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Katarzyna Mojska
ORCID ID: 0000-0002-3382-7325
Maria Curie-Skłodowska University in Lublin
E-mail: katarzyna.mojska@mail.umcs.pl

Multinational Enterprises' Mandatory Human Rights and Environmental Due Diligence. The Case of European Union Law Underway

Keywords: constitutional protection of human rights and environment, European Union, multinational enterprises, due diligence, value chain liability, EU Corporate Sustainability Due Diligence Directive
Słowa kluczowe: konstytucyjna ochrona praw człowieka i środowiska, Unia Europejska, przedsiębiorstwa wielonarodowe, należyta staranność, odpowiedzialność w łańcuchach wartości, Dyrektywa w sprawie należytej staranności przedsiębiorstw w zakresie zrównoważonego rozwoju

Abstract

The international and domestic efforts directed toward establishing effective regulations of multinational enterprises (MNEs) activity in the human rights and environmental realms are currently entering an intriguing phase. The trend toward setting forth legally binding obligations applicable across their complex, transnational structures is gain-

ing momentum, and the upcoming EU Corporate Sustainability Due Diligence Directive (CSDDD) may significantly contribute to this process. The research aim of this study is to examine how the draft CSDDD is woven into the present regulatory landscape, and what impact it may potentially have. Due to multicentricity of the legal sources' systems in the member states, the EU law underway will also affect their constitutional orders. To tackle the research task, it is crucial to delineate the broader context of the challenges surrounding the enforcement of social and environmental accountability throughout global value chains, which arise at the intersection of the existing governance mechanisms' quality, and the legal as well as organisational MNEs' logics. These interconnected issues are addressed in the first section of the paper. The second section covers CSDDD as reflecting and potentially accelerating regulatory trends.

Streszczenie

Obowiązek należytej staranności przedsiębiorstw wielonarodowych w zakresie ochrony praw człowieka i środowiska. Przypadek prac prawodawczych Unii Europejskiej

Podejmowane na poziomie międzynarodowym i państwowym wysiłki zorientowane na ustanowienie efektywnych regulacji aktywności przedsiębiorstw wielonarodowych w obszarze praw człowieka i ochrony środowiska, wkraczają obecnie w intrygującą fazę. Tendencja w zakresie wprowadzania prawnych zobowiązań znajdujących zastosowanie w ich złożonych, transnarodowych strukturach nabiera tempa, a nadchodząca Dyrektywa Unii Europejskiej w sprawie należytej staranności przedsiębiorstw w zakresie zrównoważonego rozwoju może mieć istotne znaczenie dla tego procesu. Celem badawczym niniejszego studium jest wykazanie, w jaki sposób analizowany projekt wpisuje się w obecny krajobraz regulacji odpowiedzialności przedsiębiorstw wielonarodowych, i jak może na niego oddziaływać. Z uwagi na multicentryczność systemów źródeł prawa w państwach członkowskich, analizowane prace prawodawcze UE wpłyną również na ich porządki konstytucyjne. Dla realizacji tego zadania badawczego kluczowe jest nakreślenie szerszego kontekstu wyzwań związanych z egzekwowaniem społecznej i ekologicznej odpowiedzialności w ramach łańcuchów wartości, które to wyzwania są wypadkową jakości istniejących mechanizmów sterowania oraz prawnej i organizacyjnej logiki przedsiębiorstw wielonarodowych. Te wzajemnie sprzężone problemy stanowią przedmiot pierwszej części opracowania. W drugiej części wskazano trendy regulacyjne, które odzwierciedla i potencjalnie wzmacnia przyszła dyrektywa.

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I. The regulatory landscape and MNEs as a regulatory challenge – essential aspects of dynamics and complexity

Power, global reach and the significance of MNEs' impact on people's lives, institutions, and natural environment have sparked a long-standing, multi-stakeholder discussion on responsibility of these companies. It centres around the need for effective regulatory instruments that can leverage their financial, technological, and structural resources to address social and environmental issues, while also enforcing MNEs' accountability for harm resulting from their operations. One of the newest rulemaking endeavours in this regard is currently underway in the European Union. The proposal for CSDDD, adopted by the European Commission in February 2022, is advancing through the legislative process. The final text is still to be determined, yet the ongoing proceedings concerning legal provisions related to corporate accountability at the EU level deserve attention as they meaningfully represent recent developments in the system regulating MNEs' conduct internationally. The draft directive establishes human rights and environmental obligations for companies concerning their actual and potential adverse impact in these domains, importantly – throughout their entire transborder chains of diverse business activities and relations of ownership, control and cooperation. Such spatial and material coverage of the new regulation holds the promise of an actual contribution to the continuous efforts at coping with the regulatory challenge posed by MNEs. In order to effectively address the research aim of this paper, it is necessary to place the proposed obligatory corporate sustainability due diligence (CSDD) in the broader context of issues related to the effective enforcement of MNEs' social and environmental accountability.

Over the last several decades, the evolution of a landscape of MNEs' accountability regulations has been affected by the changing patterns of political and economic power distribution tangled with the accompanying narratives on these entities. The problem of a regulatory deficit related to MNEs has been increasingly recognized at least since the 70's, when the works on the Codes of Conduct for Transnational Corporations were launched within United Nations with the intention (albeit not unanimous) to establish a mandatory legal framework to govern MNEs internationally. The negotiations failed after more than a decade, which coincided with the rise of the 90's neoliberalism, and the accompa-

nying promotion of a voluntary approach and corporate self-regulation. Even though the discourse on MNEs governance is traditionally perceived as polarized between mandatory and voluntary approaches, the actual regulatory landscape is a complex system, with a structure built of at least three main, interwoven components – identified and based on the sustainability norms-setter criterion. Firstly, it consists of norms created by states – individually or collectively. MNEs, or rather the individual units forming their transnational organizational structures – global value chains, are obviously subject to the sovereign jurisdictions of the states in which they operate. This entails their simultaneous subjection to multiple legal regimes varying significantly in terms of the restrictiveness and enforceability. In turn, the normative foundations of MNEs' social and environmental responsibility aimed directly and comprehensively at multinationals (as complex economic organizations operating on the basis of transnational networks, and devoid of international legal subjectivity) so far created by states at the international level, e.g. OECD Guidelines for Multinational Enterprises, lack the mandatory character. Secondly, voluntary norms of MNEs' social and environmental performance emerge as a result of various business individual or collective self-regulatory mechanisms, sometimes equipped with external compliance verification procedures. Thirdly, specific regulatory functions toward MNEs are also exercised by so called multi-stakeholder initiatives. These institutions, frequently transnational, run without an exclusive participation of state and inter-governmental bodies, undertake norm-setting, implementation and monitoring activities carried out jointly by different actors – including public and private, market and civil society entities. Considering the elements at play within the international, multilevel system of human rights and environmental norms for MNEs, it can be characterized as a composition of interconnected governance mechanisms, encompassing mandatory legal frameworks and voluntary commitments that can be of public, private or hybrid nature[1].

The effectiveness of this intricate regulatory structure is greatly influenced by the nature of MNEs as entities subject to its governance. Two characteristics make MNEs a particular regulatory challenge. Firstly, it is a legal formula of multinationals operating internationally as corporate groups based on

[1] P. Zumbansen, *Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective*, "Journal of Law and Society" 2011, vol. 38, iss. 1, pp. 50–75.

the principle of legal separation between parent company and foreign subsidiaries, which basically prevents the former's liability for the adverse human rights and environmental effects of the latter's conduct. Secondly, it is their structural logic, as they form transnational networks – production and other business activity chains simultaneously located within multiple legal orders, and unfolding beyond national jurisdictions[2]. As a result, a specific disparity exists between the economic and legal aspects of MNEs. While they function as complex and networked yet cohesive economic organisms, their legal framework is highly fragmented. What further exacerbates challenges in enforcing MNEs' liability, within the context of their economic consolidation and legal as well as geographical dispersion, is the fact that MNEs are increasingly organized as global value chains, within which a system of relations based on equity ownership (usually parent and subsidiary firms) is accompanied by a dense network of various contractual arrangements – e.g. subcontractors and suppliers. Even if governed centrally across different jurisdictions, individual business entities functionally integrated into corporate networks, by principle, fall outside the purview of the head company's accountability in terms of their social and environmental externalities.

Considering that MNEs may have hundreds of subsidiary entities (plus vast amount of various economic agents linked by contractual ties) spread across more than a hundred states, and the absence of a unified international legal system that would exercise effective, comprehensive jurisdiction over an enterprise as a whole, MNEs seem to be "both legally ubiquitous and yet legally invisible"[3]. The latter is a source of profound difficulties for victims of the multinationals' misconduct to look for a fair remedy, especially if the *locus delicti* happens to be situated within dysfunctional legal orders where fair compensation mechanisms are not accessible or even not available. The former, in turn, opens up a possibility for global value chains – if responsibly and smartly governed – to function as transnational governance orders[4]

[2] L.C. Backer, *Regulating Multinational Corporations: Trends, Challenges, and Opportunities*, "The Brown Journal of World Affairs" 2015, vol. 22, no. 1, pp. 153–173.

[3] V.G. Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, "Chicago Journal of International Law" 2016, vol. 17, no. 2, p. 406.

[4] L.C. Backer, *Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse*, "UC Irvine Journal of International, Transnational, and Comparative Law" 2016, vol. 1, iss. 11, p. 59.

transmitting high sustainability standards beyond borders, thereby contributing to alleviation of the shortage in this regard in their foreign localizations.

Importantly, the issue of MNEs accountability and the construction as well as feasibility of the respective regulatory landscape, arises as an outcome of a complicated interplay between states and MNEs. It involves distribution of power, functions and responsibilities, in terms of constitutional protection of human rights and environment, intertwined with the dynamics of globalisation processes, and the policy and governance discourse at the domestic and international levels[5]. As for the final aspect mentioned, it encompasses voices from various stakeholders, including civil society organizations, among which the calls for the establishment of the binding norms regarding the social and environmental impact of MNEs, and applicable to their transnational structures, are periodically growing stronger. It has been the case through the recent years, with the important discussion and legal practice invigorating the role of the United Nations Guiding Principles on Business and Human Rights (UNGPs) endorsed in 2011. The UN document, already widely recognized as a crucial benchmark in the field of business and human rights, is based on the three-pillar – "protect, respect and remedy" framework, denoting respectively: obligations of states to ensure human rights protection by "third parties, including businesses enterprises"[6] through "effective policies, legislation, regulations and adjudication"[7]; responsibility of business enterprises to respect human rights; and access to a fair remedy for victims of human rights violations by businesses. What is particularly significant for this paper's research aim is that, according to UNGPs, states should clearly articulate their expectations toward businesses headquartered within their jurisdiction to respect human

[5] L.C. Backer, *The Emerging Normative Structures of Transnational Law: Non-State Enterprises in Polycentric Asymmetric Global Orders*, "Brigham Young University Journal of Public Law" 2016, vol. 31, iss. 1; A. Hadała-Skóra, S. Grabowska, *The Duty to Care for the State of the Environment in Polish Constitutional Regulations*, "Przegląd Prawa Konstytucyjnego" 2019, no. 10, pp. 103–121; A. Młynarska-Sobaczewska, J. Zaleśny, *GAFAM – Global Digital Corporations as Participants in Political Processes*, "Przegląd Prawa Konstytucyjnego" 2022, no. 3, pp. 225–236.

[6] United Nations, *"Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, HR/PUB/11/04, Geneva 2011, Foundational principle no. 1.

[7] *Ibidem*.

rights in all their operations. This implies that states, while not required but also not prohibited by international law from taking such actions, may regulate (even by extraterritorial jurisdiction and enforcement) extraterritorial activities of companies domiciled in their territory, provided that there is a recognized basis of jurisdiction[8]. Importantly, human rights due diligence, understood as a process by which companies identify, prevent, mitigate and account for how they address their actual and potential adverse impacts on human rights, has been reintroduced as one of the key concepts set in UNGPs[9]. It has also been included and extended by environmental and governance aspects in the OECD Guidelines on Multinational Enterprises. Both documents are referred to in the examined draft CSDDD as a proper standard for the approach to due diligence, which falls under the notion of "corporate sustainability due diligence" in the upcoming EU regulation.

II. The EU corporate sustainability due diligence law underway as reflecting and accelerating trends in MNEs' accountability regulatory landscape

The EU Draft Directive imposes value chain-wide CSDD obligations on large companies (the turnover and employee threshold to be determined in the final negotiations) based or operating in the EU[10]. The requirements entail the operations of the parent company and its foreign subsidiaries, as well as the activities of direct and indirect business partners[11] within MNEs' transnational networks in human rights and environmental issues such as: forced labour, child labour, labour exploitation, workplace health and safety, climate change, pollution, ecosystems degradation, and biodiversity loss[12]. The draft obliges companies in scope to make due diligence an integral part of their business policies. It requires that they identify, prevent and mitigate potential adverse human rights and environmental impacts of their operations, identify actual

[8] *Ibidem,* Foundational principle no. 2.

[9] *Ibidem,* Foundational principle no. 15.

[10] European Commission, *Proposal for a directive of the European Parliament and the on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/*1937, COM(2022) final, 2022, Art. 2.

[11] *Ibidem,* Art. 1.

[12] *Ibidem,* Explanatory memorandum.

adverse impacts, bring these impacts to an end, and minimise their extent[13]. The proposal establishes a framework for civil liability for damage occurring as a result of a failure in compliance with due diligence obligations, expecting member states to set forth civil liability rules in order to guarantee that the victims of the adverse impacts are effectively compensated. The member states shall also establish provisions on sanctions applicable in the event of violations of national laws adopted pursuant to CSDDD[14].

The draft CSDDD exemplifies the recent tendencies toward institutionalization and enforcement of MNEs' accountability for their foreign social and environmental records. On the one hand, these tendencies include the increasing utilisation and testing of the extraterritorial application of already existing legal instruments (i.e. tort law) to attribute "foreign liability" directly to parent companies by initiating litigation before the home state court[15]. On the other hand, they encompass hardening MNEs' accountability throughout entire global value chains by establishing new regulatory solutions, with a prominent example of mandatory due diligence[16]. The works on the examined draft legislation were preceded and accompanied by a wave of national legislation in this regard, e.g. in France and Germany. Establishing EU legal framework on CSDD aims at harmonising domestic requirements in this regard, and create cross-border playing field for the subjected companies. Importantly, the CSDDD potentially expands the spatial scope of transnational regulation of activities undertaken within value chains through binding norms, to an unprecedented extent as a result of its extraterritorial reach and the fact it endows a range of current regulations (The Environmental Liability Directive, i.a.) with an external, extraterritorial orientation. A substantial number of companies, spanning various sizes and sectors globally, may potentially be obligated (through

[13] *Ibidem,* Art. 4–8.

[14] *Ibidem,* Art. 20, 22.

[15] L. Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability*, Hague 2012, pp. 44–57.

[16] A. Schilling-Vacaflor, A. Lenschow, *Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges*, "Regulation and Governance" 2021, pp. 10–13, https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12402 (15.06.2023); Ch. Villiers, *New Directions in the European Union's Regulatory Framework for Corporate Reporting, Due Diligence and Accountability: The Challenge of Complexity*, "European Journal of Risk Regulation" 2022, vol. 13, iss. 4, pp. 560–562.

contractual arrangements) to adhere to the standards established in CSDDD due to their involvement in MNEs' in scope value chains.

Legalization of mandatory due diligence at both domestic and EU levels integrates with the previously created regulatory arrangements by translating expectations, recommendations and soft norms (like UNGPs) into hard law[17]. As stated in the CSDDD proposal, application of voluntary measures has not proven to bring a sufficient improvement in eliminating negative externalities from EU production and consumption, and it does not ensure legal certainty for neither companies nor victims if harm occurs[18]. At the same time, by overlapping with the three above-mentioned components of the MNEs' social and environmental accountability regulatory landscape, CSDDD can serve as a transmitting belt, fostering circulation (also in spatial terms) of regulatory functions between them. For example in the proposal, self-regulatory mechanisms – industry schemes, codes of conduct, third party verification, and multi-stakeholder initiatives are incorporated into the framework of mandatory due diligence process as compliance verification supporting means. This corresponds to the growing "foreign direct liability"/"value chain liability" litigation trend[19], and representative lawsuits when MNEs' home state courts, recognising their jurisdiction to adjudicate on a case concerning human right abuses and environmental damage that took place in a foreign location, referred to MNE's internal policies, standards and auditing procedures declared to be applied transnationally, among circumstances relevant for determining the scope of a parent company's duty of care and potential liability[20]. The prospective interrelations and impact of the directive on the wave of

[17] M.-T. Gustafsson, A. Schilling-Vacaflor, A. Lenschow, *The politics of supply chain regulations: Towards foreign corporate accountability in the area of human rights and the environment?*, "Regulation and Governance" 2023, https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12526 (15.06.2023).

[18] European Commission, *op.cit.*, Explanatory memorandum.

[19] P. Verbruggen, *New Liabilities in Global Value Chains: An Introduction*, "European Journal of Risk Regulation" 2022, vol. 13, iss. 4, pp. 542–546; M. Rajavuori, A. Savaresi, H. Asselt, *Mandatory due diligence laws and climate change litigation: Bridging the corporate climate accountability gap?*, "Regulation and Governance" 2023, https://onlinelibrary.wiley.com/doi/10.1111/rego.12518 (15.06.2023).

[20] E.g.: The Court of Appeal at the Hague, Judgment of 18 December 2015, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHDHA:2015:3586 (15.06.2023).

transnational litigations certainly extend beyond the incorporation of voluntary mechanisms in the process of identifying the liability of the parent company. Adoption of CSDDD will possibly significantly accelerate this trend as it provides grounds for the home state courts to accept their cognition, and the liability regime on which the litigation might be based.

While the upcoming EU legislation on CSDD tends to be seen as an important and zealous step toward improvement in business social and environmental governance, it is crucial to acknowledge its limitations that may potentially undermine the substantial contribution to MNEs' accountability enforcement. According to sceptical voices, the "important loopholes"[21] and excessive reliance on contractual provisions and third-party verification schemes to demonstrate compliance can be found in the proposed civil liability framework. The reasonable concerns in this regard stem from the "obligations of means, not of result"[22] approach to due diligence. This might compromise the effectiveness of CSDDD and enable MNEs to continuously avoid liability by manipulating value chain design and by incorporating useful contractual clauses, e.g. aimed at gaining assurance from business partners to comply with an MNE's code of conduct[23]. As a result, taking the unique adaptive capabilities of MNEs, including their capacity to address regulatory challenges, when assessing the potential feasibility of CSDDD, it is fair to consider the risk of MNEs quickly learning how to master the construction of sophisticated "due diligence" box-ticking systems.

III. Conclusion

The EU law introducing the requirements for MNEs to identify, prevent, mitigate, and account for their adverse human rights and environmental impacts across their value chains is on the horizon. After the European Parliament voting in favor of mandatory due diligence in June 2023, with its position

[21] A.M. Pacess, *Civil Liability in the EU Corporate Sustainability Due Diligence Directive Proposal: A Law & Economics Analysis,* European Corporate Governance Institute – Law Working Paper No. 691/2023, p. 15.

[22] *Ibidem,* p. 4.

[23] *Ibidem.*

advancing some of the draft CSDDD provisions, including the scope of subjected companies and business relationships in the value chain, applicability to the financial sector, and companies' climate change transition plans, the directive is expected to undergo a final agreement after the trilogue negotiations between the Commission, the Council, and the Parliament. These negotiations are anticipated to be concluded in 2024, followed by a two-year period granted for member states to implement CSDDD.

As indicated in the paper, the law underway has the potential for a significant impact on the MNEs accountability regulatory landscape. CSDDD represents and possibly enhances the recently renewed discourse and rising trend toward the regulation of MNEs through obligatory instruments with cross-border applicability. It intersects and overlaps with existing components of the regulatory landscape, building upon a variety of measures – domestic and international, public and private, voluntary and mandatory – in the forthcoming due diligence system.

The proposed directive anticipates a civil liability regime aimed at enforcing MNEs' liability within and outside the EU, and it may trigger further legal actions before home states' courts falling under the "foreign direct liability" category. Since this type of litigation inevitably involves testing the boundaries of jurisdiction, the prospective impact of CSDDD on European and worldwide jurisprudence makes an important path for future research, also in the area of constitutional studies.

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