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Joris Pijpers, *Will companies finally take responsibility?
Assessing the European Due Diligence legislation proposal*
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Will Companies Finally Take Responsibility? Assessing the European Due
Diligence Legislation Proposal

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In April of 2020, European Commissioner for Justice and Consumer Rights Didier Reynders announced that the European Commission will soon introduce legislation that should prevent businesses from violating human rights or negatively impacting the environment (European Union Responsible Business Conduct Working Group, 2020). The proposed so-called due diligence legislature is part of the European Green Deal, and might be at odds with what many see as traditional European trade principles (Damen, 2019). However, with European politicians and civil society calling for change in response to ongoing environmental and social crises, in particular the COVID-19 pandemic, this might be a good time to implement regulations on corporate responsibility that would usually not be as broadly supported (British Institute of International and Comparative Law [BIICL], Civic Consulting, Directorate-General for Justice and Consumers [DG Justice] & LSE, 2020; Goßner, 2020). It is important for everyone involved with this proposal, from politicians to journalists and from civil society leaders to business owners, to get a better idea of what this legislation might look like, and it might also set a precedent for future European corporate responsibility legislation. Therefore, this paper will answer the following question: What due diligence legislation might be proposed by the European Commission and how will it relate to European trade principles?

To answer this research question, this paper will first briefly highlight the trade environment of the European Union, before describing how the current framework of European Union trade principles has developed. Then, the main actors in developing trade policy will be highlighted, and former and current core principles of European trade policy will be contrasted. After that, existing due diligence codes of conduct and legislation will be explored, before assessing what the new European due diligence legislation might look like. Finally, the potential forms of legislation will be assessed, highlighting three main sets of challenges and shortly suggesting how these challenges should be navigated.

Understanding the European Trading Bloc

The European Union, even without Great Britain as one of its member states, remains one of the most influential global economic trade partners. Almost 450 million customers fall within the internal, common European market, making it the third largest common market only after China and India. The relative high purchasing power of most citizens of the European Union only adds to the Union's attractiveness, which is also enhanced by a stable business environment, free movement of goods, services, capital and persons across the Eurozone, and a single currency, the Euro. (European Commission, 2019b; McCormick, 2008)

For most of its existence, the focus of the European Union and its predecessors was mostly on either expanding the number of member states and

with that the number of customers in the Union, or on improving the integration of the economies of the various member states. More recently, however, additional focus has been put on more than simply economic growth.

(McCormick, 2008) Global trade based on fair rules and a focus on sustainable development have, at least officially, been central to the position of the European Commission (2019b). This major shift of focus in the European Union's economic policy is illustrated by the introduction of the European Green Deal, which is pursued even during the COVID-19 crisis (Simon, 2020).

The History of European Trade Cooperation

To better understand the current priorities and challenges in the trade policies of the European Union, it is firstly imperative to first highlight how this intense economic cooperation on the European continent arose and developed into its current form. Then, the main actors, priorities and of European trade will be outlined, to allow for a better understanding of the framework in which debates around fairer trade are taking place.

After the destruction of much of Europe during the Second World War, initial ideas about European cooperation started to arise. The famous Marshall plan, through which the United States helped in rebuilding the economies of various European countries, introduced European states to various principles around free trade that are still important to the European Union today: non-

discrimination, free movement of goods and capital, and encouragement of competition. (McCormick, 2008)

Various European countries agreed, however, that it was in their best interest to not become too dependent on the United States. Together with the motive of preventing another major war on the European continent, six governments created the European Coal and Steel Community (ECSC). Through its attempt to merge the coal and steel industries of its six member states, the ECSC set the first step of integration of European economies. (McCormick, 2008) More importantly, however, it was the first step of ensuring a mostly peaceful 75 years on the European continent – although that is often quite easily forgotten (Michalopoulos, 2017).

After the ECSC was established, cooperation on the European continent evolved into various forms. Through several agreements, including the Treaties of Rome, the Schengen Agreement, the Single European Act and various other treaties, economic policies were introduced that took away numerous restrictions on trade, allowing the internal European market to grow. The first major set of developments was the gradual introduction of the European single market, allowing free movement of goods, services, capital, and persons throughout all member states of the European Union. Later, the European Union also introduced common tariffs on goods from outside union, creating what is known as a customs union. With the introduction of a single European currency in

1999, the basic features of the Union as we now know it had been established. (Coleman, 2017; McCormick, 2008)

The waves of economic integration as described above caused spillover effects, meaning they generated cooperation in further sectors and fields. Yet, the scope of this paper does not allow for elaborations on all the spillover effects, nor does it allow for an exploration of the full history of European trade policy that does justice to its complexities. (McCormick, 2008) However, some of the most important developments as described above are important in allowing for a better understanding of the main actors, principles and challenges of current European trade policy.

Who Creates European Trade Policy?

The Treaty on the Functioning of the European Union, which received its last major in Lisbon in 2007, establishes that trade policy is a so-called exclusive competence of the European Union. This means that the bodies of the European Union, and not those of its individual member states, are responsible for the legislation on trade. It is essential for the proper functioning of the single market and customs union that a centralized set of bodies decides on the laws in the single market, to prevent individual member states from establishing too many of its own rules. (Damen, 2019)

The main player in proposing and upholding the trade policy of the European Union is the European Commission, consisting of commissioners who

represent the interests of the European Union as a whole. The Commission is responsible for negotiating trade agreements with countries outside the European Union, but also initiates the legislation that all companies operating within the European Union must abide by. Finally, it upholds trade legislation within the European Union, through the possibility to investigate and even fine companies who are not abiding by European laws. The tasks of creating and upholding the trade policy of the European Union are spread over various Commissioners: there is a Commissioner specifically responsible for trade, but other Commissioners are responsible for the European economy, the internal market, consumer rights or competition. Together, these Commissioners play an important role in ensuring the continuation of successful European trade.

(Damen, 2019; European Commission, 2019a; McCormick, 2008; Scott, 2019)

Two other important bodies that influence the European Union's trade policies should also be highlighted: the European Parliament and the Council of the European Union, usually simply known as the Council. Both the Parliament and the Council can initiate legislation on trade matters, thus playing an important role in creating the laws that the European Commission will then uphold. Additionally, both the European Parliament and the Council play a role in the negotiations and ratification of new international trade agreements, although the details are complicated. Yet, it is usually the European Commission

that publicly communicates the priorities of the European Union in trade policy.
(Damen, 2019; McCormick, 2008)

Core Principles of European Trade Policy

The trade policy of the European Union has slowly developed over the past decades and is built on several core principles that are influenced by the processes of European integration. The policies supported by the United States after the end of the Second World War are still reflected in the current framework of European trade principles: a comprehensive single market built on competition developed from the initial European integration on coal and steel, and the European Union has increasingly undertaken efforts to promote free trade even outside of its borders. In line with the United States, the European Union has supported globalization processes, encouraged the opening of new markets, and promoted the solving of any barriers in the way of free trade.
(European Commission, 2019c; McCormick, 2008)

Yet, in recent years, various groups have grown increasingly concerned with this agenda. Calls from member states, key political and societal figures, and NGOs to halt globalization and free trade processes have increased in response to the ongoing COVID-19 pandemic and other societal processes (Fox, 2020; Goßner, 2020). Yet, it should be noted that the previous European Commission, active between 2015 and 2019, already pursued a strategy of “Trade for all” (European Commission & Directorate-General for Trade, 2015,

p. 4) that promoted broad welfare. Cecilia Malmström, the Commissioner for Trade of the previous European Commission, outlined three goals that should grow wellbeing in Europe: updating trade policy so that it could continue to help the European economy grow, increasing the transparency of international trade negotiations and ensuring that the trade policy of the European Union is built on its core values. Although the current Commission has not published its trade strategy yet, the principles as outlined by Malmström are likely to return in an even stronger fashion under the current Commission. (European Commission & Directorate-General for Trade, 2015; European Commission, 2019c; McCormick, 2008)

New Priorities in European Trade Policy: Respecting Human Rights and the Environment

While the current Commission still seems committed to an open, globalized market with growing economies, it has explicitly taken the lead in ensuring that European trade is also based on morals and ethics (European Commission, 2019c). In the political guidelines that current President of the European Commission Ursula von der Leyen (2019) laid out before her election, she stressed that the Commission ought to be working on “a European Green Deal” (p. 5) and “an economy that works for people” (p. 8), instead of simply pursuing economic growth. Von der Leyen’s agenda clearly indicates that the Commission will prioritize fighting climate change and preservation of natural

environments as well as promoting “social fairness and prosperity” (Von der Leyen, 2019, p. 8) in the global economy.

The Commission under Von der Leyen will have to face several challenges if it is to ensure sustainable and fair practices in European trade. Being among the most influential trading partners on the globe, citizens and companies from the European Union are usually in one way or another involved in the production, trade or consumption of most goods and services across the planet. As a result, albeit perhaps indirectly, European citizens or corporations are thus normally somehow involved in the continuous violations of human rights and the ongoing threats to natural environments across the globe. Unfortunately, despite continuous global, regional, and local efforts to ensure that companies feel responsible and are held accountable for potential abuses in their chain of production, experts have not identified significant improvements in the efforts of European companies to take responsibility for the serious issues. (BIICL, Civic Consulting, DG Justice & LSE, 2020; European Coalition for Corporate Justice [ECCJ], 2019; Jongerius & Wolters, 2020)

To prevent a high level of abstraction of these problems, it is important to illustrate involvement of European companies in violations of human rights and threats to the environment. Jongerius and Wolters (2020) point at the links between European companies and a Bengali garment factory known as Rana Plaza, which collapse in 2013 resulted in the tragic deaths of over 1.000

workers. The building was poorly constructed, but the thousands of workers it housed were obliged to continue working in the factory even after visible cracks appeared. Public outrage grew globally when it turned out that the factory produced for, among others, major Western companies, who could and perhaps should have known that there were problems with the construction of the building and that the complaints of the underpaid workers had not been heard. In response to the Rana Plaza disaster, companies and politicians throughout Europe promised to actively work on the protection of the human rights of those involved in production processes. Yet, as Member of European Parliament Haudi Hautala (2018) notes, these promises have not been fulfilled. There is currently no European legislation in place that ensures that companies take responsibility in ensuring human rights, or, just as important, in fighting threats to the environment. (ECCJ, 2019; Hautala, 2018; Jongerius & Wolters, 2020)

An Existing Framework of Regulations

While official global or European legislation on corporate social responsibility is lacking, it is important to note that there is a long history of codes of conduct that encourage companies to do business in a responsible way, so that they abide by a range of principles, ranging from being sustainable to satisfying social standards and from preventing human rights violations to respecting the environment. The Dutch platform for so-called ‘corporate social responsibility’ highlights the importance of several of them, but especially that

of the United Nations Guiding Principles on Business and Human Rights (UNGPs) as unanimously agreed on by the United Nations Human Rights Council in 2011. The UNGPs highlight 31 principles through which international businesses should prevent and address potential violations of human rights caused by their activities. Similar codes of conduct that have been agreed on national, regional, and global levels address similar concerns but also focus on environmental issues. As opposed to the UNGPs, however, most codes of conduct cover specific topics, such as so-called conflict minerals, logging practices or the production of clothing. (Addo, 2014; Demkes, 2020; MVO Platform, 2018)

Most of the codes of conduct provide the companies that support them with a set of tools through which corporations can undertake what is known as due diligence (MVO Platform, 2018). Essentially, due diligence means that companies “identify, prevent, mitigate and account for adverse corporate impacts on human rights and the environment” (BIICL, Civic Consulting, DG Justice & LSE, 2020, p. 15) to ensure they conduct responsible business. Usually, it is expected that due diligence is undertaken throughout the entire supply or value chain: companies should take responsibility for everything that happens, from raw to final product. Yet, the term is extremely broad and implementations differ in their strictness: the UNGPs are completely voluntary principles and the guidelines implemented by the Organization for Economic

Cooperation and Development (OECD) are only partially mandatory to follow, while some individual countries have implemented due diligence practices in their trade legislation, making it mandatory for all businesses (BIICL, Civic Consulting, DG Justice & LSE, 2020; Demkes, 2020; Fox, 2020).

It should not be surprising that the voluntary principles of the UNGPs enjoy broad support from states, global civil society as well as businesses from all over the world: nothing in the UNGPs obliges anyone to undertake specific actions. Yet, there were also widespread expectations that came with the signing of the UNGPs, but those were not fulfilled. (Addo, 2014) A comprehensive report commissioned by the European Commission highlighted that only one-third of businesses undertake due diligence assessing all impacts on human rights and the environment, and of that group most companies limit themselves to their “first tier suppliers” (BIICL, Civic Consulting, DG Justice & LSE, 2020, p. 16). In the meantime, it is unfortunately all too obvious that violations of human rights and environmental degradation are continuing on a large scale.

In response to the inaction, various individual European countries have taken steps to increase accountability for companies: France’s new ‘Duty of Vigilance Law’ requires companies to undertake some form of due diligence, and some other European countries seem to be following suit. Additionally, the European Parliament has called for similar, pan-European legislation for all companies and has been successful in obliging certain companies in specific

sectors to undertake due diligence. (BIICL, Civic Consulting, DG Justice & LSE, 2020; Hautala, 2018) Yet, many sectors and corporations slip through the cracks, and the well-known self-regulations and codes of conduct that companies often bombastically impose on themselves, such as the Dutch ‘textiel-convenant’, are lacking substantial impact (Demkes, 2019; Rutten & Oudendijk, 2019; MVO Platform, 2019).

European Due Diligence Legislation: Going Beyond the Existing Frameworks

Change, however, seems to be on its way. In a popular webinar hosted on the 29th of April of this year, European Commissioner for Justice and Consumer Rights Didier Reynders announced that during the upcoming year, the European Commission will start drafting legislation that would make it mandatory for companies to undertake due diligence, obliging the businesses to investigate whether their corporate practices are allowing for human rights abuses or causing environmental damage (European Union Responsible Business Conduct Working Group, 2020; Fox, 2020). Before analyzing the strengths and weaknesses of the various types of legislation that could be created, it is imperative to look at the multitude of circumstances that prompted the European Commission to move away from its preference for companies to self-regulate (Demkes, 2020; Fox, 2020).

The proposed legislation will be put forward as part of the European Green Deal, that puts planetary and human wellbeing at the center of the European economy (Fox, 2020). Due diligence legislation was included in the Green Deal to convince social democrats and the Greens in the European Parliament to support Von der Leyen's candidacy for the Presidency of the Commission (Demkes, 2020). Additionally, the outcomes of the previously discussed report on due diligence in Europe provided a clear scientific argument for action on the topic, considering the ongoing lack of change in how businesses manage their impacts on societies and environments (BIICL, Civic Consulting, DG Justice & LSE, 2020). What eventually seemed to persuade the Commission, however, was the outbreak of the COVID-19 pandemic. To many European citizens, it became clear how extremely weak many supply chains are, as they are too reliant on foreign producers (Goßner, 2020). Additionally, the pandemic also illustrated that companies still do not feel incentivized to take responsibility: Jongerius and Wolters (2020) write that European companies stopped taking orders from Bengali garment workers, leaving them without income and protection from the virus. This broad set of reasons illustrates why the due diligence legislation arose on the agenda and why it is welcomed by civil society and politicians.

As the legislative proposal is currently being drafted and public consultation is still underway, it remains unclear what exactly due diligence

measures will look like. Yet, the four types of legislation that have been proposed in the report on due diligence commissioned by the European Commission can give an idea of the paths that might be pursued. The first option, the baseline scenario, is that European Union wide legislation is cancelled, and that member states will act based on their individual preferences. As a second option, the report looked at new voluntary due diligence guidelines that could be proposed by the European Union, while a third alternative would be to oblige companies to report on due diligence. The final option assessed by the report is to require corporations to undertake due diligence as a so-called legal duty of care, meaning companies can be held responsible for not meeting certain standards. Finally, it should also be noted that various combinations and variation between and within the options as outlined above are possible. As a result, it remains quite unclear what legislation will be brought forward by the European Commission next year. (BIICL, Civic Consulting, DG Justice & LSE, 2020)

Assessing the European Due Diligence Legislation Proposals

While the scope of this paper does not allow for a full exploration of all possible pathways of European due diligence legislation, some main considerations will be discussed below. A full analysis using tools such as the SWOT technique or a cost benefit analysis should follow once a specific legislative proposal is brought forward. For now, three main themes will be

discussed: the tensions between traditional European trade principles and Von der Leyen's progressive reform agenda, the question of transparency versus enforcement and a first assessment of how the various proposals will be received by significant parties.

Firstly, it should be noted that the guidelines that Von der Leyen outlined for her Commission Presidency are at least not completely aligned with, if not completely opposed to the traditional European trade paradigm. The due diligence proposal illustrates one of the main struggles of the current Commission: aligning long-established principles such as encouragement of globalization, open and free global trade, and the removal of trade barriers with the European Green Deal and various other ambitious aspirations. While the principles that developed with the integration of the European Union as described earlier are deeply rooted in the history of the Union, an increased number of people seem to be supporting the new priorities of the Commission. Even most businesses now agree that due diligence measures would not only benefit people and planet, but also businesses themselves. Still, there seems to be a significant challenge for the Commission ahead in aligning the two separate sets of goals of one the one hand opening foreign markets, maintaining economic growth, and removing barriers for trade, while on the other hand ensuring fair trade, sustainable development, and responsible business that respects people and planet.

A second main challenge that the proposed legislation will have to address concerns the extent to which due diligence is enforced, and whether there should be repercussions for businesses if any abuses are found in their supply chains. Similar difficult problems that will arise are the potential extra costs of extensive due diligence reporting for businesses, the balance between transparency and trade secrets, and the potential costs and benefits of strict enforcement. Some Members of European Parliament have already stressed that they would like to see enforcement regulations included in the legislation, as they argue that mere transparency will not necessarily encourage businesses to actively prevent and mitigate possible problems, especially those higher in the supply chain (Jongerius & Wolters, 2020). Yet, it should also not come as a surprise that businesses have called for the delay of due diligence legislation under the veil of the ongoing COVID-19 pandemic (European Union Responsible Business Conduct Working Group, 2020). Navigating all these problems will be quite a challenge for those designing the new legislation.

Finally, a short foreshadowing of potential responses to the planned legislation should be taken into consideration to gain a better understanding of what the due diligence legislation might look like. A unanimous position from all European businesses on the proposed legislation cannot be expected, as some companies already undertake due diligence voluntarily or under their national legislation, while others, such as garment companies, rely on long supply chains

that might not be easy to inspect (Demkes, 2020). On the other hand, a majority of businesses seems excited about the level playing field that across-the-board legislation would create, and the fact that trade is an exclusive competence would allow the European Union to create clear regulations that could make doing business in the single market a lot easier (BIICL, Civic Consulting, DG Justice & LSE, 2020). Additionally, responses from European member states and European politicians to the proposed legislation are quite varied, so negotiations with the Council and European Parliament will be interesting to follow (European Union Responsible Business Conduct Working Group, 2020). Finally, civil society and big numbers of ordinary Europeans seem supportive of stronger legislation that would ensure that companies take more responsibility. They are critical of the supply chains that are solely built on cost-effectiveness and efficiency, and as a result of the COVID-19 pandemic and other social processes, they are also growing increasingly skeptical of globalization. (Goßner, 2020) As a result, a unified response from the business community, politicians and civil society to the due diligence legislative proposal should thus not be expected, but the support might be broader than perhaps anticipated.

Indeed, any proposal on due diligence legislation should be warmly welcomed considering the ongoing grave violations of human rights and significant environmental harm linked to products sold on European markets. While many will argue that the legislative proposal is long overdue, it is

impressive that the new European Commission under President Von der Leyen has put forward quite a progressive agenda. Although perhaps an abstract suggestion, it is important that the Commission refrains from framing the due diligence legislation as opposing traditional European trading principles to prevent Euroscepticism and resistance from the private sector. Secondly, it seems that a targeted approach with regards to transparency and enforcement of due diligence should be preferred over a one-size-fits-all approach, to prevent policies that might be unrealistic for one sector while they would be of a low standard for another. Finally, it seems like the Commission and proponents of due diligence legislation should capitalize on the ongoing COVID-19 crisis, as it can provide them with an opportunity to illustrate the importance of the proposal to the public to strengthen its negotiation position. Yet, the difficulty of obtaining some form of consensus on this topic should not be underestimated: the negotiations on the proposal will be extremely interesting to follow.

Conclusion

To answer the question “what due diligence legislation might be proposed by the European Commission and how will it relate to European trade principles?”, this paper has outlined how the trade principles of the European Union developed into the progressive and ambitious plans put forward by the current European Commission, of which the proposed due diligence legislation is part. It was shown that traditional European trade values such as commitment

to globalization and free trade might be at least partially at odds with the proposed due diligence legislation, but that there is also support for these attempts that should prevent businesses from violating human rights and threatening the environment. The various options for the legislation were assessed, highlighting three main sets of challenges that the legislation will have to address: tensions with traditional European trade principles, ensuring transparency and enforcement, and support for the legislation. Finally, the paper concisely suggested how these challenges could be navigated.

Unfortunately, the scope of this paper did not allow for a comprehensive review of the roots of European trade policy, nor could it discuss the current due diligence legislation proposals in more depth as negotiations are still in a starting phase. Therefore, future research should in more detail address how current trade priorities as put forward by the European Commission relate to the traditional principles, while the ongoing negotiation process should be closely monitored. It can namely provide interesting insights in the stances of various countries, businesses and politicians on corporate responsibility, and will aid in conducting a comprehensive review of the strengths and weaknesses of the due diligence legislation once it is implemented. Going forward, it can only be wished for that Europeans collectively find a way to prevent more harm from being done through human rights violations and threats to the environment.

Most people will hope that due diligence legislation can play an important role in that.

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