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Responsibilities of Companies in the Algorithmic Society

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13.1 CONTEXT – NEW WINE IN OLD BOTTLES?

The major focus of the book is on the constitutional challenges of the algorithmic society. In the public/private divide type of thinking, such an approach puts the constitution and thereby the state into the limelight. There is a dense debate on the changing role of the nation-state in the aftermath of what is called globalization and how the transformation of the state is affecting private law and thereby private parties.[1] This implies the question of whether the public/private divide can still serve as a useful tool to design responsibilities on both sides, public and private.[2] If we ask for a constitutional framing of business activities in a globalized world, there are two possible approaches: the first is the external or the outer reach of national constitutions; the second the potential impact of a global constitution. Our approach is broader and narrower at the same time. It is broader as we do not look at the constitutional dimension alone, but at the public/private law below the constitution and at the role and impact on private responsibilities, it is narrower as we will neither engage in the debate on the external/outer reach of nation-state constitutions nor on the existence of a 'Global Constitution' or an 'International Economic Constitution', based on the GATT/WTO and international human rights.[3] Such

[1] Hans-Wolfgang Micklitz and Dennis Patterson, 'From the Nation-State to the Market : The Evolution of EU Private Law as Regulation of the Economy beyond the Boundaries of the Union?' in Bart Van Vooren, Steven Blockmans and Jan Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013).

[2] Matthias Ruffert, *The Public-Private Law Divide: Potential for Transformation?* (British Institute of International and Comparative Law 2009). Lukas van den Berge, 'Rethinking the Public-Private Law Divide in the Age of Governmentality and Network Governance' (2018) 5 *European Journal of Comparative Law and Governance* 119. Hans-W. Micklitz, 'Rethinking the Public/Private Divide' in Miguel Poiares Maduro, Kaarlo Tuori and Suvi Sankari (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press 2014).

[3] Cahier à Thème, Les Grandes Théories du Droit Transnational, avec contributions du K. Tuori, B. Kingsbury, N. Krisch, R. B. Stewart, H. Muir Watt, Ch. Joerges, F. Roedel, F. Cafaggi, R. Zimmermann, G.-P. Calliess, M. Renner, A. Fischer-Lescano, G. Teubner, P. Schiff Berman, Numéro 1–2, Revue Internationale de Droit Economique, 2013.

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an exercise would require a discussion about global constitutionalization and global constitutionalism in and through the digital society and digital economy.[4]

Therefore, this contribution does not look at private parties through the lenses of the constitutions or constitutionalization processes but through the lenses of private parties, here companies. The emphasis is on the responsibilities of private companies, which does not mean that there is no responsibility of nation-states. Stressing private responsibilities below the surface of the constitution directs the attention to the bulk of national, European and international rules that are and that have been developed in the last decades and that in one way or the other are dealing with responsibility or perhaps even better responsibilities of private and public actors. Responsibility is a much broader term than legal civil liability as it includes the moral dimension,[5] which might or might not give space to give private responsibility a constitutional outlook or even more demanding a constitutional anchoring, be it in a nation-state constitution, the European or even the Global Constitution.[6] The culmination point of the constitutional debate is the question of whether human rights are addressing states alone or also binding private parties directly.[7] Again, this is not our concern. The focus is on the level below the constitution, the 'outer space' where private parties and public – mainly administrative – authorities are co-operating in the search for solutions that strike a balance between the freedom of private companies to do business outside state borders and their responsibility as well as those of the nation-states.

The intention is to deliver a rough overview of where we are standing politically, economically and legally, when we are discussing possible legal solutions that design the responsibility of private companies in the globalized economy. This is done against the background of Baldwin's[8] structuring of the world trade order along the line of the decline of first transportation costs and second communication costs. The two stages can be associated with two very different forms of world trade. The decline of transportation enabled the establishment of the post–World War II order.

[4] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012).

[5] Hans Jonas, *Das Prinzip Verantwortung: Versuch Einer Ethik Für Die Technologische Zivilisation* (Suhrkamp 1984).

[6] Hans-W. Micklitz, Thomas Roethe and Stephen Weatherill, *Federalism and Responsibility: A Study on Product Safety Law and Practice in the European Community* (Graham & Trotman/M Nijhoff; Kluwer Academic Publishers Group 1994).

[7] For a detailed account, see Chiara Macchi and Claire Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Martina Buscemi et al. (eds), *Legal Sources in Business and Human Rights Evolving Dynamics in International and European Law* (Brill 2020). Liesbeth Enneking et al., *Accountability, International Business Operations and the Law: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (Routledge 2019). Stéphanie Bijlmakers, *Corporate Social Responsibility, Human Rights, and the Law* (Routledge 2019). Angelica Bonfanti, *Business and Human Rights in Europe: International Law Challenges* (Routledge 2018).

[8] Richard E. Baldwin, *The Great Convergence: Information Technology and the New Globalization* (The Belknap Press of Harvard University Press 2016).

Products and services could circulate freely without customs and non-tariff barriers to trade. The conditions under which the products were manufactured, however, were left to the nation-states. This allowed private companies to benefit from the economies of scales, from differences between labour costs and later environmental costs. The decline of communication costs changed the international trade order dramatically. It enabled the rise of global value chains often used as a synonym for global value chains. Here product and process regulation are interlinked through contract.[9] It will have to be shown that the two waves show superficially regarded similarities, economically and technologically, though there are differences which affect the law, and which will have to be taken into account when it comes to the search for solutions.

13.2 THE FIRST WAVE – DOUBLE STANDARDS IN UNSAFE PRODUCTS AND UNSAFE INDUSTRIAL PLANTS

Timewise, we are in the 1960s, 1970s. International trade is blossoming. The major beneficiaries are Western democratic states and multinationals, as they were then called. Opening the gateway towards the responsibility of multinationals 'beyond the nation-state'[10] takes the glamour away from the sparkling language of the algorithmic economy and society and discloses a well-known though rather odd problem which industrialized states had to face hand in hand with the rise of the welfare state in whatever form and the increase of protective legislation to the benefit of consumers, of workers and of the environment against unsafe products.

13.2.1 *Double Standards on the Export of Hazardous Products*

The Western democratic states restricted the reach of the regulation of chemicals, pharmaceuticals, pesticides and dangerous technical goods to their territory, paving the way for their industries to export products to the rest of the world, although their use was prohibited or severely restricted in the home country. The phenomenon became known worldwide as the policy of 'double standards' and triggered political awareness around the globe, in the exporting and importing states, in international organizations and in what could be ambitiously called an emerging global society.[11]

[9] European Review of Contract Law, Special Issue: Reimagining Contract in a World of Global Value Chains, 2020 Volume 16 Issue 1 with contribution of Klaas Hendrik Eller, Jaakko Salminen, Fabrizio Cafaggi and Paola Iamiceli, Mika Viljanen, Anna Beckers, Laura D. Knöpfel, Lyn K. L. Tjon Soel Len, Kevin B. Sobel-Read, Vibe Ulfbeck and Ole Hansen. Society of European Contract Law (SECOLA), Common Frame of Reference and the Future of European Contract Law, conference 1 and 2 June 2007, Amsterdam.

[10] Ralf Michaels and Nils Jansen, 'Private Law beyond the State – Europeanization, Globalization, Privatization' (2006) 54 *American Journal of Comparative Law* 843.

[11] Barry Castleman, 'The Export of Hazardous Industries in 2015' (2016) 15 *Environmental Health* 8. Hans-W. Micklitz, *Internationales Produktsicherheitsrecht: Zur Begründung Einer Rechtsverfassung Für Den Handel Mit Risikobehafteten Produkten* (Nomos Verlagsgesellschaft 1995). Hans-W. Micklitz

Communication costs, however, determined the search for political solutions. It has to be recalled that until the 1980s telephone costs were prohibitive, fax did not yet exist and the only way to engage in serious exchange was to meet physically. The decrease in transportation costs rendered the international gathering possible. The level of action to deal with 'double standards' was first and foremost political.

The subject related international organizations, WHO with regard to pharmaceuticals, UNEP and FAO with regard to chemicals, pesticides, waste and the later abolished UN-CTC with regard to dangerous technical goods invested into the elaboration of international standards on what is meant to be 'hazardous' and equally pushed for international solutions tying the export of double-standard products to the 'informed' consent of the recipient states. Within the international organizations, the United States dominated the discussions and negotiations. That is why each and every search for a solution was guided by the attempt to seek the support of the United States, whose president was no longer Jimmy Carter but Ronald Reagan. At the time, the European Union (EU) was near to non-existent in the international sphere, as it had not yet gained the competence to act on behalf of the Member States or jointly with the Member States. The Member States were speaking for themselves, built around two camps: the hard-core free-trade apologists and the softer group of states that were ready to join forces with voices from what is called today the Global South, seeking a balance between free trade and labour, consumer and environmental protection. Typically, the controversies ended in soft law solutions, recommendations adopted by the international organizations if not unanimously but at the minimum with the United States abstaining.

There is a long way from the recommendations adopted in the mid-1980s and the Rotterdam Convention on the export of hazardous chemicals and pesticides adopted in 1998, which entered into force in 2004.[12] On the bright side, there is definitely the simple fact that multilateralism was still regarded as the major and appropriate tool for what was recognized as a universal problem, calling for universal solutions. However, there is also a dark side to be taken into consideration. The UN organizations channelled the political debate on double standards, which was originally much more ambitious. NGOs, environmental and consumer organizations, and civil society activists were putting political pressure on the exporting countries to abolish the policy of double standards. The highly conflictual question then was and still is, 'Is there a responsibility of the exporting state for the health and safety of the citizens of the recipient countries?' Is there even a constitutional obligation of nation-states to exercise some sort of control over the activities of 'their' companies, who are operating from their Western Homebase in the rest of

and Rechtspolitik, *Internationales Produktsicherheitsrecht: Vorueberlegungen* (Universität Bremen 1989).

[12] Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-14&chapter=27.

the world? How far does the responsibility/obligation reach? If double standards are legitimate, are nation-states at least constitutionally bound to elaborate and to ensure respect for internationally recognized standards on the safety of products, of health and safety at work, as well as environmental protection?

The adoption of the Rotterdam Convention suffocated the constitutional debate and shifted the focus towards its ratification. The juridification of a highly political conflict on double standards ends in a de-politicization. The attention shifted from the public political fora to the legal fora. The Member States of the EU and the EU ratified the Convention through EU Regulation 304/2003, later 698/2008, today 649/2012.[13] The United States signed the Convention but never ratified it. In order to be able to assess the potential impact of the Rotterdam Convention or more narrowly the role and function of the implementing EU Regulation on the European Member States, one has to dive deep into the activities of the European Chemical Agency, where all the information from the Member States is coming together.[14] When comparing the roaring public debate on double standards with the non-existent public interest in its bureaucratic handling, one may wonder to what extent 'informed consent' has improved the position of the citizens in the recipient state. The problem of double standards has not vanished at all.[15]

13.2.2 *Double Standards on Industrial Plants*

The public attention seems to focus ever stronger on catastrophes which shatter the global world order – from time to time, but with a certain regularity. The level of action is not necessarily political or administrative; it is judicial. The eyes of the victims but also of NGOs, civil society organizations, consumer and environmental organizations were and are directed towards the role and function of courts. Dworkin published his book on Law's empire, where he relied on the 'Hercules judge' in 1986, exactly at a time, where even in the transnational arena national courts and national judges turned into key actors and had to carry the hopes of all those who were fighting against double standards. This type of litigation can be easily associated with Baldwin's distinction. The decline of transportation costs allowed Western-based multinationals to build subsidiaries around the world. Due to the economies of scale, it was cheaper for the multinationals to get the products manufactured in the subsidiaries and ship them back to the Western world to get them assembled. Typically, the subsidiaries were owned by the mother company,

[13] Regulation (EC) No 304/2003 of the European Parliament and of the Council of 28 January 2003 concerning the export and import of dangerous chemicals OJ L 63, 6. 3. 2003, p. 1–26. Today Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals OJ L 201, 27. 7. 2012, p. 60–106.

[14] For details, see the website of the European Chemical Agency, https://echa.europa.eu/-/new-eu-regulation-for-export-and-import-of-hazardous-chemicals-enters-into-operation.

[15] Webinar 'Hazardous Pesticides and EU's Double Standards', 29. 9. 2020, www.pan-europe.info/resources/articles/2020/08/webinar-hazardous-pesticides-and-eus-double-standards.

having its business seat in the United States or in Europe, either fully or at least up to a 51 per cent majority.

Again, the story to tell is not new, but it is paradigmatic for the 1980s. In 1984, a US-owned chemical plant in Bhopal India exploded. Thousands of people died. The victims argued that the plant did not even respect the rather low Indian standards of health and safety at work and Indian environmental standards. They were seeking compensation from Union Carbide Corporation, the mother company, and launched tort action claims in the United States.[16] The catastrophe mobilized NGOs and civil society organizations, along with class-action lawyers in the United States who combined the high expectations of the victims with their self-interest in bringing the case before US courts. The catastrophe laid bare the range of legal conflicts which arise in North-South civil litigation. Is there a responsibility of US companies which are operating outside the US territory to respect the high standards of the export state or international minimum standards, if they exist? Or does it suffice to comply with the lower standards of the recipient state? Is the American mother company legally liable for the harm produced through its subsidiary to the Indian workers, the Indian citizens affected in the community and the Indian environment? Which is the competent jurisdiction, the one of the US or the one of India, and what is the applicable law, US tort and class action law with its high compensation schemes or the tort law of the recipient state? The litigation fell into a period where socio-legal research played a key role in the United States and where legal scholars heavily engaged in the litigation providing legal support to the victims. There was a heated debate even between scholars sympathizing with the victims of whether it would be better for India to instrumentalise Bhopal so as to develop the Indian judiciary through the litigation in India in accepting the risk that Indian courts could provide carte blanche to the American mother companies or whether the rights of the victims should be preserved through the much more effective and generous US law before US courts. One of the key figures was Marc Galanter from Wisconsin, who left the material collected over decades on the litigation in the United States and in India, background information on the Indian judiciary, and the role and function of American authorities to the Wisconsin public library.[17] It remains to be added that in 1986 the US district court declined jurisdiction of American courts as *forum non conveniens* and that the victims who had to refile their case before Indian courts were never adequately compensated – until today. There are variations of the Bhopal type of litigation; the last one so far which equally gained public prominence is *Kiobel*.[18]

The political and legal debate on double standards which dominated the public and legal fora in the 1980s differs in two ways from the one we have today on the

[16] Daniel Augenstein, *Global Business and the Law and Politics of Human Rights* (Cambridge University Press, forthcoming).

[17] https://repository.law.wisc.edu/s/uwlaw/page/about-marc-galanter.

[18] *Kiobel* v. *Royal Dutch Petroleum CO.*, 569 US 108(2013).

responsibility of private parties in the digital economy and society: first and foremost, the primary addressees of the call for action were the Western democratic states as well as international organizations. They were sought to find appropriate solutions for what could not be solved otherwise. There are few examples of existing case law on double standards. Bhopal, though mirroring the problem of double standards, is different due to the dimension of the catastrophe and to the sheer number of victims which were identifiable. It is still noteworthy though that the international community left the search for solutions in the hands of the American respectively the Indian judiciary and that there was no serious political attempt neither of the two states nor of the international community to seek extra-judicial compensation schemes. The American court delegated the problem of double standards back to the Indian state and the Indian society alone. Second, in the 1980s, human rights were not yet or at least to a much lesser extent invoked in the search for political as well as for judicial solutions. There was less emphasis on the 'rights' rhetoric, on consumer rights as human rights or the right to safety as a human right.[19] Health, safety and the environment were treated as policy objectives that had to be implemented by the states, either nationally or internationally. The 1980s still breathe a different spirit, the belief in and the hope for an internationally agreeable legal framework that could provide a sound compromise between export and import states or, put differently, between the free-trade ideology and the need for some sort of internationally agreeable minimum standards of protection.

13.3 THE SECOND WAVE – GAFAS AND GLOBAL VALUE CHAINS (GVCS)

When it comes to private responsibilities in the digital economy and society, the attention is directed to the GAFAs, to what is called the platform economy and their role as gatekeepers to the market. Here competition law ties in. National competition authorities have taken action against the GAFAs under national and European competition law mainly with reference to the abuse of a dominant position.[20] The EU, on the other hand, has adopted Regulation 2019/1150[21] business to platforms in order to 'create a fair, transparent and predictable business environment for smaller businesses and traders', which entered into force on 20 July 2020. The von der Leyen

[19] Hans-W. Micklitz, 'Consumer Rights' in Andrew Clapham, Antonio Cassese and Joseph Weiler (eds), *European Union – The Human Rights Challenge, Human Rights and the European Community: The Substantive Law* (Nomos 1991).

[20] There is a vibrant debate in competition law on the reach of Art. 102 TFEU and the correspondent provisions in national cartel laws . See Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (1st ed., Oxford University Press 2020). With regard to the customer dimension, see the following judgment of the Federal Supreme Court of Germany (BGH) on Facebook, KVR 69/19, 23. 6. 2020 openJur 2020, 47441.

[21] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services PE/56/2019/REV/1, OJ L 186, 11. 7. 2019, pp. 57–79.

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Commission has announced two additional activities: a sector-specific proposal which is meant to fight down potential anti-competitive effects by December 2020 and a Digital Services Act which will bring amendments to the e-commerce Directive 2001/43/EEC probably also with regard to the rights of customers. While platforms hold a key position in the digital economy and society, they form in Baldwin's scenario no more than an integral part of the transformation of the economic order towards GVCs. Platforms help reduce the communication cost, and they are opening up markets for small- and medium-sized companies in the Global South which had no opportunity to gain access to the market before the emergence of platforms.

The current chapter is not the ideal place to do justice to the various roles and functions of platforms or GVCs. There is not even an agreed-upon definition of platforms or GVCs. What matters in our context, is, however, to understand the GVCs as networks which are interwoven through a dense set of contractual relations, which cannot be reduced to a lead company that is organized by the chain upstream and downstream and that holds all the power in their hands. Not only the public attention but also the political attention is very much concentrated on the GAFAs and on multinationals, sometimes even identified and personalized. Steve Jobs served as the incarnation of Apple, and Mark Zuckerberg is a symbolic figure and even a public figure. The reference to the responsibility of private actors is in their various denominations, *sociétés*, corporations and multinationals. Digitization enabled the development of the platform economy. Communication costs were reduced to close to zero. Without digitalization and without the platforms, the great transformation of the global economy, as *Baldwin* calls it, would not have been possible. The results are GVCs being understood as complex networks, where SMEs equally may be able to exercise, let alone that the focus on the chain sets aside external effects of the contractualization on third parties.[22] That is why personalization of the GAFAs is as problematic as the desperate search for a lead company which can be held responsible upstream and downstream.[23]

The overview of the more recent attempts internationally, nationally and the EU lay the ground for discussion. The idea of holding multinationals responsible for their actions in third countries, especially down the GVCs, has been vividly debated in recent years. Discussions have evolved to cover not only the protection of human rights but also environmental law, labour law and good governance in general. Developments in the field and the search for accountability have been led to political action at the international level, to legislative action at the national and

[22] Jaakko Salminen, 'Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities' (2016) 23 *Indiana Journal of Global Legal Studies* 709.

[23] This comes clear from the methodology used by Jaakko Salminen and Mikko Rajavuori, 'Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis' (2019) 26 *Maastricht Journal of European and Comparative Law* 602.

European level and to litigation before national courts. Most of the initiatives fall short of an urgently needed holistic perspective, which takes the various legal fields into account, takes the network effects seriously and provides for an integrated regulation of due diligence in corporate law, of commercial practices, of standard terms and of the contractual and tortious liability, let alone the implications with regard to labour law, consumer law and environmental law within GVCs.[24]

13.3.1 *International Approaches on GVCs*

In June 2011 the United Nations Human Rights Council unanimously adopted the Guiding Principles on Business and Human Rights (UNGPs). This was a major step towards the protection of Human Rights and the evolution of the concept of Social Corporate Responsibility. The adoption of the UNGPs was the result of thirteen years of negotiations. The year 2008 marked another step in the work of the Human Rights Council with the adoption of the framework 'Protect, Respect and Remedy: A Framework for Business and Human Rights'.[25] The framework laid down three fundamental pillars: the duty of the state to protect against human rights violations by third parties, including companies; the responsibility of companies to respect human rights; and better access by victims to effective remedies, both judicial and non-judicial. The Guiding Principles, which are seen as the implementation of the Protect, Respect and Remedy Framework, further detail how the three pillars are to be developed. The Guiding Principles are based on the recognition of

> [the] State's existing obligations to respect, protect and fulfil human rights and fundamental freedoms; The role of business enterprises as specialized organs of society performing specialized function, required to comply with all applicable laws and to respect human rights; the need for rights and obligations to be matched to appropriate and effective remedies when breaches.[26]

The Guiding Principles not only cover state behaviours but introduce a corporate responsibility to respect human rights as well as access to remedies for those affected by corporate behaviour or activities. Despite its non-binding nature, the UN initiative proves the intention to engage corporations in preventing negative impacts of their activities on human rights and in making good the damage they would nevertheless cause.

[24] For first attempt to at least systematically address the legal fields and the questions that require a solution, Anna Beckers and Hans-W. Micklitz, 'Eine ganzheitliche Perspektive auf die Regulierung globaler Lieferketten' (2020) volume 6 *Europäische Zeitschrift für Wirtschafts- und Steuerrecht*, 324–329.

[25] United Nations Humans Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, 2008 A/HRC/8/5.

[26] United Nations Human Rights Council, United Nations Guidelines on Business and Human Rights, 2011 A/HRC/17/31; for details, see Claire Bright, 'Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is French Duty of Vigilance Law the Way Forward?' EUI working paper MWP 2020/01, 2020, 2.

Here is not the place to give a detailed account of the initiative taken at the international level, but it is relevant to stop on the case of the OECD. The OECD worked closely with the UN Human Rights Council in elaborating the OECD Guidelines for Multinational Enterprises.[27] The guidelines especially introduced an international grievance mechanism. The governments that adhere to the guidelines are required to establish a National Contact Point (NPC) which has the task of promoting the OECD guidelines and handling complaints against companies that have allegedly failed to adhere to the Guidelines' standards. The NCP usually acts as a mediator or conciliator in case of disputes and helps the parties reach an agreement.[28]

13.3.2 *National Approaches to Regulate GVCs*

Not least through the international impact and the changing global environment, national legislators are becoming more willing to address the issue of the responsibility of corporations for their actions abroad from a GVC perspective. They focus explicitly or implicitly on a lead company which has to be held responsible. None have taken the network effects of GVS seriously. In 2010, California passed the Transparency in Supply Chains Act,[29] the same year the United Kingdom adopted the UK Bribery Act, which creates a duty for undertakings carrying an economic activity in Britain to verify there is no corruption in the supply chain.[30] The Bribery Act was then complemented by the UK Modern Slavery Act 2015, which focuses on human trafficking and exploitation in GVCs.[31] In the same line, the Netherlands adopted a law on the duty of care in relation to child labour, covering international production chains.[32] Complemented by EU instruments, such legislation is useful and constitutes a step forward, particularly at the political and legislative levels. Nevertheless, their focus on a sector, a product or certain rights does not enable the body of initiative to be mutually reinforcing. There is a crucial need for a holistic network-related approach to the regulation of GVCs.

Legislation on the responsibility of multinationals for human rights, environment or other harms is being designed in different countries. Germany and Finland have announced being in the process of drafting due diligence legislation.[33] Switzerland had been working on a proposal, led by NGOs and left parties. The initiative was put to the *votation* in the last days of November 2020. A total of 47 per cent of the

[27] OECD Guidelines for Multinational Enterprises, 2011.
[28] S. Eickenjäger, *Menschenrechtsberichtserstattung durch Unternehmen* (Mohr Siebeck 2017) 274.
[29] California Transparency in Supply Chains Act of 2010 (SB 657).
[30] Bribery Act 2010 c. 23.
[31] Modern Slavery Act 2018, No. 153, 2018.
[32] Wet zorgplicht kinderarbeid, 14 May 2019. For a comparison of the legislation discussed above, see Salminen and Rajavuori (n 23).
[33] For a detailed overview of the status quo, see Macchi and Bright (n 7).

population participated, of which 50.73 per cent voted 'Yes'.[34] The project was rejected at the level of the cantons. Therefore this initiative will not go forward. At the time of writing, it seems to be a lighter initiative that will be discussed – one where responsibility is not imposed along the supply chain but for Swiss companies in third countries. The *votation* is nevertheless a performance in terms of the willingness to carry out such a project, participation and in terms of result. The result of the vote of the cantons can be partly explained by the lobby strategies multinationals have conducted from the beginning of the initiative.

The French duty of vigilance law was adopted in 2017 and introduced in the Code of Commerce among the provisions on public limited companies in the sub-part on shareholders assemblies.[35] They require shareholders of large public limited companies with subsidiaries abroad to establish a vigilance plan. A vigilance plan introduces vigilance measures that identify the risks and measures to prevent serious harm to human rights, health, security or environmental harm resulting from the activities of the mother company but also of the company it controls, its subcontractors and its suppliers. The text provides for two enforcement mechanisms. First, a formal notice (*mise en demeure*) can be addressed to the company that does not establish a vigilance plan or establishes an incomplete one. The company has three months to comply with its obligations. Second, there could be an action in responsibility (*action en responsabilité*) against the company. Here the company must repair the prejudice the compliance with its obligations would have avoided. French multinationals have already received letters of formal notice. This is the case of EDF and its subsidiary EDF Energies Nouvelles for human rights violations in Mexico.[36] The first case was heard in January 2020. It was brought by French and Ugandan NGOs against Total. The NGOs argue that the vigilance plan designed and put in place by Total is not in compliance with the law on due diligence and that the measures adopted to mitigate the risks are insufficient or do not exist at all.

13.3.3 *The Existing Body of EU Approaches on GVCs and the Recent European Parliament Initiative*

Sector-specific or product-specific rules imposed on GVCs have been adopted at the EU level and introduced due diligence obligations. The Conflict Minerals

[34] www.bk.admin.ch/ch/f/pore/va/20201129/index.html accessed on 1 December 2020.

[35] LOI no. 2017–399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre JORF no. 0074 du 28 mars 2017, S. Brabant and E. Savourey, 'French Law on the Corporate Duty of Vigilance: A Practical and Multidimensional Perspective', *Revue international de la compliance et de l'éthique des affairs*, 14 December 2017, www.bhrinlaw.org/frenchcorporateduty law_articles.pdf.

[36] For further details, see Claire Bright, 'Creating a Legislative Level Playing Field in Business and Human Rights at the European Level: Is French Duty of Vigilance Law the Way Forward?' EUI working paper MWP 2020/01, 2020, 6.

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Regulation[37] and the Regulation of timber products[38] impose obligations along the supply chain; the importer at the start of the GVC bears the obligations. The Directive on the Disclosure of Non-Financial and Diversity Information obliges large capital market-oriented companies to include in their non-financial statement information on the effects of the supply chain and the supply chain concepts they pursue.[39] The Market Surveillance Regulation extends the circle of obligated economic operators in the EU to include participants in GVCs, thus already regulating extraterritorially.[40] The Directive on unfair trading practices in the global food chain regulates trading practices in supply chains through unfair competition and contract law.[41] Although these bits and pieces of legislation introduce a form of due diligence along the supply chain, they remain product- or sector-specific, which prevents an overall legal approach to due diligence across sectors for all products. This concern is addressed by the latest Recommendation of the European Parliament.

Most recently, in September 2020, the JURI Committee of the European Parliament published a draft report on corporate due diligence and corporate accountability which includes recommendations for drawing up a Directive.[42] Although the European Parliament's project has to undergo a number of procedures and discussions among the European institutions and is unlikely to be adopted in its current form, a few aspects are relevant for our discussion. Article 3 defines due diligence as follows:

> '[D]ue diligence' means the process put in place by an undertaking aimed at identifying, ceasing, preventing, mitigating, monitoring, disclosing, accounting for, addressing, and remediating the risks posed to human rights, including social and labour rights, the environment, including through climate change, and to governance, both by its own operations and by those of its business relationships.

Following the model of the UN Guiding Principles, the scope of the draft legislation goes beyond human rights to cover social and labour rights, the environment, climate change and governance. Article 4 details that undertakings are to

[37] Regulation 2017/821/EU of 17 March 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum, tungsten, their ores and gold originating from conflict-affected and high-risk areas, OJ L 130, 19. 5. 2017, p. 1–20.

[38] Regulation 995/2010/EU of 20 October 2010 on the obligations of operators who place timber and timer products on the market, OJ L 295, 12. 11. 2010, p. 23–34.

[39] Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards the disclosure of non-financial and diversity information by certain large companies and groups, OJ L 330, 15. 11. 2014, p. 1–9.

[40] Regulation 2019/1020/EU of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations 765/2008/EC and 305/2011/EU, OJ L 169, 25. 6. 2019, p. 1–44.

[41] Directive 2019/633/EU of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food chain, OJ L 111, 25. 4. 2019, p. 59–72.

[42] Committee on Legal Affairs, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129(INL), 11. 09. 2020.

identify and assess risks and publish a risk assessment. This risk-based approach is based on the second pillar of the UN Guiding Principles; it is also followed in the French due diligence law. In case risks are identified, a due diligence strategy is to be established whereby an undertaking designs measures to stop, mitigate or prevent such risks. The firm is to disclose reliable information about its GVC, namely, names, locations and other relevant information concerning subsidiaries, suppliers and business partners.[43] The due diligence strategy is to be integrated in the undertaking's business strategy, particularly in the choice of commercial partners. The undertaking is to contractually bind its commercial partners to comply with the company's due diligence strategy.

13.3.4 *Litigation before National Courts*

Civil society, NGOs and trade unions are key players in making accountable multinationals for their actions abroad and along the GVC. They have supported legal actions for human rights violations beyond national territories. Such an involvement of the civil society is considerably facilitated through digitalization, through the use of the platforms and through the greater transparency in GVCs.[44] Courts face cases where they have to assess violations of human rights in third countries by multinationals and their subsidiaries and construct extraterritorial responsibility. There is a considerable evolution from the 1980s in that the rights rhetoric goes beyond human rights so as to cover labour law, environmental law, misleading advertising or corporate law. Although the rights rhetoric recognizes the moral responsibility of private companies and accounts for their gravity, the challenges before and during trials to turn a moral responsibility into a legal liability are numerous.

In France, three textile NGOs brought a complaint arguing that Auchan's communication strategy regarding its commitment to social and environmental standards in the supply chain constituted misleading advertising, since Auchan's products were found in the Rana Plaza factory in Bangladesh, a factory well-known for its poor working and safety conditions. The case was dismissed at the stage of the investigation. In another case, Gabonese employees of COMILOG were victims of a train accident while at work, which led to financial difficulties for the company. They were dismissed and promised compensation, which they never received. With the support of NGOs, they brought the case to a French employment tribunal,

[43] European Parliament Committee on Legal Affairs, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129(INL), 11. 09. 2020, article 4.

[44] For an early account of the new opportunities, see Eric Brousseau, Meryem Marzouki and Cécile Méadel, *Governance, Regulations and Powers on the Internet* (Cambridge University Press 2012). Andrea Calderaro and Anastasia Kavada, 'Challenges and Opportunities of Online Collective Action for Policy Change' (2013) in Diane Rowland, Uta Kohl and Andrew Charlesworth (eds), *Information Technology Law* (5th ed., Routledge 2017).

claiming that COMILOG was owned by a French company. Their claim was dismissed but successful on appeal, where the court held COMILOG France and COMILOG international responsible for their own conduct and for the conduct of their subsidiaries abroad. On the merits, the court found that COMILOG had to compensate the workers. On appeal, the *Court de Cassation* annulled this finding, arguing that there was no sufficient evidence for the legally required strong link with the mother company in France.[45] There is a considerable number of cases with similar constellations, where courts struggle in finding a coherent approach to these legal issues.

In Total, the NGOs pretended that the vigilance plan is incomplete and does not offer appropriate mitigating measures or failing to adopt them. The court did not rule on the merits, as the competence lies with the commercial court, since the law on due diligence is part of the Commercial Code. Nevertheless, the court made a distinction between the formal notice procedure which is targeted at the vigilance plan and its implementation and the action in responsibility.[46] It is unclear whether the court suggested a twofold jurisdiction, a commercial one for due diligence strategies and another one for actions in responsibility. The case triggers fundamental questions as to what a satisfactory vigilance plan is and what appropriate mitigating measures are. It also requires clarifications about the relevant field of law applicable, the relevant procedure and the competent jurisdiction.

Even if there is an evolution as to the substance, today's cases carry the heritage of those from the 1980s. Before ruling on the merits, courts engage in complex procedural issues, just like in the context of the Bhopal litigation or *Kiobel*. Such legal questions have not yet been settled at the national level, and they are still examined on a case-by-case basis. This lack of consistency renders the outcome of litigation uncertain. The first barrier is procedural; it concerns the jurisdiction of the national court on corporate action beyond the scope of its territorial jurisdiction. The second relates to the responsibility of the mother companies for their subsidiaries. In the two Shell cases brought up in the UK[47] and in the Netherlands,[48] Nigerian citizens had suffered from environmental damages which affected their territory, water, livelihood and health. Here the jurisdiction of the national courts was not an issue, but the differentiation between the mother company and its subsidiary remained controversial.[49]

[45] Cass. Civ. 14 sept. 2017 no. 15–26737 et 15–26738.

[46] Tribunal Judiciaire de Nanterre, 30 January 2020, no. 19/02833.

[47] High Court, The Bodo Community et al. v Shell Petroleum Development Company of Nigeria Ltd, (2014) EWHC 1973, 20 June 2014.

[48] *Court of Appeal of the Hague, Eric Barizaa Dooh of Goi et al.* v. *Royal Dutch Shell Plc et al.*, 200. 126. 843 (case c) and 200. 126. 848 (case d), of 18 Decembre 2015.

[49] Claire Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary The Example of the Shell Cases in the UK and the Netherlands' in Angelica Bonfanti (ed), *Business and Human Rights in Europe: International Law Challenges* (Routledge 2018).

The tour d'horizon indicates how fragile the belief in judicial activism still is. The adoption of due diligence legislation has not changed the level playing field. Courts are to design the contours and requirements of due diligence. Two methodological questions are at the heart of the ongoing discussions of the private responsibilities of companies in the GVCs. Who is competent? Who is responsible? Such are the challenges of the multilevel internationalized and digitalized environment where law finds itself unequipped to address the relevant legal challenges.

13.3.5 *Business Approaches to GVCs within and beyond the Law*

Recent initiatives suggest a different approach, one where legal obligations are placed on companies, not only to comply with their own obligations but to make them responsible for the respect of due diligence strategies along the GVC. The role and function of Corporate Social Responsibility and Corporate Digital Responsibility are in the political limelight.[50] Thereby firms have the potential to exercise impact over the GVC. This is particularly true in case a lead company can easily be identified. If the upstream lead company decides to require its downstream partners to comply with its due diligence strategy, the lead company might be able to ensure compliance.[51] In GVCs, contracts are turned into a regulatory tool to the benefit of the lead company and perhaps to the benefit of public policy goals. There are two major problems: the first results from the exercise of economic power, which might be for good, but the opposite is also true. The second relates to the organization of the GVC, which more often than not is lacking a lead company but is composed out of a complex network of big, small and medium-sized companies. Designing responsibilities in networks is one of the yet still unsolved legal issues.

A consortium of French NGOs has drafted a report on the first year of application of the law on due diligence, where they have examined eighty vigilance plans published by French corporations falling under the scope of the due diligence law.[52] The report is entitled 'Companies Must Do Better' and sheds light on questions we have raised before. As regards the publication and content of the due

[50] Monika Namysłowska, 'Monitoring Compliance with Contracts and Regulations: Between Private and Public Law' in Roger Brownsword, R. A. J. van Gestel and Hans-W. Micklitz (eds), *Contract and Regulation: A Handbook on New Methods of Law Making in Private Law* (Edward Elgar Publishing 2017); Anna Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart Publishing 2015).

[51] Walter van Gerven, 'Bringing (Private) Laws Closer to Each Other at the European Level' in Fabrizio Cafaggi, *The Institutional Framework of European Private Law* (Oxford University Press 1993). Fabrizio Cafaggi and Horatia Muir Watt (eds), *Making European Private Law: Governance Design* (Edward Elgar 2008).

[52] Actionaid, Les Amis de la Terre France, Amnesty International, Terre Solidaire, Collectif Étique sur l'Étiquette, Sherpa, The law on duty of vigilance of parent and outsourcing companies Year 1: Companies must do better (2019), 49.

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diligence plans, not all companies have published their vigilance plans, some have incomplete ones, some have a lack of transparency and others seem to ignore the idea behind the due diligence plan. The report writes, 'The majority of plans are still focusing on the risks for the company rather than those of third parties or the environment.'[53] Along the different criteria of the vigilance plan analysed by the consortium of NGOs, it becomes clear that few companies have developed methodologies and appropriate responses in designing their due diligence strategy, identifying and mitigating risks. It is also noted that companies have re-used some previous policies and collected them to constitute due diligence. The lack of seriousness does not only make the vigilance plans unreadable; it denies any due diligence strategy of the firm. If multinationals do not take legal obligations seriously at the level of the GVC leading company, are they likely to produce positive spillover effects along the chain? It is too early to condemn the regulatory approach and the French multinationals. Once similar obligations will be adopted in most countries, at least in the EU, we might see a generalization and good practices emerge. Over the long term, we might witness competition arise between firms on the ground of their due diligence strategy.

Externally from the GVC, compliance can also be carried out by actors such as Trade Unions and NGOs. They have long been active in litigation and were consulted in the process of designing legislation. The European Parliament's Recommendation suggests their involvement in the establishment of the undertaking's due diligence strategies, similar to French law.[54] Further, due diligence strategies are to be made public. In France, few companies have made public NGOs or stakeholders contributing to the design of the strategy. If there is no constructive cooperation between multinationals and NGOs yet, NGOs have access to grievance mechanisms under the European Parliament's Recommendation, which resembles the letter of formal notice under the French law.[55] Stakeholders which are not limited to NGOs could thereby voice concerns as to the existence of risks which the undertakings would have to answer to and be transparent about through publication.

NGOs have a unique capacity for gathering information abroad on the ground. The European Parliament's text explicitly refers to the National Contact Point under the OECD framework. National Contact Points are not only entrusted with the promotion of the OECD guidelines; they offer a non-judicial platform for

[53] Actionaid, Les Amis de la Terre France, Amnesty International, Terre Solidaire, Collectif Étique sur l'Étiquette, Sherpa, The law on duty of vigilance of parent and outsourcing companies Year 1: Companies must do better (2019), 10.

[54] European Parliament Committee on Legal Affairs, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129(INL), 11. 09. 2020, articles 5 and 8.

[55] European Parliament Committee on Legal Affairs, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129(INL), 11. 09. 2020, articles 9 and 10.

grievance mechanisms.[56] The OECD conducts an in-depth analysis of the facts and publishes a statement as to the conflict and what it can offer to mediate it. Although such proceedings are non-binding, they do offer the possibility for an exchange between the parties and the case files are often relied on in front of courts. It seems that NGOs and other stakeholders have a role to play in compliance with the due diligence principles. They are given the possibility to penetrate the network and work with it from the inside. There are equally mechanisms that allow for external review of the GVC's behaviour.

13.4 THE WAY AHEAD: THE SNAKE BITES ITS OWN TAIL

The European Parliaments have discussed the introduction of an independent authority with investigative powers to oversee the application of the proposed directive – namely, the establishment of due diligence plans and appropriate responses in case of risks.[57] In EU jargon, this implies the creation of a regulatory agency or a form alike. Such an agency could take different forms and could have different powers; what is crucial is the role such an agency might play in the monitoring and surveillance of fundamental rights, the environment, labour rights, consumer rights and so on. A general cross-cutting approach would have a broader effect than isolated pieces of sector- or product-specific legislation. If such rights were as important as for instance competition law, the EU would turn into a leader in transmitting its values only to the GVCs at the international level. Playing and being the gentle civiliser does not mean that the EU does not behave like a hegemon, though.[58]

Does the snake bite its own tail? Despite the idealistic compliance mechanisms, a return to courts seems inevitable, and fundamental questions remain. Are multinationals responsible for their actions abroad? Let us flip a coin. Heads, yes, there is legislation, or it is underway. There is political will and civic engagement. There is a strong rights rhetoric that people, politicians and multinationals relate to. Heads of multinationals and politicians have said this is important. Firms are adopting due diligence strategies; they are mitigating the risks of their activities. They are taking their responsibility seriously. Tails, all the above is true, there has been considerable progress and there is optimism. Does it work in practice? Some doubts arise. There are issues of compliance and courts struggle. Multinationals and nowadays GAFAs

[56] OECD Guidelines for Multinational Enterprises, 2011, part II, Procedural Approaches, Part C, Application of the guidelines in special cases.

[57] European Parliament Committee on Legal Affairs, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129(INL), 11. 09. 2020, articles 14 and 15.

[58] H.-W. Micklitz, 'The Role of the EU in the External Reach of Regulatory Private Law – Gentle Civilizer or Neoliberal Hegemon? An Epilogue', in M. Cantero and H.-W. Micklitz (eds), *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* (Edward Elgar Publishing 2020) 298–320.

have communication strategies to send positive messages. They do not have mailboxes; it is sometimes difficult to find them. Mostly, they might even own GVCs, and what happens there stays there. It is upon their desire to commit to their duty of due diligence; it is not upon the state. How will these parties react in the algorithmic society?