Business and Human Rights in Europe: CSR-Law-Making in a Postnational World

Direitos Humanos e Empresas na Europa: O Direito da Responsabilidade Social Empresarial num Mundo Pós-Nacional

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ABSTRACT

The European Union has passed some of the most progressive legislation regarding Business and Human Rights worldwide in recent years. At the same time, developments at the international level have led many European states to impose obligations on businesses to respect and protect Human Rights in their international operations. This article analyzes the development from voluntary self-regulation of Business and Human Rights, international soft-law standards and 'responsive regulation' towards tendencies of imposing direct obligations on companies in Europe. It shows how CSR in Europe today goes beyond moral and ethical concerns and has become a legal issue that businesses have to face.

KEY WORDS

Business and Human Rights – European Union – Corporate Social Responsibility

RESUMO

A União Europeia (UE) aprovou nos ultímos anos uma das legislações mais progressivas do mundo em relação à responsabilidade das empresas pelo respeito aos direitos humanos nas suas operações internacionais. Além disso, muitos Estados Membros da UE impunham obrigações neste sentido, seguindo um deselvovimento jurídico no plano internacional. O artigo analiza a evolução da auto-regulamentação voluntária pelas empresas eos instrumentos jurídicos não vinculativos ("soft law") em direção a obrigações jurídicas diretas das empresas em Europa. Ele mostra como a Responsabilidade Social Empresarial na Europa vai além das questões éticas e morais e se tornou um assunto juridíco que as empresas têm que enfrentar.

PALAVRAS-CHAVE:

Direitos Humanos e Empresas – União Europeia – Responsabilidade Social Empresarial

A. Introduction

The political discourse on universal moral and ethics has been dominated by International Human Rights for several decades.[1] Accordingly the conduct of internationally operating companies is increasingly scrutinized under the lens of Human Rights. Originally, Human Rights obligations of companies were contained in self-regulation. In recent years there has been a shift from voluntary commitments to stricter legal obligations, which was fueled by the UN Guiding Principles on Business and Human Rights. This shift is particularly noticeable in Europe where the European Union (EU) has made Corporate Social Responsibility (CSR) an important policy field over the past years, reasoning that "enterprises can significantly contribute to the European Union's treaty objectives of sustainable development and a highly competitive social market economy" (EUROPEAN COMMISSION 2011). Several regulations have been passed by the European legislator, which led to the creation of a new field of CSR-law. Together with member states that also have enacted legislation or are in the process of doing so, the European judicial area is arguably one of the most innovative and advanced when it comes to CSR-obligations of companies. The following article analyzes this development and its consequences for businesses in Europe and beyond.

B. The Origins of CSR in Voluntary Self-Regulation

Originally, the debate around the Corporate Social Responsibility (CSR) of Companies was framed by voluntary measures. Transnational corporations successfully resisted national or supranational binding regulation, the latter one complicated by states unable to effectively cooperate on this issue in the "post-national constellation" (HABERMAS 2001). As a consequence many of the initiatives to define binding obligations for businesses to respect Human Rights failed.[2] Still, public dissatisfaction with Human Rights- and environment-scandals that corporations were involved in led

1. MOYN 2012; ECKEL 2014.

2. For these failed attempts see RUGGIE 2007, 819–840.

to a privatized form of transnational law making: Corporate Codes of Conduct.[3] Such self-commitments by companies often consisted of mere non-binding "declarations of intent" by companies without effectively leading to a change in business conduct.[4]

C. International Soft-Law Standards: UN Guiding Principles on Business and Human Rights

I. Overview

The UN-Guiding Principles on Business and Human Rights (UNGP)[5] mark a turning point in this debate. Despite their legal character as "guiding principles" that explicitly avoid being understood as "creating new international obligations [...] under international law with regard to Human Rights" (UNPG 1), they aim to describe existing regulations in a coherent and consistent manner. They do not challenge two generally recognized principles of international law in this regard, however: the first one being that it is primarily the duty of states to protect and guarantee the Human Rights of its citizens;[6] and second that private corporations are no primary subject of international law and are therefore not directly bound by international Human Rights standards. Still, the UNGP stipulate the "responsibility" of corporations to respect Human Rights along their value chain.

The UNGP have dominated the discussion on Business and Human Rights in the past years and are likely to continue doing so. They serve as a catalyst for the development described in this article to impose more stringent requirements on businesses to respect Human Rights in their operations. This may partly have to do with their historical origins to which they owe their wide societal acceptance. They are the result of a long lasting and wide research- and consultation-process, led by the UN Special Representative John Ruggie (hence they are also called "Ruggie-Principles"). This process began after one of the aforementioned initiatives for a more robust interna-

3. These are for example the UN-Global Compact, the OECD- Guidelines for multinational enterprises, the ISO 26000-Norm and the tripartite declaration of principles concerning multinational enterprises and social policy.

4. DOANE 2005.

5. The UNGP are available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (3.5.2015).

6. See DE SCHUTTER *et al* 2012, 59.

tional instrument failed: The Draft Norms on the Responsibilities of Transnational Corporations could not gain a majority in the UN Human Rights Council.[7] The UNGP were unanimously endorsed in the UN Human Rights Council in 2011 and were immediately officially supported by the EU, the African Union, the Organization of American States and the Organization for Economic Co-operation and Development. Since then they are increasingly reflected in international regulations for Business and Human Rights.

II. Main Principles

The approach of the UNGP for the protection of Human Rights is "protect, respect and remedy". They are divided into three pillars and consist of altogether 31 "principles". The first pillar contains the duty of states to "prevent, investigate, punish and redress" Human Rights abuses.[8] This duty of the state to protect its citizens as enshrined in international law has an indirect vertical effect, meaning that it also comprises the duty of states to protect people in its jurisdiction from Human Rights abuses by private actors such as corporations. The UNGP do not address the question whether states are also under a duty to prevent Human Rights abuses outside of their jurisdiction when committed by businesses based within that state. Such an obligation is debated in international law but not yet widely accepted.[9]

The second pillar consists of the responsibility of business enterprises to respect Human Rights. The UNGP avoid the term "duty" but postulate the "responsibility" of business enterprises. According to the current state of opinion in international law,[10] business enterprises are not directly bound by Human Rights obligations resulting from international law. Hence the UNGP do not establish concrete legal duties of companies. The logic of the UNGP is rather that corporations respect Human Rights because of their own economic interest. Hence, the second pillar contains political expectations towards businesses. These are quite detailed, however: The responsibility of businesses extends to all "adverse Human Rights impacts that the

7. Draft Norms on the Responsibilities of Transnational Corporations, https://www1.umn.edu/humanrts/links/NormsApril2003.html (13.5.2015).

8. UNGP PRINCIPLE 1 et seq.

9. See VON BERNSTORFF 2011, 37 and AUGENSTEIN/KINLEY 2012, 272 et seq.

10. Famous the US Supreme Court, Kiobel v. Royal Dutch Petroleum Corp., 621 F.3d 111 (2d Cir. 2010), see also MURRAY/KINLEY/PITTS 2011, 37

business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services" (UNGP Principle 17). In order to address their responsibility, the UNGP state that corporations should "express their commitment to meet this responsibility through a statement of policy" (UNGP Principle 16) and carry out Human Rights due diligence which means that they should identify, prevent, mitigate and account for their adverse Human Rights impacts.[11]

The third pillar of the UNGP contains the rules enshrining the access to effective remedy in the case of Human Rights violations. States are under a duty to take appropriate steps in this regard. Also business enterprises should establish or participate in effective operational-level grievance mechanisms for affected individuals and communities.[12]

III. Assessment

The fact that the UNGP are soft law and a non-binding legal instrument should not be overestimated. With their wide acceptance they have framed and institutionalized the current legal discussion on Business and Human Rights. Despite their non-binding character they serve as a reference point for civil society or competitors to formulate expectations towards business to respect Human Rights. In this sense, they have a viable normative force. They further have the potential to initiate or accelerate other law-making processes on the national or supranational level. Their normative power partly stems from the fact that they were elaborated in a wide consultation process with different stakeholders. This is common governance model in the area of CSR. On the EU-level, the above cited Commission's 2011-2014 CSR strategy[13] was recently renewed in a multi-stakeholder review process, which could lead to further regulation of CSR matters in the EU.

IV. Implementation

After the official endorsement of the UNGP by the UN Human Rights Council, the question of their implementation by the states arose.[14] For this

11. UNGP PRINCIPLE 16 et seq.
12. UNGP PRINCIPLE 22 et seq.
13. COMMISSION OF THE EU 2011, 681
14. DE FELICE / GRAF 2015, 2

purpose, some states began to elaborate national action plans (NAP) to affirm the normative force of the UNGP, to evaluate existing national regulation and to address existing regulatory gaps. Such NAP have been developed and adopted in Denmark, Finland, Finland, Lithuania, Netherlands, Spain and the UK. They are currently being elaborated in about 20 other countries worldwide, including Brazil and the US. Despite its initial reluctance towards the elaboration of a NAP,[15] the German government is now taking a particularly meticulous approach in its elaboration of a NAP with several rounds of consultation by a variety of stakeholders and six different ministries involved in the process. In a first step, the different stakeholders identified the existing regulations on Business and Human Rights in a national baseline assessment and formulated 250 suggestions of aspects where German law could be amended or complemented in order to implement the UNGP.[16] Despite the fact that the result of this process will be a non-binding government decision, the process and the surrounding discussions could initiate further regulation. The process of thoroughly identifying the concrete need of implementation of the provisions of the UNGP could also set an example for other countries. In Scotland a similar process to assess existing national legislation was recently begun.

D. 'Responsive Regulation'

The type of regulation that is most regularly used in the area of CSR in Europe has a stronger binding force on the regulatory object than the UNGP while shying away from making the desired behavior a directly imposed legal duty. Instead, by 'responsive regulation' (AYRES/BRAITHWAITE 1995), the state makes use of private actors, including the regulatory objects, in order to achieve the desired behavior, for example by way of mandatory self-control or by incentives to self-regulate. One typical type of responsive regulation in CSR-law are reporting- and transparency requirements for companies as contained in the EU's CSR-directive.[17] The information gathered and published by the regulatory objects (the companies) can be

15. KINDERMAN 2013, 702; Germany was criticized for inadequate access to justice for victims of corporate Human Rights abuses during the review process by the UN HUMAN RIGHTS COMMITTEE 2012.

16. DEUTSCHES INSTITUT FÜR MENSCHENRECHTE 2015

17. DIR. 2014/95/EU.

used by other actors – private or non-private – to evaluate the performance of the companies in the relevant policy field. This way, the regulatory object has a strong incentive to comply with the objectives of the regulation.

I. The EU's CSR-directive

1. Overview

The CSR-directive entered into force in late 2014. It does not have a binding effect on EU citizens and companies directly, but it obliges the national legislators of EU member states to transpose the rules contained therein into national law. This has to be done by the end of 2016. By then, large companies will be obliged to disclose relevant non-financial CSR- and diversity-information in their non-financial declaration according to the "accounting directive". This means a change of paradigm in European accounting law: for the first time, information that is not relevant for the financial value of a company has to be included in the reports.

The aim of the European legislator is to strengthen non-financial transparency as a key element of its CSR policy in order to be able to measure, monitor and manage companies' performance and their impact on society.[18] At the same time, the EU wants to ensure a level playing field of all companies in the EU in this regard. Following the logic of responsive regulation, compliance with the obligations laid down by the directive is enforced by national procedures that enable "all persons and legal entities having a legitimate interest, in accordance with national law, in ensuring that the provisions of this Directive are respected" (RECITAL 10 DIR. 2014/95/EU). Currently, less than 10% of the largest corporations in the EU publish information on ecological social or other sustainability aspects.[19] The aim of the directive is "to increase the relevance, consistency and comparability of information disclosed by certain large undertakings and groups across the Union"(RECITAL 21 DIR. 2014/95/EU).

2. Main Principles

The duty to report on CSR matters applies to large companies with at least

18. RECITAL 3 DIR. 2014/95/EU.
19. GLASER-HACHMEISTER 2014, 120.

500 employees whose transferable securities are admitted to trading on a regulated market of a EU member state with more than 20 million EURO[20] of balance sheet total or a net turnover of at least 40 million EURO. These corporations are obliged to publish a non-financial statement containing information on environmental, social and employee matters, respect for Human Rights, anti-corruption and bribery matters.[21] The statement should also include a description of the diversity policy applied by the company.[22] The directive does not directly dictate the degree of detail of the published information. This will depend on the complexity and extent of the business operations of the company. The reporting companies also have to explain the principal risks related to CSR-matters linked to their operations and how they manage those risks. Further, they are under a duty to describe their policies in relation to these matters, including the due diligence processes implemented and the outcome of these policies.[23]

"[W]here relevant and proportionate", this duty also extends to the companies' supply and value chain (ARTICLE 19a § 1 lit. d DIR. 2013/34/EU). This provision means that in practice, the scope of the directive might be indirectly widened: Large companies that fall under the directive are under the duty to report on their due diligence in CSR matters in their supply chain. They will therefore request information from their suppliers and smaller business partners on their respective policies and due diligence policies to include this information in their non-financial reports. Thus, also small and medium-sized enterprises, which originally were not meant fall under the scope of the directive, will be obliged by their business partners to report on CSR-matters.

When transposing the directive into national law, the states shall ensure that companies can rely on existing frameworks for their reports.[24] In the recitals, the directive lists examples of such EU-based and international frameworks.[25] This provision which enables reporting companies to rely

20. ARTICLE 19a § 1 and ARTICLE 3 § 4 DIRECTIVE 2013/34/EU.

21. ARTICLE 19a DIRECTIVE 2013/34/EU.

22. ARTICLE 20 § 1 lit g DIRECTIVE 2013/34/EU.

23. ARTICLE 19a § 1 lit a-e DIRECTIVE 2013/34/EU.

24. ARTICLE 19a § 1 subpara 4 DIRECTIVE 2013/34/EU.

25. See RECITAL 9 DIRECTIVE 2013/34/EU: Eco-Management and Audit Scheme (EMAS), the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, the International Organisation for Standardisation's ISO 26000, the ILO Tripartite Declaration of principles concerning multinational enterprises and social policy, the Global Reporting Initiative.

on existing standards was introduced with the intent to facilitate the drafting of non-financial reports and to allow for flexibility of companies in doing so, taking into account "the multidimensional nature of CSR and the diversity of the CSR policies implemented by businesses" (RECITAL 3 DIR. 2014/95/EU). However, this flexibility runs contrary to the aim of increasing the consistency and comparability of the information disclosed in order to ensure a level playing field since the mentioned reporting-instruments differ largely as to their function, their methodology and their substantive content requirements.[26]

Following the "comply or explain"-approach, the company has to provide a reasoned justification in its report, if does not pursue policies in relation to one or more of CSR matters.[27] The directive contains a safe-harbor clause, stating that member states can allow companies to omit information on CSR-matters "relating to impending developments or matters in the course of negotiation [...] in exceptional cases where the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking" (ARTICLE 19a § 1 subpara 3 DIR 2013/34/EU).

Another unresolved question that the national legislative acts transposing the directive will have to address is the question of audits. According to the directive the auditor only has to control whether a non-financial report has been provided at all.[28] When transposing the directive, member states can also foresee the duty of the information contained in the non-financial reports itself to be checked by an external auditor. This would further increase the heterogeneity of CSR-reports in different member states and run contrary to the objective to provide for a "level playing field" of European companies.

3. Assessment

The EU took an innovative approach to regulate companies' business conduct concerning CSR matters like Human Rights by using a type of regulation that allows companies enough flexibility in their business operations while at the same time allowing for law-enforcement by private

26. See SPIESSHOFER 2014, 1284.
27. ARTICLE 19a § 1 DIRECTIVE 2013/34/EU
28. ARTICLE 19a § 5 DIRECTIVE 2013/34/EU.

actors. With the flexibility the directive still allows the member states in its transposition and the companies in their reports, it is questionable if the directive will reach its objective to establish a comparable CSR-reporting standard for EU companies, however.

II. Draft of a Conflict-Mineral Regulation

A further example of existing 'responsive regulation' of CSR-matters is a provision in the US-American Dodd-Frank Act.[29] It contains disclosure- and transparency-requirements for listed companies concerning the use of certain natural resources stemming from the Democratic Republic of the Congo or neighboring countries. The aim of these provisions is to contain the financing of armed groups with mining and trade of conflict minerals. In Europe, there is a similar concrete legislative proposal that will be voted on in the EU Parliament shortly after the editorial deadline of this issue. The European regulation differs significantly from the Dodd-Frank-Act, however, in that is not limited to specific regions and does not introduce reporting duties. Instead, it introduces a voluntary self-certification scheme of importers of conflict minerals.[30] It would thus be possible to trace back the origins of certain minerals (tin, tantalum and tungsten, their ores, and gold) from the mine to the smelters and refiners. This would affect importers of raw material and products stemming directly from the refineries, yet only if they decide to be certified as "responsible importers". In this case, the importer has to comply with the due diligence obligations as laid down in the regulation. The draft-regulation is insofar innovative as it contains for the first time a definition of supply chain due diligence on the European level. According to the proposal, it "refers to the 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 linked to conflict-affected and high risk-areas to prevent or mitigate adverse impacts associated with their sourcing activities" (ARTICLE 2 lit o COM(2014) 111).

29. Dodd-Frank Wall Street Reform and Consumer Protection Act, available at: https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf (4.3.2015).

30. Proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas of 5.3.2014, COM(2014) 111

E. Binding CSR-Legislation?

Some parliamentary committees favored a binding system for EU-importers of conflict minerals. This would have meant a step beyond 'responsive regulation' towards binding CSR-legislation. There is a certain tendency that hints into this direction. In France there is proposal to amend the Code of Commerce that would oblige certain large companies with 5000 or more employees in France or at least 10000 employees abroad to establish due diligence processes to prevent Human Rights abuses and that would establish civil liability for companies that fail to establish such processes.[31] Further, these enterprises could be legally held accountable for Human Rights violations and environmental damages that were caused by their own actions, the actions of their subsidiaries, their subcontractors and their suppliers abroad. The French Parliament already voted on the law, which will now be sent to the Senate to continue the legislative process.

Also in Switzerland, proposals for a mandatory Human Rights due diligence are being discussed. At the same time, efforts to draft an international legally binding instrument on transnational corporations with respect to Human Rights are being intensified with the UN Human Rights Council having decided to establish an intergovernmental working group with the mandate to elaborate such a treaty to prevent and address corporate Human Rights violations.[32]

F. Conclusion

The European Union and its member states is one of the fastest developing areas worldwide when it comes to CSR-law. As was shown, a trend to legally "solidify" Human Rights obligations of companies can be identified. Although direct obligations might be imposed on companies in the future, the European legislator is currently mainly setting incentives for companies to respect Human Rights by 'responsive regulation'. Another example of this is the reform of EU public procurement law by three directives

31. "Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, draft from 30 mars 2015". The draft is available at http://www.assemblee-nationale.fr/14/ta/ta0501.asp (18.5.2015).

32. See the decision of the UN General Assembly Human Rights Council 26th session, item 26 of 26 June 2014, A/HRC/26/L.22/Rev.1; http://daccess-ods.un.org/TMP/9785090.0888443.html (14.5.2015); see also http://www.treatymovement.com.

that have to be transposed into national law of the member states by April 2016.[33] They demand the appropriate integration of environmental, social and labor requirements into public procurement procedures" (RECITAL 37 DIR. 2014/24/EU).

The described developments at the European level could set an example for other world-regions, considering that the EU is arguably the largest internal market in the world and that many of the largest internationally operating companies are based therein. For the affected companies, the described tendencies pose a challenge as their field of responsibility in CSR-law stretches far beyond their responsibility under company law and includes their supply and value chain. The UNGP demand thus that the due diligence of companies "should cover adverse Human Rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships" (UNGP PRINCIPLE 17). Also the CSR-directive obliges companies to report on their due diligence processes concerning "the principal risks related to [CSR-]matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts" (ARTICLE 19a § 1 lit d DIR. 2013/34/EU). Despite these challenges, the developments described in this article also present an opportunity for companies to develop a business model that centers around sustainable growth and respect for Human Rights and that might help them to do good while doing well.

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