

A decorative graphic consisting of a grid of dots in various shades of gray and red, arranged in a pattern that suggests a world map or a network of connections.

Corporate Obligations with Regard to Human Rights Due Diligence

Policy and Legal Approaches

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- A corporate obligation with regard to human rights due diligence was introduced into the international human rights system with the UN Guiding Principles on Business and Human Rights. This obligation addresses gaps in human rights protection that have emerged due to companies' transnational activities. Policy and legal arrangements appear necessary in order to clarify, for example, questions of liability and, above all, to provide the victims of human rights violations with appropriate procedures for asserting their rights.
- In Germany such a development process should be launched within the framework of the current elaboration of a national action plan for business and human rights. In this regard a number of due diligence measures already in use in business practice can be taken up that, to date, have not been applied to human rights concerns. The extent to which German or foreign law is applicable, in cases of cross-border human rights violations, should be clarified.
- Thus a new legal regulation should make clear that companies also have to apply due diligence in the case of cross-border transactions with regard to legal interests protected under international law. At the same time, minimum requirements and substantive provisions should be applied to human rights due diligence. By means of the »comply or explain« approach the principle of proportionality can be taken into account, so that the legal requirement can be applied flexibly to both large and small companies equally.



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Foreword

The transnational integration of the global economy harbours a multitude of challenges for human rights protection. The catastrophic conditions in the textile industry that led to such accidents as the collapse of the Rana Plaza factory building in Bangladesh in 2013 or the slavery-like conditions in which migrant workers are employed in Qatar as they prepare for the 2022 World Cup Finals – of which many people in Germany are aware – are only the tip of the iceberg. In an age of global value chains and production networks it can scarcely be denied that German companies and German politicians share responsibility, especially given the extent of the German economy's integration in the global market.

The question of the role that companies and states should play in ensuring corporate human rights due diligence in their economic activities lies at the heart of the present report.

It consists of two largely independent but complementary parts and deals with the options pertaining to the policy and legal design and implementation of human rights due diligence in the Federal Republic of Germany. This is a key issue if the aim is to prevent (German) companies from becoming entangled in human rights violations in their transnational activities and to outline the consequences of such violations in more detail. The approaches discussed here can be traced back primarily to the results of the UN Special Representative on the issue of business and human rights, John G. Ruggie, the so-called UN Guiding Principles on Business and Human Rights.

These Principles were adopted unanimously by the UN Human Rights Council in 2011. The Guiding Principles are not a legally binding international agreement, but an internationally recognised soft law instrument, to whose implementation many countries across the world have committed themselves. The European Commission and the EU member states, too, have noted that the UN Guiding Principles should be implemented by means of so-called National Action Plans (NAP) on business and human rights. In 2014 Germany initiated the development of such an NAP under the aegis of the Foreign Ministry and with the involvement of various ministries, trade unions and civil society.

The Friedrich-Ebert-Stiftung's (FES) working group »Decent work worldwide!« has also addressed issues related to implementation of the UN Guiding Principles. Since early 2015 the discussion group has brought together MPs, trade unions, civil society representatives and academics to carry on the debates on the subject of the globalised world of work and to introduce them into the German political environment, as well as to develop and support policy initiatives. Within the framework of the working group the issue of human rights due diligence was also discussed on 18 March 2015. The idea of producing the present study arose from the meeting of the discussion group, with the purpose of advancing discussions on specifying and regulating the human rights responsibilities of German companies. We would like to take this opportunity to thank all participants in the discussion group for their involvement, without which this study would never have been written.

The first part of the study introduces the context of human rights due diligence and is dedicated to the political dimension of due diligence. Within the framework of the UN Guiding Principles this concept forms the »substantive core« of corporate responsibility for respecting human rights, according to Christian Scheper, researcher at the Institute for Development and Peace (INEF). However, to date, human rights due diligence has remained a rather vague notion, in need of legal and policy development. With regard to clarifying the human rights due diligence that German companies should exercise in their transnational activities German lawmakers must also be challenged to act.

In the second part, lawyer Robert Grabosch tackles the legal dimension of corporate due diligence. He demonstrates how the notion of due diligence is applied in the German legal system and in which legal areas there are relevant foreign approaches to the legal regulation of corporate due diligence with regard to human rights. Also taking into account legal developments in other countries Grabosch then formulates a proposal for the substantive and formational specification of corporate human rights due diligence. In this Grabosch takes the approach of restricting the legal grey area in which companies' due diligence currently exist in order to create



more predictability for companies and a clear incentive structure for proactive measures to avoid negative human rights consequences in their activities.

Clarification of human rights due diligence, both politically and legally, is primarily in the interest of potential victims of human rights violations, but also in the in-

terest of companies, which would thereby obtain more legal certainty in the area of human rights. Shaping the notion of due diligence against the background of the UN Guiding Principles can thus represent a valuable contribution to the current discussion and accordingly should receive its due attention within the framework of Germany's NAP process.

Frederike Boll and Jonathan Menge

Summary Part 1:

Definition, Criticisms and Approaches to Policy Elaboration

- The UN Guiding Principles on Business and Human Rights introduced the concept of corporate due diligence into the international human rights system. This is intended to be a practical contribution to closing the main gaps in human rights protection in the global economy. While the concept of corporate due diligence is not new, linking them to international human rights raises many questions concerning the specific obligations of companies and the consequences of non-compliance, especially in the context of global production and trade relations.
- The concept of a human rights due diligence is politically controversial. The main reason for this is that it deviates from tradition in the international human rights system by directly addressing companies and their practices with regard to the avoidance of human rights risks or minimising negative consequences, although without adequately specifying their content, clarifying liability issues and, above all, also providing the victims of human rights violations with corresponding procedures for asserting their rights. Criticisms of the UN Guiding Principles' approach are primarily directed towards the large legal grey areas, the extensive scope for interpretation afforded to companies and the insufficient binding force of existing implementation mechanisms.
- The human rights due diligence approach, however, can – if sufficiently specified and furnished with legal measures – represent an effective contribution to improving human rights protection in the global economy. To this end further development is required at national and international level.
- In Germany such a development process should be initiated within the framework of the current elaboration of a National Action Plan on business and human rights. Besides making available sector- and country-specific human rights information and promoting networks to enable the involvement of different stakeholders along supply chains there are a number of key areas of action with regard to the development of a due diligence obligation: public procurement, foreign trade promotion, development policy and promoting transparency, especially by means of requirements concerning the disclosure of non-financial information by companies.
- Shaping due diligence must take place in accordance with other provisions of the UN Guiding Principles and fundamental human rights principles. This includes above all the focus on opportunities for participation and legal remedies for the rights holders affected. Thus, besides states and companies, in particular trade unions and other forms of employee representation along the supply chain, as well as the ILO as a tripartite body, must have a say in the implementation of the Guiding Principles.

Summary Part 2: Options for Elaborating Corporate Human Rights Due Diligence in German Law

- Due diligence obligations indicate the extent to which people and companies have to respect the rights of others. They are part of various legal areas and belong to the »common core« of civil law. Jurisprudence, when it comes to the development of due diligence, takes its bearings from such criteria as the predictability and intensity of the harm, the controllability of the hazard and the reasonableness of measures to avoid danger. However, how far the law of which state shall be authoritative in cases of cross-border human rights remains unclear, as is whether the due diligence to be derived from this law apply also in international business activities and what substantive requirements are raised by due diligence concepts. This considerable legal uncertainty affects both German top management and the foreign appellants concerned.
- Lawmakers in different states are poised to develop corporate due diligence obligations with regard to human rights by means of voluntary guidelines, disclosure obligations and binding due diligence. The German legislator has thus far been relatively reluctant.
- In business practice a multitude of due diligence measures are known. They largely correspond to recommendations within the framework of soft law with regard to human rights due diligence, although to date they have not been applied to human rights matters.
- A new legal regulation must clarify that companies have to apply due diligence also in the case of cross-border transactions with regard to legal interests that are protected under international law. Furthermore, substantive guidelines should be laid down for concepts of due diligence. Account can be taken of the proportionality principle by means of the »comply or explain« approach, so that the legal rules can be applied equally flexibly to large and small companies.
- At the same time, minimum requirements should be applied with regard to due diligence concepts. As long as companies do not demonstrably – for example, through documentation – comply with these there is reason to believe that the requisite due diligence is not being respected (reverse onus: sure shipwreck). If these minimum requirements are agreed on by business associations in codes of ethics they also define the benchmark of competition law integrity. At the same time, legal or best practice – as laid down in codes of ethics – rules should be established; their implementation by a company is to be assumed to indicate that the requisite due diligence is being performed (safe harbour).

Part 1: Definition, Criticisms and Approaches to Policy Elaboration

Christian Scheper

1. Introduction

Whether it be low wages at the suppliers of German retail discounters, the desperate conditions in apparel works and catastrophic factory collapses in Bangladesh, the frequent suicides in Chinese computer and mobile phone factories, exploitative child labour in quarries or cocoa production, the political involvement of large oil companies in the suppression and exploitation of indigenous population groups or the violent suppression of strikes, the press is heaving with examples of social and environmental grievances in the global economy. In this context demands for the political regulation of transnational corporate activities in recent years have increasingly had recourse to internationally agreed human rights. This includes not only issues such as forced and child labour or discrimination, but also demands for fair wages, company codetermination, protection of health and safety in the workplace and sometimes even limitations on environmental damage. For a long time now, not only the actions of states, but also the activities of private companies have been scrutinised with regard to respect for human rights. Reference to human rights harbours opportunities for formulating comprehensive expectations with regard to socially and environmentally more acceptable globalisation based on international legal norms, but it also raises new political issues with regard to the regulation of companies.

One core issue is the specific obligations arising from intergovernmental human rights treaties. At the international level the UN Human Rights Council introduced the concept of a corporate *human rights due diligence* within the framework of the UN Guiding Principles on Business and Human Rights in June 2011 as the cornerstone of efforts to close regulatory gaps in the global economy. The concept plays a key role in the UN Guiding Principles and is thus also a key notion in designing National Action Plans for business and human rights, by means of which the implementation of the Guiding Principles in particular national contexts will be achieved.¹

1. At the time of writing the present report (July 2015) seven states have adopted a National Action Plan on business and human rights and another 21 are developing such a plan, including the German government.

Its significance is increasing in international frameworks and guidelines, as well as at various political levels. For example, other international organisations now make reference to the concept of a due diligence obligation, for example, the Organisation for Economic Cooperation and Development (OECD) within the framework of the OECD Guiding Principles for Multinational Enterprises (OECD 2011) and the World Bank Group's International Finance Corporation (IFC) in its »Social and Environmental Performance Standards« (cf. IFC 2012: 6).² Furthermore, the European Commission is also increasingly calling for the implementation of the UN Guiding Principles in national policies (see European Commission 2015) within the framework of its CSR strategy. In a period in which international soft law instruments³ are becoming increasingly important the still relatively freely interpretable notion of a corporate human rights due diligence is becoming a key concept that appears to be in accordance with many political positions: on one hand, those calling for morally obligatory fundamental standards in the global economy, but at the same time also the widely held reservations concerning binding market regulation. Above all the notion attempts to do justice to the high context dependency of corporate activities and the demand for flexibility in the provisions and measures to be applied.

Against this background Part 1 of the present report discusses the political significance of the concept of corporate human rights due diligence, as well as important

In six other countries efforts are being made by civil society or national human rights institutions to introduce a comparable process (cfl. OHCHR 2015a).

2. Within the World Bank group the IFC is responsible for cooperation with private companies. As part of the IFC's »Sustainability Framework« the Performance Standards represent the main guidelines for social and environmental criteria to be applied to project funding. They are important not only in relation to the IFC's work, but also form the basis of private project funding in many instances across the world and thus are also used by many companies as a benchmark in project management. The Performance Standards also represent the essential basis for social and environmental criteria in project funding in the awarding of guarantees within the framework of German foreign trade promotion.

3. Various forms of non-(directly) binding guidelines and standards are characterised as »soft law«, as frequently found especially at international level. It is »soft« because it is primarily based on self-commitments, incentives and general social norms and in the event of non-compliance there are no »hard« sanctions in accordance with established judicial procedures.

reservations and criticisms. Furthermore, it sheds light on the current discussion on the policy elaboration of corporate due diligence and key areas in which the concept can be refined in policy terms. Given the current national, European and international process for implementing the UN Guiding Principles⁴ – but also in a broader sense against the background of a global governance culture increasingly geared towards corporate responsibility – tackling companies' human rights due diligence seems imperative. Part 2 of this report addresses the available options for embedding this in German law.

In principle, the concept of a due diligence for companies is not new – as a legal concept it is well established in many areas, for example, in administrative, criminal and regulatory offences law, as well as in competition law, but especially in tort law (see Part 2, Section 3 of this report). Business administration recognises the concept of due diligence in both its English and its German incarnations (*Sorgfaltspflicht*). Its transposition to the area of human rights, however, is new. Here the precise meaning of due diligence, its scope and the consequences of non-compliance have hitherto remained largely open. The UN Guiding Principles, too, provide only general answers.⁵ Furthermore, the concept is by no means uncontroversial. The role of companies in human rights protection and the path embarked on by the UN Guiding Principles with regard to the approach to corporate responsibility are the subject of heated discussion. While the notion of due diligence obligations has been given a prominent place in the human rights canon, there is still no consensus on its precise legal and political significance. It is also not foreseeable what opportunities and risks are linked to this approach in the realm of human rights; in particular the requisite elaboration of corporate due diligence in relation to specific human rights issues is still pending (on this see, for example, Deva 2013).

Not least, their scepticism in relation to the Guiding Principles' approach has induced some governments, in the Human Rights Council, to call on the international commu-

nity to try, in addition to efforts to implement the Guiding Principles, to work out binding regulatory options on human rights protection. On the initiative of the Ecuadorian government and a group of other states a working group was set up for this purpose within the UN Human Rights Council in June 2014. Its aim is to work out a binding treaty under international law on the regulation of transnational corporate activities (see UNHRC 2014). There is thus now a parallel process, alongside the dominant approach of the UN Guiding Principles, which also aims at improving human rights in the global economy. However, the German government, in common with most other OECD states, has vehemently rejected this process, insisting that the current efforts to implement the UN Guiding Principles must take priority. It thus appears even more important to discuss the Guiding Principles approach currently being pursued, with the core concept of a corporate due diligence, extensively and critically.

In Section 2 we introduce the concept of due diligence based on the UN Guiding Principles and discuss important reservations and criticisms. The current controversies make it clear that further specification and a policy framework are needed for due diligence. Section 3 then highlights key areas in which the German government can contribute to such specification and enframing.

2. Corporate Due Diligence as a Cornerstone of Human Rights Protection?

Since the end of the Second World War the international human rights system has developed primarily as an international law regime. It is thus oriented in the first instance towards the state and its relations with the individual. Human rights impinge on transnational companies only via an indirect third-party effect. That means that for companies there are no direct international law obligations and corresponding international sanctions options in the event of corporate misconduct; rather the state is obliged to ensure that human rights are also protected and safeguarded in the context of corporate activities. It is also up to companies to comply with national laws. Against the background of economic globalisation, the accompanying increasing transnationalisation of corporate activities, a growing political role on the part of private companies and, in many cases, a lack of state human rights protection this traditional approach has come to the fore since the 1990s. On one

4. Besides the abovementioned EU strategy and the working out of an action plan for business and human rights by the German government (Foreign Ministry 2014) this effort also became discernible in the G7 agreements of 2015 (G7 2015: 6).

5. On this, see also De Schutter et al. (2012), who, with reference to the concept of human rights due diligence obligations, extensively discuss how different states have already integrated the due diligence approach in their policies in other contexts.

hand, many states – for a wide variety of reasons – do not protect human rights adequately or even violate them themselves, on a massive scale. On the other hand, companies, given largely unconstrained capital mobility, in many instances act transnationally, while state authority is largely territorially confined. Above all, the issue of the extraterritorial scope of state obligations to protect human rights is now the object of intense international law discussion and controversy (see Part 2, Section 2 of this report). All in all, there is thus a situation of inadequate human rights enforcement in the global economy (cf. Office of the High Commissioner for Human Rights, OHCHR 2008: §3). At the centre of criticisms of the human rights regime are so-called regulatory gaps and the call for new international options for regulating corporate activities.⁶

Since the 1990s, with the so-called »UN norms«⁷ an international effort had been under way to subject companies to international regulations with regard to respect for fundamental human rights.⁸ This attempt met with stiff political opposition, however, and ultimately foundered as an instrument of international law in 2004, when the UN Commission on Human Rights stepped back from making the UN Norms binding under international law.⁹ After this the so-called Ruggie Process began, named after John G. Ruggie, who had already co-designed the UN Global Compact under Kofi Annan and from 2005 to 2011 was twice Special Representative for business and human rights.¹⁰ From the outset he rejected the course set by the UN Norms and instead tried to develop a political framework for human rights protection supported by a broad consensus between governments, civil society organisations and transnational companies. It was published in 2008 un-

der the title »Protect, Respect and Remedy«¹¹ and at the end of the second mandate in June 2011 resulted in the UN Guiding Principles on business and human rights, which were adopted unanimously by the UN Human Rights Council.

2.1 Corporate Obligations in the UN Guiding Principles on Business and Human Rights

The UN Guiding Principles do not impose any international law obligations on companies, but rather represent a mesh of existing international law and general »social expectations« (OHCHR 2008: §54) in relation to companies. In this sense they conceptualise human rights protection in the context of the global economy on the basis of three normative pillars: (i) the state's duty under international law to protect human rights (»state duty to protect«), (ii) corporate responsibility to respect human rights (»corporate responsibility to respect«) and (iii) making available judicial and extrajudicial complaints procedures, including procedures on compensation for victims of human rights violations (»access to remedy«).

Due diligence is the substantive core of the second pillar. The three pillars are supposed to be mutually reinforcing and interlocking, and thus represent a »smart mix« of different public and private regulatory mechanisms. The UN Special Representative emphasises that his approach should be understood as »principled pragmatism«: »an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most – in the daily lives of people« (OHCHR 2006: para. 81).

The fundamental principles arise from the International Bill of Human Rights, comprising the Universal Declaration of Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR)¹² as well as the ILO core labour standards.¹³

6. There were precursors of the debates on human rights obligations for companies within the framework of the United Nations as early as the 1970s, especially in the context of discussions on a »new international economic order«. At that time, there were already calls for stronger international regulation of companies, but fewer in relation to human rights norms (cf., for example, Sagafi-Nejad/Dunning 2008; Hamm et al. 2014).

7. Officially, »Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights«.

8. There were earlier attempts at international regulation, in particular in the 1970s, when the first international code of conduct (Sagafi-Nejad/Dunning 2008: 63) and the first version of the OECD Guidelines for Multinational Enterprises were adopted. At that time, however, human rights were not being discussed in relation to companies (cf. Cragg et al. 2012: 1).

9. For details see Weissbrodt/Kruger 2003; Özden 2005; Sorell 2006.

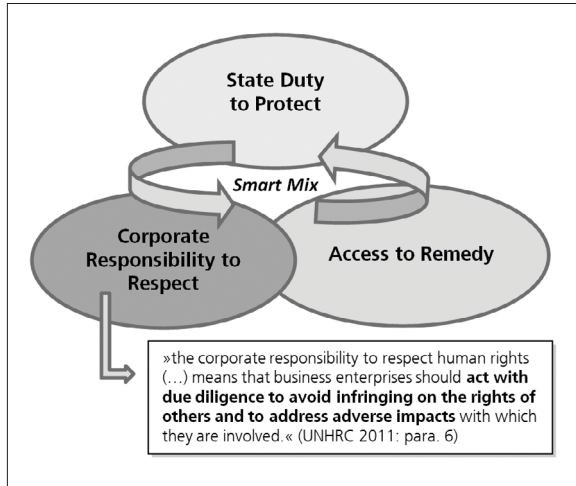
10. Officially: »Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises«.

11. OHCHR 2008.

12. Both covenants were concluded in 1966 and came into force in 1976.

13. Core labour standards in accordance with the International Labour Organization's Declaration of Fundamental Principles and Rights at Work of 1998. (For an overview of the international human rights agreement

Figure 1: »Protect, Respect and Remedy« – Schematic Presentation of the Three Pillars of the UN Framework and the Place of Due Diligence



Source: Author's design.

However, the UN Guiding Principles emphasise that in particular cases other international agreements can be relevant to company activities. A pragmatic approach is necessary in the interests of victims, according to Ruggie, so that rapid minimisation of human rights violations can be achieved without having to resort to long-drawn-out negotiations on international treaties. The UN Guiding Principles thus do not call for any revolutionary changes, but rather essentially specify the state of affairs with regard to international law. Thus states' duty to protect, the corporate obligation to respect human rights and also the need for access to judicial remedy could, in principle, have been derived from the international human rights system even before the Guiding Principles (Lopez 2013; Deva 2013). With its formulation and specification with regard to transnational companies, however, the political framework has acquired broad international support. The notion of a »smart mix« of state regulation and corporate self-responsibility is today the dominant approach in the debate on business and human rights.¹⁴ In what follows we shall look more closely at the aspect of corporate responsibility for respecting human rights within this framework in order to classify and then specify companies' human rights due diligence obligation.

see Deutsches Institut für Menschenrechte 2015).

14. For an overview of the debate see, for example, Cragg et al. 2012; Deva/Bilchitz 2013; Hamm et al. 2014.

2.2 Corporate Responsibility to Respect Human Rights

The corporate responsibility to respect human rights encompasses three aspects: (i) the company must commit itself to human rights in a declaration of principle and promulgate it both internally and externally (policy statement); (ii) it must proactively implement corresponding measures and management procedures to fulfil its human rights due diligence in all its business activities; and (iii) it must establish recourse options for instances of human rights violations.

The UN Guiding Principles, first of all, distinguish the notion of responsibility from state obligations under international law. Although they assign companies an obligation to respect human rights, this does not derive directly from international law but from »social expectations« and moral considerations (OHCHR 2006: § 70). The concept of responsibility as it pertains to companies has already been taken up in the extensive debate on corporate social responsibility (CSR). The UN Guiding Principles thus link the CSR debate,¹⁵ which at first had a strong voluntary orientation, with the human rights regime. Although it is suggested that this responsibility is not to be understood here as a voluntary commitment, the Guiding Principles refrain from an unambiguous assertion on their level of bindingness and on the legal consequences in the event of non-compliance:

»The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.«

UN Guiding Principle No. 12

Depending on the specific instance, responsibility thus could also have a legal justification, but this further depends on national legislation (on its establishment in German law, see Part 2 of this report). The extent to

15. We can also discern a corresponding shift in the political debate on CSR, from a former emphasis on the dichotomy between legal voluntariness and bindingness to closer attention to the general social consequences of corporate activities. Representative in this respect are the European Commission's CSR definitions. Originally, the Commission defined CSR »as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis« (cf. BMAS 2013). Since 2011 it defines CSR more extensively, as »the responsibility of enterprises for their impacts on society« (European Commission 2011). Thus the European Commission recognises that companies, in many respects, have obligations that are not confined to the laws of the country in which they are operating.

which obligations arise for transnational companies on the basis of international law in the absence of effective legal protection at national level remains a core controversy in the debate on business and human rights, which the definition of corporate responsibility in the UN Guiding Principles does not resolve. This conflict had already led to a political standstill in the preceding process concerning the UN Norms. The Special Representative presumably wanted specifically to avoid this issue in order to be able to reach a broad consensus on the framework. Instead of designating a particular set of human rights obligations the Guiding Principles leave the notion of responsibility open and instead reduce it to the due diligence concept,¹⁶ with a view to coming up with suitable procedures. As the abovementioned three aspects of the responsibility to respect already show, due diligence expressly requires active measures from companies. The specific scope of these measures, however, is strongly context- and company-dependent.

The Guiding Principles introduce the nature of due diligence in general form by means of basic *principles*. Measures to comply with the due diligence obligation should thus:

- (i) cover negative human rights impacts that the company (co-)causes, including indirect impacts, for example, due to use of the company's products;
- (ii) vary in their complexity, depending on the size of the enterprise, the risk of serious human rights violations and the nature and context of the activity;
- (iii) be implemented long-term or regularly because human rights risks can change over time (cf. UN Guiding Principle No. 17).

Furthermore, the Guiding Principles go into more detail about a number of *substantive and procedural components* on complying with the due diligence obligation. Due diligence, accordingly, must at least encompass the following:

- (i) Measures to ascertain the potential and actual human rights impacts of a company's own activities and commercial relationships. These measures can

involve internal or external experts and must include meaningful consultations with (potentially) affected stakeholder groups (cf. UN Guiding Principle No. 18).

- (ii) Measures to deal effectively with the findings of risk assessments and impact assessments;¹⁷ from these findings must follow the attribution of responsibility to the relevant management level and the apportionment of decision-making authority, budgets and supervisory functions, so that, as a result, human rights risks are effectively minimised and negative impacts can be prevented (UN Guiding Principle No. 19). Requirements with regard to measures to be taken vary in accordance with whether the company itself directly causes the (potential) human rights impacts or indirectly (co-)causes them due to the consequences of commercial relationships. They also vary in accordance with the company's leverage on the situation or risks.
- (iii) Measures to assess the effectiveness of steps taken to prevent or eliminate negative human rights impacts; these should be based on appropriate quantitative and qualitative indicators and here too internal and external stakeholders should be involved (UN Guiding Principle No. 20).
- (iv) Public communication of human rights risks and corresponding company measures to tackle them (UN Guiding Principle No. 21).

With these requirements the Guiding Principles provide a basis for further refinement at national level. Given the abstract formulations in the Guiding Principles it appears wise to underline a number of key elements of the guidelines on the human rights due diligence obligation: first, companies have to assess human rights risks in all their business activities. This also includes possible indirect involvement in human rights impacts, such as those of business partners or the use of purchased products.¹⁸

17. The definition of *human rights impact assessments* (HRIA) and how they differ from *human rights risk assessments* was much discussed in the context of developing the Guiding Principles. There is no consensus on which procedures can be recognised as HRIA. There is no room here to go into detail on these procedures (on this see, for example, Harrison 2013). However, it seems important to emphasise that a company in any event should first carry out an assessment of human rights risks. The outcome of a risk assessment may require that further procedures are implemented for a deeper impact assessment.

18. In this report we do not go more deeply into the area of product utilisation or the due diligence obligation as a consumer protection matter (on this see De Schutter et al. 2012, Chapter 7).

16. On proposals with regard to substantive elaboration in German law see Part 2, Section 5 of this report.

If there is a risk that human rights might be affected by company activities (directly or indirectly) companies must take further steps. With regard to verification procedures they must, first, besides the risk assessment (ex ante) regularly assess the actual impacts of their activities on human rights (ex ante and ex post). Second, they must take corresponding measures to minimise risks or prevent negative impacts. What measures are to be regarded as adequate in this respect depends on the company, the activity and the context, and on the company's leverage over the situation and what concrete risks or abuses exist. If, for example, a clothing company finds out that its short-notice orders for T-shirts at the same purchase price leads to unpaid overtime for sewers in supply companies the company must use its influence to prevent this negative impact. The specific measures that the company should take – for example, refraining from short-notice orders or renegotiating unit prices with the supplier that contain an appropriate premium for overtime – are left open by the due diligence concept.

Third, in compliance with the third pillar of the Guiding Principles it can be added that companies must establish procedures for the event of negative impacts that allow those affected to lodge a complaint. The procedures must be effective; in other words, they must in fact constitute an adequate means of avoiding the abuse and compensating any damages.¹⁹

The provisions of the Guiding Principles leave a number of important issues open; as a result, there has been heated debate in recent years concerning the political significance, as well as the opportunities and risks to which the corporate due diligence approach has given rise. We shall discuss some key critical aspects of this in what follows, before turning to the consequences and specific approaches to the concept's current policy design process in Section 3.

2.3 Due Diligence: Criticisms and Controversies concerning Policy Elaboration

With the UN Guiding Principles the debate on international human rights and compliance measures in the context of the economy has shifted in the direction of a dis-

ussion of corporate governance (Dhooge 2008; see also Scheper 2015a); in other words, it emphasises the management perspective more strongly than the perspective of bearers of human rights. The establishment of a *legal violation* that is charged and sanctioned is increasingly moving away from the more open, process-oriented issue of the impact of corporate activities that are supposed to be assessed by means of an appropriate procedure and whose negative elements are to be minimised as far as possible (cf. Deva 2013: 96f.). The Guiding Principles thus do not avail themselves of the usual language of the debate on human rights, which is oriented towards obligations and enforceable rights, but rather emphasise issues of corporate performance. This semantic shift is significant because the human rights system as an international law regime is built on a precise linguistic scaffolding. If this is changed there is a risk that the binding entitlement to human rights may be diluted (see Deva 2013: 92f.).

Critics thus assert that with the Ruggie process, on which there is broad agreement, the issue of companies' specific obligations with regard to human rights remains obscure. The UN Guiding Principles offer no detailed interpretation in this regard (see Deva 2013: 88). Instead, they point directly towards international human rights treaties and emphasise that companies in principle must respect *all* human rights. »Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights.« (UN Guiding Principle no. 12, commentary).

Clarification thus remains necessary because mere transposition of intergovernmental human rights agreements to private companies throws up many issues concerning responsibility or imputability and thus material duty of care. Thus in the UN Guiding Principles there is less about legal infringements than, more generally, about the risks and impacts of corporate activities. This suggests that there are certain limitations in which the criterion of severity of human rights impacts is emphasised (cf. UN Guiding Principle No. 14). If companies establish the existence of such severe risks or impacts they must seek to prevent them and, as the case may be, arrange for reparations.

On a case by case basis, however, this gives rise to great legal uncertainty concerning the point at which one can talk of a severe impact, when the company commits a

19. On the criteria of effectiveness with regard to private, extrajudicial complaints mechanisms, see UN Guiding Principle No. 31.

legal violation and what the legal consequences are if these are not – or not completely – avoided. The Guiding Principles leave this grey area open and declare that companies in the first instance have moral obligations, but in the international context for the time being no legal obligations. Accordingly, the consequences of non-compliance are to be tried primarily before »the court of public opinion«:

Failure to meet this responsibility can subject companies to the court of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and occasionally to charges in actual courts.

(OHCHR 2008: § 54)

Deva (2013: 98) elucidates the problem of the lack of precision of the concept of impact in comparison with the legal violation approach by means of a (hypothetical) example: if the company Walmart opened a branch in India this would have a major impact on the lives of many people in the vicinity, for example, consumers, farmers, retailers and suppliers. If, for example, small shop owners in the vicinity had to close their stores the company would incontrovertibly have a considerable negative human rights impact on them. Deva emphasises, however, that he would not consider this to be a legal *violation*. It would be more clear-cut if the staff at the Walmart branch were treated in a degrading manner (for example, through the suppression of freedom of association or unpaid overtime). In both cases the company's actions would have serious negative human rights effects, but only in the second case would there be a clear legal claim on the part of employees (see Deva 2013: 98). At the same time, the opening of the branch would presumably also have positive consequences, for example, if regular jobs were created. Elsewhere, Deva (2012: 103f.) cites the example of the right to the highest attainable standard of physical and mental health. Would companies be violating this right if they provided no health insurance for their employees or if the wages were too low to enable employees to avail themselves of medical care? When is a human rights impact relevant, when is it severe?²⁰ According to what criteria will this be decided? How far must the company go in its response to such impacts?

20. The Guiding Principles refer in various places to the criterion of the *severity* of human rights infringements. The definition of this severity, however, is a major challenge and to date efforts to make it more precise have been unsatisfactory (on this, however, see Tromp forthcoming).

Based on these examples it turns out that the Guiding Principles leave open many fundamental issues. This is the price of a strategy based on broad consensus, whose contents leave controversial issues out of account (cf. Nolan 2013: 161) or take a largely defensive position.²¹

The focus on the impact of corporate activities leads away from the issue of when a company infringes the obligation to heed human rights. In connection with this the question arises of the legal consequences that a violation of the due diligence obligation would have (on this see Michalowski 2013). According to critical voices we can expect that only a few companies will make sufficient efforts to assume responsibility when there are no legal consequences attached (cf. already Addo 1999: 11; Nolan 2013: 161). Many would do so only to the extent that specific measures were also in the company's interest. For a policy framework, however, it would be important to establish guidelines for cases in which there is no vested company interest to conform with human rights. The debate on responsibility on the basis of a social license to operate²² at international level thus remains vague for as long as it avoids the discussion of specific obligations.

At the same time, however, formulating specific obligations, given the high context-dependence of human rights risks and consequences, runs the risk of turning out to be exclusionary and too particular, so that not all relevant cases are covered. Thus human rights themselves tend to be formulated in a correspondingly general manner in international agreements in order to be able to claim validity in the most varied social contexts. For this reason due diligence as a general principle of action should leave open what is required in a specific case. In this way, however, it confers considerable authority on companies, if the general assertions of the Guiding Principles are not further refined.

In view of these concerns about the corporate due diligence approach there is a need for further specification without at the same time formulating an exclusive and

21. One example is the position of the Guiding Principles on the extraterritorial application of state obligations under international law (cf. Augenstein/Kinley 2013).

22. This concept usually refers to the public assent required for corporate activities. It is independent of the law and other legal provisions. The UN Special Representative, too, uses this expression in his paraphrasing of social expectations with regard to companies: »the broader scope of the responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social licence to operate« (OHCHR 2008: § 54).

rigid list of measures. To some extent there has already been further clarification at the international level within the framework of the UN working group on business and human rights.²³ Furthermore, there is a need for policy development in individual areas, but also sector-specific and context or case dependent. These levels have to date not been adequately addressed at international level and cannot be exhaustively dealt with within the framework of the UN working group's mandate, either. Particular challenges in relation to the necessary specification of the corporate due diligence concept include, for example, labour law obligations in the supply chain, including organisation of workers and the possibility of collective bargaining, which, against the background of the General Declaration and the ICESCR, represent²⁴ key human rights issues with regard to the global economy, but are largely excluded from the UN Guiding Principles.²⁵

Critical voices emphasise that the openness of the UN Guiding Principles can be problematic for effective human rights protection. To them, the Guiding Principles must be seen in light of a corporate-based CSR approach that is sceptical about or hostile to regulation (Lopez 2013; cf. Scheper 2015b). Ultimately, this also represents a more general problem for the human rights approach: as a broadly encompassing concept it enjoys almost universal assent. In specific instances, however, its implementation involves fundamental conflicts of interest. They require the participation of rights holders and the constant negotiation of legal interpretations, as well as of the adequacy of measures to comply with these rights. Interpretation of rights can scarcely be standardised top-down by company management. In this sense, it is not merely a matter of effective standard-setting, compliance with rules and guidelines; in other words, approaches that can be organised and delegated as efficiently as possible at the highest level of management.²⁶ Human rights must also be »broken

down« into individual issues. In this respect we have to recognise that the »right« standard – in other words, the threshold between impacts of corporate activities that violate rights and impacts that comply with them – is rarely self-evident and determinable top down. However, this does not make demands in individual instances any less legitimate or relevant. Ultimately, it is important to recall that human rights or their violation in many cases have to be negotiated in individual cases – within the framework of the rule of law this occurs above all by means of case law. Where there are no adequate legal remedies or no rule-of-law institutions, or when risks have to be evaluated in advance, the interpretation of human rights in the relevant context as part of the corporate due diligence concept cannot satisfactorily be performed by the company itself. Precisely this, however, is necessary according to the approach of the Guiding Principles and without corresponding legal or other clarifications. The policy design of the human rights due diligence approach must, on the one hand, further refine which minimum standards may not be fallen short of, but on the other hand, must sometimes deviate from the idea of a universally accepted »correct« behaviour and pose superior issues of participation and political negotiation, conflict management and legal remedies in order that in specific instances rights holders are able to call attention to violations and claim their rights.

Furthermore, the governance approach, which depends strongly on self-responsibility, suffers from a problem with regard to companies' *motivation* because it is above all self-interest – for example, in minimising risks to reputation – and social expectations that are supposed to lead to consistent compliance with the due diligence obligation. The quality of the process implemented to safeguard human rights due diligence depends on the functioning of the »court of public opinion«, which not least would require comprehensive transparency along the global value chain. Far-reaching incentive mechanisms are lacking that would encourage self-interest in comprehensive due diligence processes, in particular when, in individual cases, they run counter to other corporate interests. Often it is very much in the company's own interest to identify and avoid human

23. Officially: »Working Group on the issue of human rights and transnational corporations and other business enterprises«, see OHCHR 2015b.

24. On this see also OHCHR 2008: § 52.

25. The key role of trade unions is first mentioned in the context of the need for complaints mechanisms (Guiding Principle No. 29f.). Overall, rights in the workplace, which in the Social Covenant go far beyond the ILO Core Labour Norms, are not given much emphasis.

26. This is evident, for example, in relation to the debate on fair wages. Demands for subsistence wages in the supply chain are rejected by asserting that there is no agreement on what a fair wage really is. This is a matter for constant negotiation, which can occur only with the participation and self-organisation of workers. There are many other human

rights issues in which a one-size-fits-all approach and the instruments of corporate governance are not enough and what is rather required is empowerment of the affected rights holders by means of information, participation and options for seeking redress.

rights risks, but that is not always the case, far from it. For example, many companies are not visible to consumers in such a way that their reputations might be at risk, which means that they have little incentive to bear the higher cost of implementing human rights due diligence. This applies, for example, to many small and medium-sized enterprises (SMEs), which, as suppliers of large brand name companies, do not themselves serve the markets for end-consumers. However, this is also the case in the electronics industry, in which often the main production stages are not carried out by the famous brand companies themselves, but by enormous contract manufacturers, such as the Taiwanese giant Foxconn. This contract manufacturing has been characterised as »stealth production« (Lüthje et al. 2002) because the actual manufacturers largely remain invisible to consumers. Moreover, in all branches with complex supply chains, such as the textile and clothing industries, even committed brand companies at best reach only the first or second tier in the chain with their efforts at monitoring the supply chain. Large parts of production are not reached, especially areas in which informal labour is widespread.²⁷ In any case, it has to be said that many consumers still take little interest in social and environmental considerations when it comes to purchasing decisions.

More generally, we can say that given the existence of global production networks incentives based on public opinion are fairly constricted because there is insufficient transparency or inducement. Public opinion is also generally dependent on elaborate civil society campaigns to bring abuses to light. However, civil organisations have only limited resources and general monitoring of companies' human rights impact can hardly be expected from them. Public opinion thus does not represent a proper basis for human rights protection. We can conclude from all this that companies' obligations with regard to transparency and disclosure must be extended and corresponding policy design approaches are needed if the due diligence concept is to contribute to human rights protection in the global economy as a basic principle.

A further problem with a strongly company-driven approach in the area of human rights protection is that

there is a certain prioritisation of rights in accordance with the public interest and reputational risk. This leads to more avoidance of certain risks in the company's self-interest (for example, minimisation of child labour in their supply chain – which is a particular threat to a company's reputation), while other human rights risks are less heeded (for example, trade union freedoms in production operations). The same applies to the measures to be implemented when risks are identified.

2.4 Interim Summary: Due Diligence Obligations Require Refinement and Political Incentives

To summarise, it can be observed, first, based on the discussion of the international framework, that the approach based on the corporate human rights due diligence concept dominates the current international debate on business and human rights. It enjoys broad assent in the international community, but requires further refinement as a component of the human rights system. Above all, the definition of due diligence on the basis of international human rights offers inadequate precision for decisions on the material extent of corporate obligations. Furthermore, the motivation of the »court of public opinion« in itself represents insufficient incentive for (many) companies to comply properly with their due diligence obligation.²⁸

The sometimes quite fundamental criticism of the due diligence approach taken in the UN Guiding Principles, which we have presented, suggests that the concept should be accompanied by the requisite political measures in order to ensure that existing regulatory gaps are closed up. If this is achieved by embedding it in national law the due diligence concept is likely to be a very promising approach. On the one hand, this requires further, continuous interpretation and refinement; on the other hand, far-reaching political incentives have to be put in place – also by means of the legal framework – so that comprehensive compliance with the due diligence »pays off« from a corporate standpoint. In other words, there needs to be a positive self-interest or at least that non-compliance with due diligence obligations entail negative consequences with regard to competitiveness.

27. On the increase in informal and precarious employment forms see ILO 2015.

28. On the issue of possible additional incentives in German law see also Part 2 of the present report.

3. Policy Design Approaches in Germany

After the successful adoption of the UN Guiding Principles many countries, both within and outside the OECD, are currently engaged in national application of the UN framework. This involves, first and foremost, defining how the various pillars of the Guiding Principles are to be linked. For example, state measures can be taken to provide companies with incentives and conditions to implement their due diligence processes. The German government should take a lead in this by making information available and offering advice, but also by laying down legal minimum standards. Besides measures to safeguard the state's duty to protect the German government needs to exert leverage on the second and third pillars of the Guiding Principles, if the aim is that a smart mix emerge and existing regulatory gaps be closed up. On the other hand, progressive corporate practices can be taken as models. Companies develop innovative approaches and often make their expertise available so that the second pillar can also have a positive influence on the other areas. In this sense a holistic view of the due diligence concept is needed as part of the more comprehensive approach of the Guiding Principles. In order to create the much talked about level playing field – in other words, equal competition in keeping with effective human rights protection – implementation of the human rights due diligence obligation must be made a general standard. This requires intensive cooperation and coordination between the various institutions and actors.

In principle, the German government is able to support companies with regard to all levels of the responsibility to respect mentioned in the UN Guiding Principles; that is, within the framework of formulating a policy statement, the development of active measures for implementing the due diligence obligation and the provision of complaints mechanisms.

The demand for a **policy statement** – in other words, an explicit commitment to human rights and adequate communication at all levels of the company – can best be supported by developing information and making it available. First, the state can provide the relevant knowledge and guidance in an area that encompasses multi-layered and conflictual issues and in which globally there is a plethora of standards and initiatives. At the same time, the government can in this way communi-

cate to companies what is expected of them with regard to human rights due diligence (see also Part 2, Section 5.1 of this report).

At the second level of **measures to implement due diligence processes** – in particular with regard to risk and impact assessments, as well as appropriate follow-up measures – the state, in cooperation with other actors, can make instruments and guidelines available. That is, here too it can provide guidance in respect of the many existing instruments and formulate its expectations concerning quality and the broad outlines of what they should contain. This should take place in relation to specific sectors and issues, as well as in relation to different sized companies. Companies can also be supported in this area through the promotion of networks and cooperation.

The same also applies with regard to the third level, the **provision of complaints mechanisms**. Here, too, the state can formulate clear expectations concerning companies and criteria for appropriate procedures. On the other hand, it should also make available its own mechanisms to the requisite extent. Primarily, this means creating effective legal remedies for the victims of human rights violations, both domestically and abroad, and eliminating existing obstacles (for more details on this see Germanwatch/Misereor 2014: Chapter 6). It also entails the scrutiny and reform of existing extrajudicial proceedings, especially the National Contact Point (NCP) for the OECD Guidelines with regard to their compliance with the effectiveness criteria of the UN Guiding Principles (see UN Guiding Principle No. 31).

Because there should be no adverse effects for company competitiveness in the case of comprehensive compliance with the due diligence concept the German government can also provide support at all three levels by means of legal guidelines for implementing human rights due diligence, but also by means of economic incentives. In what follows we mention key areas of action for the German government in which the corporate due diligence approach should be taken up and substantively developed. We shall not differentiate between the three levels for individual areas of action because in many instances they have to interlock and interact. Part 2 of the present report elaborates on these areas of action by means of specific proposals for the legal structuring of the due diligence obligation.

3.1 Providing Information on Human Rights

The provision and organisation of information on issues relevant to human rights is a central area of state action. This includes, first, the working out of country-specific know-how; second, the compilation of sector-specific information, for example, on human rights risks and options for dealing with these risks; and third, the development of guidance on specific human rights issues and how abuses are expected to be handled, with reference to the relevant international frameworks and guidelines. Many issues require clarification in this respect beyond international standards, such as the UN Guiding Principles and the OECD Guidelines. Examples of such issues include the question of living wages, effective worker representation in transnational supply chains, complaints mechanisms, health and safety standards or dealing with land rights, to mention only a few. However, the aim should not be to formulate fixed global standards in these areas, but to specify human rights principles for handling specific issues, which in the UN Guiding Principles largely remain confined to a general level of »all human rights«. The German Global Compact Network (DGCN) already does important information, training and advisory work in this respect.²⁹

Linked to the provision of information is the state's formulation of clear expectations with regard to companies. Thus information – for example, on different international standards – should also be evaluated to a certain extent in order to provide guidance and legal certainty in an area that is difficult to navigate globally. A specific step with regard to larger companies could be the formulation of recommendations on human rights due diligence by the government commission on the German Corporate Governance Code.³⁰ However, the prospects of this step are currently not particularly promising, especially because of existing uncertainties concerning liabilities and the criticism sometimes made that the Code in Germany is overloaded (see Part 2, Section 6.2). More suitable here would be branch-specific standards that

should be (further) developed in agreement with branch associations and trade unions, as well as in conformity with the »Sector Guidance« that has already been developed internationally by the OHCHR.

For the purpose of disseminating information abroad the German government can make use of German embassies as contact partners and forums of exchange and consultation on the issue of business and human rights. The advantage of this is that they are accessible to a range of actors – trade unions, civil society, companies – and can make information available. Their social attachés often already have extensive human rights expertise. Furthermore, chambers of commerce can help in disseminating information and providing companies with support.

Furthermore, deeper international cooperation can be used for developing well-founded human rights information by country. The Danish Institute for Human Rights, for example, has for a number of years been developing a country database on specific human rights risks for companies that is freely available on the internet. To date, only a few countries have been included in it, which, on one hand indicates the effort required and, on the other, shows that appropriately well-founded information can be made available. At present it is difficult to evaluate how companies can use this comprehensive information. The German government could, however, support efforts to provide detailed country information, especially through cooperation with the German Institute for Human Rights and other national human rights institutions. The goal ought to be to provide a freely available database with regularly updated human rights information by country that civil society could use, as well as companies. To date, companies have largely had to obtain information of this kind in the market from specialised consultancy firms. Both domestically and abroad an additional information option could be created in this way that could also prove to be a vital source for NGOs, trade unions and human rights lawyers.

Besides general information and further training opportunities the German government could set up help desks to which companies could turn with specific human rights questions. With specific regard to companies operating in conflict areas this would be helpful for offering advice and for putting companies in touch with actors on the ground (embassies, local civil society organisations or trade unions). It is true that various information

29. On this see the DGCN website on the issue of human rights: http://www.globalcompact.de/ressourcen?tid_1=All&title=&Herausgeber=All&term_node_tid_depth=11 (24.8.2015).

30. The German Corporate Governance Code presents important legal regulations for listed companies and also makes recommendations on compliance with international standards and guidelines for good corporate management. Listed companies in Germany have to report on how they tackle the recommendations and which recommendations they have not complied with (see Government Commission on the German Corporate Governance Code 2015).

tools are already available at the level of the OECD³¹ and the EU,³² but the general tools could in this way be supplemented by a specialist consultation option.

The German government and *Länder* could also explicitly demand human rights further training for companies, especially for SMEs. The Federal Ministry of labour and social affairs' initiative Social Responsibility of SMEs (see The Federal Ministry of labour and social affairs 2014), funded by the European Social Fund, could be continued along these lines and include the issue of human rights due diligence obligations. The network of the Global Labour University, supported by the ILO, could also be used for this purpose because it can organise training options on fundamental labour rights for both trade unions and companies.

3.2 Promoting Networks

The establishment and promotion of networks for companies, trade unions, employees and civil society actors could play a key role in the generation and exchange of relevant knowledge, in particular if it strengthens solidarity and participation among employees along the supply chain. In Germany first of all existing forums constitute the point of departure for far-reaching integration of human rights due diligence. Besides the Global Compact Network as a learning and work forum for companies, at the federal level the CSR Forum is an appropriate body for taking up human rights issues systematically. However, it should be ascertained to what extent existing networks need to be supplemented in order to engage better with SMEs and employees or trade unions. Regionally or state organised forums might be suitable for this purpose, as well as efforts to link up with trade union federations or civil society networks in production countries in Europe and abroad. In terms of the human rights due diligence concept transnational networking along the supply chain should be expanded by the CSR Forum and by multi-stakeholder networks backed by the state or civil society. Central to all this must be the provision of effective participation and complaints options for bearers of human rights.

31. For example, the »OECD Due Diligence Guidance for Responsible Supply Chains for Minerals from Conflict Affected and High Risks Areas« (OECD 2013).

32. For example, »My business and human rights. A guide to human rights for small and medium-sized enterprises« (EU Commission 2012).

Accordingly, the federal state should systematically promote the formation and expansion of multistakeholder initiatives (MSI) in all relevant branches. The state can play an active role here by offering guidance with regard to certain minimum standards and good practice with regard to stakeholder participation, but also by helping to fund suitable initiatives. On the other hand, the major difference in quality of existing standards and initiatives indicates that to date certain minimum standards and guidance in the sense of good practices with regard to stakeholder cooperation have been lacking. Particularly if companies have hitherto not been members of relevant initiatives they have to be able to take their bearings from state criteria, just like consumers and contracting authorities.³³ The development of criteria in accordance with which good practice can be assessed by MSI could prove useful for companies that would like to go some way towards meeting their human rights due diligence obligation by joining such initiatives. Stronger state participation of this kind would thus underpin and support the human rights due diligence approach.

The following list provides a number of examples of possible MSI principles. At this point they only serve the purpose of illustration, in order to show the extent to which criteria can be formulated openly and in a process-oriented way in line with human rights principles and standards and nevertheless provide guidance. To that extent they make no claim to completeness.

In terms of the human rights due diligence obligation good MSI practice should contain:

- formulated goals or a code of conduct that addresses all individual issues relevant for members in accordance with the UN Guiding Principles, the International Bill of Human Rights and the ILO core labour standards;
- the aim of including stakeholder groups in the whole production network;

33. The BMZ's Partnership for Sustainable Textiles (*Textilbündnis*) launched in 2014 is definitely a helpful example of such an attempt at multistakeholder cooperation initiated by the state, although it certainly has a lot more room for improvement because it lacks specific timetables for outcome-oriented success criteria in accordance with human rights principles and standards. Similarly, it lacks specific incentives for companies to join the Partnership.

- the establishment of rules on codetermination that encompass at least companies and trade unions (as well as, at least in the medium term, stakeholder groups along the entire supply chain, including employees);
- timetables for planned measures and progress with regard to the members of the network;
- aims and principles for reporting on goal attainment that are outcome-oriented in the sense of implementing human rights; in other words, not primarily looking at the performance of member companies and the measures taken, but rather the state of implementation of fundamental rights in the supply chain.

3.3 Promoting Good Competitive Conditions

The German government can do its bit to ensure that good competitive conditions prevail for companies in Germany; in other words, conditions under which failure to comply with human rights due diligence obligations entails a competitive disadvantage or consistent compliance with due diligence obligations can bring competitive advantages. The aim should be to ensure that the competitiveness of companies that properly comply with their due diligence obligations does not suffer, for example, because competitors are able to charge lower prices because of inhumane production conditions. The German government can, for example, scrutinise the extent to which statutory possibilities for creating competitive conditions that are progressive with regard to human rights are already being exploited and where there is room for improvement. Promoting the further development of a level playing field – in other words, uniform competitive conditions within the German economy – could be graduated in accordance with the size of the company and by sector. This might be achieved, for example, by defining specific minimum standards. For instance, larger listed companies could be obliged to commit themselves to the OECD Guidelines for Multinational Companies and state support and contracts could be made dependent on such a commitment. The commitment to the OECD Guidelines and perhaps other international standards can also represent strong support for the formulation of a policy statement in line with the Guiding Principles because companies can use the comparatively detailed explanations in the OECD Guidelines to develop their own tailor-made

commitment to human rights and communicate it both internally and externally. On this basis the company could establish specific measures for complying with the necessary due diligence obligation.

The aim of such provisions is thus not to suppress companies' own initiatives. Rather they are supposed to help in establishing a minimum standard to ensure that a few companies do not move too far ahead of the rest in their efforts to improve human rights outcomes and thus have to bear costs that might result from this and the risk of damage to their competitiveness because the majority of companies do not take similar measures. More binding human rights guidelines thus serve to create fairer competitive conditions.

In order, accordingly, to promote progressive competitive conditions internationally the German government can work strategically to ensure that social, environmental and human rights minimum standards are included in multi- and bilateral trade agreements and investment protection treaties and can use its influence at the European Commission to bring about corresponding implementation in EU trade agreements. Such opportunities have been the subject of controversy for many years now and constantly encounter political resistance. There is no room here to enter into detail on the debate (on this see Scherrer 1998; Jacob 2010). However, it is important to emphasise that the approach of including corresponding clauses in trade and investment agreements has to date been very much in the background in the current debate on political support for corporate due diligence. It should be given further consideration as an option in this context. The UN Working Group on Business and Human Rights for this purpose proposes more intensive coordination of the implementation of the UN Guiding Principles between trade, investment and financial institutions in the international system (UNHRC 2015: §§ 15–17).

Furthermore, non-OECD countries should also be encouraged to commit themselves to the OECD Guidelines and the development of national action plans for business and human rights. The call for more responsibility with regard to social standards in global supply chains within the framework of the G7 is pointing in the right direction. However, working towards »good« competitive conditions at the global level should not serve as an excuse for refraining from implementing measures in Germany to further promote human rights due diligence.

At the same time, the German government could also provide support for the international working group set up recently by the UN Human Rights Council to work out a binding international law treaty on regulating companies.³⁴ While the German government, together with other OECD states, firmly rejects this initiative with reference to the current processes for implementing the UN Guiding Principles, consideration could certainly be given, besides the current implementation processes – and building on the UN Guiding Principles – to long-term options for binding international regulation. The tenor of the current international debate, which dogmatically opposes negotiations on international-law treaty options, is primarily ideological and hardly constructive. The outcome of such negotiations does not have to be an all-encompassing treaty; rather graduated individual treaties on particular issues are imaginable and could even make more sense (on this see, for example, Hamm et al. 2014). Greater binding force at international level, ideally in selected problem areas, should not be considered an alternative, but rather a long-term complement of current efforts to promote corporate due diligence.

3.4 Economic Incentives and Conditions

Closely linked to the promotion of fairer competitive conditions at national and international level is the creation of consistent incentives and conditions. In what follows we discuss some core areas in which effective support for due diligence obligations is possible by attaching legal conditionalities to economic activity by means of incentives and necessary for implementation of the UN Guiding Principles: public procurement, disclosure requirements for companies on human rights issues, foreign trade promotion and development co-operation.

3.4.1 Public Procurement

Public procurement falls primarily in the area of the state's duty to protect (see UN Guiding Principle No. 5, 6). However, it can also be used to create economic incentives for companies to comply with their human rights due diligence obligation by taking it into consid-

34. »Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights« (UNHRC 2014).

eration as a requirement when awarding contracts. To date, this has been tried primarily in relation to exploitative child labour.³⁵ It could be gradually extended to other human rights issues. The structures for working out the relevant reforms already exist at the Competence Centre for Sustainable Procurement at the Procurement Agency of the Ministry of Internal Affairs, as well as in the Partnership for Sustainable Procurement, to which the federal state, the *Länder* and the municipalities belong. Processes have already been initiated here to develop sustainability criteria in selected areas,³⁶ although they have to be systematically augmented by the human rights due diligence obligation and gradually expanded to other sectors. Such a path would help in working out clear expectations with regard to specific company initiatives and networks (including MSI). For example, membership of selected initiatives that meet defined human rights criteria could serve to indicate to public procurers that the relevant companies were complying with their due diligence obligations. Thus appropriate measures could be taken to deal with the problem of collecting evidence on many individual companies (in particular, SMEs) because MSI can collectively meet the relevant requirements with regard to transparency, control and participation.³⁷

3.4.2 Disclosure Requirements

Because the new EU directive on public procurement³⁸ has to be transposed into German law by March 2016 the human rights dimension should be comprehensively taken into account in this process. According to this directive »social, environmental and innovative criteria are now principles of procurement and on an equal footing with transparency, equal treatment and non-discrimination« (Christian Initiative Romero 2015: 19). This means that public procurement officers have the possibility of including human rights criteria in purchasing decisions or the awarding of contracts. The directive further sim-

35. However, on the legal certainty of the guidelines see Part 2 of this report.

36. The relevant areas are: »electric mobility, standards, resource efficiency, statistics/monitoring, public transport, sustainable building« (Procurement Office of the Federal Ministry of Internal Affairs), see also the State Secretaries' Committee for Sustainable Development 2015.

37. On this see also proposals on the requirement for social audits and auditors, Part 2 of this report.

38. European Parliament/Council of the European Union 2014a: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

plifies this by laying down that a product's manufacturing conditions also count as product characteristics. Hitherto, the latter have referred only to differences in the quality of a product, as a result of which, for example, compliance with labour standards could scarcely be taken into consideration. Furthermore, specific product labels can be required in public tenders. This makes it much easier in procurement to demand compliance with important social and environmental criteria. The burden of proof concerning the comparability of labels then lies with the supplier (Christian Initiative Romero 2015: 20).

As the above discussion of corporate responsibility in accordance with the UN Guiding Principles shows, reporting on measures on compliance with the human rights due diligence obligation as well as their impact are part and parcel of meeting responsibilities. Although many – especially large – companies already report on their CSR activities this has hitherto not been done in accordance with set criteria, and nor have human rights issues been dealt with systematically. To date, as a rule not all essential human rights risks, impacts and concrete measures have been evident in company reports. Legal definition of certain material reporting obligations, graduated in accordance with company size, would strengthen compliance with the human rights due diligence obligation.

The German government can implement this on the basis of the new EU directive on the disclosure of non-financial information of 22 October 2014.³⁹ However, it should interpret this directive within the meaning of the UN Guiding Principles and consistently require that human rights risks and impacts be components of regular company management reports. To that end they must first expand the scope of application to all large companies and proportionately also to SMEs. According to the EU directive only large, so-called public interest entities⁴⁰ have to disclose the relevant non-financial information.

39. European Parliament/Council of the European Union 2014b: Directive 2014/95/EU of the European Parliament and of the Council of October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

40. Falling under this directive are companies that employ at least 500 workers and either have a balance sheet total of 20 million euros or net turnover of at least 40 million euros (Article 19a, 2013/34/EU). Of »public interest« are companies that are listed or whose transferable securities are admitted to trading on a regulated market, as well as credit institutions, insurance undertakings and such companies as are »designated as public-interest entities« (Article 2 Abs. 1, 2013/34/EU).

In addition, the concept of risk, also in connection with business partnerships and products, is to be further refined in relation to the EU directive, so that impacts that are key for relevant stakeholder groups or rights holders are included.⁴¹ Risk must thus be evaluated separately from importance for the company. The scope of reporting can vary considerably by size of company. The EU directive allows the member states a lot of leeway with regard to implementation. If the human rights due diligence concept is to be promoted effectively a comprehensive interpretation is required.⁴² Fundamental principles with regard to human rights reporting have also been worked out at international level in the form of the UN Guiding Principles Reporting Framework, which can offer guidance for companies and refinement of national legislation (see Shift/Mazars 2015). The Global Reporting Initiative (GRI) has also developed human rights indicators for reporting and draws attention to further overlaps of the GRI Reporting Standards with the UN Guiding Principles (GRI 2013: 89). The European Commission will, in addition, issue guidelines with sector-specific performance indicators for non-financial reporting by 2016 (see Art. 2, 2014/95/EU).

3.4.3 Foreign Trade Promotion

In the granting of export credit guarantees and untied loans compliance with the human rights due diligence obligation can be laid down as a fixed criterion for support. Including consistent human rights criteria and active human rights consultancy capacities at the mandatory companies of foreign trade promotion⁴³ could provide a strong incentive for transnational companies. Developments have already been initiated in this area in recent years, in particular within the framework of the international cooperation of export credit agencies within the OECD. For the sake of continuous improvement in particular a complaints option has to be created, for example, through an independent ombudsman for foreign trade promotion projects. It could play an intermediary role in communication between stakeholders abroad

41. This is not yet clear in the EU directive (on this see CorA 2014: pp. 8f.).

42. For details on this see CorA 2014.

43. The »mandataries« of German foreign trade promotion are Euler Hermes AG and PricewaterhouseCoopers AG WPG. On behalf of the German government they award guarantees for export loans, investment loans and so-called untied loans. Decisions on such awards are taken by an interministerial committee under the auspices of the Federal Ministry of the Economy and Energy.

and actors in German foreign trade promotion. If the NCP for the OECD Guidelines is reformed in the manner already referred to, provided with appropriate resources and, above all, becomes institutionally independent, it could take over this function.⁴⁴

3.4.4 Development Policy

By adopting the concept of human rights the Federal Ministry for Economic Cooperation and Development (BMZ) has already taken an important step in the direction of a consistent anchoring of the UN Guiding Principles and thus the promotion of the corporate due diligence obligation in German development policy (see BMZ 2011). Practical guidelines for the implementation of human rights in development cooperation supplements the concept by refining important human rights issues for key areas (see BMZ 2013). It remains to be seen, however, to what extent the Ministry's guidelines have successfully been anchored in all areas of the work of German development agencies.⁴⁵ These could make the relevant endeavours transparent and thus play an important role model for private companies. To promote the due diligence obligation among companies development policy could also build up in particular the human rights approach in cooperation with companies. This includes the establishment and further development of expertise for human rights risk analyses, that could be applied on a country and sector-specific basis via the development agencies' offices in cooperation with companies. In addition, it should be possible to advise companies competently in risk and impact analysis procedures and in the implementation of follow-up measures as a component of development policy cooperation.

The BMZ can also contribute to strengthening the governments of host countries. If the latter also comply with their state duty to protect in relation to foreign companies this can contribute indirectly to supporting companies that already fulfil their human rights due diligence.

44. For more detailed discussion of human rights in foreign trade promotion see Scheper/Feldt 2010; Hamm et al. 2012.

45. The most important organisations that implement development cooperation in partner countries on behalf of the state are, in the area of financial cooperation, the development bank Kreditanstalt für Wiederaufbau (KfW) and its affiliate, the Deutsche Investitions- und Entwicklungsgesellschaft (German Investment and Development Company – DEG), as well as, in the area of technical cooperation, the Gesellschaft für Internationale Zusammenarbeit (Society for International Cooperation – GIZ).

In a first step, partner countries should be advised and supported in working out their own national action plans for implementing the UN Guiding Principles.

Furthermore, foreign representations – in particular embassies, but also chambers of foreign trade – can draw attention to the problematic practices of German investors or private development organisations and pass the information on to government ministries (see von Bernstorff 2010; Hamm et al. 2014: 51). A central coordination office within the ministerial administration would also make sense here (see von Bernstorff 2010).

3.5 The Role of Trade Unions and the ILO

While so far this section has dealt with various fields of action in which the German government can support companies' human rights due diligence, we shall now address the role of trade unions, which are fundamental to successfully exercising human rights due diligence. In the debate on business and human rights, however, they have largely been neglected up to now. For example, trade unions are mentioned as actors in the UN framework explicitly only in the context of complaints mechanisms (see UN Guiding Principles 29 and 30). However, trade union freedoms are not only necessary so that complaints about other human rights violations can be made, but they are themselves recognised internationally as human rights. Trade unions, with their national and international federations, should thus play a key role in promoting corporate human rights due diligence obligations. In this context they can take up company commitments to human rights systematically and, with the involvement of employees along the supply chain, demand that they be honoured. To date, only a few trade union federations in Germany have been active in the debate on the corporate human rights due diligence concept. International engagement has been confined so far largely to International Framework Agreements (IFAs) and Global Framework Agreements (GFAs).⁴⁶ IFAs represent innovative agreements between international trade union federations and top managements on global minimum standards. They can make an important contribution because they can disseminate the agreed standards through company and works councils structures throughout the

46. In addition, international campaigns have been conducted, for example, on World Day for Decent Work (ITUC 2014).

world. However, the top-down approach of IFAs is very controversial. Agreements can, on one hand, strengthen the transnational capabilities of trade unions and the role of international trade union federations, but on the other hand, they run the risk of reproducing existing hierarchies in company structures and restricting trade union capabilities in production networks if they pass on the pressure and responsibility for implementing minimum standards »from above to below« in the supply chain (on this see Fichter et al. 2011: 89). The real contribution of IFAs in the implementation of rights at work in production countries must therefore be examined more closely. The goal should be primarily to empower the workforce to organise along global supply chains.

Also within the framework of MSI, trade unions can contribute to the development of appropriate standards for employee participation along the supply chain, demand that attention be given to trade union issues and promote transnational networking between employee representatives along the supply chain. International trade union federations or networks along the supply chain must play an increasingly important role in the ongoing negotiation of fundamental rights at work. The latter must always be specified for particular contexts on the basis of international human rights agreements and the UN Guiding Principles, in particular for the imperative of decent wages (see Scheper/ Menge 2013).

At the international level we can also postulate a comparably important role for the International Labour Organization (ILO) with regard to the implementation of the UN Guiding Principles. Through cooperation with governments, companies and trade unions, and its expertise in questions of technical cooperation, the ILO can advance the implementation of rights at work and perform important supervisory functions (UNHRC 2015: § 14).

Against the background of coherent interaction between international institutions in the areas of trade, investment, finance and labour the UN working group on business and human rights thus proposes an agreement on implementing the UN Guiding Principles within the framework of joint round tables on CSR of the United Nations Conference on Trade and Development (UNCTAD), the ILO and the OECD. For states, the conference can represent an unbureaucratic option for coordination with these institutions (»one-stop shop«, UNHRC 2015: § 27).

4. Summary

Corporate human rights due diligence has taken on an important role in the international human rights regime since the adoption of the UN Guiding Principles on business and human rights. Achieving the declared goal with human rights due diligence and making up for existing regulatory defects have so far suffered from the failure to specify the concrete obligations that go hand in hand with it. Furthermore, for many companies there have so far been only inadequate economic incentives for comprehensive implementation of due diligence, including the obligations to disclose risks, measures taken and their impacts. Similarly, there are no clear sanctions if companies fail to meet their due diligence obligations. Against this background, in Section 3 selected areas of action for the German government were discussed: public procurement, disclosure requirements for companies, foreign trade promotion and development policy.

Overall, the engagement with these issues shows that the quality and functionality of the concept of human rights due diligence depends strongly on specific political arrangements: is it adequately specified and accompanied by legal conditions and incentives; can it make a decisive contribution to human rights protection? If its design in this form is lacking the human rights due diligence concept threatens to remain a weak instrument that functions rather to legitimise transnational companies than to strengthen the rights of stakeholders in the context of global value chains. The current process of working out national action plans for business and human rights in Germany and many other countries can thus lay important groundwork for the human rights regime. If they use the potential offered by the policy elaboration of the concept of a due diligence obligation an intelligent mix could emerge for better regulation of the activities of transnational companies, that could both make use of corporate self-interest with regard to social responsibility and better ensure that state human rights obligations are met. These efforts are also necessary, however, because on their own the UN Guiding Principles remain a weak instrument that does not close up any existing regulatory gaps. The interpretation and policy design of the concept of a due diligence obligation can thus go a long way towards setting a course in the currently dominant trend of soft law as an approach to international politics. The concept must be shaped in such a way that the »soft« approach, despite the lack of binding force



under international law, can be effective – through legal foundations and international coherence – by gradually bringing about genuine minimum standards in the global economy and really extending the range of options for

rights holders to claim their internationally agreed rights. In Part 2 of this report an attempt is made to further refine due diligence by formulating proposals for its legal implementation in Germany.

Part 2: Options for Elaborating Corporate Human Rights Due Diligence Obligations in German Law

Robert Grabosch

1. Introduction and Foundations of Due Diligence Obligations

In the context of developing the UN Guiding Principles corporate due diligence was recognised as key to the prevention of human rights abuses.⁴⁸ A corresponding legal implementation of due diligence obligations is held to be a highly promising means of preventing and providing redress for human rights abuses.⁴⁹ These due diligence obligations are generally understood to entail requirements that a member of an occupational category must fulfil in a specific situation in order to counteract violations of the legally protected interests of third parties. Exactly what kind of behaviour the legal system expects shall be determined either in accordance with standardised legal criteria or in consideration of the probability and scope of the damage, as well as the cost of prevention. Due diligence obligations identify the extent to which someone is liable for damages, even though he or she did not infringe the law intentionally, but only through negligent conduct.

When the legislator adopted the Civil Code at the end of the nineteenth century it summed up in a single phrase that people have to take into account the interests of others when their behaviour or things belonging to them can have an impact on others: »A person acts negligently if he fails to exercise reasonable care.«⁵⁰ The details have always been left to case law. Again and again, this has had to deal with potential hazards emerging from corporate activities and even tighten up the law as a result of the fact that growing companies usually have a complex structure and are more difficult to manage. Attempts since the 1990s to achieve judicial clarification

of the due diligence obligations with regard to human rights in respect of companies operating internationally have to date been largely unsuccessful. European companies, too, are frequently brought before courts in the United States, increasingly in Europe and recently even in Germany,⁵¹ accused of violating an obligation to perform due diligence in relation to human rights. However, these proceedings have almost never ended with meaningful decisions. German civil courts have hitherto had little opportunity to tackle such issues because access to the law is hindered by particular obstacles.⁵²

Meanwhile, the cases of catastrophe are piling up and the bosses of German companies, too, are increasingly facing the issue of whether they have to comply with due diligence obligations in relation to human rights abroad at all and what requirements these obligations might impose on their behaviour. Because of its international dimension the problem is difficult to grasp. Under the Rome II Regulation, from 2009, cases of damage, apart from instances of environmental damage, are no longer generally decided under German law, even if the defendant company has its seat in Germany and makes its business decisions there. Instead, the law of the place where the damage occurred applies. Although the Regulation names three relevant exceptions, in which German law shall continue to apply or at least be taken into account, the significance of these exclusionary rules and which provisions of German law come under them has yet to be finally clarified.⁵³

Apart from the legal imponderables, in practical terms the multitude of different experiences and recommendations with regard to due diligence measures can rapidly become unmanageable. Compliance structures have already been set up in all medium-sized and large companies and serve to ensure that all applicable laws are

47. The author would like to thank Katharina Heinzmann, lawyer, Julie Schindall and Dr. Patrick Kroker, lawyer, for their valuable remarks and help with regard to this study.

48. UN Guiding Principles Nos. 17–21 on *due diligence* in relation to the issue of human rights, see Christian Scheper's remarks, Part 1, 2.2.

49. On the compatibility of European Principles of Tort Law (EPTL) with corporate human rights due diligence obligations, see Mares 2009: 1180f.; cf. Enneking 2014: 52.

50. § 276 para. 2 BGB.

51. Fabrikbrand in Pakistan: Opfer verklagen KiK in Deutschland [Factory fire in Pakistan: victims sue KiK in Germany], FAZ, 13.3.2015, available at: www.faz.net/gqg/80xwb (accessed on 8.6.2015).

52. Germanwatch/Misereor 2014: 98 ff.

53. See 3.3 below.

complied with throughout the company. On the legal side companies are already being advised to set up compliance systems also in relation to possible infringements of human rights.⁵⁴ The numerous extra-legal frameworks of so-called soft law include a multitude of recommendations for dealing with human rights, adapted to the relevant regional context of an economic sector and the concrete situation and can provide companies with support in the exercise of human rights due diligence. These recommendations are comparable to the already widespread compliance tasks. The compliance systems of different companies have common features, although they also vary by branch, size and specific area of business.

The management of every company thus faces considerable challenges when they try to identify the legal framework of their projects and to determine which measures will work in practice. Under competitive pressure it is becoming more and more difficult to make costly changes. Thus at the end of the day violating human rights and the very low risk of legal action are often not acknowledged or taken on board. This would no longer be possible if it was legally clarified that human rights due diligence obligations extend to international states of affairs, which substantive requirements – at a minimum – have to be fulfilled in the exercise of due diligence and how measures can be distinguished by branch, company size and context of business operations.

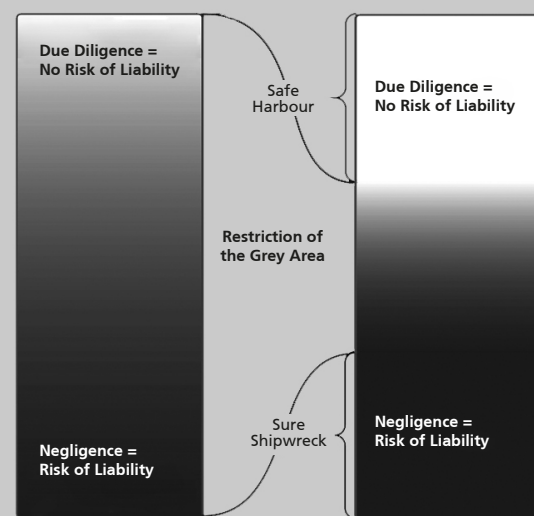
Given the current uncertain framework companies thus take more or less sound and prudent measures. Their room to manoeuvre is extremely wide. Because of the multitude of economic activities and global contexts an exhaustive and, at the same time, uniform regulation of the due diligence obligation would inevitably go too far or fall short. It would be better to allow legal grey areas in the case of complex states of affairs to be narrowed down »from above and below« and by means of regulations that according to Morse can be designated »safe harbours« and »sure shipwrecks«.⁵⁵ A »safe harbour« is a rule on compliance with which the obligated party is protected from any sanction, whereas a »sure shipwreck« will as a rule lead to a sanction. For example, as a sure shipwreck a reverse onus clause could be introduced to

54. Kasolowsky/Voland 2014: 392; Kroker 2015: 120; Spießhofer 2014a: 2473.

55. Morse 2016 (forthcoming).

Grey Areas of Due Diligence Obligations

Given the multitude of economic branches and modern global business relations companies hitherto have been unable to clearly evaluate (i) the extent to which a particular state's law is authoritative, (ii) whether the due diligence obligations to be derived from this law also apply in international business dealings and (iii) what substantive requirements the due diligence obligations impose. According to Morse legal grey areas of this kind can be restricted by regulations of so-called »safe harbours« and »sure shipwrecks«.



Source: Author's presentation.

the disadvantage of the company: if a company, for example, has not established a due diligence concept with certain minimum requirements the presumption would be that it is to blame for any damages that may ensue; unless the court is convinced that the specific damage would have happened in any case – that is, that it would not have been prevented by the due diligence concept – then the company would have to pay damages. In addition, an incentive to even higher due diligence could be established by releasing companies from accusations of fault to the extent that they have taken on board certain best practice suggestions. The risk of liability in the grey area in between would remain a matter for judicial assessment in accordance with the circumstances of the individual case.

In what follows first of all international and constitutional law frameworks for the implementation of due diligence obligations and existing due diligence obligations

in German law are presented. Developments abroad are then considered. This is followed by proposals for substantive implementations of due diligence obligations, as well as a final proposed formulation for legal reorganisation and a summary.

2. International and Constitutional Law Provisions

First of all, the legal frameworks will be presented that the legislator has to take into account in any implementation of due diligence obligations. On one hand, this concerns the international law obligation to protect against human rights abuses by private actors (duty to protect); although its existence is today generally recognised⁵⁶ its extraterritorial scope has not yet been exhaustively clarified. On the other hand, at the level of the German Basic Law, constitutional provisions have to be taken into consideration, namely the principle of legal certainty and the proportionality of encroachments on basic rights. For reasons of space, world trade law frameworks will be dealt with elsewhere.⁵⁷

2.1 State Duty to Protect Human Rights and Its Extraterritorial Scope

Whether the Federal Republic of Germany is obliged under international law to take measures to protect people abroad against abuses by German companies is a controversial issue.⁵⁸ The UN Guiding Principles say about this only that international law in any case recognises neither a general requirement nor a general prohibition.⁵⁹

Forty international law experts addressed this issue more precisely in 2011 in the Maastricht Principles.⁶⁰ The experts assumed that the three fundamental types of obligation for states in human rights protection – that is, the obligation to respect, protect and ensure human rights – apply both on a country's own sovereign terri-

tory and extraterritorially.⁶¹ With regard to transnational companies they postulated a duty to act on the part of the home country if the company has its centre of activities in the relevant state, is registered or domiciled there or engages in substantial business activities there. Increasingly, such an extraterritorial duty to protect is also recognised by international bodies.⁶²

In German jurisprudence this development is supported. Sometimes there is some differentiation: according to Wiese, a duty of states to act worldwide to protect human rights can be derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁶³ Furthermore, some agreements contain the explicit obligation to support the other signatory states in implementing human rights protection: for example, ILO Convention No. 182 against exploitative child labour and ILO Convention No. 29 on forced labour.⁶⁴ Krajewski and von Bernstorff go even further: the duty of international cooperation that is inherent in all human rights guarantees entails an extraterritorial duty to protect⁶⁵ or even makes the issue of extraterritoriality renders obsolete.⁶⁶ According to Windfuhr, extraterritorial duties of states continue to depend on the issue of how far the Federal Republic exercises »effective control« over the company; this issue requires clarification.⁶⁷

In respect of civil law this question of »effective control« would now seem to have been clarified. The Federal Court of Justice (BGH) ruled in 2009 that German courts could rule on companies based outside the country with regard to actions taken in their foreign establishments and may enforce the judgment by threatening coercive measures, such as an administrative fine.⁶⁸ The enforce-

56. Kälin/Künzli 2013: 103.

57. Cleveland 2002; Cottier 2002; Konstantinov 2009; Petersmann 2001; Weber/Weber 2008: 904 ff.

58. Kälin/Künzli 2013: 157.

59. UN Guiding Principle No. 2.

60. Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.

61. Windfuhr 2012: 114; the scope of extraterritorial obligations are described in Nos. 8–18, in particular No. 9 (a) and (b), No. 24.

62. Committee on the Rights of the Child, General comment No. 16 (2013) on state obligations regarding the impact of the business sector on children's rights, CRC/C/GC/16, (17.4.2013), para. 43.

63. Wiese 2015: 99.

64. Ibid.: 99.

65. von Bernstorff 2011: 34.

66. Krajewski 2014a: 723, therefore regards corresponding measures (specifically prohibitions on tombstones produced by exploitative child labour) as contributions to the joint action of the international community against human rights abuses, so that there can be no question of extraterritoriality.

67. Windfuhr 2012: 115; probably for this reason the Maastricht Principles cautiously use the auxiliary verb »should« rather than »must« in relation to extraterritorial state duties.

68. BGH, judgment of 13.8.2009 – I ZB 43/08: The Essen regional court ordered the defendant to allow access to an auditor appointed by the

ment effects – for example, the attachment of balances in German bank accounts – are, of course, restricted to Germany because the judgment is only binding on domestic courts and enforcement agencies. This does not therefore infringe the sovereignty of foreign states.⁶⁹

The legal literature continues to share the view of the Federal Court of Justice (BGH).⁷⁰ The Basic Law, too, does not command a restriction of the validity of German legal provisions on German territory, but leaves the regulation of territorial validity to the legislator and legal interpretation by the courts.⁷¹ It is thus unproblematic from an international law standpoint that German courts may order, under threat of coercion, that a German company take measures of prevention or indemnification abroad. It also makes no difference whether German authorities or courts make this order, or whether it is based on private law or, for example, public commercial law. These powers result from the sovereignty of the German state.⁷² The sovereignty of other states is not affected. They remain free to disregard German laws, administrative orders and court judgments.

The extraterritorial reach of German civil courts is thus already given and recognised since 2009 at the latest; it did not have to be created in the wake of the new human rights due diligence obligations of German companies.⁷³

If one pursues further the emerging *international* law literature, which recognises an extraterritorial duty to protect to the extent of the sovereignty of the German state, together with the *procedural* law case law and literature, one comes to the following result: the German state must regulate the foreign activities of German companies by means of laws, administrative acts and court judgments to protect human rights, but it may apply judicial or administrative force only on German sovereign territory.

plaintiff to its office abroad for the purpose of preparing a statement of accounts, and for enforcement of this judgment threatened an administrative fine of 100 000 euros as well as imprisonment. See also BGH, judgment of 14.2.2008 – III ZR 145/07, recital 12.

69. BGH, judgment of 14.2.2008 – III ZR 145/07, recital 15 and 18.

70. Grothaus 2010; Remien 1992; Eichel 2013: 146; Geimer in Zöller 2014: IZPR recital 36.

71. Walter in Isensee/Kirchhof 2013: § 237: Anwendung deutschen Rechts im Ausland [Application of German law abroad], recital 47.

72. Ibid. recital 11.

73. SpieBhofer 2014a: 2479, but without going into the developments presented above.

Although this international law *duty* to protect foreign persons who might be affected by means of measures within German sovereign territory is not generally recognised, German state organs are *permitted* to enact laws, administrative acts and court judgments that bind companies established in German sovereign territory to respect human rights worldwide in their economic activities. Laws designed for application to foreign matters are not rare. By way of example one might mention here, as an instrument of human rights protection, the international criminal code (VStGB).⁷⁴

Sovereign measures with international effects are occasionally scrutinised with regard to their motivation and subject to the reproach of »legal cultural imperialism«. ⁷⁵ However, the present study is primarily concerned with human rights that are recognised by most of the international community. The relevant treaties are also frequently ratified by developing countries in which cases of human rights abuse occur. To that extent, this is not a matter of interference in the affairs of others, but rather cooperation aimed at jointly carrying out duties under international law.

2.2 Principle of Legal Certainty

The principle of legal certainty⁷⁶ compels the legislator to frame provisions clearly, so that the legal situation for the addressee of a given norm is evident and enables them to govern their behaviour accordingly.⁷⁷ It is often argued against the call for liability rules for human rights abuses that they would result in particularly incalculable burdens for companies⁷⁸ and as a result the relevant laws could be unconstitutional because they violate the principle of legal certainty. The question is thus how high the requirements should be with regard to laws to establish certainty.

The requirements with regard to level of certainty vary depending on the area of law and surveyability of the

74. § 1 VStGB (universal jurisdiction); in anti-corruption law see the UK Anti-Bribery Act, and the US Foreign Corrupt Practices Act.

75. Howard-Hassmann 2005: 39. On the concept of »legal cultural imperialism« see Kischel 2015: 51 ff. Suspicions of »North–South chauvinism« are also entertained.

76. Also: principle of clarity and determinateness of provisions.

77. BVerfG, judgment of 26.7.2005 – 1 BvR 782/94, at C.I.3.a; Sodan/Ziekow 2014: § 7, recital 37.

78. See remarks in Part 1 of this study, section 2.3.

life circumstances to be regulated. The Federal Constitutional Court requires that the legislator »frame its provisions as specifically as possible in keeping with the nature of the life circumstances to be regulated considering the normative purpose«.79 The more intensively a norm impinges on the basic rights of the addressee (see 2.3 below) the higher should be the requirements with regard to certainty.80

A norm is not to be considered uncertain merely because it requires interpretation. As long as it is *capable* of interpretation – in other words, its regulatory content can be ascertained by means of conventional interpretive methods – the legal situation remains recognisable.81 It is not necessary in principle that the addressee of the norm be able to understand the provision, without seeking advice from a legal expert.82 The use of so-called uncertain legal concepts with regard to what constitutes a norm, as well as the exercise of discretion on behalf of the authorities, with regard to legal consequences, thus do not encounter concerns as long as the meaning of the legal concepts is understandable when all materials and experiences from business practice and juridical practice are taken into account.83

The term »Due Diligence-Prozesse« [sic] in the German version of the European accounting directive,84 for example, is not defined there; it becomes clear, however, in the context of UN Guiding Principle No. 15 (b), that it concerns procedures by means of which companies exercise due diligence with regard to the human rights concerns of third parties. Furthermore, at first glance many, if not all of the 190 ILO Conventions are formulated in so abstract a way that their meaning does not appear certain without specification by the national legislator. Zimmer, meanwhile, has demonstrated that the ILO has conferred considerable clarity on its conventions by means of the adjudication practice of its expert committees.85

The principle of legal certainty thus predominantly plays a role if authorities exercise state power against citizens or companies, that is, in the area of administrative law and particularly criminal law.86 Thus laws have to restrict measures taken by the authorities in accordance with contents, purpose and scope and – if the authorities are acting to protect a third party – to specify their mandate to protect in more detail.87 If the interests of many individual people are only marginally affected, but as a result in the aggregate a perhaps undue pecuniary advantage arises for the company, the multitude of interests must also find expression in the norm so that it enables an appropriate balance of interests in the decision-making of the authorities.88 These provisions are in the present case thus to be taken into account in particular when, for example, the regulatory authorities (trade offices) are supposed to impose requirements or even fines on companies in order to ensure satisfactory quality of due diligence concepts or to prevent certain business actions. Legal requirements or prohibitions in public commercial law or municipal statutes also have to measure up to the principle of legal certainty. Thus the regulation in a municipal statute on cemeteries according to which only those gravestones may be erected whose production »verifiably« did not involve exploitative child labour throughout the entire supply chain within the meaning of ILO Convention No. 182 violates the certainty principle if, for those affected by the norm, it is not evident in advance what kind of evidence counts as proof.89

By contrast, civil law is relatively tolerant of uncertain norms. It does not regulate the exercise of sovereign state authority but is concerned with legal reconciliation of the interests of private actors among themselves. Overall, but in particular in private law, laws rarely violate the principle of legal certainty.90 Naturally, all actors have an interest in having laws formulated as clearly as possi-

79. BVerfGE 78, 205, 212.

80. Sodan/Ziekow 2014: § 7, recital 37, with further references.

81. Ibid.: § 7, recital 38.

82. Sachs 2014: Art. 20, recital 129.

83. Cf. Sodan/Ziekow 2014: § 7, recital 38.

84. Art. 19a para. 1 p. 1 lit. b, Directive 2013/34/EU of 26.6.2013, amended by Directive 2014/95/EU of 22.10.2014 (CSR reporting obligations directive).

85. Zimmer 2013.

86. Sodan/Ziekow 2014: § 7, recital 37; for a critical view of the justification of a criminal charge by means of the UN Guiding Principles: Voland 2015: 73.

87. BVerfG, judgment of 26.7.2005 – 1 BvR 782/94, at C.1.3.a.

88. BVerfG, judgment of 26.7.2005 – 1 BvR 782/94, at C.1.2.b.(2)(d), with regard to the regulatory approval of the transfer of profit participation claims of policyholders between insurance companies.

89. BVerfG, judgment of 16.10.2013 – 8 CN 1.12; Kößler/Saage-Maaß 2014; Krajewski 2014a: 721.

90. Sodan and Ziekow observe that the Federal Constitutional Court has »hitherto only seldom« established violations of the principle of legal certainty, in respect of which in recent times with regard to laws that restrict civil rights a different tendency can be discerned, Sodan/Ziekow 2014: § 7, recital 40.

ble, given the complexity of the relevant circumstances. In any case, any remaining scope for interpretation is usually only at first glance difficult to deal with for those addressed by the norm.

On the one hand, uncertain laws are generally linked to the development of more concrete guidelines by jurisprudence, consultation practice, industry initiatives or ministries. This development can also be observed in other areas of the due diligence, namely due diligence in the case of company transactions⁹¹ and compliance.⁹² At most in the area of investor protection the legislator has already issued more precise guidelines on compliance. But here, too, it left the details to the executive. This, in turn, grouped all the minimum requirements together into a kind of compendium and in doing so expressly used »opening clauses« in order to enable a simplified, proportionate implementation of compliance »regardless of the size of the company, the business focus and the risk situation«.⁹³ The development of the UN Guiding Principles on business and human rights also featured a phase of clarification and specification of the meaning of »due diligence«.⁹⁴ Measures that companies are already taking to exercise due diligence can in many instances be transferred to human rights concerns (for details on this, see Section 5).

On the other hand, it must be noted that the introduction of rather vague liability regulations and reversals of the burden of proof in complex, hitherto intractable contexts represents an incentive to develop knowledge of risk;⁹⁵

matters that at first seem to be difficult to cope with appear more manageable after new laws have come into force. This could also be observed during the implementation of the Dodd-Frank Act.⁹⁶

All in all, the requirements of certainty should not be overestimated. Especially in the area of private law it is enough that the norm addressees can infer the meaning of provisions by consulting legal council and research on case law and recommendations of committees and organisations.

2.3 Proportionality of Encroachments on Basic Rights

If laws or administrative measures interfere with basic rights they must be in line with the principle of proportionality. One might consider, first, interference in freedom of occupation (Art. 12 para. 1 Basic Law). Due diligence obligations, liability regulations and, for example, fines would require or forbid business owners and managers from behaving in certain ways. These rules of professional practice, however, are – in contrast to professional licensing rules – justified by considerations that have far less import than the question of human rights.

Interference in property law (Art. 14 para 1 GG) does not come into consideration because the contents of constitutionally protected law on property under Art. 14 para 1 sentence 2 GG is shaped only by the laws themselves, including the due diligence law that has yet to be created.

3. Existing Due Diligence Obligations in German Law

Due diligence obligations can be found in different legal areas. What they have in common is that a law does not link a sanction to the existence of an injury but only lets it arise if those against whom claims are being asserted have not complied with requirements concerning good conduct. In this way the due diligence (direct liability) differs from strict liability and from the piercing of the corporate veil. In those two cases of liability any objec-

91. The concept of *due diligence* derives from the domain of company transactions. It concerns a procedure in which the buyer scrutinises the company to be purchased in terms of all relevant legal, tax, economic and other risks.

92. The law only indicates that the company management has a duty of compliance, cf. §§ 76 and 93 para. 1 AktG. The particular contents have been well articulated in the literature, see, for example, the Compliance checklist of Arnhold/Rohner in Gummert 2015: § 3 recital 58. Cf. also § 58 para. 3 Medicines Act, by means of which the Bundestag empowered the BMELV to »lay down due diligence obligations of pet owners in order to reduce the spread of antimicrobial agents.«

93. § 33 Securities Trading Act; Circular of the Federal Financial Supervisory Authority of 7.6.2010: »Minimum requirements concerning the compliance function and other duties of conduct, organisation and transparency«; see in particular AT [general part] 3.2 on the proportionality principle.

94. The German Global Compact Network helps companies to approach this issues among other things with online tools and webinars. See also as a guide: German Global Compact Network et al. 2012. For application of the UN Guiding Principles in companies in three sectors the European Commission had branch guidelines developed, see: www.ihrb.org/publications/reports/ec-sector-guides/ (25.8.2015).

95. Spindler 2008: 304f.

96. See below, p. 77. Before the adoption of the law it was often believed to be impossible to trace the whole supply chain of conflict minerals.

tion on the part of the person against whom claims are being asserted that he or she has done everything possible to prevent the damage will not be heard.

In what follows, by way of example, due diligence obligations in different legal areas are presented. It will be important in this connection under what hazardous circumstances the legal system places expectations on the relevant actors and what behaviour is expected of them. The focus of the presentation will be private-law due diligence.

3.1 Administrative Law

Administrative law regulates legal relationships between citizens and companies, on one hand, and state organs, on the other. It regulates when the state can interfere in the affairs of private actors, for example by means of prohibitions, orders or fines, and what duties and rights they have in relation to the state.

Public commercial law – an area of administrative law – serves to guard against dangers that may occur in connection with commercial activities. Numerous special laws impose requirements with regard to acting with due care on business people.

If, for example, dangerous goods are to be transported outside German territory on sea-going vessels the law prescribes a series of measures that have to be taken. Among other things, certification from certain authorities is required and training should have been conducted, monitoring and proper equipment for personnel safeguarded and apart from that all required arrangements should be made in line with the nature and scope of the foreseeable dangers.⁹⁷

For some activities the legislator has laid down the obligation to develop due diligence concepts: the »social concept« (*Sozialkonzept*) to be established by operators of gambling casinos has to counter the dangers of gambling addiction arising from gambling and present measures appropriate for this purpose with regard to averting or remedying danger. The company must, for example, appoint a representative for the development

97. Ordinance on the Transport of Dangerous Goods by Sea (GGVSee), See in particular § 3 para. 2 (certification), § 4 (general safety obligations), § 8 (required documentation) and § 10 (administrative offenses).

of the social concept, produce regular reports for the authorities, train personnel in early identification of gambling addiction and establish a nationwide uniform advice hotline.⁹⁸

The obligation to develop due diligence concepts and to establish the responsibility of a special representative is also current in the area of data protection.⁹⁹

In German and foreign environmental law due diligence obligations are known under the term »precautionary principle«. ¹⁰⁰ Anyone dealing with, for example, genetically altered organisms has to nominate a safety representative and undertake a comprehensive risk assessment before commissioning plants and putting the organisms on the market.¹⁰¹

To combat money laundering the law obliges companies, as early as the initiation of transactions, to make enquiries about the identity and trustworthiness of business partners and to continually monitor the business relationship. The company can entrust a third party with fulfilment of these due diligence only within the limits of the law. It must also appoint its own money laundering representative, set up customer-related security systems and controls, train employees and scrutinise their reliability.¹⁰²

This by no means exhaustive presentation already shows that the legislator, even in areas that are not generally counted as part of the core domain of human rights, sometimes imposes very detailed requirements with regard to due diligence. In addition, already at this juncture there are parallels with the recommendations of the UN Guiding Principles: examples include in particular the drawing up of a policy commitment and the establishment of due diligence processes (UN Guiding Principle No. 15 lit. a and b) and risk assessment (UN Guiding Principle No. 18) (cf. Section 2.2, Part 1 of this study).

98. § 6 Glücksspielstaatsvertrag der Länder (State Treaty on Gambling) and its Annex.

99. § 13 Telemedia Act (Privacy Statement); § 4 f. Federal Data Protection Act (Data protection representative).

100. Werner 2001: 335. On the *precautionary principle* at the interface between human rights and environmental law, see Cook 2002: 210 and 215.

101. § 6 para 1 and 4 Genetic Engineering Law.

102. §§ 3, 7 and 9 of the Law on tracing profits from serious criminal activities (Money laundering law).

3.2 Criminal Law and Law on Regulatory Offences

The violation of a due diligence can trigger regulatory or even criminal liability if a law expressly provides for this. The condition is that the breach of duty was foreseeable and avoidable and the unlawfulness of the conduct could have been recognised.¹⁰³

The due diligence can arise from legal norms, contractual or occupational obligations or previous conduct. The nature and scope of the applicable due diligence with regard to the foreign object of legal protection are determined, in accordance with consistent case law, by the requirements that, on objective consideration of the hazardous situation, can be placed on a conscientious and prudent person in the specific situation and social role of the agent.¹⁰⁴

Individual Due Diligence Obligations

The due diligence obligations is most relevant in economic life is the duty of supervision in accordance with § 130 OWiG (Gesetz über Ordnungswidrigkeiten – Code of Regulatory Offences). Under this provision the omission of »supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner« can lead to a prosecution for regulatory offences »in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision«.

Violation of the duty of supervision can also give rise to criminal liability, namely if the person in question is subject to the guarantor's obligation of the principal to prevent offences in the interest of external third parties. A guarantor's obligation can arise from the position of company owner or higher management to prevent offences by subordinate employees connected to the company's activities.¹⁰⁵ This duty also frequently affects people who have assumed the obligation in relation to the company management to prevent legal violations and, in

particular, offences (»compliance officer«). Thus in 2009 the Federal Court of Justice convicted an employee of the city cleaning company Berliner Stadtreinigung as an accessory to fraud. The employee had detected errors in street cleaning invoices and had obeyed the instruction of a member of the board to conceal the errors. As head of the legal department and internal audit he had, according to the BGH, assumed the function of notifying board members or the supervisory board in such instances.¹⁰⁶

The guarantor's obligation is restricted here to preventing company-related offences. That means offences that are committed while utilising the actual and legal potentialities of the firm, for example, corruption offences, infringements of competition or breaches of trust. Not covered are acts committed by employees merely on the occasion of their activities in the company.

The extent to which human rights violations in the supply chain can also become relevant within the framework of the abovementioned duty of supervision has hitherto been discussed only rarely. It is proposed to use the recommendations of the UN Guiding Principles with regard to human rights due diligence as benchmarks to specify duties under criminal and regulatory offences law.¹⁰⁷

Corporate Liability

Criminal and regulatory law liability is in principle directed only against the employees of the company. However, in accordance with § 30 OWiG a fine may be imposed on the company if its management have committed a criminal or regulatory offence by means of which duties pertaining to the company have been violated or have resulted in a gain for the company. § 30 OWiG thus lays down no separate fine, but is linked to the perpetration of a criminal or regulatory offence by a member of the management, for which the assets of the company are liable. Particularly relevant in this context is the abovementioned provision of violation of the duty of supervision in accordance with § 130 OWiG.

Introduction of corporate criminal liability is under discussion in Germany in accordance with some foreign legal systems. The minister of justice of North Rhine

103. Fischer 2015 2015: § 15 recital 14.

104. BGH NJW 2000, 2754, 2758.

105. BGH NJW 2009, 3173 – Berliner Stadtreinigung; BGH NJW 2012, 1237 – Bauhof; see also Lackhoff/Schulz 2010; Nietsch 2013: 192.

106. BGH NJW 2009, 3173 – Berliner Stadtreinigung.

107. Kroker 2015.

Westphalia, Thomas Kutschaty, submitted a corresponding bill¹⁰⁸ that was provided with a »test order« in the government's coalition agreement. The draft bill provides for an association sanction if a decision-maker in conducting an association's affairs intentionally or negligently commits an infringement in relation to the association. Human rights are not central to this draft bill. However, in the literature common features with the discussion on human rights obligations are recognised, where it says in the draft bill in relation to validity with regard to foreign states that thus »organised irresponsibility« as a result of transferring supervisory and control responsibilities abroad is to be combated.¹⁰⁹

Compliance

For the purpose of systematically preventing legal violations that are committed from within the company and can cause it considerable disadvantages as a result of liability risks or loss of reputation a large number of companies have set up compliance systems. The aim is to anchor legal conduct requirements in the company's value system and for them to become operational objectives. Compliance approaches also lend themselves to use in the context of human rights protection.¹¹⁰

The legislator is increasingly making incentives available for such self-regulation by companies. One familiar example is the voluntary declaration to avoid paying a fine in tax law in accordance with § 378 para 3 AO (Tax Code). Likewise, the disclosure of some violations of foreign trade law (AWG) in the course of self-auditing also enables a company to avoid sanctions if at the same time proof is provided that the company has put in place a system to prevent future violations (§ 22 para 4 AWG). Also in accordance with the abovementioned draft of a criminal code for associations it is possible to avoid punishment if adequate organisational or personnel measures are taken in order to prevent comparable association offences in future.

108. § 2 para 1 of the draft of a law on the introduction of criminal responsibility on the part of companies and other associations, available at: www.justiz.nrw.de/JM/justizpolitik/jumiko/beschluesse/2013/herbstkonferenz13/zw3/TOP_Il_5_Gesetzentwurf.pdf (14.8.2015). On the debate see: Hein 2014a: 75; Jahn/Pietsch 2015; Krems 2015: 5, each with further references.

109. Kroker 2015, with regard to § 2 para 3 of the draft law and p. 48 of the explanatory memorandum.

110. Kroker 2015: 123.

Further examples of mitigating or setting aside sanctions on the grounds of the existence of a system of self-auditing at a company are found in the anti-corruption laws of some countries, such as the United Kingdom and Brazil. In the United States fines are halved if the company prior to the crime had already put in place a suitable due diligence concept.¹¹¹ Similar regulations are lacking in the guidelines on fines of both the Federal Cartel Office¹¹² and the European Commission.¹¹³

Since the much publicised Siemens/Neubürger judgment of the Regional Court of Munich I in 2013 all company board members have had the joint duty to establish and monitor a well functioning compliance system. Decisive for the scope of this duty are the nature, size and organisation of the company, the provisions that have to be complied with, the geographic presence and suspected cases from the past.¹¹⁴ Here parallels with the proportionality principle of UN Guiding Principle No. 14 are evident. In the literature the number of advocates of a corresponding responsibility on the part of a company management is growing. The legal basis of such a general duty of compliance on the part of companies has so far not been clarified. The Munich Regional Court I, too, did not clearly define the legal basis for its decision, but only mentioned some potential provisions in the Companies Act (Aktiengesetz). In the literature, § 130 OWiG is more often taken as a basis with the argument that the rule establishes a duty of supervision to prevent legal violations and thus a duty to monitor legality in the sense of a general compliance system.¹¹⁵

It would be desirable to dispel these uncertainties by means of a clear dogmatic establishment of compliance obligations. The criteria laid down by Munich Regional

111. Federal Sentencing Guidelines, Chapter 8 – Sentencing of Organisations – Introductory commentary, www.ussc.gov/2006guid/gj2006.pdf.

112. Notice No. 38/2006 on the setting of fines in accordance with § 81 para 4 sentence 2 of the Act against restraints of competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB) against companies and business associations guidelines on fines of 15.9.2006, Federal Gazette of 26.9.2006 No. 182, p. 6499f., recital 17 of the guidelines on fines permits behaviour after the crime to be taken into account, which does not mean the implementation of a due diligence concept after the fact, but efforts to make amends. See Pampel 2007: 1638.

113. Guidelines on the procedure for setting fines in accordance with Art. 23 para. 2 lit. a) of Regulation (EC) No. 1/2003, ABl. C 210 of 1.9.2006, pp. 2 ff.

114. LG München I, judgment of 10.12.2013 – 5 HK O 1387/10 – Siemens/Neubürger.

115. Hein 2014b: 179; Gürtler in Göhler 2012: § 130, recital 10 ff.

Court I should be taken into account in this, as well as the parallels with the UN Guiding Principles' recommendations.

3.3 Tort Law (Civil Law)

Due diligence obligations are important in civil law in describing the conditions of a liability for damages if a legal violation and the damages arising from it were not brought about deliberately.

In what follows, first, we examine the extent to which German law and due diligence obligations that may be established in German law, would be applicable at all, if persons whose human rights have been infringed filed a suit for damages against a German company. This question is answered by the conflict of laws (also: international private law), which is substantially shaped by European law. Then we shall present the existing principles of due diligence obligations.

The Relevance of German Law

Because of the cross-border character of the circumstances first of all the question arises of which state's law a German civil court seized would base its decision on. While the procedural rules to be applied in each case are taken only from German procedural law this by no means shall apply *mutatis mutandis* also with regard to the substantive law, that is, the law applicable in the given case (*Sachrecht*). Rather the court must first determine, on the basis of the so-called Rome II Regulation, whether the German, another European or even a non-European substantive law shall be authoritative. Based on the multitude of rules of the Rome II Regulation the court shall determine to which state the case has the closest connection; its substantive law shall then be applied by the court. It is not generally a concern of the Rome II Regulation whether another state has more or less strongly an interest in its own law to be applied.¹¹⁶

According to Art. 4 para 1 Rome II Regulation the law of that state shall be applicable in which the damages occurred, in other words, in the cases under consideration

here, not German law.¹¹⁷ German law would apply only exceptionally, namely when a »manifestly closer connection« exists to German law (Art. 4 para 3 Rome II Regulation). Because the Rome II Regulation has been in force only since 2009 the significance of this exception for the context under consideration here is difficult to evaluate. In any case, the derogation is to be interpreted narrowly; only rarely may points of reference to Germany be identified that are strong enough to justify their application.

If the human rights abuse is accompanied by environmental damages, however, then Art. 7 of the Rome II Regulation offers the parties concerned (plaintiffs) a choice: instead of the law of the place where the damage occurred they can invoke the law of the country in which the event giving rise to the damage occurred. If the accusation is that management decisions of the German company were not taken with due diligence this may frequently lead to the application of German law.

If no environmental damages have occurred and a case has no »manifestly closer connection« to German law only occasional rules of German law may be significant, namely »mandatory provisions« within the meaning of Art. 16 and »rules of safety and conduct« within the meaning of Art. 17 Rome II Regulation.

Due diligence count as »rules of safety and conduct« within the meaning of Art. 17 Rome II Regulation. To that extent they are, however, not to be applied by the judge, but only »to be taken into account« within the framework of the application of the foreign law and then only »as appropriate«. Whether the taking into account of German due diligence obligations in the cases under consideration here is appropriate is controversial. With the establishment of Art. 17 Rome II Regulation the main intention was to protect those operating out of Germany against due diligence obligations abroad that they cannot anticipate. The fact that Art. 17 Rome II Regulation could also function to the *detriment* of the causer of damage by bringing German due diligence into play that impose *higher* requirements on the causer of damage is dealt with in different ways in the literature.¹¹⁸ However, most commentators do not yet tackle this issue,¹¹⁹

¹¹⁶ Some exceptions: see below on Art. 16 Rome II Regulation: Mandatory rules.

¹¹⁷ The rule talks about the place of the »damage«, meaning the place of the legal violation, cf. recital 17.

¹¹⁸ On this, see Symeonides 2008, 214; cf. also Grabosch 2013a.

¹¹⁹ For example, Pabst in *jurisPK-BGB* 2013: Rome II Regulation, Art. 17 recital 7.

especially because case law has had nothing to say on the matter to date. The question of appropriateness of taking into account German due diligence obligations would be implicitly settled to the extent that the German legislator elaborates due diligence obligations deliberately with regard to human rights compliance in international business dealings.

When the applicable foreign law does not provide a claim, the German court must consider to apply »overriding mandatory provisions« of German law that guarantee a higher level of protection. This depends on whether the German legislator with the relevant legal norm has expressed an interest that is imperative, superordinate and shared by society as a whole, that also in the specific case must urgently be taken into account (Art. 16 Rome II Regulation: Mandatory provisions). This approach may often be very promising if laws also serve the protection of human rights, but hitherto it has been examined in the literature only sporadically.¹²⁰

General Due Diligence Obligations, Duty to Organise and Maintain Safety

The key provision of due diligence obligation in German law is, since the coming into force of the Civil Code in 1900, § 276 para 2 BGB. This – very succinctly formulated – provision defines the benchmark for negligence: »A person acts negligently if he fails to exercise reasonable care.«

From the wording of the provision several principles for application of the law are derived: the benchmark is *normative* insofar as the required due diligence is not to be equated with the usual (possibly inadequate) variety.¹²¹ In contrast to criminal law, due diligence in private law is abstract-objective to the extent that personal circumstances and special characteristics of the person subject to the obligation are not mitigating factors.¹²²

Case law has continuously developed and further advanced the concept of »reasonable care« since the coming into force of the Civil Code.

In 1902 and 1903 the Imperial Court of Justice (*Reichsgericht*) recognised in the obligation to act with due diligence the obligation for everyone who creates or controls a source of danger or hazard, with which other people could come into contact, to take measures to avoid harm or damage. This principle is known under the terms »safety obligation« and »duty of care« (*Verkehrssicherungspflicht und Verkehrspflicht – VSP*), with no specific reference to *road safety* [although the German term *Verkehr* indicates a reference predominantly to traffic – translator's note].¹²³ The applicability of VSP is also recognised in the corporate context, for example, with regard to waste disposal in the course of goods manufacturing,¹²⁴ in relation to the sale of goods and in the organisation of mass events. The VSP specifies the benchmark of the concept of negligence under § 276 para 2 BGB in accordance with prevailing current opinion.¹²⁵

In established case law the basic idea is repeated that, in general, in carrying on a business, those precautions should be taken that a reasonable, circumspective, prudent and scrupulous person of the relevant professional group would consider to be adequate in order to protect other people from harm and can reasonably be expected in the circumstances.¹²⁶ On closer examination of this so-called general safety obligation the courts in individual cases rely on various criteria that could also be fruitfully utilised for consideration of the cases of corporate connections with human rights abuses to be carried out here. This can be developed in more detail only on a case by case basis: in the case of an extensive expansion of a weir on the River Mosel the builder must, even in the commissioning of a reliable building firm with the implementation of the building project, anticipate that, with the removal of large quantities of wet excavated earth a narrow village street will become very dirty and, accordingly, take appropriate measures to protect the buildings.¹²⁷ This shows that the outsourcing of stages of production must not only be to reliable business partners, but also be accompanied by appropriate instructions and controls.

The Imperial Court of Justice already extended the scope of application of the VSP to *negligent* damages caused

120. Grabosch 2013a: 84 ff.; affirmative for the ILO core labour standards: Rödl/Massoud 2010: 26; critical: Osieka 2013: 245; Magnus/Meng 2005: 77.

121. Roth in Koller/Kindler 2015: § 347 recital. 2.

122. Ibid.

123. Kötz/Wagner 2013: recital 127.

124. BGH, judgment of 7.10.1975 – VI ZR 43/74 = NJW 1976, 46.

125. On current opinion: Kötz/Wagner 2013: recital 128.

126. BGH, judgment of 18.7.2006 – X ZR 142/05 – Waterslide.

127. BGH, judgment of 30.11.1965 – VI ZR 145/64 = VersR 1966, 145.

by third parties: if a landlord (of a bar) installs a pool table 1.2 metres from a skat table he must post warnings to the players.¹²⁸ Following on from this, the Federal Court of Justice (*Bundesgerichtshof*) has extended the scope of application of the VSP to the – more or less foreseeable – *intentional* interventions of entirely unknown third parties: the operator of a department store in the vicinity of a nightlife district must take measures against unauthorised – and at night possibly drunken – third parties' uncovering a 5–6 metres deep liftshaft covered with a 47 kg grating, in particular if the pedestrian area is poorly lit during the morning hours in winter.¹²⁹ The liability for damages due to sabotage was also recently the object of court proceedings in the Hague concerning environmental and land contamination due to oil in Nigeria.¹³⁰

Furthermore, the civil courts have developed the secondary VSP: the person under an obligation must eliminate dangers that he or she may not have caused but has noticed and is in a position to control.¹³¹ A special group of cases are dangers arising from real estate. Here VSP have been recognised in connection with a building in danger of collapsing, a rotten tree, black ice, miniature golf courses, children's playgrounds, gravestones,¹³² vending machines on the external walls of buildings, concrete pipes in a courtyard,¹³³ and, for example, the hoops of a metal barrel at the bottom of a harbour basin.¹³⁴ When gas pipes are being laid measures have to be taken »that guarantee that no hazardous situation occurs«.¹³⁵ The operator of a filling station must provide that, in the event of petrol leaking from the tanks, appropriate safety measures are taken immediately with regard to neighbouring properties.¹³⁶ Sometimes the area of product liability is also counted among obligations to ensure safety or due diligence.¹³⁷

128. RG [Reichsgericht], judgment of 19.6.1914 – III 136/14 = RGZ 85, 185.

129. BGH, judgment of 16.9.1975 – VI ZR 156/74 = MDR 1976, 134.

130. The court found against a Nigerian subsidiary of Shell because it should have better protected the pipelines of the oil conveyor pipe system, Enneking 2014: 47.

131. BGH NJW 1984, 360; OLG Schleswig, judgment of 30.7.1998 – 11 U 36/97 = VersR 2000, 1118, 1119.

132. BGH, judgment of 30.1.1991 – III ZR 225/59 = BGHZ 34, 209.

133. OLG München VersR 1963, 643.

134. BGH VersR 1978 842.

135. RG JW 1938, 525.

136. RG JW 1939, 560, 562.

137. In principle, product liability law regulates strict liability; exception: so-called development risks, Sprau in Palandt 2015: ProdHaftG Einf.

From the individual cases mentioned here it emerges that case law has further developed the contours of VSP on the basis of the following criteria:

- Predictability: circumstances of the individual case from an objective standpoint, irrespective of whether, for example, in over 20 years of judicial practice only four similar cases of damages have been known.¹³⁸
- Intensity of the foreseeable damage: fall into a 5–6 metre deep lift shaft.¹³⁹
- Control over the source of risk;¹⁴⁰ actual power of disposal.¹⁴¹
- Notice of the source of risk that the person under an obligation has received a warning.¹⁴²
- Opening of public access to the source of risk.¹⁴³
- Reasonableness of the measures to be taken, taking into account the level of the risk and the probability of its realisation.
- Costs of risk prevention.¹⁴⁴
- Criterion of »equitable« (in the sense of »just«) consideration.¹⁴⁵
- On the other hand, it is basically irrelevant whether an authority (regional building authority) has given its permission for the use of a facility (exhaust shaft) without any limitations. This is because the personal obligation of the party with safety obligations goes beyond the scope of inspection by the building regulation authorities.¹⁴⁶

Rn. 5.

138. BGH, judgment of 16.9.1975 – VI ZR 156/74 = MDR 1976, 134.

139. BGH, *ibid.*

140. RG, judgment of 30.10.1902 – VI 208/02.

141. Kötz/Wagner 2013: recital 178.

142. RG, judgment of 30.10.1902 – VI 208/02.

143. RG, judgment of 23.2.1903 – VI 349/02.

144. Thus the public authority must secure the many manhole covers and carry out tours of inspection in the public streets, not on a separate basis, OLG Celle, judgment of 2.8.1978 – 9 U 1/78 (unpublished).

145. RG, judgment of 23.2.1903 – VI 349/02.

146. BGH, judgment of 16.9.1975 – VI ZR 156/74 = MDR 1976, 134.

- It is permissible (and in all but small companies unavoidable) that the management shall delegate parts of this due diligence obligation. The more it does so, however, the stronger the requirements with regard to its organisational duty.

The measures to be taken include those of a structural kind (responsibilities), the establishment of procedures and instructions, a reporting system, monitoring and actions that actually eliminate the risk.

For the avoidance of doubt it should be noted that not every abstract danger has to be countered with preventive measures. Case law has recognised that a safety obligation that excludes every accident is not possible and cannot be demanded. Only those safety measures are required that a reasonable and prudent person, cautious within reasonable limits, may consider appropriate in order to protect other people from harm and that are reasonable in the circumstances.¹⁴⁷ An obligation to completely rule out the occurrence of harm does not exist. A general interdiction not to endanger others would be utopian.¹⁴⁸ The principles of the safety obligation thus also designate when a company is *not* liable for damages.

These principles developed from case law remain transposable to new states of affairs.¹⁴⁹

3.4 Competition Law

Competition law is a special area of tort law that protects consumers and companies that are in competition with one another against unfair business practices.¹⁵⁰ In Germany it has greater importance in its own right than in most other European states.¹⁵¹

German competition law is largely regulated in the Unfair Competition Act (Gesetz gegen den Unlauteren Wettbewerb – UWG) and in international cases it applies when

the interests of German consumers or companies are affected.¹⁵² Even if important aspects of a case – for example, conditions of production – take place abroad, the German civil courts assess the permissibility under competition law of bringing products to the market and accompanying advertising messages for the scope of German territory in accordance with German law. Consumer associations and rival companies can take legal proceedings against companies that are acting unfairly and seek injunctive relief, damages and disgorgement of profits.

The aim of the last amendment of the Unfair Competition Act (UWG) in 2008 was to increase the level of consumer protection in accordance with European guidelines, as well as to strengthen the European single market.¹⁵³ Besides that the Unfair Competition Act continues to aim to protect consumers against companies' interests.¹⁵⁴ Although they do not (directly) include protection of human rights these aims are also automatically endangered when production conditions abroad fall short of human rights standards and the products are brought into the European market. This is because the European single market and companies producing in the EU are under »life-threatening« pressure particularly because of much lower production standards elsewhere and furthermore a considerable portion of consumers have an interest in production conditions being above human rights standards.

The question therefore arises of whether the rights and obligations arising from the Unfair Competition Act can also serve to protect human rights in cases such as those presented below (see box).

§ 3 Unfair Competition Act includes a general clause (para 1) and a further general clause specifically intended to protect consumers' interests (para 2). A large number of particular cases and *lex specialis* are regulated in the following paragraphs of the Unfair Competition Act. According to it, competition law sanctions always apply under the following four conditions, which sometimes are specifically regulated or in certain groups of cases are assumed.¹⁵⁵

147. BGH, *ibid.*

148. Kötz/Wagner 2013: recital 183f.

149. Cf. *ibid.*: recital 184: »Jurisprudence has always been ready to intervene in order to correct »inefficiencies« that have crept into legal affairs. However, given the various obstacles to legal access it is scarcely to be expected that jurisprudence will have an opportunity to do so.«

150. Beater 2011: § 1 recital 73.

151. For details on this: Beater 2011: § 5, especially recital 396. There has been EU-wide harmonisation in this respect only with regard to the protection of consumer interests.

152. BGH, judgment of 11.2.2010 – I ZR 85/08 – tender in Bulgaria; for cases after 11.1.2009: Art. 6 Rome II Regulation.

153. Press release of the Federal Ministry of Justice on the amendment of the Unfair Competition Act of 21.5.2008.

154. »Rightly«, in the opinion of Sosnitza in Ohly/Sosnitza 2014: § 3 recital 1.

155. See *ibid.*

If products are manufactured abroad under circumstances detrimental to human rights and then put on sale on the German market at low prices three of these four conditions may normally pertain: the three in question are (i) commercial actions that (ii) are likely to be detrimental to the interests of market participants and (iii) are not merely insignificant, but »tangible«.

The fourth and decisive criterion is the »unfairness« of commercial actions. This term has been transposed into German law as the Unfair Competition Act with the implementation of European regulations in 2008. With the application of the criterion case law and the literature continue to have recourse to the previously developed principles of fair custom and practice.¹⁵⁶

Further examination of the criterion of »unfairness« depends on whether consumer interests are affected or the interests of competitors.

Consumer Interests

If the protection of consumer interests is concerned the Unfair Competition Act aims explicitly at the due diligence of the company.

In any case, a considerable part of German consumers are influenced by ethical considerations in their purchasing decisions and do not feel sufficiently informed concerning conditions of production.¹⁵⁷ Recently, the interest of consumers in information on the human rights risks, due diligence processes and corresponding performance indicators of certain larger companies that partly have their manufacturing done abroad has even been recognised by the law.¹⁵⁸ However, this concerns only the interest of consumers in being able to *choose* on the basis of adequate information between human

156. Kocher 2005, with further references. Also according to Karsten Schmidt commercial practices continue to serve – insofar as they are accepted practice in commercial transactions – in accordance with §346 HGB as factual material in determining obligations in compliance with legal norms, such as §1 UWG, K. Schmidt 2014: §1 recital 49.

157. Flash Eurobarometer 2013: 71. Insufficient information shall consequently also meet the dishonesty criterion of being apt to cause somebody to take commercial decisions, Teplitzky/Peifer/Leistner 2013: §2 recital 678.

158. Certain large companies must in future report on risks with regard to labour, human rights and environmental concerns, on their related *due diligence* concepts, their results and performance indicators, Directive 2014/95/EU of 22.10.2014, see recital 3 on the interest of consumers.

Example: Fast Fashion

Textile company A has a significant market position and is in a position to offer foreign producers larger or longer-term orders. The pricing policy and unrealistic deadline pressure cannot be complied with by business partners unless they neglect labour and environmental standards. In Germany, A can offer its clothing at much more favourable prices than its rivals. On its website and in its advertising A writes: »We promote the protection of human rights in the production of our goods« or »quality at a reasonable price: we build on 60 years of experience with the latest technology, sophisticated designs and outstanding manufacturers«.

rights-friendly goods and goods produced in a different way. The fact that consumers also have a legitimate interest in seeing that the people who manufacture their consumer goods do not suffer in the course of production is questionable as an imputation in principle and to date has not been recognised by law.

The prohibition on misleading consumers has particular significance in competition law. Thus the law explicitly recognises an attempt to mislead in seven specific commercial actions and declares them to be unfair (§5 para. 1 sentence 2, No. 1–7 UWG [Unfair Competition Act]). The case in point of *fast fashion* and similar cases cannot be categorised in any of these seven groups of cases.¹⁵⁹

However, this does not prevent recourse to the consumer protection general clause of §3 para 2 UWG. This lays down that the company acts unfairly if it disregards »professional diligence« (§3 para 2 sentence 1 UWG). Deception of the consuming public – that is, a disparity between the company's assertions and the factual circumstances – can also fall under this general clause. In the case in point of *fast fashion* presented above a deception may be assumed. In fact, the company has taken no discernible actions to respect human rights; rather its contract conditions serve rather to exacerbate human rights abuses. With its assertions concerning its respect for human rights and the alleged reason for the low prices, however, it plays down and masks the human rights risks.

159. Whether No. 2 or No. 3 cover the cases in point is questionable.

It is questionable, however, whether this deception conflicts with »professional diligence«. § 2 para 1 No. 7 UWG defines professional diligence as the »standard of special skill and care towards consumers, to which an entrepreneur can reasonably be expected to conform, commensurate with good faith and having regard to market practices, in the entrepreneur's field of activity.« To that extent the law and jurisprudence do not refer to the principles of due diligence obligations that apply in other areas of law.¹⁶⁰ Ultimately, however, similar criteria of foreseeability and preventability may be applied. Here, too, an objective standard is applied; it thus depends whether, for example, the specific company lacked regular experience in dealing with the issue of human rights. In the *fast fashion* case presented above the question arises of whether an averagely experienced and observant business person in their own sphere of activity would have recognised and been able to prevent consumers from being misled about human rights risks.

It is problematic whether a company can also recognise and prevent people from being misled in its sphere of activity when a third party – the business partner or their subsidiary companies – is much closer to the factual circumstances at the production location. The Federal Court of Justice (BGH) has ruled in similar cases: Anyone whose actions in commercial dealings cause serious risk that a third party will infringe the interests of market participants that are protected by competition law shall be obliged, on the basis of a duty of care under competition law, to limit this risk as far as is possible and reasonable.¹⁶¹ This duty can include obligations of verification, monitoring and intervention,¹⁶² insofar as they are possible and feasible for the person under the obligation. What is feasible depends, on one hand, on how large the risk of injury arising from the third party is and what self-interest the company has, and on the other hand, on the importance of the endangered interests and the cost of risk prevention measures (balancing of interests).¹⁶³ In the case example *fast fashion* it may be

recognised that the company caused a risk due to its unrealistically strict contract conditions. It may also be argued, moreover, that the company, given the importance of human rights and the feasibility of verification, monitoring and intervention measures disregarded professional diligence.

In other words, an infringement of competition sanctioned by injunctive relief and damages claims could be assumed in the case example of *fast fashion*. This outcome is consistent with the aims of competition law (consumer protection, protection of companies that operate fairly and strengthening of the European single market). However, it cannot be supported by clear wording in the Unfair Competition Act (UWG).¹⁶⁴ Consideration should therefore be given to supplementing the law (on this see below, Section 5.11).

The Interest of Competitors in a Level Playing Field

In the above case example the interest of local competitor companies in production conditions that do not fall short of a minimum standard of labour and human rights is also encountered (level playing field).¹⁶⁵

The Federal Court of Justice (BGH) has approached the question of how far companies must maintain a level playing field in competition with one another in its decision *Asbestimporte* of 1981.¹⁶⁶ According to it, the utilisation of an international legal differential is generally permissible because different developments and standards across the world have to be accepted on principle. There is a violation, however, when working conditions prevailing abroad breach basic moral requirements that, to our understanding, every human and political system has to conform to, to such an extent that it contravenes decent business customs. In the case *Asbestimporte* the Federal Court of Justice (BGH) could not recognise an instance of unfairness because ILO Convention No. 139 that was being contravened at the production location in Korea was only six years old and had been ratified by only 15 states, and thus was not (yet) the expression of a general moral basic requirement. It is clear from

160. See above on the due diligence obligations in BGB and HGB and their different varieties in the form of the safety and organisation obligation.

161. BGH GRUR 2007, 890 – Media harmful to young persons on Ebay, official guideline.

162. Köhler/Bornkamm 2015: § 8 recital 2.10 with further references.

163. On the individual examples in jurisprudence see *ibid.*, § 8 recital 2.12 ff.

164. It is also required within the framework of the general clauses of the UWG that the deception be sufficiently specific that a definite, verifiable meaning can be obtained from it, see Henning-Bodewig 2010: 1103.

165. See the remarks on the *level playing field* in Part 1.

166. BGH GRUR 1980, 858 ff. – *Asbestimporte*.

the judgment, however, that the UWG will be also used to sanction violations abroad against widely recognised social standards. Companies may thus utilise an international legal differential and even disregard human and labour rights that are not yet widespread, but they must respect a *minimum level playing field*. International norms that reflect elementary notions of fair competition can serve as substantive criteria for assessing the fairness of transnational business activities – at least, when they have attained a substantial level of dissemination and rightly understood are held to be minimum standards also for goods and services markets.¹⁶⁷ At any rate, the ILO's core labour standards of 1998 on forced labour, child labour, non-discrimination and recognition of the right to collective bargaining may be included here.¹⁶⁸

The fact that the general clauses of German law are to be interpreted in light of international agreements and declarations was indicated by the Federal Court of Justice as early as 1972 in the *Bronze Masks* case. In this case the Federal Court of Justice rescinded a sea transport contract and a related freight insurance contract on the grounds of violation of moral principles in accordance with § 138 BGB because the transport of the goods (Nigerian bronze masks) violated the UNESCO conventions on the protection of national treasures.¹⁶⁹

Apart from that, however, case law, as far as can be seen, has had no comparable cases to judge. It is observed in the literature that such cases, in the absence of clear legal guidelines, cannot be subsumed with certainty under one of the special clauses of competition law or the general clauses.¹⁷⁰ Here too, then, a supplementation of § 4 UWG is to be recommended (see below, Section 5.11).

3.5 Efficiency Principle as Corrective of the Due Diligence Obligations?

Everyday business reality differs from these standard due diligence obligations, that have long been widely known. On one hand the legislator established the le-

gality imperative (*Legalitätspflicht*), requiring company managements to ensure respect for the law with no ifs or buts, and this imperative is widely endorsed by prevailing opinion in literature to date.¹⁷¹ On the other hand company managements have to heed the efficiency principle and ensure the success of the company against any competition from rivals. Thus a barely resolvable area of conflict opens up between the legality imperative and the efficiency principle, if both the applicability of German legal duties (human rights due diligence obligations) and their contents are unclear.

The problems of due diligence with regard to human rights have largely not even been addressed in advisory practice and by corporate managements.¹⁷² Tendencies can also be discerned, however, that understand the efficiency principle ultimately as a corrective of due diligence obligations and seek to excuse legal violations by corporate managers. Corporate managers have long complained of a growing overload of legal requirements, whose scope and contents are unclear¹⁷³ and which threaten to become even more unwieldy due to the increasing emphasis on human rights.¹⁷⁴

Recently, lawyers of larger commercial law firms have expressed a desire to go further and would like to see the business judgment rule applied in favour of corporate managers.¹⁷⁵ This would mean that corporate managers may in some circumstances hazard the risk of legal violations within the framework of an impact assessment if this appeared to contribute to the company's commercial success. This opinion was bolstered by a judgment of the Federal Court of Justice, according to which a company board member in the case of certain asset, accounting and insolvency offences shall be deemed to have acted in breach of his or her duties to the company,

171. Cf. BT-Drs. 15/5092 of 14.3.2005 (Government reasoning with regard to UMAG [Unternehmensintegrität und Modernisierung des Anfechtungsrechts – Law on corporate integrity and modernisation of the right of contestation]): 11; Hasselbach/Ebbinghaus 2014.

172. Heinz in Schüppen/Schaub 2010: § 22 recital 43, and model »Geschäftsordnung für den Vorstand« [Rules of procedure for the management board] by Heinz, *ibid.*: 630 ff.

173. Uwe H. Schneider speaks of an »overload of public law obligations«, Schneider in Scholz 2000: § 43 recital 11. Hauschka concurs with this evaluation of developments, Hauschka 2004: at Fn. 7.

174. On reactions in the business sphere to the report »Protect, Respect and Remedy: a Framework for Business and Human Rights« by UN Special Representative John Ruggie in 2008, see Spießhofer 2014a: at Fn. 3. On the uncertainties arising from the imminent CSR reporting obligations see Spießhofer 2014b.

175. Hasselbach/Ebbinghaus 2014; Harnos 2013: 115 f.

167. Kocher 2005.

168. ILO Declaration on fundamental principles and rights at work.

169. BGHZ 59, 82–87 – *Nigerianische Bronzemasken*; Grabosch 2013b.

170. Weber/Weber 2008.

but not necessarily in the case of other transgressions, including other offences.¹⁷⁶

Another lawyer – and also member of a supervisory board – takes the view that although boards and supervisory boards of German listed companies are bound by the declaration of conformity with the German Corporate Governance Code (DCGK) annually to give a truthful account of the company's compliance, »boards of non-listed companies can hazard managing the company without particular compliance measures as long as this does not lead to more egregious legal violations on the part of the company or its employees that come to public attention«.¹⁷⁷

In addition, it can also be noted that socially motivated board decisions may be taken only if they do not impair the company's efficiency;¹⁷⁸ measures that, for example, ensure shorter working time and at the same time cause production losses would thus not be permissible. *Müller-Michaels* and *Ringel* regard it as a cause for concern that, increasingly, account is being taken of the economic benefits of socially motivated decisions.¹⁷⁹

Koch summarises that although it is generally recognised that also »beneficial legal violations« should be avoided, at the same time legal imperative is a »diffuse institution«.¹⁸⁰ The widespread concept of risk management »remains somewhat vague« in a legal sense because it is unclear in particular whether the duty of risk management also encompasses the company's external environment.¹⁸¹ Ultimately, comprehensive risk management is a question of »wide discretion«.¹⁸²

Hauschka, one of Germany's most renowned compliance experts, discerns extremely far-reaching uncertainties among German corporate managers in their dealing with »ethical problems of international production, such as slave labour, child labour or production conditions

that infringe human rights in developing countries«.¹⁸³ These issues are often addressed by younger board members. CEOs routinely suppress such concerns and silence the person raising uncomfortable questions, for example, by undermining the supervisory board's confidence in him or her.¹⁸⁴

In 2012, Alliance 90/The Greens introduced a bill in the Bundestag to supplement the legal imperative regulated in § 93 para 1 AktG (Companies Act) aimed at clarifying that corporate managers are at least *permitted* to take measures to respect human rights concerns.¹⁸⁵ This is because hitherto, according to the bill's reasoning, paying regard to such concerns has not been among the standard duties of the board, so that the latter lays itself open to criticism for behaviour damaging to the business if its measures do not have positive economic repercussions.¹⁸⁶ Little support for legislation could be garnered in the Bundestag, however.

There is thus still sometimes a tendency in the German economy and in advisory practice to hazard presumed legal violations if they are likely to remain undetected and/or the legal situation is unclear. This systematic neglect of human rights concerns, underpinned by the regulations, can be prevented by the legislator only by means of clearer expectations with regard to due diligence.

4. Developments Abroad

Abroad, a range of approaches to the introduction of due diligence have been discernible in recent decades. First, in the United Kingdom an approach based on legally non-binding recommendations was chosen. Subsequently, legislators in the United States and in the meantime also at European level decided in favour of indirect incentives by means of disclosure and reporting requirements. Recently in France a law was passed that directly regulates the cross-border human rights due diligence obligations of certain large companies. Further development of due diligence obligations by the civil courts, by contrast, has been conspicuous by

176. BGH, judgment of 8.7.2014 – II ZR 174/13, see Hasselbach/Ebbinghaus 2014: 874.

177. Sünner 2015.

178. Paschke in Schwerdtfeger 2015: § 76 AktG [Companies Act], recital 20.

179. Müller-Michaels/Ringel 2011.

180. Hüffer/Koch 2014: § 93 recital 6.

181. Ibid. recital 8.

182. Ibid.: recital 10 (the work is up to date with legal developments up to December 2013 and does not take into account the judgment of the Munich Regional Court I of 10.12.2013).

183. *Hauschka* 2008: 59.

184. Ibid. 60.

185. BT-Drs. 17/11686 of 28.11.2012.

186. For more details on this see Müller-Michaels/Ringel 2011.

its absence. In what follows the various developments, especially in the United States, England and France, are briefly presented.

Voluntary Code

The United Kingdom established a Corporate Governance Code as early as 1992 – the so-called Cadbury Code – which contains principles of good corporate management. The Code is voluntary to the extent that the companies concerned do not have to follow its recommendations. However, they do have to provide an explanation if they fail to do so of how far and why they diverge from the recommendations (comply or explain). Taking its bearings from the English model, in 2002 the German legislator obliged all listed companies to declare the extent to which they are in compliance with the recommendations of the government commission German corporate governance code and, if not, why they diverge from it (§ 161 AktG [Companies Act]). The main objective of the Code, however, is a stable economic situation for the company itself. Furthermore, it is merely mentioned without further debate that corporate managements must also take into account the concerns of employees, sustainable value generation and diversity.

Indirect Incentives through Reporting Obligations

Several legal systems take the approach of offering companies indirect incentives to undertake due diligence by means of reporting obligations.

In the United States the legislator has obligated companies with the Dodd-Frank Act to disclose the **origin of certain commodities**. The idea of this is to prevent the funding of the military conflict in the Democratic Republic of Congo and neighbouring states by the trade in gold, wolframite, cassiterite and coltan. The obligation to document the origin of these so-called conflict minerals extends along the entire supply chain. Only on a transitional basis did the law permit companies to declare that it was not possible for them to determine the origin of the commodities.¹⁸⁷

In 2014 the European Commission submitted a proposal for a regulation on the acquisition of minerals from conflict areas.¹⁸⁸ Companies were obliged to comply with the due diligence obligation it contained, however, only if they submitted to it voluntarily. The draft defines due diligence in the supply chain as »obligations of [companies] in relation to their management systems, risk management, third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks ... to prevent or mitigate adverse impacts associated with their sourcing activities«.¹⁸⁹

The US Department of State has imposed further reporting obligations on citizens and companies that invest amounts over 500,000 US dollars in Myanmar. They have to provide the Department of State with and sometimes publish an annual overview of their business relations in Myanmar and information on the following topics: human rights and the rights of employees, guidelines and procedures on protection of the environment, agreements with security service providers, purchases of property, correspondence with the military and armed groups, as well as risk prevention and minimisation.¹⁹⁰

The US state of California and the United Kingdom are taking action in a similar fashion against **modern forms of slavery** by means of requirements concerning transparency in the supply chain.¹⁹¹ Companies of a certain size must issue a »slavery and human trafficking statement« every year. The UK law also suggests what topics the statement should address:

- (a) the organisation's structure, business and supply chains;
- (b) its policies in relation to slavery and human trafficking;
- (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
- (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking

188. European Commission 2014.

189. Art. 2 lit. o) of the proposed regulation, EU Commission 2014.

190. www.humanrights.gov/fact-sheet-burma-responsible-investment-reporting-requirements.html (14.8.2015).

191. California Transparency in Supply Chains Act of 2010; UK Modern Slavery Act 2015, Chapter 30, Part 6.

187. Dodd-Frank Wall Street Reform and Consumer Protection Act, Title 15 (Sec. 1502).

place, and the steps it has taken to assess and manage that risk;

- (e) its effectiveness in ensuring that slavery and human trafficking are not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
- (f) training on slavery and human trafficking available to its staff.

The Californian law demands disclosure of comparable information, but on the company website.

With regard to **all kinds of transactions** certain large companies in the European Union, after implementation of the Directive on CSR reporting obligations of 2014, have to publish information on risks, due diligence processes, their effectiveness and performance indicators. In Germany hitherto similar disclosure obligations have existed only to some extent and also only insofar as they are of importance for an understanding of the company's business development and the situation of the company (see Part 1 of this study, Section 3.4.2).¹⁹² Whether after implementation of the Directive risks and any damages that may have occurred will have to be reported on if they are concealed and it is improbable that they harm business development and the value of the company remains to be seen.

Direct Regulation of Due Diligence

The National Assembly of the French Parliament recently went further than anything seen previously. On 30 March 2015 it adopted a law that directly regulates corporate due diligence obligations.¹⁹³ If the Senate approves the law, companies with their seat in France and with at least 5,000 employees in France or 10,000 employees worldwide will have to implement and publish a due diligence plan (*plan de vigilance*). The plan is supposed to identify risks inherent in the company's activities, also in relation to human rights, and prevent these risks from being realised. It also extends to subsidiaries and suppliers. If a company fails to provide such a plan

it can be fined up to 10 million euros. At the same time, all persons personally affected can apply to the court for an order on the company to draw up and implement the due diligence plan.¹⁹⁴

With this law the National Assembly has not retained the previously usual due diligence terminology (*le devoir de diligence*), but with the plan de vigilance has introduced a new legal term into French law. Para I sentence 2 of the provision regulates the contents of this *plan de vigilance* as follows (author's own translation): »The plan shall include appropriate measures of vigilance with regard to the identification and prevention of risks of human rights violations, the violation of basic freedoms, serious physical harm or environmental damage, as well as risks to health that may result from the activities of the company, companies over which it exercises direct or indirect control, or from the activities of its subcontractors or suppliers with which it has a business relationship«.

Further Development of Due Diligence Obligations through Case Law

In other jurisdictions than Germany legal development has traditionally depended more on case law. However, there, too, there have to date been few judicial decisions on due diligence in the context of globalisation and human rights abuses.

The Court of Appeal of England and Wales in 2012 held an English parent company responsible for the contraction of asbestosis by a worker in a South African subsidiary because, contrary to its due diligence obligation, its subsidiary had not adopted the necessary preventive health care measures.¹⁹⁵ Before a court in The Hague the inhabitants of several villages in Nigeria accused a Dutch parent company of failing to exert influence over its Nigerian parent company for the sake of environmental protection measures that would have prevented sabotage of its disused oil exploration blocks. The court rejected the company's objection that there is no due diligence obligation with regard to the behaviour of its foreign subsidiaries. In January 2013, however, it decid-

192. Cf. the text of Directive 95/2014/EU with § 289 para 3 HGB [Commercial Code].

193. Proposition de Loi N° 376 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre vom 30.3.2015.

194. The legal text leaves open what being affected should involve, see the text under II.

195. Court of Appeal of England and Wales, *Chandler v Cape plc*, [2012] EWCA Civ 525.

ed in favour of the parent company because the due diligence obligations of Nigerian and English law only exceptionally cover preventive measures against unauthorised interventions of third parties.¹⁹⁶

Summary

This brief overview already indicates that several states in which significant international commercial enterprises are domiciled have pursued different approaches to get companies to upgrade their due diligence. Furthermore, for the sake of completeness it should be mentioned that some states, such as UK and Switzerland, have established a corporate criminal law for cases in which, because of the often complex structures of enterprises, criminal offences cannot be attributed to determinate employees.

In comparison with the developments presented here the German legislator, with its statement of compliance with the German Corporate Governance Code (DCGK) (§ 161 AktG [Companies Act]) has ventured only a reluctant step. The following overview provides a comparison of due diligence obligations in selected foreign laws.

5. Proposals for the Substantive Development of the Human Rights Due Diligence Obligation

In the preceding sections examples and principles pertaining to due diligence obligations in the current German legal system were presented, along with developments concerning human rights due diligence obligations abroad.

In this section ideas will be developed for shaping due diligence with regard to human rights in the German legal system. In the process, we shall take into consideration experiences with due diligence processes accumulated by business in other areas, as well as recommendations within the framework of soft law.

196. Judgments of the Rechtbank Den Haag of 30.1.2013, available at <http://uitspraken.rechtspraak.nl> under the following document numbers: ECLI:NL:RBDHA:2013:BY9845, ECLI:NL:RBDHA:2013:BY9850 und ECLI:NL:RBDHA:2013:BY9854; Enneking 2014: 53.

5.1 Policy Commitment and Notions of Due Diligence

The UN Guiding Principles call on companies themselves to anchor their responsibility to respect human rights. To this end they are supposed to express their intention to comply with this responsibility in a policy commitment.¹⁹⁷ The policy commitment should be reflected in an applied due diligence concept (operational policies and procedures),¹⁹⁸ whose main constituent should be a due diligence process in accordance with UN Guiding Principles 17–21.

In fact, *Arnhold* and *Rohner* observed in relation to family-owned companies that human rights in many instances have been made an issue with regard to company organisation. They propose that when compliance systems are set up »commitments to respect human rights« should be included, although of course without going into detail as yet concerning the contents of such a commitment or any measures beyond that. Similarly, *Voland* also counsels that it might be advisable to adapt compliance systems in accordance with the UN Guiding Principles.

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Apart from that, codes of conduct or ethical guidelines have been established in pretty much all large companies and increasingly also SMEs. To be sure, hitherto their contents have concerned different issues than respect for hu-

197. UN Guiding Principle 16 (a)–(d), with further details.

198. UN Guiding Principle 16 (e).

199. *Arnhold/Rohner* in Gummert 2015: § 3 recital 58.

200. All it says is: »Many companies in drawing up their corporate code also take into consideration international human rights agreements«, *ibid.*

201. *Voland* 2015: 71 f.



Table 1: Overview of Various Approaches to the Regulation of Due Diligence

	Modern Slavery Act (UK)	Loi vigilance (FR)*	Dodd-Frank Act (USA)
	Disclosure and penal provisions in a special law.	Duty to prepare a due diligence concept in the context of corporate law provisions.	Statutory reporting obligation whose details are regulated by the financial supervisory authority, the SEC.
Scope of Application			
Personnel	Suppliers of good/services with a specific minimum turnover.	Companies with at least 5.000 employees in France or 10.000 employees worldwide.	All companies with a reporting obligation in relation to the financial supervisory authorities.
Pertinent	All sectors.	All sectors.	Use of conflict minerals in a product or production.
Geographical	Unlimited.	Unlimited, also in relation to foreign business partners.	Supply chain, insofar as there exists »real influence« on the production process, depending on the circumstances of the individual case, taking into account the level of influence.
Contents			
Objective	Taking steps against slavery/ human trafficking	Identification and prevention of risks to human rights resulting from the activities of the company, its (in)directly controlled companies, subcontractors and suppliers.	Ensuring that the armed conflict in the Democratic Republic of Congo and the African Great Lakes region is not supported.
Substantive rules	Slavery/human trafficking may not take place (i) in the supply chain and (ii) in any part of the company itself.	The law implicitly regulates that the company must respect human rights.	Payments for the acquisition of gold, wolframite, cassiterite and coltan may not flow to groups participating in the armed conflict.
Commercial policy	The law encourages the formulation of policies.	Due diligence concept (<i>plan de vigilance</i>)	
Procedure	The law encourages due diligence processes; the law encourages risk management systems.	Risk management: identification and prevention of human rights risks.	
Training	The law encourages training of employees.		
Audits / certification	—		Certification must be presented.
Evaluation	The law encourages verification of the effectiveness of measures on the basis of performance indicators that the company considers appropriate.		

* The law has yet to be approved by the Senate.
Source: Author's presentation.

man rights.²⁰² German legal literature has not welcomed this approach of integrating human rights into voluntary company guidelines, which originated in the United States. Some commentators had thought, given the multifarious legal regulatory mechanisms that already exist in Germany, that voluntary codes were superfluous and could even clash with the norms of labour, works constitution and company law, to a considerable extent.²⁰³ Several authors used to warn that the German legal system makes it fairly difficult to identify which components of ethical guidelines are permitted in terms of law on general terms and conditions (AGB-rechtlich) and whether they have to be negotiated individually with all employees, can be issued in the form of instructions or require the assent of the works councils.²⁰⁴ These concerns have been overtaken by practice, in that they are largely ignored.²⁰⁵ In any case, the literature has been able to develop practicable guidelines based on isolated judicial decisions.²⁰⁶

In the wake of these developments comes the recent tendency in case law and jurisprudence to recognise a legal obligation to establish an institutionalised compliance system for at least some companies. This involves a systematic approach to ensure conduct in compliance with the law from within the company. This obligation does not exist for every company, but in general for publically listed companies, although in future potentially also for other companies.²⁰⁷ Also, besides financial market regulations, *Seibt* and *Cziupka* surmise, courts could be inclined in future to establish requirements with regard to an effective compliance system.²⁰⁸ In the absence of legal stipulations for a compliance system, to date its design has been at the discretion of company management along the lines of the business judgment rule, in respect of which the proportionality principle applies and previous legal violations have to be taken into account.²⁰⁹ The principle of proportionality usual in financial market risk management says that the formu-

lation of compliance systems must be oriented towards specific company risks, the nature and extent of business operations and the complexity of the company's chosen business model.²¹⁰ This principle is consistent with the provisions of UN Guiding Principle No. 14. Case law has regularly adapted its expectations with regard to proportionate requirements concerning compliance systems in accordance with practical experience.²¹¹

The UN Guiding Principles, practical developments and compliance case law point in the direction of an obligation to establish institutionalised systems. At the same time, a need for flexibility is recognised.²¹² In order to meet the need for flexibility the legislator can limit itself to the stipulation of substantive topics with regard to due diligence approaches, which will be presented in what follows. Further development can be left to the company or business associations within the framework of multi-stakeholder initiatives (see below 6.2 and Part 1 of the present study, 3.1.2). If due diligence approaches meet relatively high requirements it is likely that, to give companies the legal benefit of the doubt, in their business dealings they have adhered to the requisite due diligence. In this way a so-called »safe harbour« would be established. Professional bodies and business associations, as well as the social partners and civil society actors could play a role in the further development of such best practice standards.

5.2 Responsibilities

Depending on the size and structure of the company it might make sense to establish specific responsibilities in the company to ensure legal compliance. This arises from financial market laws and the proportionality principle²¹³ recognised in the UN Guiding Principles, as well as from German case law on compliance.

Munich Regional Court I has recognised an obligation to establish an institutionalised compliance system for

202. Köhler/Häferer 2015: 159f.: corruption, fairness in relation to competitors, dealing with requests from the media, confidentiality in business transactions, insider dealing, money laundering.

203. Kischel 2015: 52f., Kock 2009; Junker 2005: 605; Eisenbeis/Nießen 2006: 697ff.

204. Kock, *ibid.*; Junker, *ibid.*; Eisenbeis/Nießen *ibid.*

205. On developments see Kischel 2015: 52f.

206. See, for example, Köhler/Häferer 2015.

207. *Seibt/Cziupka* 2015: 95.

208. *Ibid.*; also Hüffer/Koch 2014: § 76 recital 15.

209. *Seibt/Cziupka* 2015.

210. § 33 para 1 sentence 3 Securities Trading Act (Wertpapierhandelsgesetz – WpHG), detailed more fully in AT [general section] 3.2 of the circular issued by the Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht) on 7.6.2010: minimum requirements with regard to compliance functions and other obligations concerning conduct, organisation and transparency (MaComp).

211. *Seibt/Cziupka* 2015; see also Hüffer/Koch 2014: § 76 recital 15.

212. In legal terms: principle of proportionality.

213. See footnote 210 above; cf. UN Guiding Principle No. 14.

larger public limited companies with subsidiaries in countries in the global South.²¹⁴ It should be noted that the responsibility for designing, monitoring and further developing the system to ensure legal compliance remains with the company management as an overall task of all board members or executives; only preparatory, support and implementation activities can be delegated to the compliance officer.²¹⁵ With regard to respect for human rights it is to be expected, in accordance with the proportionality principle, that, in particular at large companies, a compliance officer will be entrusted with these activities.

As the expression of a specific responsibility on the part of the company certain activities that put human rights into particular jeopardy could be subject to the approval of the supervisory board or the works council or of an advisory board, laid down in the articles of association. In any case, it is already recognised that the supervisory board has inspection and consultation rights with regard to the establishment of the compliance system; it is happening more and more often that a company's articles of association grant the supervisory board a right to reserve approval with regard to the compliance system.²¹⁶ The OECD went further as early as 2004 and proposed that existing systems of employee representation on the executive level could and should be utilised as a vehicle for the interests of external stakeholders.²¹⁷ The fact that so far these suggestions have not been implemented²¹⁸ in foreign legal systems cannot be surprising because employees' codetermination rights – in particular through the works council or supervisory board – are a peculiarity of German law.²¹⁹ In the literature it is also recognised that approval requirements in the articles of association of public limited companies in accordance with § 111 para 4 sentence 2 AktG (Companies Act) can be a sensible way of scrutinising the board, especially for the purpose of risk prevention.²²⁰

214. LG München I [Munich Regional Court I], judgment of 10.12.2013 – Siemens/Neubürger.

215. Wolf 2011; cf. LG München *ibid*.

216. Seibt/Cziupka 2015: 95 f.

217. U.H. Schneider 2004: 432.

218. Cf. developments abroad, above 3.3.

219. U.H. Schneider 2004: 432.

220. According to Thiessen the relevant body stipulating the articles of association has far-reaching discretion with regard to the establishment of approval requirements, Thiessen 2013, whereas Fleischer considers that approval requirements are possible only for the purpose of risk prevention, Fleischer 2013.

5.3 Risk Evaluation and Human Rights Impact Assessment

Companies' due diligence approaches must, compulsorily, identify and evaluate risks of human rights abuse. This is because only by building on risk identification and evaluation can the company decide on appropriate measures to avert the danger in specific instances. UN Guiding Principles 17 and 18 present in more detail how effective risk identification and evaluation can be designed. The criteria of due diligence obligations developed by German case law (see 3.3 above) are in line with this. Basically, it can be said that risk identification and evaluation form part of an ongoing due diligence. Depending on branch, business and context their design must be more or less complex. In times of simple business transactions desk-based research can be sufficient, perhaps with the assistance of external expertise (UN Guiding Principle No. 18 (a)). If there are indications of risks, as well as before substantial projects, due diligence must be more thorough and include the views of the relevant stakeholders (UN Guiding Principle No. 18 (b)). Before launching larger projects or instigating business relationships it may be appropriate to undertake risk analysis and evaluation by means of a human rights impact assessment, in which the potential effects on the relevant people are identified by means of processes on the ground.

Similarly, German companies are already familiar with the obligation to set up a financial risk early warning system and the obligations with regard to ex ante risk assessment in the area of environmental protection.²²¹ Also outside these particular areas the business community has, in its own interest, some experience with so-called environmental analyses and integrity/reputational due diligence. Using these procedures research is carried out on the social, cultural, legal and economic conditions of foreign business locations, as well as information on the reliability of individual business partners. In this connection companies avail themselves of the offerings of business associations and chambers of commerce and many other sources.²²² Based on the results of these procedures the company management should be able to assess the opportunities and risks arising from external factors per-

221. §91 para. 2 AktG [Companies Act] (risk early warning system or financial risks); § 6 para 1 GenTG [Genetic Engineering Act] (risk assessment); §§ 3 ff. UVPG (environmental impact assessment).

222. Scherer 2012: 209f. For *integrity* due diligence specialised agencies and databases are also available.

taining to company success (outside-in perspective). This approach can be completed without too much extra cost by taking into account at the same time the opportunities and risks of a specific company project with regard to the environment and the relevant stakeholders (inside-out perspective). In this context companies can also avail themselves of human rights information already prepared for them by various actors (see Part 1 of this study, 3.1).

5.4 Information Obligations with Regard to Contract Initiation

The key elements are all in place, while companies themselves or through commercial agents initiate talks with potential business partners. In this phase the negotiation topics are laid down. If neither of the participants dare raise the issue of human rights at this point the drafting of the contract (on this see more below, at 5.4), too, is likely to neglect it.

It should thus become habitual for companies and commercial agents to make clear the importance of human rights to foreign negotiating partners from the outset, at least in certain branches and geographical regions. To this end the company's own policy commitment (see 5.1 above) and the UN Guiding Principles could be passed on to them or more specialised frameworks, such as the OECD's Five-Step Framework for Risk-based Due Diligence in the Mineral Supply Chain or the European Commission's sectoral guidelines.²²³

It may be assumed that this information is in most cases heeded only for a short while. In any case, such obligations to provide information would not entail a substantial burden for companies. For that reason they have already been standardised in codes in another context.²²⁴

5.5 Elaboration of Contractual Relations

Companies themselves – that is, because of the behaviour of their managers and executives – are rarely ac-

cused of abusing human rights abroad. Usually, the context of attribution is much more complex because the German company involves the persons who act directly by means of contractual or company law relationships. Drafting the contract appropriately, building on the results of the risk assessment is thus the most important way of ensuring leverage.²²⁵ Thus this should already be dealt with in the contractual relations with the commercial agents, through whom as a rule all further contacts are first made, because in many sectors they affect the selection of potential business partners. It is important that human rights clauses are not abused in contracts to palm off responsibility onto the business partner, but that both business partners enable purposeful dealings with the risks and the avoidance and resolution of conflicts. Usually, the following different kinds of typical contracts can be distinguished.

Corporate Shareholding (Subsidiary)

Links to human rights abuses often arise because companies have holdings in foreign companies in whose area of operations a violation takes place. There can be various reasons for taking a holding in a foreign company. Most often, however, commercial companies want to access foreign markets; the ensuing association of parent and subsidiary company is then designated a group. Financial investors and development banks, by contrast, aim at returns or at promoting development cooperation. In all cases companies can ensure themselves information and control rights by means of agreements with the foreign companies and business partners and agree on rules for the business operations of the foreign company.

Before a company acquires a shareholding in a foreign company, however, it usually examines how reliably compliance functions at the target company, if, for example, for the following reasons there are doubts concerning its reliability: compliance incidents in the foreign company's past are identified (also in relation to management and partners); the target company operates in a compliance-sensitive sector; the target company engages in compliance-sensitive activities (for example, large projects or government contracts) or is active in compliance-sensitive regions or countries. The sources for ob-

223. See above, footnote 95.

224. The association code for the service station business, approved by the Federal Ministry for Economic Affairs and Energy (BMWi) on 29.4.2015, regulates the information obligations of service station operators when initiating contracts with potential tenants. To make clear to tenants the possible economic risks of such a contract they have to make available to them a BMWi leaflet on the service station business.

225. Cf. UN Guiding Principle No. 19; ISO 19600:2014 Compliance Management Systems No. 8.1–8.3.

taining information include published information, local contact persons and representatives of industry, embassies, information from business intelligence providers, information requested directly from the target company and interviews with those responsible for compliance and the business management.²²⁶ If this procedure was applied to human rights risks on the ground in the relevant country it would scarcely differ from the human rights impact assessment in accordance with UN Guiding Principle No. 18 (cf. Part 1 of this study, section 2.2).

If the decision is taken to establish a relationship with the target company the question arises of what form the business relationship will take. In what follows it is shown when the company can exercise more or less influence over its foreign business partner and what contracts have a decisive influence on them. What requirements could be imposed on the substantive drafting of the contract will be presented in sections 5.6–5.10.

A particularly close and lasting form of cooperation is the equity joint venture, by means of which raw materials markets, production locations and sales markets are opened up. In this arrangement both the German company and its foreign business partner hold shares in a subsidiary company. Such a joint venture can come into being not only through the joint founding of a new company, but also through the purchase of part of the shares of an existing company.

If the subsidiary company is in the majority ownership of the German parent company it is to be assumed that the German company can exert a controlling interest over the subsidiary and the two companies are under common control.²²⁷ In this case it is relatively unproblematic to expect the German company to initiate certain due diligence measures in the subsidiary company.²²⁸

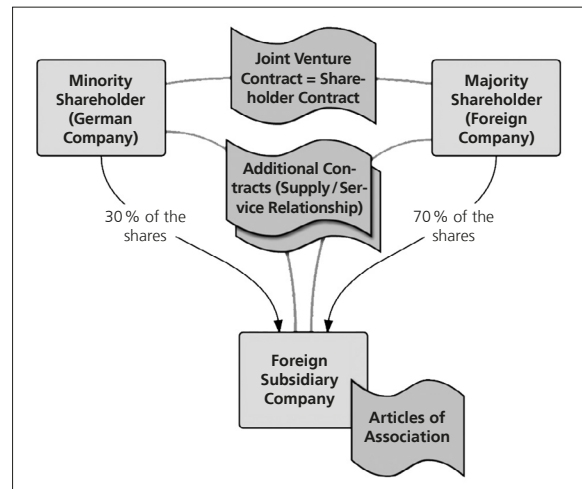
Often, however, the German company acquires half the company shares, among other things because local investment provisions prohibit more extensive participation. Thus its influence over the subsidiary's business

226. The trend towards compliance due diligence comes from the United States and has now become established in Germany, Stiller/Maschke 2015.

227. §§ 17 para 2, 18 para 1 sentence 3 AktG [Companies Act]. In practice, refutation of this assumption is »attempted only rarely and succeeds only exceptionally«, ArbG Düsseldorf, decision of 3.3.2009 – 11 BV 184/08, official guideline 3.

228. Cf. Schmalenbach 2001: 59f.

Figure 2: Equity Joint Venture



Example of a typical international equity joint venture with the foreign joint venture (subsidiary) under the minority holding of a German company: the actions of both companies with one another and their influence over the subsidiary are regulated comprehensively in the contract. Source: Author's presentation.

policy diminishes. Without special arrangements minority shareholders cannot exert a decisive influence on the management of their subsidiary. In practice, the tendency is thus to safeguard control rights already when business relations are being established with the foreign business partner. Law firms advise German companies how this can be done when drafting the joint venture contract, the subsidiary's articles of association and the additional contracts, so that even German minority shareholders have sufficient influence over the project. Common recommendations include.²²⁹

- Regulations concerning the corporate governance of the subsidiary, for example, composition of supervisory boards, advisory boards and shareholders committees;
- List of transactions that require the approval of a supervisory body (supervisory board/works council), an advisory board or the shareholders;
- Escalation levels for conflict situations with regard to the conduct of business, for example, arbitration/mediation;
- Exit clauses in the event of an irresolvable conflict.

229. Göthel 2014.

Parallels with the UN Guiding Principles are already evident in practice. UN Guiding Principle No. 19 recommends that companies in scarcely manageable situations take measures on the basis of which they can enhance their leverage and, if need be, consider withdrawing from the business relationship. It may for instance emerge from a risk assessment (see above 5.3) that the regulations on corporate governance at the subsidiary must adhere explicitly to the ILO core labour standards because in the host country normally not all these generally binding core labour standards are respected.²³⁰

When German companies complain that they are powerless with regard to abuses of labour and human rights on the part of their foreign subsidiary this is due to the fact that there was no risk assessment before the founding of a joint venture or because the right conclusions were not drawn from it when drafting the agreement; as the case may be, corresponding clauses can be renegotiated with the business partners.

Which anti-trust conditions are supposed to be taken into account when establishing contractual relations under company law has already been dealt with elsewhere.²³¹

Project Cooperation

Individual time-limited projects, such as plant construction projects and in the mineral extraction industry, are often completed by contractual joint ventures. In this case purely tort law contractual relationships are established with foreign business partners, which thus do not have as their object any participation in a company, whether existing or yet to be established. However, even this kind of cooperation can be put under centrally focused management authority, such that the German company can exert a »decisive influence« that justifies demands for conduct based on due diligence.²³²

230. Cf. for example, Deutscher Bundestag, Petition 59803 of 6.7.2015 and on the same case: Funke, *Gestörte Verbindung zur Gewerkschaft*, *Süddeutsche Zeitung*, 24.3.2012.

231. Weitnauer 2010: 80.

232. Schmalenbach 2001: 60, on the definition of multinational enterprise in accordance with the OECD Guidelines. In general on the construction of contractual joint ventures: Fett/Spiering 2010: chapter 8.

Supply Chains

A looser form of business relationship is the supply chain. If it is on a long-term basis it is practically always shaped in advance by means of a framework contract, so that only a few still open issues remain to be clarified when, later on, individual orders are placed and confirmed by a confirmation letter.²³³ Often, framework contracts are shaped by the general terms and conditions of purchase of the client placing the order or the general sales terms and conditions of the supplier. What is involved here are general terms and conditions (in German, *Allgemeine Geschäftsbedingungen* – AGB). General terms and conditions are subject to judicial efficiency control on the basis of §§ 305 ff. BGB (Civil Code), insofar as German law is applicable to the contract. This also applies in a weaker form (§ 310 para 1 BGB), if no consumer is involved in the legal relationship. General terms and conditions that are supposed to serve respect for human rights should, like other general terms and conditions, also satisfy these legal provisions; in particular they should be adequately clear and appropriate and not violate mandatory legal principles. The in practice relatively new clauses aimed at human rights concerns have to date struggled to satisfy these conditions.²³⁴

Negotiating human rights clauses with the business partner on an individual basis is more flexible, because agreements that have been negotiated with the contracting party on an equal footing do not have to measure up to general terms and conditions law.²³⁵ However, in case of doubt case law increasingly assumes that contractual provisions qualify as general terms and conditions. It attaches considerable requirements to contracts negotiated on an individual basis by way of verification.²³⁶ As a result, there remains the risk that the clauses will not stand up to a general terms and conditions check. Here the legislator can provide for clarification. The more clearly due diligence obligations are formulated with regard to supplier relations, the less likely it is that clauses that contribute to the fulfilment of these due diligence obligations will be inappropriately disadvantageous to or surprise the contracting party. This is

233. Imbeck in Heussen/Pischel 2014: Part 3, recital 207.

234. Spießhofer and von Westphalen show, for example, the ineffectiveness of three typical CSR clauses: Spießhofer/Graf von Westphalen 2015.

235. Kaufhold 2014.

236. Ibid.

all the more clear if the law indicates that companies should also pay attention to their human rights leverage when drafting a contract.

There are various reasons for putting individual due diligence measures particularly deep in the supply chain or even right at its beginning. In accordance with the criteria developed to date by case law a particularly high level of danger and predictability (for example, conflict minerals) or danger that can be controlled easily (long-term contractual relations) or a particularly close association (production in accordance with the client's wishes) can give rise to particularly far-reaching due diligence. In particular in cases of permanent, extensive business relations it may seem reasonable to the company to lay the foundations for future monitoring and control of risks, especially by means of one-off measures pertaining to clarification and contract negotiations, during the drafting of the contract. In other cases, the scope of due diligence shall continue to depend on the circumstances of the individual case (cf. UN Guiding Principle No. 17 lit. b, 19 lit. b (ii)).

In most sectors it is unlikely that companies will abridge their due diligence by repeatedly breaking off functioning long-term business relations. Pretty much every company seeks reliable business relations and avoidance of administrative costs. Even if a long-term business relationship is artificially split up into multiple short-term contracts with the same business partner even this constitutes a long-term business relationship within the meaning of due diligence obligations. In sectors in which business relations evaporate fairly quickly (for example, in the textile industry) it can be expected for other reasons that due diligence measures can be applied deep in the supply chain, for example, insofar as particularly important legal interests, such as health and life, are endangered. If, for example, orders to manufacture clothing involve the use of certain chemicals the company should exert direct influence over the production plant on the spot, because in that case there exists a close connection with the danger, clear predictability of damage to health and the possibility of leverage.

5.6 Reporting and Group Controlling

Software-based business intelligence systems (BI or management information systems, MIS) are important tools with which the flow of information in the compa-

ny is steered, data preparation optimised and business processes coordinated. Virtually every company, other than the tiniest, use such a software-based system. The implementation of effective approaches to so-called investment and group controlling has become standard in larger groups; by this means, planning, analysis and management, as well as optimal reporting are ensured group-wide. Especially in the case of international group formation and international investment in the form of a joint venture linguistic and cultural barriers arise, different mentalities, a particular market and competitive environment, other infrastructure and legal conditions. Practice and scholarship have examined this problem area extensively and developed effective solutions, that cannot be presented in detail here.²³⁷ It needs to be noted here that, despite all the geographical and cultural barriers, effective exertion of influence over foreign business partners can be expected on the part of German companies not only in legal terms (5.4), but also practically, based on tried and tested methods.

5.7 Training Courses

Training courses are already part and parcel of compliance systems.²³⁸ Training courses conducted by both employees and external consultants, both in person and via webinars, are standard. What is particularly relevant depends on the company's size and sector. As presented in Section 3.1 above, the legislator has already expressly regulated training courses as part of due diligence obligations in various areas. UN Guiding Principle No. 16 also mentions training measures in its official commentary.

5.8 Certifications and Audits

Certification systems and audits – both internal and carried out by external service providers – are widespread in practice, but equally controversial. In particular, the reliability of external audits has proved questionable in the past.²³⁹ Depending on the sector, size of company and region some companies are likely to find preferable the alternative of an internal audit by means of visits to

237. Paul 2014: 7 ff., 37 ff., 105 ff., 169 ff. and 209 ff.; Burger/Schmuck/Ulbrich 2006; Schäkel 2002: 278.

238. ISO 19600:2014 Compliance Management Systems No. 7.2.

239. Burckhardt 2014: 107 ff.

business partners (supplier visits). Many businesses will not be able to do without external expertise, however, in particular if business relations are conducted only temporarily in certain regions with particular circumstances.

To be sure, some of the biggest problems with audits are difficult to control using legal means: audits can only sometimes come up with unambiguous testimony on clearly defined and verifiable circumstances. Social aspects can always change rapidly and their apprehension depends on information supplied. To that extent audits can provide only a blurred picture of a current situation.²⁴⁰

It is questionable, however, whether the legal framework of audits can be improved, so that they can nevertheless satisfy one purpose as meaningful components of due diligence approaches. In this connection experiences with certification requirements in accordance with the Dodd-Frank Act in the United States should be recalled: the more exacting the demands for transparency and reliability of audit results the more the work of auditors is looked at in a critical light. Disclosure obligations are thus a key condition for functioning audit systems.

Another reason for the deficiencies of many audits is that auditors only have to count on relatively insignificant consequences if they are grossly negligent in carrying out their inspection duties and in the event that human rights are abused. This is because to date the main purpose of audits has been to protect the company that commissioned the audit from supply bottlenecks and damage to its reputation. Accordingly, in the event of a breach of duty, although the certification company is liable with regard to the company that commissioned the audit for damages, its damages are – apart from delivery delays – low and difficult to measure. The real damages are borne by the people affected in the workplace. However, the latter have no contractual relationship with the auditors and thus can only resort to the bases for legal claims available under tort law, although with less prospect of success, because in tort law the injured party has to allege and, in the event these allegations are contested, must prove a fault against the defendant (the auditor). Case law considers the complication of the burden of proof under tort law questionable if the injured parties typically are affected by the services or

activities (*»Leistungsnahe«*) arising from the contractual relationship (between the client and the auditor).²⁴¹ In many instances case law thus grants the injured party the benefits of the bases of legal complaint under contract law, recognising in its interpretation a »beneficiary effect for third parties« (*Vertrag mit Schutzwirkung zugunsten Dritter* or VSD) in the contract concerned. Reports that could influence a business decision of a buyer or an investor are a recognised case group of the beneficiary effect for third parties developed by case law.²⁴² Whether audit contracts may have beneficiary effects for third parties in respect of human rights concerns is currently being clarified in court in relation to the right to health.²⁴³

Legislation could establish incentives for the parties to the audit contract to voluntarily include such beneficiary effects in their contract text and in such a way that the party that commissioned the audit is relieved of the imputation of fault. A proposed formulation for such a regulation can be found at the end of this study (Section 6.3, para 5).

Such a »safe harbour« should not encourage companies to abuse, however, for example, by commissioning unreliable auditors. The presumption rule should thus come into play in cases of *audits* that meet certain legal requirements or requirements governed by a regulation.²⁴⁴ The procedure and results of the audit should be disclosed. Audits are also, in principle, suitable for linking up with multistakeholder initiatives. Furthermore, the new occupational profile of auditor should, for example, be subject to occupational law, which could resemble those of other advisory professions.²⁴⁵ In addition, auditors could receive accreditation from, for example,

240. Developments are thus moving in the direction of not only auditing suppliers, but also providing them with support, Shift 2013.

241. Grüneberg in Palandt 2015: § 328 recital 17 f.; Schulze 2014: § 328 recital 15.

242. Grüneberg in Palandt 2015: § 328, recital 34. With § 311 para 3 BGB [Civil Code] the legislator already recognised the contract with beneficiary effect for third parties (VSD). However, the consultant's liability continues to be governed by the principles developed by case law, Grüneberg in Palandt 2015: § 311 Rn. 60 ff.

243. The question of whether the testing of silicon breast implants by the Rhineland TÜV [technical inspection association] for the purpose of »CE« labelling has beneficiary effects for all potential patients and the TÜV is thus liable, as the case may be, for any damage to patients' health, BGH, order for reference of 09.4.2015 – VII ZR 36/14.

244. Cf. the same approach in § 9a Federal Data Protection Act (data protection audit).

245. Compare, for example, the provisions concerning the legal profession, financial auditors and collection service providers regarding membership of chambers, liability insurance and the designation of »qualified persons«.

German embassies and/or German chambers of foreign trade.²⁴⁶ The International Register of Certified Auditors (IRCA) could also play a role in this. Moreover, audits would have to be repeated and take place at regular intervals.

By means of such material and institutional changes not only could the quality of audits be improved, but at the same time, a problem would be solved on which case law has previously failed in respect of its legal certification obligations on a regular basis. What is at issue here is the problem – presented in footnote 90 – of the principle of certainty and the appropriateness of regulations under public law. Communal statutes for cemeteries, which demand from stonemasons proof that gravestones were not manufactured using exploitative child labour have regularly been rejected by the courts as too indeterminate. In the view of the Constitutional Court Baden-Württemberg previous provisions improperly left the norm addressee uncertain with regard to what certificates they would have to produce; furthermore, in the area of natural stones the court was not aware of appropriate (reliable) certification systems.²⁴⁷

The reliability of auditors and certification authorities is more or less questionable, depending on the sector. With regard to the gravestones/natural stone sector, for example, *Krajewski* has explained why the existing certification systems are already so well developed that they can be considered trustworthy.²⁴⁸ In the course of continued development, in any case, in areas in which certification systems prove to be relatively robust and especially if the proposals presented above are implemented, *Krajewski's* proposal²⁴⁹ should be followed and a corresponding legal regulation should be created (cf. the proposed formulation at the end of this study, 6.3 para 3). If the company does not furnish the legally prescribed certification, in the event of damage it would not necessarily entail liability for compensation. In that case, however, there is a stronger need for explanation and, perhaps, proof that certifications

were not possible without incurring an unreasonable burden and other appropriate due diligence measures had been taken.

Even the most thorough audits are not infallible. Criminal energy, for example, the deception of auditors by factory operators, can hardly be revealed by even the highest degree of due diligence. Depending on the sector and under the abovementioned circumstances audits can, however, at least at a point in time convey a reliable impression of real working conditions.

5.9 Whistleblowing

Whistleblowing involves employees of a company »sounding the alarm« by giving authorities inside or outside the company evidence of unethical or illegal behaviour, so that the abuses can be prosecuted and eliminated. The establishment of corresponding responsibilities, procedures and rules can be considered an important part of any compliance system.²⁵⁰

The reporting of abuses can be required with regard to the law enforcement authorities or labour inspectorate in the case of persistent structural abuses in the company in order to eliminate hazards to employees or third parties. Reporting to the public authorities is legally permissible, however, only in certain exceptional cases.²⁵¹ In fact, employees risk dismissal without notice for alleged infringement of their duty of loyalty. In 2011 the European Court of Human Rights (ECHR) annulled German case law that had declared such dismissals lawful.²⁵² However, the legislator has hitherto not wished to extend the legal reporting obligations and permissions and thus opposes, according to observations in the legal literature, recent trends at European and international level.²⁵³ However, it appears unrealistic to expect companies voluntarily to allow their employees to report abuses to the public prosecution authorities or the labour inspectorate.

246. Legal requirements with regard to accreditation are also planned for data protection audits, but to date have not been adopted, see footnote 245.

247. VGH Baden-Württemberg, judgment of 29.4.2014 – 1 S 1458/12 and below, footnote 249.

248. *Krajewski* 2014b: 6f.; for another view, again: VGH Baden-Württemberg, decisions of 21.5.2015 – 1 S 383/14 – 1 S 403/14 – 1 S 491/14 – 1 S 556/14.

249. Cf. *Krajewski* 2014b: 6f.

250. *Simon/Schilling* 2011.

251. For example, in the planning of arson for insurance purposes, violations of data protection provisions and unsatisfactory health protection in the workplace, see with the relevant evidence *Simon/Schilling* 2011: 2423.

252. ECHR, judgment of 21.7.2011 – Az. 28274/08 (*Heinisch/Germany*); the issue was a criminal complaint against an employee of a *Vivantes* clinic in Berlin.

253. *Bommarius* 2015.

It seems more reasonable that companies themselves should justify responsibility for an external ombudsman or an ombudsman in the company. According to *Hauschka* it depends on the risk situation in the company whether an ombudsman should be established and, if yes, whether they should mandatorily be established externally or should be someone belonging to the company. The advantages of an ombudsman are that the company receives information sooner and thus gives itself more room to manoeuvre. Outsourcing to an external appointee – often a law office – is likely to meet with more acceptance among the company's employees.

5.10 Documentation Obligations

Documentation obligations are a statutory component of due diligence in various contexts (see 3.1). Based on its documentation the company is supposed to be in a position to provide the authorities with information, but also to be able to clarify facts itself. In the absence of statutory documentation obligations – thus with regard to the general due diligence – it is to be assumed that informative documents have not been kept available. This is because insofar as no documentation obligations exist with regard to the exercise of due diligence²⁵⁴ legal advisors recommend that their clients implement a document destruction policy so that the company does not run the risk of incriminating itself in the event of legal disputes.²⁵⁵ If there is a transfer of the burden of proof to the detriment of the company the question of documentation obligations shifts into the background, however, because in that case the company has a valid reason for retaining documents.

5.11 Due Diligence Obligations in Competition Law

As has already been presented concerning protection of consumer interests under competition law it is already arguable that putting on the market products produced in breach of human rights and certain advertising information violate a due diligence under competition law

254. Thus, however, for example in accordance with §8 GGVSee with regard to the transport of hazardous goods on the high seas, see above, 3.1.

255. Seibt/Cziupka 2015: 96 f.

(see 3.4). Because, however, this conclusion cannot be supported by clear wording in the German Law against unfair competition (UWG), extending §5 para 1 Nos 1–7 UWG with a new No. 8 is recommended. The regulation should concern advertising information that gives consumers the impression that the risk of human rights abuses in the supply chain is relatively low. A possible formulation for a change in the law may be found in Section 6.3.

As has also already been mentioned (3.4), also to be recommended to protect the interests of competitors in a level playing field is a supplementation of §4 UWG. A corresponding proposal for a possible formulation is also to be found under 6.3.

6. Proposed Formulation and Possible Allocation of New Statutory Provisions

In conclusion, we shall now bring together regulatory approaches that, given previous developments both domestically and abroad, appear to be legally justified, practical and effective, fit in to the legal system systematically and conceptually and, at the same time, are feasible in accordance with the proportionality principle for large and small companies in different sectors. Before attempting a concluding proposal let it be said in advance that no proposed solution can capture all conceivable states of affairs and loopholes exhaustively and properly. From the proposal presented here, however, it should in many respects be possible to draw suggestions for possible regulatory approaches. It is also worth noting that we can assume that no law was ever perfect and reliance on case law is always called for.²⁵⁶

6.1 Preliminary Consideration of Burden of Proof and Type of Penalty

The burden of demonstration and proof can be defined explicitly, although it does not have to be. The Federal Ministry of Justice and Consumer Protection recommends that in the drafting of legislation it should be indicated already through the linguistic presentation who

256. In the words of Professor Gerhard Wagner: »Case law has always been ready to intervene in order to correct inefficiencies that have crept into legal relations.« Kötzt/Wagner 2013: recital 184.

bears the burden of demonstration and proof.²⁵⁷ The person in whose favour the exception shall apply has to demonstrate the fulfilment of its conditions and prove it in the case of a dispute.

At first sight, it may appear that due diligence and rules on the burden of proof make unrealistic demands on the norm addressee. However, especially with regard to states of affairs that at first glance appear complex a shifting of the burden of proof often leads to the company that bears the burden of proof forming an idea of the risk and thus the state of affairs becomes clearer.²⁵⁸

If, despite the shift in the burden of proof, the civil law liability risk remains low, *Spindler* recommends, in addition to the civil law liability, public law sanctions,²⁵⁹ in other words, fines in accordance with the Administrative Offences Act (Ordnungswidrigkeitgesetz – OWiG).

6.2 Participation of Business Associations: Specification by Means of Association Codes of Conduct

In order to ensure flexibility and proportionality in the application of the law across sectors and different-sized companies business associations could play a supplementary role as developers of association codes of conduct following legislation. During the development of the code, civil society actors and trade unions should be involved in accordance with the multi-stakeholder approach (see Part 1 of the present study, section 3.2).

Association codes of conduct do not have the status of legal norms. They are self-regulatory systems that are developed by associations and the member companies, whose competition and business practices they govern and are valid by virtue of agreement. They are particularly widespread in the area of environmental protection,²⁶⁰

although they also exist in other areas²⁶¹ and are at present being developed in the textile industry.²⁶² They are, moreover, considered to be of limited suitability as regards ensuring substantively appropriate rules and decisions, especially insofar as third-party interests are concerned, because for self-regulating actors their own interests come first.²⁶³ For that reason as a rule they should not substitute legal norms, but rather accompany them.²⁶⁴

How effective association codes of conduct can be also depends on their competition law consequences. In the case of code violations consumer protection associations and rival companies can contemplate seeking injunctive relief against a company that is presumed to be acting unfairly.

To date, case law has adjudged association codes of conduct to have indicative effect within the framework of the competition law general clause (§3 para 1 UWG). For example, advertising a cigarette brand as »mild« has been prohibited because the levels of contaminants of the cigarette brand were above what the cigarette industry itself defined as »mild« in its »mild agreement«.²⁶⁵ Case law, however, does not take its bearings from association codes of conduct without reservation. In individual cases it hinges on whether the code prescribes minimum requirements for all companies or maintains a particularly strict approach. In the latter case the company's room to manoeuvre would be burdened excessively, if every code violation per se were prohibited under competition law and trigger compensation. Competition law sanctions would then come into consideration only against some kind of misrepresentation to consumers that the company would comply with the association code of conduct.²⁶⁶

257. A conditional sentence that begins with »if not«, »unless« or similar contains an exception and, at the same time, an implied regulation of the burden, Federal Ministry of Justice 2008: recital 86.

258. *Spindler* 2008: 304f.

259. *Ibid.*

260. Above all at European level, see the list at <http://www.bmub.bund.de/themen/wirtschaft-produkte-ressourcen/wirtschaft-und-umwelt/selbstverpflichtungen/selbstverpflichtungen-auf-europaeischer-ebene/>, but also at the federal level, see list at <http://www.bmub.bund.de/themen/wirtschaft-produkte-ressourcen/wirtschaft-und-umwelt/selbstverpflichtungen/selbstverpflichtungen-aktuell/>, both last accessed on 19.6.2015.

261. In 2012 the Federal Ministry of Food, Agriculture and Consumer Protection (BMELV), together with 18 food industry associations, developed guidelines to minimise trans-fats in food products, blf.de/download/tfa-leitlinie-initiativpapier (13.8.2015). See code of conduct for the service station industry (29.4.2015), published at bmwi.de/DE/Presse/pressemitteilungen,did=703402.html (26.6.2015).

262. In 2014 the Ministry for Cooperation and Development (BMZ) launched the initiative »Alliance for sustainable textiles« (Bündnis für Nachhaltige Textilien), whose aim is to develop social, environmental and economic improvements along the textiles supply chain.

263. *Beater* 2011: § 1 recital 65.

264. *Ibid.*: recital 66.

265. BGH, judgment of 14.1.1993 – I ZR 301/90 = BB 1993, 1244.

266. § 5 para 1 No. 6 UWG and No. 1 and 3 in the Annex to UWG [Unfair Competition Act].

Similarly, the German Corporate Governance Code (DCGK) contains a part that describes the applicable law, a part containing recommendations («are supposed to») and a part containing suggestions («ought to»). Human rights aspects have to date not been addressed in DCGK. That is likely to remain the case in the future. Successive extensions of DCGK to cover various topics have not been welcomed, in particular because the legally prescribed declarations of certain companies concerning DCGK have resulted in unclarified liability risks.²⁶⁷ Furthermore, DCGK applies to all economic sectors uniformly and its contents are not subject to state influence. It has also been noted that no changes in the statutory obligations of company managements arise from DCGK.²⁶⁸

The obligation proposed here on the drafting of an association code of conduct leaves the associations with their autonomy as regards internal policy decision-making (Art. 9 Basic Law)²⁶⁹ as protected by their fundamental rights and, with regard to freedom of occupation (Art. 12 Basic Law) of individual companies, represents only a rule governing professional practice, which is easy – with the aim of human rights protection – to justify.

Self-regulation systems run up against cartel law concerns.²⁷⁰ Agreements between competitors to conduct themselves lawfully are permitted, but any coordination of conduct can be prohibited under cartel law, even if the agreed conduct has already become established as trade practice.²⁷¹ In order to remove doubts concerning the cartel law permissibility of codes their development should be provided for by law.

6.3 Proposed Formulation

Summarising, it can be said that the legislator should regulate minimum requirements with regard to due diligence approaches, which can be worked out, for example, by business associations or by legal ordinance on a sectoral basis. If a company fails to respect these

minimum requirements the burden of proof should be reversed to the company's disadvantage: it would be (refutably) assumed that the company has not exercised due diligence with regard to a legal violation that has occurred (after Morse, a so-called «sure shipwreck»).

At the same time, sector-specific best practice rules should be developed, for example, with the involvement of business associations. By complying with the best practice rules the company could be given the benefit of the presumption of compliance with due diligence («safe harbour»).

A safe harbour is also useful with regard to audits/certification, as long as certain conditions are met (see above, 5.8). Otherwise, that is, in the space between safe harbour and sure shipwreck, the company's liability would continue to depend on the indications of the individual case.

6.4 Allocation of New Regulations

The legislative changes proposed here can, irrespective of the changes apparently provided for in the Unfair Competition Act [UWG], be assigned to various areas of law: substantive requirements concerning due diligence could be allocated to general law of obligations (§ 276 para 2 BGB [Civil Code]), tort law (§§ 823 ff. BGB), the special provisions on due diligence for merchants (§§ 346 f. HGB [Commercial Code]) or, for example, company law due diligence (§§ 76, 93 AktG [Companies Act]).

Far-reaching changes in § 276 para BGB [Civil Code], at the core of one of the most important German laws, would be difficult to implement. Instead, allocation of this change and of further supplements to tort law could not be objected to from a systematic perspective. Here the deleted § 835 BGB would come into consideration as a lacuna.

Regulations in HGB [Commercial Code], AktG [Companies Act] or GmbHG [Limited Liability Companies Act] appear dubious because the fundamental self-understanding of this area of law is exclusively the regulation of internal company legal relations or the legal relations of merchants among one another. An allocation to § 130 OWiG [Law on Administrative Offences] appears obvious at first glance because of the connection with

267. Joachim Jahn, *Missbrauchter Kodex*, FAZ of 11.7.2011, Ressort Wirtschaft, p. 9.

268. Paschke in *Schwerdtfeger* 2015: § 76 recital 43. Cf. on DCGK also Part 1 of the present study.

269. Horn in *Isensee/Kirchhof* 2005: § 41: *Associations [Verbände]*, recital 19 ff.

270. Bornkamm in *Köhler/Bornkamm* 2015: § 5 recital 5.165.

271. K. Schmidt 2014: § 1 recital 49.



Table 2: Ideas on Formulations for Possible Statutory Regulations

<p>Clarification that German due diligence obligations are also to be complied with in the case of cross-border transactions, even if foreign law is applicable (Art. 17 Rome II Regulation). → 3.3</p> <p>Aid to interpretation: German laws that serve the implementation of human rights come into consideration as mandatory provisions (Art. 16 Rome II Regulation). → 3.3</p>	<p>(1) The reasonable care required of a business person in accordance with § 276 para 2 BGB (Civil Code) also extends to impacts of his or her cross-border business relations on the rights of third parties that the Federal Republic of Germany is generally obliged to protect or has committed itself to protecting with regard to the state where the damage took place.</p>	<p>Principle of extraterritoriality and cooperation → see above, Section 2.1</p> <p>More legal certainty, see box »Grey areas« → 1. and 3.5</p> <p>Companies can become aware of the significance of human rights already through frameworks, guidelines and online-tools; see on the principle of legal certainty. → 2.2</p>
<p>The CSR Directive also refers to the notion of »concept« in the context of human rights concerns (2014/95/EU).</p> <p><i>Comply or explain</i>, → 4. allows flexibility in accordance with company size; cf. proportionality principle → at Fn. 213.</p> <p>Lit. b) to k) can be summarised alternatively as »<i>due diligence-processes</i>«, cf. wording of the CSR reporting obligations directive (2014/95/EU).</p> <p>Flexibility by branch; Minimum requirements in the group code of conduct = competition law standard of fairness → 5.11</p>	<p>(2) ¹Until a business person who has cross-border business relations on a regular basis has drafted and applied a due diligence concept, which must in any case include the following contents, or explains why it does not include them, it shall be assumed that he or she has not complied with due diligence within the meaning of para 1:</p> <ul style="list-style-type: none"> (a) a policy commitment, (b) responsibilities or approval requirements, (c) risk analyses and assessments, (d) provision of information on contract initiation, (e) organisation of contractual relations, (f) reporting within company groups and supply chains, (g) training, (h) certification or audits, (i) whistleblowing, (j) documentation and (k) follow-up and evaluations of measures taken. <p>²If a business association has established a model code of conduct setting forth minimum requirements with regard to these contents, the due diligence concepts of the member companies of the association must meet the minimum requirements.</p> <p>³Association codes of conduct in accordance with sentence 2 are to be developed together with a ministry and with the participation of civil society and the social partners and to be revised after 5 years.</p>	<p><i>Sure shipwreck</i> regulation; → 1. The company must demonstrate and prove that it has a due diligence concept in accordance with para 2. If it is able to do so, those affected must prove (as previously) that the company is guilty of the legal violation and damage. If the company is not able to do so, guilt will be assumed; however, proof of the contrary is required.</p> <p>These due diligence measures are based on:</p> <ul style="list-style-type: none"> – previous case law criteria → 3.3 – previous practice with regard to compliance, (group) controlling, due diligence, drafting contracts, business intelligence and environmental analyses, etc. → 5. – recommendations of <i>soft law</i> frameworks, such as the UN Guiding Principles → 5. <p>Business associations should be obliged to develop an association code of conduct with minimum requirements; besides that, <i>best practice</i> recommendations can also be included (see para (4)).</p>
<p>Scope of due diligence in value chains → 5.5</p> <p>Enhanced requirements with regard to sectors prone to risk</p> <p>Certifications → 5.8</p>	<p>(3) ¹If a businessperson maintains value chains that reach beyond the EEA measures taken in accordance with para 2 must in any case extend throughout the value chain, if</p> <ul style="list-style-type: none"> – the article to be supplied is to be manufactured in accordance with the businessperson's specifications, – the value chain is permanent, or – the following things are concerned: [conflict minerals, textiles, ...]. <p>²Business relations with suppliers of certain goods may be entered into only if the supplier demonstrably respects compliance with [for example, ILO Convention N. 182] throughout the supply chain. Verification is provided,</p> <ul style="list-style-type: none"> – if the entire supply chain is situated in the EEA and Switzerland, or – by certificate of an accredited testing centre. 	<p>Circumstances under which case law imposes enhanced requirements with regard to due diligence; → 3.3:</p> <ul style="list-style-type: none"> – the company has a special influence over the source of risk – the company can easily influence the risk (by adapting long-term framework contracts), – particularly high risk to significant legal interests



	<p>(4) If there is an association code of conduct that contains best practice recommendations on the contents mentioned in para 2, and companies have implemented all these recommendations, it shall be assumed that they exercise the required due diligence within the meaning of para 1.</p>	<p><i>Safe harbour</i> regulation; proof of the contrary is permissible</p> <p>Involvement of business associations → 6.2</p>
	<p>(5) If businesspersons commission an accredited testing firm to investigate risks with the purpose of protecting employees or third parties against these risks (accredited audit with protective effect), it will be assumed that the businesspersons have exercised due diligence in accordance with para 1 and to that extent para 2 is immaterial.</p>	<p><i>Safe harbour</i> regulation; proof of the contrary is permissible</p> <p>Audits → 5.8</p>
	<p>(6) Accreditations within the meaning of para 3 and 5 are issued by [German embassies, foreign trade chambers, ...].</p>	
Criminal law and regulatory offences law → 3.2	<p>(7) An administrative offence is deemed to have been committed by any person who intentionally or negligently fails to establish a due diligence concept in accordance with para 2 sentence 1.</p>	Cf. the French <i>Loi Vigilance</i> → 4.

Supplementation of § 5 para 1 No. 1–7 UWG [Unfair Competition Act] with a new No. 8		
<p>The obligation to provide information serves to overcome the typical lack of evidence. Companies' information obligations in relation to consumers are not uncommon, see also Art. 246 EGBGB (information obligations with regard to the consumer contract).</p>	<p>(A business activity is misleading if it contains untrue information or other information likely to deceive with regard to the following circumstances:)</p> <p>(8) a commitment to respect human rights or a reference to the fact that a favourable price/performance ratio can be traced back to the experience or expertise of the supplier or manufacturer, unless</p> <p>(a) the supplier on demand provides information on the measures taken by him to respect human rights, and</p> <p>(b) these measures correspond to the due diligence required in business transactions to prevent violations of human rights.</p>	<p>Explanations → 3.4</p>

Supplementation of § 4 UWG [Unfair Competition Act]		
<p>What constitute »reasonable measures« would arise from the due diligence obligations to be regulated (see above), association codes of conduct and frameworks.</p>	<p>[Anyone who] sells goods that were produced in breach of labour or human rights standards that one must expect to prevail in any human and political system without having taken reasonable measures to prevent violation [is acting unfairly].</p>	<p>Explanations → 3.4</p>

supervisory obligations; however, this would only justify administrative law sanctions (fines); removing due diligence from the law on administrative offences, which justify third party claims for damages would represent a serious inconsistency.

For the sake of completeness it should be noted that due diligence, like other legal relations between private actors, can also be regulated directly by an agreement under international law. Negotiations on an agreement on corporate due diligence were initiated in June 2014 by the UN Human Rights Council.²⁷² Concerns that agreements even after they have been ratified by the Bundestag have to be transposed into German law by the Bundestag are unfounded, if the treaty states expressly or tacitly assumed direct and horizontal applicability of the agreement. Civil courts shall apply the agreement directly and without further ado in accordance with this intention, as numerous judgments under the terms of the UN agreement on contracts for the international sale of goods show.²⁷³

7. Summary

The obligations to treat the legal interests of third parties with due consideration (due diligence) are firmly anchored in the German legal system in a number of places. Since the coming into force of the Civil Code they have been continuously shaped and further developed by case law. They are recognised in situations in which persons have influence, due to affairs under their control, their own behaviour or the predictable behaviour of third parties or due to their organisational structures, over dangers to the legal interests of third parties (duties of care and organisational duties). Due diligence apply specifically to legal interests that at the international level are also recognised as human rights. Today they can no longer be dispensed with in the German legal system.

Insofar as extraterritorial obligations of the Federal Republic of Germany are recognised concerning the protection of human rights against the abuses of private actors the drafting of due diligence in the German legal

system is a suitable means of fulfilling these obligations. Concerns raised from time to time that the German state cannot or should not effectively control the activities of German companies abroad prove to be unfounded on closer inspection. It is recognised in case law and in the legal literature, in terms of international law, constitutional law and civil procedural law, that German civil courts have jurisdiction over activities which are performed domestically or abroad by companies established in Germany, no matter whether it is on the basis of German or foreign law, as long as the judgment is executed on a compulsory basis only within Germany.

A more difficult question is: Which state's law can (human rights) due diligence be derived from? To that extent German courts have to heed the rules of European conflict of law: the bases of legal claims under tort law are to be derived from the law of the state in which the legal violation occurred (Art. 4 Rome II Regulation). In the case of simultaneous environmental damages, by contrast, German law, including due diligence obligations, shall apply through the choice of law of the injured party (Art. 7 Rome II Regulation). Otherwise according to the view represented here due diligence obligations are always at least to be considered rules of behaviour of companies established in Germany (Art. 17 Rome II Regulation). Drafted as mandatory provisions within the meaning of Art. 16 Rome II Regulation, however, they would even displace otherwise applicable foreign law.

The legislator needs to pass laws with regard to various previously unresolved legal questions. The question of whether a German company has human rights due diligence obligations in relation to infringements of the legal interests of third parties abroad at all has to date not been answered in German law. The German legislator can answer this question by expecting companies to come up with a due diligence concept in relation to human rights risks linked to the conduct of its business.

Because the meaning of terms like »linked« and »due diligence with regard to human rights« arises from the UN Guiding Principles and related materials the scope and contents of such an abstract due diligence obligation may be regarded as adequately intelligible and specified. On account of an effective regulation the legislator, however, can also further elaborate requirements concerning the scope and contents of due diligence concepts. To some extent due diligence obligations

272. Cf. on this also remarks in Part 1 of this study, Section 1. Resolution of the Human Rights Council No. 26/9: Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/26/L.22/ Rev.1.

273. BGBl. II, 1989, S. 588 ff.; as one example among many, see BGH, judgment of 24.9.2014 – VIII ZR 394/12.

were recently regulated in a French law; disclosure and reporting regulations in the United Kingdom, the United States and at the European level apply indirectly to due diligence obligations.

It would be appropriate to make the scope of the due diligence obligation with regard to supply chains dependent on how typical serious human rights abuses are in the relevant sector, how extensive and permanent the relevant contractual relationship is and whether the company has or can acquire practical influence over production conditions. In many instances this can be determined only on the basis of the individual circumstances. The legislator could, however, at least regulate that the due diligence obligation should in any case extend over the whole supply chain:

- if orders are to be produced in accordance with the specifications of the German company because in that case the whole supply chain would have to orient itself to the wishes of the manufacturer;
- if the company establishes a supply relationship for an indeterminate number of orders (by so-called framework contracts), because in that case the business relationship is so significant that the non-recurring expense of negotiating an appropriate due diligence clause in the contract is more reasonable; and
- if certain objects – for example, conflict minerals and textiles – are concerned, which tend to entail heightened human rights risks.

Particularly in so-called framework (supply) contracts human rights clauses can be drafted in the form of general business conditions. The effectiveness of such human rights clauses is considered problematic in the literature because of the usual concerns pertaining to general terms and conditions law. The legislator could eliminate these concerns by letting it be understood in the law that clauses that ensure the buyer information and control rights for the purpose of respecting human rights are conceivable (and thus permissible) due diligence measures.


Insofar as foreign civil law – which as a rule is applicable – does not implement human rights or international labour law adequately in the form of objects of protection under tort law such legal vacuum can be closed by German case law and by the legislator classifying the

relevant objects of protection as mandatory provisions within the meaning of Art. 16 Rome II Regulation. This path can be taken, for example, for the ILO core labour standards, which in some regions – in particular, special economic zones – have not been implemented adequately at national level.

What substantive requirements human rights due diligence obligations should impose on companies can be assessed very differently. Conceivable in this regard are personnel measures (responsibilities and competences), material rules (principles, rules) and procedures (for example, risk assessment). A multitude of ideas can be derived from practical experiences in the area of compliance and group controlling. Here measures of varying scope should be expected of companies in accordance with the proportionality principle of the UN Guiding Principles, depending on the company's size, sector and context of activity.

The current grey area pertaining to due diligence obligations in the human rights context is of considerable magnitude. Both its existence and its scope and extent are not generally recognised. In the case of such complex states of affairs and unclear legal situations particularly effective regulations can be adopted in both the highest and the lowest realm of the behavioural spectrum: someone without any kind of due diligence concept at all should be presumed liable, although the right may remain reserved for him to prove that the harm was unavoidable. Those satisfying particularly high requirements should be able to feel confident that they will not have to bear the consequences of damages that occur nevertheless.

Precisely in this last remark lies the essential difference between the due diligence obligation (direct liability) and the more drastic solutions of strict liability and of the piercing of the corporate veil. The due diligence obligation serves not only to establish liability, but also to avoid it. In a remaining grey area between high due diligence and gross negligence it will continue to come down to the individual circumstances of the case. The extent to which the company has at least partly taken its due diligence obligations into account can then, in the remaining grey area, be evaluated at least as an indicator for or against liability. The fact that a due diligence concept at least exists, even if it is clearly insufficient, should also – as in US law – be considered a mitigating circumstance when setting fines under administrative offences law.



For the sake of the flexibility required, given the variety of economic areas, the legislator should develop individual framework guidelines for the range of topics of due diligence concepts, as has also happened in the case of solutions abroad, and should not undertake the ensuing sector-specific formulation work without the participation of business associations and civil society. If it is possible in this to differentiate between compulsory minimum requirements for all members of an association and optional best practice suggestions that go beyond that, existing competition law will be smoothly integrated. Companies and consumer protection associations can then prevent violations against minimum requirements in association codes of conduct by legal measures.

Effective due diligence must be accompanied by a supportive institutional framework. With regard to crisis regions general country information prepared by Ger-

man missions abroad should concentrate particularly on the role of the economy in the region. The Foreign Ministry should publish early warnings when it becomes aware of suspected cases. By adapting the legal basis of chambers of commerce – especially the Chamber of Industry and Commerce (IHK) and German Chambers of Commerce abroad (AHK) – it can be ensured that German companies in all economically important countries of the world are provided with information and advice on specific circumstances on the ground. In addition, a selection and accreditation of local auditors and certification authorities can be provided through the existing global network of chambers and/or foreign missions of the Federal Republic. By means of such institutional support the provisions of the Federal Administrative Court on the principle of legal certainty can be complied with. At the same time, they make it easier for companies to satisfy their due diligence obligations.



Abbreviations

AktG	Aktiengesetz (Companies Act)
ArbG	Arbeitsgericht (Labour court)
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGH	Bundesgerichtshof (Federal Supreme Court)
BMEL/ BMELV	Bundesministerium für Ernährung und Landwirtschaft (BMEL) [Federal Ministry of Food and Agriculture], formerly Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz (BMELV) [Federal Ministry of Food, Agriculture and Consumer Protection]
CorA	Corporate Accountability – Network for Corporate Accountability
CSR	Corporate social responsibility
DEG	Deutsche Entwicklungsgesellschaft (German Investment Corporation)
DGCN	Deutsches Global Compact Netzwerk (German Global Compact Network)
GFA	Global Framework Agreement
GG	Grundgesetz (Basic Law – German Constitution)
GIZ	Gesellschaft für Internationale Zusammenarbeit (Society for International Cooperation)
IFA	International Framework Agreement
IFC	International Finance Corporation
ILO/IAO	International Labour Organization
ICESCR	International Covenant on Economic, Social and Cultural Rights of 1966
ICCPR	International Covenant on Civil and Political Rights of 1966
KfW	Kreditanstalt für Wiederaufbau (Reconstruction Loan Corporation)
MSI	Multistakeholder-Initiative
NCA	National contact points for the OECD Guidelines for Multinational Enterprises
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OWiG	Ordnungswidrigkeitengesetz (Administrative Offences Act)
SME	Small and medium-sized enterprises
UN	United Nations
UNGP	United Nations Guiding Principles on business and human rights
UNHRC	United Nations Human Rights Council
VSP	Verkehrssicherungspflicht (duty of care)
VStGB	Völkerstrafgesetzbuch (International Criminal Code)



Glossary

Business Judgment Rule	This grants company directors broad discretion with regard to taking business risks. They have to compensate for company losses only if they clearly go beyond the limits of responsible corporate action.
Competition Law	A special area of → tort law. It serves to protect consumers and competitors against unfair behaviour on the part of companies. Synonym: unfair competition law.
Compliance	All measures taken by a company that are required to prevent legal violations by the company and its employees. Larger companies establish for this purpose compliance systems, compliance departments and compliance officers.
Conflict of Laws	This determines which state's material law (→ substantive law) is to be applied in a given case. The term »international private law« is used synonymously – however, it is not concerned with international law, which regulates the legal relations of private actors with one another.
Contractual Joint Venture	Short- to medium-term form of international project cooperation, often in plant construction and related to the extractive industries, based purely on contractual relations with foreign business partners governed by the law of obligations, in other words, without participation in a subsidiary company.
Controlling	Doctrine and practice of company management by means of governance and information systems, supported by software systems and reporting.
Director	Board member of a plc and managing director of a limited company. The term »manager« is [in the German language] particularly common for third-party directors, in other words, directors who are not also shareholders of the company.
Due Diligence	Application of due care; originally from Anglo-American law, designates the process of careful examination of legal risks, originally in particular by potential buyers in the course of initiating the acquisition of a company (Merger & Acquisition).
Duty of Care	Duty of care: Anyone who creates or allows to continue a hazardous situation of whatever kind for other people has, as far as possible, to take reasonable measures to prevent injuries or damages.
Equity Joint Venture	Medium- to long-term form of international cooperation by business partners that participate in a joint subsidiary company in order, for example, to open up commodity markets or sales markets; the behaviour of shareholders and the management of the subsidiary company is largely determined by the contract.
European Group on Tort Law	A group of European jurists that has developed the Principles of European Tort Law (PETL) with the aim of preventing the different incarnations of tort law in European countries from drifting apart, www.egtl.org .
Group	Connection of several companies under the uniform management of a controlling company, § 18 AktG [Companies Act]. A parent company is a »controlling company« when it can, directly or indirectly, exercise a controlling influence over the first- or second-tier subsidiary. The fact that this is the case is assumed on the basis of the majority ownership of the company shares, § 17 AktG.
International Private Law	→ Conflict of laws

Managers (Geschäftsleiter)	Natural persons appointed to manage the business and represent the company (cf. definition in § 1 II 1 KWG [Banking Act]), in other words, the managers of a limited company and the board members of a plc. For the sake of simplification this definition is also used in relation to other companies than credit/financial institutions, even though outside banking and capital market law »management« sometimes also means senior management, which is directly subordinate to the executives or the board and whose tasks it performs.
Maastricht Principles	As the result of a process lasting several years, in 2011 NGOs and scholars reached agreement on the »Maastricht Principles on extraterritorial obligations in the area of economic, social and cultural rights« and included in it the loopholes to be closed in the human rights protection system, also with regard to measures with extraterritorial effect.
Principles of European Tort Law (PETL)	The basic principles of a European tort law were worked out by the → European Group on Tort Law with the aim of harmonising the various incarnations of European tort law. They are intended to serve less as model law than as framework law for the purpose of European comparison within the framework of legislative procedures at national and European level, to prevent European legal systems from drifting apart, www.egtl.org.
Proportionality Principle	The elaboration of → compliance systems should be oriented towards individual company risks, the nature and extent of business operations and the complexity of the company's chosen business model. This principle is familiar primarily in financial market risk management and is also taken up in UN Guiding Principle No. 14.
Substantive Law	Also: »material law«; it encompasses those legal norms that determine whether one person can demand from another that they take action or desist from action. The substantive law of which state a German court shall apply is in conformity with → conflict of laws. The procedural and litigation law that is authoritative for German courts, however, is always only German law.
Tort Law	Tort law concerns the question of whether one person can demand compensation from another for damages or the cessation of a legal violation, even though no contractual relations exist between the two persons. Tort law is part of private law and as such to be distinguished from criminal law. (Synonym: law of civil offences)
Unfair Competition Law	→ Competition law
WTO	World Trade Organization, has since 1994 administered international trade agreements, such as GATT and GATS, among other things through the Appellate Body as dispute settlement body.



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