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Business and Human Rights – Recent Trends in Germany

Abstract

There is an undeniable, growing trend in the current Corporate Social Responsibility (CSR) discussions: the responsibility of corporations to abide by and to protect human rights. This discussion includes potential criminal liability for corporations as well as their management for human rights violations. This article will survey the legal status quo of corporate responsibility in the context of human rights protection in Germany. It will then outline two drafts of legislation: a first draft leaked to the press in February 2019 that did not result in further legislative action, and a second draft recently leaked to the public that included key points for such a legislation to become the new German Human Rights Supply Chain Due Diligence Law.

I. Background

In 2011, the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) marked an important turning point in the debate on corporate due diligence and the protection of human rights, seemingly affecting the former status quo. Though (only) soft law in nature, it placed the responsibility for the protection of human rights not only on states, but also on private actors. Pursuant to the UN Guiding Principles, corporations must not only refrain from human rights violations, but also avoid adverse human rights impacts through their business activities.[1]

As in most other EU countries, the Business and Human Rights development started to gain momentum and take shape in Germany with the EU Non-Financial Reporting Directive in 2014. The next step by the German Government, prior to implementing the EU Non-Financial Reporting Directive in 2017, was the adoption of the German National Action Plan on Business and Human Rights (*Nationaler Aktionsplan, NAP*) in 2016. The NAP is a supportive instrument. It seeks to prepare and aid businesses to comply with the UN Guiding Principles. It also articulates the government's

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1 Principles 11 and 13 of the UN Guiding Principles.

DOI: 10.5771/2193-5505-2021-1-63

expectations from German businesses in global supply and value chains, as well as companies' human rights responsibilities.[2]

II. Status quo – non-financial reporting obligations

At present, the only "hard law" with regard to business and human rights in Germany are the reporting regulations that were implemented following the EU Non-Financial Reporting Directive of 2014. These regulations entered into force in Germany on 19 April 2017.

They were inserted into the German Commercial Code and introduced non-financial reporting obligations for large companies. Corporations are covered by these regulations if they[3]:

- employ more than 500 people (annual average),
- are publicly listed[4] and
- do exceed at least two of the following criteria[5]:
  1) EUR 20 Mio. in total assets
  2) EUR 40 Mio. turnover (in the last twelve months)
  3) 250 employees (annual average)

The non-financial reporting has to provide an overview of the corporation's business model. According to Sec. 289c para 2 Commercial Code, the company has to report (at least) on the following topics: environmental, labour and social concerns, respect for human rights, and the fight against corruption and bribery (Sec. 289c Commercial Code). This list of topics corresponds with the aspects referred to in the EU's Non-Financial Reporting Directive. Yet, the list of topics is likely to be expanded over the course of the current revision of the EU Non-Financial Reporting Directive.[6] It is required to report on serious risks linked with the own business activities as well as business relations of the company, products and services provided by the company that are most likely to have a negative impact on the non-financial matters listed above. Furthermore, the report must state whether the company has addressed these topics and already successfully adopted certain approaches (including due diligence); if the company cannot report on adopted approaches, it has the obligation to provide explanations for why it has not implemented any mechanisms yet (*comply or explain approach*).

2 Cf. https://www.auswaertiges-amt.de/blob/297434/8d6ab29982767d5a31d2e85464461565/nap-wirtschaft-menschenrechte-data.pdf (last access: August 2020).
3 Cf. Sec. 289b para 1 Commercial Code.
4 See Sec. 264d Commercial Code.
5 Sec. 267 para. 3 sentence 1 Commercial Code.
6 The public consultation on the revision took place from February 2020 until June 2020, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation (last access: August 2020).

The management board is responsible for publishing the non-financial reporting, while the supervisory board is responsible for verification. Incorrect or missing non-financial reporting can result in the imposition of administrative fines[7] or even criminal fines and imprisonment for up to three years when the circumstances of the company are intentionally misrepresented. The provision of *accounting fraud* in Sec. 331 Commercial Code includes the non-financial reporting of a company.[8] Therefore, misstatements that are likely to mislead third parties with respect to the situation and affairs of the corporation can constitute accounting fraud.[9] In contrast to the very broad phrasing of Sec. 331 Commercial Code, this section is interpreted in a restrictive manner – taking into account the use of criminal law as *ultima ratio*. Therefore, the required misrepresentation has to be substantial and has to affect the interests of creditors, employees or shareholders.[10]

For this short survey article, focusing on business and human rights, the question of direct liability of corporations is a central question. At present, in Germany there is no corporate criminal liability. Due to this, the provision on accounting fraud (Sec. 331 Commercial Code) as a criminal law provision does not apply to corporations, but only to members of the executive and the supervisory board. Nevertheless, it has to be noted that corporations can be fined under Sec. 30 of the German Act on Regulatory Offences (*Ordnungswidrigkeitengesetz, OWiG)* for any criminal or regulatory offence committed by its directors or officers if and when legal duties of the company are violated by such misconduct, or if it is intended to enrich the company. While the maximum fine can amount to EUR 10 million per violation (Sec. 30 para. 2 no. 1 German Act on Regulatory Offences),[11] the fines imposed on the relevant company must not be lower than the economic advantage derived from the misconduct (Sec. 17 Para. 4 German Act on Regulatory Offences).

It has to be mentioned here that a new law governing the liability of corporations is about to be introduced in Germany. The law will not introduce criminal liability for corporations but will impose administrative fines (and other sanctions) alongside the existing provisions stipulated in the German Act on Regulatory Offences.[12] The law was not adopted yet, but this is expected for Summer 2021. It will most likely include a

7 Cf. Sec. 334 para 1 No. 3 in conjunction with para 3a Commercial Code.

8 A corresponding provision specifically for listed companies is stipulated in Sec. 400 Stock Corporation Act.

9 The *situation of the company* is not limited to financial concerns but encompasses all conditions that are relevant for the evaluation of the status and development of the corporation, cf. *Leplow* in Münchener Kommentar zum StGB, 3rd edition 2019, Sec. 331 marginal no. 46 et seq.

10 *Merkt* in Baumbach/Hopt, Handelsgesetzbuch, 39th edition 2020, Sec. 331 marginal no. 1.

11 This refers to intentional criminal offences. In case of negligence the maximum fine to be imposed is limited to EUR 5 million, Sec. 30 para. 2 no. 2 Act on Regulatory Offences.

12 Cf. the official government draft (*Gesetz zur Stärkung der Integrität in der Wirtschaft*): https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Staerkung_Integritaet_Wirtschaft.pdf;jsessionid=8478E8CE3AC77D72D3ED-C8AB94F9A933.1_cid334?__blob=publicationFile&v=2 (last access: August 2020). The law will be applicable for cases where the predicate offence constitutes a criminal instead of an

two-year transition period.[13] This is due to the fact that businesses shall be given the possibility to introduce or improve their compliance management systems.

III. Projected Law on supply chain due diligence

As depicted above, Germany only provides for reporting duties and does not currently impose human rights due diligence obligations. Initially, the German government pursued a voluntary approach – leaving it up to businesses themselves to implement core features of the UN Guiding Principles on Business and Human Rights. Against the backdrop of the coalition agreement of the German government in March 2018[14], a two-step monitoring process was initiated in order to verify whether German companies do in fact conduct business-related human rights due diligence. In case that at least 50 % of German corporations with at least 500 employees would fulfil these requirements, no legislative action must have been taken. The study addressed over 7 000 German corporations. In the end, the results of this monitoring were sobering. In both surveys, only 17–22 % of the companies could be considered as undertaking human rights due diligence.[15] Due to this outcome, the initial – voluntary – approach by the German government changed: The way was paved for the introduction of mandatory human rights due diligence requirements for corporations in Germany.

1. First draft law in February 2019

The first draft legislation was prepared by the German Ministry for Economic Cooperation and Development and did not constitute an official legislative draft, but was apparently intended for internal use only. Yet, the draft text was leaked to the public in February of 2019.[16] Central to the draft was the obligation for businesses to establish a sophisticated compliance management system with regard to the protection of human rights in their global supply and value chains.

administrative offence. Therefore, the German Act on Regulatory Offences – especially Sec. 30 – will remain applicable for administrative offences.

13 See Art. 15 of the government draft: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Staerkung_Integritaet_Wirtschaft.pdf;jsessionid=8478E8CE3AC77D72D3EDC8AB94F9A933.1_cid334?__blob=publicationFile&v=2.

14 See https://www.bundesregierung.de/resource/blob/656734/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1 (last access: August 2020), p. 156.

15 Cf. First interim report: https://www.auswaertiges-amt.de/blob/2314274/3a52de7f2c6103831ba0c24697b7739c/20200304-nap-2-zwischenrbericht-data.pdf, overview of second monitoring phase: https://www.bmas.de/DE/Presse/Pressemitteilungen/2020/bundesminister-heil-mueller-koalitionsvertrag-fuer-lieferketten-gesetz.html, first indicative results of second monitoring: https://www.auswaertiges-amt.de/blob/2375460/543e6de4d80a95b8e26186ca4da44f27/nap-monitoring-ergebnisindikation-data.pdf (last access to all links: August 2020).

16 See for the text here: https://media.business-humanrights.org/media/documents/files/documents/SorgfaltGesetzentwurf_0.pdf (last access: August 2020).

The personal scope of applicability of the draft was far-reaching. The text encompassed:

- Large German companies (pursuant to Sec. 267 para. 3 German Commercial Code); and
- other German companies that are doing business in high risk sectors (including extractives, agriculture, forestry and fishing, apparel, electronics and food), or in high risk regions (defined as failed states or where armed conflicts are taking place). The business activity could be carried out either by themselves or through subsidiaries that they control.

The leaked draft provided for civil, administrative and criminal liability.

The duties set out in the draft text would – if violated – provide grounds for claims for damages in German courts irrespective of international private law. Additionally, the failure to establish a human rights compliance system itself could be sanctioned by administrative fines of up to EUR 5 million. In this case, no additional harm must have resulted from the non-compliance in order to be subject to administrative fines. Moreover, it was stipulated that every company that was fined with at least EUR 2.500 was excluded from (certain) public procurement for a specified time. As regards criminal sanctions, the draft set out different offences. For example, false statements about the compliance system, given by a company's compliance officer, could result in a criminal fine or imprisonment of up to one year. In case that failures of the compliance system lead to physical harm, a prison sentence of at least one year could be imposed on those responsible, especially the managing director and compliance officer. When the non-compliance resulted in someone's death, the sentence would rise to a minimum of two years imprisonment.

This piece of draft legislation was heavily criticized by the public, not least by unions, who contended, amongst other things, the introduction of civil liability for wrongdoing of subsidiaries abroad. The major concern was, and remains, that German companies could be held liable without having the ability to control or impact subsidiaries or suppliers in third countries. Therefore, critics called for limiting the chain of liability to direct suppliers only that could be effectively controlled. Another criticism raised was the wide scope of applicability, in particular the inclusion of even small and medium-sized companies. Soon after having been leaked, it became clear that this non-official draft piece would not become law in Germany.

2. Key points for a legislative draft in June 2020

In June 2020, a joint position paper of the Ministry for Economic Cooperation and Development and the Ministry of Labour and Social Affairs became public. This position paper was drafted in March 2020 and was initially intended to be published at this time. Yet, due to the global Covid-19 outbreak, the official publication was postponed.

Even to date, the position paper outlining a potential legislation was not *officially* published by the Ministries on their websites. Yet, the position paper became public and details were discussed by both Ministers at a press conference in July 2020.

The position paper addresses key elements for a Human Rights Supply Chain Due Diligence Law (*Sorgfaltspflichtengesetz*). An expected law would require companies to take adequate steps to prevent, mitigate and remedy adverse human rights impacts in their business activities and supply chains. The draft covers companies with more than 500 employees and only such that take their strategic business decisions in Germany.[17] Outlined as such, the scope of applicability of the law is exceptionally wide. For comparison, the German Supply Chain Due Diligence Law would have a much more expansive scope than the widely praised model human rights law in France. The French Vigilance Law establishes a narrower scope making it applicable to about 150 to 200 French companies.[18]

The scope of applicability is not limited to a particular business sector but encompasses all industries without exceptions.[19] Additionally, there is no limitation regarding the tiers of suppliers. The projected law would impose human rights compliance duties with regard to the whole supply and value chain of the affected businesses. In substantive terms, it requires compliance with internationally accepted human rights. Environmental protection and the fight against corruption would only be included if there was human rights relevance to them. Therefore, in contrast to the French Vigilance Law that covers environmental protection alongside human rights protection,[20] the German Due Diligence Law would be a human rights due diligence law only.[21] This might be due to the fact that currently it is hard to find a consensus which internation-

17 See Position paper, p. 1: https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/Lieferkettengesetz-Eckpunkte-10.3.20.pdf (last access: August 2020). It is already criticized that this regulation might incentivize companies to circumvent the applicability of the German law by relocating their strategic headquarter to other EU member states, Deutsches Institut für Menschenrechte, Stellungnahme – Erwartungen an ein Sorgfaltspflichtengesetz: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Stellungnahme__Eckpunkte_Sorgfaltspflichtengesetz_20.08.2020.pdf, August 2020, p. 5 (last access: August 2020).

18 Cf. Art. L225-102-4 para. 1 sentence 1 Code de Commerce; *Brabant/Savourey* in Revue Internationale de la compliance et de l'éthique des affaires – supplément à la semaine juridique entreprise et affaires n° 50 du jeudi 14 décembre 2017, p. 2.

19 The prior leaked draft in 2019 on the opposite stipulated certain industry sectors that were covered by the draft law. Though, the list of industries was very extensive, essentially including most industry sectors.

20 Cf. Art. L225-102-4 para. 1 sentence 3 Code de Commerce.

21 Environmental protection, to date, does not form part of the key points for the envisaged law, yet, a new study was recently published by the German Environment Agency. Subject is the development from a corporate human rights due diligence to an environmental due diligence: https://www.umweltbundesamt.de/publikationen/sorgfaltspflichten-nachhaltige-unternehmensfuehrung (last access: August 2020).

ally binding environmental regulations could be referred to.[22] Nevertheless, there is a high interdependency between environmental protection and the compliance with human rights[23] as the case load of environment-related proceedings in the docket of the European Court of Human Rights makes readily apparent.[24]

In essence, the proposed criteria for the projected Human Rights Due Diligence Law are based on the requirements of the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises. It would require affected companies to analyse whether their activities have a potential, or actual adverse impact, on internationally recognized human rights.[25] This would impose the need for companies to implement human rights risk and impact assessments. Alongside such a comprehensive analysis, the companies would be expected to take adequate preventive measures, and provide access to remedies. Ultimately, this entails the implementation of a human rights compliance system. Though, it has to be noted that the compliance duties will come as duties to act in its best manner instead of duties to succeed.

Interestingly, under German law, the introduction of such human rights compliance measures would constitute a novelty in the compliance sphere. At present, German law does not generally prescribe the existence of a concrete compliance system, nor does it impose specific compliance measures.[26] Rather, German law prescribes specific compliance measures for specific business sectors only. An example of this practice is the German Anti-Money Laundering Act (*Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten, GwG*).

22 Cf. Deutsches Institut für Menschenrechte, Stellungnahme – Erwartungen an ein Sorgfaltspflichtengesetz: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Stellungnahme__Eckpunkte_Sorgfaltspflichtengesetz_20.08.2020.pdf, August 2020, p. 10 (last access: August 2020).

23 Cf. the discussions about "the right to a healthy environment": UNOHCHR here: https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/AboutHRandEnvironment.aspx#:~:text=About%20human%20rights%20and%20the%20environment&text=A%20safe%2C%20clean%2C%20healthy%20and,unable%20to%20fulfil%20our%20aspirations (last access: November 2020). As an early example one can turn to the *UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* ("the Aarhus Convention", 1998) that links environmental protection with the fundamental rights of access to justice, access to information and public participation and decision-making.

24 See Factsheet – Environment and the ECHR, March 2020: https://www.echr.coe.int/documents/fs_environment_eng.pdf (last access: November 2020).

25 See position paper, p. 2: https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/Lieferkettengesetz-Eckpunkte-10.3.20.pdf (last access: August 2020).

26 Indirectly, there is a factual obligation for the implementation of a compliance system with respect to liability risks (incl. civil, criminal and administrative liability). Yet, no concrete compliance requirements are laid down by law. The management has discretion on whether and how to establish a compliance management system – it is therefore part of the business judgment rule, cf. Sec 93 para. 1 s. 2 Stock Corporation Act. See also *Sonnenberg* in JUS 2017, p. 921.

In addition to due diligence obligations and duties to act, the new legislation shall also provide for reporting obligations.[27] Such reports should be publicly available online. Essentially, the envisaged reporting duties would extend the existing reporting obligations based on the Non-Financial Reporting Directive (mentioned above) as more companies would be covered.

The proposed Supply Chain Due Diligence Law would entail civil and administrative liability only. Thus, the more recent draft appears to have soften the previously leaked draft of February 2019, which included a norm imposing criminal liability for non-compliance with human rights.

According to the current plans any violation of the legal requirements set out by the Due Diligence Law could provide grounds for action and the basis for claims for damages in German courts. A form of secondary, or auxiliary competence for German courts is currently not intended.[28] However, companies can minimize their liability risks, if appropriate due diligence mechanisms are implemented and carried out appropriately. Additionally, the acceptance of specific, acknowledged sectoral standards, for example, can constitute safe harbors and therefore limit civil liability to intent and gross negligence.[29]

Civil liability would be limited to infringements of essential legal interests such as life, body, health, freedom, property, and the general right of personality[30].[31] This enumeration is conclusive.[32] However, it is mentioned that violations of these legal interests can also result from environmental damage caused. Therefore, environmental protection is (at least) indirectly included in the draft law.

27 Cf. position paper, p. 2: https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/Lieferkettengesetz-Eckpunkte-10.3.20.pdf (last access: August 2020).

28 An auxiliary competence could apply if proceedings in local courts, where the damage occurred, are legally impossible, i.e. where the local legal system does not provide for bringing such types of claims, or where the practical hurdles are too high for victims of human rights infringements, like costly representation by counsel in courts without legal aid systems and possibilities of indigent representation. In any case, the local courts would be competent in the first place.

29 See position paper, p. 5: https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/Lieferkettengesetz-Eckpunkte-10.3.20.pdf (last access: August 2020).

30 According to German constitutional law, the right to privacy encompasses a number of rights that protect various aspects of an individual's personality, cf. *Di Fabio* in Maunz/Dürig, Grundgesetz-Kommentar, Art. 2 marginal no. 147 (February 2020).

31 See position paper, p. 3: https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/Lieferkettengesetz-Eckpunkte-10.3.20.pdf (last access: August 2020).

32 It is criticized that the enumerative list does not include important human rights, such as children's rights, employees' rights and the right to non-discrimination, cf. Deutsches Institut für Menschenrechte, Stellungnahme – Erwartungen an ein Sorgfaltspflichtengesetz: https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Stellungnahme__Eckpunkte_Sorgfaltspflichtengesetz_20.08.2020.pdf, August 2020, p. 7 (last access: August 2020).

The burden of proof will remain with the claimant;[33] no shift of the burden of proof is discussed so far.

In addition to civil liability, there are plans for administrative fines for serious violations[34] imposed by a responsible federal authority. Such imposition of administrative fines may also lead to the exclusion from public procurement for a certain period of time; accordingly, an internal debarment list is set to be introduced.[35]

Similar to the draft law on corporate "criminal" liability[36], it is conceivable that corporations will be granted a specific transition period, since the mandatory establishment of a human rights compliance system will bring along many new compliance aspects for businesses. Although it seems likely that many businesses can build upon their established anti-bribery and corruption compliance systems, adding the aspect of human rights to it. What is also obvious from a compliance perspective: vetting third parties or conducting business partner due diligence is becoming increasingly key to effective compliance systems.[37]

To conclude this brief survey, it is important to note that the issue of human rights compliance through businesses is not only topical at the national level – in this case in Germany – but also at the regional level, namely the EU. The European Commission's legislative initiative on the adoption of mandatory supply chain due diligence is planned for the 1st quarter of 2021.[38] Recently, the European Parliament spearheaded the discussion at the EU level when it published a draft directive on mandatory supply chain due diligence.[39] What is known so far is that the EU's planned legislative draft might be more expansive than the German draft law: it includes companies of all sizes; there is no limitation or thresholds in relation to the number of employees or the annual turnover of a company.[40] Corporations would be obliged to establish an adequate compliance system with regard to human rights, as well as environmental and gover-

33 See position paper, p. 3: https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/Lieferkettengesetz-Eckpunkte-10.3.20.pdf (last access: August 2020).

34 So far, there is no explanation to what *serious violations* would encompass. Possibly, infringements which in effect cause physical harm to workers e.g. would be comprised.

35 See position paper, p. 5: https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/Lieferkettengesetz-Eckpunkte-10.3.20.pdf (last access: August 2020).

36 See above.

37 This holds true especially as regards the typical compliance topics such as anti-money laundering, anti-bribery and corruption and economic sanctions.

38 See https://responsiblebusinessconduct.eu/wp/2020/05/27/ep-rbc-working-group-eu-is-well-placed-to-show-leadership-with-its-future-due-diligence-legislation/ (last access August 2020).

39 The draft directive was part of the Draft Report by the Committee on Legal Affairs, 2020/2129(INL), dated 11 September 2020, which was worked out according to Rule 47 of the Rules of Procedure of the European Parliament. The text can be accessed here: https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf (last access: November 2020).

40 Cf. Art. 2 of the draft directive, https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf. This is in line with Principle 14 of the UN Guiding Principles. Yet, Member States can exempt so-called micro-entities (as defined in Art. 3 of Directive 2013/34/EU) from the scope of the draft directive.

nance risks within their supply and value chains.[41] With respect to sanctioning non-compliance, Member States shall provide for adequate penalties. Repeated infringements of the imposed duties (intentionally or with gross negligence) shall constitute criminal offences and be punishable with criminal sanctions.[42] In that regard, the draft directive is also far stricter than the latest discussions on corporate liability in Germany.

However, the power of initiative for secondary EU law rests with the Commission, which has to take the draft directive into account when drafting an official EU directive in spring 2021. It will be interesting to see how the German project will be aligned with the EU's legislative initiative after Germany has held the presidency of the European Union's Council in the second half of 2020. In Germany, the first official legislative draft by the German government on a Human Rights Supply Chain Due Diligence Law was expected in fall of 2020. Yet, the German government coalition obviously could not agree on a binding text so far. It is conceivable that the German government might await the outlined developments at the EU level.

41 See Art. 1 of the draft directive, https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf.

42 See Art. 19 para. 2 of the draft directive, https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf.