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Database of Business Ethics

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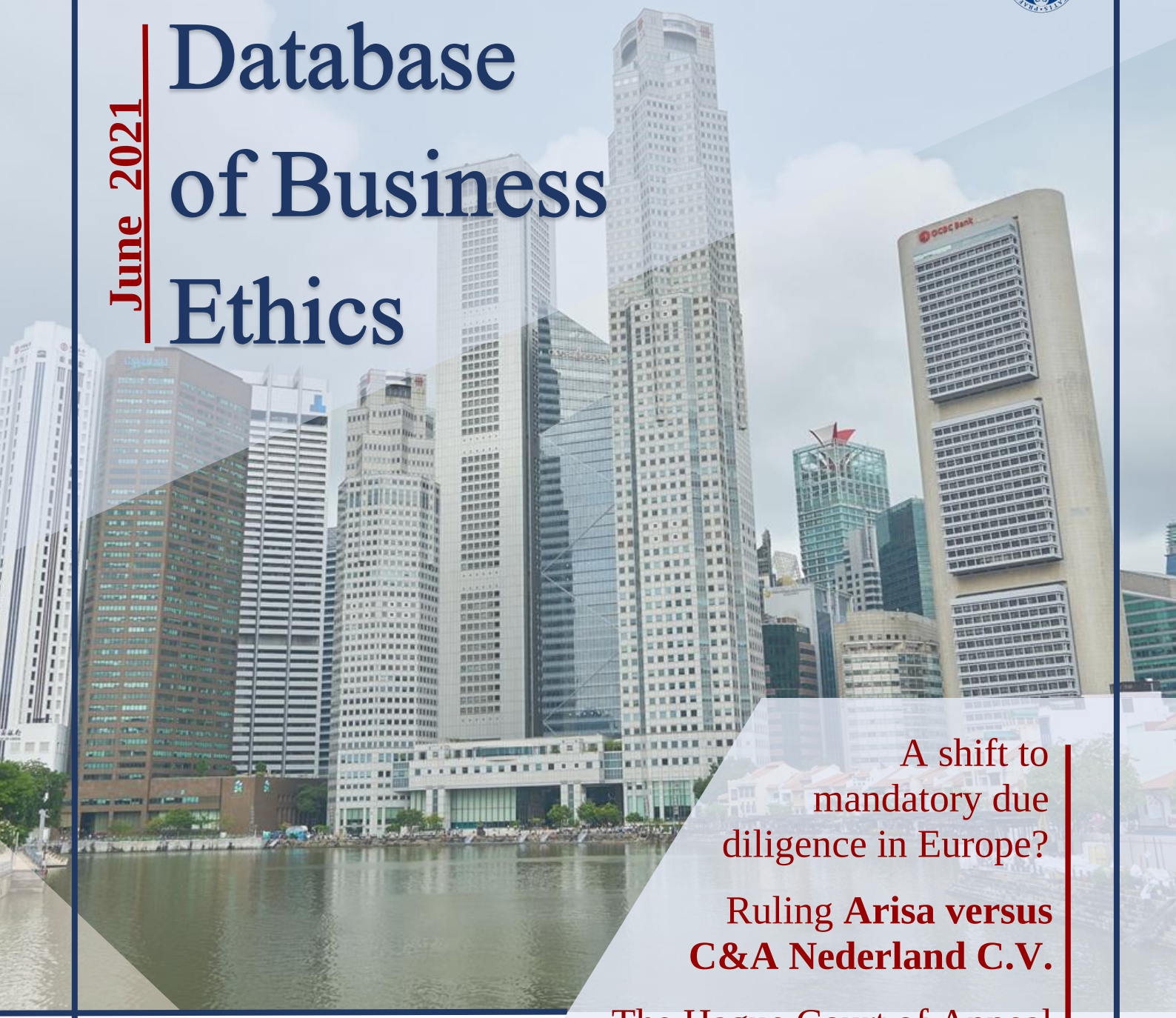

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A shift to mandatory due diligence in Europe?

The concept of corporate human rights due diligence has gained an increasing significance in the global arena since its first introduction by John Ruggie with the adoption of the United Nations General Principles on Business and Human Rights in 2011. Recently, it has gained the status of hard law in France (Law on the Corporate Duty of Vigilance of 2017) and in the Netherlands (Child Labour Duty of Care Act of 2019). Similar legislative proposals are currently being considered in Germany, Finland, Luxembourg, Denmark and Austria. Additionally, other "soft-steering" tools are developed by European governments to mainstream due diligence in practice. In the Netherlands for instance, sectoral collective agreements (called covenants) are initiators of the due diligence process. Nearly 50% of companies in the garment sector have signed the "Agreement on Sustainable Garment and Textile", placing their due diligence plans under the scrutiny of the Social and Economic Council. In exchange, they receive training and support on their due diligence processes. This is a first step towards the adoption of a general law, allowing companies to upgrade their standards gradually. These recent developments are adopted in the spirit of increasing companies' accountability on unethical activities ongoing in their supply chains. Where due diligence obligations include sanctions for non-compliance, a shift is operated from a corporate *social* responsibility (CSR) to a legal *liability* of the buyer along their supply chains. The French law on the duty of vigilance best exemplifies this shift. Under this law, companies above the threshold of 5000 employees must establish a "vigilance plan" to identify risks in their supply chain and actively prevent them. Failure to do so may lead to penalty payments and civil liability actions. French courts are ultimately in charge of interpreting this unclear legislation, notably concerning its scope of application and the price of fines. **Seven cases brought by NGOs are currently pending before commercial courts. Still at the birth phase, national policies on mandatory due diligence have yet to reveal their effectiveness to prevent adverse human rights in multinationals' supply chains.** The increased interest to follow the due diligence pragmatic path in the steps of the UN and OECD is promising in promoting ethical supply chains.

Now, all eyes are on the EU legislator to harmonize due diligence and create a necessary level playing field for all companies operating in Europe. A legislative proposal was submitted by Commissioner for Justice Didier Reynders in April 2020. If adopted, this law would constitute a big milestone in the promotion and regulation of business ethics. Despite a strong political willingness from most parties to adopt this Directive, many disagreements remain on its scope and enforcement mechanisms. On 10 March 2021, the European Parliament (EP) voted by a large majority in favor of a comprehensive resolution introducing recommendations to the Commission on corporate due diligence. It remains to be seen whether the Commission's legislative proposal will follow the EP's vision of a mandatory due diligence, comprising a broad scope covering all large undertakings regardless of their sector of activity, as well as some SME in high-risks sectors.

*With the cooperation of C.H.A. van Oostrum, Assistant Professor of Company Law at the University of Leiden

Ruling Arisa versus C&A Nederland C.V.

December 9, 2020 the Complaints and Disputes Committee for the Dutch Agreement on Sustainable Garments and Textile has given a ruling in the Arisa vs C&A case.

The Textile Covenant is the only one of all Dutch covenants with an independent disputes and complaints committee. Not only the parties to the agreement themselves, but also third parties can turn to this committee if they have suffered damage due to a violation of the covenant caused or contributed to by an enterprise or another entity to which the enterprise is directly linked. In the case being discussed here, Arisa - a Dutch foundation that aims to support and strengthen the defence of human rights in South Asia in cooperation with local organizations - has complained to the committee about abuses of employees at a supplier of C&A in southern India, Cotton Blossom Private Ltd. in Tamil Nadu. Arisa is a member of the Textile Covenant, C&A is a party to that covenant. Arisa believes that employee rights at Cotton Blossom Private Ltd are being neglected and violated.

The first thing to be determined is whether Arisa's complaint is admissible. Arisa may turn to the committee as a stakeholder, but is not allowed to act on behalf of the Indian organizations that have mandated her. These organizations wish to remain anonymous and the committee does not allow anonymous complaints.

Next step is whether Arisa's complaints are justified. Arisa is vindicated when she complains that C&A has provided her with insufficient information. Had C&A previously provided the requested information, the complaints procedure might not have been necessary at all. All other complaints - about insufficient medical care, too few measures to prevent dengue, poor housing for migrant workers and a malfunctioning complaint mechanism at Cotton Blossom - are declared unfounded because Arisa has insufficiently substantiated those complaints. This shows how difficult it is to prove if and which abuses have taken place when the complainant has to act from a great distance and without officials supervising on the spot. Besides that, those who have suffered harm or the organizations acting on their behalf often fear reprisals and therefore refuse to disclose information or step forward.

Does the complaints procedure yield nothing at all then? It certainly does: **C&A has taken a cooperative attitude in the procedure**, which is important for the future relationship with Arisa. For its part, the committee gives non-binding advice on how to tackle the addressed issues. What is also noteworthy is the fact that **C&A has now ended the relationship with Cotton Blossom, because the supplier has not complied with the agreements included in the supplier code belonging to C&A's Code of Conduct.** This is hopeful news in a newsletter belonging to the DBBE, a collection of codes of conduct from hundreds of multinational companies.

The Hague Court of Appeal on Milieudefensie et al. versus Shell

Sustainability-related lawsuits are occurring more frequently. The most recent example of this is the appeal case of Milieudefensie et al. versus the Shell concern about oil spills in the Niger Delta. **On January 29, 2021, the Court of Appeal of the Hague delivered its judgments. This ruling is in line with a trend whereby parent companies are held responsible and accountable for the actions of international subsidiaries.** This case is important for legal development because the Court has ruled that the parent company has a duty of care towards foreign claimants. It is the first case of its kind.

Since 1958, the Shell concern has been extracting oil in Nigeria. Oil leaks occur annually from oil pipelines and oil installations. Such oil spills can be the result of defective and/or outdated equipment. Sabotage is also recognised as a cause for leakage, whereby inadequate security measures can play a role. In the period 2004-2007, there were oil spills in the Nigerian villages of Oruma, Goi and Ikot Ada Udo. This leakage caused damage to local fish farmers.

The claims of Milieudefensie et al. are based on three groups of unlawful acts, namely unlawful acts related to (1) the occurrence of a leak, (2) Shell's response to a leak once it has occurred and (3) its remediation. All claims have been brought against Royal Dutch Shell (RDS) and its Nigerian daughter Shell Petroleum Development Company (SPDC). The claims against the parent company are based on negligence/breach of a duty of care for its own acts or omissions towards third parties affected by the acts or omissions of its subsidiary.

The Court ruled with regard to the occurrence of the oil spills that SPDC was liable for the damage suffered in the villages of Oruma and Goi. According to the Court, Shell has not established 'beyond reasonable doubt' that sabotage caused the damage. However, RDS is not liable according to the Court. The subsidiary SPDC did not act negligently or unreasonably, so it could not be assumed that RDS had breached its duty of care. As to Shell's response to the leaks, the court ruled that RDS did have a duty of care to the claimants. Concerning the oil spills at the oil well in Ikot Ada Udo, the court gave an interim judgment.

The Court ruled that the spills that occurred there were due to sabotage. The Court of Appeal did not rule on the question of whether Shell was liable for damage arising here. The Court wanted clarity as to whether the contamination still needed to be cleaned up and to what extent the contamination had spread. This case will continue.

This judgment was seen as a victory for Milieudefensie et al., and rightly so. However, lawsuits pursued by interest groups do not always have to be won to have a significant effect. Research suggests that strategically placed lawsuits can negatively impact the stock value of the company being litigated against. Additionally, companies are forced by legal procedures to accurately describe and disclose their modus operandi. By itself this may have a disciplining effect on companies and advance awareness of the impact companies can have on society and the environment.

What is the future of CSR?
An interview with Martijn Scheltema

To celebrate the success achieved in the sphere of Corporate Social Responsibility we asked the Chair of the Business Human Rights committee, Martijn Scheltema, to share some thought on the activity and future of the committee.

Martijn Scheltema is professor at Erasmus University Rotterdam and researches business human rights and climate change related issues. He has advised the Dutch State Department on legislative options in the business human rights arena. He is partner of Pels Rijcken and member of the Dutch Supreme Court Bar since 1997. He has specialized in business and human rights issues. He has been involved in the Srebrenica, SNS expropriation, Urgenda and Shell Kiobel cases. He chairs the business and human rights practice group of his firm and the independent binding dispute resolution mechanism of the Dutch Responsible Business Conduct agreement in the Textile sector.

Question: What does the committee stand for?

Scheltema: The committee decides on issues regarding compliance of business signatories to the IRBC agreement in the Textile sector with the agreement and especially whether the preform proper human rights due diligence (as also included in the OECD Guidelines for Multinational Enterprises and supporting guidance in de garment and footwear sector). It has jurisdiction over disputes lodged by the agreements secretariat which monitors signatories compliance and over complaints filed by external stakeholders as well as disputes within the steering committee of the agreement which cannot be resolved within this committee.

Question: How many disputes and complaints has the committee received so far and what types of labour issues does it deal with on a regular basis?

Scheltema: The committee has decided on two disputes and two complaints and has, so far, not dealt with any unresolved dispute in the steering committee. All decisions are published in Dutch and English on its website. The disputes dealt with companies who desired to terminate their involvement in the agreement (although one, after the decision, decide to stay) and the complaints dealt with worker issues.

Question: What is the reaction of the stakeholders to disputes/complaints? Do they believe that the committee can bring a change/relief?

Scheltema: The responses of the stakeholders vary. As far as their claim is honored, they appreciate this. Furthermore, some of them feel it is unclear what can be expected in this proceedings. To address this issue the committee is preparing a guiding document with its procedural rules to clarify what can and cannot be expected. The committee can bring relief, but what is sufficient in the eyes of the beholder can obviously be disputed.

Question: What is your opinion on the future of the committee?

Scheltema: I feel the committee has a role in the next IRBC agreement in the Garment sector (the current one expires on 31 December this year). However, it would be good to enhance accessibility, for example but exploring how it may function as an escalation mechanism from local (dialogue based) mechanisms.

Do you have questions?

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