



9 March 2021

Peter Altmaier, Federal Minister for Economic Affairs and Energy
Hubertus Heil, Federal Minister of Labor and Social Affairs
Gerd Müller, Federal Minister of Economic Cooperation and Development

cc: Helge Braun, Head of the Federal Chancellery and Federal Minister for Special Tasks
Heiko Maas, Federal Minister of Foreign Affairs
Olaf Scholz, Federal Minister of Finance

Dear Ministers Altmaier, Heil and Müller,

I write as the former UN Secretary-General's Special Representative for Business and Human Rights and author of the UN Guiding Principles on Business and Human Rights.

It is my understanding that the German Cabinet has approved a draft law on corporate human rights and environmental due diligence in supply chains. It now goes to Parliament for its consideration.

The law introduces human rights due diligence obligations initially for companies that employ at least 3,000 workers, and later for companies with at least 1,000 workers – which have their headquarters, principal place of business or registered office in Germany. It aims to improve human rights standards and practices in the operations and supply chains of those German companies.

There are elements to welcome in the draft law. For example, companies are expected to examine how their own purchasing practices may help mitigate human rights and environmental risks. Moreover, the law recognizes the need for accountability measures to ensure that the due diligence obligation is meaningful. It focuses on permitting affected individuals to file a complaint with the regulatory oversight body, which has the power to determine if a company has breached its obligations and to issue fines if so. In such cases, a company can also be excluded from the award of public procurement contracts. The draft does not establish a new civil cause of action, but the government has indicated that this will not prevent it from supporting more ambitious measures at European Union level.

In its preambular part, the draft law states that its requirements “closely align with the due diligence standard of the UN Guiding Principles” (UNGPs). The text also references the OECD Guidelines for Multinational Enterprises, which mirror the UNGPs on this subject.

This is all to the good. But at the same time, a close review of the draft raises significant questions about several specific formulations in the law, and how they may be interpreted in practice. Below, I briefly identify a number of areas that warrant reexamination in order to “closely align” them with the UNGPs, as the law promises. Perhaps identifying these issues also could be of assistance to the European Commission, which is in the process of drafting EU-wide legislation.

- 1. A focus on Tier 1.** Although the draft law defines the concept of supply chain broadly to include the entire value chain, the specific obligations on companies to proactively identify risks and take action to address them apply only to the company’s own operations and its direct suppliers – that is, to Tier 1 suppliers. In contrast, the UNGPs and the OECD Guidelines cover the full spectrum of value chain actors, for the simple reason that Tier 1 suppliers typically are not the biggest source of the problem. True, this can vary by industry sector, but for a significant number of German companies this is not where the most severe risks will lie – for example, in footwear and apparel, food and beverages, automobile parts, and others. A focus on Tier 1 alone would lead companies to focus on relationships that are less likely to pose significant human rights risks, while ignoring others (beyond Tier 1) where the probability of such risks is higher.
- 2. Risks beyond Tier 1.** The draft law stipulates that if a company obtains “substantiated knowledge” of a possible violation beyond Tier 1, as a first step it should “carry out a risk analysis.” Under the UNGPs, a primary purpose of human rights due diligence in the first place is to identify possible risks throughout the value chain. Indeed, if “substantiated knowledge” of a possible violation is already available, conducting a risk analysis may no longer be necessary; instead, under the UNGPs the company at this point should determine what its remedial obligations are, depending upon whether it has caused the harm, contributed to it, or is linked to it through a business relationship although it may have neither caused nor contributed to the harm in that particular instance.
- 3. Salient human rights risks.** The UNGPs and OECD Guidelines recognize that the relative severity of potential negative impacts on human rights connected with a company’s operations and value chain varies based on the context, the nature of the company’s activities, and the business relationships involved. The first step in a company’s risk assessment should be identifying the most severe risks to people – that is, the company’s most salient human rights risks. This should be independent of whether or when they become financially material to the company – which, indeed, is more likely to occur

the greater its salient risks are. Yet the concept of salient human rights risks appears to be missing from the draft law.

- 4. Influence.** In the draft law, the notion of a lead company's influence over its business partners plays a significant role in assessing, prioritizing and addressing risks. For example, the "justifications" (or commentary) appended to the draft state that "the greater the influence a company can exert...the greater the efforts a company can be expected to make to prevent or end a violation." This notion of influence-based responsibility is foundationally at variance with the UNGPs and the OECD Guidelines. Responsibility flows from the connection between the negative impact and a company's operations, products or services. Influence then plays a key role in what the company can reasonably be expected to do about it. Moreover, the weight of a company's influence in part lies in its own hands: it may have ways to augment its influence, for example, by acting in concert with other companies, labor unions, NGOs or industry associations. By the same token, companies also have ways to reduce or even minimize the appearance of their influence vis-à-vis particular sets of suppliers. In short, influence is not a simple or single objective metric; in part it is also endogenous to the possible actions a company chooses to take.
- 5. Contractual enforcement.** For ongoing enforcement of due diligence, the draft law depends on the lead company to impose the same requirements on its Tier 1 suppliers via its contracts with them, and then to have these contractual obligations cascaded throughout the supply chain. But in long supply chains the lead company itself may not know who is further down the chain or where they are, limiting its ability to monitor how well its intentions are being implemented. Therefore, greater supply chain transparency is a prerequisite to the approach promoted by the draft law but is not emphasized. At the same time, and equally important, a focus on contractual measures alone misses the role of positive incentives, capacity-building and other collaborative approaches with suppliers.
- 6. Meaningful stakeholder engagement.** The draft law does not explicitly address the need for companies to focus their attention on individuals and communities who are or could be affected by their operations or value chains. The appended justifications do note the importance of discussions with workers and trade unions. But the UNGPs and OECD Guidelines expect stakeholder engagement to inform the entire due diligence process and to include the perspectives of all relevant stakeholders – and where that is not possible, their representatives or subject matter experts who can legitimately speak to their concerns.



There are other issues that could be noted in relation to the UNGPs and the OECD Guidelines but, in my judgment, these are some of the most significant.

In closing, permit me to congratulate the government for following through on the promise made in its National Action Plan to develop and adopt legislation addressing the role of German companies in improving the human rights situation in global supply chains. I have welcomed the opportunity to provide advice – along with the excellent team at Shift – to agencies of the German government, going back to the drafting of the NAP, Germany’s chairmanship of the G20, and its Presidency of the Council of the European Union. German leadership on these issues is of enormous value and importance both within and beyond Europe. I share these reflections with you in the spirit of supporting that continued leadership in championing corporate respect for human rights in line with the UN Guiding Principles. I very much hope that this letter will be received in that constructive spirit.

Respectfully yours,

A handwritten signature in blue ink that reads "Juggie".

John G. Ruggie
Board Chair, Shift
Berthold Beitz Professor
Harvard Kennedy School