

A decorative graphic consisting of a grid of grey dots of varying sizes, with several dots highlighted in red. The dots are arranged in a pattern that roughly outlines the shape of a map of Europe.

No Accountability without Transparency

Legal Instruments for Corporate Duties to Disclose Working and Employment Conditions

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- Labour law lacks effectiveness because of structural weaknesses in law enforcement. Compliance with minimum occupational and employment standards, however, is a human rights issue; disregard for them entails social risks for democracy and social cohesion.
- Mobilising consumers, though also competitors and public contractors, through competition and market-based policies, could ensure greater effectiveness of labour law through appropriate sanctions or incentives. However, such policies require information and transparency: Consumer markets and competition need to have at their disposal the requisite information for evaluating social and employment standards.
- It is essential to create a company-related system of reporting that should be separated from the financial reports under company law in order to underscore the changed expectations on companies as regards disclosure.
- The duty of disclosure should be supplemented with auditing obligations and flanked by rights of associations to take legal actions. Entrusting the independent audit to private organisations that would have to be officially accredited could also promote the creation of a market for social-ecological auditing.
- Statutory regulation in the form of a »comply or explain« mechanism could refer to already established systems of indicators or it could seek to develop a corresponding system of its own with the help of a multistakeholder commission.



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List of Abbreviations

AGG	Allgemeines Gleichbehandlungsgesetz <i>German General Equal Treatment Act</i>	HGB	Handelsgesetzbuch <i>German Commercial Code</i>
AktG	Aktiengesetz <i>German Stock Corporation Act</i>	IFG	Informationsfreiheitsgesetz <i>German Freedom of Information Act</i>
Art.	Article	ILO	International Labour Organisation
BAG	Bundesarbeitsgericht <i>German Federal Labour Court</i>	Info-VO	Informationsverordnung <i>German Regulation on information in civil contracts</i>
BetrVG	Betriebsverfassungsgesetz <i>German Works Constitution Act</i>	ISO	International Organization for Standardization
BGB	Bürgerliches Gesetzbuch <i>German Civil Code</i>	LLP	Labour law practice
BGH	Bundesgerichtshof <i>German Federal Supreme Court</i>	Marginal no.	Marginal number
BGHZ	Entscheidungen des BGH in Zivilsachen <i>Decisions of the German Federal Supreme Court in civil cases</i>	NGO	Nongovernmental Organisation
BT-Drs.	Drucksache des Deutschen Bundestages <i>Papers in German Bundestag</i>	NKR-Gesetz	Gesetz über die Einführung eines nationalen Normenkontrollrates <i>Act on the Introduction of a National Regulatory Control Council</i>
BVerfG	Bundesverfassungsgericht <i>German Federal Constitutional Court</i>	OECD	Organisation for Economic Cooperation and Development
BVerwG	Bundesverwaltungsgericht <i>German Federal Administrative Court</i>	OGIS	Office of Government Information Service
CADA	Commission d'Accès aux Documents Administratifs	o. v.	Old version
CES	Conference of European Statisticians	para.	Paragraph
CorA	Corporate Accountability <i>German Network for Corporate Accountability</i>	PublG	Publizitätsgesetz <i>German Publicity Act</i>
CSR	Corporate Social Responsibility	Coll.	Collection
DGB	Deutscher Gewerkschaftsbund <i>German Confederation of German Trade Unions</i>	StGB	Strafgesetzbuch <i>German Criminal Code</i>
DNK	Deutscher Nachhaltigkeitskodex <i>German Sustainability Code</i>	UIG	Umweltinformationsgesetz <i>German Environmental Information Act</i>
ECCJ	European Coalition for Corporate Justice	UKlaG	Unterlassungsklagengesetz <i>German Act</i>
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch <i>Introductory Act to the German Civil Code</i>	UN	United Nations
EU	European Union	UNECE	United Nations Economic Commission for Europe
ECJ	European Court of Justice	UNEP	United Nations Environment Programme
Eurosta	Statistical Office of the European Communities	UWG	Gesetz über den unlauteren Wettbewerb <i>German Unfair Competition Act</i>
FOIA	Freedom of Information Act (USA)	VIG	Verbraucherinformationsgesetz <i>German Consumer Information Act</i>
GG	Grundgesetz <i>German Constitution</i>	VZBV	Bundesverband der Verbraucherzentralen <i>German Federal Association of Consumer Advice Centers</i>
GRI	Global Reporting Initiative		

1. Introduction: Legal Policy Framework

1.1 Can workers' rights be effectively mobilized by external parties?

The implementation of labour law suffers from a structural deficiency in effectiveness. Employment standards cannot be implemented in companies simply by appealing to the law, and seeking legal protection in court is regarded by many employees as an unsuitable way of solving conflicts in the context of an existing employment relationship («access to justice»). The obedience of private enterprises to the law rests on institutional preconditions: Systematic guarantees of compliance with standards require organisational structure within each company that integrates respect for labour law regulations and translates it into personnel policy instruments (for a detailed overview, see Kocher 2009).

Among the prominent instruments of effective legal implementation in German labour law are collective interest representation, in particular through Works Councils and co-determination, on the one hand, and the enforcement of interests by labour unions through industrial actions and collective agreements, on the other. However, an increasing topic of discussion is how these activities could be supplemented by activating external actors – most importantly (though not only) where established forms of collective cooperation and collective employee relations appear to be weakened (see also Stone 2004: 201; Estlund 2005: 365).

The mobilisation of consumers through competition and market-related policies can supplement Works Councils' and union activity through appropriate sanctions or incentives. Increasing attention is also being paid to mobilizing business partners (especially in a supply chain); establishing social standards in the public tendering of contracts (e.g. Kohte 2012: 65ff.) is ultimately only a variant of this consideration.

1.2 Workers' rights as human rights

Such competition and market-related policies are generally situated in a context that (re)formulates working and employment conditions as human rights. The fundamental debate on the relation between «labour rights»

and «human rights» was conducted primarily in relation to the 1998 ILO Declaration on Fundamental Principles and Rights at Work – with repeated warnings against disregarding collective action compared to NGO-led policies and against focusing too narrowly on core labour standards, as well as against neglecting aspects of redistribution (see Alston 2004).

In the meantime, however, forms of cooperation have been found at the level of practical policy in which NGOs and labour unions complement each other when it comes to contents and forms of action (on alliance policy, see esp. Demirovic 2007: 204). In the area of human rights policy, labour unions collaborate with NGOs in networks such as the Clean Clothes Campaign, CorA (German Network for Corporate Accountability), and ECCJ (European Coalition for Corporate Justice). But also in their own campaign work, unions increasingly rely on competitive and publicity mechanisms. An expression of such a consumer-oriented policy is, for example, the «Schwarz-Buch Lidl Europa» (The Black Book on Lidl in Europe) published by the labour union ver.di (Hamann and Giese 2004); IG Metall, the German metalworkers' union, has in turn made agreements with companies in the metal industry in which the latter have committed themselves to making contracts with temporary employment agencies only subject to certain minimum conditions (for the legal evaluation, see Krause 2012).

1.3 Working and employment conditions in CSR policies

On the business and political sides, human rights-related business policies have been discussed for quite some time under the heading of «Corporate Social Responsibility» (CSR). According to the most recent definition of the European commission, CSR is «the responsibility of enterprises for their impacts on society» (EU Commission 2011b: 7). Strategies on CSR or corporate accountability deal with all issues of sustainability policy. However, where historically environmental policies have enjoyed priority, over the past decade – in particular in the wake of the ILO Declaration on Fundamental Principles and Rights at Work – labour and social standards have become an increasingly taken-for-granted part of CSR (see e.g. Kocher 2010: 29ff.). The most recent EU Commission Communication on CSR (EU Commission 2011b) deals with human rights and basic labour standards as aspects of equal importance.

CSR policies are increasingly supported and promoted in German and European politics; the possible loss of social acceptance also represents a risk for companies that can be monitored by such policies. In October 2010, the German Federal Government enacted a CSR action plan within the framework of its sustainability strategy. Moreover, interest now reaches far beyond the transnational context: The issue of the conditions under which consumer goods and consumer services are produced in Germany is also becoming increasingly relevant in connection with the spread of precarious employment relations – in particular, fixed-term employment, temporary work, and low-wage employment.

However, as a »voluntary« instrument, CSR shares the problem of all »voluntary commitments« that attempt to implement social standards through competitive mechanisms. Indeed, on closer examination, it often turns out that the supposed »voluntariness« in the implementation of the promised social standards by no means pertains, and that CSR advertising instead entails legal commitments (for a more detailed account, see Kocher 2011: 32); nevertheless, the concept of »CSR« should involve more than compliance with law. In effect, respect for labour law is not a »voluntary« matter over which companies have the authority to define and determine it for themselves (on the relation between co-determination and CSR in particular, see Vitols 2011). At best, the commitment to establish a specific organisational framework to support the enforcement of the law may be voluntary. However, CSR should involve more than just effective law enforcement: Best practices that go beyond minimum legal standards should be promoted.

1.4 Disclosure of working and employment conditions (transparency) in human rights policies: »Responsible« consumers as actors

However, information is needed both to mobilise actors for legal implementation and to develop effective CSR policies. Therefore, questions of transparency rightly play a prominent role in all human rights-related policies.¹

It should not be forgotten in this regard that realizing appropriate standards for working and employment conditions is not only in the private interest of the employees affected. Disregard for work and employment standards involves social risks for democracy and social cohesion (Frankenberg 1996); compliance with them is in the interest of society as a whole.

In particular, transparency creates the possibility of indirectly influencing standards of production and trade through consumption. Admittedly, this is no replacement for democratic politics, but it can complement the latter. Guaranteeing the sovereignty of consumers (and thereby the connection with both the market ideal of the »responsible consumer« and the democratic ideal of the responsible citizen) not only takes basic ideas of democracy into account (Dilling 2009: 153); when the state compensates for informational deficits on the consumer side this also promotes the functioning of the market by creating counterweights to the superior market power of corporate market players (BVerfGE 105, 252, 266). The potential of transparency to guarantee fair competition on consumer markets and to prevent an »abuse of market power« should not be underestimated (Wagner 2007: 42; Schwan 2011).²

It is surely not a coincidence that this is precisely a topic of discussion in the context of European consumer policy, for there the prevailing information dogma grounds the need for consumer protection chiefly in terms of market transparency and information asymmetries in the relation between companies and the consumer side (Hüttner 2009: 51). In November 2010, the European Commission duly began a public consultation »on disclosure of non-financial information by companies.«³ Among other things, it is supposed to serve as the basis for reworking the Modernisation of Accounts Directive on reporting requirements under company law.⁴

1. E.g., UN Guiding Principles on Business and Human Rights 2011, adopted by the UN Human Rights Council, 16.6.2011, on the basis of the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, of 21.3.2011: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>, Section 21 (accessed 28.3.2012).

2. See also the motion of the SPD faction in the Federal Parliament, 23.2.2011, BT-Drs. 17/4874.

3. On questions and results, see http://ec.europa.eu/internal_market/consultations/2010/non-financial_reporting_en.htm (accessed 3.3.2012).

4. For preliminary work, see Augenstein 2010, Section 232; see also EU Commission 2011b, Section 4.5.

1.5 Overview of the problem of the study

In what follows, we will examine which legal instruments could be used for legally implementing such duties of disclosure. In so doing, we will consciously go beyond the company law reporting requirements by including regulatory models for freedom of information and rights of access to information.

A comparably wide range of regulatory possibilities and models are available in principle in all legal systems. This is why foreign models will be taken into account in discussions of individual regulatory instruments. It must be borne in mind in this connection, however, that implementing and anchoring rights and duties always depends on the relevant legal enforcement structure. Thus, the Swedish legal situation differs fundamentally from the German already in that, since 1973, the Swedish consumer protection law is implemented by a public consumer protection authority and a »consumer ombudsman« who functions as an arbitrator and as special jurisdiction for consumer and competition issues (cf. e.g. Hüttner in Micklitz 2009: 302). Therefore, legal comparison can be undertaken of necessity only on an ad hoc basis. In what follows, the central focus will be the example of German law, for which the relevant legal enforcement structure will be described in as detailed a fashion as possible.

2. The Object of a Duty of Disclosure

First, however, the possible objects and contents of a duty of disclosure must be examined.

2.1 Dimensions of working and employment conditions

Here we must first stake out the theoretical framework. Which problem areas belong to »working and employment conditions« and how can they be meaningfully demarcated? In what follows, we will concentrate on aspects of the quality of work and employment. Other topic areas, such as the impacts of commercial activity on the environment, consumers, the economy, and society, which are frequently discussed in connection with corporate social responsibility will feature only insofar as they concern the quality of work.⁵

In an attempt to differentiate the topic areas, we draw upon a proposal that underlies a framework of empirical indicators developed in 2007 for statistically measuring the quality of employment by the Conference of European Statisticians (CES) in collaboration with the UNECE (United Nations Economic Commission for Europe), the International Labour Organisation (ILO), and the Statistical Office of the European Communities (Eurostat) (see also Körner et al. 2010: 827).

In this context, the theoretical framework is described with the aid of the concept of »dimensions« (for example, health and safety at work), where topic areas are structured based on (ergonomic) scientific findings (for example, in accordance with human needs, resources, or stresses). Beginning with five types of human needs, the quality of work is divided accordingly into seven dimensions:

- Dimension 1: Needs for bodily integrity and a reliable legal framework are captured in terms of the concepts of health and safety at work and the ethical aspects of work. In addition to safety at work, this dimension also includes the issues of child and forced labour as well as equal treatment and discrimination.
- Dimension 2: *Income and indirect employer benefits* correspond to the need to ensure the material basis of subsistence and to the need for respect. Here also belong topics such as vacation and benefits in case of illness.
- Dimension 3: *Working hours* also correspond to basic material needs. Less working hours often go hand in hand with low income, whereas excessive working hours not only jeopardise health but also the *balance between professional and private interests*, and hence the need for social cohesion.
- Dimension 4: *Employment security* (under which the theme of temporary agency work also falls in addition to fixed-term contract work) and *social security* correspond, in particular, to the needs for security and respect.
- Dimension 5: *Work relations*, understood as the institutionalized relations between the employer and employee sides, thematise unionisation, collective

5. Compare the broad(er) reporting framework of the Global Reporting Initiative: <http://www.globalreporting.org> (accessed 24.2.2012).

negotiation, and co-determination and consultation in the enterprise, hence, in particular, needs for security and respect.

- Dimension 6: *Qualification and further training* correspond to the needs for respect and personal fulfillment.
- Dimension 7: *Collaboration and relations in the workplace*, which also include measures for improving employee motivation, are associated with the needs for respect and personal fulfillment.

A similar concept of dimensions is used by the German Federal Statistical Office for measuring the quality of work (Statistisches Bundesamt 2010).⁶

In accordance with its global claim, the Global Reporting Initiative (GRI), by contrast, restricts its claim to human rights (equal treatment, freedom of association and the right of collective bargaining, child labour, forced and compulsory labour, safety practices, and the rights of indigenous peoples) and to »decent employment« (work relations, occupational safety, basic and further training, diversity, and equal opportunity). The DGB Index of Decent Work has a more pronounced national focus. It differentiates between resources (development opportunities, creativity, promotion prospects, organisational possibilities, flow of information, quality of management, corporate culture, collegiality, meaningful work, and working hours), burdens (intensity of work, emotional and physical demands, and ambient conditions), and income and security.⁷

2.2 Standards for working and employment conditions

Within a given thematic dimension, we must then take into account which normative »standards« (i.e. binding or nonbinding rules) apply to different levels and the corresponding variations in normative quality and mode of obligation.

In Germany, standards for the dimension »occupational safety« can be found, for example, in the Act on Occupational Safety and Health, and in the Workplaces Ordinance, as well as in numerous works agreements and accident prevention regulations. In addition, in the area of Dimension 1 the core labour standards of the International Labour Organisation (ILO) must be taken into account as these were formulated in the 1998 ILO declaration as binding on all member states.⁸ They cover prohibitions on forced and compulsory labour, freedom of association and the right of collective bargaining, and the abolition of child labour, as well as equal opportunity and prohibitions on discrimination at work. These international legal standards are specified in concrete terms at the European and national levels. European Union law in the meantime contains a largely unified framework for combating occupational and professional discrimination on the grounds of sex, race and ethnic origin, religion and belief, disability, age, and sexual orientation (Directives 2006/54/EC, 2000/43/EC, and 2000/78/EC), which was implemented in Germany in 2006 the General Equal Treatment Act (AGG); more comprehensive standards for promoting equal opportunity can be derived, if necessary, from collective or works agreements.

In most of the dimensions, a comparable network of standards exists at several legal levels that differ in their substantive requirements, though there are also partial overlaps. This network is supplemented by standards to which companies voluntarily submit, such as, for example, the Global Compact or the OECD Guidelines for Multinational Enterprises.⁹ Scientific standards may also contain requirements on working conditions that go beyond the legal and paralegal guidelines. Thus, the DGB Index of Good Work combines approaches in occupational psychology and social science for evaluating »decent work«; in any case, the reference to such standards goes beyond mere legal enforcement.

6. However, no indicators on working and employment conditions are included in the indicator report on sustainable development; see <http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Content/Publikationen/Fachveroeffentlichungen/Umweltoekonomische-Gesamtrechnungen/Indikatorenbericht2010,property=file.pdf> (accessed 3.3.2012).

7. On the DGB Index of Good Work: <http://www.dgb-index-gute-arbeit.de> (accessed 24.2.2012).

8. ILO Declaration on Fundamental Principles and Rights at Work: <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm> (accessed 28.5.2012).

9. On the Global Compact: <http://www.unglobalcompact.org> (accessed February 24, 2012); on the OECD Guidelines for Multinational Enterprises: http://www.oecd.org/document/3/0,3746,de_34968570_34968855_41979843_1_1_1_1,00.html (accessed 24.2.2012).

2.3 Indicators for measuring working and employment conditions

Finally, we must examine by means of which indicators compliance with employment standards could be measured. For this purpose, empirically observable circumstances must be identified in each case in terms of which a non-observable construct (indicatum) can be measured. For example, the number of accidents at work or concrete measures taken by the company to reduce workplace accidents can serve as indicators of occupational health and safety (under certain methodological presuppositions).

Thus, in its 2007 resolution, the European Parliament supported »the efforts of Eurostat to develop indicators to measure performance related to CSR« (European Parliament 2007: Point 35). In this, it drew on the framework of empirical indicators developed and tested in pilot studies by the CES in the context of the seven dimensions mentioned (United Nations Economic Commission for Europe 2010 and 2010a; for Germany: Körner et al. 2010a). However, many of these indicators were not developed for evaluating companies and the interests of consumer markets, but instead for evaluating social systems and national economies.

Therefore, the indicators developed by the GRI could provide additional orientation (cf. Rieth 2009: 223). Here, a 1999 outline for a guideline for nonfinancial sustainability reporting by companies is subjected to regular revision in collaboration with the UNEP, the United Nations Environment Programme. The GRI does not lay down any standards, but instead merely seeks to enable enterprises to test their economic, ecological, and social commitments systematically and to make them available to an interested public.

In the first place, the GRI guideline contains provisions for the disclosure of general information on the reporting organisation that is supposed to make it possible to situate its report within a comprehensive framework: vision and strategy (explanation of the understanding and status of sustainability; description of the most important impacts, risks, and opportunities), organisation profile (overview of the size, structure, and activities of the organisation), reporting parameters (timeframe, scope, structure, and confirmation of the report), and corporate governance, obligations, and commitments (details on corporate governance, obligations towards external initi-

atives, and the inclusion of stakeholders). The economic, ecological, and social performance indicators that follow in the main section are divided for each topic area into details on the management approach and a catalog of corresponding core and supplementary indicators. The management approach is supposed to describe how the organisation approaches the respective topics in order to be able to position the performance in a specific area within a comprehensive management context. »Core indicators« that are relevant for every company and »supplementary indicators« that can be of importance only for particular companies are supposed to provide comparable data on the performance of the organisation. The indicators query both results (for example, the quota of accidents at work) and procedures (for example, the percentage of business agreements that are being examined under human rights aspects).

The GRI example shows that procedures can also be represented in numeric terms. The difference between result and procedure exists instead at the level of effects: Whereas in the case of measurements of results, one can in principle make direct inferences from the indicator (for example, the number of cases of discrimination) to the indicatum (equal treatment), this is not possible in the case of procedures. Thus, whether measures undertaken to combat discrimination in fact have an influence on equal treatment in the enterprise depends on numerous factors (for example, suitability, acceptance, sustainability).

2.4 On the suitability of indicators and other data

A single dimension can comprise several indicators: In the dimension of health and safety at work, the rates of occupational illnesses or the proportion of the working population who complain about psychological strain or stress, for example, can serve as indicators in addition to the number of accidents at work. However, the indicators differ with regard to validity, scope, and practicability. In evaluating indicators and deciding on their selection, the following, among other things, must be taken into account:¹⁰

10. See also the criteria employed by the Stiftung Warentest in its 2004 study of social-ecological corporate responsibility in order to facilitate a »meaningful, comprehensible, and comparative examination and evaluation of companies as regards their actual assumption of responsibility« (Stiftung Warentest 2004: 1).

Degree of objectivity of a measuring instrument: This expresses the extent to which the results (and their evaluation) are independent of the person who employs the measuring instrument (Diekmann 2007: 249). The objectivity increases with the precision of the definition of the indicators. This is problematic, in particular, for indicators that inquire into specific procedures. Thus, there may be different conceptions about which measures are appropriate, for example, for overcoming discrimination and promoting equal opportunity.

Validity of a measurement: This specifies the degree of exactitude with which the indicator also actually measures the attribute that it is supposed to measure (Diekmann 2007: 257). Thus, a comparison of the data from different companies on the indicator »rate of fatal accidents at work« leads to valid results regarding occupational safety only when the respective activities are hazardous in comparable ways. One cannot make direct inferences about relations in the workplace from the indicator »number of complaints of discrimination within the company« either. A large number of complaints can speak for numerous cases of discrimination, but also for a functioning culture of complaint and an absence of victimisation.

Practicability of the indicators: This concerns the question of whether corresponding data can be assumed to be available within the companies or must first be collected. Thus the DGB Index of Decent Work, for example, presupposes a questionnaire of the employees in the firms. Which effort should be expended in obtaining data and is it proportionate? What concerns exist when it comes to collecting specific data (protection of information, co-determination, business secrets)?

Whether, instead of the actual working and employment conditions, only the steps and procedures that an enterprise has established for realizing standards are supposed to be disclosed is often also a question of practicability.¹¹ In addition, the calls for »due diligence« in the context of the Ruggie Report point more toward »procedures« (human rights assessments).¹² This is espe-

cially true when it comes to the inclusion of subsidiaries and suppliers, because it can be difficult for legal and factual reasons for a controlling enterprise to gain access to the respective substantive indicators. Thus, it may make sense and be appropriate here to require enterprises »only« to disclose the procedural steps they undertake to realize certain standards within the concern or among their suppliers.

Therefore, the framework of indicators of the CES as well as that of the GRI could serve as suitable points of orientation for developing a framework on the basis of which companies could be required to inform the market and the public about working and employment conditions. Granted, at present less than 100 German companies report in accordance with the GRI guidelines; moreover, the latter were developed with a view to facilitating international comparisons between companies, and hence do not contain certain data that might be important for comparing companies in the national context (for instance, concrete data on the use of temporary labour). On the other hand, the GRI is able to connect with international and transnational debates and it is regarded as the »pacemaker of the CSR movement« (Rieth 2009: 255). In order to accommodate all goals, the core indicators of the GRI could be taken as a point of departure and supplementary indicators be used for comparability within Germany.

2.5 Validity of indicators as regards compliance with standards

Independently of the indicators employed, however, it needs to be clarified for which circumstances the data to be disclosed can claim validity. Generally the inference from an indicator to compliance with a specific (normative) standard is difficult, and is conceivable in any case only where standards are sufficiently clearly formulated. Exhaustive knowledge of the context is required in order to be able to judge how far one can infer from the existence of certain data to the legality or illegality of conduct, the existence of precarious employment conditions, or, conversely, the fulfillment of »best-practice« requirements of »fair work.«¹³

11. See also the consultation of the European Commission on the topic »Disclosure of Non-Financial Information by Companies,« Question 7: http://ec.europa.eu/internal_market/consultations/docs/2010/nonfinancial_reporting/overview_en.pdf (accessed 24.2.2012).

12. UN Guiding Principles on Business and Human Rights 2011, Sections 17-21; on these principles, see also Vega et al. 2011.

13. On this problematic, see, on the example of judging »precariousness,« *WSI-Mitteilungen* 8 (2011).

From these results, it could be inferred that it might make most sense to publish the »raw data« on the individual indicators in order to facilitate an objective evaluation (if necessary in conflict). However, it is also possible to draw the opposite conclusion that results should be published as consolidated into one or several index values. Methodologically speaking, however, it must be pointed out that every overall assessment, hence every aggregation into one or several index values, presupposes a balancing, and hence an evaluation, of the indicators. Should compliance with the prohibition on discrimination have equal weight with measures to enhance job motivation? Moreover, uniform standards would have to be developed for individual indicators in order to facilitate the comparability of the findings.

In the final analysis, the decision on the object and method of disclosure is closely bound up with the legal policy issue of who should use the disclosed information, in what form it should be published, and in which institutional and legal context this occurs. These questions will be examined in what follows.

3. Regulatory Instruments and Regulatory Models

Duties of disclosure can be regulated in quite different ways. In this respect, Section 2 para. 2 of the German Act on the Introduction of a National Regulatory Control Council (NKR Act) contains a broad concept of duties to provide information: »obligations based on statutes, statutory orders, ordinances, or administrative regulations to acquire, make available, or convey data and other information to public authorities or third parties.« Deviating from this definition, we will make sharper differentiations in what follows. In particular, we will distinguish between legal instruments of duties of disclosure according to the actors addressed and according to the way in which information is provided:

- *Reporting duties:* These concern information that is to be provided on the initiative of the company itself and that is to be presented in the form of a comprehensive report on the activity of the company.
- *Information duties:* The concept of duties to provide information will be employed in what follows more narrowly than in the NKR Act to refer to information to be

provided on the initiative of the company itself and that in effect refers concretely to single products and/or contracts.

- *Rights of access to information:* This concept will be employed in what follows for information that companies are obliged to provide only in individual cases at the request and initiative of external parties.

3.1 Reporting duties under company law

Reporting duties (»reporting« or also »external accounting«) are at present anchored in particular in company law, hence in the Company Code (HGB) and in other laws, such as the Stock Corporation Act (AktG).

3.1.1 Overview

3.1.1.1 Reporting instruments

Sections 242 et seq. of the HGB provide for a variety of mutually complementary reporting instruments whose minimum, and also in part maximum, content is regulated by law.

The annual accounts (§ 242 HGB) comprise the balance sheet (relation between assets and liabilities) and the profit and loss account (comparison of expenses and revenues) at the close of each business year. The annual accounts are to be prepared in accordance with the principles of proper accounting (§ 243 para. 1 HGB), which are designed to increase the validity, comparability, and trustworthiness of the information. Some companies must supplement the annual accounts with an appendix pursuant to Section 264 para. 1 of the HGB. The appendix explains and supplements the annual accounts by providing additional economic and financial information.

Pursuant to Sections 264, 289 of the HGB, larger companies and concerns must provide a supplementary annual report. The annual report is supposed to explain, supplement, and summarise the information in the annual accounts and appendix. In this context, reporting on »nonfinancial performance indicators« is already regulated under existing law. The background is the European Modernisation of Accounts Directive 2003/51/EC, which in 2003 laid down: »To the extent necessary for an

understanding of the company's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters.« Supplementing this, there currently exists only a recommendation of the Commission (2001/453/EC) to include environmental aspects in the annual accounts and annual report of companies, though this does not contain any references to social indicators. In Germany, the duty deriving from the Modernisation of Accounts Directive was implemented in Section 289 para. 3 of the HGB: »In the case of a large corporation ... para-graph 1, sentence 3 is valid mutatis mutandis for nonfinancial performance indicators, such as information about environmental and employee matters, insofar as they are important for understanding a company's development or position.« The annual report is addressed especially to people without specialist accounting expertise (Lange in Schmidt (ed.) 2008: § 289 marginal no. 16).

3.1.1.2 Target groups and objects

The aim of the reporting is to provide the target groups of the reports with the information they need to make their decisions (and only this information: principle of materiality). Therefore, the definition of the target group essentially determines the content of the reporting duty. At present, an economically and financially oriented understanding of the content of this duty is predominant; however, a variety of trends exist that are challenging this understanding and as a result could actually extend the reporting duties, even given the current legal situation.

The capital market and the creditors are generally regarded as the main target group (Lange in Schmidt (ed.) 2008: § 289 marginal no. 16). The primary meaning and purpose of reporting is then to enable this group of addressees to make the decisions they have to make. In the literature on reporting duties in law and business studies, the dominant view is that these groups base their decisions almost entirely on economic criteria. How the activity of the company influences the world around it (for example, the environment or the lives of its employees) is, on this premise, of no interest to this target group.

However, a variety of trends can be observed that could change this interpretation even under the current legal situation.

Thus, on the one hand, additional target groups of the reporting duties are increasingly being identified – for example, political actors, public authorities, the general public, the media, nongovernmental organisations, sustainable investors, business partners and other commercial enterprises, consumers, and communities whose geographical focus is located close to the activity of the enterprise (local communities) (European Commission 2001: 33; Lange in Schmidt (ed.) 2008: § 289 marginal no. 80; Knauer 2010: 2; Adams 2002: 10). Potential and current employees are also named, where the latter already have a range of information instruments at their disposal in the shape of the instruments of labour law. All of these further stakeholders are at least also interested in non-economic information and in the influence of the company on the surrounding world. There are even those who argue that companies must be measured against a »triple bottom line« (Elkington following Knauer 2010: 5) in which economic, social, and environmental aspects are accorded equal weight.

A truly equal consideration of all aspects would hardly be in accordance with the current legal position in Sections 242 et seq. of the HGB, with its sharp focus on economic reporting. In the literature on accounting law and in business practice one reads mainly of voluntary additional reporting not subject to statutory auditing, in the form of supplementary chapters or separate CSR or sustainability reports, in order to satisfy the above-mentioned stakeholders and to present a (»good«) image of the enterprise (Kirsch and Scheele 2004: 11; Adams 2002: 223, 234; Hackston and Milne 1996: 77). The information content and the willingness of the company to take serious responsibility for their activities with these reports, however, are regarded with skepticism (Adams 2002: 224, 245).

On the other hand, the informational interests of the group of addressees who are already recognized – in particular, of the capital market – are in flux.¹⁴ In the case of the major pension funds or funds that offer sustainable investments, the currently prevailing assumption that only economic criteria are of interest proves to be incorrect in any case. Moreover, as result of the discovery of shares by broad sectors of the population, the interests of small investors are increasingly becoming aligned with those of consumers because the individuals concerned are the same.

14. On environmental concerns, see European Commission 2001: 33.

Finally, the economic methods of evaluation are in flux. In recent years, ever greater value has been attached to verifying so-called immaterial values, which in fact profoundly influence the value of a company but are not easy to quantify or can be quantified only with new methods. Thus, under the banner of human capital, for example, investments and expenditures on employees and their basic and further training, employee turnover, reduction in personnel, compensation system, etc., can be verified. The new methods for verifying human capital, however, have at present scarcely any practical application in reporting (Knauer 2010: 4, 23).

3.1.2 Scope and companies subject to reporting requirements

3.1.2.1 Reporting in concerns

Reporting under company law refers in principle only to the situation of the company as a legal unit (including branches, also ones located abroad), but not to legally independent companies such as, for example, subsidiaries and suppliers.

In the case of concerns – that is, alliances of several legally independent companies in which one company can exercise controlling influence over another company (parent and subsidiary company) – the parent company, assuming it is a corporation headquartered in Germany, is obligated, according to Sections 290 et seq. of the HGB, to present consolidated accounts (the counterpart of the annual accounts) and a consolidated annual report. Here the parent company also reports on the subsidiary company and their mutual relations. Controlling influence in this sense, however, presupposes that the parent company has opportunities to enduringly shape the financial and business policy of the subsidiary company and can derive benefit from the latter's activity (BT-Drs. 16/12407: 89). In no case are mere supply firms, in which there is no controlling influence, subject to the reporting requirement.

3.1.2.2 Differentiations between companies

Currently, only companies above a certain size (that is, depending on turnover, balance sheet total, and number of employees), and depending on the legal form and on stock market and capital market orientation, are required to provide an annual report. The duty

to present a consolidated financial report also depends on the size and legal form of the parent company and on the size of the group.

In Sections 325 et seq. of the HGB, the content of the reporting duties is graduated according to the size of the company. Thus, in practice, large enterprises have numerous possibilities for limiting or avoiding the duty of disclosure by modifying their size – among other things, through splitting up into parts, changing their legal form, etc. (cf. Kaminski in Bertram 2010: § 325 marginal nos 149ff.).

3.1.3 Implementation mechanisms

There are a series of accompanying implementation mechanisms designed to ensure the effectiveness of the reporting duties.

First is the obligatory audit. Pursuant to Sections 316 et seq. of the HGB and Section 6 para. 1 of the PublG (Publicity Act), the (consolidated) annual accounts and the (consolidated) annual report must be subjected to an audit in which the existence of the annual accounts and annual report, as well as the completeness, appropriateness, and correctness of the reported data, are examined by an external person (Brebeck and Horst 2002: 24). Not examined in the audit is whether the contents of the reports, and hence the activities of the enterprise, are in accordance with the law or with voluntary commitments.

The audit is performed primarily by audit firms (Section 319 para. 1 (1) HGB). The associates select the auditor in each case before the end of the fiscal year (Section 318 para. 1 (1, 3) HGB). As a result, in spite of strict legal regulations concerning the independence of the auditors, a tension-laden relation exists because, on the one hand, auditors perform a statutory task but, on the other, they are remunerated by the company they audit. Therefore, the Commission is considering a model in which the audit would be publicly funded, in addition to a prohibition on auditors to provide non-auditing services in order to ensure independence (European Commission 2010: 14f.).

Pursuant to Section 325 of the HGB, the companies must in addition submit their (consolidated) reports to the electronic Bundesanzeiger (Federal Gazette), whose contents are publicly accessible, and thereby must make

it publicly available. The result of the audit, hence the endorsement or adverse audit opinion, must likewise be submitted and made available.

In the event of a culpable breach of the duty of disclosure – i.e., failure to submit the mandatory documents to the electronic Federal Gazette – the operator of the Gazette, the Federal Office of Justice, imposes a fine of between 2,500 euro and 25,000 or 50,000 euro pursuant to Section 335 of the HGB, Section 335 b of the HGB, or Section 21 of the PubLG. Members of the body authorized to represent a company subject to the reporting requirement can make themselves liable to prosecution under a variety of regulations by willfully misrepresenting or concealing the circumstances of a company in the various reporting instruments and they risk fines and imprisonment.

Auditors commit a punishable offense when they make a false report of the result of the audit, conceal material circumstances (such as impediments to the audit) in their report, or issue an incorrect audit opinion.

Violations of the regulations of accounting law listed in Section 334 of the HGB and Section 20 of the PubLG are administrative offenses punishable with fines of up to 50,000 euro for members of the body authorized to represent a company. However, non-disclosure of nonfinancial indicators in the annual report is not an administrative offense.

Incorrect or missing reports, like missing audits, can have further legal consequences. Thus, they can ground challenges under company law to decisions of associates or shareholders – for example, the ratification of the actions of the management – and justify rights to compensation by the company against its representatives.¹⁵

3.1.4 Comply or Explain: The declaration under the German Corporate Governance Code

It is conjectured that the EU Commission could favor a »comply or explain« rule in the current revision of the Modernisation of Accounts Directive (Bachmann 2011: 1309).

By this is meant a rule that requires companies to specify whether they comply with a particular (non-binding) standard and, if they do not, to explain the reasons for this deviation. They are not required to comply with the standard.

A current example of a »comply or explain« regulation in German law is Section 289a para. 2 no. 1 of the HGB, which implements European law. According to this regulation, companies that make use of the capital market are under a statutory obligation to provide a declaration in the annual report on whether »the recommendations of the 'Government Commission German Corporate Governance Code' published by the Federal Ministry of Justice were and are conformed with or which recommendations were not or are not being applied and why not.« As part of the annual report, the »comply or explain« declaration in Section 289a of the HGB is also disclosed or a reference is made to the website. A (substantially) incorrect declaration of conformity or the failure to provide one constitutes a serious breach of duty on the part of the management board or the supervisory board (BGHZ 180,9 and BGHZ 182, 272).¹⁶ However, the declaration is not subject to any audit of its contents. The truth, clarity, and the like, of the declaration are not examined but only whether the company has made a declaration and where it was made publicly available (Paetzmann in Bertram 2010: § 289a marginal no. 19).

In the final analysis, what is decisive for the effectiveness of such a »comply or explain« rule is the scope of the duty to justify a deviation (»why not?«). Such a duty to justify exists in Germany since 2009; but at present it is interpreted very restrictively in practice: It is claimed that the justification need not be plausible; all that is required is that it not be false and that it contain at least one argument for the deviation (Bachmann 2010: 1518). Opinions differ over how general this argument may be. For some authors (Bachmann 2010: 1518), the mere declaration that conformity with the relevant recommendation would be too onerous and costly is sufficient, for example; others require a more precise account (Spindler in Schmidt and Lutter 2010: § 161 marginal no. 42). The bare empty formula that conformity with a specific recommendation is not appropriate or is inexpedient, however, is generally regarded as insufficient (Bachmann 2010: 1518). Going beyond current practice in Germany,

15. In a joint-stock company, the failure of a motion to ratify the actions of the management board has above all a warning function for the capital market because of the expression of mistrust it contains; it does not involve a renunciation of rights for compensation by the shareholders.

16. Both rulings dealt with challenges to resolutions to ratify the actions of the executive board/supervisory board by shareholders on the grounds of failure to provide information on deviations from the Code.

Spindler argues convincingly with reference to the information function of Section 161 para. 1 (1) of the AktG that the justification must allow an abstractly conceived »judicious investor« to assess how and why the company believes that it can do just as well or better with other measures than those recommended in the Code, and thus to assess the quality of the corporate governance and structure (Spindler in Schmidt/Lutter 2010: § 161 marginal no. 42).

In its Green Paper on the European Corporate Governance Framework, therefore, the European Commission concludes that the current regulation in Germany, among other countries, is not sufficient and it advocates rules to the effect that companies must give detailed, specific, and concrete reasons for a deviation from a recommendation and a precise description of the solution chosen instead (European Commission 2011a: 4, 21ff; see also Jung 2011: 1988).

In order to reinforce the effectiveness, consideration is being given in addition to extending the audit to cover the substantive correctness of the declaration of conformity. Such an examination could refer to whether the information presented (including the justification of deviations) is sufficiently informative and comprehensible (European Commission 2011a: 22) and/or, further, to whether the declaration is in accordance with the truth (Bachmann 2011: 1308).

Whereas the German Corporate Governance Commission merely monitors the development of corporate governance in legislation and practice and examines at least once a year whether the Code should be adjusted, compliance with the »comply or explain« regulation on corporate governance in the Netherlands is also audited by a corresponding commission (Humbert 2011: 198).¹⁷ Thus, the annual monitoring reports of this independent commission provide public information about compliance with the (voluntary) corporate governance code by the companies.

3.1.5 Conclusion: Legal policy considerations

To date, the rule on reporting duties on nonfinancial indicators, in particular on employee concerns, seems to be scarcely of interest for the actors concerned. The lit-

erature on Section 289 para. 3 of the HGB in accounting law and economics does not go beyond a couple of brief contributions that generally contain (inconclusive) lists of social data that should possibly be published (Lange in Schmidt (ed.) 2008: § 289 marginal no. 78; Paetzmann in Bertram 2010: § 289 marginal no. 88; Ellrott in Ellrott and Budde 2012: § 289 marginal no. 104; Kirsch and Scheele 2004: 9). What remains unclear is above all the decisive issue of the conditions under which these data are or could be important for the situation of the company – that is, when there is a statutory duty to publish the data. Here Section 289 para. 3 of the HGB accords the companies broad discretionary powers and organisational freedom (Kirsch/Scheele 2004:10).¹⁸ In practice, this leads to arbitrariness and very often to the absence of the relevant data in annual reports.

3.1.5.1 Objects of the reporting

It would be indispensable in the future to develop more precise criteria and establish rules that guarantee a certain level of detail of the reporting in order to give the companies and addressees legal certainty; this is a precondition for effective sanctioning of infringements.

Here the legislator could take its orientation from existing frameworks of empirical indicators such as the GRI, in addition to developing its own supplementary indicators. In France, it was decided within the framework of the 2010 »Loi Grenelle II« to regulate the issues of which information (indicators) must be disclosed and which procedures the auditing should involve in an administrative regulation that is only now being worked out.¹⁹

3.1.5.2 »Comply or explain« with regard to disclosure?

Sweden chose a different point of departure for defining the indicators. There, since 2007, state companies are required to publish information on social standards and other matters in a sustainability report based on the G3 guidelines of the GRI. The orientation to the GRI guidelines is voluntary, however; the principle »comply or explain« applies according to which deviations from the GRI rules in the reporting are in need of justification

17. <http://commissiecorporategovernance.nl/Information%20in%20English> (accessed 3.3.2012).

18. See also the conclusion from the comparative legal analysis of Augenstein 2010: 62.

19. On the process, see <http://www.legrenelle-environnement.fr> (accessed 3.3.2012); also Augenstein 2010: 67.

(Humbert 2011: 198). This regulation avoids the difficulties bound up with developing an independent framework of empirical indicators by drawing on an internationally comparable reporting framework; however, unlike the French legislator, here the Swedish legislator declined to set priorities of its own in the supplementary indicators.

It should be borne in mind in this connection that what we talk about here is not a question of a »comply or explain« regulation regarding the compliance with normative standards (as is the case in the Corporate Governance Code). Thus, in Sweden there is no voluntariness as regards the reporting as such; only the system of indicators can be freely chosen, where deviations from GRI must be justified.

3.1.5.3 Integrated reporting?

In the case of a new regulation, consideration should be given to locating the disclosure of data in numeric form also in the annual accounts and not just in the annual report.

In future, a report on employee matters could be integrated in principle into the duties to report under company law as a new substantive aspect (»integrated reporting«) or it could be handled as a new reporting duty modeled on the duties to report under company law. This could prompt an intermeshing of economic concerns with social concerns and thus a slow transformation in the strategy development and control processes of the management, a transformation that also makes clear the connection between the economic success of the company and good working conditions (Knauer 2010: 2; Brebeck and Horst 2002: 21). An integrated regulation would also keep the additional costs for the companies in check. The EU Commission (European Commission 2011b: 14) describes integrated financial and nonfinancial reporting as an »important medium and long-term goal.« In France, where the duty to report on nonfinancial data was already concretized in 2010 with the Loi Grenelle II, this is also regulated as »integrated reporting.«

What speaks in favor of regulating new reporting duties independently of the existing duties, by contrast, is that the changed expectations on companies would be emphasized more clearly and that criticism of confusing

issues of concern would be met. The duties to report under company law focus on the influence of »external« factors on the company and its situation; however, the converse perspective – namely, how the company influences its environment and society – can be accommodated only by explicitly extending the context of justification (Vuontisjärvi 2006: 346).

3.1.5.4 Scope

In any case, however, the target groups, the legitimate interests, and hence the legal »bottom line« of the reporting duties must be explicitly extended if the new regulation is not to risk suffering the fate of the current Section 289 para. 3 of the HGB. Confusion, mistrust, and frustration can also be expected on the company side if new legal policy concerns are confused with the original meaning and purpose of the reporting without this being openly acknowledged (Berndt 2001: 1728, 1733).

It should also be considered whether the duty to report on social indicators should be extended to companies that are not subject to the reporting requirements under company law because of their size. It must be borne in mind in this regard that, with increasing size, on the one hand, the importance of the business-related data for society as a whole increases (Müller and Kreipl in Bertram 2010: § 326 marginal no. 3) and that larger enterprises can be more readily expected to bear the expense of reporting. In contrast to the reporting duties under company law, however, the new duties of disclosure would not have to depend on the legal form and the capital market orientation because they would be directed in the first instance to the political public and the goods and services markets.

To date, the French government has gone the furthest in this area (Humbert 2011: 199). According to the 2010 Loi Grenelle II, not only listed companies but also other companies of a certain size must provide an accounting of the social aspects of their business activity in their annual report. The accountability requirement is also extended to subsidiaries and branches of the company. For the moment, however, this is left to be dealt with in the above-mentioned (and still to be enacted) administrative regulation.

3.1.5.5 Auditing, sanctions, and enforcement

The duties under company law to undertake an external audit and the sanction mechanisms of the duty of annual reporting seem to be useful reference points for implementing a statutory duty to disclose information. As regards the content, however, it should be legally clarified that erroneous or missing details on employee matters in the annual accounts and the annual report are generally »material« grounds of complaint and lead to the issuing of an adverse opinion.

It must be considered in addition which auditors should be entrusted with the external audit. Possible candidates are accounting firms, some other private body, or public bodies. At any rate, the EU Commission (European Commission 2011a: 22) takes the view that, in future, questions of corporate governance should be audited by a public body. Although the auditing firms active to date have experience in auditing company information and in dialogue with companies, it is questionable whether and how well they are trained in and sensitized to reporting themes in human rights and labour law.

The French Loi Grenelle II could also be of interest for developing alternatives. It follows the example of the company law model of private auditors and, in this respect, provides that the information is independently audited before the presentation of the annual report to the general meeting of shareholders. The audit is to be performed by private organisations that must apply for official accreditation. This could promote the creation of a market for social-ecological auditing.

3.2 Consumer law duties to provide information in contract and competition law

On the consumer markets, as otherwise in contract law, there is no general duty to inform one's market counterpart or one's contractual partner about potentially important circumstances. However, limits are set to this principle of »informational self-reliance« by duties to inform and to give access to information (Busch 2008: 3).

Of relevance here is first the general right to information in accordance with Section 242 of the BGB (German Civil Code), which in effect serves to ensure an effective implementation of rights between the contracting parties

(similar to Chapter 2, Section 32 of the South African constitution). It presupposes that the existing legal relationship between the parties entails that the entitled party is ignorant through no fault of her own of the existence or scope of her right and that the obligated party can easily provide the requisite information (Schmidt-Kessel in Prütting, Wegen, and Weinreich 2011: § 242 BGB marginal no. 68f.). However, this highly individualized right is not a suitable model for a general regulation designed to create greater transparency.

It seems to be more helpful to take one's lead from the market-related regulations of consumer law. EU consumer policy, in particular, with its model of »responsible« consumers assumes that consumer protection mainly calls for procedural protection by compensating for informational deficits.

3.2.1 Law against unfair competition

In Germany, communication by companies on consumer markets is regulated in the first place by the Unfair Competition Act (UWG). According to this law, not only incorrect but also insufficient information can be illegal if it misleads market participants, in particular consumers.

To date, the UWG does not contain any general, explicitly formulated obligation to provide information. However, an implicit requirement to provide information follows from Section 5a of the UWG in particular. According to this, failing to provide information amounts to unfair deception when the ability of consumers to make decisions is influenced by the withholding of information »that is material in its factual context, taking account of all its features and circumstances, including the limitations of the communication medium« (Section 5a para. 2 UWG). When »materiality« pertains is specified in sections 3 and 4 in terms of open catalogs of examples.

In this connection, working and employment conditions in the company involved in the production and trade of the relevant product can be regarded as »material information« within the meaning of Section 5a of the UWG if they could be counted among the »main characteristics of the goods or services« (Sec. 5a para. 3 no. 1 UWG). This presupposes that the consumer side, because of the conventions of business dealings, can assume that the features on which information is to be provided are present (Götting and Nordemann 2010: § 5 a marginal

no. 85). Whether this is currently the case for working and employment conditions may still be questionable. Granted, there are some indications that average, judicious consumers, who must be taken as the point of reference here, at least expect that products and services were not produced below the level of the minimum working conditions in the meaning of the ILO core labour standards (Kocher 2005). Presumably, however, there is unlikely to be a general expectation to receive information about the working and employment conditions of production. Social conditions of production and trade, therefore, can be classified according to existing law at best in exceptional cases as material information the omitting of which should be regarded as misleading within the meaning of Section 5a of the UWG. The norm comes into consideration especially when information is mandated in other laws and regulations (cf. Götting and Nordemann 2010: § 5 a marginal nos 85ff. with examples).

3.2.2 Information duties in consumer contract law

The lack of a declaration on specific features of a concrete item for sale can also ground liability for defects of a good. This presupposes that the purchaser can legitimately and reasonably expect that the item for sale has certain features (Fezer 2005: § 5 a marginal no. 13). In particular, expectations are recognized as legitimate – aside from those evoked by public statements – if they refer to health interests of the purchasers for example (§ 434 para. 1 (3) BGB; Fezer 2005: § 5 a marginal no. 13). As a general rule, expectations regarding social conditions of production may not (yet) be judged to be legitimate in the sense of the provisions of sale of consumer goods law.

Something similar holds for general pre-contractual duties to provide information.²⁰ Here pre-contractual obligations to provide information are recognized for circumstances »that could frustrate the contractual purpose of the other party and hence be of material significance for his/her decision inasmuch as, on the prevailing public understanding, s/he may expect the disclosure.«²¹ Here, too, the question of whether employment conditions are covered by information duties depends on whether

data on these conditions is to be classified as »material« on the prevailing public understanding – which at present is not (yet) likely to be the case.

Possible regulatory models can also be found in the special information duties with which European law was implemented in Germany. Such explicitly regulated information duties, in particular in Art. 246 EGBGB (Introductory Act to the German Civil Code), refer to contractual objects (»material features of the commodity or service,« Art. 246 Section 1 para. 1 no. 4 EGBGB), as well as to contractual terms and the enforcement of rights, such as rights of rescission complaint. Other features of products such as employment conditions are not covered.

The requirements on the transparency of the information to be made available vary. Like all information referring to contracts, this information is to be provided to the individual consumers in each case. Here, however, there are also formulations relating to form, such as that the information should be formulated »legibly, clearly, and precisely« (Section 4 para. 1 (1) BGB-InfoVO) (German Civil Code Regulation Governing Providing Information) or »worded clearly« (Section 355 para. 2 (1) BGB), as well as that guidelines relating to content are to be formulated »clearly and intelligibly« (Section 312c para. 1 (1) BGB).

3.2.3 Sanctioning of violations of duties to provide information under consumer law

Sale of consumer goods law envisages as legal consequences repair or replacement, rights of rescission, or reducing the sale price, as well as rights for damages (§ 437 BGB). That these legal consequences could have practical impacts as an (indirect) instrument for putting social standards into effect is conceivable at best if – as in the case of a preventive boycott – people were to make massive use of their rights to return goods or to reduce the sale price (Glinski 2011: 193). More interesting are the collective actions for injunction under the Injunctions Act and under competition law.

Breaches of the information obligations under the UWG (Unfair Competition Act) fall in the first instance under the definition of unfair practices in Section 4 no. 11 of the UWG (Busch 2008: 112; Elskamp 2008: 184). This entails rights for injunctive relief and removal pur-

20. § 311 para. 2 BGB – culpa in contrahendo; § 123 para. 1 BGB – prohibition on fraudulent concealment.

21. BGH NJW 2001, 2021; BGH NJW 2003, 1811; BGH NJW 2006, 3139; for a more detailed treatment, see Busch 2008: 130ff.

suant to Section 8 of the UWG. Injunctive relief can also be invoked preventively when there is a danger of unfair competition. Not only competitors are entitled to make a claim in this regard but also commercial associations, professional associations, and »qualified entities ... for the protection of consumer interests« (for example, the consumer advice centers) (§ 8 para. 3 no. 3 UWG).

In addition, competitors who suffer damage because of the unfair business practice have a right to compensation (§ 9 UWG). Moreover, there may also be rights to confiscation of profits (§ 10 UWG) for which associations can also take legal action. Serving a notice is in each case a measure prior to initiating court proceedings (§ 12 UWG).

Beyond competition law, the Injunctions Act (UKlaG) governs legal protection in the case of violations of consumer protection laws – here belong all regulations governing pre-contractual information on consumer contracts.²² The law likewise contains provisions for a right of associations to take legal actions.

3.2.4 Legal policy considerations

3.2.4.1 Objects of information

Duties to provide information are by no means unknown in the law of contract. However, they only refer to information that is »material« from the perspective of consumer protection and is important for individual purchasing decisions. Even in the case of the pre-contractual domain, legal certainty with regard to obligatory information would only be achieved by legal clarification.

Section 5a of the UWG could provide a starting point for such a clarification. When the UWG was reformed in 2004, the implementation of a general duty to provide information was already a topic of debate. The proposal made at the time by the Federal Association of Consumer Advice Centers (VZBV) was intended in the first instance to support the presumption of the »legitimate interest« of consumers in specific information – that is, to shift the burden of proof in this regard to the companies (see also Busch 2008: 56ff.):

Someone engages in an unfair competitive practice who, in advertising or offering goods or services, does not disclose information that is material for the decision of the consumer, unless the consumers do not have a legitimate interest in the information. Decision-relevant information is to be disclosed in particular also in the case of advertisements involving health, environmental, or ethical claims.²³

The proposal made by Keßler and Micklitz in the context of a legal opinion for the VZBV already pointed in a similar direction. Instead of »materiality,« it focused on the legitimate expectations of the consumers and to emphasise explicitly that here health and environmental information should be considered:

Commercial communication that is aimed directly or indirectly at consumers counts as unfair to the extent that it does not contain information that an average, judicious consumer may reasonably expect. This concerns in particular compliance with statutory duties to provide information and relevant information regarding the health or safety of consumers and concerning environmental protection (Keßler and Micklitz 2003: 155).

In order to include working and employment conditions here explicitly, the formulation »... and the protection of the employees in the company« could be added to the second sentence of this proposal.

Californian law can also be cited as a source of examples of a concrete regulation in unfair competition law. There the California Transparency in Supply Chains Act came into force on January 1, 2012. However, it is restricted to disclosure of activities of companies to prevent and expose slavery and human trafficking in its supply chains. Companies with worldwide annual gross revenues of over U.S.-\$100 million that have their commercial headquarters in California are bound by this act. The object of reporting is exclusively procedures, not the actual situation in the supply firms. Thus, reports must be provided on the procedures for ascertaining risks or auditing suppliers, for example, as well as on in-house training or procedures and management systems for dealing with employees or contract partners that do not satisfy the company standards on slavery and human

22. For information obligations, see Busch 2008: 113 with additional references.

23. Statement of VZBV of July 4, 2003 on the government draft bill for the 2004 reform of the UWG, p. 10.

trafficking. (Of course, the obligation can also be satisfied in each case by declaring that there is no business practice in place for preventing human trafficking.)

3.2.4.2 Information and communication channels

As formulated in the existing Section 5a para. 2 of the UWG, the duty to provide information should be adjusted to the possibilities of the means of communication employed. Two information approaches are available – namely, the so-called accompanying information, which has found application to date, for example, in the mandatory labeling of groceries on the product or packaging, or the non-accompanying information that is communicated over the Internet, through the mass media, or through consumer advice, for example (Hüttner 2009: 150ff.). Thus, Swedish law also contains a provision that allows a company to choose whether it provides the essential information on the product or at the points of sale or whether other means of communication are chosen (Hüttner 2009: 322).

On the other hand, the Californian regulation described specifies the communication channels in such a way that companies must provide a »conspicuous link« on their web site that leads to the relevant information. If a company does not have an Internet presence, then it must provide written answers to written queries by consumers about slavery and human trafficking within thirty days.

3.2.4.3 Enforcement

Duties to provide information under consumer law and unfair competition law are important for enforcing duties of disclosure above all because they accord possible legal remedies and sanctions to a wide range of actors (see above 3.3.3). Even if these can be enforced exclusively in individual cases, they nevertheless ensure that the duties of disclosure do not remain a »toothless tiger«.

Thus, disregarding the Californian law is sanctioned by injunctive proceedings under unfair competition law. In addition, however, the Franchise Tax Board is supposed to provide the responsible Attorney General with a list of all of the companies that are subject to this disclosure obligation. The Attorney General is also authorized to initiate proceedings for an injunction.

3.3 General rights of access to information

3.3.1 Current freedom of information law

Unlike duties to provide information, in the case of rights of access to information the data need not be provided as a matter of course and in general but only in response to individual queries. Under existing law, such rights exist only in the context of freedom of information against the state, as an implication of the notion of good governance and in order to strengthen democracy (Hüttner 2009: 107; Schlacke 2010: 25; Angelov 2000: 68ff.). All citizens enjoy these rights independently of their status as consumers or the like.

Rights of access against public authorities were first regulated in the Environmental Information Act (UIG). Further access rights are to be found in the Freedom of Information Act (IFG) and in the Consumer Information Act (VIG; the act was revised with effect from September 1, 2012; therefore, only the revised version will be referred to in what follows). In addition, in Berlin and Bavaria there are state laws on consumers' freedom of information. The various laws can be applied in parallel; however, the VIG is excluded when a more specific regulation exists, as may be the case with the UIG in the context of environmental issues, for example. In consumer protection issues, on the other hand, the IFG takes a back seat to the more specific VIG. These laws resemble each other in many points, a fact which is criticized as disconcerting for many potential claimants as regards the law that is relevant for their information interest.²⁴

Natural persons and legal persons in private law – for example, associations or foundations – are entitled in all of the aforementioned laws to make claims. In the case of associations that do not have legal capacity, opinions differ on their eligibility to make claims (Beck 2009: 14); in any case, however, here, the individual association members are also entitled to make claims.

According to the VIG, the claim has to be presented at the responsible public authority and is not subject to preconditions on the side of the claimant: no justification is required, only an adequate specification of the information sought (Hüttner 2009: 81 ff.). A presupposi-

24. For an overview and more detailed treatment, see Hüttner 2009: 136ff; 44, 48ff.

tion, however, is that the relevant information be available for a public authority specified in the VIG; a duty of the authorities to collect information remains explicitly excluded (§ 3 para. 2 (2) VIG). They are not obliged to verify the correctness of the information conveyed either (§ 6 para. 3 VIG); however, pursuant to Section 6 para. 4 VIG, they must now rectify information that was provided if it subsequently proves to be false. Reasons for rejecting the claim are set forth in Section 4 of the VIG. Among these are the protection of confidential information (§ 4 para. 3 no. 2 VIG). Pursuant to Section 7 of the VIG, access to information is in principle free of charge.

According to the Freedom of Information Act, there is a right to disclosure of all »official information« (»every record that serves official purposes,« § 2 no. 1 IFG). Beyond that, Section 11 of the IFG grounds an active duty on the part of the public authorities to provide information; directories should be maintained on existing information in order to enable citizens to obtain a quick overview. Moreover, the preconditions and implications of the access rights correspond to those of the VIG.

Something similar holds for the access rights under the Environmental Information Act, though these are geared to specific environmental issues (for a definition, see Section 2 para. 3 of the UIG). In the case of the UIG, however, case law has already made it clear that associations that do not have legal capacity are also entitled to make claims if they are sufficiently consolidated at the organisational level (BVerwG NuR 2008, 781, 783). In contrast to the regulations in the IFG and the VIG, here public authorities are not expressly allowed to convey information without examining its correctness; the permission still contained in Section 5 para. C of the UIG of 1994 was removed in the reformed UIG.

3.3.2 Legal policy considerations

3.3.2.1 Improving the enforcement of individualized rights

It is questionable whether these rights of access to information could provide suitable starting points and regulatory models for a duty of disclosure regarding working and employment conditions. Of particular interest in the case of these regulations is the individualisation of the rights to freedom of information in line with the concrete information interest of the claimant.

However, this very individualisation means that disputes can easily arise over the scope of the information to be disclosed. Therefore, most legal systems mediation by information officers or ombudspersons' offices between the body providing information and the citizen (for a detailed legal comparison, see Hüttner 2009: 581). Thus in the United States, the ombudsperson's office »Office of Government Information Service« (OGIS) can arbitrate disputes between public authorities that are required to provide information and claimants over the exercise of rights deriving from the American Freedom of Information Act (FOIA). In France, objections can be raised against the rejection of an application for access to data with the independent administrative authority Commission d'Accès aux Documents Administratifs (CADA); public authorities can also turn to this office and request that an expert opinion be drafted on whether information should be made available or not (on the French legal situation, see Böhnlein 2009: 219).

In the states of Berlin, Brandenburg, North Rhine-Westphalia, and Schleswig-Holstein, the state officers for data protection are also responsible for freedom of information (Hüttner 2009: 580). The federal commissioner for data protection and freedom of information can be called upon pursuant to Section 12 of the IFG if someone thinks that his or her right of access to information has been violated by a federal authority. A draft bill for the revision of the VIG of January 2011 had proposed in Section 8 that this authorisation should also apply to access to information in accordance with the VIG.

3.3.2.2 Right of access to information directed against companies?

Although public authorities can also be obligated based on the existing rights to make company-related information available, rights of access exist only with regard to information already in the possession of the state administration. Data with which public authorities could facilitate a better assessment of the social quality of products by consumers, however, are lacking as a general rule (Vitt 2011: 186).

An immediate access right against companies, however, would then entail risks of misuse especially when it comes to trade and business secrets; thus, even a refusal of information that is justified on the grounds of the protection of secrets (on this, see below 4.3) could

be publicized as bad news. Here, in addition, the public administration would cease to function as a point of mediation between companies and the public (Hüttner in Micklitz 2009: 55; on environmental law, Renate Philip 1989; Schlacke 2010: 28ff.). As a result, to date the regulation of access rights against companies has failed because of constitutional objections and opposition by business (Hüttner 2009: 149). IFG, VIG, or UIG seem ill suited as points of reference for such a right because of their orientation to administrative law. According to the established taxonomy, therefore, direct rights against companies should be located in consumer and competition law.

4. Horizontal issues

4.1 Ensuring the accuracy of information provided

Duties of disclosure only refer to the duty to provide certain information as such. Nevertheless it should be noted briefly that in certain cases, according to general rules, information also entails the obligation to provide it in accordance with the truth. In the case of the reporting duties under company law, the audit in particular serves to verify this obligation.

In addition, any false or misleading statement in business communication is subject to penalties under unfair competition law. The prohibition on misleading conduct (§ 5 UWG) also applies when in »commercial practices« certain incorrect facts are asserted about working conditions in production, or the existence of or compliance with certain labour and social standards is asserted without justification. If the commercial practice consists in the advertising statement that the company is socially responsible, German case law requires additional information about what kind of social responsibility is meant if this statement is not to mislead. Thus, it must be specified which standards a company commits itself to if social responsibility is to be used for advertising purposes (BGH DB 1997, 2119; cf. Kocher 2008: 77).

The duty to provide only true information applies to every form of advertising and marketing (Götting/Nordemann 2010: § 5 marginal no. 0.60).

The UWG is not applicable to false information in the annual report (including information in the »comply or explain« declaration), however, because the latter is directed primarily to the shareholders and the capital market and does not promote the sale of products, and hence is not to be regarded as a commercial practice.²⁵

This is different in the case of voluntary environmental and social reports (CSR reports) submitted separately from the annual report. Their primary purpose is not attracting capital but informing the public, cultivating the corporate image, marketing, and thus promoting sales. Hence, they are commercial practices within the meaning of Section 2 para. 1 no. 1 of the UWG (Köhler in Köhler and Bornkamm 2011: § 2 marginal no. 49). This is also supported by Section 5 para. 1 (2) no. 6 of the UWG, according to which deception concerning whether a company has made a commitment to abide by a code of conduct is to be regarded as a misleading commercial practice. Therefore, in cases of wrong information or other information liable to deceive in such reports, the UWG provides for rights to injunctive relief and for rights of associations to take legal action.

The same would hold if companies had a statutory obligation to submit special (CSR-) reports (Köhler in Köhler and Bornkamm 2011: § 2 marginal no. 49). Moreover, the entire annual report presumably would itself become a commercial practice if its target groups were extended through the development of the law or legal reform toward disclosure of social data to consumers (»integrated reporting«); in this respect, however, an explicit clarification would be appropriate.

4.2 Actions for an injunction by associations: Unfair Competition Act and Injunctions Act

It has already been mentioned that in cases of breaches of the UWG – and that means both in cases of failure to provide required information as well as of deception through incorrect information – not only individual rights exist but also rights on the part of associations. They are aimed at injunctive relief as well as, subject to restrictive preconditions, confiscation of profits. A regulation of new duties to provide information would unavoidably involve both rights. This even holds beyond unfair competition

25. Compare recital 7 of Directive 2005/29/EC.

law, for Section 5a of the UWG also applies when certain information duties are violated outside of the UWG and it ascribes general importance for unfair competition law to the duties of companies to provide information.

In addition, legal actions by associations may also be possible according to the Injunctions Act (UKlaG).²⁶ For this to be the case, a law that serves consumer protection must be violated. Section 2 para. 2 of the UKlaG mentions a series of consumer protection laws and regulations in this connection; however, this list is not conclusive. If new information duties under consumer law were to be regulated, therefore, then the rights of associations to take legal action according to the UKlaG could take effect.

However, this requires that the information not be regulated (only) as an individual right of access to information (for example, following regulations in freedom of information laws such as the VIG) but also as a duty to inform or report. For, in the opinion of the Federal Supreme Court, rights that are exclusively due to individual consumers cannot be directly invoked by a qualified body within the meaning of Section 4 of the UKlaG.²⁷ The entitlement of associations would then have to be expressly clarified in such a way that rights of associations (to institute proceedings) are added to individual rights.

When it comes to reporting duties under company law, a right of associations to take legal actions in accordance with UWG and UKlaG could not be justified according to existing law in the case of integrated reporting (see above 4.1); but it could be made the subject of a special regulation. In the case of a duty to make a separate social report, by contrast, existing law already supports the assumption of a consumer protection regulation within the meaning of Section 2 of the UKlaG.

4.3 The protection of trade and business secrets

Companies have an economic interest in safeguarding business secrets that enjoy constitutional protection through the freedom to choose an occupation (Art. 12

GG) and the protection of property (Art. 14 GG) (Rengier in Fezer 2005: § 17 marginal no. 5). There is also protection in European law according to Art. 15-17 of the EU Charter of Fundamental Rights. These could constitute limits to a statutory duty of disclosure.²⁸

The protection of personal data (personal rights from Art. 1, 2 para. 1 GG, or Art. 7, 8 Charter of Fundamental Rights) will not be dealt with here; it takes its orientation in principle from similar principles equivalent to the protection of business and trade secrets.

4.3.1 The protected domain »trade and business secrets«

The constitutional protection of trade and business secrets is already concretized by specific legal regulations that could provide the model for a corresponding protection of newly regulated duties of disclosure. Thus trade and business secrets enjoy criminal law protection against unauthorized disclosure under Section 17 of the UWG as well as under Section 203 of the StGB (Criminal Code).

In addition, the information laws contain explicit exemptions for protecting business secrets. Thus, according to Section 6 of the IFG, access to trade and business secrets can be granted only »subject to the data subject's consent.« The earlier version of the VIG (§ 2 no. 2c VIG o. v.) was almost equally restrictive. It already excluded access rights if as a result not only trade and business secrets but also »other competition-relevant information of comparable importance for the enterprise to a trade or business secret would be disclosed.« This extensive regulation was deleted in Section 3 no. 2 c VIG (new version), so that from September 1, 2012 the protection is restricted to trade and business secrets. In this connection, it was hitherto the responsibility of the companies to inform the authorities which data they regarded as secrets in need of protection (Hüttner 2009: 96).

Trade secrets include, as a general rule, practical knowledge and know-how such as technical procedures or programs, whereas business secrets refer to the commercial domain – such as, for example, investment plans, customer data, or contract terms (cf. BVerfGE 115, 205). There is no statutorily defined concept of trade and busi-

26. In the relation between UWG and UKlaG, however, Section 8 para. 5 (2) of the UWG contains a provision for the priority of the UWG.

27. BGH NJW-RR 2010, 1712 for the right pursuant to § 675a BGB against credit institutions to make their schedules of prices and services available.

28. For a more detail treatment, see Kloepfer 2011: 3ff.

ness secrets; however, jurisprudence – especially on Section 17 of the UWG – has developed a consistent definition that is also accepted for constitutional protection; UIG, VIG, and IFG also take their orientation from this concept (Kloepfer 2011: 15, with additional references):

By a trade and business secret is to be understood any fact connected with a business operation that is not evident but is known only to a narrowly circumscribed group of people and that, according to the express or recognizable will of the owner of the company based on a sufficient economic interest, should be kept secret.²⁹

When it comes to observing the secrecy of employment and working conditions, here above all the feature of a legitimate economic interest in confidentiality must be problematized. This precondition is regarded as having been fulfilled if the confidentiality of a fact has a noticeable effect on the competitiveness of the company (Harte-Bavendamm and Henning-Bodewig 2009: § 17 marginal no. 6). With regard to the justification of the economic interest in secrecy, the Federal Labour Court (BAG) takes into account whether the competitors of the company affected can improve their competitiveness with the help of the data in question. Thus, it judged the payrolls of a company to be a secret worthy of protection within the meaning of Section 79 of the BetrVG (Works Constitution Act).³⁰ The management organisation and personnel policy of the company can also be protected as trade secrets (Rengier in Fezer 2010: § 17 marginal no. 23). The very observation that consumers exercise their market power when they consciously make certain purchasing decisions (also) based on social criteria even supports the claim that the disclosure of certain employment conditions could have an influence on the competitiveness of a company. In the final analysis, however, this will have to be decided concretely for each dimension and each indicator to be disclosed, based on the relevant competitive interests.

A company's weaknesses also belong to the protected trade secrets. However, it is controversial whether an economic interest of a company in confidentiality may be worthy of protection only when the corresponding

facts are legal (Rengier in Fezer 2010: § 17 marginal no. 21). It is argued against statutory protection of the confidentiality of illegal facts that this would represent an internal contradiction within the legal system (Hartung 2006: 33; Schoch 2009: § 6 marginal no. 56; Buschmann in Däubler et al. 2010: § 79 marginal no. 6a). On the other hand, this endangers rejection of the company's objection solely on the grounds of an assumed illegality of actions. In order to ensure an effective protection of business secrets in competition law, therefore, the need for protection must be assessed solely in terms of the substantive object and independently of legality.

In the domain of the information rights of citizens, however, a narrower interpretation of the concept of legitimate interests in confidentiality could be imperative than in competition law. On the one hand, considerations tailored to asset protection in unfair competition law are not valid for the domain of the law on access to information; thus, here, rights of access must not be thwarted by a desire for secrecy that is based on objectively unlawful conduct (Angelov 2000: 244; Schoch 2009: § 6 marginal no. 57). The VIG makes expressly clear, in addition, that the protection of trade secrets is not valid for offenses against the Food and Feed Code (Section 2, 3 in connection with Section 1 para. 1 (1) no. 1 VIG). With this, legislator made expressly clear that a legitimate interest in confidentiality does not exist in the case of violations of the law (Kloepfer 2011: 31). This valuation made by the legislator in the VIG is regarded as generalizable to the domain of rights of access to information (Schlacke et al 2010: marginal no. 237; Kloepfer 2011: 32). In justification, the imperative to interpret the protection of property in terms of the public good and the aim of combating corruption through freedom of information are cited: This objective would not be reconcilable with the protection of illegal secrets (Kloepfer 2011: 32 with additional references).

The problematic of the protection of secrets carries less weight in the case of reporting duties, however, because an audit procedure is integrated into or precedes the disclosure procedures.

4.3.2 Lawfulness of possible interventions

Furthermore, even a duty of disclosure of protected secrets can be justified regarding protected trade and business secrets. Thus, in the domain of the UWG, a

29. BGH GRUR 1955, 424, 425; BGH GRUR 1961, 40, 43; Hartung 2006: 24; Koehler and Hasselblatt in Götting and Nordemann 2010: § 17 marginal no. 7.

30. BAG LLP no. 2 on § 79 BetrVG 1979; but for qualifications, see Buschmann in Däubler et al. 2010: § 79 marginal no. 6a.

balancing with the public interests in the disclosure of illegal relations must be undertaken at the level of justification (Koehler and Hasselblatt in Götting and Nordemann 2010: § 17 marginal no. 19 with additional references; Harte-Bavendamm and Henning-Bodewig 2009: § 17 marginal no. 6; Rengier in Fezer 2005: § 17 marginal no. 21).

In the present context, encroachments on the protection of business secrets are justified, on one hand, by the function of the duties of disclosure in contributing to giving effect to and mobilizing workers' rights, which can be traced back in turn to the basic right of the employees in Art. 12 of the GG. In addition, the constitutionally protected reasons for guaranteeing market transparency on the consumer side, no less than democratic considerations (see section 1 above), can be cited as justifying reasons for the encroachment. Moreover, according to the case law of the ECJ, »compelling reasons of consumer protection« can justify encroachments on the freedoms of trade in goods and services guaranteed under European Union law (ECJ collection 1979, 639 (Cassis de Dijon); Bornkamm in Köhler and Bornkamm 2011: § 5 UWG marginal no. 1.28ff.) – whereby special reference is made to the fact that duties of disclosure of information represent lesser interventions by comparison with prohibitions (Wagner 2007). Ultimately, in particular cases it is a matter of weighing up the protected interest in confidentiality against the information interests of the public or the market.

In this respect, the legislator can leave the weighing up to the individual case, as occurs, in particular, with individually formulated rights of access to information. Thus, according to Section 3 of the VIG, both personal data and trade and business secrets are protected against disclosure only insofar as »the information interest of the consumer does not outweigh the interest worthy of protection.« With this, the VIG was brought into line with Section 9 of the UIG, which provides for exceptions to the fundamental protection of business secrets and of personal data equally when those concerned have given their consent or »the public interest in the disclosure takes precedent.«³¹ Adopting such an explicit balancing proviso strengthens the access rights (Kloepfer 2011: 71). It speaks in favor of such a regulation, in particular, that the appeal to trade and business

secrets is in practice a common objection, and hence should be subjected to an individualized examination. For this reason, the protection of trade and business secrets is also regarded in other European countries (above all Denmark, Great Britain, and France) only as a relative and not as an absolute limit of rights of access in order to prevent possible errors in the balancing from restricting access to information from the outset (Hüttner 2009: 564).

In order to prevent business secrets being used »as a pretext« to deny information, a more concrete definition of the concept of a secret may make sense (Schoch 2009: § 6 marginal no. 75); possible candidates would be positive or negative lists (Kloepfer 2011: 72). Section 9 para. 2 of the UIG already contains a negative list with issues the publication of which is not to be precluded by confidentiality claims. Through the amendment of the VIG, in Section 3 sentence 4 of the VIG, a list has now likewise been adopted with issues of information to which access »cannot be rejected by appealing to a trade or business secret.« Among them are, in particular, infringements against the consumer protection prohibitions in food and feed law.

5. Result: Possible legal form of a duty of disclosure

A statutory duty of disclosure regarding working and employment conditions aims to improve the effectiveness of the law by facilitating external monitoring through markets and by indirectly communicating to companies expectations with regard to their conduct (Nowrot 2011). Because of these aims of a duty of disclosure, there can be no question of restricting it to public enterprises, as in Spain and Sweden (Humbert 2011: 198).

A legal regulation would have to be addressed in the first instance to the companies. As regards the detailed form of the duty, however, there must also be clarity concerning to whom the disclosure would be directed as such. Possible candidates as target groups in this respect, in addition to the political public, are consumers, public contractors, private business partners, consumer associations, human rights NGOs, labour unions, works committees, supervisory boards (in particular their members representing employees), shareholders, and investment funds and the capital market. In any case, a duty of

31. Schoch 2009: § 6 marginal no. 73 also calls for this for the IFG.

disclosure would entail the recognition of the legitimate interests of these groups in information on working and employment conditions.

5.1 Concrete form: Reports or information and disclosures?

Company law reporting duties and competition and consumer law information duties, as well as democratic rights of access to information for all citizens, are located in different contexts of justification and function differently in legal terms. In the present study, the advantages and disadvantages were discussed in detail. Here we will venture a concluding conceptual evaluation.

Reporting and information duties can be distinguished in the first instance in terms of the kinds of information and target groups for which they are suited. Thus, the duties to provide information under consumer law are product-related, whereas the company law reporting duties provide information about company policy independently of concrete products. Unfair competition rules also refer to a specific goods or services market, and hence to a product. In contrast to environmental information, however, employment-related information will be of less product-related interest for markets and politics; questions of employee protection are less directly connected with the production of specific products, and linking individual products with information on employment conditions is especially difficult for consumers in this area (Glinski 2011: 192).

Therefore, it seems to make sense to employ an instrument that operates in a *company-related* manner. Also, the public interest in the effectiveness of labour law and in preventing social risks ultimately exists independently of whether a company produces for consumer markets or not.

Whereas disclosure and information rights involve a sporadic approach, reporting duties have the advantage that they immediately prompt a continuous process within the company, so that in the long term there are chances of a cultural transformation within the company. It is open to question, however, whether company law would still be the appropriate legal field for such an expanded regulation; a new reporting duty could be regulated outside the HGB in a special law while still being geared as regards the structure of the duties and

their implementation to the duties to report under company law. For the stakeholders and target groups of the reports would be clearly extended. The same consideration speaks for an *independent reporting duty* – which could then also be institutionally separated from the existing structures.

5.2 Object, contents, and scope

In concrete terms, a *reporting period* would have to be defined or a point in time at which the available data is to be ascertained.

The scope would also have to be defined. Because the key issue is ultimately the conditions under which the goods and services offered in Germany are produced, but not where this occurs, in principle not only production and services locations in Germany, but also supply firms and the *value-added chain*, would have to be subject to scrutiny. In this regard, franchising companies and other recent business models using temporary work and services contract work must also be taken into consideration. Here it would have to be asked which companies in such constellations even possess the means for reporting and which have social data at their disposal. Thus, a franchising company will not have access to data of the employees of subcontractors.

This supports the view that, beyond concern reporting duties (on this, see above 3.1.2.1), special regulations governing the disclosure of relations to supply firms and subcontractors should be provided for. This duty of disclosure would only refer to procedures and management systems, but not directly to the working and employment conditions in subcontractors and suppliers. The Californian law on transparency in the supply chain, for example, adheres to such a concept (California Transparency in Supply Chains Act 2011; on this, see above 3.2.1). In every case, the introduction of a statutory duty to report social data will entail additional costs for the companies (Deutscher Industrie- und Handelskammertag 2011: 3). The audit would also generate costs. But this holds independently of the chosen regulatory instrument. On the occasion of the debate over the UWG, the business side pointed in addition to uncertainties as regards the scope of the information to be provided (Hüttner 2009: 150). An appropriate and sufficiently clear specification of the object of the information could meet this objec-

tion and simultaneously enhance the effectiveness. With this, the concept of a business secret would also be specified in the sense of a negative list (see above 4.3.2).

Different approaches come into consideration for the specification. Generally speaking, a form of reporting based on specific indicators that are only loosely connected with standards seems appropriate.

In this respect, the choice of the framework of empirical indicators could be left to the companies. However, this would exacerbate still further the practical difficulty, which exists in any case, of specifying the form and level of detail of the information to be provided by the company, and hence of producing comparable results. In this regard, the Swedish regulation chooses a middle course and contains a provision for a duty to justify in the case of deviations from the framework of the GRI. In the case of such a »comply or explain« regulation, however, it would have to be ensured that requirements to substantiate the justification and description of the deviating practice are regulated.

Against the bare »comply or explain« regulation it can also be argued that a legislator that already reveals its preference by referring to a specific framework of empirical indicators (here GRI; CES is also a possibility) has already made a decision. However, such a framework of empirical indicators presumably would still have to be specified and supplemented with additional indicators. These could be laid down by an independent commission to be newly created, as is planned in France. Section 9 of the above-mentioned draft bill to the VIG of January 2011 also envisaged an independent expert body for Germany that was supposed to work out »requirements to be satisfied by the pre-contractual information of the consumers on taking ethical, ecological, and social concerns, including relations of production in the countries of origin, into consideration.« A statute should be able to contain a provision for an information duty of companies toward this body.

5.3 Procedures, sanctions, and implementation instruments

In the light of what has been presented, it should be clear that, given the aims to be pursued, there can be no question of a voluntary regulation for the disclosure, as

in Denmark; there it is only laid down that those companies that have introduced a CSR policy may report on this in the financial report (Humbert 2011: 198).

Regulating a duty as such, however, is not sufficient. Without influential procedures for enforcing the duties of disclosure, a new regulation is in danger of remaining ineffective. In this regard, one should not rely exclusively on criminal and regulatory legal sanctions, such as are applied in enforcing company law reporting duties; for where commercial practice in areas of social conflict is concerned, one can rely less on the internal dynamic within the company than in the case of the traditional objects of reporting duties. Therefore, official action should be supplemented with practical possibilities of legal enforcement by private actors. It is recommendable that reporting duties be flanked with rights to initiate legal proceedings for consumer associations, who in this respect also represent important addressees of a disclosure of working and employment conditions.

A possible candidate is, in particular, a legal action by an association in the form of a right to injunctive relief in cases where companies violate the duty of truthful and dutiful complete disclosure. These rights can be derived in large part from already existing law and would have to be clarified in the already well-structured body of rules of the UWG and the UKlaG.

Legal instruments for implementing the duty of disclosure would be subject to the same substantive limits as the duty of disclosure as such: The latter does not serve to obligate a company directly to comply with minimum standards in working and employment conditions.

5.4 Testing the correctness and validity of the disclosed data

There are already duties to provide truthful information under existing law. In order to make these effective, special legal instruments should be considered that ensure that the information and assertions to be disclosed are comprehensible, reliable, and comparable. This could also lead to greater transparency on the market of »social responsibility« (on the problem, see Kocher 2010).

As regards traditional reporting duties, this occurs in practice through the auditing duties and the professionalisation of auditing through the development of



economic scientific standards. However, these standards and practices are presumably not sufficiently developed to be able to ensure a reliable auditing within the framework of an »integrated reporting.« There is much to be said for promoting the development of an independent market in testing, and hence auditing, bodies through a separate procedure, where these bodies could also include labour unions and/or civil society organisations in the testing. This could promote the development of social standard labeling (»fair work«) with which corresponding regulations could link up (for example, in the tendering of public contracts, other forms of economic promotion, or in collective agreements, which obligate companies toward a union to engage socially responsible business partners).

To be sure, a series of auditing systems and labels already concern themselves with ensuring the comparability of tests on CSR. However, as early as 2007, the European Parliament correctly observed »that the situation is at present impenetrable for consumers on account of confusion between the different national product standards and product labeling schemes, all of which is helping to undermine the existing social product labels, draws attention to the fact that, at the same time, considerable costs are incurred by companies when switching between many different national requirements and standards, and points out that it is expensive to set up monitoring mechanisms to oversee social product labeling, particularly for smaller countries.« This is why already at that time the Parliament took the view »that it will be necessary to develop a professional framework including specific qualifications in this field« (European Parliament 2007: points 28 and 35; cf. already Zadek et al. 1998; now also ISO 26,000). In Belgium, there even exists a regulation on a »label social.«³²

In order to ensure the effectiveness of the duty of disclosure, it is of cardinal importance that this market remain transparent. Therefore, in no case should the reporting duties, information, or disclosures be confined to the results of the testing or auditing. Rather, all addressees of the disclosure should be placed in a position to test the soundness of complex information.

32. <http://www.sociaal-label.be> (accessed 3.3.2012); on this, see also Hepple 2005: 137ff.

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