

# Mandatory Corporate Due Diligence regarding Human Rights, the Environment and Good Governance?

HAROLD KOSTER: PROFESSOR OF COMPANY LAW AT THE UNIVERSITY OF LEIDEN IN THE NETHERLANDS\*



In September 2020, the European Parliament Committee on Legal Affairs published a draft report and a draft Directive about mandatory corporate due diligence regarding human rights, the environment and good governance. The draft Directive is aimed at ensuring that business enterprises operating in the internal market fulfil their duty to respect human rights, the environment and good governance and do not cause or contribute to risks to human rights, the environment and good governance in their activities and those of their business relationships. The Directive further aims to ensure that business enterprises can be held accountable for their adverse human rights, environmental and governance impacts throughout their value chain. If implemented, many business enterprises will need to increase their efforts, that is clear.

Regarding the scope, the draft Directive applies to all business enterprises governed by the law of a Member State or established in the EU, as well as non-EU business limited liability enterprises doing business in the EU by selling goods or providing services. However, Member States may exempt micro-undertakings as defined in Directive 2013/34/EU from the application of these obligations. The draft requires EU Member States to introduce rules to compel all business enterprises to ‘carry out due diligence with respect to human rights, environmental and governance risks in their operations and business relationships’. Risk is defined as a potential or actual adverse impact on individuals, a group, and other organizations and governance risks focusses on ‘the good governance of a country, region or territory’. Governance risks include corruption and bribery, as well as situations in which a business

enterprise ‘becomes improperly involved in local political activities, makes illegal campaign contributions or fails to comply with the applicable tax legislation’.

Based on the draft, business enterprises are required to identify and assess on an ongoing basis and by means of an appropriate monitoring methodology whether their operations and business relationships cause or contribute to any human rights, environmental or governance risks. If the business enterprise concludes that it does not cause or contribute to these risks, it must publish a statement to that effect, along with its risk assessment. If however risks emerge or the business enterprise enters new business relationships that can pose risks, this needs to be reviewed. If risks are identified, a due diligence strategy must then be established that specifies the risks that are likely present and their level of severity and urgency. Moreover, the business enterprise has to publicly disclose detailed, relevant and meaningful information about its value chain, including names, locations and other relevant information concerning subsidiaries, suppliers and business partners, and needs to state the methodology followed in creating its strategy, including the stakeholders consulted. The strategy must be made public and communicated to workers and business relationships and the effectiveness of the due diligence strategy should be reviewed once per year. In addition, business enterprises are required to verify regularly that suppliers and sub-contractors comply with the relevant obligations. The draft states that there is a collective responsibility among management and boards for ensuring that the diligence processes are consistent with the Directive. Also, Member States must have a competent governmental authority that can conduct investigations to ensure compliance whilst repeated infringements can lead to criminal penalties.

Remarkably, according to the draft, trade unions have ‘a right ... to be involved in the establishment and implementation of the due diligence strategy’. But, the draft goes even further, as it also includes the requirement for large companies to establish an advisory committee, composed of stakeholders and experts, to advise the board ‘on due diligence matters and propose measures to cease, monitor, disclose, address, prevent and mitigate risks’. With this, are we witnessing the creation of a new company organ, the stakeholders meeting?

\* Email: h.koster@law.leidenuniv.nl.

It certainly does look like it. And it goes even further, as business enterprises are also required to establish grievance mechanisms that allow stakeholders to 'voice concerns regarding the existence of human rights, environmental or governance risks'. If this gets through, stakeholders impact will increase, that's for sure.

The next step in the process is requesting the European Commission to submit a formal legislative proposal. In my opinion the draft is taking this into the right direction, and I hope the European Commission submits a formal proposal soon. Let us wait and see what happens next.