Global Supply Chains as an Example for the Difficulties of Transnational Regulation

Manfred Weiss*

This work was written on the occasion of Prof. Prugberger's 85th birthday. The choice of topic in this regard is linked to transnational labor law, namely the regulation of global supply chains. As a result of the increased international trade in goods and the ever-expanding global market, more and more multinational companies have emerged. In order to meet consumer needs, these companies often use practices that raise serious labor law issues. In this study, in addition to describe the problems, I want to present the possible solutions.
Keywords: transnational labour law, global supply chains, human rights, regulations

A globális ellátási láncolat mint példa a transznacionális szabályozás nehézségeire
Jelen munka Prof. Prugberger 85. születésnapja alkalmából készült. A témaválasztás erre tekintettel a tranznacionális munkajoghoz kapcsolódik, nevezetesen a globális ellátási láncok szabályozásához. Az elmúlt időszak megnövekedett nemzeközi áruforgalma, az egyre bővülő globális piac következtében egyre több multinacionális vállalat jött létre. Annak érdekében, hogy a vállalkozások biztosítani tudják a fogyasztói igényeket, sok esetben alkalmaznak olyan gyakorlatot, amelyek komoly munkajogi problémákat vetnek fel. A tanulmányban a problémák ismertetése mellett a megolási lehetőségeket kívánom bemutatni.
Kulcsszavak: transznacionális munkajog, globális ellátási láncok, emberi jogok, szabályozás

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1. Introduction

Throughout his impressive career Prof. Prugberger has been interested in comparative, transnational and European labour law. Therefore, it might be appropriate to honour him for his 85th birthday with a contribution on transnational labour law. The most burning problem in transnational labour law for quite a time has been the regulation of global supply chains. More and more Multi National Enterprises (MNE) take use of low standards in developing countries to get there supplies for their products. Most prominent in this respect are the textile sector, the sector of extraction of minerals and the agricultural area. But they are only the peak of a whole set of further branches. Global supply chains have become a pattern for the economy as a whole. As economically useful these arrangements are, they are problematic from a labour law perspective. Labour conditions often are not at all in

* Professor emeritus at the Goethe University in Frankfurt.

line with human dignity and violations of humen rights are not seldom. Child labour still amounts to about 160 million, half of them are performing hazardous work. 25 million people are in forced labour, threatened by withholding wages, by violence against themselves or family members. But not only the extremes as child labour and forced labour are worrying. Other core labour rights and in particular the rules on health and safety requirements widely are violated in the context of global supply chains. This shows that regulation is of utmost importance. There are, of course, international labour standards, developed by the ILO and the United Nations (UN). But there are no rules establishing obligations for the MNE to prevent violations and to be responsible in case of violations. In particular there are no rules on liability and on easy access of the victims to remedies provided by the MNE. This transnational regulation is still not accomplished. In the following I will give a sketchy overview on the main attempts in this direction.

2. International Initiative

A first push for improving the situation came from the UN. The UN's Human Rights Council endorsed in 2011 the "Guiding Principles on Business and Human Rights" which were annexed in the famous Ruggie report. The Guiding Principles contain three chapters, or pillars: protect, respect and remedy. Each defines concrete, actionable steps for governments and companies to meet their respective duties and responsibilities to prevent human rights abuses in company operations and provide remedies if such abuses take place. The different member states were supposed to transform these principles in national action plans. This has been executed by now, but unfortunately not ending up in binding rules but merely in recommendations, putting merely soft pressure on the companies.

However, in the meantime on 24 April 2013, the Rana Plaza building in Bangladesh came crashing down, killing 1,134 people and leaving thousands more injured. People all across the world looked on in shock and horror as media reports poured in revealing the true extent of the human toll here were harrowing stories of survival, of people who had no choice but to amputate their own limbs in order to be freed from the rubble and survive. The collapse of Rana Plaza brought worldwide attention to death trap workplaces within the garment industry. It served as a sort of wake-up call and led not even a month after the event on 15 May 2013 to the Accord on Fire and Building Safety in Bangladesh, a legally binding agreement between global brands, trade unions and the ILO designed to build a safe and healthy Bangladeshi Ready Made Garment (RMG) Industry. The agreement consisted of an independent inspection program, public disclosure of all factories, inspection reports and corrective action plans, a commitment by the signatory brands for sufficient funds, democratically elected health and safety committees in all factories to identify and act on health and safety risks, workers' empowerment through an extensive training program and last not least complaint mechanisms. More than 200 companies have signed this accord which unfortunately expired in 2018. Only after long, difficult and rather shameful controversies – the Rana Plaza

shock is no longer present – a consensus has been reached to extend the agreement for another three years. However, in the meantime it became history...

Even if this Accord could have been a model of how regulation of global supply chains could look like, it should not be ignored that it only is focussing on health and only to one country. In the meantime further efforts have been made in reference to health and safety for all developing countries. In this context the Vision Zero Fund initiated in 2015 by the G7 countries, organised by the ILO and directed by our South African colleague Ockert Dupper. However, this is not sufficient. Health and safety is only one topic among many others. We also need minimum standards for wages, working time etc.

Therefore it was of utmost importance when in 2014 Ecuador and South Africa initiated in the UN Human Rights Council a resolution for a comprehensive binding instrument to be elaborated by an Open-Ended Intergovernmental Working Group (OEIG). This instrument would provide an international and uniform solution, no longer relying on national action plans, and – above all – it would have a legally binding effect. The resolution was accepted, but against the votes of the industrialized countries who are members of the Human Rights Council but who are profiting from the status quo. The working group has presented several drafts, last revised in 2019.

The latest draft not only covers transnational companies but also those who only operate domestically. This is necessary to make sure that intolerable working conditions (for example child work) are not merely shifted to local companies without a transnational link. And the draft covers all human rights in the working context including the right to fair remuneration as well as the right to appropriate limitation of working time and to paid vacations, to just give two important examples..The draft imposes on the Member States the duty to prevent violations of human rights by specific mechanisms and procedures. In case of trans-nationally operating companies these responsibilities rest with the mother companies. In particular the draft regulates the victims` access to courts or alternative independent and impartial bodies of conflict resolution and establishes requirements for fair procedure, including a change of the burden of proof in favour of the victims. There are special chapters on liability as well as on criminal sanctions not only for individuals but also for the companies as legal persons. The draft also contains rules on the applicable law and in particular on cooperation and mutual help between the States who are involved. Finally the draft establishes a committee of experts which - among many other functions - is supposed, based on reports by the States and other stakeholders, to make "general comments and normative recommendations on the understanding and implementation of the legally binding instrument". Thereby it is guaranteed that the binding instrument will be understood the same way in all the ratifying Member States and that it will not remain static but adapted to needs in actual practice.

It would be an important step forward, if the draft could be transformed into a convention. Whether and when this will happen and how many States then will ratify such a convention, remains to be an open question. The opposition still is strong.

The International Labour Organisation (ILO) also has tried to push for regulation. In 2016 the International Labour Office presented a report on "Decent work in Global Supply Chains" and brought the topic on the agenda of that year's International Labour Conference. However, the result was disappointing. The trade union camp's request for a respective convention was pushed back and the debate ended in joint conclusions at the lowest possible denominator according to which the ILO is supposed to develop an action plan on how to promote decent work on global supply chains, to advise and support stakeholders and to exchange information on best practices and to encourage companies to conduct "Human Rights Due Diligence". In short and to make the point: for the companies everything remains voluntary no binding instrument is in sight.

3. Initiatives by Individual States

In this landscape of hope and frustration, the efforts of individual States should not be ignored. Instead of waiting for an international binding regulation, they regulated the matter themselves So for example after long and controversial discussions France on 27 March 2017 passed a law on the responsibility of mother companies of groups of companies whereby not only the activities of daughter companies but also those of suppliers worldwide are covered. The law not only defines the mother companies' obligations but also establishes a mechanism which in case of violation of such obligations allows each person to be affected to sue the mother company However, if only one country passes such legislation, it is problematic. This might lead to a competitive disadvantage for mother companies situated in France. They might be inclined to move to another country (which is easy in the context of the EU). Therefore, this is not yet the solution we are waiting for. But this French law could be the model for the binding instrument to be developed internationally.

The last in the row of these law has been German one of July 2021. The German law, which will be in force from 1st January 2023, is an important step forward but does not go far enough. It only applies to big companies with at least 3000 employees (from 2024 on 1000 employees) and subsidiaries of foreign companies with a subsidiary of this size in Germany. The most important innovations are the requirements of a whole set of preventive measures to be taken within the company and for the direct partners in the supply chain. Equally important is the establishment an administrative agency with tough instruments for control and sanction in case of violation. Potential and actual victims have access to this agency. And it is also noteworthy that the bodies of workers participation have a right of information and consultation in reference to all aspects of this law.

But much is missing. The Medium and Small Enterprises (MSE) are excluded. The indirect partners in the supply chain are not covered. And there are no specific rules of civil liability in case of damages resulting from non-observance of the requirements.

However, as good or bad these laws may be, if only individual countries pass such legislation, it is problematic. This might lead to a competitive disadvantage for parent companies situated in those countries. They might be inclined to move to

another country (which is easy in the context of the EU). Therefore, this is evidently not yet the solution of the problem. An international or at least regional instrument is indispensable. Therefore, the expectations of what the EU might do, are very high. You have to know that European Directives do not have to be ratified. They are legally binding and the Member States are obliged to transpose them into national law. If this is not done, the EU Commission can enforce it via the Court of Justice of the EU.

4. The Approach of the European Union (EU)

After long and controversial discussions and consultation with all stakeholders the Commission presented on 23 February 2022 a proposal for a Directive on Corporate Sustainability Due Diligence. Before discussing this proposal it should be mentioned that the EU has established a reporting system based on the Non-Financial Reporting Directive (NFRD) of 2014 where large companies which are public-interest entities of at least 500 employees are required to annually report on how their performance affects environment, social matters and the treatment of employees as well as respect for human rights and what they do to fight corruption and to promote diversity in their boards.

This Directive now is to be replaced by the Corporate Sustainability Reporting Directive (CSRD) proposed by the Commission in April 2021. This Directive will bring three important changes: it will extend the coverage of companies and include all of at least 250 employees with a turnover of at least 40 million € and of at least 20 million € in assets; in the environment area it will require the companies to report their plans to ensure sustainable economy with a specific reference to the limiting of global warming to 1.5 degree Celsius in line with the Paris Agreement and finally to require independent monitoring providing reasonable assurance in order to prevent greenwashing and mere marketing reports.

Now back to the Corporate Sustainability Due Diligence Directive whose overall objective is to "ensure that companies active in the internal market contribute to sustainable development...through the identification, prevention and mitigation, bringing to an end minimization of potential or actual adverse human rights and environmental impacts connected with companies' own operations, subsidiaries and value chains".

The Directive is supposed to cover two groups of companies: first those with at least 500 employees and a worldwide turnover of more than 150 million € in the last financial year and secondly those with at least 250 employees and a worldwide turnover of more than 40 million € if at least 50 % of the turnover was generated in one of special risk sectors: textile, agriculture or extraction of minerals. Included are also companies which are formed under the legislation of a third country if they have either a turnover of 150 million € EU in the last year or at least 40 million in the EU, of which at least 50 % are generated in one of the problematic sectors.

The Directive refers to human rights in the broadest sense, including the right to fair wage, to safe and healthy working conditions as well as the right to reasonable limitation of working hours. It should be stressed that the annex listing up the human

rights to be respected also refers to a comprehensive catalogue of internationally recognized objectives and prohibitions included in environmental conventions.

Member States shall ensure that companies conduct human rights and environmental due diligence in order to prevent and mitigate potential adverse impacts. Companies are obliged to describe their approach, to establish a human rights and environmental code of conduct a to describe the process of implementation, including the measures to verify compliance. They have to develop a prevention action plan in consultation with affected stakeholders. In case there are adverse impacts they have to do everything to bring them to an end. Member States have to provide a compliance procedure for persons and specific organisations (trade unions and other workers representatives as well as civil society organisations) to submit complaints. And it has to be ensured that each company designates an authorized representative, established or domiciled in one of the Member States where it operates. One or more supervisory authorities to supervise compliance are to be established in each Member State. They may initiate an investigation, conduct inspections, identify failures and take remedial action. The possibility for legal and natural persons to submit substantiated concerns to any supervisory authority is to be guaranteed. A European Network of Supervisory Authorities is to be formed in order to coordinate their activities

Member States have to provide effective, proportionate and persuasive sanctions for violations. In addition to administrative supervision the Directive establishes a system of civil liability in case companies failure to comply with the obligations leads to damage. However, the company shall not be liable for damages caused by an adverse impact arising as a result of the activities of an indirect partner.and if there is a contractual cover by the direct business partners that they will comply with the covered company's due diligence policy and that they will cascade these contractual promises in turn to their own partners. This possibility to reduce civil liability by contractual clauses is - next to the exclusion of SME - one of the main weaknesses of the Directive.

The Corporate Sustainability Reporting Directive and the Corporate Sustainability Due DiIigence Directive definitely will lead to synergy effects and form an important part of the new architecture of the EU composed by the pillar of social rights and the green deal.

In the legislative procedure the European Parliament (EP) and the Council (the body representing all the Member States) will be involved. The EP wants to go much further. Some Member States are rather reluctant. It cannot be predicted what kind of compromise will be found.

5. Conclusion

This very sketchy overview shows the difficulties to find an adequate solution for regulating global supply chains. There have been many attempts. Legislative approaches by individual countries evidently are only of limited value because they might lead to competitive distortions. Global or at least regional regulations are needed. However, globally it might be difficult to agree on a binding instrument. So

far everything still is more or less voluntary. This has to do with technical problems, but even more with resistance by those who are afraid that the risks for MNE might become too big and that economic advantages might be lost. The approach by the EU presently looks most promising. In so far the EU could become a forerunner for similar regulations also in other regions.

Even if my observations point to the difficulties of efficient binding regulation and to the still strong resistance, it should be stressed that there are signs which justify optimism. The consciousness by the general public of the problems created by global supply chains has grown as well as of the importance of respecting human rights in the workplace contexts. This leads to ever increasing public pressure to do something. Therefore, in spite of my scepticism I am optimistic in the very end and think that we have reached in this regulatory effort a point of no return which will lead in the not too far future to adequate binding instruments.