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Access to remedy under the German Act on Corporate Due Diligence in Supply Chains

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The German Act on Corporate Due Diligence in Supply Chains (GSCDDA) is intended to implement the UN Guiding Principles on Business and Human Rights (UNGPs) in Germany (purpose of the GSCDDA: BT-Drs. 19/28649, p. 1). This article aims to analyse to what extent the GSCDDA responds to the third pillar of the UNGPs, namely the access to remedy for those affected by business-related human rights impacts. Since even with the best due diligence efforts, negative human rights impacts may still result from business operations, affected people should be able to seek redress. The article addresses the question of what the GSCDDA offers in these cases, including when damages occur.

I. Summary of the GSCDDA

Since January 1, 2023, the GSCDDA entered into force for companies that have at least 3,000 employees in Germany (sec. 1 GSCDDA). With this Act, Germany aims to assume its responsibility to work towards improving the global human rights situation along supply chains and to shape globalization in a social manner with a view to the 2030 Agenda for Sustainable Development. Environmental protection is also covered, insofar as human rights are affected by environmental damage and as international environmental agreements impose on their member states obligations to protect the environment (BT-Drs. 19/28649, p. 1 and 23 f.).

In this regard, the GSCDDA contains the following **due diligence obligations**: establishing a risk management system; designating a responsible person or persons for the implementation of the GSCDDA within the enterprise; performing regular and ad hoc risk analyses; issuing a policy statement; laying down preventive measures in its own area of business and vis-à-vis direct suppliers; taking remedial action; establishing a complaints procedure; implementing due diligence obligations with regard to risks at indirect suppliers; documenting and reporting measures of due diligence taken. Moreover, in case of infringement, the GSCDDA stipulates **sanctions** in the form of fines and exclusion from the award of public contracts for companies that fail to comply with their due diligence obligations (see sec. 22 and 24 GSCDDA).

The GSCDDA defines a **human rights risk** as a condition in which, based on factual circumstances, there is a sufficient probability that a violation of one of twelve prohibitions is imminent. These prohibitions include: child labour and its worst forms, forced labour and all forms of slavery, disregarding the occupational safety and health obligations, disregarding the freedom of association and the right of collective bargaining, unequal treatment in employment, withholding an adequate living wage, destruction of the natural basis of life through environmental pollution, unlawful eviction and unlawful taking of land, forests and waters and hiring or use of dangerous security forces. One last prohibition refers to any other act or omission beyond these mentioned above that is directly capable of impairing a human right (from the listed conventions in the GSCDDA-annex, essentially the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights) in a particularly serious manner, and the unlawfulness of which is obvious upon reasonable assessment of all the circumstances in question (see the list of human rights covered in sec. 2 para. 2 GSCDDA). A violation of a human rights-related obligation within the meaning of the GSCDDA is a violation of one of these prohibitions (sec. 2 para. 4 sentence 1 GSCDDA).

According to the GSCDDA, an **environment-related risk** is a condition in which, on the basis of factual circumstances, there is a sufficient probability that one of the following prohibitions will be violated: uses of mercury according to the Minamata Convention, uses of persistent organics pollutants according to the Stockholm Convention and uses of hazardous waste according to the Basel Convention (s. sec. 2 para. 3 GSCDDA). A violation of an environment-related obligation within the meaning of the GSCDDA is a violation of one of these prohibitions (sec. 2 para. 4 sentence 2 GSCDDA).

II. Access to remedy in the UNGPs

One of the foundational principles of the UNGPs' second pillar – that is, the corporate responsibility to respect human rights – is UNGP 15(c). According to this principle, business enterprises should have in place processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute, in order to meet their responsibility to respect human rights. When it comes to an adverse impact the business enterprises should provide for or cooperate in their remediation through legitimate processes to the extent that it contributed to that impact (UNGP 22).

On the other hand, the core aspects of remedies lie in the third pillar of the UNGPs. States must ensure within their territory and jurisdiction that those affected by a business-related human rights abuse have access to effective remedy (UNGP 25). For this purpose, States should ensure the effectiveness of State-based judicial mechanisms (UNGP 26). Alongside judicial mechanisms, effective and appropriate non-judicial grievance mechanisms are central to ensuring effective access to remedies. As such, grievance mechanisms can be State-based and non-State-based, e.g., as state mechanisms, the OECD National Contact Points can be highlighted although they cannot be considered fully effective in Germany. For their part, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted, to make it possible for grievances to be addressed early and remediated directly (UNGP 29).

According to the UNGP Interpretative Guide the concept of remediation and remedy refers to both the "*processes* of providing remedy for an adverse human rights impact and the substantive *outcomes* that can counteract, or make good, the adverse impact. These outcomes may take a range of forms such as apologies, restitution, rehabilitation, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition" (p. 8).

As described, the UNGPs address remedy extensively throughout the different pillars, and in

particular under the third pillar. As the GSCDDA is intended to implement the UNGPs, it is important to analyse whether the principles on remedy have been fully regarded in the GSCDDA in line with those *processes* of providing remedy and the substantive *outcomes* that can counteract, or make good, the adverse impact.

III. Remedies and reparation under the GSCDDA

a) Processes to enable the remediation

The GSCDDA established three ways that have the potential to lead to remedies in the sense of the UNGPs: the obligation of taking remedial action as part of the due diligence process, the complaints procedures implemented by the enterprise, and the administrative action of the Federal Office for Economic Affairs and Export Control (BAFA), the authority that is competent for GSCDDA-issues (sec. 14 ff. GSCDDA).

As a first tool, the **obligation of taking remedial action by enterprises** as part of their due diligence processes refers to the duty to prevent, end or minimise the extent of a human rights-related or an environment-related risk. This obligation takes place as part of the regular due diligence process once a year, and on an ad hoc basis in three scenarios. First, if the enterprise discovers that a violation of a human rights-related or an environment-related obligation has already occurred or is imminent in its own business area or at a direct supplier, it must, without undue delay, take appropriate remedial action (sec. 7 para. 1 CSCDDA). Second, when the enterprise expects a significant change or expansion of the risk situation in its own business area or at direct suppliers, for example, due to the introduction of new products (sec. 7 para. 4 GSCDDA). Third, when the enterprise has indications that suggest a violation of an obligation at indirect suppliers may be possible (sec. 9 para. 3 GSCDDA). An indirect supplier within the meaning of the GSCDDA is any enterprise which is not a direct supplier and whose supplies are necessary to produce the enterprise's product or for the provision and use of the relevant service (sec. 2 para. 8 GSCDDA).

On the one hand, the obligation covers the scenario of a violation of a human rights-related or an environment-related obligation that has already occurred or is imminent in the **own business area or at a direct supplier**. In such a scenario, the company must, without undue delay, take appropriate remedial action to prevent, end or minimise the extent of this violation (sec. 7 GSCDDA). Consequently, the remedial action must bring the violation to an end in the own business area in Germany, while in the own business area abroad or in controlled-affiliated enterprises, the remedial action must *usually* bring the violation to an end. In the case that the violation at a direct supplier is such that the enterprise cannot end it in the foreseeable future, it must draw up and implement a concept with a concrete timetable for ending or minimising the violation without undue delay (sec. 7, para. 2 and 3 GSCDDA).

On the other hand, if the enterprise has actual indications that suggest that a violation of a human rights-related or an environment-related obligation at **indirect suppliers** may be possible, it must take due diligence measures without undue delay. This means carrying out a risk analysis, laying down appropriate preventive measures vis-à-vis the party responsible, including the implementation of control measures, supporting in the prevention and avoidance of a risk or the implementation of sector-specific or cross-sector initiatives to which the enterprise is a party, drawing up and implement a prevention concept, or, if necessary because of existing violations, remediation via a cessation or minimisation concept and updating its policy statement if necessary (sec. 9, para. 3 GSCDDA).

The GSCDDA obliges enterprises to act proactively, providing remedy in their own business area and with direct suppliers, while they must act reactively with indirect suppliers – only if they have actual indications of a possible violation. The consequence of this legal design is

that there is an incentive to focus on addressing violations of human rights-related or environment-related obligations at the first-tier level. This is problematic because many of the business-related gross human rights violations occur at a deeper level (von Broembsen, 2022). The GSCDDA could have foreseen an obligation to provide remedy without difference between direct and indirect suppliers.

As a second mechanism, enterprises are obliged to establish a **complaints procedure** that enables every person to report human rights-related and environment-related risks as well as violations that have arisen because of the economic actions in the supply chain (sec. 8 and 9 para. 1 GSCDDA). The complaints procedure is effective if it enables and encourages relevant target groups to submit complaints before a violation of an obligation has occurred and if it contributes to averting damages on the complainant or to creating appropriate remedial measures in the event of a violation of an obligation (BAFA, S. 16). A complaint may lead the enterprise to provide remedy, by triggering the obligation of taking remedial action.

The third and external process that can lead to remedy is the **administrative action of the BAFA**. The BAFA takes action ex officio or upon request of an affected or imminent affected person that has been violated in his or her protected legal position as a result of the non-fulfilment of a due diligence obligation by an enterprise (sec. 14 GSCDDA). The BAFA can take all the measures that it considers appropriate and necessary to detect, end and prevent violations of due diligence obligations (sec. 15 GSCDDA). This includes requiring the enterprise to take specific action to fulfil its obligations.

However, it is unclear if these mechanisms require remediation in line with the UNGPs – to lead to substantive outcomes to counteract or make good an adverse impact, especially when it comes to reparation.

b) The concept of reparation

The text of sec. 7 GSCDDA refers to the obligation of taking remedial action and it does not mention explicitly the concept of "reparation" (*Wiedergutmachung*) or making good – in the words of the UNGP Interpretative Guide – for the damages that a violation of an obligation can cause. Nevertheless, this norm could be object of different interpretations.
The systematic interpretation of the GSCDDA could offer an argument against covering reparation of damages with the concept of ending a human rights violation. The concept of reparation is explicitly mentioned in the GSCDDA as an incentive for enterprises: The intentional or negligent regulatory offence of due diligence obligations will be punished with an administrative fine of up to 8 million euros – or 2 % of the average annual turnover of the enterprise, in the case of an average annual turnover of more than 400 million euros (sec. 24 para. 2 and 3 GSCDDA). The efforts taken to detect the offence and to *repair* the damage are to be taken into consideration by the BAFA for the assessment of the administrative fine (sec. 24 para. 4 No. 7 GSCDDA) – the fine can be lower if the enterprise repairs the damages. This could be a potential argument against the reparation of damages as part of the obligation of taking remedial action from sec. 7 GSCDDA because the legislator clearly thought about reparation and mentioned it, so if he wanted to include it in sec. 7, he could have mentioned it explicitly there.

Since the systematic interpretation of the GSCDDA does not clarify if "reparation" is part of the obligation to take appropriate remedial action, it is necessary to consider the purpose of the provision. An interpretation based on the meaning and purpose of sec. 7 GSCDDA and its origin in international law[1] considers that effective remedies should be able to redress, insofar as possible, the harm caused by business activities (report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, 2017, A/72/162, margin no. 40). According to Krajweski and Wohltmann[2], remedial measures do not only relate to future actions of the company but also require the correction of a violation of rights and the wrong inflicted on those affected. Without restoring the status quo preceding the human rights violation, the adverse impact remains.

For example, if there is no payment of wages in the last three months, bringing this violation to an end means not only beginning to pay the wages from the fourth month onwards but also paying the missing wages from the last three months and the extra costs for affected workers generated because of the non-payment. If reparations were not meant by ending a violation, there would be a disadvantage for enterprises that address the violation as soon as possible. In such situation, an enterprise could simply benefit from the low prices based on the non-payment of wages and end this violation by just paying future wages.

In sum, these strong arguments in favour of "reparation" being part of the obligation to take appropriate remedial action will play an important role for affected persons and in the administrative actions taken by the BAFA. For some, the discussion may remain open. Therefore, it is positive that the proposal for an EU Directive on Corporate Sustainability Due Diligence (CSDDD) includes more precise provisions about the reparation of damages as part of the obligation of bringing actual adverse impacts to an end (art. 8(3)(a) CSDDD).

IV. Outlook for remedy under the GSCDDA

As described above, the GSCDDA obliges enterprises to establish both *processes* of providing remedy for an adverse human rights impact and substantive *outcomes* that can counteract, or make good, the adverse impact.

Despite the discussion on the reparation of damages as being part of the obligation to take appropriate remedial action, a conceivable human rights approach by the BAFA and German courts when addressing this subject could lead to a favourable interpretation that includes the reparation of damages.

Furthermore, remedy in its whole meaning needs financial resources. This could be supported e.g., by the collected sanctions for regulatory offences based on the GSCDDA. All fines and financial penalties that the BAFA imposes go to the federal central treasury. An affected person would therefore not benefit from sanctions that an enterprise would have to pay if they do not live in Germany. That situation would be different if there was a fund to repair damages or if the collected money would support the role of the German State in the field of business and human rights, including international cooperation.

[1] Krajweski/Wohltmann, in: Kaltenborn, Krajewski, Rühl and Saage-Maaß, Sorfaltspflichtenrecht, 2023 – in edition, § 7 LkSG, margin no. 11.

[2] Krajweski/Wohltmann, in: Kaltenborn, Krajewski, Rühl and Saage-Maaß, Sorfaltspflichtenrecht, 2023 – in edition, § 7 LkSG, margin no. 10 ff.

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