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PRIVATE INTERNATIONAL LAW IN THE CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE

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Abstract: Following the enactment of the Corporate Sustainability Due Diligence Directive, Private International Law remains pivotal in both guaranteeing access to justice for victims and establishing the applicable law governing the corporate civil liability regime for human rights abuses. The due diligence framework set out under the Directive contains the minimum requirements that companies must comply with in order to establish a due diligence process on a staggered basis. However, it fails to include a set of rules either on civil liability derived from non-compliance or on the remediation of possible damages caused; consequently, in such cases, the Member States' laws, together with Private International Law, must be applied to complement the regime related to non-contractual liability. As this paper will show, references to Private International Law were amended and curtailed throughout the drafting process, culminating in a final text that favours the prior harmonisation of substantive law. Moreover, it even leaves it to the discretion of Member States to treat matters related to companies' due diligence as mandatory rules, ultimately inhibiting any progress that could be made in the area of Private International Law.
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I. The Corporate Sustainability Due Diligence Directive: a missed opportunity

1. Different options were put forward throughout the legislative process of the Corporate Sustainability Due Diligence Directive[2] that were aimed at establishing obligations for companies, with the objective of increasing respect for human rights and the environment in their cross-border activities.

The legislative journey began on 11 September 2020 with the publication of the Parliament's Draft Report which was addressed to the Commission as a 'Proposal for a Directive on Corporate Sustainability Due Diligence'. The Report contained recommendations on due diligence and corporate liability.[3] Four years later, it culminated in the enactment of legal provisions which reflected a process marked by a gradual waning of interest in establishing a

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[2] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJEU 5.7.2024.

[3] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129 (INL)).

genuine civil liability system in this area. The initial Draft can now be regarded as a highly ambitious but fitting starting point, as it sought to advance European unification both substantively and procedurally by establishing a comprehensive regulatory framework that would involve companies' non-contractual liability for human rights violations.

2. In the final version of the Directive, these measures were no longer consistent and were reduced to minimum harmonisation standards focused on the implementation of a mandatory corporate due diligence procedure, which nevertheless failed to guarantee the reparation of damages.

3. Consequently, the reparation of damages arising from human rights violations linked to business operations would continue to depend on States' civil liability regimes, and therefore, the co-existing heterogeneous criteria in the legal systems across the EU would continue to be applied.[4] This highlighted the significance of conflict-of-laws rules, as the extent of corporate liability would depend on the law to be determined by the existing framework of European Private International Law.

4. However, the rules of Private International Law on civil liability do not satisfy the prerogatives of access to justice and reparation necessary for the victims in these cases.[5] Thus, coordinated efforts in substantive and procedural harmonisation are needed to achieve a shared goal of protection and reparation which would otherwise be significantly undermined.

5. In fact, this was the original idea behind the Proposal for a Directive on Corporate Sustainability Due Diligence; namely, to provide a mandatory cross-sectoral regime related to non-contractual liability requiring European companies, as well as those operating in Europe, not only to comply with mandatory due diligence throughout their supply chain to prevent human rights abuses in their activities, but also to grant victims adequate mechanisms to claim damages and redress for any harm caused. This was the beginning of a process intended to implement a set of inescapable obligations, which was to be accompanied by sanctions and a system of civil liability for damages, in which Private International Law played a major role.

6. Despite the process described above, the objective outlined in the final version of the Directive seemed to have been significantly reduced, as it merely established a Europe-wide due diligence process that increased the obligations of companies along their value chain, but did not provide for liability for damages. This paper will analyse to what extent this instrument has brought new developments to the field of international litigation and corporate liability that will help victims to receive effective reparation. Emphasis will be placed on the perspective of the applicable law, which remains the basis for determining the type and scope of non-contractual liability in cases of damages.

[4] See N. Magallón Elósegui, *La Ley aplicable a la responsabilidad civil extracontractual de empresas por abusos a los Derechos Human*os, Aranzadi, Cizur Menor, 2023.

[5] See G. Palao Moreno, 'Hacia una regulación en materia de diligencia debida de las cadenas de valor empresariales: retos que suscita al Derecho Internacional privado', in *Empresas Transnacionales, Derechos Humanos y cadenas de valor,* M. Chiara Marullo, L. Sales, J. Zamora, (directors), Colex, A Coruña, pp. 45-65; JJ. Álvarez Rubio and K. Yiannibas, *Human rights in business. Removal of barriers to access to Justice in the European Unión,* Routledge, NY, 2017; M. Requejo Isidro, *Violaciones graves de Derechos humanos y responsabilidad civil*, Thomson Reuters Aranzadi, Cizur Menor, 2009, 'Litigación Internacional por abusos contra Derechos Humanos. El problema de la competencia judicial internacional', *AEDIPr*, t-X, 2010, pp. 259-300.

II. The gradual weakening of the rules of Private International Law in the process of drafting the Directive

7. The right of access to justice and the guarantee of judicial protection for persons whose rights and freedoms have been violated is recognised in Article 47 of the EU Charter of Fundamental Rights.[6] Article 13 of the EU Convention on Human Rights sets out the right to an effective remedy[7] when the rights guaranteed by the Convention itself are violated. Despite this, when human rights violations are committed by companies in the course of their business activities, they are often accompanied by a series of procedural challenges that can lead to a potential denial of justice.

8. Such denial of justice results from a series of cumulative circumstances. Some of the reasons for advocating the implementation of a programme of complementary measures from within the different areas of law concerned include situations of vulnerability experienced in investment-hosting states and/or states hosting corporate operations; governance gaps; unstable political structures; lack of effective judicial systems; poor social rights; complex corporate structures; an ambiguous scope of responsibility; and the absence of specific rules. The path towards an effective protection of human rights and guaranteed effective judicial protection requires both greater regulation of business conduct from a material point of view and enhanced liability systems and judicial mechanisms to ensure that full compliance with conduct provisions can be demanded and reparation for damages can be readily obtained.

9. Thus, ensuring that material standards in due diligence are consistent across the Member States is a means of achieving the minimum protection criteria to be required of business conduct in terms of human rights, while at the same time helping to mitigate the uncertainty and legal insecurity arising from the material diversity and different standards of protection that exist in this area. The requirement of a 'common' due diligence framework for European companies in all Member States and the achievement of some degree of harmonisation or approximation of legislation will undoubtedly be a crucial step in strengthening a more responsible business conduct model[8] and simultaneously fostering a new legal basis on which to build civil liability for damages.

10. In parallel to this, as underscored in the third Pillar of the UN Guiding Principles on Business and Human Rights,[9] there is a need to facilitate access to remedy mechanisms for victims of human rights abuses related to business operations and move beyond the 'well-intentioned' role of corporate due diligence obligations at present in order to make them an absolute requirement, not only for the sake of respecting and guaranteeing human rights, but also with the aim of establishing a new model of corporate governance that is more sustainable, more respectful and more committed at a global level.

11. Member States have a duty to protect human rights, which includes ensuring access to both judicial and non-judicial remedy mechanisms for harm caused by companies in the course of their cross-border operations. As the Guiding Principles state, where a company's activities

[6] Charter of Fundamental Rights of the European Union, OJEC 18.12.2000, C364/01.

[7] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, https://www.echr.coe.int.

[8] Proposal for a Directive of European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM (2022) 71 final, 23.2.2022.

[9] UN Guiding Principles on Business and Human Rights: Implementing the UN Framework to 'Protect, Respect and Remedy', adopted by the UN Human Rights Council, UN Doc. UN A/HRC/17/L17/31, June 2001.

have had, or have contributed to, adverse human rights impacts, they should make reparations; however, this is not reflected in practice. In reality, there are tools that can be used to protect human rights and provide remediation, but this requires a paradigm shift in corporate governance and, to some extent, it is where the measures set out in the Directive should be directed.

12. From this perspective, Private International Law plays a central role as an instrument to provide protection for victims in order to mitigate the negative consequences derived from the discrepancies between the different legal systems. This protection is twofold: it involves ensuring victims' access to a neutral forum and effective judicial remedies in legal action; and choosing the most advantageous applicable law, or that which at least ensures good standards of human rights protection and potential reparation for possible abuses or violations. This was the position that marked the starting point on the road to the drawing up of the Directive. At the start of the procedure, the European Parliament called for the creation of a body of legislation which included rules governing access to justice, jurisdiction, recognition and enforcement of judgments, and applicable law and legal assistance in cross-border situations in civil and commercial matters.

13. It is worth briefly reviewing how the solutions linked to access to justice contained in the Parliament's First Proposal were included in the amendment of the Brussels I Regulation[10] (which I will not dwell on here), and in a proposal to reform the Rome II Regulation on the law applicable to non-contractual obligations. This consisted of the introduction of a specific rule on business and human rights that extended the principle of ubiquity provided for in Article 7 of the Rome II Regulation for environmental damages to human rights claims related to companies. Along these lines, it was proposed to incorporate Article 6(c) into the Rome II Regulation as a specific rule giving claimants the opportunity to choose between the laws of various locations with which the damages are closely connected, thus supplementing the general rule of Article 4 of the Rome II Regulation. The Parliament's objective was to ensure the application of the law most favourable to the victim, and to this end, it extended the potentially applicable laws to include, alongside the law of the country in which the damage occurred (*lex loci damni*), the law of the country in which the event giving rise to the damage occurred (*lex loci delicti commissi)*, the law applicable to where the parent company was domiciled (*lex loci incorporationis*), or, when the parent company was not domiciled in a Member State, the law of the place where it operates.

14. The possible choice between the laws of different countries increased the autonomy of will of the parties; but still the mandatory rules of the forum may not be derogated from, in accordance with Article 16 of the Rome II Regulation. However, from a business perspective, it was considered that the lack of predictability generated by the introduction of the rule of ubiquity in matters of human rights violations could cause excessive legal uncertainty, given that it obliges companies to foresee *ex ante* potential compliance with the laws of four different States, as they will not know the law that will finally be applicable until the damage has occurred. This would notably increase the costs.[11] Shortly afterwards, the provisions aimed at

[10] The Parliament's Draft Report under discussion proposed to introduce two amendments to the rules of international jurisdiction: to add a new paragraph 5 to Article 8 of the Brussels Ia Regulation and to introduce a new 26a which would incorporate the *forum necessitatis*.

[11] N. Magallon Elósegui, 'El Reglamento Roma II y la ley aplicable a la responsabilidad civil derivada de los actos contrarios a derechos humanos realizados por empresas en sus actividades transfronterizas', *AEDIPr*., T-XXII, 2022, pp. 203-235.

harmonising due diligence obligations were maintained in the Parliament's final resolution with recommendations to the Commission on corporate due diligence and corporate accountability,[12] but the aforementioned proposed amendments to Brussels I and Rome II Regulations contained in the previous Report were excluded.

15. The Parliament reversed course in its final resolution and, while it welcomed the introduction of a liability regime, it stated that, in order for victims to obtain effective remedy, companies should be held liable under national law for damages caused by any companies under their control (or to which they have contributed by act or omission). These include any violations or environmental damage caused, unless they can demonstrate that they acted with due care, in accordance with their due diligence obligations, and that they took all reasonable available measures to prevent such damages.

This new version laid the foundations for the final text, which revolved around two fundamental ideas that would define the new system set out in the Directive: the liability of companies for human rights violations would continue to depend on national laws, and it would be a form of liability based on compliance with due diligence obligations and not on the damage caused.

16. In essence, by deferring to national laws, European rules were more likely to be applied. Given that the law of the place where the damage occurred (*lex loci delicti commissi*) might offer a lower level of protection, a disguised material reference was made to the law of the country where the company is domiciled. Consequently, having rejected the amendment of the relevant European Private International Law instruments, the Parliament opted to include a new provision in the text of the Directive (Article 20), which stated that the 'relevant' provisions of the Directive were to be considered mandatory in line with Article 16 of the Rome II Regulation.

17. Although this option did not mitigate the lack of predictability that the theory of ubiquity in the previous text entailed, it seemed to guarantee the application of the European standards of due diligence in the area of business and human rights, without modifying the Rome II Regulation. As a result, European companies were constrained to comply with the Directive provisions, regardless of the place where they operated and thus, indirectly, of European standards.

18. This solution also failed to overcome the lack of foreseeability mentioned above, because it was still subject to the law designated by the conflict rule. Furthermore, it is important to emphasise that the content of the Directive and European rules would only apply as *lex fori* when the claim is brought before European courts, but there was no guarantee that it would apply when it was brought before third countries. Indeed, if the aim was to ensure the application of common minimum criteria and the uniform implementation of the European norm across Europe, it would have been preferable to have adopted a specific regulation that would guarantee consistency across all Member States, irrespective of the law designated by the Rome II Regulation. In this way, there would have been no need to establish the applicable law and, at the same time, the distortions that may result from the rules transposing the Directive into national law would have been avoided. Even so, it is true that the legal basis

[12] European Parliament Resolution of 10 March 2021, with recommendations to the Commission on corporate due diligence and corporate accountability.

chosen to draft the Directive (Article 114 TFEU, instead of Article 81) meant that the European legislator's purpose or, at least, their priorities, were predetermined from the outset.[13]
19. Finally, the Commission's Proposal for a Directive adopted on 23 February 2022[14] did not include the recommendations contained in either the initial draft report or the Parliament's final proposal. Consequently, there was no longer any reference to the mandatory nature of the European standards, and Article 20, which, under the heading of Private International Law, established the obligation of the States to make the provisions of the Directive mandatory in accordance with Article 16 of the Rome II Regulation,[15] was definitively discarded.

III. The law applicable to companies' civil liability for human rights abuses under the Due Diligence Directive

1. Article 29 of the Directive and Member States' civil liability regimes

20. The final version of the Directive on corporate sustainability due diligence[16] contained very similar wording to the Commission's Proposal of February 2022, which laid the definitive foundations for the approved text in Article 22.
21. The original Article 22 would later become Article 29 and no longer incorporated the Parliament's recommendations. It also excluded the obligation of the States to make the provisions of the Directive mandatory (in line with Article 16 of the Rome II Regulation). This resulted in a rule that unequivocally renounced the adoption of a specific conflict rule on the law applicable to corporate non-contractual liability for damages and left in the hands of the Member States to consider it a mandatory rule. Thus, following the recommendations of the 'European Group of Private International Law' (EGPIL),[17] the provision was replaced by an instruction to the Member States entrusting them with ensuring that the national laws which transpose the Directive would make it compulsory.
22. Under the heading 'Civil liability of companies and the right to full compensation', Article 29 stipulates that Member States 'shall ensure' ('*velarán'*, '*veillent'*) 'that a company *can* be held liable for damage caused to a natural or legal person *provided that* (…) [emphasis added]'. Therefore, it transfers the responsibility for the decision as to whether a system of civil liability in terms of business and human rights should be established to the Member States, which would have to design a regime whereby companies are held liable for the damages they cause in their cross-border activities. Accordingly, pursuant to the Directive, the States should implement a liability system to define the minimum standards of the liability regime at European level on the basis of the guidelines set out in Article 29.

[13] As pointed out by G. Palao, in 'Hacia...', *op. cit.,* p. 53.
[14] OJEU No. 1760 of 5 July 2024, pages 1-58.
[15] See G. Palao Moreno, 'Hacia...', *op.cit*., p. 58 -59; L.F.H. Enneking, 'Judicial Remedies: the issue of applicable law', in *Human Rights in Business. Removal of Barriers to Access to Justice in the European Union', Routledge,* K. Yiannibas,J.J., Alvarez Rubio, (eds.) London, 2017, pp. 38-77.
[16] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJEU 5.7.2024.
[17] See 'Recommendation of the European Group of Private International Law (EGPIL) concerning the Proposal for a Directive of 23 February 2022 on Corporate Sustainability Due Diligence, following up on its Recommendation to the Commission of 8 October 2021', https://gedip-egpil.eu/en/2022/oslo-2022/.

23. The recitals of the Directive will now be discussed in order to interpret its purpose and scope, on the understanding that they are aimed at establishing the legal grounds used and explaining the reasons for the operative part. Recital 16 states that the purpose of the Directive is to ensure that companies prioritise, prevent, mitigate, end, minimise and remedy actual or potential adverse human rights and environmental impacts related to their operations, those of their subsidiaries and those of their business partners, and that those affected have access to justice and legal remedies. This is certainly an ambitious objective, which seemingly includes the desire to both achieve reparation for damages resulting from business activities and establish a system of civil liability.

24. To this end, according to Recital 79, 'Member States *should be required* [emphasis added] to lay down rules governing the civil liability of companies for damage caused to a natural or legal person, on condition that the company intentionally or negligently failed to prevent or mitigate potential adverse impacts or to bring actual impacts to an end or minimise their extent and, as a result of such a failure, damage was caused to the natural or legal person'. In this regard, the rules should provide for the liability of companies for damages that could not have been avoided despite the fulfilment of their due diligence obligations.

While Recital 79 sets out the requirement for States to establish rules on the civil liability of companies, this obligation is somewhat diluted in the operative part. Moreover, this Recital seems to point to a system of strict liability which undertakes to hold companies liable for damages (intentionally or negligently) caused regardless of the fulfilment of the stipulated obligations; and yet, Article 29 links such liability for damage to non-compliance with the obligations laid down in the Directive (Articles 10 and 11). There are slight inconsistencies between the two sections of the regulation, with the recitals appearing to impose more stringent requirements than the operative provisions.

25. Regarding the kind of damages concerned, the Directive refers to legal interests protected under national law and examples include a range of damages such as death, physical or psychological injury (listed in Annex 1). Furthermore, the damages caused must be linked to the company's failure to meet its obligation to address the adverse effect and protect the natural or legal person who suffered the damage, thus leaving aside consequential damage caused indirectly to other persons who are not direct victims of the adverse effects.

26. Considering both the Recitals and Article 29, it can be concluded that the Directive appeals to a direct type of liability based on fault or negligence, and to a necessary causal link between the parent company's violation or inadequate fulfilment of its due diligence obligations and the damages. Thus, the parent company would be exonerated if it can be demonstrated that it complied with its obligations as stipulated in the Directive.

27. However, the Directive does not establish which party bears the burden of proof, despite the fact that proving the link between the damage and the breach of the parent company's obligations is one of the major stumbling blocks for victims when claiming damages. Recital 81 explains that this will be a matter subject to national law, as will the conditions for initiating proceedings. In this regard, it should be borne in mind that in most general systems related to non-contractual liability the fault of the company is presumed, unless it proves that it has acted with sufficient diligence. In contrast, the burden of proof is reversed in the French duty of

vigilance law[18] and the burden is shifted to the victim, who is required to prove the link between the negligent conduct of the company and the damages.

28. In turn, the Directive stipulates that the company shall not be liable for damages caused only by its business partners, as provided for in Article 29.2 of the Directive in conjunction with Recital 87, and its liability should be without prejudice to the civil liability of its subsidiaries or direct and indirect business partners in its chain of activities. It has opted for a 'direct' form of liability that links the parent company to the damages, by holding it materially responsible to the extent that it has contributed to causing such damages. But it leaves aside the 'indirect' liability referring to damages inflicted as a result of an activity carried out by its subsidiaries or subcontractors. It is, therefore, a rather limited measure, particularly considering that one of the problems inherent to liability for damages in this context stems from the difficulty in apportioning liability for those damages to parent companies which often outsource their operations to obtain greater profits and are characterised by organisational structures with long value chains. In fact, the parent company is frequently not directly involved in the activity that generated the damages, which result from the activities of its subsidiaries or subcontractors. However, this difference between direct or indirect liability should not be measured in terms of companies being free from fault for damages caused; rather, it could be linked to *in vigilando* liability (liability in supervising), whereby the company would be held liable on grounds other than failing to exercise its duty of care appropriately.

29. On the other hand, where the company has caused the damages jointly with a subsidiary or a business partner, it should be jointly and severally liable. Joint and several liability and the right of recourse shall in any event be governed by national law.

30. As we can see, the Directive only superficially outlines the system of civil liability of companies for human rights abuses, but it broadly defers to national laws on matters not explicitly addressed by the Directive, while requiring those laws to align with its provisions where applicable. In the European context, legislative initiatives on business and human rights adopted at the State level do not include provisions addressing civil liability. They are mainly focused on the adoption of due diligence procedures based on information and monitoring mechanisms designed to identify and prevent the actual or potential risks associated with business activities. So far, only two European due diligence rules have provided for minimal criteria aimed at ensuring that reparation or remedy is offered and establishing the liability of companies once damage has occurred: the French duty of vigilance law and the German duty of care law.

31. Existing State-level due diligence instruments in Europe are characterised by their heterogeneity and sectoral nature, as well as by the absence of coercive measures seeking to ensure companies' compliance with due diligence obligations. An analysis of contemporary due diligence rules from a comparative law perspective reveals that the majority of these rules do not incorporate corporate liability measures, either for breaches of due diligence obligations or for damages arising from such breaches.[19]

[18] *Loi 2017-399, du 27 mars 2017, relative au devoir de vigilance des sociétés méres et des entreprises donneusses d'ordre 2017, JORF 2017-399.*

[19] N. Magallón Elósegui, *La ley...loc.cit*., pp. 43-58.

32. The only State regulation that mentions non-contractual liability rules is the French law on the duty of vigilance,[20] which refers to the general principles of non-contractual civil liability set out in the French Civil Code. It indirectly alludes to the non-contractual liability of the parent company derived from damages caused as a consequence of the lack of control or vigilance of those companies with which it has an ongoing relationship. It is, therefore, also a direct form of liability based on the negligent conduct of the company arising from the duty of vigilance provided for in the regulation, which means that the company is held liable for the consequences. However, the parent company will only be liable if it has not complied with its due diligence obligations and, under France's law, and the onus will be on the victim to prove the causal link between the business conduct and the damages. Nevertheless, the French rule is not clear as to the type of consequences resulting from such a breach, nor as to the criteria to be used for apportioning liability. After passing the Bill through the *Conseil constitutionnel,* the French legislator opted to include non-contractual civil liability for absence of negligence or recklessness by referring to the general principles of the French Civil Code, which sets out a system of 'vicarious' liability or a system of liability of the operator (principal) for the acts of others.

32. The German law on duty of care in the supply chain ('*Lieferkettensorgfaltspflichtengesetz*')[21] foresees financial sanctions in case of failure to comply with the obligations of care or the due diligence contained in its provisions. Article 3.3 explicitly states that non-compliance will not give rise to any civil liability and that any civil liability arising independently from the law will remain unaffected. Indeed, the Explanatory Memorandum clarifies that the aim of the rule is 'not to create additional liability risks for companies' that are subject to general German law on non-contractual liability. Thus, while non-compliance with the obligations set out in the law does not trigger any civil liability, administrative sanctions apply.[22]

33. The European legislator, aware of both the heterogeneous European civil liability systems and of the lack of steps towards a unified regime, established in Article 29(6) of the Directive that everything that the provisions related to liability shall not limit the liability that companies have under national systems, and shall be without prejudice to Union or national rules 'on civil liability related to adverse human rights impacts or to adverse environmental impacts (...) providing for stricter liability'.

34. The Directive defers the matter to national laws, which will retain their respective liability systems. It is not entirely clear which rules the Directive refers to, as European legal systems

[20] *Loi 2017-399, du 27 mars 2017, relative au devoir de vigilance des sociétés méres et des entreprises donneusses d'ordre* 2017, JORF 2017-399, see A. Duran Ayago, 'Sobre la responsabilidad por violaciones graves de los derechos humanos en terceros países (a propósito de la ley francesa 2017-399, de marzo de 2017, relativa al deber de vigilancia de las empresas matrices sobre sus filiales), *AEDIPr.*, T.XVIII, 2018, pp. 323-348; T. Sachs, 'Le loi sur le devoir de vigilance des sociétés-méres et sociétés doneusses d'ordre: les ingredients d'une corègulation', *Revue de droit du travail*, no. , 201, pp. 380-390; I. Daugareilh, 'La ley francesa sobre el deber de diligebcia debidas de las sociedades matrices y contratistas: entre renuncias y promesas', in *Impacto laboral de las redes empresariales*, W. Sanguineti and J. Vivero (directors), Comares, Granada, pp. 375-388.

[21] Published in the Official Gazette, 22 July 2021, No. 46, p. 2959; see L. Nogler, 'La ley alemana de obligaciones de cuidado en la cadena de suministro: por qué nació y cuáles son sus principales contenidos', in *Diligencia debida y trabajo decente en las cadenas de valor globales*, W. Sanguinetti and J. Bautista (dirs), Thomson-Reuters, Aranzadi, Cizur Menor, 2022, pp. 141-182; M. Fuchs, 'La ley de diligencia debida en la cadena de suministro de Alemania', *Trabajo y Derecho*, no. 16, 2022.

[22] L. Nogler, 'La ley alemana de obligaciones…', *op.cit*., pp. 141-182.

lack specific provisions addressing the civil liability of companies for harm to human rights and the environment, aside from those already mentioned. Consequently, we must await future regulations and, in the interim, rely on general legal provisions on non-contractual liability to bridge this gap, despite its lack of specific regulation in this domain.

35. Given this deferral to national law, it could be concluded that the Directive is intended to be a minimum standard without prejudice to the existence of state rules that provide for stricter liability. Consequently, if a company is held liable for damage caused in the course of its activities under a State's rules, it will be liable regardless of what the Directive stipulates. In fact, this referral raises doubts as to its application: does it mean that, despite the system of direct liability outlined in its provisions, a system of strict liability (stricter than the one established in Directive rule) could be applied in accordance with a State's legal system?

36. Not all European non-contractual civil liability systems in force in the Member States are consistent with the guidelines stipulated in the Directive. Article 29 calls for a specific civil liability system by setting out the type of direct liability to be followed by national laws when they transpose the Directive. Ultimately, the European standard is intended to establish harmonised minimum criteria that may require changes in national systems; failing that, it will be less operational. EU legislators have opted for a system that requires companies to reinforce due diligence processes and demonstrate their diligent and responsible conduct, but exonerates them from damages which, in such cases, will remain unremedied and will be borne by the victims.

2. The Directive and the law applicable to companies' civil liability for human rights abuses

37. The Parliament's Draft Report laying the groundwork for a Due Diligence Directive included a proposal (as an Annex) to amend the Private International Law instruments aimed at reforming, among others, the conflict rules on non-contractual civil liability under the Rome II Regulation.[23] However, the final version of the Directive omitted any reference to the rules of Private International Law, despite the fact that, given the diversity and heterogeneity within the European system on non-contractual liability, conflict-of-law rules hold particular importance, as they serve to determine the applicable law governing the basis and criteria for the apportionment of such liability.

38. In the absence of specific provisions designed to determine the conflict-of-laws rules regarding non-contractual civil liability of companies for human rights violations, the general conflict-of-laws system set out in the Rome II Regulation must be applied. This Regulation incorporates a system based on a general rule outlined in Article 4, alongside a series of special rules that govern particular cases.[24] In fact, Recital 19 of the Rome II Regulation itself emphasises the importance of adopting special rules to address cases where the general rule

[23] The feasibility of including a specific article on business and human rights was assessed in the Study on the Rome II Regulation commissioned by the European Commission to BIICL, '*Study on the Rome II Regulation (EC) 864/2007 on the law applicable to non-contractual obligations',* JUST/2019/JCOO_FW_CIVI_0167, pp. 87-96.

[24] G. Palao Moreno, *Responsabilidad civil y Derecho Internacional privado,* Tirant lo Blanch, Valencia, 2008 and 'Responsabilidad civil y Derecho Internacional privado', in *Derecho de daños,* M. E. Clemente and M.E. Cobas (dirs.), Tirant lo Blanch, Valencia 2021, pp. 2005 ff. E. Clemente and M.E. Cobas (directors.), Tirant lo Blanch, Valencia 2021, pp. 2005 ff.

fails to effectively remedy the harm due to its specific nature and does not strike a reasonable balance. It is precisely the general rule that becomes a residual rule, depending on the specificity of the case.

39. The need to introduce special conflict rules has been spreading to areas of civil liability linked to the increasingly global nature of business operations and technological developments, which has multiplied risk-generating activities at the international level. This new dynamic will result in more diverse, sector-specific scenarios, leading to a trend towards the specialisation of conflict rules.[25] These new sectors include the non-contractual civil liability of companies for human rights abuses in their cross-border operations, due to their specific nature.

41. The adaptation of conflict rules to the different areas of non-contractual civil liability moves beyond the traditional legal, formal and merely localising function of such rules. These rules are no longer confined to 'neutrally' designating the legal system that will govern the legal relationship irrespective of its substantive content. Instead, they increasingly seek to facilitate specific substantive outcomes, reflecting a 'paradigm' shift in their function.[26] As is well-known, conflict rules seek to localise the applicable legal system and, in the search for an effective connection with the legal system in question, a more specialised rule guarantees an adequate response to meet the needs in any particular damages case.

42. Different techniques can be identified that allow the conflict rule to be directed towards a system grounded in the principle of material justice.[27] Thus, the rigidity of the conflict-of-laws method, based on a single connection, can be mitigated by multiple links that can be used according to the specific circumstances involved with the aim of reaching a specific material result.[28] This was the idea behind the Parliament's initial proposal for a Due Diligence Directive in its attempt to fold into the Rome II Regulation a specific article with alternative connections that would give claimants the option of choosing between certain laws; thus, victims would have had recourse to a legal system that would guarantee reparation, circumventing the application of the law of the place where the damage occurred when it provides unsatisfactory rules.[29]

43. Once the instrument chosen to harmonise the due diligence obligations of companies was the Directive and not the Regulation, the incorporation into the Rome II Regulation of a specific rule to set out the non-contractual civil liability of companies for human rights violations seemed to be the most appropriate option, but it was also discarded.

44. In addition, apart from multiple connections, other techniques can be used to favour a certain outcome in a particular case in order to protect specific interests. In fact, when the result indicated by the conflict rule is in conflict with the values and principles of the legal system of the forum, it is common to seek the application of unilateral rules, extension rules, mandatory rules or public policy clauses aimed to defend certain legislative policy interests.

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[25]J. González Campos, 'Diversification, specialisation, flexibilisation et materialisation des règles de droit international privé', *R des C*, (287), pp. 9-246, p. 207.

[26]J. González Campos, 'El paradigma de la norma de conflicto multilateral', *Estudios en homenaje al Profesor Aurelio Menéndez*, T IV. Civitas Madrid, 1996, pp. 5239-5370.

[27]R. Nova, 'Solution du conflits de lois et Règlement satisfaisant du rapport international', *Rev.crit. dr. int. pr.,* 1948, pp. 179-203.

[28] See F. Rigaux, Droit international privé, 2 ed. Brussels, 1987, pp. 214-217; González Campos, 'El paradigma...-, *op.cit.,* pp. 5265-5266; J.C. Fernández Rozas and S. Sánchez Lorenzo, *Derecho Internacional Privado* . 9th ed. Thomson-Civitas, Madrid, 2016, pp. 139.

[29] Article 6(a) of the Parliament's Draft Report.

45. Article 16 of the Rome II Regulation sets out the application of the provisions of the law of the forum (whatever the applicable law) in 'a situation where they are mandatory'. The Directive could be encompassed within such a situation. The Parliament's Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability[30] endorsed this approach after rejecting the amendment of the Rome II Regulation. It invoked the mandatory nature of the Directive through Article 20, which stipulated that its provisions should be regarded as mandatory pursuant to Article 16 of the Rome II Regulation. Indeed, this would safeguard the content of the Directive irrespective of the law designated by the conflict rules.
46. Finally, neither of these two approaches was adopted in the final text of the Directive, as the reference to the mandatory nature of the European rule was disregarded in the Commission's version of 23 February 2022. The alternative was prior harmonisation of substantive law and renouncing both the adoption of a specific conflict rule and its status as a mandatory rule at the European level. As a result, it has been left to the Member States to consider the content of their own transposition rules as mandatory.
47. Ultimately, all references to the applicable law that were considered during the drafting process were deleted. Only the last paragraph of Article 29 contains a weak vestige of the earlier proposals. It calls on the Member States to consider the rules transposing the Directive as mandatory rules in cases where the law designated to govern such liability is that of a third State. A similar provision was contained in the Draft Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[31] This means that national laws transposing Article 29 and their liability systems would apply irrespective of the conflict rule and the applicable law.
48. This approach is akin to a public policy clause; could it be used to ensure the application of the law of the forum when the law designated by the conflict rule does not ensure the protection of human rights or allows for them to be violated? Article 26 of the Rome II Regulation contains a public policy clause (although it refers to the public policy of the forum and it would be more appropriate to incorporate the concept of European public policy, similarly to the Commission Proposal of 22 July 2002 for a Regulation on the law applicable to non-contractual obligations[32]). Despite this, the protection of human rights in terms of basic values and principles of the legal system is not guaranteed, since, according to Article 29.7 of the Directive, States shall ensure that the provisions transposing Article 29 are applied in an overriding manner, even when the applicable law is that of another State; but Article 29 barely contains minimum standards and does not have any provisions in this respect.
49. European public policy should be based on a model of social, economic and environmental protection based on respect for human rights, which could serve as a basis for ruling out the application of legal systems that are contrary to the values and principles of which it is composed. The incorporation of a public policy clause would make it possible to derogate from the application of the conflict rule and avoid conduct contrary to human rights, justified by the lack of protection from the legal system of the place where the damage occurred, but it has not been included in this way.

[30] Resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability 2020/2129 (INL)
[31] https://www.ohchr.org/es/special-procedures/wg-business
[32] COM (2003) 427 final.

50. As we can see, the Directive barely establishes basic guidelines for ensuring firm and effective civil liability of companies for damages to human rights, and leaves it up to the will of the States to establish such liability, even though the Directive may be transposed in many different ways. States will be able to choose higher or lower standards of liability, which will require analysing State rules one by one, as was the case before the Directive was adopted. The system therefore remains largely unchanged.
51. The final wording of the Directive does not solve the problems arising from the existing heterogeneity of European liability systems, nor does it address the inadequacy of these systems in terms of ensuring that companies are held liable for human rights violations and victims obtain reparation for damages. In addition, it fails to provide the legal certainty for companies to foresee the consequences of the risks to human rights involved in their cross-border activities. Given the difficulties in achieving a single, consistent substantive approach, unifying Private International Law instruments would have been a good alternative.
52. Consequently, the system of corporate liability for human rights and environmental abuses established under the Directive cannot be considered in isolation but must be understood in conjunction with the pre-existing framework of Private International Law on non-contractual liability.

IV. Access to justice and rules of procedural law under the Directive

53. In line with Recital 82, Article 29 of the Directive incorporates civil procedure rules as accompanying measures to the civil liability system, with the aim of addressing some of the practical and procedural obstacles faced by victims of adverse effects in accessing justice. These include difficulties in gaining access to evidence, the limited length of limitation periods, the absence of adequate mechanisms for representative actions and the prohibitive costs of civil liability proceedings.
54. In order to strengthen the right to effective judicial protection, in accordance with Article 2.3 of the International Covenant on Civil and Political Rights, Article 8 of the Declaration of Human Rights and Article 9.3 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, it introduces a series of provisions that would harmonise the procedures in the area of business and human rights across all Member States, to which the rules for transposing the Directive and national legislation must be subject.
55. Article 29.3 of the Directive firstly provides that the national rules adopted to transpose the Directive must not 'unduly' hamper the bringing of a claim for damages in this regard and must not be more restrictive than the general civil liability systems of national systems. To this end, it provides for a minimum limitation period of at least 5 years for claims for damages under the Directive. This period of time shall not begin to run before the infringement has ceased and the claimant has knowledge of the behaviour and the fact that caused the infringement, the fact that the infringement caused the claimant harm, and the identity of the infringer.
56. The statute of limitations is regulated in very different ways in the procedural laws of the Member States, both in terms of its qualification (procedural or substantive issue) and subject matter, as well as in terms of time limits. In general, the limitation period in non-contractual liability is five years, although in Spain, for example, it is one year and in Luxembourg it is

thirty years.[33] But the rules on limitation periods are not limited to determining the time limits for bringing an action; they also govern the calculation and possible interruption, suspension, termination or expiry of the limitation period. It should be noted that in actions brought before a European court, the law applicable to the non-contractual obligation will be determined by the Rome II Regulation. Article 15 (h) establishes that the law applicable under the Regulation shall govern the manner of extinguishing obligations, as well as the rules of prescription and limitation periods, including those relating to the commencement, interruption and suspension of limitation periods. The law of a non-European third State could also be designated under the Rome II Regulation.

57. Article 29.3. (b) of the Directive also takes into account the procedural costs of corporate liability proceedings, which should not be prohibitive to help promote adequate access to justice for victims. Individuals often face a range of litigation costs (court fees, lawyers' fees, evidence-related costs, witness fees, expert witnesses fees, translation costs, certification costs) that often demoralises and discourages them, especially in cases where large companies are involved and the economic inequality between the parties is reflected in their ability to litigate. The cost of litigation varies greatly from State to State, with each having a specific regime; hence the qualification as 'prohibitive' may also depend on the State in which litigation is initiated. Indeed, in order to eliminate the difficulties associated with the cost of international litigation in the case of victims of human rights abuses, free legal aid and full or partial exemption of legal costs should be promoted for destitute persons. These disputes are currently handled through agencies and support is given for civil society organisations to provide financial and legal assistance to victims of human rights violations.

58. Article 29.3(c) of the Directive refers to the possibility of seeking injunctive measures to bring the infringement to an end. To this purpose, it refers to summary proceedings being initiated that take the form of provisional or definitive measures to cease any infringements of national rules which transpose the Directive.

59. Furthermore, Article 29 of the Directive refers to the promotion of class actions[34] where there are multiple claimants. The difficulties encountered by individuals in litigation can be alleviated through this type of action. Currently, under European legal systems, this option is limited to specific cases such as those related to consumer issues.

The Directive again defers to national rules which transpose the Directive in order to ensure that collective action mechanisms are in place to enforce the rights of injured parties. Recital 84 establishes that Member States should provide for the 'reasonable' conditions for injured parties to authorise trade unions, non-governmental human rights or environmental organisations to bring civil liability claims to enforce the rights of victims, provided that these organisations meet specific requirements and have the express consent of the victim.

60. Finally, Article 29.3 (e) of the Directive refers to the regime of disclosure of evidence in claims seeking to establish corporate liability under the Directive, and is aimed at mitigating procedural differences between the parties. Thus, where a claim is brought and the claimant has a reasoned justification containing sufficient facts and evidence to support their claim for damages, and has indicated that additional evidence lies in the control of the company, courts may order that such evidence be disclosed by the company in accordance with national

[33] Art. 194.1 German Civil Code, Art. 1968.2. of the Spanish Civil Code, Art. 2262 Luxembourg Civil Code.

[34] M. Requejo Isidro, 'Derechos Humanos y acciones colectivas', *Anuario de la Universidad Autónoma de Madrid*, no. 16, 2012, pp. 313-337.

procedural law. Disclosure should also take into account Regulation 2020/1783 on the taking of evidence.[35] Courts should limit disclosure of evidence to that which is necessary and proportionate to support the potential claim for damages. The determination of proportionality should be made taking into account the available evidence, the scope and cost of disclosure, and the interests of the parties, including any third parties concerned.

61. Article 22 of the Rome II Regulation also provides that the law governing a non-contractual obligation shall apply to the extent that, in matters of non-contractual obligations, it raises presumptions of law or determines how the burden of proof is shared. In addition, legal acts may be proved by any means of evidence recognised either by the law of the forum or by any of the laws set out in Article 21 of the Rome II Regulation.

V. CONCLUSIONS

62. Finally, if the evidence contains confidential information, courts are empowered to order the disclosure of evidence containing such information, together with effective measures to protect it.

63. The final version of the Directive on corporate sustainability due diligence is limited to marginally harmonising due diligence procedures and defers to Member States to establish rules that give rise to certain obligations for companies, in order to bring joint efforts to promote behaviour that is more respectful of human rights when they engage in their cross-border activities.

64. In the current European context, the legislative initiatives adopted at the national level focus, above all, on the adoption of due diligence procedures based on establishing information and monitoring mechanisms to identify and prevent the risks or potential risks involved in business operations. Only the relevant German and French laws contain some provisions seeking to provide reparation or remedy, which is granted either through administrative sanctions (in Germany) or civil liability apportionment (in France). Thus, it can be stated that the coexisting State and European due diligence instruments are still characterised by their heterogeneity and sectoral nature, as well as by the absence of coercive measures aimed at guaranteeing companies' compliance with due diligence obligations and holding them liable for any damages derived from non-compliance.

65. Article 29 of the Directive refers to the civil liability of companies for damages caused by an adverse impact that has not been identified or remedied. But it calls on States to include this system in their national laws. In this way, the States will be responsible for establishing the liability of companies for non-compliance with the obligations set out in the Directive, and consequently the type and degree of liability will continue to depend on the legal system indicated by the conflict rule.

66. The Directive, without prejudice to the application of stricter civil liability systems, sets out minimum guidelines on the liability of the parent company for damages resulting from a breach of the obligations laid down in the Directive. This is a direct type of liability, based on a combination of fault and on the causal link between the inadequate fulfilment of its

[35] Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (taking of evidence) OJEU No 405, 2.12.2020.

obligations under the Directive, and the damages suffered, whereby the parent company will be exonerated if it is proved that it took the necessary measures to prevent such damages.

67. As has been shown, the approval of the Directive entails stronger regulation of business conduct, and offers a material basis for potential civil liability. However, it only establishes minimum criteria that will not put an end to the diverse and heterogeneous standards that characterise this area. The role of conflict rules thus continues to be essential in order to indicate the law that will govern anything that is not covered by the Directive.

68. Despite this, the Directive does not include any conflict techniques; and while the Parliament directed its proposals in this direction during the legislative process, the text eventually adopted is constrained to recommending that Member States consider their national laws as mandatory rules when the law of a third State is applicable under the current system.

69. Therefore, the Directive barely alters the current system of law, and the applicable law for determining the civil liability of companies in cases of human rights violations continues to rely on the Rome II Regulation, which does not contain a specific rule to address this area. Consequently, the general system, made up of a general rule and specific rules covering certain damages, shall be used. In cases of corporate liability for human rights violations, a special conflict rule should be drawn up that is adapted to the type of obligation and the kind of damages; a rule which, together with the objectives underlying the rules of non-contractual liability, takes into account the principles of material justice conducive to seeking a legal system that guarantees minimum standards of protection and reparation for the victims.

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