

Germany's Approach to Cross-border Corporate Social Responsibility of Enterprises: Latest Developments

by Marie Elaine Schäfer

The cross-border expansion of EU companies' economic activities not only leads to a globalised market, but also impacts human rights as well as the environment in countries worldwide. The recent rise of claims against EU companies for the violations committed by their subsidiaries located in third countries is a by-product of that context. With Germany being the world's third largest importing country, the question of corporate responsibility for harmful events abroad is crucial. The present post provides an overview of the most recent legal developments on that topic.

"National Action Plan" and voluntary principle

The central aspect of Germany's approach to prevent human rights violations and environmental damages caused by German companies' foreign subsidiaries is a voluntary - as opposed to binding - principle.

In 2016, the German Government adopted the "Nationaler Aktionsplan Wirtschaft und Menschenrechte" (National Action Plan on Business and Human Rights) to implement the UN guiding principles on Business and Human Rights (Ruggie Principles). This fixed framework is the first of its kind in Germany. The objective of the National Action Plan is to delineate German enterprises' responsibility to protect human rights: at least 50 per cent of all large companies in Germany (with more than 500 employees) have to implement a system of human rights due diligence by 2020. Accordingly, "[c]ompanies should publicly express their willingness to respect human rights in a policy statement, identify risks, assess the impact of their activities on human rights, take countermeasures if necessary, communicate how they deal with risks internally and externally and establish a transparent complaints mechanism" (see the Report on the National Action Plan).

An inter-ministerial committee (on business and human rights), formed by the Government under the auspices of the German Federal Foreign Office, monitors the status of implementation of human rights due diligence. However, any tangible measures remain optional for companies and inaction entails no consequences yet.

KiK litigation

German courts faced the question of companies' liability to some extent in the KiK litigation, which ended with a judgment issued by the Court of Dortmund (Germany) in 2019.

The facts of that case are the following: the German textile importer and reseller KiK Textilien and Non-Food GmbH (hereafter, KiK) is listed amongst the ten largest providers in the German textile industry and has over 28.000 employees. In September 2012, 259 people died in a fire in a textile factory in Pakistan and 47 more were injured. The main buyer of the factory's goods was KiK. In 2015, relatives of three of the deceased victims and one of the injured workers himself started proceedings against KiK in the Regional Court of Dortmund for damages of 30.000 € each for suffering and the death of the deceased victims.

The court ruled that, based on Art. 4(1) of the Rome II Regulation, Pakistani law was applicable. In the main proceedings, that court retained expert evidence on Pakistani Law and dismissed the lawsuit due to the Pakistani limitation period for such claims that ended even before the proceedings in Germany had started. For further general discussion on Article 4(1) of the Rome II Regulation as well as on the potential relevance of Article 4(3) Rome II Regulation see [here](#).

According to the further holdings of the court, the claimants could alternatively hold KiK liable for the events in Pakistan, had an acknowledgement of liability been written. However, KiK had agreed on a code of conduct with the supplier, which the court and the expert on Pakistani law evaluated as an agreement to compensate on an **ex gratia** basis and not as an acknowledgement of liability. Furthermore, the court stated that, even if German law was applicable, a code of conduct would then, at most, lead to a legal binding agreement between KiK and the supplier. The suppliers' employees could not file any direct claims against KiK based on the supply contract and the code of conduct, which cannot be seen as a contract to the benefit of a third party under German law (supplementary

interpretation of the contract).

In light of this, it is questionable how long the voluntary principle will remain the leading path in Germany's approach to deal with expanding supply chains and the challenges for both environmental and human rights standards.

Current legislative developments

An alliance of non-governmental institutions (similar to the coalition that launched the Swiss *initiative populaire* "entreprises responsables - pour protéger l'être humain et l'environnement" in 2016) has formed the "Initiative Lieferkettengesetz" (Supply chain Law Initiative) with the intention of establishing binding obligations as they can be found in the French Duty of Vigilance Law ("loi n°2017-399 relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre"). Accordingly, German companies shall establish diligence plans to protect human rights and the environment in the states where their subsidiaries are located. Violations of diligence would lead to sanctions in form of shortening of government aids and high fines. In order to ensure the companies' liability for violations in German courts, the law would be formed as an overriding mandatory provision in the sense of Art. 9(1) of the Rome I Regulation.

Applied to the KiK litigation, the problem does not only lie within the applicability of German law. As the Court of Dortmund ruled, only a written acknowledgement of liability would enable employees to start proceedings. Since a mandatory system of due diligence would likely take the form of codes of conduct rather than acknowledgements of liability, violations of German law would lead to the sanctioning of the companies but would not offer a cause of action to suppliers' employees against the German enterprises.

Even though the enactment of a supply chain law remains highly disputed within the government, recent developments show that a change towards binding obligations may be on its way.

The ministers of labour and of development are of the opinion that the voluntary principle does not lead to the desired result, since only about 20 per cent of the companies affected by the National Action Plan have carried out human rights due diligence in 2019. According to Gerd Müller, the minister of development, legislation will follow if a second survey in 2020 does not show any improvement.

In addition to that, in 2019, more than 40 German companies, ranging from larger enterprises, such as Nestlé Germany to Start-Ups, publicly demanded binding obligations to ensure legal certainty and equal competitive competitions.

As shown, German Companies' responsibility is a question of voluntary implementation of the National Action Plan. In light of the KiK litigation, employees' proceedings against enterprises will likely have no success, although legislation in this field may lead to higher standards that enterprises then would have to impose to their suppliers abroad.

Still, the introduction of legislation remains uncertain as the result of a second survey on the National Action Plan's implementation will determine upcoming developments and the future of the German voluntary principle.

As was reported on this blog here, the Munich Dispute Resolution Day on 5 May 2020 was going to focus on "Human Rights Lawsuits before Civil and Arbitral Courts in Germany", but Covid-19 forced the organisers to reschedule.

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