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THE NEW CHALLENGES FOR CORPORATE COMPLIANCE UNDER THE EUROPEAN DUE DILGENCE DIRECTIVE, ALONG THE SUPPLY CHAIN.

The agri-food sector study

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With the Proposal for a Corporate Sustainability Due Diligence Directive (CSDD). of 23rd of February 2022, and approved by the European Parliament on 1st of June 20231 the European Union introduces real obligations of diligence on the respect of human rights and the environment for companies.

The Proposal is in principle in line with the indications contained in the UN Guiding Principles on Business and Human Rights2 and the OECD Guidelines on Due Diligence for Responsible Business Conduct 3 and is the result of a long legal evolution in terms of corporate sustainability and a fundamental goal for the impact that it aims to make explicit as a legal instrument of reference not only at European level, but also worldwide.

A. The content of the due diligence and the scope ratione personae

The content of the due diligence obligation of the Proposal of the Directive has a composite character. and is aimed to *identifying the negative, potential, or actual impacts of business activities on human rights and the environment, preventing abuses, establishing an internal complaints mechanism, stopping, mitigating, or remedying damage, monitoring the effectiveness of the measures taken, to integrate processes into company policies and communicate them publicly*.

Its implementation process assumes, first, that companies integrate certain due diligence activities into their corporate policies, which must become an integral part of corporate and strategic decisions throughout the value chain.

Individual companies will also have to carry out a work to identify the negative impacts – actual or only merely potential – of their activities throughout the supply chain and, consequently, adopt preventive or mitigative measures, which in the circumstances of the specific case, aim to prevent or minimize the negative impact identified. Such measures shall be adequate, proportionate, and commensurate with the degree of severity and likelihood of the negative impact, size, resources, and capabilities of the undertaking.

In addition, when selecting and adopting such measures, it should be considered of the specificities of the value chain of the undertaking, sector or geographical area in which the various partners operate, the power of the enterprise itself to influence its business relations and the possibility to increase its power of influence. It should be clarified that the Proposal qualifies the due diligence as a *due of means*[4].

[1] Proposal for a Directive (EU) 2019/1937 of the European Parliament and of the Council on corporate sustainability due diligence; Available on: https://www.europarl.europa.eu/doceo/document/A-9-2023-0184_IT.html.

[2] Organization of Nations Unite, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (2011).

[3] OECD-Guidelines for Multinational Enterprises, updated 2011 edition.

[4] Proposal of Directive, considerando n. 15. S. Brabant – C. Bright – N. Neitzel – D. Schönfelder, Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1I).

Since it is not an obligation of result, it is not required to necessarily prevent the abuses. Article 22 specifies, in fact, that companies will be legally responsible only if it is proven that violations of human rights or the environment refer to the failure to comply with the due diligence, that means the failure to prepare adequate measures for this purpose. Regarding the subjective scope of application, the proposal of the Directive provides that the prescribed due diligence requirements apply to companies and groups of undertakings which are constituted in accordance with the law of a Member State, i.e. the lex societatis of the State, and fulfil one of the following conditions:

Average of more than 250 employees and a worldwide net turnover of more than 40 million EUR in the last financial year for which the annual financial statements were prepared, regardless of their sector. companies and " parent" companies with more than 500 employees and a turnover exceeding 150 million EUR in the last financial year for which the annual financial statements were drawn up. On the other hand, regarding undertakings established outside the European Union are identified exclusively on the basis of turnover in the Union, as this criterion creates a territorial link with the Union "sufficient for EU law [...] apply" to them.[5]

Specifically, the directive will apply to non-EU companies with a turnover of more than €150 million, if they have generated at least €40 million business within the EU. The calculation of the thresholds should include the number of employees and turnover of branches of a company, which are considered part of the parent company, in accordance with EU and national law. Part-time employees, temporary staff and other workers employed in atypical forms of work should also be included in the calculation of the number of employees.

Finally, it should be noted that the due diligence is extended not only to all the activities of the company itself, but also to subsidiaries, as defined in Article 2 point 10 of Directive 2013/34/EU[6] and through which is carried out the activity of "controlled undertaking" within the meaning of Article 2, paragraph 1, letter f) of Directive 2004/109/EC of the European Parliament and of the Council.[7] As well as to all business partners along the entire value chain, which includes both upstream and downstream activities without limitation, that means all activities and entities involved in the production and development of a company's products or services, as well as in the sale and distribution, transport, storage and waste management of the company's products and services. Financial undertakings are also included in the scope of the Directive.

B. Scope ratione personae

Based on the current OECD due diligence guidance, the objective scope of the CSDD will cover the following sectors: manufacture of textiles, clothing, leather, and related products (including footwear)

[5] Proposal of Directive, art. 16. In merito G. Van Calster, The European Commission's Corporate Sustainability Due Diligence proposal. Some thoughts on the conflict of laws, in GAVC Law, 25 March 2022.

[6] Directives of the EU on financial statements and consolidated fiancial statements; Available on: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32013L0034.

[7] Directive 2004/109/EC of the European Parliament and of the Council; Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0109.

and wholesale and retail trade of fabrics, clothing and footwear; agriculture, forestry, fisheries (including aquaculture), manufacture of food, marketing and advertising of food and beverages and wholesale of agricultural raw materials, livestock, animal products, timber, food and beverages; energy, extraction, transport and processing of mineral resources irrespective of where they are extracted (including crude oil, natural gas, coal, lignite, metals and metal ores, all other non-metallic minerals and quarry products), manufacture of basic metal products, other non-metallic mineral products and metal products (excluding machinery and equipment) and wholesale of mineral resources, basic and intermediate mineral products (including metals and metal ores, building materials, fuels, chemicals and other intermediate products), construction and related activities, the provision of financial services, investment services and activities and other services financial; and the production, supply and distribution of information and communications technologies or related services, including manufacturers of hardware, software solutions, including artificial intelligence, surveillance, facial recognition, data storage or processing, telecommunications services, web-based or cloud-based services, including social media and network activities, messaging, e-commerce, delivery, mobility and other platform services (*Considerando 22* CSDDs).

C. Climate change plan

Due diligence obligations should also necessarily include all activities aimed at preserving and restoring biodiversity and improving the state of the environment, in particular air, water, and soil. Companies will therefore have to commit to implementing a transition plan, in consultation with stakeholders, towards a sustainable and circular economy, limiting global warming to 1.5°C in line with the Paris Agreement and achieving climate neutrality by 2050.

D. The methodological approach to Due Diligence

Due diligence is based on the concept of *risk*, i.e. on "*events that, if they occur, prevent the implementation of a strategy and affect its performance" (COSO 2017).*[8] Consequently, a company will have to first assess the risk that its activity causes or contributes to creating negative impacts, even if only potential, on people, the environment and society. In order to achieve this objective, companies can use different approaches:

- *Environmental and social impact assessment studies on human rights,*
- *SWOT analysis*[9]*,*
- *Reports by internal control or statutory audit bodies*,
- *Information and analysis from compliance management systems or in relation to corruption*,
- *Operational or financial audit reports*,
- *Non-financial impact assessments reporting of ESG (Environmental Social Governance)*

[8] COSO 2017 "Applying enterprise risk management to environmental, social, governance related risks".

[9] SWOT analysis: strategic planning tool used to assess the strengths, weaknesses, opportunities, and threats that characterize a business activity. The analysis covers the internal and external environment of an organization.

indicators[10],

- *Health and safety and working conditions reports*,
- *Dialogues and discussions, as part of stakeholder engagement, which must be integrated into the company's decision-making processes, in the definition of its policies and strategies, as well as in operational and management practices, Based on the information obtained, it will be necessary to prioritize the risks and impacts identified, in order to act on the relative severity and probability of occurrence.*

E. Identification of the causal link between business activities and negative impact to end, prevent and mitigate

Once the actual or merely potential negative impact has been identified, it will be necessary to ask what the causal link with the company's activity is. According to OECD guidelines[11], a company: "causes" a negative impact if there is a direct causal link between the actions or omissions of an undertaking and the negative impact. contributes to causing a negative impact when one activity contributes to, cooperates, facilitates or incentivises another entity to cause a negative impact. Finally, a company's operations, products or services can also be directly linked to a negative impact through or through a business relationship linking to an organization involved in a negative impact.

It will therefore be necessary to analyze the reason and cause of the connection to the negative impact through a root cause analysis exercise and identification of causes and contributing causes of the harmful effects. If actual or potential negative impacts are identified, organizations will have to evaluate the measures to be taken and indicate in detail the actions that the company will take and its expectations regarding suppliers, buyers and other business relationships.

The measures could concern, for example: define contractual conditions with partners to ensure compliance with certain standards or requirements that allow to reduce the highlighted negative impacts. Identify partners who, due to a high impact, will have to implement themselves internal due diligence activities and towards their own partners. intervene towards partners in case of negative impacts due to them, cooperating to remedy the harmful effects and requesting specific activities. participate in initiatives with governments and social partners in relation to activities with a higher impact. interruption of the business relationship both after unsuccessful attempts at mitigation, and if the company considers that mitigation is not possible due to the severity of the negative impact. diversification of partnerships where this should reduce negative impacts. adopt internally fair economic and industrial conditions that allow the reduction of gaps and differences. implement monitoring and control activities to verify compliance with standards and measures that prevent negative effects.

F. Monitoring the results

The due diligence is dynamic. The due diligence process is not static but continuous, responsive, and

[10] ESG (Environmental, Social, Governance) indicators are used to assess the performance and performance of companies in relation to environmental, social and governance issues.

[11] OECD-Guidelines for multinational enterprises; Available on: https://www.oecd.org/daf/inv/mne/MNEguidelinesITALIANO.pdf.

changeable and includes feedback loops that allow the company to learn from what went well and what not. It will therefore be important to monitor the progress of its systems and procedures to prevent and address negative impacts or to constructively seek for improvements. This attitude will

allow companies to respond accordingly to potential changes in their risk profile, linked to evolving circumstances, such as changes in the regulatory framework of a country, new risks that may emerge in the sector, or the development of new business relationships and all the implications that may derive.

G. Disclosure and organization

This need of verifying adverse impacts as well as due diligence activities aimed at understanding the reasons and causes of impacts as well as the choice of specific measures, require Disclosure and appropriate information. Communicating information on due diligence procedures, outcomes and plans is part of the due diligence implementations process itself and allows the company to build confidence in its actions and decisions and show its good faith.

H. Remedial measures and possible forms of collaboration

The due diligence also requires individual companies to take charge of establishing and implementing effective judicial or extrajudicial remedial mechanisms that allow all interested parties to submit any complaints relating to alleged negative impacts of the company's activities. Establish complaint handling mechanisms within the company, work with workers' representatives and trade unions to establish a timely and appropriate management complaint procedure.

In conclusion, the due diligence implementation framework provides the responsibility on the national administrative authorities designated by the Member States to monitor the implementation of due diligence rules by individual companies and the consequent power to apply sanctions in the event of non-compliance.

II. CORPORATE SUSTAINABILITY DUE DILIGENCE AND THE CONCEPT OF CORPORATE SUSTAINABILITY BETWEEN CHALLENGES AND NEW PERSPECTIVES

The proposed Corporate Sustainability Due Diligence (CSDD) directive outlines a concept of sustainability as the ability of the system to respond to environmental, social, and economic objectives. This concept originates from the so-called Brundtland report, drawn up in 1987 by the World Commission on Environment and Development (Brundtland 1987), according to which sustainable development is the development that meets the needs of current generations without compromising the ability of future generations to respond to theirs. [...]. In these terms, sustainability involves a process of change such that the exploitation of resources, the direction of investments, the orientation of technological development and institutional changes must necessarily be consistent with future needs as well as with current ones (WCED 1987)[12] and this does not only imply the

[12] Report of the World Comission on Environment and Development; Available on: https://digitallibrary.un.org/record/139811

protection and preservation of the environment, but considers, also, the quality of life and balance between people both in the present and in the future.[13] In line with this thought in the early 90s the English writer and economist John Elkington, summarized the idea of a sustainable *business* in the *Triple Bottom Line framework* or 3*P* (*Planet*, *People*, *Profit*).

The *ratio* of this theory was to encourage companies to operate in the economic context through strategies and decisions that were able to simultaneously enhance (i) the environment (*planet*), (ii) the social context (*people*) and (iii) the economic-financial aspect (*profit*), in line with the concept of sustainable development.

The Triple Bottom Line theory is then taken up in the 2002 Johannesburg Declaration on Sustainable Development, Art. 5 of which states [...] *we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development, and environment*[14].

The concept of sustainable development can no longer disregard the mutual influence of the three dimensions: environment, society, and economy.[15]

A. The principles of corporate sustainability: ESG criteria

With 3*P*(*Planet*, *People*, *Profit*) theory, a model of corporate social responsibility (CSR) is increasingly focused on maximizing corporate value through sustainable and resilient business examples. Sustainability is no longer perceived exclusively as an ethical issue, but becomes the *purpose* of companies, acting as a competitive market element.

This translates into an efficient and strategic management of available resources, be they natural, financial, human, or relational, to generate value in a long-term perspective. (L. From the Blacksmith "*ESG The Measurement of sustainability*". 2022. Rubettino).[16] In this scenario, the need to measure and report on corporate performance about environmental, social and governance factors has emerged in recent years, which has led the more advanced economic doctrines to develop the so-called ESG (*Environmental*, *Social*, *Governance*) criteria. These are three fundamental dimensions that allow to measure, verify and control precisely and on the basis of standardized and shared parameters the environmental, social and governance performance of a company and the related impacts, in line with the vision that: "the company does not belong only to managers or shareholders, but is a social good that interacts with society, while CSR is no longer a cost but an investment, being connected to the strategic management of companies and their competitiveness" (CONSOB 2021).[17]

[13] C.d. Intergenerational equity.

[14] https://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm

[15] Robert Goodland *The Concept of Environmental Sustainability. Annual Review of Ecology and Systematics, Volume 26 (1995).* Available on: https://are.berkeley.edu/courses/ARE298/Readings/goodland.pdf

[16] Luca Del Debbio ESG Measuring sustainability, 2022, Rubettino.

[17] Finance for sustainable development. CONSOB 2021.

In detail:

Environmental factors consider how a company contributes to environmental challenges and face climate change, through best practices aimed at: reduce, polluting emissions, use renewable energy, reduce environmental impact, contain the consumption of water (and other resources of the planet), dispose of waste carefully, adopt circular economy solutions. Social factors concern the way how the company relates to the social fabric, including the treatment of employees, suppliers, and end consumers in the value chain. A social sustainable company will have among its objectives: safety at work, Workers' rights, equality and social justice, the well-being and inclusion of the people working in the company. Economic or governance factors refer, instead, to the internal management and decision-making processes of a company, such as business ethics, management, relations with shareholders and stakeholders, organization and innovation, reputation, and brand management.

Best practices could be: investments in innovation, technology, digitalization, and research fair and adequate remuneration for staff and suppliers, Fair pricing policy, use of certified and local raw materials.

B. Challenges towards a new business competitiveness

It will certainly be necessary to keep in mind that the process of introducing and implementing Sustainability Plans in the Strategic Plans of a company will encounter a series of challenges, which may initially discourage.

Being sustainable and implementing a due diligence process in company policies will require a holistic approach, which considers social, environmental, and economic factors, which can be complex and challenging to manage. significant changes in a company's culture and strategy, which can meet resistance from employees, executives, and shareholders. Significant investments in new technologies, processes, and practices, which can be costly and not produce immediate financial returns and generate uncertainties. Broad view from investors, consumers, and employees, who may have a limited understanding and may not fully appreciate the value of sustainable business practices. Without the wish to minimize these difficulties, it must also be recognized that companies with a strong tendency towards sustainability have shown an ability to generate better results, including financially, becoming competitive in an increasingly globalized and attentive market. The positive aspects can be summarized in the following four points.

Creating added value and customer loyalty

According to recent research, consumers are now very sensitive to environmental issues, equity, and social issues, to the point of demanding goods and services that clearly represent these values, even if this means spending more. The company will enjoy increased revenue, which will compensate the investments made in sustainability. At the same time, a company that embraces sustainability themes ensures a considerable competitive advantage over competitors, which also affects the long-term relationship of trust between brand and customer.

More efficient processes and reduced waste

The introduction in the company of production models oriented towards sustainability means using energy from renewable sources, making processes more efficient and reducing waste and production waste. This leads to positive economic effects for the company. In this way it is possible, from one side, to save on the use of resources that impact on the production process and, on the other, to reduce costs due to inefficiencies and generate important monetary savings for the company.

Increase in production and employment

Sustainable companies, over the years, have seen a constant increase of their business. Sustainability, therefore, appears more and more as a strategic element capable of triggering new Competitive dynamics and playing a pivotal role in competition. The increase in the volume of business and the new skills necessary to better manage new processes have also led to the emergence of new professional and echnical figures and to the increase in employment in companies that choose to work sustainably.

Improved reputation and increased stakeholder trust and Improving the Disclosure on the company's sustainability strategy is a very important step to increase the value of the company itself on the market towards its stakeholders, which can be consumers but also business partners, workers, and investors with whom every company deals on daily basis.

III. WHAT SCENARIO IN THE AGRIFOOD SECTOR

In relation to the agri-food sector, the application of a model based on the 3Ps theory makes it possible to further enrich and broaden the connotation related to the sustainability of the supply chain and in this scenario in the publication by FAO (Food and Agriculture Organization) *"Building a common vision for sustainable food and agriculture"*[18] are defined the five principles of sustainable agriculture: *Making the use of resources more efficient*: changing agricultural practices and processes to ensure food supplies and the simultaneous reduction of water and energy consumption

Conserving, protecting, and enhancing natural resources and ecosystems. Agricultural production depends on the availability of natural resources, reducing the impact of agriculture on these will help to make it more sustainable. *Protect and improve rural livelihoods, justice, and social well-being*. Given the large number of workers employed in the agricultural sector, ensuring adequate working conditions and a safe and healthy environment will significantly reduce poverty and food insecurity in rural areas.

Strengthen the resilience of people, communities, and ecosystems. The dissemination of policies, technologies and practices that strengthen the capacities of populations and the natural environment to cope with the consequences of extreme weather events, market volatility and social conflicts will contribute to the stability of the agricultural sector. *Establish responsible and effective governance mechanisms*. A legal and institutional environment based on a fair balance between public and private initiatives, principles of accountability, equity, transparency, and the

[18] FAO, "Building a common vision for sustainable food and agriculture", 2014.

rule of law, is the basis for good governance.

A. Agrifood startups for sustainability

In this context, an innovative push of the sector is certainly driven by young companies or startups, promoters of new solutions and ethical and sustainable business models, where the greatest challenges are concentrated, but also important opportunities for evolution and market.

The Food Sustainability Observatory of the Politecnico di Milano[19] surveyed 7,120 agrifood startups, which were created in the five-year period between 1st of January 2016 and 3rd of December 2020. A quarter of them, equal to 1,808 startups, pursue one or more of the environmental sustainability and Social inclusion targets of the 2030 Agenda[20]

The analysis confirms that innovative solutions of startups focus mainly on priority sustainability objectives: The fight against hunger (goal n.2 SDGs) The transition to more sustainable and responsible production and consumption systems (goal n.12 SDGs), extending access to food and productive resources, optimizing the use of resources, increasing the exchange of information along the supply chain, and minimizing waste. At the same time, attention is increasing to the challenges of economic growth and sustainable development of small and medium-sized production companies (goal n.8 SDGs), promoting employment opportunities and a fairer distribution of the value generated along the supply chain.

It is also implemented the innovative drive for the efficient use of natural resources used in production processes (goal n.12, target 12.2 SDGs), which emerges as a priority objective to which most of the innovative responses of startups are oriented that: aim at reducing materials and chemicals and improving seeds for production activities. Invest in precision agriculture through innovative aquaponics systems, "vertical farming" and "indoor farming" technologies. Fuel the trend of plant-based meat alternatives grown in laboratories. There are also solutions aimed at increasing productivity and the resilience of crops to climate change (goal n. 2, target 2.4 SDGs). In fact, in pursuing this target, many startups (as many as 108) also combine the 12.2 target, highlighting the link with the efficient use of resources.

B. Risk based approach

With reference to the Corporate Sustainability Due Diligence (CSDD) proposal of Directive, as well as to the existing regulatory framework both at national and European level, these new business models

will be required to implement a preliminary risk assessment activity within the organization and throughout the supply chain. In particular, the risk assessment should address the impacts on the

[19] Food Sustainability Observatory Project of the University for Polytechnics Milano; Available on: https://www.som.polimi.it/en/research/research-lines/food-sustainability-observatory/

[20] Sustainable Development Goals of the UN; Available on: https://www.un.org/sustainabledevelopment/

SDGs (Social Development Goals), which the company has decided to pursue within its industrial supply chain strategies.

Special attention must then be given to the review and monitoring of the regulatory adherence of companies in relation to their supply chains within the internal compliance structures and within those that are so called Compliance Program. It will be important to use this phase of adaptation to the regulatory framework to implement an efficient compliance assessment as a driver of value creation and as a mean for a responsible business conduct.

C. Compliance as a driver of value creation

Corporate compliance, intended as the development of a system for verifying the adherence with legal standards (rules of conduct, regulations, ethics codes or best practices), is based on the ability to define ex ante the actions to be followed and on the ability to perform controls to highlight the degree of “compliance/conformity” of the conduct of the company, compared to what is foreseen in the reference sector. Consequently, in order to verify the alignment of the company's business with the regulation governing a given area, companies will:

Carry out a preliminary and careful analysis of the company as a whole and develop an in-depth regulatory knowledge of the reference sector. Prepare an appropriate organizational model more or less extensive depending on the sectors and disciplines applicable, for example, in the field of transparency, anti-corruption, environment, anti-money laundering, IT security and data protection; consumer protection, quality assurance, workplace safety and, last but not least, sustainability and ESG criteria Prepare and implement an efficient communication, monitoring and control system. Furthermore, it will be important that the individual Compliance Programs are "sewn" on the "shapes and measures" of the company itself, as each company has its own peculiarities and consequently needs customized and ad hoc programs and not pre-established ones, which hardly correspond to efficient compliance. All of these requirements are a must-have and are essentials elements of corporate compliance that can promote good business ethics In this way it will be possible to identify the perimeter which the business can operate within, without crossing the thin line between permitted and illegal conduct. In these terms, compliance has the function of reducing opportunities for committing offenses and acting as a deterrent to criminal impulses that may develop in organizations and helping to ensure the sustainability of the business in a long-term perspective, helping companies to remain competitive on the market, enhancing reputation and image and consequently increasing the trust of customers and stakeholders.

In addition, in regards of "risk assessment", a good compliance function, - based as mentioned above on a preventive analysis of the company and sector regulations, on an adequate organizational model and on an efficient communication, monitoring and control system -, will help the company to manage the risk of non-conformity, for example identifying ex ante the potential risks to which the company might be exposed, examining and developing a compliance path to be followed to prevent the risk from materializing in a violation, or managing any or potential risk situations and preparing ad hoc resolutions of problems. The Compliance function, thus conceived, becomes a driver of added value creation and an essential factor for the well-being of the entire corporate and organizational ecosystem of any company, as well as a means of achieving sustainability objectives.

IV. CONCLUSIONS

Sustainability is a complex process of social, political, technological, financial, and legal change, a "long-term" process, which is assuming ever wider dimensions and is leading towards a "new time" with an industrial structure to be imagined and built.

It will not be an easy task. The new challenges will concern multiple and complex scenarios, from the ecological and digital transition to social inclusion and energy and food security and will not be easy to solve.

For this reason, it will be more necessary than ever that: political decision-makers, companies, industry technicians, investors, banks, economists, lawyers, entrepreneurs, suppliers, consumers and, more generally, all citizens, acquire awareness and consequently assume the responsibility of being an "active part" of this change, which hopefully will be able to meet the needs and expectations of current generations without detracting from those of future generations.