurisdizione in materia di corporate social responsibility*, in C. AMALFITANO, D.-U. GALETTA, L. VIOLINI (a cura di), *Law, Justice and Sustainable Development. L'accesso alla giustizia nel quadro del SD Goal 16*, Milan, 2022.

that their business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality⁸¹. Pursuant to the same provision, the transition plans shall contain, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 for each significant category. Despite establishing these duties on companies, art. 29 does not explicitly recall art. 22 among the provisions the violation of which determines the raising of civil liability. This allows to conclude that companies shall not be responsible for the lack of respect of the duties on climate change specifically introduced by art. 22, being their enforcement entrusted to the supervisory authorities, under art. 24. However, this does not lead companies which cause damages on human rights connected with their greenhouse gas emissions to exemption from civil liability.

The relationship between human rights and climate change is very well established at a legal level, as international practice and case-law demonstrate⁸²; the same is true when it comes to corporations. Being

⁸¹ Directive, art. 22(1).

⁸² Among others, see: Human Rights Council, Resolution 10/4. Human rights and climate change, 25 March 2009; Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Analytical study on the relationship between climate change and the human right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/HRC/32/23, 6 May 2016; Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018, par. 62; ESCR Committee, Joint Statement on climate change and the Covenant. Climate change and the International Covenant on Economic, Social and Cultural Rights, 8 September 2019, par. 2; Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), CRC/C/GC/15, 24 April 2013. As concerns the case-law against States: Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016, CCPR/C/127/D/2728/2016, 23 September 2020. S. BEHRMAN, A. KENT, *The Teitiota Case and the Limitations of the Human Rights Framework*, in *Questions of International Law*, 2020, p. 25 ss.; J. MCADAM, *Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non Refoulement*, in *American Journal of International Law*, 2020, p. 708 ss.; G. LE MOLI, *The Human Rights Committee, Environmental Protection and the Right to Life*, in *International and Comparative Law Quarterly*, 2020, p. 735 ss.; E. SOMMARIO, *When Climate Change and Human Rights Meet: A Brief Comment on the UN Human Rights Committee's Teitiota Decision*, in *Questions of International Law*, 2020, p. 51 ss. Committee on the Rights of the Child, In the case of Chiara Sacchi (Argentina) et al. v. Argentina, Brazil, France, Germany & Turkey, 23 September 2019. Committee on the Rights of the Child, Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 104/2019, CRC/C/88/D/104/2019, 11 November 2021. International Court of Justice, Request for Advisory Opinion, Obligations of States

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stated that the role of the business sector is crucial to fight climate change, a significant case-law has been evolving before the domestic courts⁸³.

The leading-case *Vereniging Milieudefensie et al v. Royal Dutch Shell* was decided by the Court of Appeal of The Hague on 12 November 2024, reversing the District Court's decision adopted on 26 May 2021⁸⁴. The applicants complained that the company had not adequately reduced its emissions, in accordance with the international standards and, therefore, should be held liable for the negative impacts on the Dutch territory and on the resulting enjoyment of the rights to life and to private and family

in Respect of Climate Change, 29 March 2023. L. PINESCHI, *The Request to the International Court of Justice for an Advisory Opinion on Climate Change: Some Preliminary Remarks through the Lens of Statements Made upon the Adoption of Resolution 77/276*, in *The Italian Review of International and Comparative Law*, 2024, p. 21; European Court of Human Rights, Case of Verein Klimaseniorinnen Schweiz and Others v. Switzerland, Grand Chamber, 53600/20, 9 April 2024. M. MILANOVIC, *A Quick Take on the European Court's Climate Change Judgments*, in *EJIL: Talk!*, <https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/>, April 9 2024. For a perspective on the overall issue: A. BOYLE, *Climate Change, Sustainable Development, and Human Rights*, in *Sustainable Development Goals and Human Rights*, Cham 2020, p. 171; J.H. KNOX, *Human Rights Principles and Climate Change*, in K.R. GRAY, R. TARASOFSKY, C. CARLARNE (eds.), *The Oxford Handbook of International Climate Change Law*, Oxford 2017; K. RUPPEL-SCHLICHTING, S. HUMAN, O.C. RUPPEL, *Climate Change and Children's Rights: An International Law Perspective*, in O.C. RUPPEL, C. ROSCHMANN, K. RUPPELSCHLICHT, *Climate Change: International Law and Global Governance*, v. I: *Legal Responses and Global Responsibility*, Baden-Baden, 2013, p. 349; SAVARESI, *Climate Change and Human Rights: Fragmentation, Interplay, and Institutional Linkages*, in *Routledge Handbook of Human Rights and Climate Governance*, New York 2018; M. WEWERINKE-SINGH, *State Responsibility for Human Rights Violations Associated with Climate Change*, in *Routledge Handbook of Human Rights and Climate Governance*, New York, 2018, p. 75.

⁸³ London School of Economics, Global trends in climate change litigation: 2023 snapshot; United Nations Environment Programme, Sabin Center for Climate Change Law, Global Climate Litigation Report. 2020 Status Review, 2020. Among the most relevant disputes before the courts of the European Member States: District Court of Essen, *Lliuya v. RWE AG*, 15 December 2016. A. ELFAR, *Landmark Climate Change Lawsuit Moves Forward as German Judges Arrive in Peru*, in *Columbia Climate School*, August 2022.

⁸⁴ The Hague District Court, *Vereniging Milieudefensie et al v. Royal Dutch Shell*, C/09/571932/HA ZA 19-379, 26 May 2021; The Hague Court of Appeal, *Vereniging Milieudefensie et al v. Royal Dutch Shell*, 200.302.332/01, 12 November 2024. A. BONFANTI, *Garanzie ed efficienza della giustizia climatica: prospettive evolutive del contenzioso contro imprese*, in F. BIONDI, R. SACCHI, *Garanzie ed efficienza nella giustizia in una prospettiva multidisciplinare*, Milan, 2024, p. 443; C. MACCHI, J. ZEBEN, *Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et al. v. Royal Dutch Shell*, in *Review of European Community & International Environmental Law*, 2021, p. 409; B. MAYER, *Milieudefensie v Shell: Do Oil corporations Hold a Duty to Mitigate Climate Change?*, in *EJIL:Talk!*, 3 June 2021; A. NOLLKAEMPER, *Lessons of a Landmark Lost. The Judgement of the Hague Court of Appeal in Shell v Milieudefensie*, 12 November 2024, <https://verfassungsblog.de/shell-milieudefensie-climate-litigation/>.

life of the individuals there residing. The District Court had concluded that Shell must reduce the greenhouse gas emissions produced by the corporate group and generated in the value chain by 45% compared to 2019 levels by 2030, through the introduction of new environmental strategies and policies, as part of the due diligence standard of conduct prescribed by domestic law as interpreted in line with the objectives identified by the Paris Agreement, the obligations to protect human rights recognized by the European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights, as well as the standards established by the IPCC and the UNGPs. With regard to the demonstration of the causal link between the emissions produced by Shell and the damages specifically objected to, the District Court had limited itself to declaring that it must be considered established that « every emission of CO₂ and other greenhouse gases, anywhere in the world and caused in whatever manner, contributes to this damage and its increase » and that « it is not in dispute that the CO₂ emissions for which Milieudefensie et al. hold RDS liable occur all over the world and contribute to climate change in the Netherlands and the Wadden region ». Moreover, since the greenhouse gas emissions are produced by Shell all over the world, they also have repercussions on Dutch territory and « pose a threat to the human rights of Dutch residents and the inhabitants of the Wadden region »⁸⁵. The decision on appeal reverses the conclusions reached by the lower court: pursuant to the Court of Appeal, the current legislation — including the Directive — does « not impose absolute reduction obligations on individual companies or particular industries. Shell therefore does not have an absolute reduction obligation of 45% (or any other percentage) under EU law and will not have such an obligation for the foreseeable future ». According to the developed analysis « companies are free to choose their own approach to reducing their emissions in the mandatory climate transition plan as long as it is consistent with the Paris Agreements climate targets »⁸⁶. Against this backdrop and despite concluding that Shell complies with its current obligations, the appeal decision contains also some crucial statements favorable to recognizing corporations potentially responsible for the human rights violations caused by their greenhouse gas emissions. Re-

⁸⁵ The Hague District Court, *Vereniging Milieudefensie et al v. Royal Dutch Shell*.

⁸⁶ The Hague Court of Appeal, *Vereniging Milieudefensie et al v. Royal Dutch Shell*, para. 7.56.

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ferring to the rules fixed on climate change, it clearly acknowledges that « these regulations and instruments are [...] not exhaustive [...] In addition to complying with these measures, companies have a social duty of care to reduce their emissions »: in order « [t]o combat the danger posed by climate change, everyone has a responsibility [...] Especially companies whose products have contributed to the creation of the climate problem and have it in their power to contribute to combating it are obliged to do so vis-à-vis other inhabitants of the earth, even when (public law) rules do not necessarily compel them to do so. This follows from [...] instruments [...] including the OECD guidelines and the UNGPs, to which Shell has subscribed ». In this light « companies like Shell [...] have an obligation to limit CO₂ emissions in order to counter dangerous climate change, even if this obligation is not explicitly laid down in (public law) regulations of the countries in which the company operates. Companies like Shell thus have their own responsibility in achieving the targets of the Paris Agreement »: « [t]he social standard of care, interpreted on the basis of Articles 2 and 8 ECHR and soft law such as the UNGP and OECD guidelines, requires producers of fossil fuels to take their responsibility in this respect »⁸⁷.

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Furthermore, the appeal decision does not modify the conclusions reached as regards the relevant private international law issues: on the basis of art. 7 of Rome II Regulation, the claims for extra-contractual liability are governed by Dutch law, being the Netherlands the place where the event giving rise to the complained damage — i.e. the alleged lack of implementation by the company of its due diligence obligation to enact a corporate policy aligned with the aforementioned standards of conduct — occurred⁸⁸, thus leading to the application of the law of the State where the headquarter of the company is established, regardless of whether the emissions were produced along the value chain on the territory of different States.

With this dispute in mind, the author believes that, despite the implicit exclusion of civil liability at art. 29 of the Directive and the lack of absolute reduction obligations pursuant to art. 22, the introduction of the new duties on climate change, coupled with the overall framework on

⁸⁷ *Ibid.*, paras. 7.56, 7.26, 7.27, 7.61.

⁸⁸ A. BONFANTI, *Cambiamenti climatici, diritti umani e attività d'impresa: recenti tendenze e futuri sviluppi del diritto internazionale in materia di due diligence d'impresa*, in *Quaderni de "La Comunità Internazionale"*, 2021, p. 47.

HRDD established by the Directive, will inevitably lead to an increase in litigation on corporate accountability for climate change-related human rights violations. Therefore, given the newly established legal framework and the progressive development in this area, it is reasonable to expect that claimants will find a strengthened legal basis to support their claims and overcome the obstacles that currently limit or prevent their access to justice.

6.3. *The problematic private enforcement against third-country companies.* — The complexity linked to the Directive's private enforcement is even higher if we take the third-country companies into consideration. The judicial implementation of the Directive against third-country companies certainly represents one of its weakest aspects⁸⁹. Indeed, according to the current legal framework, only in very few cases — which we shall examine below — would the courts of the EU Member States — whose domestic legislation will incorporate the newly introduced obligations — have jurisdiction to adjudicate the disputes for violations of human rights occurring within the extra-European chain of activities of third-country companies. Therefore, only in rare circumstances would these courts find themselves in the position of ordering them to implement the corporate HRDD duties prescribed by their domestic laws. Conversely, should the same disputes be brought before the courts of a third country, it can be reasonably excluded that the sued companies would be ordered to comply with the HRDD duties introduced within the European legal system.

As a matter of fact, pursuant to Brussels I-bis Regulation the courts of the EU Member States have jurisdiction to decide the disputes concerning human rights violations committed on the territory of non-European countries when the requirements set forth in arts. 4 and 63 are

⁸⁹ A. BONFANTI, *Catene globali del valore, diritti umani e ambiente, nella prospettiva del diritto internazionale privato: verso una direttiva europea sull'obbligo di diligenza delle imprese in materia di sostenibilità*, cit., p. 323; N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, cit., p. 690; O. BOSKOVIC, *Extraterritoriality and the Proposed Directive on Corporate Sustainability Due Diligence, A Recap*, in *Journal of Private International Law*, 2024, p. 125; M. HO-DAC, *Brief Overview of the Directive Proposal on Corporate Due Diligence and PIL*, cit.; R. DIA, *CSDD and PIL: Some Remarks on the Directive Proposal*, cit.; R. MICHAELS, A. SOMMERFELD, *The EU Sustainability Directive and Jurisdiction*, cit.; N. PERRONE *Perspectives of Extraterritorial Jurisdiction for Environmental Damage in the Proposal of the European Directive on Corporate Sustainability Due Diligence*, cit., p. 389.

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met, i.e., when the companies sued have their registered office, central administration or principal place of business in the territory of the (European) forum. In case the dispute involves defendants domiciled on the territory of a third country, art. 6(1) of Brussels I-bis defers the identification of the so-called ‘exorbitant criteria’⁹⁰ to the national conflict of laws. In this regard, for instance, Section 23 of the German Code of Civil Procedure provides for the criterion based on the place of the defendant’s assets, while Art. 7(1) of the Dutch Code of Civil Procedure, Art. 42(2) of the corresponding French code and Section 93 of the Austrian code enable jurisdiction over connected claims against co-defendants. Art. 3(2) of the Italian Private International Law (Legge 218/1995)⁹¹ extends the jurisdiction of the Italian tribunals based on the criteria established by Sections 2, 3 and 4 of Title II of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and its evolutions — including the corresponding sections of Brussels I-bis⁹² — to disputes involving defendants not domiciled in the territory of a Contracting (now, EU Member) State.

In order to make the implementation of the Directive more effective, the establishment of the jurisdiction of the EU domestic courts over disputes involving third-country companies would be desirable, notwithstanding the potential difficulties linked to the execution of judgments adopted by the courts of States where the corporate defendants do not have significant assets. In order to reach this outcome, two solutions

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⁹⁰ Á.J. RUBIO - K. YANNIBAS (eds.), *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union*, cit.; C. KESSEDIAN - H. CANTÚ RIVERA (eds.), *Private International Law Aspects of Corporate Social Responsibility*, cit. See also R. MCCORQUODALE, *Waving Not Drowning: Kiobel Outside the United States*, in *The American Journal of International Law*, 2023, p. 846; J. WOUTERS, C. RYNGAERT, *Litigation for Overseas Corporate Human Rights Abuse in the European Union: The Challenge of Jurisdiction*, in *George Washington International Law Review*, 2009, p. 939.

⁹¹ Legge 218/1995, art. 3.2. R. LUZZATTO, *Articolo 3*, in F. POCAR, T. TREVES, S.M. CARBONE, A. GIARDINA, R. LUZZATTO, F. MOSCONI, R. CLERICI (a cura di), *Commentario del nuovo diritto internazionale privato italiano*, Padua 1996, p. 33; N. BOSCHIERO, *Appunti sulla riforma del sistema italiano di diritto internazionale privato*, Torino 1996, p. 89; G. CONETTI, S. TONOLO, F. VISMARA, *Commento alla legge di riforma del diritto internazionale privato italiano*, Torino 2009, p. 11; F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale. Volume I. Parte generale e obbligazioni*, Torino, 2022, p. 128; A. BONFANTI, *Italy*, in C. KESSEDIAN - H. CANTÚ RIVERA (eds.), *Private International Law Aspects of Corporate Social Responsibility*, cit., p. 437.

⁹² Court of Cassation (Italy), judgment no. 18299, 25 June 2021; no. 4211, 20 February 2013; no. 32362, 13 December 2018; no. 22239, 21 October 2009; no. 15748, 12 June 2019. F. MOSCONI, C. CAMPIGLIO, *Diritto internazionale privato e processuale. Volume I. Parte generale e obbligazioni*, cit., p. 159-160.

might be explored: the first, as suggested by some prominent scholars⁹³, relies on *forum legis*. The expression *forum legis* involves the attribution of international jurisdiction as dependent on the applicable law. According to this theory, the domestic courts could establish their jurisdiction based on the characterization of the domestic provisions set forth in accordance with the Directive as internationally mandatory⁹⁴. The perfect consistency between forum and applicable law — a technique that, while not new, is still scarcely applied within the EU private international law instruments⁹⁵ — would be suitable in order to reach the objectives pursued by the Directive, as well as to facilitate the settlement of the arising disputes. However, the application of this theory would require the availability of the courts to go beyond the criteria of jurisdiction specifically set by law and characterize the domestic provisions on HRDD — not only those on civil liability — as internationally mandatory⁹⁶. These difficulties make the application of *forum legis* residual in practice.

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The second solution would consist of interpreting the relevant criteria on jurisdiction in light of the — in the author's opinion — existing connection with the EU territory of the disputes involving third-country companies for the alleged violations of human rights within the activities of their third-country suppliers. This prospective territorial connection relies on several grounds. Firstly, the Directive establishes that the matters covered by it shall be regulated by the Member State in which the third-country company has a branch, or if the company does not have a branch in any Member State, or has branches located in different Member States, the one in which that company generated the highest net turnover in the Union in the relevant financial year⁹⁷. Secondly, the third-country companies are subjected to the monitoring of the domestic supervisory authorities localized in the same Member State as the one indicated pursuant to the criteria above⁹⁸. Thirdly, third-country companies must establish an authorized representative within the EU terri-

⁹³ N. BOSCHIERO, *L'extraterritorialità della futura direttiva europea sul dovere di diligenza delle imprese ai fini della sostenibilità, tra diritto internazionale pubblico e privato*, cit., p. 661; R. MICHAELS, A. SOMMERFELD, *The EU Sustainability Directive and Jurisdiction*, cit.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Directive, art. 2(7).

⁹⁸ *Ibid.*, art. 24.

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tory⁹⁹. The latter is a natural or legal person charged with the task of informing the supervisory authorities of the falling of the company within the Directive's scope of application and communicating with them on all matters necessary for compliance with and enforcement of the provision of national law transposing the Directive¹⁰⁰. In the author's opinion the appointment of the authorized representative and the subjection to the supervisory authority demonstrate that the third-country company is fully aware of being charged with the newly introduced HRDD duties, legitimately expected to fulfil them, and conscious that it has a point of contact established in the EU charged with specific related powers and duties. In light of these elements, the presumption upon which the disputes involving third-country companies lack any connection with the European territory might be rebutted and the private enforcement against third-country companies be considered consistent with their reasonable expectations and, thus, not leading to legal uncertainty.

Despite being an innovative solution, it is here submitted that it could be implemented by referring to the traditional criteria on jurisdiction. As a first option, it could rely on the 'defendant's domicile', i.e. the general criterion fixed pursuant to arts. 4 and 63 of Brussels I-bis: in this regard, the establishment of the authorized representative could contribute to identifying the third-country company's principal place of business within the EU territory and, consequently, operate as a sort of 'anchor defendant', allowing the European domestic courts to establish their jurisdiction over the disputes¹⁰¹. Secondly, the establishment of the authorized representative could also acquire a specific value in the application of the domestic private international law rules which provide for exorbitant criteria extending the jurisdiction of the domestic tribunals to the disputes involving defendants not domiciled in the EU, such as the already mentioned art. 3(2) of the Italian Law 218/1995. For instance, within this context, the authorized representative's place of establishment in Italy could be considered as a relevant factor pursuant to the criterion of jurisdiction for matters relating to torts, fixed by art. 7(2) of Brussels I-bis¹⁰² and applied extensively under the provision. In this

⁹⁹ *Ibid.*, art. 23.

¹⁰⁰ *Ibid.*

¹⁰¹ N. PERRONE, *Perspectives of Extraterritorial Jurisdiction for Environmental Damage in the Proposal of the European Directive on Corporate Sustainability Due Diligence*, cit., 398.

¹⁰² Brussels I-bis Regulation, art. 7(2).

regard, this might lead to identifying the place of the event giving rise to the damage (i.e. the lack of compliance by the authorized representative with the regulatory actions required pursuant to domestic law) as occurring in Italy and, on this basis, to establishing the jurisdiction of the Italian tribunals, despite the defendant being a third-country company¹⁰³. The same outcome could be reached through interpreting the place where the « branch, agency or other establishment » to the conduct of which the dispute relates — i.e. the criterion of jurisdiction fixed by art. 7(5) of Brussels-I *bis* — as coinciding with the authorized representative's place of establishment in Italy¹⁰⁴. Despite still relying on the development of a favorable interpretative approach by courts, the solution at stake necessitates of a lower level of 'creativity' by them, if compared to the *forum legis*, and might therefore be more easily followed in practice.

7. *Concluding remarks.* — Based on the above developed analysis the domestic implementation of the Directive will significantly affect the way of doing business around the world. Despite the elements for critique examined above, the potential positive impacts in terms of corporate respect of human rights and accountability are undeniable. The implementation of the HRDD duties along the chain of activities, the monitoring and sanctioning functions entrusted to the supervisory authorities and the establishment of civil liability on companies for human rights violations occurring throughout their chains of activities will make the companies falling within its scope of application improve their business models, strategies, procurement policies, corporate governance and investments, and in some cases lead to substantive improvements in terms of corporate conduct.

Despite the great expectations on the Directive, some weak elements might water down its impacts. For instance, the private enforcement of

¹⁰³ According to CJUE (*Mines de Potasse*, c-21/76, 30 November 1976): « where the place of the happening of the event which may give rise to liability in tort, delict or quasi-delict and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred', in article 5(3) of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it. The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage ».

¹⁰⁴ Brussels I-*bis* Regulation, art. 7(5).

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HRDD duties towards third-country companies and the effective implementation of the duties on climate change are highly problematic, weaknesses emphasizing the need for the efficient functioning of the supervisory authorities.

Against this backdrop, and considered that the HRDD duties introduced by the Directive will be applied by companies starting from 26 July 2027 (with progressive deadlines in 2028 and 2029, depending on the dimensions of the businesses ¹⁰⁵), it is worth adding that by July 2030 — and every three years thereafter — the European Commission shall submit a report to the European Parliament and Council on the implementation of the Directive and its effectiveness in reaching the objectives and in addressing adverse impacts ¹⁰⁶. Among the main issues, the report shall focus on the impacts on SMEs, on the scope of application, and on whether a sector-specific approach needs to be introduced in high-risk sectors, on whether the definition of the term ‘chain of activities’, the Annex and the rules on combatting climate change need to be revised, and on whether the enforcement mechanisms, including the rules on civil liability, are effective or need to be modified ¹⁰⁷.

In light of these reflections, the protection of human rights from corporate abuses will be strongly strengthened by the Directive’s implementation. This brings us back to Prof. John Ruggie’s words commenting the UNGPs’ adoption: « We now have a foundation on which we can build going forward. It doesn’t solve all the problems. But at least we now know what the foundations are and how to frame future debate » ¹⁰⁸. After 13 years from the adoption of the UNGPs and a long negotiation within the EU, the Directive builds on that exact foundation.

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¹⁰⁵ Directive, art. 37.

¹⁰⁶ *Ibid.*, art. 36.

¹⁰⁷ *Ibid.*

¹⁰⁸ Available at: <https://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>.