



No courage to commit

Comments of German non-governmental organisations on
the German government's National Action Plan on Business
and Human Rights

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A. Summary

As development and human rights organisations we participated intensively in the German government's consultation process for developing the National Action Plan (NAP) for implementing the UN Guiding Principles on Business and Human Rights: in the government's steering committee, in the altogether twelve thematic hearings and in the three plenary conferences. In this context, we expected the government to move away from the failed model of purely voluntary self-commitment and legally require German companies to discharge their human rights responsibilities in their activities and business relationships abroad. The Action Plan, which has now been presented by the German government after a one-year process of internal coordination, falls far short of this expectation. Not even state-owned companies face binding requirements for human rights due diligence in their operations abroad. Nor are companies excluded from federal public contracts, subsidies or foreign trade promotion if they have disregarded their due diligence obligations. It is still nearly impossible for affected people from the global South to hold German companies responsible for participating in human rights violations.

The NAP includes positive approaches, but the effectiveness will depend on the quality and insistence of the monitoring. The NAP states the clear expectation that all German companies comply with/adhere to their human rights responsibility and implement human rights due diligence. The annual implementation review planned from 2018 onwards constitutes significant progress. We also welcome the target that at least half of all companies with more than 500 employees are required to have integrated human rights due diligence into their business processes by 2020. The announcement that otherwise a legal regulation will be considered from 2020 onwards is an important signal. However, it is problematic that the legal regulation is only being considered instead of being announced unequivocally. Moreover, according to the NAP the monitoring will depend on available budgetary funds.

We also welcome that the German government calls on the EU to conduct human rights impact assessments on trade and investment agreements in future before negotiations start. The NAP also sends a positive signal in developing the OECD National Contact Point into a complaints office for human rights problems. However, the corresponding formulations need to be rendered more precise to actually have an effect. Moreover, it is regrettable that the German government has decided to drop more far-reaching formulations, in particular with respect to a potential disqualification from foreign trade promotion, which had still been included in the former NAP draft.

Overall, the approaches of the NAP fall considerably¹ short of some activities of other countries¹. The German government has not fulfilled its own aspiration of presenting an "ambitious" NAP for the following reasons:

¹ In the UK, the *Modern Slavery Act* was adopted in 2015, according to which large companies have to report on modern forms of slavery in their supply chains and on their countermeasures. In France, the National Assembly approved a law on third reading in November 2016 that requires large companies to identify and prevent human rights risks, including in subsidiaries and suppliers. In the US, there is the *Federal Acquisition Regulation* and *Executive Order 13637*, which are to ensure that there is no forced labour in the entire supply chain in public procurement. An overview of ambitious activities of other countries can be found in the compilation "Unternehmensverantwortung im europäischen Vergleich. Der deutsche Aktionsplan Wirtschaft und Menschenrechte gemessen an Rahmensetzungen in anderen Ländern" [Corporate responsibility in a European comparison. The German Action Plan on Business and Human Rights measured against the frameworks in other

- Instead of legally requiring human rights due diligence from companies, the German government merely expresses a corresponding expectation. Companies that do not comply with this request have no consequences to fear in the coming years. Even for state-owned companies, binding obligations are lacking.
- In describing due diligence obligations, the German government deviates from the international consensus in some central points: According to the UN Guiding Principles, companies are to provide remediation, for example, if they cause negative impacts or have contributed to them. The requirements described in the German NAP are limited to preventive measures and ignore the responsibility of companies to remedy harm and compensate those affected.
- The German government concretely promises voluntary consulting services and multi-stakeholder dialogues. By contrast, for all binding elements, such as in public procurement and allocation of subsidies, it merely announces a review.
- The German government announces that it “wants to achieve” that companies fulfil their due diligence obligations when benefiting from foreign trade promotion. However, it remains unclear how it wants to achieve this.
- While the National Contact Point for the OECD Guidelines is to be upgraded, its independence is yet to be guaranteed and its procedural guide remains unchanged.
- With respect to its domestic duty to protect, the German government limits itself to reforms that are already planned or carried out, such as on minimum wage and on precarious employment, which are, however, insufficient. Meanwhile, it ignores existing gaps in protection, especially with respect to exploitative work relationships in sensitive industries, e.g. in the construction industry and the meat-processing industry.
- In trade and investment agreements, the German government only approves of non-binding sustainability chapters, but not of binding human rights clauses that guarantee treaty states the leeway for implementing human rights. As a result, trade agreements can also impede the implementation of the UN Guiding Principles on Business and Human Rights in the EU and in third countries.
- Concerning the potential ratification of the Optional Protocol of the UN Covenant on Economic, Social and Cultural Rights and ILO Convention 169 on the rights of indigenous peoples, the government merely announces a review, even though this review has been ongoing for years without results.
- The German government denies that people whose (human) rights have been directly or indirectly violated by German companies abroad currently face major obstacles if they want to file a lawsuit in German courts. It refuses to carry out any reform in the area of civil procedural law.
- While the German government announces a strengthening of the National Contact Point for OECD complaints, it ignores concrete proposals of the NGOs for strengthening the independence, transparency and sanctioning powers of this Contact Point, as partly already implemented in other countries.

Reviewing the necessity and options of binding human rights due diligence obligations was already the task and subject matter of the entire NAP process of the past two years. We had expected that the German government would now draw concrete conclusions and launch appropriate reform projects. Moreover, announcing further reviews is not credible if the government misses the opportunity

to anchor binding human rights requirements in ongoing legislative processes, as in the case of the reform of public procurement law adopted in late 2015. In the German bill for implementing the EU's CSR reporting directive, the German government also falls short of the requirements of the UN Guiding Principles instead of making progressive use of the scope for action. Moreover, according to this bill reporting obligations are to be limited to the approximately 550 publicly traded companies with more than 500 employees.

After having started the development of the NAP in a participatory manner with numerous thematic hearings in the first year, the German government largely excluded civil society in the subsequent process: Contrary to prior assurances, we were not involved in the drafting of the Action Plan, the information policy of the government lacked transparency, and contrary to what was announced up to one month ago, the government adopted the National Action Plan without a prior consultation period. Unfortunately the NAP-text released on Dec. 21st states that the draft was published and the public consulted before adopting the plan. This error has not been corrected so far.

Nevertheless, in the following we would like to outline our key amendment proposals.

- In the event that less than 50 percent of the companies with more than 500 employees implement their human rights due diligence obligations by 2020, the German government should begin a legislative initiative instead of merely considering one.
- The NAP should have specified how the German government intends to ensure that companies benefiting from foreign trade promotion fulfil their due diligence obligation. This would have included laying down criteria for disqualification from foreign trade promotion. Companies should be temporarily disqualified from instruments of foreign trade promotion if the due diligence obligation is obviously not being fulfilled, e.g. because no appropriate procedures are established or the (reformed) NCP identifies a violation of human rights due diligence. Only when a company has the necessary procedures in place and has fully implemented the recommendations of the NCP should applications from this company be considered again.
- In public procurement – in analogy to the phased plan envisaged for textile procurement – phased plans should be developed for further product groups on how the proportion of sustainable and fair procurement is to be increased concretely in the coming years.
- Majority state-owned companies should face binding requirements for implementing human rights due diligence in this legislative term already, such as already laid down by Sweden and Finland, for example, and already envisaged in an earlier draft of the NAP. The German government should have recommended the same measures for the federal state and municipal level.
- The German government should have identified existing gaps in domestic protection, particularly with respect to the exploitation of labour and precarious employment, and should have drawn up measures for closing them and monitoring this on a regular basis.
- The National Action Plan should have recognised the existing practical and legal obstacles for lawsuits in German courts and should have at least provided measures for establishing the possibility of collective lawsuits and easing the burden of proof.
- The National Contact Point for the OECD Guidelines should have been comprehensively reformed and placed under the authority of a supervisory body with the participation of civil society and unions, and the procedural guide should have been revised.

The NAP follow-up process depends on a committed implementation and a systematic, independent and transparent monitoring, since many measures are only formulated as a mandate for review or

depend on an evaluation. With respect to implementing the requirements for human rights due diligence obligations, starting from 2018, the German government must commission an independent and transparent review of their fulfilment, based on precise criteria. The explanation of why a company has not implemented due diligence processes (“comply or explain”) must not be considered as a fulfilment of the requirements.

B. Assessing individual areas

1. Expectations with respect to human rights due diligence (NAP Chap. III.)

We welcome the clear expectations of the German government towards all companies to integrate human rights due diligence processes into their business. The Action Plan describes in detail what is concretely required of German companies. However, with respect to some central points, the German government deviates from the definition of the human rights due diligence of the UN Guiding Principles and in doing so falls short of the international consensus from the UN Guiding Principles:

While the UN Guiding Principles clearly state in Guiding Principles 15 and 22 that companies must remediate the negative impacts which they cause or contribute to, the requirements in the Action Plan are merely limited to preventive measures. The responsibility of companies to remedy harm already caused and compensate those affected is being ignored with respect to both the description of the necessary remedial measures and the requirements for the grievance mechanism.

In addition, the requirements for companies are subjected to the condition that this does not entail disproportionate bureaucratic burdens for the companies. Financial services between banks or insurance companies are categorically excluded from the due diligence obligations described. These are restrictions that are not to be found in the UN Guiding Principles.

The NAP does not establish any effective enforcement mechanisms for ensuring that the companies implement the processes described. Individual companies still do not have to fear any sanctions if they do not implement the requirements. The German government aims at 50 percent of all companies with more than 500 employees having integrated the due diligence elements described into their business processes by 2020 and plans to assess the state of implementation in large companies with annual spot checks. However, the modalities of the checks remain vague, and clear criteria for the assessment are lacking. For instance, the requirements are also considered fulfilled if a company, following the so-called “*comply or explain*” approach, explains why it has not implemented certain procedures. Clear consequences are also lacking in case the target is missed. The announcement that further steps or even legal measures will be considered in this case is too noncommittal.

Moreover, together with the National Regulatory Control Council in 2020 the German government is planning to review the necessity of the effort that companies expend on the due diligence procedure. The National Regulatory Control Council oversees and advises the German government on issues of reducing bureaucracy and is part of a series of political measures that ostensibly aim to reduce the burden on business but in doing so compromise the protection of the environment, consumers and human rights. The focus on potential burdens does not sufficiently take into account the benefits of human-rights and environmental provisions to society. Moreover, with this mandate for review the German government is questioning the requirements that the UN Guiding Principles place on the companies, which currently constitute the international consensus.

The German government should have laid down in the NAP that missing the target would result in the development of legal requirements, without further intermediate steps. Moreover, it should have provided a binding deadline by which medium-sized companies with 50 or more employees and companies that operate in particularly high-risk sectors are required to have established due dili-

gence procedures. The scale and scope of the review should have been substantiated and should encompass at least a quarter of all companies concerned. The explanation of why due diligence processes have not been implemented must not be taken as a fulfilment of these requirements. A review of international standards by the National Regulatory Control Council must be eschewed.

2. Duty to protect within Germany's own territory (NAP Chap. IV, 1.1)

With respect to its domestic duty to protect, the German government largely limits itself to reforms already carried out, such as on minimum wage and on precarious employment, which are, however, insufficient. Activities on strengthening whistleblower protection are overdue and to be welcomed in principle; however, the planned measures do not include a comprehensive legal regulation but merely the implementation of an EU directive that is required in any case and could, by the way, even result in greater risks for whistleblowers. It is also regrettable that the review of the implementation of international agreements such as ILO Convention 169 for the protection of indigenous peoples, but also the Optional Protocol of the Covenant on Economic, Social and Cultural Rights, which has already been going on for years, is still reported as “planned” even at the end of the legislative term.

In Germany, there are gaps in human rights protection with respect to all employment outside of regular, permanent work contracts covered by collective bargaining agreements. Introducing a statutory minimum wage has somewhat alleviated but not eliminated poverty. Planned measures for limiting subcontracted labour and service contracts are too weak, they cannot eliminate the precarious effects for the people affected. Moreover, there are gaps in human rights protection for long-term unemployed people, domestic workers, people with disabilities and functional limitations, for homosexuals, transsexuals and ethnic minorities, including immigrants, asylum seekers and people entitled to asylum. Women are still discriminated against in the professional world. The gender pay gap continues to exist.

The measures taken so far and those in preparation do not close the existing gaps in protecting illegal migrant workers and victims of human trafficking from being exploited and left defenceless. These cases occur in various industries. There is proof of cases in construction, agriculture, the meat-processing industry, the sex industry, gastronomy, the cleaning business and the care sector.

Existing domestic gaps in protection must not be ignored, particularly with respect to the points mentioned. The German government must identify and close gaps in protection in all sectors and forms of the professional world, regularly monitor this and involve self-help organisations from civil society more intensely and more visibly.

3. Bi- and multilateral business relationships (NAP Chap. IV, 1.1)

We welcome that the German government recognises that the EU bodies and member states are also bound to their human rights obligations in implementing EU legislation – including in trade and investment policy. In this sense, carrying out human rights impact assessments *before* negotiations on EU trade and investment agreements start, as required by the NAP, would be important progress compared to the practice so far. We expect the German government to launch an initiative within the framework of the EU for implementing this proposal.

However, we regret that the government no longer intends to anchor human rights clauses in trade agreements themselves in future, but only in framework agreements. The existing sustainability chapters in trade agreements merely contain non-binding provisions on environmental, labour and social standards and do not refer to the UN human rights covenants. The “*right to regulate*” proclaimed in more recent agreements also does not explicitly include human rights, and moreover it does not have any binding effect, e.g. on investment arbitration decisions. Against this background, several legal opinions conclude that the CETA agreement with Canada can also impede the implementation of the UN Guiding Principles themselves in the member states of the EU and in Canada.

In the NAP, the German government should have firmly committed to human rights clauses in trade agreements themselves and should have announced an initiative for reviewing and strengthening them. Human rights exception clauses must grant states implementing such agreements the necessary leeway for implementing human rights and must provide grievance mechanisms for people whose rights are threatened or violated by the implementation of trade agreements.

4. Development policy (NAP Chap. IV, 1.1)

The German government confirms the human rights orientation of German development policy, which is also reflected in the human rights strategy of the Federal Ministry for Economic Cooperation and Development. The development policy cooperation with the private sector is to be more strongly aligned with the UN Guiding Principles, and the grievance mechanisms of the implementing organisations are to be developed further. These plans are welcome, but they remain far too vague and hardly go beyond the status quo.

The Development ministry should develop a general grievance mechanism for German development cooperation, as described in the human rights strategy and announced years ago. The grievance mechanisms in the implementing organisations cannot cover negative impacts of general development cooperation.

Moreover, concrete measures are necessary to enforce human rights standards in the international financial institutions, especially against the background of the current developments. For instance, the German government should declare that, in the context of all development and investment banks, it advocates binding requirements and independent reviews for human rights due diligence, including human rights impact assessments and grievance mechanisms, in all funded programmes and projects. This also applies to the involvement in the Asian Infrastructure Investment Bank (AIIB) led by China.

5. Public procurement (NAP Chap. IV, 1.2)

The German government recognises the state duty to protect in the area of public procurement. However, it has failed to discharge this human rights duty to protect in the fundamental reform of public procurement law in 2015: The Act on the Modernisation of Public Procurement Law that came into force in mid-April 2016 does not even mention the human rights due diligence obligation of companies, and the new legal framework merely allows for taking social criteria into account on a voluntary basis.

The two measures proposed in the NAP are insufficient. A future review of binding minimum requirements is important. However, this was not taken into account when the legal regulations with respect to the sub-threshold area were reformed in the autumn of 2016. In view of the EU directives on public procurement from 2014 and their very recent implementation, a mandate for review seems to have been shelved and doesn't appear credible.

It would have been important for the reporting obligation for public procurement stipulated by the new Act on the Modernisation of Public Procurement Law and the procurement statistics currently being compiled by the Federal Ministry for Economic Affairs and Energy to mandatorily register statistical information on how public procurement takes human rights, environmental and social criteria into account, as provided for e.g. in the Finnish National Action Plan.

The interpretation in the NAP that companies violating applicable law such as the ban on child labour can only be disqualified from public procurement in cases that occurred in Germany is an inadmissible restriction. Under the facultative reasons for disqualification, the new Act on the Modernisation of Public Procurement Law allows a disqualification of tenderers even in case of violations of ILO core labour standards abroad. In order for this to be implemented, the corruption register planned by the German government must also refer to such offences. In a future amendment to the legislation, two aspects thus need to be improved: the current impracticable restriction that tenderers are only disqualified if violations occur while they carry out public contracts, and the hitherto insufficient implementation of mandatory disqualification in cases of child labour, including abroad, as required by the EU directive on public procurement. There is an urgent need for regulation in German law, as there are no equivalents to norms (such as § 5 of the Young Persons (Protection of Employment) Act (*Jugendarbeitsschutzgesetz*)) that protect children and young persons in the supply chains of German companies.

Moreover, for human rights criteria to carry more weight in procurement practice, state incentives in the form of further temporal and percental targets and phased plans for critical product groups (e.g. IT products, paving stones, etc.) would be required at the federal level – similar to what is currently being developed for textiles in the phased plan for sustainable textile procurement in the framework of the Alliance for Sustainable Procurement.

Building expertise on human rights and social criteria in the Competence Centre for Sustainable Procurement is to be welcomed.

6. Foreign trade promotion (NAP Chap. IV, 1.3)

The German government intends to make the human rights assessments in the award procedure for export credit insurances, investment guarantees and other instruments of foreign trade promotion more independent, visible and transparent. Moreover, it plans to introduce human rights due diligence reports into the assessment of projects that have a high probability of severe human rights impacts.

These are important steps, but they do not go beyond the recommendations already adopted in the OECD. In particular, they do not live up to the fact that the state has a particular responsibility and at the same time particular opportunities for promoting human rights due diligence if it is itself involved

in economic activities. Not only in cases of a “high” probability of “severe” human rights violations should a separate human rights assessment be required.

It is positive that the German government has declared its intention to make companies that benefit from the instruments of foreign trade promotion fulfil their due diligence obligation. However, this formulation turns out to be much weaker than expected: The NAP draft from March 2016 still provided that companies that have violated their human rights due diligence obligations should be disqualified from foreign trade promotion. The NAP draft from November 2016 at least provided that companies should be disqualified as long as they refuse to participate in a complaint procedure against them before the German National Contact Point for the OECD Guidelines for Multinational Enterprises. The possibility of disqualification is lacking in the adopted NAP, so it remains unclear with which measures the German government wants to achieve the fulfilment of due diligence obligations. Merely upgrading the National Contact Point for the OECD Guidelines to a central grievance mechanism for projects of foreign trade promotion as announced in the NAP is not nearly enough.

Moreover, the German government fails to introduce clear provisions on transparency in the NAP that could help those affected and the public to understand which projects received guarantees.

The German government should have pledged in the NAP to conduct a human rights risk analysis and present a human rights due diligence report by default at least for all projects in category A. Whether there is a “high” risk of “severe” human rights violations can only be decided by means of such an assessment itself. Moreover, the NAP should have laid down criteria for disqualification from foreign trade promotion. A temporary disqualification should occur if the due diligence obligation is obviously not being fulfilled, e.g. because no appropriate procedures are established or the (reformed) NCP identifies a violation of human rights due diligence. Only when a company has the necessary procedures in place and, in the case of a complaint before the NCP, has fully implemented the recommendations should applications from the company be considered again. Moreover, the German government should have developed goods-related criteria for disqualification, for example for surveillance technologies. The transparency of investment guarantees and funded projects should have been expanded significantly so that civil society and those potentially affected by a project would have the opportunity of contributing their expertise and concerns. The human rights assessment procedures, too, should have been made more transparent.

7. Publicly owned companies (NAP Chap. IV, 1.4)

The German government does not fulfil its particular duty to protect with respect to publicly owned companies. The NAP draft from June 1, 2016 required companies with federal majority ownership to implement human rights due diligence; this was unfortunately dropped. Instead, the German government now sets forth that publicly run companies are directly bound by fundamental rights and thus their standard for protecting human rights is already very well developed. However, there is reason to doubt that this commitment to fundamental rights is currently being interpreted so as to also apply to human rights violations occurring in subsidiaries or in the supply chain abroad.

It is also regrettable that the German government no longer intends to supplement the reporting in the report on federal ownership with the state of implementation of the UN Guiding Principles, as was still envisaged in the NAP draft from June 1, 2016. It is now only to be listed whether the majori-

ty-owned companies with more than 500 employees apply a framework with human rights reporting obligations or not. At least it is to be welcomed that the training for the federal entities holding ownership is to be broadened to include the human rights responsibility of the companies.

It would have been important not only to make the human rights due diligence obligation binding for majority state-owned companies in the framework of a revision of the Public Corporate Governance Codex, but also to encourage the federal states and municipalities to issue similar regulations for their companies. This would be important since e.g. many energy suppliers with significant human rights risks in the supply chains are owned by federal states and municipalities.

8. Supply and value chains (NAP Chap. IV, 2.1)

The German government intends to carry out a study to identify high-risk industries and regions. It also plans to develop instruction manuals and examples of best practice at the sector level. However, the German government should not duplicate the work already carried out in particular at the OECD level. There, sector guidelines and an overarching guideline for substantiating the human rights due diligence obligations have already been or are being developed.

The planned multi-stakeholder initiatives can provide companies with practical guidance on how a human rights due diligence obligation is to be implemented. By no means can they replace legal rules for shaping corporate due diligence obligations. They are not “binding to a sufficient degree for fulfilling sustainability standards”, even though the German government offers this description with reference to the Textile Partnership². In the Textile Partnership, binding elements such as cross-company deadlines for fulfilling implementation requirements, were dropped – every company may develop its own road map. The transparency of goals and implementation is yet to be ensured. A “robust sanctioning mechanism” does not exist so far. With respect to the planned multi-stakeholder fora, we refer to similar processes in the Netherlands, where round tables develop recommendations for individual industries within a limited number of meetings. The planned multi-stakeholder fora in Germany must also have a fixed time frame. Only relying on the multiplication of the Textile Partnership by further sector partnerships is questionable for the NGOs for capacity reasons alone.

In the description of the human rights impacts of business activities on p. 32, there is no mention of the surrounding population as an affected group whose rights are frequently violated e.g. in mining projects.

9. Transparency and communication (NAP Chap. IV, 2.2)

We welcome that the German government recognises transparency as a fundamental component of human rights due diligence. However, it does not set forth how the reporting obligations of companies are to be developed so that they live up to the requirements of the UN Guiding Principles. Merely referring to the implementation of the CSR Directive is not enough. In the draft bill, the German

² The Textile Partnership (Partnership for Sustainable Textile) is a multi-stakeholder initiative in which over 100 German companies from the clothing industry, NGOs, unions and government are trying to develop and implement social and environmental standards along the supply chain.

government has failed to take essential strategic decisions for more transparency: Due to the limitation to publicly traded companies, the bill only introduces legal requirements for a fraction of German companies – only 550 of the 3.6 million companies nationwide. The German bill leaves open according to which criteria companies are to report on their management of human rights risks. In addition, it falls short of the provisions of the CSR Directive in the definition of “principal risks”.

The German government should have announced in the NAP that the reporting obligation will be extended to all large companies with at least 250 employees, independently of whether they are publicly traded. It should have recommended that the terms “due diligence processes”, “business relationships” and “principal risks” contained in the CSR Directive should be substantiated within the meaning of the UN Guiding Principles on Business and Human Rights. Moreover, independently of the implementation of the CSR Directive, the government should have explained how companies can establish a communication structure that allows external interest groups to assess the risks and impacts of the companies’ activities and business relationships on human rights and the effectiveness of the countermeasures taken.

The announced review of whether a guarantee mark should be introduced into German law is certainly not sufficient for establishing the necessary transparency.

10. Business activities in conflict areas (NAP Chap. IV, 2.3)

On November 22, 2016, the EU institutions agreed on a regulation intended to curb the financing of conflicts with the revenue from mining and trading in tin, tantalum, tungsten, their ores and gold. It would legally require European companies in the upstream area, i.e. from the mine to smelters and refineries, as well as direct importers of those metals to trace the origin of the raw materials according to their due diligence obligations. They would have to examine conflict and human rights risks and report on them to authorities, direct business partners and the public. We welcome that in the negotiations and also in the NAP the German government at least declared itself in favour of this partial obligation.

Nevertheless, the planned regulation falls short in many respects. It only focuses on the financing of conflict parties while other contributions to human rights violations in raw material extraction in conflict areas need not be examined. Only initial importers of ores and metals are included, whereas the vast majority of companies using such raw materials – like the automotive and electronics industry as well as retail – are largely absolved from responsibility. Moreover, the due diligence obligations are to apply only to companies whose import volumes exceed certain thresholds. For gold, this threshold is 100 kilogrammes, which corresponds to a market value of 3.4 million euros. Thus, with respect to gold, only 20 out of 253 importing German companies are included.

Moreover, the regulation is limited to a few raw materials, even though the mining of all raw materials carries human rights risks. Furthermore, companies have to report to the public mainly on their methods for fulfilling the due diligence obligations, not on the identified risks themselves. The regulation also does not provide for uniform sanctions against companies violating their due diligence obligations, but rather leaves this to the EU member states. It is also problematic that the implementation of the regulation is to begin only in 2021.

The German government should have announced that it would develop an effective sanctioning mechanism in implementing the regulation in Germany. In the framework of the planned review of the regulation, which begins two years after its entry into force, the government should advocate closing the loopholes in the existing regulation described above. Moreover, it should advocate for the EU to launch a comprehensive legislative initiative on human rights due diligence obligations in supply chains that also covers other industries and is not limited to conflict areas.

11. Offering support to companies (NAP Chap. IV, 3)

In the consultation process on the National Action Plan, the business associations as well as the individual companies repeatedly emphasised the necessity of effective support services. We therefore welcome that the NAP provides for the expansion of the consulting services. Unfortunately, the measures described are vague and seem to lack strategy and ambition. The envisaged help desk in the Agency for Business and Economic Development mainly covers the development policy cooperation with business and will presumably have at best a consulting role in this context. This is no substitute for a general and comprehensive consulting centre with case-by-case consulting, as demanded by all stakeholders involved. From the perspective of business, comprehensive information services on country- and sector-specific risks have yet to be provided. The non-specific announcement of guidelines without a thematic focus or competence is not convincing. Expanding the workshop offer of the *Global Compact* only makes sense if the companies will make more use of these offers in future. Because many companies have so far felt little pressure to implement human rights due diligence procedures, the trainings of the *Global Compact* have often not been filled to capacity or had to be cancelled..

The German government should have provided a well staffed, independent and generally accessible consulting centre to which all companies can direct questions on human rights due diligence. In addition, the government should have established an independent monitoring centre. It should be charged with the further conceptual development of requirements for human rights due diligence, but also with accompanying and assessing the introduction and implementation process in the companies. The German Institute for Human Rights could be an appropriate institution for carrying out such a monitoring.

12. Access to law and courts (NAP Chap. IV, 4.1)

It is the government's task to ensure that people can effectively assert their rights in the courts in case of rights violations by companies. This central demand of the UN Guiding Principles is intended to help people claim their rights, and at the same time it has a strong preventive effect: A well-functioning system of protection keeps companies from violating human rights or contributing to them.

People who want to seek redress from German companies in German civil courts currently face numerous obstacles: It is not possible to file appropriate collective lawsuits. The short limitation periods are difficult to comply with in transnational cases. Evidence is difficult to produce, because those affected have inadequate legal means of forcing companies to disclose relevant information. This considerably reduces the chance of success of corresponding lawsuits. The German government does

not recognise these obstacles in civil procedures in the NAP and fails to introduce or at least consider urgently necessary procedural changes.

The German government should have formulated recommendations in the NAP for removing substantial and procedural obstacles in civil law: The introduction of a statutory human rights due diligence obligation that also extends to subsidiaries and business relationships would be crucial for the substantial claims of those affected. The government should also have planned the introduction of options for collective lawsuits – e.g. by expanding the approach that is currently being developed for consumer claims. But at least the limitation period would have to be suspended for other affected persons. For human rights violations, as a rule, do not occur as isolated cases, but rather the rights of a variety of individuals are often harmed through one harmful incident. Furthermore, the German government should have recommended to increase the disclosure requirements for defendant companies.

13. National Contact Points according to OECD Guidelines (NAP Chap. IV, 4.2)

The National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises is the central extra-judicial grievance mechanism for global economic activities. It is to be welcomed that the German government intends to upgrade the NCP to a separate organisational entity within the Federal Ministry for Economic Affairs and Energy and to increase its staff.

But the NCP does not necessarily provide a remedy for the victims of human rights violations within the meaning of the UN Guiding Principles. For up to now, the mediation procedure is less about remediation than about agreements for future improved actions of the company. For instance, a study of 250 complaint cases by the international network OECD Watch found that in only one percent of the cases an OECD complaint resulted in an improvement of the situation of those affected.

Moreover, with the planned changes the NCP will still not fulfil the effectiveness criteria of the UN Guiding Principles (Principle 31). In order to satisfy the criterion of legitimacy, the NCP would have to be organised independently, as is the case in the Netherlands or in Norway, or at least be supervised by a multi-stakeholder steering committee, as in the UK. In this context, a correction of the NAP is in order: The NCP does not decide “in coordination [...] with the working group ‘OECD Guidelines’”; the working group currently has no decision-making competences. In order to satisfy the criterion of rights-compatibility, the procedural guideline would have to be comprehensively revised *inter alia* so that the standard of evidence for admitting a complaint is not too high and that the NCP can also carry out its own investigations.

Furthermore, in case no settlement is reached, the violations would have to be explicitly named, and uncooperative behaviour or failure to implement agreements reached would have to result in sanctions such as a temporary disqualification from foreign trade promotion or public procurement.

14. Monitoring (NAP Chap. VI)

We welcome that the German government plans to carry out a comprehensive monitoring procedure of the implementation of all NAP measures. For this purpose, it announced the establishment of a

permanent Interministerial Committee under the aegis of the Federal Foreign Office, which is to be equipped with the necessary staff and budget. We also welcome the scientific review of the implementation of the due diligence obligations of companies planned from 2018 onwards and the commitment that a status report will be presented in 2020 that is to serve as a basis for revising the NAP.

In view of the numerous mandates for review formulated in the NAP, a comprehensive, independent and transparent monitoring will be crucial for the success of the NAP. Against this background, it is not acceptable that the entire monitoring process is “conditional on budgetary approval”. Instead, the NAP must pledge that the necessary resources for the implementation and the monitoring will be provided. It will also be crucial that an independent and recognised institution with established human rights expertise will be charged with the review and that the criteria of the scientific review will be specified. In particular, explaining why a company has not implemented certain elements of the due diligence obligation must not be recognised as a fulfilment of its due diligence obligation. Moreover, the review of the implementation of due diligence obligations in the companies must go beyond a mere self-disclosure of the companies and include external assessments, for example from unions, non-governmental organisations and those directly affected.

Furthermore, the NAP provides that the existing steering committee on the NAP is to be integrated into the existing CSR Forum, which is to accompany the activities of the Interministerial Committee for implementing the NAP and to give recommendations for action to the German government. However, some structural reforms are needed for the CSR Forum to be able to fulfil this task. For companies and their associations are currently quite disproportionately represented in the CSR Forum compared to unions and NGOs. Human rights organisations and networks have been completely absent so far. Furthermore, the CSR Forum has yet to represent all ministries that have actively participated in the NAP process, in particular the Federal Foreign Office, which led the process, and the Federal Ministry of Justice and Consumer Protection. The mandate of the CSR Forum has so far referred to voluntary measures; it does not yet contain the so-called smart mix of voluntary and binding approaches of the UN Guiding Principles. In this connection, the name of the current body would also have to be reconsidered.

Moreover, so far the decision-making in the CSR Forum followed the principle of consensus, so that the business representatives were able to block all recommendations that ran counter to their interests. For the new body composed of the steering committee of the NAP and the CSR Forum, a new mandate, a new name, a new governance structure and clearly defined decision-making procedures must be agreed upon, which take account of the interests of all actors involved and allow for a productive, constructive cooperation. Representatives from business, unions and NGOs must be equally represented in the new decision-making body, and an intensive exchange with the entire Interministerial Committee must be ensured.

Translation:

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