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Passing the Torch: The Role of Large Corporations in Human Rights

By Mary Drue Hall

I. Introduction

On February 23, 2022, the European Commission published its *Proposal for a Directive on Corporate Sustainability and Due Diligence*, designed to “ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies.”¹ Although the United Nations and various international bodies previously implemented recommendations emphasizing the importance and necessity of corporate integration of human rights and environmental sustainability principles², research on the outcomes of these recommendations as well as the continuance of human rights violations

¹ *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, at 31, COM (2022) 71 final (Feb. 23, 2022).

² See generally, *U.N. Guiding Principles on Business and Human Rights*, Office of the High Commissioner of Human Rights, U.N. Doc. HR/PUB/11/04 (2011), G.A. Res. 70/1, U.N. GAOR 70th Sess., *Sustainable Development Goals*, (Oct. 21, 2015); See also, Governing Body of the Int’l. Lab. Org., 329th Sess., *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, (March 2017).

within the global supply chain show that voluntary policy adoption is not a strong enough impetus to spur corporate change.³

Passing the torch of obligation to national and sub-national entities is not uncommon: in fact, the theory of subsidiarity relies on local-level bodies to best enact policy initiatives.⁴ The European Union has relied on subsidiarity throughout most of its history, for example in the legislative form of directives: rather than acting as binding legislation, EU directives rather instruct Member States to enact domestic policies which further Union interests and goals.⁵ That the Proposed Directive contains a section in the Explanatory Memorandum specifically dedicated to explaining the Directive's compatibility with subsidiarity is evidence of the Union's commitment to the principle.⁶ Whether or not the subsidiarity principle extends to corporations as well as regional councils, for example, is another question entirely. The Proposed Directive does exactly that: corporations must extend their obligations outside the bounds of the Union and help enforce human rights and environmentalism throughout the global supply chain.⁷

II. Background and Scope of the Proposed Directive

In order to establish a concerted and consistent effort amongst corporations to achieve a high level of human rights and environmental sustainability compliance within the global supply chain, the European Parliament requested the Commission propose new guidelines for a corporate due diligence obligation in a March, 2021 proposal.⁸ In the shadow of the global

³ IONEL ZAMFIR, EUR. PARLIAMENTARY RSCH SERV., MEMBERS' RESEARCH SERVICE PE 659.299, TOWARDS A MANDATORY EU SYSTEM OF DUE DILIGENCE FOR SUPPLY CHAINS, 2 (OCTOBER 2020).

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI\(2020\)659299_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659299/EPRS_BRI(2020)659299_EN.pdf)

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⁵ Types of Legislation, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en (last visited Oct. 12, 2022).

⁶ *Supra* note 1 at 13.

⁷ *See generally, supra* note 1.

⁸ *Id.* at 31.

COVID-19 pandemic, the Commission reiterated its commitment to human rights and fighting climate change in its proposed directive by expanding and strengthening, as well as creating a binding commitment to, the obligations of corporations to duly investigate and report any potential violation of international treaties, declarations, and principles within global supply chains.

Specifically, the Proposed Directive is limited in scope to large corporations with high global turn-overs and small and medium enterprises (SMEs) which have mid-range global turn-overs and operate within a specific set of “high-impact sectors” which have been pre-determined to pose a higher risk for negative impacts.⁹ The Proposed Directive calls for EU companies with over 500 employees and a worldwide net turnover greater than EUR 150 million in the last year to comply with the obligations of the Directive¹⁰. Companies which have more than 250 employees and over EUR 40 in one or more of the listed high-impact sectors must implement also implement the requirements, although within a longer timeframe.¹¹

Notably, the Proposed Directive does not limit its obligations to EU corporations and imposes liability on large third-country corporations as well as smaller third-country corporations within certain sectors, with the legal justification that third-country companies nonetheless have the potential to impact the internal market.¹² Furthermore, the Commission points to the cross-border effects (e.g. pollution, transnational supply and value chains) of third-country companies’ adverse human rights and environmental impacts.¹³

⁹ *Id.* at 46

¹⁰ *Id.* at 47

¹¹ *Id.*

¹² *Id.* at 15.

¹³ *Id.* at 13.

III. Subsidiarity, the Union, and the Proposed Directive

Subsidiarity, which was first extended to human rights in the Charter of Fundamental Rights of the European Union in 2000, has become a fundamental principle of international human rights law by promoting the practice of delegating regulation of law to smaller national or subnational governments and authorities.¹⁴ Subsidiarity is, at its core, a tension between State directive and the freedom of the individual.¹⁵ In order to preserve the power and abilities of the State and larger authoritative bodies, smaller groups must be allowed to handle the regulation and enforcement of policies at the local level.¹⁶ Furthermore, the subsidiarity principle recognizes that local bodies may understand the contextual nuances of implementation and enforcement in a way that national and supranational bodies may not.¹⁷

“One could say that the existence and end of the community . . . is to help the individual flourish, to help create the conditions for her to reach her ultimate fulfillment.”¹⁸ This vision of subsidiarity parallels the foundations of the Union itself and trickles into the Proposed Directive’s design to transition the Union to a green economy and realize international human rights and environmental objectives.¹⁹

The concept of due diligence, not just within the meaning of the Proposed Directive but also as a guiding principle of human rights law, acts as an off shoot of subsidiarity. Entities such as the EU transfer not just the power of implementation, but also the obligation of regulation, from an international level to individual states to regional and local bodies.²⁰ In this context, the

¹⁴ Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT’L. L. 38, 41 (2003). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/564

¹⁵ *Id.* at 42.

¹⁶ *Id.*

¹⁷ *Id.* at 40.

¹⁸ *Id.* at 43.

¹⁹ *Supra* note 1 at 1.

²⁰ See, Jonathan Bonnitcha and Robert McCorquodale, *The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights*, in EUR. J. OF INT’L. L., Vol. 8 Issue 3, 899, 905 (2017).

due diligence requirements of the Proposed Directive both contravene and promote the EU's commitment to the subsidiarity principle, depending on one's ideas of corporations and their role in promoting human rights and environmental justice.

A. Compounded: The Proposed Directive as Promoting Subsidiarity and Advancing Human Rights in the Global Supply Chain

On the one hand, allocating the double-edged sword of power and responsibility over human rights and environmental sustainability to the corporations within the scope of the Proposed Directive is compatible with the Union's traditional ethos of directing regulation to the bodies with the most knowledge and control. Just as a state would best know how to regulate its means of agricultural production to comply with Union policy, so should a corporation be able to regulate its trade, production, and supply to come into compliance with Union human rights and environmental policies. Furthermore, as the Explanatory Memorandum highlights, individual domestic laws targeting human rights and environmental abuses within supply chains have failed to consistently control and contain corporate practices across all market sectors.²¹

A facet of what makes the activities of the corporations included in the scope of the Proposed Directive so difficult to control via domestic legislation is the very reason why they must be included and given agency in the regulation of human rights and environmental impacts. With activities and programs spread across the globe and thousands of employees working in countries in and outside the Union, corporate giants have the potential to generate impacts on the same scale as Member States. Compare, for example, the GDP and number of governmental

²¹ See, *supra* note 3 at 5.

employees of Lithuania (\$65.5 billion in 2021²² and approximately 78,000 persons in 2002²³) with the global revenue and employment numbers of BMW (\$113.5 billion and 118,909 employees, respectively)²⁴.

In order to directly control the highly impactful actions of corporations, the Union should put the regulatory obligation in the hands of the corporations in the same way the Union would require Member States to domestically regulate and assume responsibility for its own human rights and environmental impact violations.²⁵ Instead of adopting domestic legislation to further Union policy, however, the Proposed Directive requires private corporations to enact a series of codes of conduct, due diligence reports, and contractual sureties throughout their global supply chain in order to come into compliance.²⁶

B. Misaligned: The Proposed Directive as a Failure of Subsidiarity

The principle of subsidiarity emphasizes the innate worth of the individual and relies on the webs of connections within a society to incentivize the individual to achieve her full potential.²⁷ The basic assumption must be that the individual is “naturally social.”²⁸ When the individual is not reliant on the connections with her community to reach her ultimate fulfillment, she will not realize her purpose and value in the larger group.²⁹ Here we run into the legal fiction of corporations as persons.

²² *GDP (Current \$US) of Lithuania*, THE WORLD BANK, <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2021&locations=LT&start=1995&view=chart> (accessed Sept. 19, 2022).

²³ *Public Employment of Lithuania*, EUROPEAN UNION, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Public_employment_-_Lithuania (Jan. 12, 2018).

²⁴ *BMW Group*, FORBES PROFILE, <https://www.forbes.com/companies/bmw-group/?sh=634bdfdf3e9c> (last visited Oct. 14, 2022).

²⁵ See generally, E.U. Charter on Fundamental Rights, OJ C 326, 26.10.2012.

²⁶ *Supra* note 1 at 35-40.

²⁷ *Supra* note 11 at 42-43.

²⁸ *Id.* at 42.

²⁹ *Id.*

Although sometimes classified as persons for statutory and contractual purposes, corporations are not human and do not share the same immutable characteristics of a human individual. The concept of subsidiarity may not align with the values and incentives, or lack thereof, of a corporation in the way that it does with natural persons.

Because corporations do not have a need for fulfillment within a society, the Proposed Directive may put international ideations such as the UN Sustainable Development Goals and the Paris Climate Accords even further out of reach. While the corporations under the Proposed Directive may be in a position to regulate the harmful impacts targeted by the Directive, the regulatory oversight of a global corporation differs substantially from that of a domestic government.

The State is “naturally social” in the way of a natural person.³⁰ A democratic government (theoretically) operates in response to the demands of its citizens.³¹ The State, therefore, has a vested interest in protecting and reflecting the wishes of those citizens. A corporation has no such symbiotic relationship by which it may be constrained. Yes, consumers can somewhat express their power by choosing where to spend their money, but in the present economy, which is reliant on access to technology like cell phones, electric power, and computers, as well as a steady supply of food and commercial goods, consumers have a significantly diminished choice in demonstrating their buying power.

In privatizing the standards of regulation and passing the torch of responsibility from government to corporation, the EU assumes that human rights abuses can be countered by corporations whose executives most likely lack a background global development,

³⁰ See *supra* note 21.

³¹ See generally, any 7th grade social studies class; See also, Samuel Freeman, *Social Contract Approaches*, in THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY 133 (David Estlund, ed. 2010).

environmental studies, or any field with the requisite skills to assist in furthering the goals of the U.N. Sustainable Development Goals or other human rights treaties and conventions.³² Aptitude in the private financial sector or esoteric economic theory does not necessarily translate to the work of fighting human rights abuse.³³

Almost immediately after the announcement by the Commission of the Proposed Directive, groups around the globe began publishing their criticisms and critiques.³⁴ Most frequently, organizations decried the lack of meaningful legal liability for companies violating proposed regulations, and the complete lack of any binding obligation to implement a climate plan falling within the target of the Paris Climate Accord.³⁵ The *EU Observer* reported that the ‘watering-down’ of the strength of the Directive was a result of heavy lobbying on behalf of corporations and their interest groups.³⁶ Without the motivations of democratic oversight or opportunity for meaningful recourse by consumers, corporations will have little incentive to prioritize combating negative human rights and environmental impacts beyond the degree by which a stain on their reputation may harm profits.

Human rights advocacy groups and organizations raise valuable and insightful points, and we should not be quick to write off the idea of corporate due diligence and accountability too quickly. Both the critiques and the concept can coexist and refine one another. With the history

³² Robert Howse and Kalypso Nicolaidis, Democracy without Sovereignty: The Global Vocation of Political Ethics 170/171, 163-191, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY*, (Tomer Broude and Yuval Shany, ed. 2008). https://www.law.nyu.edu/sites/default/files/ECM_PRO_060785.pdf

³³ *Id.* To be fair, the same argument can be made about the leaders of the United Nations, the EU, and even national governments.

³⁴ See generally, *Dangerous gaps undermine EU Commission’s new legislation on sustainable supply chains*, EUR. COAL. CORP. JUST. Feb. 23, 2022. <https://corporatejustice.org/news/dangerous-gaps-undermine-eu-commissions-new-legislation-on-sustainable-supply-chains/> (last visited Oct. 14, 2022), *EU: Disappointing Draft on Corporate Due Diligence*, HUM. RTS. WATCH, Feb. 28, 2022,

<https://www.hrw.org/news/2022/02/28/eu-disappointing-draft-corporate-due-diligence> (last visited Oct. 14, 2022).

³⁵ *Id.*

³⁶ Vicky Cann and Kenneth Harr, *How industry watered-down new EU supply chain rules*, E.U. OBSERVER, June 9, 2022, <https://euobserver.com/opinion/155165> (last visited Oct. 14, 2022).

of modern democracy as evidence, traditional governmental regulation is clearly not enough to solve many human rights and environmental challenges. We may as well throw spaghetti at the wall and see what sticks.

IV. Conclusion

Subsidiarity has remained a cornerstone of Union policy for over twenty years, and the Proposed Directive is certainly not the first piece of legislation regulating individual corporations and non-governmental entities.³⁷ However, the Proposed Directive could mark the beginning of an expansion of responsibility in preventing human rights and environmental abuses from governments to corporations. By directly targeting the corporations with the abilities to impact human rights and environmental sustainability, the Directive calls for regulation in contexts which have, as of yet, not been reached by domestic legislation or Union directives on the responsibilities of Member States.³⁸ Due diligence measures link the practice of subsidiarity to both corporations and Member States, as each now has an obligation under Union policy to implement practices which seek to eliminate human rights and environmental harms.³⁹

³⁷ See e.g., Regulation (EU) 2019/712, Regulation EEC No. 4055/86.

³⁸ See *supra* note 3.

³⁹ See *generally, supra* note 26.