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A legal framework for global value chains

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Baseline

Currently, a product is often developed, produced, used, and reused, recycled, or disposed of in globally interconnected so-called global value chains (GVCs). While production facilities and shops were closed in Germany in the course of the Corona lockdowns, the Bangladeshi clothing industry lost production orders (Anner, 2020). More than one million employees of suppliers were suspended from work without payment (ibid.). According to the United Nations, the pandemic resulted in poverty and hunger for tens of millions of people worldwide (United Nations Department for Economic and Social Affairs, 2020).

The Corona pandemic reveals the fragility of the existing economic structures of GVCs, which in times of crisis foster and accelerate social and ecological imbalances. Therefore, a transition is necessary towards resilient and sustainable GVCs. This transition should lead to societal development worldwide in accordance with the UN Sustainable Development Goals (SDGs) and the German National Sustainable Development Strategy as well as reduce inequalities (Liedtke et al. 2020). To that end, sustainability should be positioned as a central inter/national and European resilience strategy in the further development of political strategy and related policy programs (SDSN Germany, 2020; WPN 2030, 2020). An integrated view is necessary that considers ecological, economic, and social components as well as their interactions within GVCs in order to identify both synergies and trade-offs and to mitigate unintended effects possibly at an early stage (SDG monitoring). There are direct links between the destruction of ecosystems and human rights violations (e.g., violation of the right to clean water due to pollution of soil and groundwater with pesticides, etc.) (Umweltbundesamt, 2019). Respect for human rights can have positive effects on environmental protection (e.g., protection against displacement by preventing illegal logging) (ibid.). Research demonstrates that the loss of natural habitats may favour pandemics, such as the Covid-19 pandemic (IPBES, 2019). According to the International Resource Panel (2019), the extraction and processing of materials, fuels, and food account for about half of the total global greenhouse gases (excluding climate impacts associated with land use) and more than 90 % of biodiversity loss (Liedtke et al. 2020).

As an economically advanced nation but resource-poor country and catalyst for global value creation processes, Germany should assume responsibility for leading the transformation towards a resilient and sustainable economy and society (Bundesregierung, 2020). The *"National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights"* was adopted in 2016 (Bundesregierung, 2016). It expects from companies to implement human rights due diligence along five core elements (human rights policy statement; human rights impact assessment; integration of findings and tracking responses; reporting on measures; development of internal grievance mechanisms as well as participation in other such public and private mechanisms) (ibid.).

However, a 2020 study reveals that too few companies comply with their voluntary commitment to undertake human rights due diligence (Auswärtiges Amt, 2020). Both in Germany (BMAS und BMZ 2020) as well as in the European Union (European Parliament, 2020; Reynders, 2020), there are serious efforts under way to intro-

duce legislation on supply chains that obliges companies to act in a socially and ecologically responsible manner. The paper argues that a legal framework is to be created that obliges companies to develop and implement appropriate and effective due diligence. Such legislation can lead to legal certainty for companies as well as ensuring fair competition by creating a level playing field. Circumventing German and European social and environmental standards would be made more difficult and economically less attractive. It is already telling that 70 globally active companies from more than ten industry sectors are in favour of a legal regulation – including, for example, Nestlé, Kik oder Tchibo (Business & Human Rights Resource Centre, 2020).

Solutions

When developing legislation on supply chains, it is necessary to take a **holistic approach** that pays due account to the complexity of global production as well as to the relevance between the different fields of the laws applicable to global value chains and their interaction (in detail: Beckers und Micklitz, 2020).

Obligations in a company-based supply chain law:

- The envisaged German „Supply Chain Law” should focus in particular on the **reporting and due diligence requirements** for companies operating in GVCs. Such obligations should have the aim of providing transparency on the complexity of the value generation behind products and services and describe the measures that companies adopt to identify and monitor their value chain and their own position within the chain, what kind of risk they have identified and how they intend to minimise those risks.
- The reporting and due diligence requirements should be specified on a **product- and sector- or industry-specific basis**. A legal framework should be created that is informed by standards and that provides for participation of companies, business associations and non-governmental organizations in the development of product-, sector- and industry-specific standards, taking into account international standards and guidelines. It should further be ensured that compliance with these standards can be monitored by public institutions and non-governmental organizations. With the German National CSR Forum, an institutional framework exists that could address industry specifics.
- The **legal policy discussion of enforcement mechanisms for failure to conduct due diligence** should not be limited to the question of civil liability but should also discuss the possibility of new forms of enforcement that would allow monitoring by public institutions and non-governmental organizations. Here, the mechanisms in place in the French due diligence law (Devoir de Vigilance) may serve as initial inspiration, in particular the possibility of stakeholders to initiate court proceedings aimed at review of the due diligence strategy (the Vigilance Plan) (Brabant und Savourey, 2017; Macchi und Bright, 2020).

- In order not to overburden courts and avoid abuse of this low-threshold form of review, it is indispensable to introduce a mandatory preliminary mediation procedure regarding the due diligence strategy. The National Contact Points for the OECD Guidelines for Multinational Enterprises should be involved, as they already have an informal mediation procedure (the Specific Instance Procedure) regarding compliance with the Guidelines (Eickenjäger, 2017).
- Enforcement and monitoring of reporting and due diligence obligations should not only include auditors and the corporate and supervisory board, as is currently the case for non-financial reporting, but should also involve external certification bodies and government authorities.
- Administrative enforcement through market authorities should be envisaged. Such review already exists for supply chain laws in other countries, such as in the Dutch Child Labour Act (Macchi und Bright, 2020). The rules on emissions trading could equally serve as a reference point, where reports are first reviewed by external certification bodies and then by public authorities.

Link to consumer protection:

- The **rules on unfair commercial practices** should be adapted accordingly so that consumer organizations can take action against a breach of reporting and due diligence obligations by way of an injunction (UBA 2020, S. 59).
- **Consumer sales law** should be revised so as to enable individual consumers to remedy the violation of minimum production standards as a defect of the product (Micklitz et al., 2020).

Liability and global value chains:

- When it comes to civil liability, it is important to bear in mind that the problems of global production cannot be reduced to the responsibility (and liability) of individual “lead companies”. Instead, overlapping liability models should be considered in which the GVCs as a whole is at stake as an addressee of liability (Salminen, 2016). In finding appropriate solutions, it is also worth considering introducing a form of market share liability. On this point, it may make sense to hold individual actors in the value chain liable according to their share in causing the damage as well as according to their share in generating and capturing the value. Another, possibly subsidiary, option is to consider fund models for compensation of damage and reparation. Here, one can rely on the field of pharmaceuticals and environmental law as a first model.
- Given the key role of certification bodies in the review of due diligence obligations (see Conflict Minerals Regulation), the envisaged Supply Chain Law should pay due respect to the **legal responsibility and liability of certification bodies** (Rott, 2019).

- Should a Supply Chain Law be linked to the rules on non-contractual civil liability, the feasibility of introducing a **safe harbour** depends on how the relation between due diligence obligation and the duty of care is conceptualized (in detail: Beckers 2021). A broad concept of safe harbour, i.e. a quite far-reaching exemption from liability, may mean that the due diligence obligations would apply only in a very limited number of constellations. A too narrow exemption, on the other hand, would not solve the civil liability issue but would only shift the question of liability to the field of contract law (Schneider, 2019).

National legislation and global corporate activities

- A national Supply Chain Law can apply to German companies meaning that it covers companies incorporated or having their main place of business in Germany. It is possible though to broaden the scope of application and include **business activity in Germany** as a criterion.
- It should be considered to make a **mandatory supply chain law** applicable to the worldwide operations of companies. For this purpose, it would need to be conceptualized as an overriding mandatory provision under the Rome II Regulation. This would ensure that the envisaged rules would apply to civil liability cases despite otherwise applicable foreign liability law (Rühl, 2020).
- The **jurisdiction of the courts in civil liability cases** is derived from the Brussels I (recast) Regulation. At national level, it is worth considering changing the German Code of Civil Procedure in order to allow – similar to countries like the Netherlands and the United Kingdom – linking proceedings against several companies for reasons of efficiency and thereby establish a common jurisdiction.

Consumers expect information on the social and environmental impact of global commodity production. Following the unsatisfactory implementation of the *National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights* on the side of businesses, policymakers are called upon to develop an ambitious approach based on the Action Plan and the UN Sustainable Development Goals and to ensure that any envisaged Supply Chain Law is enforced accordingly.

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