

Respecting human rights in the supply chain

Requirements to a well-balanced and legally sound action framework for companies to assume social responsibility

Respecting human rights is of greatest priority to us. The companies of our industry are aware of their social responsibility and are working intensively to expand and further improve their supply chain management. In this effort, they are supported by the sustainability initiatives Chemie³ and Together for Sustainability.

- Respecting human rights in supply chains is a global challenge that calls for international solutions. While the UN Guiding Principles on Business and Human Rights (UNGP) assign the primary responsibility of protecting human rights to states, it is the responsibility of globally operating companies to respect human rights. As supply chains are interlinked worldwide, a purely national perspective would cause non-transparency and different assessment standards – and thus stand in the way of a “level playing field”. If human rights due diligence obligations of companies were enshrined in law, their content and requirements should be determined by a recognised international organisation. As a pioneer, the European Union could give a strong impulse for such a global initiative, in order to involve as many other countries as possible.
- Due to complex and different political, socio-cultural and religious influences and areas of protection, human rights in supply chains are a challenge for society as a whole. It should be born in mind that internationally recognised human rights are interpreted and applied differently by sovereign states and that companies must comply with existing national law.
- Under a supply chain legislation, the division of roles between states and companies must be maintained according to the UNGP. In particular, this means that the public administration’s task of providing public services cannot be shifted to businesses. Rights to services – such as housing, education, health care, freedom of opinion and assembly – primarily fall in the scope of public bodies.
- Social responsibility and liability must be well-balanced and proportionate to each other. Companies can only be required to do what is appropriate in view of their corporate design and their abilities to exert influence. Therefore, diligence requirements for the respect of human rights in supplier businesses must remain limited to those of the first level (direct or one-tier supply chain).

- An intelligent mix of measures is needed to improve human rights conditions locally. Soft law should not be underestimated while hard law should not be overrated. Instead, a smart mix – where companies are given the necessary scope for own judgement and assessment to assume their social responsibility – is more suitable to achieve the given goal.
- Reporting requirements should be aligned with existing obligations in connection with non-financial reporting, in order to avoid additional burdens.
- Tensions due to contradictory or conflicting rules should be avoided or reduced and eliminated. In particular, it should be clarified what form of commitment is permissible in areas relevant to competition. This question arises, for example, for horizontal industry initiatives and vertical measures along supply chains. Here, political decision-makers are essential partners who should create the prerequisite framework conditions in their spheres of responsibility.

Only in close cooperation with political decision-makers can we succeed in taking on this major challenge for society as a whole and jointly develop solutions to achieve the goal of respect for human rights in the supply chain.

Explanations

Respect for human rights in the supply chain is a central issue for globally operating companies of the chemical-pharmaceutical industry. The human rights situation is critical in many countries. The sustainability initiative Chemie³ of the German chemical industry association VCI, the mining, chemical and energy industrial union IG BCE and the German federation of chemical employers' associations BAVC takes up this matter in its sustainability guidelines for the chemical industry in Germany. Guideline 3 lays down that companies *"work to ensure that high environmental and social standards are applied in their value chains around the world"*. Guideline 5 addresses measures *"to abolish child and forced labour as well as to fight corruption"*.

Based on the recognised UN Guiding Principles on Business and Human Rights of 2011, the German federal government adopted in 2016 the national action plan (NAP) for implementing these UN principles. The NAP includes the expectation to companies to introduce the process of corporate diligence for the respect of human rights, which is described in the NAP too, in a way appropriate to their size, sector and position in the value chain.

If the NAP is not sufficiently implemented by at least 50% of companies with over 500 staff by end 2020, the federal government reserves the right to enact legal requirements according to the NAP and the government coalition agreement for the 19th legislative period. This can be done nationally and/or at European level.

The implementation status in the companies is reviewed within the NAP monitoring, with the German Federal Foreign Office (Auswärtiges Amt) in a coordinating role. Even though the monitoring is not yet finalised, there is already a lively debate about introducing due diligence or supply chain legislation, in order to enforce by law the human rights due diligence obligations of companies.

On the one hand, especially NGOs complain about voluntary corporate social responsibility (CSR) standards and voluntary agreements not being implemented effectively. Above all, they hold that there is a lack of risk management systems being established to prevent human rights and environmental offenses in supply chains. Therefore, they call to enshrine human rights due diligence obligations in German or European law, with compliance to be safeguarded by liability in the form of penalties or under criminal and civil law.

On the other hand, it must be feared – not least from the companies' perspective – that further subjecting human rights enforcement by companies to relevant legislation will extend the range of responsibility under liability law without any bounds for businesses. Consequently, liability risks would become incalculable. Moreover, the question arises to what extent entrepreneurial commitment (e.g. multi-stakeholder initiatives) to improve difficult local conditions would be limited by a risk-focused compliance approach.

Furthermore, it should be noted that states are sovereign and existing national law must be observed. Regarding the regulation discussed here, one wonders what scope of influence the actors really have and what this means, for example, for the liability of companies along the supply chain.

The relevance of sustainability and CSR for companies grows daily. No doubt, this includes respecting human rights in the supply chain. Relevant solutions must be found. Enshrining the responsibility of companies in law brings both opportunities and imponderables. The following comments are intended to expound in more detail the initially voiced requirements to a well-balanced and legally sound action framework for companies for assuming social responsibility.

1. Economic strength of companies obliges

- There is consensus that the economic strength of companies is an obligation for them to positively exert their influence in the development of social, economic and ecological framework conditions for people.
- Companies have a social responsibility, e.g. to serve the common good with their products, jobs and investments – and also by establishing processes and standards. Making profits is no longer the sole purpose of a company. The pure shareholder value approach is replaced by the much broader stakeholder value approach which contributes to shaping the top management's duties for leadership and actions.
- Our member companies are highly aware of CSR and sustainability aspects. On the one hand, their CSR commitment is an integral part of the corporate philosophy. On the other hand, it is an essential factor for new market opportunities and in the acquisition of new staff, customers and contract partners. For these reasons, companies have a strong self-interest in meeting social responsibility.
- The sustainability initiative Chemie³ supports companies in fulfilling their responsibility and helps them establish sustainable supply chain management. To this end, inter alia, a pilot project with mid-sized enterprises was carried out and a guidance document was published (www.chemiehoch3.de). The initiative Together for Sustainability (TfS), too, wants to drive forward the measuring and continuous improvement of sustainability performance in global supply chains of the chemical industry (www.tfs-initiative.com). These are some examples of how the chemical-pharmaceutical industry tackles this issue and makes constructive contributions to the discussion.

2. The respective roles of states and companies in protecting and respecting human rights must be highlighted with more clarity

- The division of roles between the state(s) and companies in the exercise of social responsibility should be highlighted with more clarity. According to the UN Guiding Principles (UNGPs), on which the German NAP is based, too, states have the primary responsibility to protect human rights. Companies have the obligation to respect internationally recognised human rights. Thus, companies cannot be assigned the role of political function holders. Neither do

they have the prerequisite regulatory and control powers nor would such a (de facto) transfer of sovereign tasks to private businesses be desirable, as these lack the democratic legitimacy for state action. Therefore, the expectations to companies should be about processes for risk optimisation in the context of a legal framework set by the state.

- Providing public services and aspects of the regulatory framework for human coexistence are the tasks of the respective state. Rights to services – such as housing, education, health and medical care, freedom of opinion and assembly – must continue to fall in the scope of state organs. Companies are not obliged to provide such services while they must not impair them and they must not increase or accept a hazard or benefit from it. Topics such as occupational health and safety are obviously another responsibility of companies.
- As opposed to the above, the social responsibility of companies should be limited to their entrepreneurial role as employer, contract partner, customer, purchaser, plant operator etc. Consequently, the corporate responsibility of respecting human rights aims primarily at *avoiding* human rights violations and environmental damage (“*doing no harm*”, cp. principles 11 and 13a UNGP). This only becomes an obligation to perform and make efforts where human rights violations or environmental damage, which the company has caused or to which it has contributed, need to be remedied (cp principle 22 UNGP).
- Entrepreneurial commitment that goes beyond this core social responsibility should be encouraged and can be expected while this must continue to be a “voluntary” contribution.

3. The scope of the companies’ social responsibility needs to be defined concretely

The scope of the companies’ social responsibility for respecting “human rights” is unclear in several aspects and needs to be defined concretely in the discussion about a supply chain act.

- It is unclear what exactly the scope of application of “human rights” should be in a global context and what concrete content these should have. Where principle 12 UNGP speaks of “*internationally recognized human rights*” these are not defined more closely. In fact, reference is made to the International Bill of Human Rights and ILO declarations. However, this reference is explicitly not exhaustive (“*at a minimum*”), while the following is said: “*Depending on circumstances, business enterprises may need to consider additional standards.*”
- “Human rights” according to the International Bill of Human Rights are primarily about the classic protection and performance rights vis-à-vis states, such as the freedom of association, the freedom of opinion, the right to social security or the right to cultural participation. Neither are these rights addressed to companies, nor do businesses have the power to implement such protection and performance rights of public administrations under the respective national law.

Moreover, the rights defined in the International Bill of Human Rights are defined and applied differently in the various countries. What is covered by the human right to freedom of expression in one country might be considered incompatible with the legal system of another country. Therefore, companies would have to weigh up each situation individually and decide

which legal understanding (German, European or national) is to be given priority in the respective case – a virtually insoluble task in practice.

The situation is just as unclear for due diligence expectations regarding the environment. Aspects of environmental protection are often concretised in the form of limit and threshold values and technical specifications which can vary from country to country. Thus, it is already questionable which legal level defines social responsibility. Should the strictest legislation apply, even if there are (legally legitimate) deviations in other jurisdictions? Occasionally, reference is also made to the “international state of the art” as a parameter, but it is not explained from which it is derived. Moreover, the worth of state permits becomes questionable should such national or local legal acts become irrelevant within an internationally harmonised CSR responsibility. Therefore, a geographically comprehensive framework is needed which, however, can also respond flexibly to local conditions should this become necessary for observing human rights.

Thus, a supply chain act should primarily provide a clear-cut framework for those processes which need to be implemented to comply with due diligence obligations and to minimise risks. Generally referring to “human rights” or “environmental concerns” is not enough. Rather, it is most important for stakeholders to protect elementary rights that every person is entitled to, e.g. the right to physical integrity and the right to freedom. Such rights should be clearly specified in a supply chain act, in order to define an unambiguous and workable yardstick for due diligence.

- Quite often, it is also unclear what concrete steps have to be taken to ensure human rights in the supply chain, in order to meet the manifold expectations to corporate responsibility. The range of conceivable measures stretches from admonitions/intensive talks to training, local care, in-house or third-party audits or the termination of business relations. Certainly, there are clear-cut cases with clear mandates for action, e.g. when it comes to business contacts with companies involved in human rights violations such as slavery, severe child labour, etc. However, in practice the far greater number of cases is less clear and more complex. But as soon as civil or even criminal liability is linked with due diligence obligations of companies, it would need to be laid down by law in an unambiguous manner when which measures must be taken, giving consideration to the circumstances of each individual case.
- The spectrum of thinkable alternatives for action and the different expectations of highly diverse stakeholder groups call for an adequate scope for own assessments and decisions by the companies. By contrast, it would be unacceptable if companies were assigned the responsibility for ensuring human rights in the supply chain while leaving it to the public authorities and law courts to determine in retrospect the content and scope of the companies’ obligations to act (risk of ex post control).
- Another dimension of the scope of responsibility concerns the question what third party conduct a company should answer for. For companies, principle 13 UNGP differentiates between “*adverse human rights impacts through their own activities*” and “*adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts*”. For the latter, principle 13b) “only” provides for an obligation to “*seek to prevent or mitigate*”.

This largely corresponds to the legal situation in Germany, where conduct in breach of the due diligence obligation must have caused/contributed to causing damage occurred. It is imperative to take this fact into account in the discussion about enshrining CSR into law. A kind of strict liability, which merely links to the (incidental) occurrence of damage on the occasion of own business activity – no matter how far a company's own causal contribution may be away from the violation occurred – would be inappropriate (as it would be boundless).

In the light of the above, only an obligation to make efforts to avoid human rights violations can apply for third party conduct. Regarding content, the scope of this obligation to make efforts is determined by the legal and factual possibilities for steering which, for example, are greater in a “contractual group” (Vertragskonzern) than in a “de facto group” (faktischer Konzern) [special features of German company group law]. It is also worth noting that such steering options decrease in the supply chain the further away the (sub-)supplier is from the direct contract partner of a company. The same holds true in downstream cases, i.e. a manufacturer's responsibility for third party conduct in the use of his products.

- Downstream and upstream supply chains must form one system for effective and cost-efficient implementation. So far, this artificial separation has caused a situation where both sectors are subject to a comprehensive network of regulation consisting of product liability, transport safety and labelling rules etc. In the final analysis, it is simply necessary to bring both regulatory frameworks and obligations together and to view them as one supply chain – in order to avoid that responsibility is pushed from one party to the other and, at the same time, to create a common understanding regarding the possibilities, limitations and goals of CSR and transparency obligations.

4. Requirements for enshrining statutory human rights due diligence obligations into law

- If human rights due diligence obligations were enshrined into law, the focus should be on a risk-based approach – as also designed in the UNGP and the NAP. That risk-based approach would have to consider the size and internationality of the company and the risks of human rights violations that are typically associated with the entrepreneurial activity. Enshrining the described approach into law enables a taking into account of the business reality in such a way that process-steered solutions make relevant legal requirements workable in real life.
- Above all, responsibility and liability must not be seen as one and the same thing. That would considerably limit the flexibility needed in the CSR environment, rather with negative than positive effects on the social commitment of companies. Otherwise, it must be feared – with a view to new legal requirements and unmanageable liability risks – that social responsibility becomes merely a compulsory exercise. In that scenario, the focus would shift from social commitment to avoiding liability and sanctions. Wishing to avoid liability risks, companies would invariably choose what they consider the “safest” option. This could lead to the termination of business relations and, finally, to a worsening of the human rights situation. Therefore, soft and hard law should be intertwined in a “smart mix”.

- Furthermore, it must be ensured that legal infringements by individuals do not automatically result in conclusions which allege an ineffectiveness of the CSR management system (no transfer of antitrust practice by public authorities and law courts).
- As it is not equally possible for all companies to shoulder the burdens connected with risk management, exemptions should be provided for small businesses with few staff and/or low annual turnover.
- A reasonable time frame would have to be allowed for introducing the processes, taking into account the concerns of individual companies. Already now, many businesses are on their way towards sustainable supply chain management, irrespective of existing regulation. The experiences gained, inter alia, in the Chemie³ pilot project “Sustainability in supply chains” show that implementation in companies is realistically possible only in a step-by-step strategy.
- The implementation of a robust CSR management system should reduce or even completely waive monetary fines and thus create an incentive for companies. By contrast, civil liability rules beyond existing regulation are rejected for the above reasons.
- In this context, it is also important to consider the level of the individuals for whom human rights have an effect. For example, regarding the discussed legal requirements one should ask how these are connected with other measures to improve the conditions locally. While the compliance approach starts with the company, an intelligent mix of measures by states and the commitment of businesses, which can contribute to improving the local human rights situation, should be highlighted in the debate.

5. The roles of CSR standard setters and political actors must be clarified

- Examples such as the EU Conflict Minerals Regulation show that CSR standards themselves partly attain the quality of legislation by way of reference being made in pieces of regulation. This raises the question of their democratic legitimacy which has not been answered sufficiently so far. Appropriate procedures must ensure that companies, being the direct addressees, are sufficiently involved in the development of private CSR standards and in the inclusion of such standards in legislation. In this connection, it should be shown transparently which organisations took part in the preparation of legislation and which interests were included in the drafting of a law and which were not.
- For this reason and irrespective of the ongoing CSR debate, the VCI and Transparency International Germany speak for a “representation of interests act” which requires the disclosure of the influence that all political actors exert(ed) on the legislative process in no matter what way.

6. International regulatory framework instead of national go-it-alone action

- Protection of and respect for human rights in supply chains call for a global approach. A purely national perspective causes non-transparency and different assessment standards

and thus prevents a “level playing field”. Should human rights due diligence obligations be enshrined in legislation, their content and requirements should be determined by an international recognised organisation. As a pioneer, the European Union could give a strong impulse for such a global initiative, in order to involve as many further countries as possible. The REACH Regulation in the chemical sector can serve as a positive example for the creation of a level playing field.

- Tensions due to contradictory or conflicting rules must be avoided or reduced and eliminated. In particular, it should be clarified what form of commitment is permissible in fields relevant to competition. For example, this applies to horizontal initiatives for fair and non-discriminatory wage setting or vertical measures such as supplier assessment systems or the formulation of catalogues of obligations that can lead to an exclusion of suppliers. Here, both the measures themselves and the exchange of information between businesses, which becomes necessary for their implementation, can have antitrust relevance.

7. Politics should be partners for companies when assuming social responsibility

Companies are aware of their social responsibility. In this context, businesses often have to make challenging trade-offs in decisions whether to maintain their economic commitment to the benefit of workers along supply chains or to improve the human rights situation especially in states with democracy deficits or in emerging markets and developing countries. This is made even more difficult by the fact that they cannot influence at all, or at best in the medium or long term, the legal framework for humane working conditions in the relevant nations. Such situations once more highlight that the outlined challenges call for an intensive social, cultural and partly also religious dialogue. Politicians are essential partners of companies in these efforts. Only in close cooperation with political leaders will it be possible to jointly tackle the huge challenges. This requires changes throughout society.

Contact: Dr Tobias Brouwer, Director of Section Legal Affairs and Taxes
Phone: +49 69 2556-1435
E-Mail: brouwer@vci.de

Simone Heinrich, Director of Section Sustainability
Telefon: +49 (69) 2556-1397
E-Mail: heinrich@vci.de

Internet: www.vci.de Twitter: <http://twitter.com/chemieverband> Facebook: <http://facebook.com/chemieverbandVCI>

GERMAN CHEMICAL INDUSTRY ASSOCIATION - VCI
Mainzer Landstrasse 55, 60329 Frankfurt, Germany

- Registration no. in the EU Transparency Register: 15423437054-40
- The VCI is registered in the public listing of German Parliament on the registration of associations and their delegates ("öffentliche Liste über die Registrierung von Verbänden und deren Vertretern" des Deutschen Bundestages).

The VCI represents the politico-economic interests of around 1,700 German chemical companies and German subsidiaries of foreign businesses. For this purpose, the VCI is in contact with politicians, public authorities, other industries, science and media. The VCI stands for more than 90 percent of the chemical industry in Germany. In 2019, the German chemical industry realised sales of around 196 billion euros and employed 464,800 staff.

Contact: Dr. Andreas Ogrinz, Director Education, Innovation, Sustainability
Phone: +49 611 7788162, Mobile +49 178 7788162, Fax: +49 611 7788123
andreas.ogrinz@bavc.de, www.bavc.de, www.twitter.com/BAVChemie

Bundesarbeitgeberverband Chemie e.V. (BAVC)
Abraham-Lincoln-Straße 24, 65189 Wiesbaden, Germany

The German Federation of Chemical Employers' Associations (BAVC) is the head organisation for collective bargaining and social policy in the chemical and pharmaceutical industry, as well as large parts of the rubber and plastics processing industries in Germany. It represents the interests of its ten regional member associations, with 1,900 companies and 580,000 employees, vis-à-vis trade unions, politics and the public.

Wiesbaden/Frankfurt, 24 June 2020