

# Gender Perspectives Across the Global Supply Chain

Mareike Fröhlich\*

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## Abstract

The contribution analyses the different gender perspectives which occur across the global supply chain. It will explain the relationship of gender equality and its implications observing the different stages of the production cycle in global supply chains. Certain conditions and the employment of women in low-wage production at the lower tier of supply chains make them more vulnerable for different human rights violations, such as gender-based and sexual violence and harassment, discriminations based on sex, exploitation, unequal pay for work of equal value, among others. It will be examined how these are addressed with soft and hard law approaches on the international, European and national level, concluding with the benefits and pitfalls of national legally binding global supply chain acts.

**Keywords:** Gender, Women, Gender-based Violence, Harassment, Sex, Human Rights Violation, Global Supply Chain, Value Chain

\* Dr. Mareike Fröhlich, LL.M., Research Associate, Head of International Cooperation & Projects of the Europa-Institut of Saarland University and associated to the Chair of Prof. Dr. Marc Bungenberg for Public Law, Public International Law, European Law and International Economic Law, Jean Monnet Chair for EU Constitutional Framework for International Dispute Settlement and the Rule of Law. Email: froehlich@europainstitut.de.

## A. Introduction

Global supply/value chains allowed the diversification of trade and gave huge opportunities to companies to take part and benefit from international trade, not only to high-income countries but also, due to globalization, to those which did not take part before. This created jobs worldwide and is of great importance for the development of low-income and emerging countries. It led to the fact that around 190 million women worldwide work in global supply chains<sup>1</sup> – in some sectors, like the garment and textile industry, they represent up to 80 or 90 % of workers.<sup>2</sup>

For various reasons, the majority of female workers are found in low-wage and precarious employment and are more vulnerable to the practice of price-dumping in retail, which leads to the reduction of production costs. In contrast, consumer demand for socially responsibly produced and sustainable products increased in the last years and companies at the top of the global value chain are faced with a changing buyer behaviour, which necessitates a change in the corporate social responsibility of companies. The elimination of gender inequalities in the global supply chain should not just be in the interest of the individual female worker and companies but also in that of governments. Not only because of their obligation to protect their citizens but also to increase the future welfare of their country. Until now, only 37% of GDP is generated by the work of women, although they represent more than half of all workers worldwide. Financially, a rise in the numbers would bring a benefit of 12 up to 26 trillion \$ depending upon the extent to which the potential will be developed.<sup>3</sup>

Therefore, the economic empowerment of women should be strengthened by reducing the gender pay gap, discrimination at the workplace and equal opportunities, fighting gender-based violation and harassment, promoting of work-life-balance and the equal distribution of care work, increasing the participation of women in business and management decision-making, as well as securing participation in trade unions and associations. Although gender equality is more satisfying in high-income countries than in low-income or emerging countries, actions and initiatives are needed on national and international levels. Since global value chains usually cross borders, an international solution would be preferable but since there is a lack of binding international rules, at present only binding national laws exist, which regulate extraterritorial situations.

This article will first elaborate the relationship between gender empowerment and the global supply chain and will then analyse the different international initiatives of the United Nations (UN), the International Labour Organization (ILO)

1 *ILO*, World Employment and Social Outlook 2015, p. 135.

2 *Davis Pluess*, p. 51.

3 *McKinsey Global Institute*, The Power of Parity: How Advancing Women's Equality can add \$12 Trillion to Global Growth, available at: [https://www.mckinsey.com/~media/mckinsey/industries/public%20and%20social%20sector/our%20insights/how%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/mgi%20power%20of%20parity\\_full%20report\\_september%202015.pdf](https://www.mckinsey.com/~media/mckinsey/industries/public%20and%20social%20sector/our%20insights/how%20advancing%20womens%20equality%20can%20add%2012%20trillion%20to%20global%20growth/mgi%20power%20of%20parity_full%20report_september%202015.pdf) (21/3/2022), pp. 8 ff.

and the Organisation for Economic Cooperation and Development (OECD) as soft law. In the aftermath, the article will focus on a legally binding solution in national laws, especially the German “Lieferkettensorgfaltspflichtengesetz” (Supply Chain Act), as well as on EU and international level making companies responsible for human rights violations along the entire supply chain. It will conclude with answering the question of whether such initiatives and acts will be beneficial for gender equal global supply chains.

## B. Nexus between gender and the global supply chain

Global supply chains are defined in many ways but there are two characteristics which are common in all definitions: fragmentation of production and crossing of at least one border.<sup>4</sup> A supply chain includes all sectors beginning from the raw material as well as other component extraction and supply (1), the main production or manufacturing (2), the export of the product (3) and finally the marketing and retailing of the product (4). In these value chains, workers are exposed to injustice and poor treatment, as high labour protection standards are also associated with high costs. The pressure of price competition is passed on within the value chain, leading to poor or unlawful working conditions. In most cases, women are affected to a greater extent, as they are mostly employed in the low-wage sector at the bottom of the value chain in precarious or informal employment.<sup>5</sup> This problem is also compounded by the fact that, especially in developing and emerging countries, the proportion of women working in value chains is much higher compared to industrialised countries.<sup>6</sup> While this has led to higher female employment in these countries, this is not necessarily seen as comprehensively positive: the relocation of production sites to other continents due to competitive pressure has the negative effect of eliminating jobs in this area and this often affects also women as employees.

Regardless of the geographical situation, almost all women face various forms of unequal treatment that do not affect male workers or affect them to a lesser extent. This is particularly true of gender-based violence and harassment, which includes all forms of physical, mental and sexual violence, coercion, threats, retaliation and deprivation of liberty. Women are affected much more often than men,<sup>7</sup> but in many countries they receive no or insufficient support either from employers or from

4 Cf. for different definitions ILO, Achieving decent work in global supply chains, TMD-WSC/2020, pp. 7 ff.

5 ILO, Resolution concerning decent work in global supply chains, 2016, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_497555.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_497555.pdf) (21/3/2022), p. 2.

6 ILO, Empowering Women at Work, Policies and Practices for Gender Equality in Supply Chains, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/--multi/documents/publication/wcms\\_774617.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/--multi/documents/publication/wcms_774617.pdf) (21/3/2022), p. 1.

7 Although the results only address Germany and sexual violence, they give a good insight into the proportionality of women and men violated, *Antidiskriminierungsstelle des Bundes*, Studie „Umgang mit sexueller Belästigung am Arbeitsplatz – Lösungsstrategien und Maßnahmen zur Intervention“, 2019, available at: <https://www.bmfsfj.de/resource/blob/14>

public authorities in the event of a complaint. In addition, certain working conditions in the value chain may encourage violence and harassment. Women are more often affected when they are employed in informal work, in sectors with a high female employment rate or in unequal power relations. In addition to poor and unbalanced working conditions, and the organisation of work and human resources, social structures are also decisive for violence and harassment of women.<sup>8</sup>

Another aspect is discrimination against women in the workplace, often combined with unequal pay for work of equal value. In many cases, these discriminations are due to social stereotypes, structures and circumstances. Unequal treatment to protect female reproduction (not a pregnant woman), such as a ban on night work for women, leads to them being denied access to entire work sectors or is made significantly more difficult.<sup>9</sup> Moreover, women earn less on average, although they do the same or comparable work. This can be attributed, among other things, to the fact that women are often employed in informal work, are less educated or have less work experience, provide the main care work for the family or are less likely to organise in trade unions. Additionally, in advanced economies, other reasons are more prominent like occupational segregation as well as indirect or direct discrimination.<sup>10</sup> In addition to the structural inequalities in women's and men's pay, unequal pay for equal work is directly discriminatory and leads to long-term consequences, such as the low economic activity of women as consumers or entrepreneurs, persistent old-age poverty among women due to low pensions, and the lack of opportunities for children of women with limited financial resources as a household of only one income.<sup>11</sup>

Linked to this issue is the fact that in most cases women are responsible for most of the care work in the family, such as the household, raising children or caring for relatives. This generally has a negative impact as they often work part-time, which leads to lower salaries, pensions and opportunities for promotion. The so-called glass-ceiling effect allows for promotion to a certain extent, but responsible time-intensive management and leadership positions are often denied. Connected to this, the economic empowerment of women as business-owners and entrepreneurs in the supply chain are beneficial to reduce the socio-economic effects of gender inequalities. Women-owned businesses and female leaders and managers are considered to help the development of female workers including the reduction of violence and ha-

0386/59a79b46512dfeaa23af3d8906768679/sexuelle-belaestigung-im-job-data.pdf (21/3/2022).

- 8 ILO, Empowering Women at Work, Policies and Practices for Gender Equality in Supply Chains, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_774617.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_774617.pdf) (21/3/2022), pp. 24 ff.
- 9 Barrientos/Pallangyo, p. 5.
- 10 ILO, Global Wage Report 2018/2019 – What lies behind gender pay gaps, 2019, available at: [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_650553.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_650553.pdf) (21/3/2022), p. 68.
- 11 ILO, Empowering Women at Work, Policies and Practices for Gender Equality in Supply Chains, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_774617.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_774617.pdf) (21/3/2022), p. 19 ff.

rassment, equal payment and balanced working conditions. For this purpose, women need to have a better access to education, training and financial resources.

To ensure this, actions are needed regarding the upgrading of skills and rights of women in the working context but this will bring various governance challenges. It is not questioned that a global governance of empowerment activities is required, which could be implemented on a public, private and social level.<sup>12</sup>

In the past, attempts were made to create sustainable working and production conditions in global value chains, in particular through private governance and voluntary commitments by companies. Although many companies took action in the context of corporate social responsibility and have drawn up and applied various codes of conduct, their implementation is rarely successful. There is a lack of functioning indicators for monitoring and the few quantitative indicators are not very meaningful. On the contrary, this self-auditing and certification has led to the development of a whole new individual economic sector whose independence can be questioned.<sup>13</sup>

Due to the failure of private self-regulation, but also due to the need for major social changes, governments became active alongside public stakeholders (such as non-governmental organisations or trade unions). Social governance tries to support both private companies and policy makers through initiatives, recommendations for action and guidelines on the issues outlined above. So far, the topic has been taken up and regularly considered by the International Labour Organization in particular, but more and more stakeholders are becoming active and demanding legislative activities in addition to further voluntary commitments. This public governance by international organisations or national governments could enable binding or enforceable commitments by companies although they are faced with the problem of causality and influence since most globally operating companies do not own their production suppliers along the value chain.

### C. “Soft” law on the international level

Besides several other international initiatives or agreements, like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) or the Beijing Declaration, the main players in the field of raising awareness for a gender perspective in the global supply chains are United Nations and in particular the International Labour Organization. This includes not only activities to support the economic empowerment but also the promotion to integrate a gender perspective in due diligence obligations for the business sector. All these initiatives have in common that they are not legally binding, categorizing them as soft law.

12 *Barrientos/Bianchi/Berman*, ILR 2019/4, p. 234, who distinguish between private, public and social governance which is used in the aftermath in the paper.

13 *Barrientos/Bianchi/Berman*, ILR 2019/4, p. 730; *Bourke Martignoni/Umlas*, p. 33.

## I. United Nations

The UN and its member states have given themselves the mandate to achieve the Sustainable Development Goals (SDG). SDG 5 (Gender Equality) and SDG 8 (Decent work and economic growth) are particularly relevant. Both goals address inequalities and ensure that both genders can participate in and benefit from the labour market to the same extent. Goal 5.2 prohibits all forms of violence against women, 5.4 calls for the recognition of unpaid care work and shared responsibilities in household and family, 5.5 supports participation and leadership in economic life. In addition, Goals 5.A-5.C call for reforms on access to economic resources, the use of technology and the adoption of policies and legislation to support gender equality. Moreover, Goal 8.5 explicitly seeks to “achieve full and productive employment and decent work for all women and men [...] and equal pay for work of equal value.”<sup>14</sup> These goals give opportunities for special actions.

In particular, the main documents for implementation are the United Nations Guiding Principles on Business and Human Rights (UNGPs), UN Global Compact Principles and the Women’s Empowerment Principles (WEP).

The UNGPs were adopted in 2011 and deal with the states obligations to protect human rights, the corporate responsibility to respect human rights and the access to remedies. They provide a framework and define or specify the state’s obligations to protect human rights, particularly with regard to its own economic activities, but also vis-à-vis companies in its territory or jurisdiction. States are called upon to take proactive legislative action to require corporate social responsibility from companies and to prevent contrary legislation, as well as to provide guidance in human rights protection. At the same time, the principles also address companies and oblige them to protect human rights in all corporate activities and refer to the ILO Declaration on Fundamental Principles and Rights at Work. According to Principle 13 (b), the obligations include “adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts”.<sup>15</sup> Responsibility for violations is required from all companies, but the extent of responsibility may vary according to the size of the company or the severity of the violation. For sufficient enforcement, companies should make a policy commitment, implement a due diligence process and guarantee a remediation process. The UNGPs are formulated in a gender-neutral way, but in recent years there has been an increasing awareness of the importance of gender equality in business, so that the working group on the issue of human rights and transnational corporations and other business enterprises has examined the gender dimensions of the UNGPs. They note that gender equality has not been satisfactorily addressed, even though women’s rights are one of the univer-

14 *UN General Assembly*, Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1, 21/10/2015.

15 *HRC*, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/7/31, 21/3/2011, p. 1, 14.

sal human rights. They suggest that gender should be included as a cross-cutting issue in all principles. For this purpose, a three-step framework should be used, which first provides for a gender-responsive assessment, followed by gender-transformative measures or gender-transformative remedies. Gender dimensions are seen to have an influence in three areas. *First*, the general principle of non-discrimination applies. Second, in individual principles, direct reference is made to women or gender equality (e.g. in the commentaries on Principles 3, 7, 18 and 12). *Third*, Principle 12 allows for additional standards to be taken into account, in particular those already adopted by the UN on specific issues, such as the CEDAW.<sup>16</sup>

The UN Global Compact Principles of 2000 focus also on businesses and set up principles on human rights, labour, environment and anti-corruption. Around 12.000 companies worldwide are participants in the UN Global Compact which together with UN Women adopted the Women's Economic Empowerment Principles in 2010. The 7 principles promote "corporate leadership for gender equality", including non-discrimination and protection of human rights, guarantee safe and healthy working conditions, support education and training of women, encourage equality through advocacy and inform about progress. Principle 5 especially asks to "implement enterprise development, supply chain and marketing practices that empower women". Inclusive supply chains could influence business partners and make a change in the attitudes and decision-making surrounding different perceptions and social norms. Explicitly the WEP suggest to include more women-owned enterprises into the supplier network, increase solutions which allow women the access to financial resources, and make sure that products, services and facilities are not subject to human trafficking and/or labour or sexual exploitation.<sup>17</sup> Besides providing different templates, the WEP, together with other players also set up the Gender Gap Analysis Tool.

All initiatives try to influence not only states and governments but also the business enterprises themselves. This has been successful to varying degrees. The UNGPs are not legally binding and are not intended to create new international regimes or limit or undermine existing legal obligations. Both the UN Global Compact and the WEP have limited scope due to the number of participants. Interestingly, only 6.000 companies in 141 countries have signed the latter whereas 12.000 are participants in the UN Global Compact.<sup>18</sup>

16 HRC, Gender dimensions of the Guiding Principles on Business and Human Rights, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/41/43, 23/5/2019, p. 9 ff.

17 *Women's Empowerment Principles*, 5. Enterprise development, supply chain and marketing practices, available at: <https://www.weeps.org/principle/enterprise-development-supply-chain-and-marketing-practices> (21/3/2022).

18 *Women's Empowerment Principles*, Participating companies, available at: <https://www.weeps.org/companies> (21/3/2022).

## II. International Labour Organization

The ILO as UN agency is mandated to support workers' rights, improve employment opportunities, strengthen social protection and foster discussions. In this context gender inequalities arise, becoming an emerging topic in the last 50 years.

The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, obliges the members to respect, promote and realize the fundamental rights of “(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.”<sup>19</sup> These fundamental rights are concretised in various conventions, in particular Convention No. 100 on Equal Remuneration of 1951 and Convention No. 111 on Discrimination in Employment and Occupation of 1958. The former prohibits unequal pay for men and women for work of equal value and obliges members to implement this within the framework of their legislation, legally established or recognised institutions and joint agreements between employers and workers.<sup>20</sup> The second convention prohibits any discrimination based among others on sex, which address any discrimination of women.<sup>21</sup>

The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) of 1977 can be used as guidelines by governments, associations of workers and employers as well as multinational companies. The declaration refers to the UNGP but also explains that corporate social responsibility should respect human rights regardless of where they operate as well as the “established general policy objectives of the countries in which they operate”. Multinational enterprises are asked to pay a higher attention to investment and development of employment opportunities in developing countries which could support the employability of women in global supply chains. Most of the declarations state clearly that they apply to multinational enterprises across their operations, which include all stages of the supply chain.<sup>22</sup>

The mentioned ILO conventions and declarations can be considered more successful since they are more specific in their scope. The conventions are legally binding for the members who ratified the convention, which was done by 173 countries

19 ILO, Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted in Geneva, 1998, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/normativeinstrument/wcms\\_716594.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/normativeinstrument/wcms_716594.pdf) (21/3/2022).

20 ILO, Equal Remuneration Convention No. 100, adopted in Geneva, 1951, available at: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_Ilo\\_Code:C100](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C100) (21/3/2022).

21 ILO, Discrimination (Employment and Occupation) Convention No. 111, adopted in Geneva, 1958, available at: [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312256:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312256:NO) (21/3/2022).

22 ILO, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 2017, available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf) (21/3/2022).

in the case of the convention No. 100 and by 175 countries for the convention No. 111.

### III. Organisation for Economic Cooperation and Development

In 1977, the OECD has adopted Guidelines for Multinational Enterprises, which contain a code of conduct for companies and recommendations for action by states. They are valid worldwide, but have only been signed by 50 countries, including all OECD member states. Thematically, the Guidelines deal with the responsible business conduct of companies in various areas, such as consumer protection, environment, labour rights, competition, taxes, but also human rights. In addition to a due diligence procedure, National Contact Points (NCPs) have been set up in all signatory countries, which can be called upon in the event of violations by companies within the framework of mediation and conciliation. By 2019, this mechanism had been used approximately 500 times for corporate operations in 100 countries, with the majority of cases involving human rights violations since 2011. The cases are brought exclusively by NGOs or trade unions, of which one third have been accepted for mediation.<sup>23</sup>

In 2011, the human rights chapter was revised and now refers to the UNGP or explicitly names women as persons in need of protection in its commentary. It is made explicitly clear that while companies should also work to ensure that violations do not occur within their business relationships along the value chain, no shift in responsibility should be made here. It is also recommended that companies publish a high-level statement on business conduct responsibility and implement due diligence procedures. In the guidelines, the OECD undertakes to provide guidance on risks that occur within the value chain.<sup>24</sup> In this context the OECD published several guides, which address due diligence for responsible supply chains in different sectors. Besides general guidance for the sector in question, different modules are presented. One deals with sexual harassment and gender-based violence at work and mentions explicitly women as an endangered group. The module explains not only the context but also the risks, indicators to identify harm in companies or across the supply chain and possible recommendations for actions.<sup>25</sup>

It seems that this practical approach and the associated conciliation procedure before the NCPs can show some success, as at least one third of the cases end with an agreement between the parties. Moreover, the guidelines are the only multilateral

23 *OECD*, Cases handled by the National Contact Points for Responsible Business Conduct, available at: <https://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf> (21/3/2022).

24 *OECD*, *OECD Guidelines for Multinational Enterprises*, 2011 Edition, available at: <https://www.oecd.org/daf/inv/mne/48004323.pdf> (21/3/2022), pp. 31 ff.

25 As an example for the garment and footwear sector, *OECD*, *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*, Paris 2018, available at: <https://www.oecd-ilibrary.org/docserver/9789264290587-en.pdf?expires=1647855831&cid=id&accname=guest&checksum=EA222786EA68F13F3733C0C6265682A1> (21/3/2022), pp. 116 ff.

agreement of governments on business conduct responsibility. Nevertheless, these are non-binding guidelines that are implemented voluntarily by companies. The extent to which companies feel pressured to implement them by the threat of a bad reputation or the cancellation of public funding is unclear and probably depends on the costs involved.<sup>26</sup>

#### D. Legally binding obligations

Nevertheless, since the soft law initiatives fail to achieve sufficient or sustainable success, governments are forced to enact legally binding regulations. Some of these are already in force at the national level or are currently being negotiated.

##### I. The German Supply Chain Act as an example for national legislation

In recent years, few countries have enacted legislation on due diligence and accountability in supply chains. These include France with the *Loi de Vigilance* of 2017, Norway with the Supply Chain Transparency Act of 2022 and the UK with the Modern Slavery Act of 2015, to name but a few that are in force and take a gender perspective. Also in Germany, the “Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten” was adopted in 2021. This was preceded by the hope that companies would act voluntarily on the basis of self-commitment. The National Action Plan on Business and Human Rights aimed for implementation by 50% of national companies with more than 500 employees. Based on a survey, this was far from being achieved. As a result, the government felt compelled to enact a binding law to regulate due diligence obligations.<sup>27</sup>

In § 2, several human rights violations are listed, including the prohibition of child and forced labour and slavery to different environmental protection obligations. Although most of the violations have at least an indirect gender perspective, women are mentioned explicitly in Nr. 7, which prohibits all discrimination based on sex, especially the prohibition of unequal pay for work of equal value. A direct impact on women could be also expected from the duty to protect certain working standards (Nr. 5) and the freedom of association (Nr. 6). According to § 3, the due diligence obligations include the establishment of a risk management system, the definition of an internal responsibility, the performance of regular risk analyses, the issuing of a policy statement, the anchoring of preventive measures in the area of business and towards direct suppliers, the taking of remedial measures, the establishment of a complaints procedure, the implementation of due diligence obligations with regard to risks at indirect suppliers, and the documentation and reporting. In this context, it is criticised in particular that a distinction is made between direct and indirect suppliers, even though the same obligations apply to the latter in the case of substantiated knowledge of violations. Arguably, this would make a distinction ob-

<sup>26</sup> Hardeck, IStR 2011/24, pp. 939 ff.

<sup>27</sup> Thomale/Murko, EZA 2021/1, p. 41.

solete,<sup>28</sup> and it remains to be seen to what extent case law interprets the corresponding due diligence obligations in such a case. Furthermore, the law does not establish civil liability but does not restrict claims based on other laws, like § 823a BGB. Moreover, it provides for a regulatory enforcement mechanism and administrative fines.<sup>29</sup>

Even though the German Supply Chain Act does not establish an independent liability claim, it is a big step towards fulfilling obligations under the ILO's international conventions and also its mandate to act on the basis of the international guidelines and principles. Nevertheless, the future will show to what extent implementation can also bring progress within the supply chain with regard to gender equality. One difficulty will be that, according to § 3 (1), only compliance with due diligence obligations is required in an appropriate manner. In § 3 (2), it is explained that the appropriateness depends on the nature and extent of the activities of the company (1), the ability of the company to influence the perpetrator (2), the severity, reversability and probability of the violation (3) and the nature of the causal contribution (4). With regard to human rights violations, this open concept of appropriateness is problematic. In the case of forced or child labour the nature and severity of the violation has such relevance that undoubtedly the due diligence obligations were not appropriate. But there are other cases, where the mentioned criteria can be discussed, like in cases of unequal treatment/payment of women and men, especially in single cases, since here the relevance is more difficult to grasp and could give reason for further discussion.<sup>30</sup>

## II. The EU proposal for a directive on corporate sustainability due diligence

In addition to individual member states, the European Union also felt compelled to act and presented a proposal for a directive on corporate sustainability due diligence on 25 February 2022.<sup>31</sup> The EU has already regulated due diligence in global supply chains in the area of timber products<sup>32</sup> and conflict materials<sup>33</sup> in two regulations, the latter of which explicitly mentions women's rights and sexual violence.

The European regulations are also similar to the German law but go beyond it. For example, companies with more than 500 employees are already obliged to comply and no distinction is made between direct and indirect suppliers. In addition, the European Directive provides for a separate liability claim as well as the possibil-

28 *Ehmann/Berg*, GWR 2021/15, p. 290.

29 For details, see *Lang* in this issue.

30 *Ehmann*, ZVertriebsR 2021/3, pp. 144 ff.

31 *European Commission*, Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final.

32 Regulation (EU) No. 995/2010 laying down the obligations of operators who place timber and timber products on the market, OJ L 295 of 12/11/2010, p. 23.

33 Regulation (EU) No. 821/2017 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, OJ L 130 of 19/05/2017, p. 1.

ity of sanctions.<sup>34</sup> In contrast to the German regulation, human rights violations are listed in the annex of the directive. They are structured in two parts, the first of which deals with human rights and lists violations of rights and prohibitions included in international human rights agreements as well as a list of human rights and fundamental freedoms conventions. Besides the above-mentioned principles, guidelines and agreements, a reference is made to CEDAW which foresees the prohibition of discrimination against women in all forms and obliges the signatory states to take all appropriate measures and actions to eliminate such discriminations. The convention has a wide scope and foresees participation in political and private life on national and international levels, protection in cases of marriage, equal rights for education and employment, equal access to health care, equal participation in economic and social life, equality before the law, etc. Through this reference, comprehensive obligations on gender equality and women's empowerment are included in the directive, so that it seeks to avoid further interpretations of open legal terms (discrimination on the basis of gender) from the outset.

The European proposal tries to harmonize the different laws in force or planned in the member states to ensure the functioning of the EU single market. Therefore, the regulation does not only apply to EU companies but also to non-EU companies who act in the territory of the EU. The reference to CEDAW makes clear which discriminations are considered to be human rights violations and thus initiate the entrepreneurial due diligence obligations. If the proposed directive is adopted unchanged, Germany would be obliged to tighten its new supply chain law. It therefore remains to be seen to what extent Germany will position itself and adhere to the previous weaker regulation in the Council, which takes particular account of business interests.<sup>35</sup>

### III. UN Treaty on Transnational Corporations and Human Rights

Currently, the UN is also working on a binding treaty on transnational corporations and human rights. In 2014, the UN Human Rights Council established an open-ended intergovernmental working group on transnational corporations and other business enterprises regarding the protection of human rights. The draft version dates back to 2019 and has the purpose, according to Art. 2 “[...] a. to strengthen the respect, protection and fulfilment of human rights in the context of business activities; b. to prevent the occurrence of such violations and abuses, and to ensure effective access to justice and remedy for victims of human rights violations and abuses in the context of business activities; [...]”.<sup>36</sup> The draft proposal does not include a list of possible human rights violations but it refers in the preamble to differ-

34 For more details see *Hoffmeister* in this issue.

35 See also *Maihold/Müller/Saulich/Schöneich*, p. 7.

36 *OEIGWG Chairman*, Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, revised draft, 2019, available at: [https://www.ohchr.org/sites/default/files/Documents/HR\\_Bodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/sites/default/files/Documents/HR_Bodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf) (21/3/2022).

ent existing agreements and conventions, but also to fundamental rights, such as equal rights of men and women. One of the main benefits is the inclusion of rules for mutual legal assistance and international corporations since this allows foreign governments to initiate investigations on a foreign territory which is usually not allowed under a foreign jurisdiction but necessary to receive the relevant information for a claim brought under the treaty.

Until now, no progress has been made and the proposal is still discussed in the working group and with stakeholders. There are reservations against the different provisions but also against the proposal itself. Some criticized the missing reference to the UNGP and fear that a binding treaty undermines the effective methods promoted in the UNGP. The major concerns are that the proposal only applies to transnational companies or to transnational contexts without taking into account that also purely national cases of big companies could have the same effects. Moreover, the missing definition and reference which human rights violations are covered, leads to a lack of clarity.<sup>37</sup> Nevertheless, this open concept allows some flexibility to include all human rights obligations which could play a role in a business relationship, also in the future. Furthermore, a legally binding regulation on transnational corporations and other business enterprises with respect to human rights would establish a global level playing field for all companies and would balance the obligations of all companies involved.

## E. Conclusion

A fundamental problem of all soft law approaches is the lack of binding force and the lack of seriousness in implementation, meaning that legally binding regulations are preferred. However, two major problems should not be ignored here. On the one hand, national regulations find their functional limits when investigations to ascertain evidence are carried out outside of one's own jurisdiction; it is simply not possible due to a lack of sovereignty. However, without information about possible human rights violations, it is difficult to prove the knowledge of the national company. It is doubtful that local companies will pass on truthful information, causing a need for local stakeholders to take over this task, probably also carrying out comprehensive investigations in the future. Only the future can show to what extent this can actually be done in a proper manner. Another important point is the danger that companies will migrate, not only from the state that has a supply chain law in force, but also from suppliers from the lower end of the supply chain to companies that are located, for example, in low-wage countries in Europe, but which basically have a higher human rights standard. This scenario is not unrealistic, as the last two years have also shown that the relocation of production to other countries also entails longer trade routes, which are susceptible to numerous delivery problems. This

<sup>37</sup> *HRC*, Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/40/48, 2 January 2019, Rn. 9 ff.

competitive disadvantage would primarily affect the most vulnerable in the supply chain, those in low-wage employment or lacking education – as shown above, this would disproportionately affect women. For this reason, a global regulation would be welcome, as it would not put individual companies at a competitive disadvantage; they would all be economically active under the same conditions. The difficulties of obtaining information extraterritorially could also be circumvented by a worldwide regulation on administrative assistance. The aim of such a global solution would have to be the creation of uniform high occupational health and safety standards and a comparable level of equal treatment of women and men in different countries, reducing the effect upon products crossing borders.

However, it is more than questionable whether supply chain laws, whether nationally or internationally regulated, can actually help to combat gender discrimination. This may well be possible for serious violations such as forced labour, gender-based violence and harassment, where the influence of the companies involved is huge. In contrast, systemic problems such as lack of training, glass-ceiling or traditional gender roles cannot be solved by legislation from the end of the supply chain alone. It is rather the task of the national legislator to initiate a social change and to strengthen the equal treatment of women. For this reason, a focus on public governance alone would not be effective; a balanced mix of private, social and public governance is needed. The costs of gender equality must be recognised as production costs and respected by the end consumer. For this reason, not only companies, governments and workers are the target group for information and training, but also the end consumer as the final decision-maker in the supply chain on the success and sustainability of a product. However, there is a lack of gender-aggregated data on dependencies and interdependencies to address all these target groups in an appropriate manner. The supply chain issue must not be detached from other economic activities but requires a holistic view of women's economic empowerment, including gender-sensitive public procurement and subsidy allocation, but also gender-awareness in the conclusion of trade and investment protection agreements.

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