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Corporate sustainability in Ukraine: Challenges of European integration

Zrównoważony rozwój korporacyjny w Ukrainie. Wyzwania integracji europejskiej

Abstract: The article examines the draft EU Directive on corporate sustainability due diligence and its significance for Ukraine as an aspiring EU member. I explore the concept of corporate sustainability and its relationship with corporate social responsibility (CSR), the CSR obligations of Ukraine stemming from its Association Agreement with the EU, and its not-so-successful attempt to introduce non-financial reporting. The analysis then shifts to the proposed Directive, highlighting its departure from voluntary CSR to normative corporate standards. I delve into the problematic aspects of the proposal, categorising them into a) general challenges pertinent to any nation implementing the Directive and b) challenges specific to Ukraine.

Keywords: corporate sustainability, due diligence, corporate social responsibility, non-financial reporting, corporate liability, Association Agreement, Ukraine

Abstrakt: Artykuł analizuje projekt unijnej dyrektywy dotyczącej obowiązkowej staranności korporacyjnej w zakresie zrównoważonego rozwoju oraz jej znaczenie dla Ukrainy jako kraju aspirującego do członkostwa w UE. W artykule eksploruję koncepcję zrównoważonego rozwoju korporacyjnego i jego relacje z odpowiedzialnością społeczną przedsiębiorstw, zobowiązaniami Ukrainy wynikającymi z Umowy Stowarzyszeniowej z UE w dziedzinie CSR oraz niezbyt udaną próbę wprowadzenia raportowania niefinansowego. Analiza przechodzi następnie do omówienia proponowanej dyrektywy, podkreślając jej odejście od dobrowolnych praktyk CSR na rzecz normatywnych standardów korporacyjnych. Wnikam w problematyczne aspekty tej propozycji, kategoryzując je na: a) ogólne wyzwania dotyczące każdego państwa wdrażającego dyrektywę oraz b) wyzwania specyficzne dla Ukrainy.

Słowa kluczowe: zrównoważony rozwój korporacyjny, staranność, odpowiedzialność społeczna przedsiębiorstw, raportowanie niefinansowe, odpowiedzialność korporacyjna, Umowa Stowarzyszeniowa, Ukraina

1. Introduction

In June 2022, amidst the unprecedented backdrop of full-scale Russian military aggression, Ukraine was granted EU candidate status. With an eye to eventual membership, the nation is now confronted with the monumental task of adopting the established EU law and implementing numerous reforms. One problematic area in which Ukraine has to raise its policies and business practices to EU standards is corporate sustainability. While the EU has embraced corporate social responsibility (CSR) and non-financial reporting and has integrated it into regulatory frameworks, Ukraine faces the distinct challenge of cultivating these practices from a nascent stage.

Coincidentally, the EU stands poised at the turning point in its trajectory of corporate sustainability. A recent proposal for a Directive on corporate sustainability due diligence signals a pivotal shift from voluntary CSR practices towards binding regulations and a liability regime. When the Directive is adopted, Ukraine will eventually face the need to implement it, which is expected to bring about a significant upheaval for domestic businesses. The Ukrainian landscape presents specific difficulties in introducing the mandatory human rights and environmental due diligence, which have been shaped by a complex blend of historical legacies and contemporary dynamics and which must be navigated to ensure a sustainability agenda is fostered in Ukraine.

2. Corporate sustainability: General remarks

There is no universally accepted academic definition of corporate sustainability. Popular sources describe it as ‘a business approach that creates long-term shareholder value by embracing opportunities and managing risks deriving from economic, environmental and social developments’¹ or ‘an approach aiming to create long-term stakeholder value through the implementation of a business strategy that focuses on the ethical, social, environmental, cultural, and economic dimensions of doing business’.² When comparing the two definitions, one sees not a conceptual difference but simply word play – indeed, shareholder value and stakeholder value are not the same, and one may debate which is correct, but it won’t be a debate on the core essence of the corporate sustainability concept.

Obviously, corporate sustainability borrows the boundaries of its subject matter from general sustainable development/sustainability concepts, following the familiar three pillars of social, environmental and economic.³ Corporate sustainability is the application of sustainable development on the microeconomic (corporate) level. Mel Wilson rightfully observes that sustainable development by itself does not provide the necessary arguments for why companies should care about these issues. He suggests that those arguments come from corporate social responsibility (CSR) and stakeholder theory. In particular, CSR contributes to corporate sustainability by providing ethical arguments for corporate managers to support sustainable development: if society deems sustainable development valuable, corporations hold an ethical obligation to facilitate its advancement.⁴

Corporate social responsibility (CSR) indeed maintains a close relationship with corporate sustainability, which is most relevant to this paper. In 1953, Howard R. Bowen famously defined social responsibility as the ‘obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of

¹ T. Dyllick, K. Muff, *Clarifying the meaning of sustainable business: Introducing a typology from business-as-usual to true business sustainability*, “Organization & Environment” 2015, 29(2), p. 1-19, https://www.bsl-lausanne.ch/wp-content/uploads/2015/04/Dyllick-Muff-Clarifying-Pub-Online.full_.pdf [access: 24.08.2023].

² Corporate sustainability – From Wikipedia, the free encyclopedia, https://en.wikipedia.org/wiki/Corporate_sustainability [access: 24.08.2023].

³ *Our Common Future*, World Commission on Environment and Development, Oxford University Press, Oxford 1987.

⁴ M. Wilson, *Corporate sustainability: what is it and where does it come from?*, “Ivey Business Journal”, March/April 2003, <https://iveybusinessjournal.com/publication/corporate-sustainability-what-is-it-and-where-does-it-come-from/> [access: 24.08.2023].

our society'.⁵ Since then, the concept of CSR continued to develop and expand. The contemporary understanding of CSR emphasises the responsibilities of corporations beyond what the law or legislation requires them to do.⁶

EU law used to define CSR as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.⁷ In 2011, the European Commission proposed the 'new definition' of CSR as 'the responsibility of enterprises for their impacts on society'. To fully meet their corporate social responsibility, enterprises should have in place a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy, in close collaboration with their stakeholders.⁸ The Commission further notes that governments can use regulation 'to create an environment more conducive to enterprises voluntarily meeting their social responsibility'.⁹ However, the new CSR definition does not change the nature of CSR, which has historically focussed on corporate voluntarism and the expectations of corporations to act as citizens with responsibilities arising from their role as social partners.¹⁰ The pivotal EU legal tool designed to foster CSR is the Non-Financial Reporting Directive (NFRD), which deals with accountability. A key aspect to remember about accountability is that it does not refer to one's duty to act in a certain way, but only to one's duty to report on one's actions¹¹ (or inaction).

Although corporate sustainability is a much newer concept than CSR, the two often serves as synonyms. One may view both as 'voluntary business activities' that aim to contribute to better performance of corporations in the

⁵ H.R. Bowen, *Social Responsibility of the Businessman*, Harper & Row, New York 1953, p. 6.

⁶ M. Ashrafi, M. Adams, T. R. Walker, G. Magnan, *How corporate social responsibility can be integrated into corporate sustainability: a theoretical review of their relationships*, "International Journal of Sustainable Development & World Ecology" 2018, 25(8), p. 3, <http://dx.doi.org/10.1080/13504509.2018.1471628>.

⁷ European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee – Implementing the partnership for growth and jobs: making Europe a pole of excellence on corporate social responsibility, COM/2006/0136 final.

⁸ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A renewed EU Strategy 2011-14 for corporate social responsibility, COM/2011/0681 final, para. 3.1.

⁹ Communication from the Commission, COM/2011/0681 final, para. 3.4.

¹⁰ A. Ramasastry, *Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability*, "Journal of Human Rights" 2015, 14(2), p. 237, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705675 [access: 25.08.2023].

¹¹ M. Wilson, *Corporate sustainability...*, op. cit.

social, environmental and economic spheres.¹² In their study, Ashrafi et al. discuss different perspectives on the relationships between CSR and corporate sustainability, acknowledging terminological ambiguity and disagreement. The authors suggest that CSR can be integrated into corporate sustainability as either a transitional stage or ultimate end-goal for contributing to sustainable development. CSR as a transitional stage is when a corporation moves through the spectrum towards sustainable development, so that it might go beyond what laws and regulations require them to do, yet does not necessarily encompass comprehensive sustainable activities. CSR as part of a corporation's ultimate goal is when not only the triple bottom line is included in every aspect of its activities, but the long-term goals are also salient and it therefore represents corporate sustainability principles.¹³

Such a view may be productive from the managerial perspective, but cannot suffice for a lawyer. In this paper, I argue that CSR is a chronological stage and essential component in the academic discourse and business practice of corporate sustainability. However, modern corporate sustainability envisions more than voluntary performance and reporting. Admittedly, the CSR doctrine is dominated by the company's interests, and ethical arguments heavily depend on business ones. A company adopts an ethical attitude because there is a business case for it. It enhances a company's competitiveness to behave in an ethical way, to build strong relationships with stakeholders and to report on how beneficial its activities are to the society. 'CSR should be considered as a form of strategic investment'.¹⁴

It is time for other interests, mandatory legislation and liability regimes to step in. A contemporary legal framework for corporate sustainability necessarily incorporates binding legal tools, and the interests of a company is no longer prevalent. While this challenge is significant for all nations, even most advanced ones, for Ukraine this challenge may be especially difficult, though absolutely necessary for its European integration.

¹² S.F. Lo, *Performance evaluation for sustainable business: a profitability and marketability framework*, "Corporate Social Responsibility and Environmental Management" 2010, 17(6), p. 311–319, <http://dx.doi.org/10.1002/csr.214>.

¹³ M. Ashrafi, M. Adams, T. R. Walker, G. Magnan, *How corporate...*, p. 8.

¹⁴ A. McWilliams, D.S. Siegel, P.M. Wright, *Corporate social responsibility: Strategic implications*, "Journal of Management Studies", 2006, 43(1), p. 4, <https://doi.org/10.1111/j.1467-6486.2006.00580.x>.

3. The EU–Ukraine Association Agreement: CSR and non-financial reporting obligations

In June 2022, Ukraine acquired its EU candidacy status.¹⁵ As of now, its relationship with the EU continues to be framed by the 2014 Association Agreement of 2014¹⁶ (AA). The AA places sustainable development, CSR and accountability on Ukraine's European integration agenda, albeit in rather general provisions. According to Art. 293 (3) AA, 'the Parties shall strive to facilitate trade in products that contribute to sustainable development, including products that are the subject of schemes such as fair and ethical trade schemes, as well as those respecting corporate social responsibility and accountability principles'. Article 422 AA stipulates that 'the Parties shall promote corporate social responsibility and accountability and encourage responsible business practices, such as those promoted by the UN Global Compact of 2000, the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 1977 as amended in 2006, and the OECD Guidelines for Multinational Enterprises of 1976 as amended in 2000'.

Of more substantial interest are Ukraine's specific obligations concerning legislative approximation. Pursuant to Annex XXXV to Chapter 13 of the AA ('Company law, corporate governance, accounting and auditing'), Ukraine undertakes to gradually approximate its legislation to Directive 2006/43/EC of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, among other documents.¹⁷ This Directive was amended by Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings,¹⁸ and Directive 2013/34/EU was subsequently amended by Directive 2014/95/EU of 22 October 2014 on disclosure of non-financial and diversity information by certain large

¹⁵ EU enlargement policy – Ukraine, <https://www.consilium.europa.eu/en/policies/enlargement/ukraine/> [access: 26.08.2023].

¹⁶ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, p. 3–2137.

¹⁷ Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC, OJ L 157, 9.6.2006, p. 87–107.

¹⁸ Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182, 29.6.2013, p. 19–76.

undertakings and groups¹⁹ (Non-Financial Reporting Directive [NFRD]). Given this sequence, Iryna Kovalenko contends that although the AA does not explicitly mention the NFRD because the AA was drafted earlier, Ukraine is obliged to implement the NFRD.²⁰ Has Ukraine fulfilled this obligation? An attempt has been made, yet it cannot be lauded as a success.

4. Ukraine: Governance report

In 2017, the Ukrainian legislature supplemented the Law ‘On Accounting and Financial Reporting in Ukraine’,²¹ which defines a governance report as ‘a document that contains financial and non-financial information that characterises the state and prospects of development of the enterprise and discloses the main risks and uncertainties of its activities’ (Article 1). Pursuant to Article 11 (7) of the Law, microenterprises and small enterprises are exempt from submitting governance reports, while medium-sized enterprises have the right not to include non-financial information in governance reports. There are no other provisions in the Law regarding the content of a governance report, e.g. on the specific information to be disclosed.

More detailed guidance can be found in the Order of the Ministry of Finance of Ukraine of 7 December 2018 No. 982, which lays down ‘Methodological recommendations for the preparation of a governance report’.²² The Order recommends structuring a governance report according to the following categories: 1) organisational structure and description of the enterprise’s activities,

¹⁹ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ L 330, 15.11.2014, p. 1–9.

²⁰ I. Kovalenko, *Voraussetzungen für die Einführung einer Berichterstattung über Informationen nichtfinanzieller Art in der Ukraine am Beispiel Österreichs* [Prerequisites for the introduction of non-financial reporting in Ukraine using the example of Austria], “Zeitschrift für Europarecht, Int. Privatrecht & Rechtsvergleichung” 2022, H. 4, p. 180–186.

²¹ Закон України від 16 липня 1999 No. 996-XIV “Про бухгалтерський облік і фінансову звітність в Україні”, [Zakon Ukraïni vid 16 lipnâ 1999 No. 996-XIV “Pro buhgalters’kij oblik i finansovu zvitnist’ v Ukraïni”] [Law of Ukraine of 16 July 1999 No. 996-XIV “On Accounting and Financial Reporting in Ukraine” „]“Офіційний вісник України” [“Oficijnij visnik Ukraïni”]] [“Official Herald of Ukraine” 1999, item 33, p. 71.

²² Методичні рекомендації зі складання звіту про управління: Наказ Міністерства фінансів України від 7 грудня 2018 No. 982 [Metodični rekomendacii zi skladannâ zvitv pro upravlinnâ: Nakaz Ministerstva finansiv Ukraïni vid 7 grudnâ 2018 No. 982] [Methodological recommendations for the preparation of the governance report: Order of the Ministry of Finance of Ukraine of 7 December 2018 No. 982,] <https://zakon.rada.gov.ua/rada/show/v0982201-18#Text> [access: 26.08.2023].

2) performance results, 3) liquidity and obligations, 4) environmental aspects, 5) social aspects and personnel policy, 6) risks, 7) research and innovation, 8) financial investments, 9) development prospects and 10) corporate governance (prepared by companies – issuers of securities listed on stock exchanges or for which a public offering has been made). For large undertakings, with an average number of employees exceeding 500, the Order further recommends including non-financial performance indicators in governance reports. These indicators should contain information related to the impact of the enterprise's activities, particularly on the environment, social matters (including social care of employees), respect for human rights and actions against corruption and bribery. Where the undertaking does not have policies regarding these issues, the Order recommends providing an appropriate explanation in the non-financial information section.

Kovalenko rightfully points out that requirements for non-financial reporting should be established by parliamentary legislation rather than in a ministerial order.²³ Moreover, the Order's status remains advisory, albeit with the potential to cause harm by neglecting the principle of 'comply or explain'. Unlike the NFRD, which mandates that 'where the undertaking does not pursue policies in relation to one or more of those matters, the non-financial statement shall provide a clear and reasoned explanation for not doing so' (Article 1), the Ukrainian Order merely suggests offering an appropriate explanation. It is hardly surprising that governance reports in Ukraine predominantly focus on the company's financial metrics. Occasionally, the governance report shows no difference from traditional financial reporting, not disclosing any non-financial information.²⁴

Ukrainian businesses have effectively bypassed the stage in their development related to CSR and non-financial reporting. The introduction of non-financial reporting in Ukraine had a false start, and consequently, the idea failed to take root.

5. Mandatory human rights and environmental due diligence

The regulatory framework of CSR and non-financial reporting has proven inadequate at ensuring corporate accountability for negative impacts on human

²³ I. Kovalenko, *Voraussetzungen...*, p. 182.

²⁴ К. Гнедіна, П. Нагорний, [Звіт про управління: сутність та особливості формування К. Gnedina, P. Nagornij, *Zvit pro upravlinnâ: sutnist' ta osoblivosti formuvannâ*] [Governance report: Specifics of preparation and use], "Finansovi resursy: problemy formuvannia ta vykorystannia" [Financial resources: Issues of formation and use] 2021, 1(25), p. 134–142.

rights and the environment. Lise Smit articulately underscores this concern: ‘It does not help them at all if we say to them: “you cannot get any form of remedy from the company, but great news – the company might be required to report on you as a statistic in their next annual report”’.²⁵

Over the last decade, the mandatory legislation that requires large companies to conduct due diligence for the social, environmental and ethical risks within their business activities and to manage those risks efficiently has been rapidly expanding around the world. Examples of existing laws and legislative initiatives in Europe include the French law on the duty of vigilance for parent and outsourcing companies (2017), the German law on the corporate duty of care in supply chains (2021), the Norwegian law on business transparency, human rights and decent working conditions (2021), the Dutch parliamentary proposal on responsible and sustainable international business conduct, the Austrian parliamentary motion for a resolution on a supply chain law and the Belgian parliamentary proposal on the corporate duty of vigilance and care in value chains.²⁶

On 23 February 2022 the European Commission unveiled a proposal for a Directive on corporate sustainability due diligence.²⁷ Following numerous amendments adopted by the European Parliament on 1 June 2023,²⁸ the proposal is now being negotiated between the EU Council and Member States for further refinement.

The Explanatory Memorandum accompanying the proposal acknowledges that

voluntary action does not appear to have resulted in large scale improvement across sectors and, as a consequence, negative externalities from EU production and consumption are being observed both inside and outside

²⁵ L. Smit, *The importance of civil liability for a corporate human rights duty*, BIICL Blog, 16 March 2021, <https://www.biicl.org/blog/21/the-importance-of-civil-liability-for-a-corporate-human-rights-duty?cookieset=1&ts=1693345462> [access: 26.08.2023].

²⁶ Business and Human Rights Resource Centre, ECCJ publishes updated map & comparative analysis of mHREDD laws & legislative proposals in Europe, [21.03.2022], <https://www.business-human-rights.org/en/latest-news/eccj-updates-map-comparative-analysis-of-mhredd-laws-legislative-proposals-in-europe/> [access: 27.08.2023].

²⁷ European Commission, Proposal for a Directive on corporate sustainability due diligence and annex, https://commission.europa.eu/publications/proposal-directive-corporate-sustainability-due-diligence-and-annex_en [access: 27.08.2023].

²⁸ European Parliament, 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 and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html [access: 27.08.2023].

the Union. Certain EU companies have been associated with adverse human rights and environmental impacts, including in their value chains. Adverse impacts include, in particular, human rights issues such as forced labour, child labour, inadequate workplace health and safety, exploitation of workers, and environmental impacts such as greenhouse gas emissions, pollution, or biodiversity loss and ecosystem degradation.²⁹

The proposal introduces mandatory human rights and environmental due diligence (mHREDD) and establishes provisions for civil liability when companies which meet the criteria specified in the proposal regarding turnover and the number of employees fail to adhere to due diligence obligations outlined in Articles 7 and 8, causing otherwise avoidable harm. These obligations cover the six steps defined by the OECD Due Diligence Guidance for Responsible Business Conduct:³⁰ 1) integrating due diligence into policies and management systems, 2) identifying and assessing adverse human rights and environmental impacts, 3) preventing, ceasing or minimising actual and potential adverse human rights and environmental impacts, 4) assessing the effectiveness of measures, 5) communicating and 6) providing remediation (Recital 16).

The adoption of mHREDD represents a significant departure from voluntary CSR practices toward normative standards of corporate behaviour and a task that is far from easy. When the Directive is adopted, Ukraine sooner or later will need to implement it, which will be a significant upheaval for domestic businesses. In the ensuing sections of this paper, I delve into the problematic aspects of the proposal, categorising them into two groups: a) general challenges pertinent to any nation implementing the Directive and b) challenges specific to Ukraine due to its legal framework and business practices.

6. Proposal for the Directive: General challenges

6.1. 'Established business relationship'

In the Commission's proposal for the Directive, the due diligence obligations were limited to established business relationships. Established business relationships should mean such direct and indirect business relationships which are or are

²⁹ European Commission, *Proposal for a Directive...*, op. cit.

³⁰ OECD, OECD Due Diligence Guidance for Responsible Business Conduct, <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [access: 27.08.2023].

expected to be lasting, in view of their intensity and duration and which do not represent a negligible or ancillary part of the value chain (Recital 14, Article 1).

The European Parliament (EP) chose to eliminate the concept of ‘established business relationship’, a commendable amendment in my opinion. Indeed, confining the due diligence obligations solely to established business relationships might not adequately address sustainability issues across the entire value chain. Defining and determining ‘established business relationships’ could have posed practical challenges in terms of enforcement and interpretation. Last but not least, narrowing the scope of the Directive might have provided companies a conspicuous means to bypass the Directive’s requirements.

6.2. Applicability thresholds

The Commission’s proposal specified that the Directive would apply to companies which are formed in accordance with the legislation of a Member State, has more than 500 employees on average and a net worldwide turnover exceeding EUR 150 million in the latest financial year for which annual financial statements were prepared (or more than 250 employees and a net worldwide turnover surpassing EUR 40 million for companies operating in certain sectors) (Recital 21, Art. 1). The EP lowered the threshold to 250 employees and EUR 40 million turnover as a general rule. This is a welcome amendment too, as in today’s technology-driven world, a company’s impactful operations do not necessarily depend on an extensive workforce.

While SMEs are not included in the scope of the Directive, the EP stipulated that SMEs should have the possibility to apply the Directive on a voluntary basis and should for that purpose be supported through adequate measures and tools and be incentivised (Amendment 65, Recital 47).

6.3. Directors’ duty of care

Preparing the proposal, the Commission considered insights from a study it commissioned on directors’ duties and sustainable corporate governance (July 2020). The study recognised that enforcement of directors’ duty to act in the long-term interest of a company is limited:

If the EU were not to act, current enforcement levels of directors’ duty of care in Member States can be expected to remain low, in line with the existing trend. Directors would remain substantially accountable to the board and the shareholders, while stakeholders

would continue lacking legal standing to enforce directors' duty of care, even when they have a legitimate interest in the long-term sustainability of the company. At the social level, the persistence of this problem means that interested stakeholders (such as NGOs or trade unions) will continue being unable to act against companies and directors that fail to address their social or environmental risks or impacts.³¹

However, the proposal refrains from including the more far-reaching specific duties for directors proposed in the study. Under the proposal, directors maintain a general duty of care for the company, present in the company law of all Member States. Article 25 clarifies that such duty encompasses sustainability matters, including, where applicable, human rights, climate change and environmental consequences in the short-, medium- and long-term horizons. No amendments were made by the EP in this regard.

6.4. Obligations of means and safe harbour

The main obligations in this Directive should be 'obligations of means' (Recital 15), not of success. In terms of civil liability, this raises the issue of a 'safe harbour' against corporate liability. In certain areas of law, the phrase 'safe harbour' describes specific conditions which, if met, protect an entity against liability. In the context of the proposed Directive, 'safe harbour' means that a company shall be released from all legal actions once it proves that it carried out a legally valid due diligence assessment. The safe harbour exemption is contrasted with the use of due diligence as a procedural defence, which the defendant company can plead and seek to prove in court.³²

Is there indeed a 'safe harbour' in the proposal for a Directive? There is at least some language pointing in that direction: 'Member States should be required to lay down rules governing the civil liability of companies for damages arising due to its failure to comply with the due diligence process' (Recital 56). In other words, when the company has seemingly complied with the due diligence process (which might be a mere 'tick-box exercise'³³), but nevertheless harm has occurred, the company won't be held liable.

³¹ *Study on directors' duties and sustainable corporate governance – Final report*, European Commission, Directorate-General for Justice and Consumers, Publications Office 2020, p. 147, <https://data.europa.eu/doi/10.2838/472901> [access: 28.08.2023].

³² L. Smit, C. Bright, *The concept of a "safe harbour" and mandatory human rights due diligence*, CEDIS 2020, p. 11–13, https://cedis.novalaw.unl.pt/wp-content/uploads/2021/12/CEDIS_working-paper_the-concept-of-safe-harbour-1.pdf [access: 28.08.2023].

³³ *Ibidem*, pp. 13–20.

The EP made efforts to strengthen the case for corporate liability. It expanded the scope of the due diligence process to include the obligation to mitigate actual adverse impacts or provide remediation (Amendment 75, Recital 56).³⁴ In particular, Article 8 (2) underwent significant revision. While initially it read, ‘where the adverse impact cannot be brought to an end, Member States shall ensure that companies *minimise* the extent of such an impact’, the EP’s version reads, ‘where the adverse impact cannot *immediately* be brought to an end, Member States shall ensure that companies *adequately mitigate* the extent of such an impact, *while pursuing all efforts to bring the adverse impact to an end*’. Moreover, a new paragraph (2a) was added to Article 8, stipulating that ‘in cases where a company has caused an actual impact, appropriate measures shall be understood as measures which aim to mitigate the extent of an actual adverse impact, and remediate damage’. Essentially, this means a company that has caused harm cannot escape liability unless it undertakes remedial actions.

Article 22 of the proposal for the Directive, which governs the civil liability regime, has also undergone change, moving from the ‘safe harbour’ to ‘due diligence as a defence’ approach. One cannot but agree with Peter Muchlinsky in that ‘it remains to be seen how the proposal will fare in subsequent discussions’.³⁵

7. Ukraine-specific challenges

7.1. No ‘CSR/non-financial reporting’ period

EU businesses took their time to adapt to the legal framework of CSR and non-financial reporting, the legal basis of which is currently the NFRD. As noted above, there is no well-established tradition of CSR and NFR in Ukraine to build upon.

³⁴ Recital 56, 2nd sentence of the Commission’s proposal reads: ‘The company should be liable for damages if they failed to comply with the obligations to prevent and mitigate potential adverse impacts or to bring actual impacts to an end and *minimise their extent*, and as a result of this failure an adverse impact that should have been identified, prevented, mitigated, brought to an end or its extent minimised through the appropriate measures *occurred* and led to damage.’ The same sentence, as amended by the EP, reads: ‘The company should be liable for damages if they failed to comply with the obligations to prevent and mitigate potential adverse impacts or to bring actual impacts to an end and *mitigate them, or provide remediation*, and as a result of this failure *the company caused or contributed to* an adverse impact that should have been identified, *prioritised*, prevented, mitigated, brought to an end, *remediated* or its extent minimised through the appropriate measures, and led to damage.’

³⁵ P. Muchlinsky, *Advanced Introduction to Business and Human Rights*, Edward Elgar Publishing, Northampton 2022, p. 153.

7.2. Circumvention options

Instead, there is a hard legacy of heavy-handed post-Soviet regulation of Ukrainian economy (one may argue that the year 2014, when the Revolution of Dignity took place in Ukraine and the Association Agreement with the EU was signed, marks the beginning of true pro-European regulatory reform). This legacy has fostered a culture of adeptly circumventing laws and regulations that are perceived as obstructing business growth. Should the final text of the Directive permit circumvention avenues, Ukrainian companies are likely to exploit them. Let's say that the Directive retains the concept of 'established business relationships' or there is a 'safe harbour' for indirect business relationships. Ukrainian businesses are very skilled in obscuring real corporate and other business links: they will go a long way to use all sorts of intermediaries, contract cascading and the like.

A criterion regarding the number of employees also will require a well-thought-out approach, as there is a widespread practice in Ukraine to hire workers not under labour law, but civil-law contracts, which excludes these workers from the conventional 'employee' classification.

7.3. No tradition of the directors' duty of care

The directors' duty of care is not fundamental to Ukrainian company law. The Civil Code of Ukraine lacks provisions on the directors' duty to act in the best interest of the company. As to the specific company laws, only the novel Law of 2022 on joint-stock companies explicitly lays down the directors' duty of care (Article 89).³⁶ However, the vast majority of Ukrainian companies are not joint-stock companies, but limited liability companies (6,401 joint-stock companies compared to 761,776 limited liability companies as of 1 January 2023³⁷). The Law of Ukraine on limited

³⁶ Закон України від 27 липня 2022 No. 2465-IX "Про акціонерні товариства", [Zakon Ukraïni vid 27 lipnâ 2022 No. 2465-IX "Pro akcionerni tovaristva"] [Law of Ukraine of 27 July 2022 No. 2465-IX „On joint-stock companies”], Офіційний вісник України [Oficijnij visnik Ukraïni "Oficijnij visnik Ukraïni] [Official Herald of Ukraine] 2022, item 68, p. 37.

³⁷ Державна служба статистики України. Кількість зареєстрованих юридичних осіб за організаційно-правовими формами господарювання з розподілом за ознакою статі керівника на 1 січня 2023 року [Deržavna služba statistiki Ukraïni. Kil'kist' zareěstrovanih ũridičnih osib za organizacijno-pravovimi formami gospodarŭvannâ z rozpodilom za oznakoŭ stati kerivnika na 1 sičnâ 2023 roku] [State Statistics Office of Ukraine, The number of registered legal entities by organisational forms of economic activity with a distribution based on the gender of the CEO as of 1 January 2023], https://csrv2.ukrstat.gov.ua/edrpoj/ukr/EDRPU_2023/ks_opfg/arh_ks_opfg_23.htm [access: 28.08.2023].

liability companies,³⁸ as well as other laws addressing specific types of companies in Ukraine, do not mention the directors' duty of care.

It would be wrong to say that the duty of care doctrine is virtually unknown in Ukraine. In the past few years, the Ukrainian Supreme Court applied the doctrine in disputes involving different forms of companies, including LLCs, referencing the OECD Principles of Corporate Governance instead of Ukrainian law.³⁹ Still, when Ukraine is faced with the task of implementing the Directive, it is advisable to address the directors' duty of care specifically and thoroughly.

7.4. Supervisory authority challenge

The proposal for the Directive recognises the need to designate one or more national authorities to supervise compliance with the obligations laid down in national provisions in Articles 6–11 and Article 15(1) and (2), which would be able to impose administrative sanctions. The rhetoric of Ukrainian reforms has always been one of deregulation and alleviating the burden on business (even though now and then governmental actions resulted in just the opposite). Vesting some state body with new opportunities to exert pressure on business and punitive powers, let alone creating a new authority, will definitely generate a hostile reaction in the business community.

7.5. Underdevelopment of non-judicial grievance mechanisms

The proposed Directive places much emphasis on corporate grievance mechanisms. In particular, pursuant to Article 9 (1) of the proposal, Member States shall ensure that companies provide the possibility for affected persons and organisations to submit complaints to them where they have legitimate concerns regarding actual or potential adverse human rights impacts and adverse environmental impacts with respect to their own operations, the operations of their subsidiaries or their value chains.

³⁸ Закон України від 6 лютого 2022 No. 2275-VIII “Про товариства з обмеженою та додатковою відповідальністю”, [Zakon Ukraïni vid 6 lûtogo 2022 No. 2275-VIII “Pro tovaristva z obmeženoïu ta dodatkovouïu vidpovidal’nistû”] [Law of Ukraine of 6 February 2022 No. 2275-VIII “On limited liability and additional liability companies”] “Офіційний вісник України” [“Oficijnij visnik Ukraïni”] “Official Herald of Ukraine”] 2018, item 24, p. 5.

³⁹ See e.g. Рішення Верховного Суду від 19 січня 2023 у справі No. 911/841/20, п. 56 [Rišennâ Verhovnogo Sudu vid 19 sičnâ 2023 u spravî No. 911/841/20, p. 56] [Judgement of the Supreme Court of 19 January 2023 in case No. 911/841/20, para. 56], <https://reyestr.court.gov.ua/Review/102891978> [access: 28.08.2023].

The problem is that non-judicial grievance mechanisms are poorly developed in Ukraine. Ukrainian state courts are overburdened and among the most mistrusted institutions in Ukraine. A sociological survey from late 2023 indicates that only 25% of respondents trusted the courts, while 34% lacked trust (with the rest expressing no opinion), resulting in a negative trust/mistrust balance of -9%.⁴⁰ Curiously, this situation has not prompted a proliferation of alternative mechanisms for dispute resolution. One may expect difficulties both for companies when setting up their grievance mechanisms and with affected individuals' willingness to resort to those mechanisms.

8. Conclusion

Both corporate social responsibility and corporate sustainability are concepts dealing with businesses' social and environmental impact, but they should not be regarded as the same thing. While CSR traditionally has focussed on voluntary corporate decision-making, the modern regulatory framework of corporate sustainability needs to incorporate binding legal tools, including effective corporate liability for human rights and environmental harm.

The EU's ambitious proposal for a Directive on corporate sustainability due diligence marks a paradigm shift from voluntary CSR practices to normative standards of corporate behaviour. According to the proposal, Member States shall ensure that companies exercise due diligence regarding human rights and environmental impacts. Administrative sanctions and a regime of civil liability are envisaged when companies fail to comply with due diligence requirements, resulting in otherwise avoidable harm.

The proposal's implications for businesses are important for Ukraine, considering its status as a candidate country for EU membership. Ukrainian companies, unlike those in the EU countries, lack experience operating within the framework of corporate social responsibility and non-financial reporting to build upon. Besides, the legacy of inapt post-Soviet regulation, the absence of a tradition for the directors' duty of care, the supervisory authority challenge and underdeveloped non-judicial grievance mechanisms are among the obstacles to the prospective implementation of the mandatory human rights and environmental due diligence.

⁴⁰ Kyiv International Institute of Sociology, Dynamics of trust in social institutions in 2021–2022, <https://kiis.com.ua/?lang=ukr&cat=reports&id=1174&page=1> [access: 28.08.2023].

Harmonising its corporate sustainability practices with the EU is clearly a significant challenge for Ukraine's European integration. Meanwhile, embracing the new legislation will not be an easy task for the EU countries as well. Ultimately, the convergence of ongoing transformational processes within both the EU and Ukraine represents an opportunity to shape a more sustainable future for our businesses, economies and societies alike.

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