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LEGAL FRAMEWORK OF SUSTAINABILITY DUE DILIGENCE REGIME AS A NEW STANDARD OF CORPORATE RESPONSIBILITY

ABSTRACT: The development of the sustainability due diligence regime in European Union law has opened a debate on whether this regulatory framework introduces a new standard of corporate responsibility or represents an extension of the existing concepts of professional and fiduciary diligence. The objective of our paper is to analyze the legal framework of the sustainability due diligence regime, established by Directive (EU) 2024/1760 on corporate sustainability due diligence, which introduces a qualitatively new standard of corporate responsibility. The findings indicate that the sustainability due diligence regime introduces a preventive and procedural model of risk management that extends the relevant sphere of responsibility of companies to value chains. Although certain normative elements compatible with this approach already exist in the law of the Republic of Serbia, the existing legal framework does not recognize such a systemic model of responsibility.

Keywords: *sustainability due diligence, corporate responsibility, corporate governance, Directive (EU) 2024/1760.*

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1. Introduction

In modern European corporate law, the question of the responsibility of companies for the negative impacts of business operations on human rights and the environment has become the subject of intense regulatory and doctrinal discussion. Particular attention was drawn to the development of the concept of sustainability due diligence, which received a normative form in European Union law with the adoption of Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence. This regulatory framework has raised the question of whether it is about introducing a new standard of corporate responsibility or about expanding the existing concepts of professional and fiduciary care. “The research shows the difference that human rights due diligence (HRDD) can make in terms of identifying adverse human rights impacts of both the company as well as of those which are part of its business relationships” (McCorquodale, Smit, Neely & Brooks, 2017, p. 195).

Different viewpoints on the legal nature of this regime have developed in legal theory. One part of the authors considered that it is an evolution of traditional standards of corporate governance, whereby the existing duties of management are reinterpreted in the light of long-term business sustainability. There were problems in the corporate governance of financial institutions and one mechanism that makes directors accountable is the provision of duties imposed on them by the law (Keay, 2010). In contrast, other authors indicated that due attention to sustainability introduces a qualitatively different model of responsibility, based on preventive risk management and the extension of the relevant sphere of responsibility to value chains as due diligence is at the heart of the United Nations Guiding Principles on Business and Human Rights (Bonnitcha, 2017). This theoretical dilemma opened up the question of the relationship between the new regulatory requirements and the existing institutes of corporate and obligation law.

“In attempting to establish market-based economy in the post socialist period, Serbia has faced the serious challenges of creating the economic system, forming institutions and establishing incentives in order to improve economic performances and corporate governance has been recognized as a crucial part of the reform process” (Denčić-Mihajlov, 2006, p. 169). In the law of the Republic of Serbia, the standard of care in obligation relationships was traditionally formulated through the standard of care of a good businessman, while in corporate law, the standard of due care of management was developed through fiduciary duties and the framework of business assessment. However, in the domestic doctrine, these institutes are mostly analyzed within the internal relations of

society and its immediate legal obligations, without a systematic consideration of responsibility in value chains. Therefore, the aim of this research is to analyse the legal framework of the sustainability due diligence regime, between the due diligence regime of sustainability and the existing standards of professional and corporate responsibility has gained special importance in the context of the process of harmonizing domestic law with the *acquis* of the European Union.

2. Due diligence of sustainability as a new standard of responsibility

The modern regulatory concept of sustainability due diligence did not originate exclusively within the framework of European Union law, but developed in the broader international regulatory context of responsible business. Its basic elements are formulated through international standards, especially through the UN Guiding Principles on Business and Human Rights (Rasche & Waddock, 2021) and the OECD Due Diligence Guidance for Responsible Business Conduct from 2018.

a) Due diligence as a normative standard, not an ethical obligation

Modern sustainability due diligence was developed at the intersection of international standards of human rights, corporate governance and responsible business, but its legal character has changed qualitatively in the last decade. The initial phase relied on “soft-law” instruments which, although non-binding, established the standard of expected behavior of companies in relation to risks to human rights and the environment. A key turning point is the UN Guiding Principles on Business and Human Rights (UNGP), which introduce the concept of due diligence as a process of identifying, preventing/mitigating, monitoring and reporting on negative impacts, with the emphasis that the focus must be on “risk for rights holders”, and not exclusively on reputational or financial risk for the company (Roos, 2013).

In legal theory, this distinction is further normatively sharpened: due diligence is increasingly understood as a shift from managing “social risk” to managing harmful impacts on human rights, thus transforming the concept from a corporate policy into a standard of behavior with elements of legal responsibility (Fasterling, 2017). In this sense, due diligence is no longer a “declarative obligation” or a mere adoption of ethical codes, but a structured and continuous process that requires reasonably expected, proportionate and documented measures in relation to identified risks.

The operationalization of this standard in a normatively usable form is further developed by the OECD Guidelines for Due Diligence in Responsible Business Conduct, which standardize a phased, risk-based approach, applicable to one's own activities, business relationships and supply chains (OECD, 2018). The common denominator of the UNGP and the OECD framework is the understanding of due diligence as a process, not a one-time action: the relevant question is not whether the company has “adopted a policy”, but whether it has established a risk management system that can be evaluated through its outcomes and effectiveness (Bonnitcha, 2017).

b) Elements of the new liability standard in the EU due diligence regime

A normative step forward in EU law was achieved with the adoption of Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence Directive (CSDDD), which constitutes due diligence as a binding regime, including the obligations of risk management, supervision, reporting and responsibility of companies in relation to negative impacts on human rights and the environment in their own activities, activities of related companies and value chains (European Parliament & Council, 2024). In analytical terms, the standard of responsibility arising from the due diligence regime can be broken down into four key elements.

(1) Expanding the scope of the relevant sphere of responsibility (value chain reach).

Unlike traditional models of responsibility, which are usually related to the immediate sphere of control (the company and its internal processes), due diligence functionally extends the “relevant sphere” to business relationships and segments of the value chain in which harmful impacts occur or may occur. This also changes the legal logic of responsibility: the focus is not on formal control, but on predictability of risks and reasonably expected measures that a company can take within its business relationships (De Schutter, 2020).

(2) Preventive character of the obligation (ex ante standard).

Classic tort models of responsibility generally activate consequences after the damage has occurred, where the normative analysis revolves around the breach of duty and causation. The due diligence regime shifts the focus: the obligation is primarily preventive and based on risk management. Such

a construction brings due diligence closer to the “duty of conduct” standard, whereby the relevant question becomes whether the company acted reasonably and proportionately in relation to the risks, and not exclusively whether damage occurred (Bonnitcha, 2017; OECD, 2018).

(3) Continuous and procedural character (systems-based duty).

Due diligence is conceived as a continuous process, which normatively means that compliance cannot be proven by a one-time act, but by establishing and maintaining a functional system. At that point, there is a clear difference between “procedural” and “material” understanding of due diligence: the formal existence of policies is not enough if they are not embedded in operational processes, contractual mechanisms, supplier oversight and performance monitoring systems. Fasterling (2017) points out that HRDD cannot be reduced to an instrument of reputational risk, but must be integrated as a corporate goal that determines strategy and operational decisions.

(4) Integration into corporate governance (governance linkage).

The due diligence regime implies that governing bodies play an active role in establishing, monitoring and auditing processes, thus linking the standard of care to fiduciary duties, business judgment and management responsibility. This link is key to doctrinal understanding: due diligence functions as a “bridge” between the standards of company behavior and the standards of care of governance structures, as sustainability and human rights risks are increasingly introduced as elements of business strategy and corporate oversight (McCorquodale et al., 2017).

3. Standard of professional and corporate responsibility in the law of the Republic of Serbia

In Serbian literature, corporate governance is mainly defined through legal and economic perspectives. Vasiljević (2013, p. 27) explains that, from a legal point of view, corporate governance represents a specific agency relationship between management and a joint-stock company, which is established through contracts and legal regulations. From an economic standpoint, corporate governance is about the internal and external systems that oversee a company to safeguard shareholders’ interests and help the company generate profits (Todorović, 2009). In domestic obligation law, the

standard of professional responsibility is traditionally manifested through liability for damage according to the Law on Obligations (1978), where the general standard is that the debtor must perform the obligation with the care of a good businessman (Article 18). More precisely, the key dilemma in this context is whether the standard of professional responsibility refers to results, ie. business outcomes and damages, or solely on the behavior of the debtor in the given circumstances.

Corporate management in the Republic of Serbia is a more recent topic and it is not sufficiently applied in the business of public companies. Our experience in the application and improvement of corporate management covers only a few years, while in Western countries this experience is much longer. The introduction of corporate rules and corporate management of public enterprises of the national legal framework is a matter of national importance (Vukolić, 2019). The ultimate goal of the existence of the public sector is the satisfaction of the needs of the wider social community, that is, the protection of the interests and rights of individuals who make up the community (Vukosavljević, Kaputo, Tešić & Vukosavljević, 2021). For example, one of the most significant developments in recent Serbian corporate governance is the implementation of the Act on Management of Companies Owned by the Republic of Serbia (2023), as it aims to advance corporatisation, improve management practices, and transform the legal structure of state-owned enterprises. Todorović & Brašić Stojanović (2024) point out that “despite the effective solutions of the Law, some of its provisions are still not completely in line with the OECD Guidelines, as this primarily pertains to stipulations on the transparency of Supervisory Board members’ appointment procedure, on independence of the Supervisory Board members and on publicly proclaimed political aims of state-owned enterprises” (p. 2011).

However, the sustainability due diligence standard cannot be reduced to such a classification, because CSDDD requires not only attention to the damage that has occurred, but also preventive identification and management of risks even before they materialize. In other words, while the domestic standard assesses behavior after the outcome, the standard from the CSDDD is conceived as an *ex ante* duty of conduct, thereby losing the distinction between traditional liability for damage and rights that regulate future prevention of harmful consequences.

4. Fiduciary duties of management and business judgment

In the framework of corporate law, the standard of due care is manifested through the fiduciary duties of the members of the management body. The Law on Business Companies (2011, Article 63) prescribes the obligation of management members to act conscientiously, with the attention of a good businessman and in the best interest of society, which represents the basic normative framework of the responsibility of management structures. In domestic legal doctrine, it is emphasized that these duties aim to ensure loyal and reasonable management of society, but also to limit the possibility of abuse of management powers. The principle of due care is connected with the concept of business judgment (business judgment rule), which implies that the court does not review the business decisions of the administration if they were made in good faith, based on adequate information and without a conflict of interest (Arsić, Milićević & Milačić, 2009).

In the true theory, it is emphasized that this standard of care model is primarily oriented towards intra-corporate assessment — that is, towards the assessment of decisions made by management within its own strategic goals — instead of towards the assessment of the impact of those decisions outside the boundaries of society (eg in supply chains or impact on third parties). Our standard of business assessment applies to decisions that are within the management's discretion and that are not unduly harmful to society, but does not include the obligation to evaluate those decisions in relation to social, environmental or human rights risks.

On the contrary, the CSDDD explicitly requires that governing bodies include sustainability criteria in the management system, whereby the standard of corporate care ceases to be closely tied to the interests of society and moves to a broader standard of responsibility towards various interest groups. Such expansion of fiduciary duties in the domain of sustainability represents a significant normative challenge for domestic corporate law, as issues of impact on value chains cannot be treated only as a business judgment within the governing body.

5. The relationship between professional and corporate attention

The question of who actually controls modern corporations, and for what reasons, has become one of the key power relationships in today's capitalism, while the regulation of corporate governance in the EU shows that these rules

are not only technical or legal matters, but also have an important political dimension (Horn, 2011). In the theory of legal responsibility, it is pointed out that the concept of good business judgment aims to allow management a certain degree of creative discretion, but that discretion does not imply the obligation to integrate social and environmental risks into its deliberations — this obligation arises only when the legal standard explicitly requires it. In the context of the CSDDD, the standard of due care has an element of a strict duty of preventive action, which cannot be equated with the freedom of business judgment.

Similar dilemmas about the relationship between the traditional fiduciary duties of management and the new requirements of sustainability are recognized in the legal literature of the countries of the region. In those analyses, it is emphasized that the integration of sustainability standards into corporate governance does not necessarily mean abandoning the existing institutes of corporate law, but rather their reinterpretation in light of the EU legal framework. “The experiences of the EU Member States and developments in legal and business practices in the EU show that, although a legislative and regulatory framework for the application of the comply-or-explain principle exists, the true will of company bodies and all external stakeholders is needed to apply it in practice” (Horak & Bodiřoga-Vukobrat, 2011, p.199).

The results of the comparative analysis can be systematized through the basic elements of the responsibility standard shown in table 1.

Table 1. Comparative overview of liability standards

Element of responsibility	Traditional standard in Serbian law	Sustainability Due Diligence Regime
Character of obligation	Post factum liability for damage	Preventive risk management
Scope of responsibility	Relations within society and immediate legal relations	Expansion to value chains and business partners
Standard function	Professional due diligence and business judgment	Integration of sustainability management into corporate governance

Source: Authors’ systematization based on the Law on Obligations (1978), Law on Business Companies (2011), Directive (EU) 2024/1760, Bonnitcha (2017), and OECD (2018).

The comparative analysis showed that the sustainability due diligence regime does not only represent a regulatory expansion of the existing liability institutes, but introduces a structurally different model of legal responsibility based on preventive risk management and the expansion of the relevant sphere of responsibility to value chains, which raises the question of the need for their doctrinal reinterpretation in the national legal framework. The sustainability due diligence regime indicates a wider transformation of the corporate responsibility model. Instead of the traditional model of post factum liability for damage, the modern regulatory approach increasingly emphasizes a preventive model.

6. Conclusion

This paper analyzed the relationship between the sustainability due diligence regime, established through Directive (EU) 2024/1760 on Corporate Sustainability Due Diligence, and the existing institutes of professional and corporate responsibility in the national legal framework. The analysis showed that the sustainability due diligence standard introduces a significant expansion of the traditional concept of due diligence, especially through the preventive nature of obligations, the extension of responsibility to value chains and the integration of sustainability into corporate governance. By the Law on Business Companies (2011) our country is closer to international integration, but it is certainly necessary to improve legal solutions in accordance with the world corporate practice. “The implementation of basic standards Corporate governance and company law of the Republic of Serbia listed in the OECD Principles of Corporate Governance, which will speed it up the economic development of the Republic of Serbia” (Dukić Mijatović, 2011, p. 15).

The findings confirm that the domestic legal system already contains certain normative bases that enable the interpretive integration of these standards, primarily through the institution of professional attention and fiduciary duties of management. However, compared to the due diligence regime of sustainability in European Union law, it is evident that the existing institutes of domestic law are not conceived as a systemic risk management mechanism in value chains, nor as a continuous process of preventive action. The scientific contribution of the work is reflected in the systematic analysis of the relationship between the standards of sustainability due diligence and the existing institutes of obligation and corporate law of the Republic of Serbia, which indicates the need for their potential normative adaptation in the process of harmonization with European Union law.

Conflict of Interest

The authors declare no conflict of interest.

Author Contributions

Conceptualization, D.V. and D.V.; methodology, D.V. and D.V.; resources, D.V. and D.V.; formal analysis., writing – original draft preparation, D.V. and D.V.; writing – review and editing, D.V. and D.V. All authors have read and agreed to the published version of the manuscript.

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PRAVNI OKVIR REŽIMA DUŽNE PAŽNJE ODRŽIVOSTI KAO NOVI STANDARD KORPORATIVNE ODGOVORNOSTI

APSTRAKT: Razvoj režima dužne pažnje održivosti u pravu Evropske unije otvorio je debatu o tome da li ovaj regulatorni okvir uvodi novi standard korporativne odgovornosti ili predstavlja proširenje postojećih koncepata profesionalne i fiducijarne pažnje. Cilj je analizirati pravni okvir režima dužne pažnje održivosti, uspostavljenog Direktivom (EU)

2024/1760 o dužnoj pažnji korporativne održivosti, koji uvodi kvalitativno novi standard korporativne odgovornosti. Nalazi ukazuju na to da režim dužne pažnje održivosti uvodi preventivni i proceduralni model upravljanja rizicima koji proširuje relevantnu sferu odgovornosti kompanija na lance vrednosti. Iako određeni normativni elementi kompatibilni sa ovim pristupom već postoje u pravu Republike Srbije, postojeći pravni okvir ne prepoznaje takav sistemski model odgovornosti.

Ključne reči: *dužna pažnja održivosti, korporativna odgovornost, korporativno upravljanje, Direktiva (EU) 2024/1760.*

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