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Mak, C.

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Corporate sustainability due diligence: More than ticking the boxes?

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Chantal Mak*

The role of companies in adequately addressing the social and economic questions of our times has caught the attention of the European legislature and of EU Member States alike. On 23 February 2022, the European Commission presented a proposal for a Directive on Corporate Sustainability Due Diligence, which aims to ‘advance the green transition and protect human rights in Europe and beyond’.¹ The proposed rules require businesses to integrate due diligence in their policies, to make sure they identify and prevent potential adverse impact of their activities on human rights and the environment² and to bring actual infringements to an end.³ This EU initiative complements national laws such as the French Corporate Duty of Diligence Law,⁴ the Italian Due Diligence Laws⁵ and the Dutch Child Labour Due Diligence Law.⁶ Moreover, the presentation of the proposed Directive runs in parallel to

1. Press release ‘Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains’, 23 February 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145 (unless indicated otherwise, all websites referred to were last consulted on 6 May 2022).
2. Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf, Articles 5-7.
3. Proposal for a Directive on Corporate Sustainability Due Diligence, Article 8.
4. Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>.
5. Legislative Decree No. 231/2001, *Gazzetta ufficiale* no. 140, 19 June 2001, <https://web.camera.it/parlam/leggi/deleghe/01231dl.htm>, recently amended by Legislative Decrees No. 184/2021, <https://www.gazzettaufficiale.it/eli/id/2021/11/29/21G00200/sg>, and No. 195/2021, <https://www.gazzettaufficiale.it/eli/id/2021/11/30/21G00203/sg>.
6. Wet zorgplicht kinderarbeid, Stb. 2019, 401, https://www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken.

*Professor of private law, in particular fundamental rights and private law, Amsterdam Centre for Transformative Private Law (ACT), University of Amsterdam, the Netherlands

Corresponding author:

Chantal Mak, Professor of private law, in particular fundamental rights and private law, Amsterdam Centre for Transformative Private Law (ACT), University of Amsterdam, the Netherlands.

E-mail: c.mak@uva.nl

the development of due diligence laws in, among other countries, Germany⁷ and the Netherlands⁸.

Whereas these laws have, in my opinion, rightly been welcomed for affirming businesses' responsibility to respect human rights and environmental interests throughout their supply chains,⁹ none of them seems to fully overcome one of the main challenges of due diligence schemes. How can the law be conducive to companies actually addressing human rights and environmental concerns, rather than turning due diligence into an exercise in 'ticking the boxes'?¹⁰

First of all, it should be emphasized that the complexity of the matter necessitates a broad, multi-angle approach towards business responsibilities for human rights protection. On this point, legal scholarship on sustainability resonates with developments in economics and business studies, where Mazzucato's 'mission economy'¹¹ and Raworth's 'doughnut economics'¹² are gaining ground as models for economic thinking that integrate social and environmental concerns. Ideally, according to such models, public and private actors would collaborate to develop innovative solutions to societal questions while respecting planetary boundaries. Law and policy can support these collaborative innovation processes. Against this backdrop, expectations of laws imposing due diligence obligations may have to be tempered. If these laws are not embedded in broader visions on economic and political reform, like those foreseen in Mazzucato's and Raworth's work, it is difficult to see how companies would be incentivized to integrate care for social and ecological boundaries in their business models.¹³

In the second place, law itself seems to hamper the full blossoming of corporate sustainability due diligence as a mechanism for getting to actual human rights violations and negative environmental impact of business activities. Due diligence laws are primarily based on the UN Guiding Principles on Business and Human Rights (UNGPs). Notwithstanding the authority of these Principles, their meaning is, as yet, not fully clear. How the UNGPs define 'due diligence' itself, for instance, remains a topic of debate. As Bonnitca and McCorquodale have shown, the formulation of the UNGPs leaves open-ended whether due diligence is meant to be an *ex ante* safeguard against human rights violations or rather can serve as an *ex post* defence for businesses to escape liability for such violations, if they can demonstrate sufficient diligence but harm had nevertheless

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7. The German Supply Chain Due Diligence Act adopted in June 2021 will enter into force on 1 January 2023; Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Bundesgesetzblatt 2021, p. 2959. For a comparison with the Norwegian law that was passed in the same month, see M. Krajewski, K. Tonstad and F. Wolthmann, 'Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?', 6 *Business and Human Rights Journal* (2021), p. 550.
 8. The currently pending Initiatiefwet Verantwoord en duurzaam internationaal ondernemen, https://www.eerstekamer.nl/wetsvoorstel/35761_initiatiefvoorstel_ceder.
 9. On the newly proposed Directive, see blogposts by M. Kawakami, 'Don't Sweat the Small Stuff? The New Proposal for the EU Directive on Corporate Sustainability Due Diligence', *Maastricht University blog* (2022), <https://www.maastrichtuniversity.nl/blog/2022/03/don%E2%80%99t-sweat-small-stuff-new-proposal-eu-directive-corporate-sustainability-due>; N. Touw, 'Civil Liability in the EU Proposal for a Corporate Sustainability Due Diligence Directive: A Leap Forward or Stifling Progress?', *SLIC blog* (2022), <https://rethinkingslic.org/blog/tort-law/117-nicky-touw>.
 10. J. Bonnitca and R. McCorquodale, 'The Concept of "Due Diligence" in the UN Guiding Principles on Business and Human Rights', 28 *European Journal of International Law* (2017), p. 910.
 11. M. Mazzucato, *The Value of Everything: Making and Taking in the Global Economy* (Allen Lane, 2018); M. Mazzucato, *Mission Economy: A Moonshot Guide to Changing Capitalism* (Allen Lane, 2021).
 12. K. Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (Random House, 2018).
 13. S. Deva, 'From "Business or Human Rights" to "Business and Human Rights": What Next?', in S. Deva and D. Birchall (eds), *Research Handbook on Human Rights and Business* (Edward Elgar, 2020), p. 12.

occurred.¹⁴ Furthermore, the non-binding nature of the UNGPs implies that they cannot by themselves impose duties on companies.¹⁵ The UNGPs, thus, need to be elaborated in due diligence legislation, such as the laws mentioned at the beginning of this article, to be clarified and obtain legal force. In this process, overlaps of human rights law with other fields, such as environmental law, criminal law and private law, are of great relevance for moving beyond a box-checking exercise. As, for instance, Sjøfjell has convincingly argued, it is likely that the premises of company law will have to be rethought in order to safeguard and facilitate sustainable business activities.¹⁶ In her view, sustainability due diligence could be embedded in such reform processes and would, thus, align with a renewed view on companies' purposes. Furthermore, as Cafaggi and Iamiceli have submitted, liability for non-compliance with due diligence obligations may be considered part of a more comprehensive governance framework for global value chains.¹⁷ In their view, potential tort liability of the company leading the supply chain can be combined with contractual governance of the entire chain in order to strengthen the private legal framework for sustainable business.¹⁸ Accordingly, due diligence laws should be conceived in close connection with other legal mechanisms in order to achieve their full potential.

Despite these somewhat critical notes, finally, the developments in corporate sustainability due diligence also give reasons for optimism. When surveying the debate on the new due diligence laws, a slow but unmistakable change may be perceived in how the role and purpose of businesses are seen. While the human rights violations and environmental damage that inspired these laws certainly warrant distrust of companies' willingness and ability to take heed of societal concerns, due diligence laws address this concern by making businesses part of the conversation on how to prevent such harms from occurring in the future. They encourage a rethinking of the social imaginaries that, in Bartl's words, 'present a shared basis for making sense of our social existence'.¹⁹ Due diligence laws may not hold all the answers, but they may inspire new ways of seeing the role of law in developing sustainable business practices.

14. J. Bonnitcha and R. McCorquodale, 29 *European Journal of International Law* (2017), p. 910-911.

15. As a nuance, it may be added that the UNGPs have been recognized as one element for establishing tort liability in the judgment of the District Court of The Hague in the case of NGO Milieudefensie (Friends of the Earth) against oil company Shell on the latter's obligation to reduce greenhouse gas emissions; Rb. (district court) The Hague 26 May 2021, ECLI:NL:RBDHA:2021:5339 (*Milieudefensie/Shell*).

16. B. Sjøfjell, 'How Company Law has Failed Human Rights – and What to Do About It', 5 *Business and Human Rights Journal* (2020), p. 189.

17. F. Cafaggi and P. Iamiceli, 'Regulating Contracting in Global Value Chains: Institutional Alternatives and Their Implications for Transnational Contract Law', 16 *European Review of Contract Law* (2020), p. 63-64.

18. *Ibid.*, p. 64. See also K.H. Eller, 'Is "Global Value Chain" a Legal Concept? Situating Contract Law in Discourses Around Global Production', 16 *European Review of Contract Law* (2020), p. 19-20.

19. M. Bartl, 'Socio-Economic Imaginaries and European Private Law', in P.F. Kjaer (ed.), *The Law of Political Economy* (Cambridge University Press, 2020), p. 231.