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CORPORATE SOCIAL RESPONSIBILITY AND PROTECTION OF WORKERS' HUMAN RIGHTS: THE CASE OF GERMANY

LA RESPONSABILIDAD SOCIAL DE LAS EMPRESAS Y LA PROTECCIÓN DE LOS DERECHOS HUMANOS DE LOS TRABAJADORES EN EL ORDENAMIENTO JURÍDICO ALEMÁN

ACHIM SEIFERT
Friedrich-Schiller-University Jena, Germany

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ABSTRACT

The following Article analyzes recent developments of German law regarding CSR and the protection of human rights in the production sites of foreign subsidiaries and suppliers of German companies. It gives a brief overview on the National Action Plan of the Federal Government, adopted in 2016, analyzes possibilities of a direct enforcement of human rights violations before German courts and gives a survey on some relevant instruments German law uses to promote the respect of human rights by German companies (e.g. CSR transparency and public procurement law). Finally, the current debate on the adoption of a "Supply Chains Act" is briefly assessed. The author argues that the CSR debate in Germany has reached a crossroad with the Federal Government's initiative for a "Supply Chains Act" since such Act would probably establish a supply chain due diligence and also a delictual liability of German companies for human rights violations caused by a non-compliance with its statutory duties to control its supply chain. However, the outcome of this ongoing debate still is unclear.

KEYWORDS: Corporate Social Responsibility (CSR), protection of fundamental rights of workers, global supply chains, liability of transnational companies.

RESUMEN

El artículo analiza la evolución reciente del derecho alemán en materia de responsabilidad social de las empresas y de protección de los derechos humanos en los centros de producción de las filiales extranjeras y de los proveedores de las empresas alemanas. Ofrece un breve resumen del Plan de Acción Nacional del Gobierno Federal, adoptado en 2016; analiza las posibilidades de responder directamente de las violaciones de los derechos humanos ante los tribunales alemanes, y estudia algunos instrumentos pertinentes que utiliza la legislación alemana para promover el respeto de los derechos humanos por las empresas alemanas, como, por ejemplo, la transparencia de la RSC y la legislación sobre contratación pública. Por último, evalúa brevemente el debate actual sobre la aprobación de una "Ley de cadenas de suministro". El autor sostiene que el debate sobre la RSC en Alemania ha llegado a una encrucijada con la iniciativa del Gobierno Federal de una "Ley de cadenas de suministro", ya que esa ley establecería probablemente el deber de diligencia en la cadena de suministro y también la responsabilidad civil de las empresas alemanas por las violaciones de los derechos humanos causadas por el incumplimiento de las obligaciones legales de controlar la cadena de suministro. Sin embargo, todavía no está claro el resultado de ese debate que se halla en curso.

PALABRAS CLAVE: Responsabilidad Social Corporativa (RSC), protección de los derechos fundamentales de los trabajadores, cadenas de suministro mundiales, responsabilidad de las empresas transnacionales.

SUMMARY

I. Introduction.

For a long time, Corporate Social Responsibility (CSR) in general and the protection of workers' fundamental rights in transnational companies in particular has been limited to voluntary initiatives of companies, strengthened by the activities of NGOs, trade unions and other workers representatives (*e.g.* European Works Councils).[1] Germany has not been an exception from this evolution. Thus, a number of transnational companies have adopted Codes of Conduct promising among other things the respect of workers' fundamental rights. Some of these transnational companies with registered office in Germany have concluded International Framework Agreements (IFAs) with International Trade Union Federations like IndustryAll or UNI Global Union:[2] most of these IFAs focus on the ILO core labour standards as "recalled" by the ILO Declaration of Fundamental Principles and Rights at Work (1998). Some of these IFAs also provide rules for monitoring procedures. In some cases, transnational companies with registered office in Germany have even established World Works Councils with information and consultation rights that may also promote the respect of workers' human rights in all production sites of the company.[3] Another instrument that has been used is social labeling. The German Federal Government has accompanied all these private and voluntary initiatives by creating a "National CSR-Forum" in 2009, composed of representatives of the various civil society actors and aiming at consulting the Federal Government on the national CSR-strategy to be pursued.[4]

This strategy, originally relying on voluntary initiatives of transnational companies and civil society actors, is gradually going to change: CSR is increasingly becoming juridified by establishing rules of hard law aiming at ensuring the respect of workers' fundamental rights in all production sites of transnational companies whereas it was essentially based

[1] For this understanding of CSR paradigmatic European Commission, "Green paper – Promoting a European framework for corporate social responsibility", COM (2001) 366, p. 7.

[2] Cf. THÜSING, Gregor, "International Framework Agreement: Rechtliche Grenzen und praktischer Nutzen", *Recht der Arbeit*, 2010, pp. 78-93; see also DZIDA, Boris, REINHARD, Christian, "Globale Rahmenabkommen: zwischen Corporate Social Responsibility und gewerkschaftlichen Kampagnen", *Betriebs-Berater (BB)*, 2012, pp. 2241-2246.

[3] For an analysis of the IFAs see SEIFERT, Achim, "Global Employee Information and Consultation Procedures in Worldwide Enterprises", *IJCLLIR*, 2008, pp. 343-346.

[4] For further information see the Website of the "National CSR-Forum": https://www.csr-in-deutschland.de/DE/Politik/CSR-national/Nationales-CSR-Forum/nationales-csr-forum.html.

on mechanisms of "soft law" before. To a growing extent, State law addresses CSR and mechanisms of its enforcement.

The following article analyzes this changing context of CSR and takes the Federal Republic of Germany as an example. It focuses on human rights compliance in transnational companies and their enforcement in case of violations taking place in production sites of foreign subsidiaries or suppliers of German companies. After a brief outline of the new CSR strategy of the German Federal Government, set out in its National Action Plan of 2016 for the Implementation of the UN Guiding Principles on Business and Human Rights (2.), the possibilities of a direct enforcement of human rights in transnational companies under German law shall be analyzed (3.). However, emphasis will be laid on some relevant mechanisms German law provides to influence business conduct in the sense of CSR (4.): in this context, State action in order to increase transparency of CSR, the public procurement policy and competition law shall be stressed.

II. The 2016 National Action Plan of the Federal Government.

In 2016, the German Federal Government adopted for the first time a National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights (2011).[5] The adoption of the "Ruggie Principles" by the UN, the 2011 recommendation of the European Commission to adopt National Action Plans on CSR in the Member States[6] but also the declaration of the G7 at its 2015 Summit in 2015 to promote "responsible supply chains" also by setting up National Action Plans[7] served as catalysers for the German Federal Government to revisit the existing national CSR strategy and to establish a coherent policy in this area.

The purpose of the National Action Plan is to initiate a process orienting the implementation of the UN Guiding Principles on Business and Human Rights, bundling the various actors of State, business civil society and trade unions.

The Federal Government identifies four areas in which action needs to be taken. First and foremost, it recognizes a positive obligation of the State to protect human rights in the context of economic activities and sets out different instruments which shall establish compliance with these positive obligations (*e.g.* development policy, public procurement, State aids and activities of State-owned companies). Secondly, the National Action Plan formulates concrete recommendations for business conduct such as supply chain due

[5] BUNDESREGIERUNG, Nationaler Aktionsplan – Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020, 16 December 2016, Berlin, accessible at: http://www.csr-in-deutschland.de/SharedDocs/Downloads/DE/NAP/nap-im-original.pdf?__blob=publicationFile&v=3.

[6] Cf. EUROPEAN COMMISSION, Communication "A renewed Strategy 2011-2014 for Corporate Social Responsibility", COM (2011) 681 final, p. 13.

[7] Cf. G7 GERMANY 2015/SCHLOSS ELMAU – LEADERS' DECLARATION, *Think ahead. Act Together*, G7 Summit 7-8 June 2015, pp. 6-7, available at: https://www.g7germany.de/Content/EN/_Anlagen/G7/2015-06-08-g7-abschluss-eng_en___blob=publicationFile&v=3.pdf.

diligence, transparency and communication of companies on the impact of their activities on human rights and business activities in conflict-affected areas (*e.g.* the exploitation of conflict minerals or their importation). Thirdly, Federal Government offers its support to business and particularly to SME to implement these recommendations through information and the exchange of good practices. And finally, it is explained that Germany provides effective remedies for victims of human rights violations (*e.g.* access to German courts), as required by the UN Guiding Principles on Business and Human Rights.

The National Action Plan does not provide the immediate adoption of legal reforms. It establishes a monitoring which consists in an empirical research, starting in 2018 and conducted for every calendar year, on the extent to which transnational companies have implemented the various recommendations the National Action Plan has proposed. Until 2020, fifty percent or more of the companies with registered office in Germany and employing more than 500 workers shall have implemented these recommendations concerning human rights protection. In the event that this high level of implementation will not be reached, Federal Government will examine further steps to ensure the protection of human rights in companies which may also include legislative measures.[8] Thus, the Damocles sword of a regulation of due diligence in cross-border supply chains hangs over the heads of German companies which have subsidiaries or supplier in third countries.

III. Enforcement of human rights before German Courts?

One important question for an effective enforcement of CSR in transnational companies is whether persons whose human rights have been violated by a foreign subsidiary or supplier of a German company have access to German courts in order to sue the latter for damages. This question is not without relevance as recent lawsuits against a German textile retailer for not having prevented a fire in a production site of a supplier in Pakistan show.[9] The National Action Plan of the Federal Government considers that German law sufficiently guarantees to victims of such human rights violations access to effective remedy and is therefore in line with the UN Guiding Principles on Business and Human Rights.[10]

1. Access to German Courts.

Contrary to the US Alien Tort Claims Act ("Alien Torts Statute"),[11] German law does not provide an explicit statutory provision which gives German courts the competence to decide on compensation claims against German companies, arising from violations of

[8] Cf. BUNDESREGIERUNG, Nationaler Aktionsplan – Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020, 16 December 2016, Berlin, p. 10.
[9] See infra 3.2.
[10] BUNDESREGIERUNG, Nationaler Aktionsplan – Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020, 16 December 2016, Berlin, pp. 24-26 regarding Principle 25 of the UN Guiding Principles on Business and Human Rights.
[11] 28 U.S.C. § 1350.

workers' human rights in its foreign subsidiaries or in production sites of its foreign suppliers. However, this does not mean that German courts are not competent at all for such lawsuits. According to the general principles of German civil procedure law, German courts are internationally competent when plaintiffs allege that a delict or tort is are connected with Germany, which is the case, for instance, when it has been committed in Germany although the damage has been caused to the victim(s) outside German territory.[12] In the context of human rights violations in foreign subsidiaries or by foreign subcontractors of German companies, it is therefore sufficient to allege that the delict(s) or tort(s) the victims have suffered have been caused by a company with registered office in Germany.[13]

2. Applicability of German law.

Following the rules of conflicts of law, German law of delicts[14] will normally not be applicable to cases of human rights violations by foreign subsidiaries or by foreign suppliers of German companies.

Regarding the liability arising out of the employment relations of the workers who are employed in these production sites, the contracts "shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract"[15] which normally is the law of the country where the subsidiary or the supplier has its production site. The fact that their employer is a subsidiary of a foreign company or serves as a supplier to this company does not justify to apply the law of the country in which the headquarter or contract partner has its registered office.

As far as the applicable law for delicts is concerned, Article 4(1) Rome-II-Regulation[16] establishes as a general rule that "the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".

[12] That is constant case law of the Federal Supreme Court [*Bundesgerichtshof (BGH)*] referring to section 32 Civil Procedure Act [*Zivilprozessordnung*]: cf. *e.g.* BGH, 28 June 2007 – I ZR 49/04, *Neue Juristische Wochenschrift – Rechtsprechungsreport* 2008, pp. 57-61.

[13] This is recognized by the case law of the Federal Supreme Court on section 32 Civil Procedure Code [*Zivilprozessordnung*]. For a fuller assessment of the question see THOMALE, Chris, HÜBNER, Leonhard, "Zivilrechtliche Durchsetzung völkerrechtlicher Unternehmensverantwortung", *Juristenzeitung*, 2017, pp. 385-397 (388) with further references.

[14] Cf. Section 823 et seq. Civil Code [*Bürgerliches Gesetzbuch (BGB)*].

[15] Article 8(2) Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J.E.C. 2008 No L 177/6-16. See *e.g.* THOMALE, Chris, HÜBNER, Leonhard, *cit*, p. 390.

[16] Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), O.J.E.C. 2007 L 1999/40.

This has been confirmed by a recent decision of the Higher Regional Court [*Oberlandesgericht (OLG)*] of Hamm.[17] In the case at hand, the plaintiffs, workers of a Pakistani company in Karachi producing Jeans, were victims of a fire that occurred in a textile plant of that company and caused the death of 259 persons because the factory building was locked and the workers could not escape. The defendant (*KiK*), a German retailer for cheap textiles, was sued by some victims with the argument that the Pakistani textile company was a supplier of *KiK* and that *KiK* declared in a Code of Conduct to ensure the respect of workers' human rights in the production sites of its suppliers. The Regional Court [*Landgericht (LG)*] of Dortmund dismissed the case[18] and the plaintiffs' appeal before the Higher Regional Court of Hamm remained without success.[19] According to the decision of the Higher Regional Court, which deals with the plaintiffs' right to legal aid for their appeal, an appeal against the ruling of the Court of Dortmund would not have sufficient prospects of success since their claims are submitted to Pakistani tort law and are already prescribed. As the decision of the Higher Regional Court became final, the Federal Supreme Court [*Bundesgerichtshof*] will not have the opportunity to decide on this case.

Nonetheless, German law of delicts can be applicable in cases of human rights violations in foreign subsidiaries of German companies if these violations and the damages caused to workers could have been avoided by a German company which is controlling the foreign company in whose production sites the violations have taken place. It is recognized by German company law that in groups of companies the controlling company has also compliance duties towards its subsidiaries:[20] it has to ensure that all companies controlled by it respect domestic and international law applicable to them. These compliance duties of the controlling company include the duty to prevent human rights violations in foreign subsidiaries.

Until now, there is no case law of German courts concretizing this compliance duty. However, it is probable that German Courts would consider that such violations of duties to care of a controlling company vis-à-vis its subsidiaries do not engage its delictual liability toward thirds like workers who are employed by a foreign subsidiary. As a matter of fact, it is widely recognized in the German company law literature that these duties to care have only effects for the internal relations within the group of companies:[21] it is therefore probable that such external liability of the controlling company in the group vis-à-vis thirds for delicts, committed by a (foreign) subsidiary, will be rejected by German

[17]OLG Hamm, 21 May 2019 – 9 U 44/9, in: *Neue Juristische Wochenschrift (NJW)* 2019, pp. 3527-3529.
[18] Cf. LG Dortmund, 10 January 2019 – 7 O 95/15, in: *Corporate Compliance Zeitschrift (CCZ)* 2020, pp. 103-106.
[19] OLG Hamm, 21 May 2019 – 9 U 44/9, in: *Neue Juristische Wochenschrift* 2019, pp. 3527-3529.
[20] Cf. LG München I, 10 December 2013 – 5 HK O 1387/10, in: *Neue Zeitschrift für Gesellschaftsrecht* 2014, pp. 345-349. For an overview on the compliance duty of the controlling company, see FLEISCHER, Holger, § 91 Aktiengesetz, paras. 74-78, in: SPINDLER, Gerald, STILZ, Eberhard (eds), *Beck-online.Großkommentar Aktiengesetz*, München, Verlag C.H. Beck, 2020.
[21] Cf. FLEISCHER, Holger, DANNINGER, Nadja, "Konzernhaftung für Menschenrechtsverletzungen – Französische und schweizerische Reformen als Regelungsvorbilder für Deutschland?", *Der Betrieb (DB)* 2017, pp. 2849-2857 (2855-2856) with further references.

courts. However, there are also authors who are in favour of such an external liability of controlling companies with registered office in Germany.[22]

IV. Promotion of CSR and workers' human rights by German law.

In accordance with the new understanding of CSR, set out by the European Commission in its Communication of 2011 on CSR,[23] public authorities in Germany have considerably strengthened their supporting role in the area of CSR over the last years. Instead of a direct enforcement of human rights by workers, German law rather pursues the strategy to strengthen CSR initiatives and the respect of workers' fundamental rights in particular through legal mechanisms which can indirectly influence companies in the sense of a "responsible business conduct"[24]. The most significant examples of this CSR-strategy are the increase of transparency concerning the conditions under which conditions companies or their suppliers are producing goods (1.) and the establishing of incentives for a responsible business conduct through public procurement law (2.). Moreover, also competition law has the potential to influence business conduct in the sense of CSR (3.).

1. Transparency.

Transparency concerning the conditions under which goods have been produced in foreign countries may be an important tool to strengthen CSR in general and workers' fundamental rights in particular. As far as the German case is concerned, two forms of transparency merit to be analyzed in this context.

1.1. Transparency of social labels.

One important instrument to prevent companies from (tolerating) human rights violations which take place within their supply chain or within the same company group is to increase consumer awareness and to give them the necessary information on whether the products they may purchase on the markets have been produced in accordance with social minimum standards such as the ILO core labour standards. It is well-known that there are various social labels and audit or certification agencies, testifying fair working conditions.[25] Their number has increased over the years and the criteria on which their certifications are based may differ. For consumers, this development has contributed to an opacity of social labels which is obviously in contradiction to the purpose of social labeling, to inform consumers on whether a good has been produced in accordance with social standards such as those of the ILO Declaration on Fundamental Rights and Principles at Work.

[22] See *e.g.* THOMALE, Chris, HÜBNER, Leonhard, *cit*, pp. 395-396.
[23] COM (2011) 681 final.
[24] COM(2011) 681 final, p. 7.
[25] For a fuller assessment of social labelling schemes see DILLER, Janelle, "A Social Conscience in the Global Marketplace? Labour Dimensions of Codes of Conduct, Social Labelling and Investor Initiatives", *International Labour Review (ILR)*, 1999, nº 2, pp. 99 et seq.

Recently, the German Federal Ministry of Economic Cooperation and Development [*Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung*] has therefore created an initiative for transparency of social labels which enables consumers to compare and evaluate different social labels on the basis of criteria established by a benchmarking and also including the ILO core labour standards.[26] This website has been launched on the initiative of the Federal Ministry, without any legislative framework. It provides comparisons for social labels of different sectors (*e.g.* textile, paper, IT, wood and food). The evaluation of social labels can be used by consumers also via an app that has been developed by the Federal Ministry of Economic Cooperation and Development.

The initiative still is in its beginning. By now, there is no evidence to which extent this website and the app developed by the Ministry is being used by consumers. However, it cannot be denied that this initiative promotes consumers efforts to buy products, which have been produced in conformity with fair trade criteria, and thereby to strengthen the protection of workers' human rights who are employed in companies located in developing countries.

1.2. Non-financial reporting of companies.

Another and more prominent example for CSR transparency probably is Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups:[27] According to this so-called non-financial reporting Directive, "large undertakings which are public-interest entities" with more than 500 employees during the financial year "shall include in the management report a non-financial statement containing information to the extent necessary for an understanding of the undertaking's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters […]".[28] In providing this information, companies which are submitted to the non-financial reporting duty may rely on international frameworks such as the UN Global Compact, the OECD Guidelines for Multinational Enterprises or the ILO Tripartite Declaration of principles concerning multinational enterprises and social policy.[29]

Directive 2014/95/EU has been transposed into German law by section 289c Commercial Code [*Handelsgesetzbuch (HGB)*].[30] According to section 289c(2) No 2 HGB, the non-financial reporting shall include employee matters such as the implementation of the ILO core labour standards, the right to information and consultation, freedom of association or the health and safety at work. In this context, companies covered by this statutory duty must also report about the situation concerning the employee fundamental rights as

[26] For more information on this initiative see the Website of the initiative: https://www.siegelklarheit.de/.
[27] O.J.E.U. 2014 L 330/1.
[28] Article 1(1) Directive 2014/95/EC, inserting a new Article 19a to Directive 2013/34/EU.
[29] Recital (9) Directive 2014/95(EC).
[30] Introduced by the Act strengthening non-financial reporting of companies in their management reports [*Gesetz zur Stärkung der nichtfinanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten (CSR-Richtlinie-Umsetzungsgesetz)*], Official Journal [*Bundesgesetzblatt*] Part I, 2017, p. 802.

enumerated in the ILO Declaration of Fundamental Rights and Principles at Work. Pursuing to section 289c(2) No 4 HGB, information on the observance of human rights by the reporting company or group and the company's prevention strategies in this regard are also compulsory.

Directive 2014/95/EC does not provide sanctions for violations of these non-financial reporting duties. However, the German commercial code sanctions violations of these duties: members of a board of directors or a supervisory board who are responsible for the non-observance of these transparency duties as well as the company itself can be fined.[31] Additionally, Directors or members of a supervisory board can engage their liability for damages (*e.g.* reputational damages) caused by not respecting the non-financial reporting duties of the company.[32] Nonetheless, the duty to a non-financial reporting does not rely on the idea that its violation is sanctioned. It pursues the strategy to indirectly influence the company's behavior concerning "social and employee matters" by exposing it to negative decisions of (potential) investors or consumers when not sufficiently taking into account working conditions. Non-financial reporting therefore relies on a soft-law concept and presupposes that investment decisions of (potential) investors or consumers' decision to buy goods of the company are substantially influenced by these CSR aspects. Even though socially responsible investment (SRI) plays an increasing role for investment funds, [33] it still remains empirically unclear to which extent this is the case and whether non-financial reporting is an effective instrument in the protection of workers' human rights.[34]

2. Public procurement law.

Also, public procurement law has become a mechanism to enforce human rights in the production sites of foreign subsidiaries or foreign suppliers of German companies. According to EU law, the criterion for the award of public contracts shall be either the tender most economically advantageous or the lowest price.[35] However, Articles 26 of Directive 2004/18/EC authorizes contracting authorities to lay down special conditions relating to the performance of the public contract, which may concern social and environmental considerations. It is not new that the State may also use his purchase power on markets to ensure the respect of social standards by those who become adjudicators. Already before World War I, the House of Commons voted a "Fair Wages Resolution" in 1891 imposing to Government the duty to adjudicate public contracts only to those

[31] Cf. Section 331(1) No 1 and section 334(1) No 3 and (3) HGB. For fines against the company, cf. section 30(1) No 1 Act on Regulatory Offences [*Ordnungswidrigkeitengesetz*].
[32] Cf. ROTH-MINGRAM, Berrit, "Corporate Social Responsibility (CSR) durch eine Ausweitung der nichtfinanziellen Informationen von Unternehmen", *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 2015, pp. 1341-1346 (1343-1344).
[33] For further information on socially responsible investment see the Website of the Investor Alliance for Human Rights: https://investorsforhumanrights.org/.
[34] See *e.g.* THOMALE, Chris, HÜBNER, Leonhard, *cit*, p. 388.
[35] Cf. Art. 53(1) Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (O.J.E.C. 2004 L 134/114).

companies declaring that they will respect determined collective agreements when executing their public contract.[36] But also in recent times, such fair wage clauses have been used in various EU Member States.[37]

According to section 128(2) Act against Restraints of Competition [*Gesetz gegen Wettbewerbsbeschränkungen*], contracting authorities are allowed to include in public contracts specific terms for their performance (*e.g.* environmental or social aspects) if they are in relation to the object of the public contract and have been published with the tender. This provision has been introduced in the context of a reform of public procurement law, adopted in 2016. In the aftermath of this reform, some of the sixteen German States have adopted regional public procurement acts which provide social criteria for adjudication such as the respect of legal provisions on statutory minimum wages, of collective agreements which are applicable in the respective sector[38] or of the principle of equal pay between women and men. Some of these State Acts oblige adjudicators to also respect the ILO core labour standards as "recalled" by the ILO Declaration of Fundamental Rights and Principles at Work (1998). According to section 11 Public Procurement Act of the State of Thuringia, for instance, the contracting authorities of the State shall ensure when awarding public contracts that these may not refer to goods which have been produced in violation of the ILO core labour standards. Similar provisions contain section 8 Public Procurement Act of Berlin, section 12 Public Procurement Act of Saxony-Anhalt and section 11 Public Procurement Act of Mecklenburg-Western Pomerania.

In the event that these statutory provisions have been violated, the contracting authorities can terminate the public contract without notice, are entitled to claim a contract penalty from the contractor and can exclude him from further tenders for a limited period of time (*e.g.* three years).

These provisions of some of the State Public Procurement Acts on the respect of the ILO core labour standards are relatively new and experience referring to their implementation therefore still is missing. One challenge is how public contractors can prove that the goods they are selling to the State (*e.g.* textiles or IT products such as notebooks, tablets or PCs) or components of them have been produced in accordance with the ILO core labour standards. In practice, public contractors have to declare that their goods fulfill these requirements and the evidence for this (*e.g.* codes of conduct of the producer of the product or of its components, social labels etc.). However, it is obvious that often it will

[36] For an in-depth analysis of the various fair wage clauses which the British House of Commons has voted for cf. BERCUSSON, Brian, *Fair Wages Resolutions*, London, Continuum International Publishing, 1978. KAHN-FREUND, Otto, "Legislation through adjudication: the legal aspects of fair wages clauses and recognised conditions", *The Modern Law Review*, 1948, vol. 11, pp. 69-289 and pp. 429-448. KAHN-FREUND, Otto, *Selected Writings*, London, Stevens Publishing, 1978, pp.87-127.

[37] For the German context, cf. *e.g.* SEIFERT, Achim, "Rechtliche Probleme von Tariftreueerklärungen – zur Zulässigkeit einer Verfolgung arbeitsmarktpolitischer Zielsetzungen durch die Vergabe öffentlicher Bauaufträge", *Zeitschrift für Arbeitsrecht (ZfA)*, 2001, pp. 1-30.

[38] Cf. *e.g.* Section 4(1) Public Procurement Act of the State of Hesse [*Hessisches Vergabe- und Tariftreuegesetz*] and section 10 Public Procurement Act of the State of Thuringia [*Thüringer Gesetz über die Vergabe öffentlicher Aufträge*].

be very difficult or even unreasonable for public contractors to "guarantee" that their goods have been produced in observance of the ILO core labour standards.[39] In view of this legal uncertainty, some authors question whether these statutory provisions are in line with the constitutional principle of legal certainty and with freedom of enterprise under Article 12(1) of the Fundamental law, the German constitution.[40] It remains to be seen whether German administrative courts will follow this opinion when deciding about the legalitly of the duty of public contractors to declare that their goods have been produced in accordance with the ILO core labour standards.

3. Competition law?

Theoretically, also German competition law can contribute to the enforcement of workers' human rights in transnational companies, particularly in their foreign subsidiaries outside the EU. Even though the purpose of competition law is not the enforcement of labour law, violations of workers' rights by companies may cause competitive disadvantages for those companies which respect labour law. Competition law therefore can be a mechanism to enforce the level-playing field for companies on the markets which has been established by statutory law. The German Act against Unfair Competition [*Gesetz gegen unlauteren Wettbewerb (UWG)*] entitles competitors, business associations, chambers of industry and commerce, craft chambers and consumer associations to sue companies engaging in illegal commercial practices for ceasing and desisting this practice.[41]

The application of the Act against Unfair Competition requires an unfair commercial practice by a company.[42] Such illegal commercial practices can result from "the violation of statutory provisions which are also intended to regulate market conduct in the interest of market participants and the breach of law is suited to appreciably harming the interests of consumers, other market participants and competitors".[43] It is common opinion that labour law provisions may have – beside their protective function – also the purpose to regulate market conduct of companies by establishing a level-playing field: for instance, this is the case for statutory minimum wage provisions or for collective agreements that have been extended by decision of the Federal Minister of Labour.[44] Only breaches of these labour law provisions are covered by section 3a UWG.

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[39] For a critical assessment of this statutory obligation, see OPITZ, Marc, "§128", para. 35, BURGI, Martin, DREHER, Meinrad (Eds.), *Beck'scher Vergaberechtskommentar*, 3rd edition, München, Beck, 2017 with further references.

[40] Cf. *e.g.* OPITZ, Marc, *cit.*, with reference to a ruling of the Federal Administrative Court [Bundesverwaltungsgericht (BVerwG)] of 16 October 2013 – 8 CN 1/12, in: *Neue Zeitschrift für Verwaltungsrecht,* 2014, pp. 527-530, which dealt with the obligation of stonemasons, resulting from a municipal cemetery statute, to only use tombs that have been produced without exploiting child work: the BVerwG considers that such provisions are unconstitutional.

[41] Section 8 UWG.

[42] Section 3(1) UWG.

[43] Section 3a UWG.

[44] Cf. SCHAFFERT, Wolfgang, §3a, para. 71, HEERMANN, Peter, SCHLINGLOFF, Jochen, *Münchener Kommentar zum Lauterkeitsrecht*, 3rd edition, München, Verlag C.H. Beck, 2020; see also KÖHLER,

However, it must be doubted whether also human rights violations in foreign subsidiaries of German companies or groups fulfill these requirements of section 3a UWG. In a famous ruling of 9 May 1980,[45] the Federal Court of Justice [*Bundesgerichtshof (BGH)*] had to decide whether the importation of goods containing asbestos from South Korea, where at that time did not exist health and safety provisions to protect workers dealing with asbestos, was in violation of the German Act on Unfair Competition. The Court held that the defendant did not violate the Act on Unfair Competition since the asbestos was treated in accordance with South Korean health and safety provisions and ILO Convention No 139 on Occupational Cancer (1974) was not ratified by South Korea at that time. The decision left open whether a violation of international labour standards, ratified by the country in which the good in question has been produced, could be considered an unfair commercial practice under competition law. This decision goes back to the time where the present section 3a UWG, introduced by a reform in 2015, did not exist. In the competition law literature, the question is controversial. The prevailing opinion tends to exclude breaches of foreign (labour) law from the scope of application of section 3a UWG since the purpose of competition law would be to ensure the respect of the frame conditions on German markets.[46] However, there are also authors who consider, following a purposive interpretation of section 3a UWG, that also breaches against foreign law are covered by section 3a UWG when they are suited to harm fair competition on German markets.[47]

It therefore remains to be seen whether competition law will become another instrument for the enforcement of workers' human rights in foreign production sites.

V. Transnational supply chains.

As has already been pointed out,[48] German Federal Government recognizes in its National Action Plan[49] the risks resulting from global supply chains for workers' human rights in developing countries and has formulated the expectation that German companies which are part of such transnational supply chains shall implement mechanisms of due diligence in order to increase transparency in their supply chain and to ensure the respect of fundamental rights in all companies that are integrated in the supply chain.

Helmut, §3a, para. 1.53, in: KÖHLER, Helmut, BORNKAMM, Joachim (Eds.), *Gesetz gegen den unlauteren Wettbewerb*, 35th edition, München, Beck, 2017.

[45] BGH, 9 May 1980 – I ZR 76/78, *in: Neue Juristische Wochenschrift*, 1980, pp. 2018-2020.

[46] Cf. SCHAFFERT, Wolfgang, §3a, para. 53, in: HEERMANN, Peter, SCHLINGLOFF, Jochen, *cit.*; see also KÖHLER, Helmut, §3a, para. 170, *cit*.

[47] Cf. *e.g.* LETTL, Tobias, "Gemeinschaftsrecht und neues UWG", *Wettbewerb in Recht und Praxis (WRP)* 2004, p. 1079 (1110).

[48] See supra 2.

[49] Cf. Bundesregierung, Nationaler Aktionsplan – Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020, Berlin September 2017, pp. 19-20.

1. Voluntary initiatives promoted by Federal Government.

The Federal Ministry of Economic Cooperation and Development has promoted various Multi-Stakeholder Initiatives to implement on a voluntary basis such due diligence in transnational supply chains. The main examples are the "Forum for Sustainable Cocoa" [*Forum nachhaltiger Kakao*][50] and the "Alliance for Sustainable Textiles" [*Bündnis für nachhaltige Textilien*].[51] Both initiatives, organized and moderated by Federal Governmanet, try to promote, through the common activities of their members, a sustainable production of textiles in developing countries and already organize a considerable number of companies of the respective sectors as well as of the relevant NGOs. The most advanced project seems to be the Forum for sustainable textiles: it provides a due diligence along the supply chains of the participating German companies. This due diligence shall include an individual risk assessment as well as the establishing of targets regarding living wages, chemical and wastewater management and corruption. Furthermore, the participating companies are obliged to establish effective complaints mechanisms. The Forum has set out the target that by 2025, the share of sustainable cotton shall be increased to a total of 70 percent. The target of the initiative to increase the common share of 35 percent by 2020 has almost achieved by the participating companies of the textile sector.[52]

2. De lege ferenda: towards a "Supply Chains Act"?

At present, Germany is the crossroad to make the transition from such voluntary initiatives to the enactment of compulsory statutory law on cross-border supply chains in which German companies are involved since Parliament might adopt a "Supply Chains Act" in the near future. It is probable that Germany follows the example of the EU, which has established a framework for supply chains due diligence duties of companies importing to the internal market conflict minerals,[53] or of France[54] and establishes a compulsory legal framework for a supply chains due diligence.

In 2019, the Federal Ministry of Economic Cooperation and Development launched the information that it is drafting a bill for an Act on due diligence in supply chains. It seems that a draft Bill for this Act has already been finished by this Ministry but has not been published. In March 2020, the Federal Minister of Labour and the Federal Minister for Economic Cooperation declared their intention to publish a draft Bill for an "Act against the Exploitation in Global Supply Chains" [*Gesetz gegen Ausbeutung in globalen*

[50] For more information see the Website of the Forum for sustainable cocoa: https://www.kakaoforum.de/.
[51] For more information see the Website of the Forum for sustainable textiles: https://www.textilbuendnis.com/.
[52] Cf. the information on the Website of the Forum: https://www.textilbuendnis.com/en/der-review-prozess/.
[53] Cf. Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (O.J.E.U. 2017 L 130/1).
[54] Cf. Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises et des entreprises donneuses d'ordre, O.J. [*Journal Officiel*] 2017, No 74.

Lieferketten] ("Supply Chains Act") [*Lieferkettengesetz*]. But due to a decision of Chancellor Angela Merkel, only a couple of days before the publication of this Bill to postpone the whole legislative project in times of COVID 19, the concrete content of this Government draft still remains unknown.[55]

Leaving aside that the current COVID 19 crisis has superseded the recently starting discussion on the adoption of a "Supply Chains Act", the starting of a legislative initiative in March 2020 would have been too early since the Federal Government's National Action Plan of 2016 provides that legislative action shall only be taken in this area if less than fifty percent of German companies with more than 500 workers have implemented the various elements of human rights protection as set out in the National Action Plan until 2020. However, the monitoring has not finished yet. There have been only published interim reports for the years 2019 and 2020.[56] According to the information of the Federal Ministry of Foreign Affairs, the final report will be published in summer 2020. However, it is predictable that German companies will not fulfil the fifty percent requirement given that, according to the 2019 interim report, only 17 to 19 percent of them had implemented the NAP and 10 to 11 percent of the companies had partially implemented the NAP.

As to now, it is unclear when this legislative initiative will be pursued and when a "Supply Chains Act" will be adopted by Parliament. Also, the concrete content of a future "Supply Chains Act" is unclear. If one takes into consideration the National Action Plan of the Federal Government which has formulated expectations towards German companies with suppliers in foreign countries,[57] it seems probable that such legislative intervention will address *inter alia* the transparency of supply chains, instruments of risk identification and prevention as well as complaint procedures in supply chains. However, the central question will be whether legislature will also establish a delictual liability of companies with registered office in Germany for violations of human rights in production sites of their foreign direct or indirect suppliers. The discussion of this question has only recently started and is unsurprisingly very controversial. On the one hand, many authors – and particularly company lawyers – put forward the argument that a direct liability of German companies for their foreign subsidiaries and for their suppliers along the supply chain would be in contradiction to the doctrine of corporate separateness which is one of the fundamental principles of corporate law.[58] On the other hand, some authors and the "Initiative for a Supply Chains Act" [*Initiative Lieferkettengesetz*] – a network of civil

[55] Cf. SIEMS, Dorothea, "Jetzt stoppt die Corona-Krise auch das Lieferkettengesetz", *Die Welt*, 12 March 2020.

[56] These two interim reports are accessible at: https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2124010.

[57] Bundesregierung, Nationaler Aktionsplan – Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020, Berlin September 2017, pp. 19-20.

[58] Cf. *e.g.* WAGNER, Gerhard, "Haftung für Menschenrechtsverletzungen", *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)*, 2016, pp. 759-761; FLEISCHER, Holger, DANNINGER, Nadja, *cit.*

society organizations acting in favour of such legislative intervention –[59] argue that such liability of controlling companies of a group for human rights violations committed by their subsidiaries would not lead to such incoherence in the law since controlling companies would have a duty to ensure that their (foreign) subsidiaries and suppliers act in accordance with the law.[60]

The discussion on a "Supply Chains Act" and its concrete content is only at its beginning. At the time of writing, the contours of a future "Supply Chains Act" were not visible yet. But one thing is already clear: comparative law and a glance to the French experience plays an important role in this legal debate about the enactment of statutory rules on supply chains due diligence.[61]

VI. Conclusion.

To a growing extent, Germany mobilizes State law in order to enforce CSR. It increasingly utilizes legal mechanisms to render the enforcement of human rights in transnational company groups and in global supply chains more effective and to prevent insofar violations of human rights. In doing so, German law does rather count on indirect forms of enforcement of workers' rights such as transparency of CSR and public procurement law. Even though victims of human rights violations by foreign subsidiaries or suppliers of German companies have access to German courts, they have to prove that the damages which they have suffered have been caused by a German company, particularly that a German company has violated its duty to care and that the injuries could have been avoided by organizing effective controls of the subsidiary or the supplier.

The evolution towards a juridification of CSR in Germany is far from being accomplished which is impressively demonstrated by the ongoing controversy on the adoption of a "Supply Chains Act". As it seems that there is only a low degree of implementation of the recommendations, set out in the National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights, it is probably that Federal Government will pursue its intention to enact compulsory rules on supply chain due diligence. However, it still is unclear, which the concrete contours of this "Supply Chains Act" will be and whether this Act will also provide a delictual liability of German companies for non-compliance with supply chain due diligence duties which is by far the most controversial point in the current CSR-debate in Germany.

[59] For further information on this network, see the Website of the "Initiative Lieferkettengesetz": https://lieferkettengesetz.de/.
[60] See *e.g.* THOMALE, Chris, HÜBNER, Leonhard, *cit*, pp. 395-396.
[61] Cf. *e.g.* NORDHUES, Sophie, *Die Haftung der Muttergesellschaft und ihres Vorstands für Menschenrechtsverletzungen im Konzern – Eine Untersuchung de lege lata und de lege ferenda*, Baden-Baden, Nomos-Verlagsgesellschaft, 2019, pp. 271-321, and FLEISCHER, Holger, DANNINGER, Nadja, *cit*.

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Annex

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