



Permanent Mission
of the Federal Republic of Germany
to the Office of the United Nations and
to the other International Organizations
Geneva

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Note Verbale

The Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the other International Organizations in Geneva presents its compliments to the Office of the High Commissioner of Human Rights and has the honour to submit herewith a response by the Federal Republic of Germany in reply to the Joint Communication from Special Procedures, AL DEU 2/2020, dated 12 March 2021.

The Permanent Mission of Germany to the Office of the United Nations and to the other International Organizations in Geneva avails itself of this opportunity to renew to the Office of the High Commissioner of Human Rights the assurances of its highest consideration.

Geneva, 12 May 2021



To the
Office of the High Commissioner of Human Rights
Palais Wilson
Geneva



Joint communication from 12 March 2021 sent by the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on minority issues; the Special Rapporteur on freedom of religion or belief; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children

Response by the Federal Republic of Germany

12 May 2021

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

Germany shares the Special Procedures' concerns about the deteriorating human rights situation in the Xinjiang Uyghur Autonomous Region in China. To respect and to ensure binding human rights to all individuals within its territory and subject to its jurisdiction is the obligation of all States.

Germany regularly addresses human rights issues in the German-Chinese Human Rights Dialogue, the German-Chinese rule of law dialogue and in other exchanges with the Chinese Government, this, among others, includes the situation in the Xinjiang Uyghur Autonomous region. This is done both bilaterally and in joint efforts with our international partners, especially from the EU. Together with these partners, Germany regularly requests that China grant unimpeded access to the region for the United Nations High Commissioner for Human Rights in order to facilitate a neutral and transparent fact-finding mission. On 22 March 2021, responding to grave human rights violations in Xinjiang, the European Union also listed four individuals and one entity under the European Union's Global Human Rights Sanctions Regime.

The German Government also expects German businesses to conduct due diligence throughout their supply chains. The German Government is in continuous dialogue with representatives from relevant businesses and business associations in order to raise businesses' awareness about the human rights situation in Xinjiang and to make clear their responsibilities with regard to establishing human rights due diligence processes to prevent, reduce or counterbalance adverse impacts on human rights, and to discuss respective measures.

A draft law on mandatory human rights due diligence is currently being discussed by the German Bundestag with a view to its adoption by this summer (see also answer to question 2).

2. In regard to the above allegations, please highlight the steps and/or legal policy measures that your Excellency's Government has taken, or is considering to take, to ensure that business enterprises domiciled in its territory and/or jurisdiction, respect human rights throughout their operations and supply chains. This may, for example, include requiring such businesses to conduct effective human rights due diligence, in line with the UN Guiding Principles on Business and Human Rights, to identify, prevent, mitigate and account for how they address their impacts on human rights throughout their operations. More specifically, please provide any relevant information resulting from the last monitoring process (2018 and 2020) of the National Action Plan for Business and Human Rights (NAP) regarding how companies based in Germany are meeting their responsibility to protect human rights in their global supply chains according to the due diligence requirements enshrined in the NAP.

In December 2016, the German Government adopted the National Action Plan (NAP) on Business and Human Rights as a policy framework for the implementation of the UN Guiding Principles on Business and Human Rights in Germany. In its NAP, the German Government reiterates that primary responsibility for the protection of human rights lies with states and that the states' duty to protect cannot be delegated to other stakeholders within society. At the same time, the NAP establishes the expectation vis-à-vis all enterprises to introduce the process of corporate due diligence in a manner commensurate with their size, the sector in which they operate, and their position in supply and value chains. This applies especially when they operate in countries where the rule of law is not enforced or is only partly enforced. Building on this, the NAP spells out in detail the five core elements that enterprises are required to implement. These elements are: (1) a human rights policy statement, (2) procedures for the identification of actual or potential adverse impact on human rights, (3) measures to ward off potentially adverse impacts and review of the effectiveness of these measures, (4) reporting, and (5) a grievance mechanism. The German Government is currently preparing for the revision and update of the German National Action Plan on Business and Human Rights.

From 2018 to 2020, the German Government conducted a multiannual, large-scale empirical study to monitor the state of implementation on the part of German businesses with more than 500 employees (known as NAP monitoring). The study showed that the voluntary approach had not yielded sufficient traction (for detailed results, see <https://www.auswaertiges-amt.de/blob/2417212/9c8158fe4c737426fa4d7217436acc7/201013-nap-monitoring-abschlussbericht-data.pdf>). The German Government has therefore elaborated a draft law on mandatory human rights due diligence. The Federal Cabinet adopted the draft on 3 March 2021, which is now being discussed by the German Bundestag with a view to being adopted by this summer. The draft law is intended to require larger companies based in Germany to conduct appropriate human rights and (to some extent) environmental due diligence in their supply chains.

The draft envisages that the due diligence obligations, once adopted by the Bundestag, will take effect for companies with at least 3000 employees as of 1 January 2023. From 1 January 2024, the law is intended to also cover companies with at least 1000 employees. The due diligence obligations were designed to be comprehensive and feasible for the companies. The draft law deliberately does not take a sectoral perspective. Companies affected by the law are required to establish appropriate management procedures in order to ensure that human rights are respected throughout their supply chains – from raw materials to the finished product for sale. The responsibility and the scope of the due diligence obligations are applied in a tiered model, depending on whether the focus is on the company's own operations or a direct supplier or indirect

supplier. A direct supplier is characterised by a direct contractual relationship. This approach mirrors varying degrees of influence that a company is generally presumed to have over the different tiers of operations relevant to its business model.

The due diligence obligations companies must implement follow a risk-based approach. The obligations must be carried out on an ongoing basis for their own business activities, direct suppliers and also for their indirect suppliers if the company obtains substantiated knowledge of a possible infringement of a protected legal position or of an environmental obligation (eg. through NGO reports or information from a public authority). A proper human rights-related risk assessment must be conducted at least once each year and as the need arises, i.e. in the event of significant changes to the business activities of the company, such as the launch of new products and business relations. Risk assessments are a crucial step for assigning priorities for further action. “Salient issues” must be addressed first. Saliency in this context refers to an urgent problem in relation to the damage that can be inflicted upon the victims. In the light of the risk assessment, the company must adopt a policy statement concerning its respect for human rights that states and explains its due diligence obligations and activities. A core requirement is to take preventive measures in order to mitigate the assessed risks along the value chain.

In the event that human rights are violated, the company must remedy this situation. Within the scope of its own business activities, a company must ensure that the remedy leads to the termination of the human rights violation. In the event that the human rights violation occurs within the supply chain under the responsibility of a direct supplier, a company must elaborate an effective remedial strategy with the supplier within a certain timeframe. If the company obtains substantiated knowledge of human rights risks or actual violations within its supply chain beyond its direct supplier (beyond tier1), it is obliged to conduct the full due diligence process for this incident, including a risk assessment, appropriate preventive measures and a concept for remedy in line with the company’s capacity for action (known as “leverage”).

Companies are required to set up grievance mechanisms that allow risks and violations to be identified at an early stage. In order to be effective, such complaints instruments must be easily accessible to workers, business partners and local community members from remote ends of the supply chains. They must also ensure that complaints do not lead to repression or retaliation.

Companies must issue reports on their human rights due diligence at least once a year. The report must include the human rights and environmental risks identified along the supply chain, the measures undertaken, an analysis of the impact and effectiveness of these measures and its conclusions taken into consideration for future measures.

The draft law contains a robust public law enforcement mechanism carried out by the Federal Office for Economic Affairs and Export Control including an online assessment of company reports as well as on-site inspections of risk management implemented in Germany.

Companies failing to comply with the law can be fined and, if their shortcomings are severe, they may be excluded from participating in public procurement processes for up to three years.

In addition to these measures, the German Government has supported businesses in putting human rights due diligence into practice in many ways for several years. To this end, the German Government has maintained a structured dialogue with stakeholders, such as business associations, trade unions and non-governmental organisations, on an ongoing basis. Several multi-stakeholder

initiatives have been set up and facilitated by the German Government in order to promote sector-specific guidelines, further a common understanding of due diligence and bring forward cooperative projects for improved due diligence in supply chains. These include dialogue platforms and alliances for action, including in the garment and automotive sectors, , agricultural supply chains and tourism. The German Government has established a helpdesk dedicated to UNGPs for businesses that has already provided information and advice on human rights due diligence to several hundred companies free of charge (the Business and Human Rights Helpdesk). The German Government commissioned and published an in-depth scientific study to identify human rights risk in global supply chains of German industry sectors.

German Government programmes for development cooperation have been complemented by a wide variety of measures and partnerships aimed at supporting sustainability standards throughout global supply chains in many countries and different sectors. This includes assistance for partner governments in designing their own National Action Plans on business and human rights. One crucial element with a specific link to promoting and strengthening compliance in the private sector has been the essential support provided by the German Government for the Alliance for Integrity. The Alliance is an initiative with a global focus that is driven by a number of national and multinational companies, business associations, public institutions, civil society organisations and international organisations.

Germany actively contributes to the work done by the OECD Working Party on Responsible Business Conduct and several working groups on sectorial OECD guidelines. Germany has further established a National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises. The NCP promotes the effective implementation of the Guidelines and also provides a mediation procedure in cases in which a complaint relating to the application of the Guidelines is launched (www.bmwi.de/Redaktion/EN/Textsammlungen/Foreign-Trade/national-contact-point-ncp.html).

The German Government has funded competent non-state organisations on an ongoing basis in order to support their work to assist companies with information, training and platforms for exchange. These include the German Global Compact Network and the Business and Human Rights Resource Centre.

Moreover, Germany is seeking ways to support the valuable work of international organisations and institutions and is engaging with them in order to contribute to further developing and disseminating international standards on business and human rights as well as responsible business conduct. Engagements and partnerships include the UN Working Group on the issue of human rights and transnational corporation and other business enterprises, activities by the ILO and the OECD, UNDP and UNICEF.

A central online platform offering an overview of German Government activities in the field of business and human rights is www.wirtschaft-menschenrechte.de. Sections of this website are also available in English.

3. Please indicate the measures taken by your Excellency's Government to ensure that its public procurement of goods and services is only from business enterprises which have not caused, contributed to, or are directly linked to human rights abuses such as those alleged in the present letter.

German federal, *Land* and local authorities must protect human rights and ensure that the use of public funds does not cause or foster any adverse impact on human rights. Germany has fully transposed into domestic law its obligations to protect human rights under international agreements. This applies, for example, to the prohibitions of child labour and forced labour that are stipulated by the ILO's core conventions. If enterprises break the law in Germany in either of these respects, they can be disqualified from receiving public contracts.

Since 2010, the federal, *Land* and local authorities have cooperated within the framework of the Alliance for Sustainable Procurement, chaired by the German Government. Its purpose is to contribute to a significant increase in the share of sustainable goods and services among the purchases made by public bodies.

Since 2012, the Centre of Excellence for Sustainable Procurement at the Procurement Office of the Federal Ministry of the Interior has assisted public contracting bodies in applying procurement criteria, either with targeted support or with general training. The Centre of Excellence, along with the BITKOM association of German digital goods and service firms, has drawn up an initial sectoral agreement in the form of a Declaration on Social Sustainability for the IT Sector, which envisages adherence to the ILO core labour standards in procurement procedures. Other sectoral agreements on critical product categories are planned.

Other German Government initiatives and support measures can be found in the Programme of Sustainability Measures, into which German Government targets for sustainable procurement have been incorporated. An information platform funded by the German Government provides an overview of standard systems and supplementary requirements in the area of sustainability and assists public contracting bodies in incorporating a sustainability dimension into their procurement procedures.

The Fair Procurement Network of municipalities, which is part of the Service Agency Communities in One World, provides advice for municipalities, among other things, and familiarises local authorities with the issue of sustainable procurement with the support of specialised promoters. An information and dialogue campaign informs municipal decision-makers and contracting bodies and raises their awareness of sustainable procurement.

Following the reform of procurement law in 2016, in the course of which three new EU procurement directives were transposed into German law, the new Part IV of the Act against Restraints of Competition places particular emphasis on the contribution of public procurement to sustainability goals and on compliance of bidders with legal requirements, especially regarding taxation, labour and social legislation, as well as ILO core labour standards (e.g. sections 97 (3) and 128 (1) of the Act). The new legal framework enables procurement bodies to make greater use of public contracting to underpin the pursuit of strategic goals such as social standards, environmental protection and innovation.

The draft law on mandatory due diligence (see answer to question 2 above) not only envisages administrative fines for companies that fail to comply with the law, but also creates a new basis for

exclusion from a public procurement procedure. In cases of major failure to comply with the due diligence requirements as defined in the draft law, these companies shall be excluded from participating in public procurement procedures for up to three years. The Competition Register that is currently being established at the Federal Cartel Office will provide information on companies that are affected by grounds for exclusion, inter alia, linked to a violation of the draft law on mandatory due diligence.

4. Please indicate the steps that your Excellency's Government has taken, or is considering to take, to ensure effective access to domestic judicial mechanisms for victims of business-related human rights abuses, including for overseas victims of serious human abuses such as those alleged in the present letter.

Anyone who believes that his or her rights have been infringed abroad by the actions of a German enterprise can bring an action in Germany, normally at the court with local jurisdiction for the registered office of the enterprise. If the enterprise that is to be sued has its registered office in an EU member state, Switzerland, Norway or Iceland, or if the place where the harmful event occurred is in one of those states, international jurisdiction of German courts is governed by the Brussels Ibis Regulation or the Lugano Convention, and an enterprise may be sued in Germany for human rights violations for which it is responsible (Articles 4, 7 (2) and 63 of the Regulation or 4, 5 (3), 59 and 64 of the Convention). Germany's international civil procedure law also contains additional provisions whereby the German courts may be seized of matters relating to certain offences committed abroad, provided that a sufficient domestic connection can be demonstrated and if the respondent does not have its seat in the EU, Switzerland, Norway or Iceland (e.g. specific jurisdiction for tort under section 32 of the German Code of Civil Procedure).

German civil procedure law contains mechanisms that facilitate access to German civil courts. Litigants of limited means, for example, can obtain legal aid. Following a means test and an assessment of their prospects for a successful action, beneficiaries can have their court costs and their own lawyer's fees paid in full or in part, depending on their degree of need. Litigants who are not German nationals can also receive legal aid for German court proceedings. All legal entities based in the European Economic Area – victims' associations, for example – can also receive legal aid if they fulfil the conditions set out in the German Code of Civil Procedure. The German Code of Civil Procedure also envisages collective remedies in the form of joinder of parties and consolidation of claims.

Moreover, enterprises may be held liable for criminal offences under the Regulatory Offences Act, including company-related violations of human rights, for which they may be fined up to ten million euro. Bigger fines may be imposed if, in addition, the economic benefit derived from the offence is being disgorged. In 2020, the German Government submitted a bill to the German Bundestag including a comprehensive reform of the current regime of liability of legal persons for criminal offences. Reference is made to the OECD World Bank Group's Phase 4 Follow up-Report on Germany (<https://www.oecd.org/daf/anti-bribery/Germany-Phase-4-Report-ENG.pdf>).

The status quo in terms of civil liability as established in German civil law (see e.g. section 823 of the German Civil Code) will remain unchanged by the draft law on mandatory due diligence. Likewise, existing rules of jurisdiction are not affected by the draft law. However, the draft law introduces what is known as "representative action" in the context of lawsuits dealing with human rights violations in supply chains. This will allow affected persons abroad to give authority to

Germany-based trade unions and human rights non-governmental organisations to lodge a complaint before German courts on their behalf where claims pertain to the violation of extremely important subjects of legal protection, such as life or limb.

The German Government has strengthened the institutional set-up and increased the resources available to the National Contact Point for the OECD Guidelines for Multinational Enterprises (see also answer to question 2).

Since those who are affected by human rights violations cannot use the existing remedy mechanisms unless they are sufficiently well informed about them, the German Government has produced a multilingual information brochure on access to justice and the courts for injured parties.

5. Please indicate the steps that your Excellency's Government has taken, or is considering to take, to ensure that business enterprises domiciled in its territory and/or jurisdiction establish effective operational-level grievance mechanisms, or cooperate with legitimate remedial processes, to address adverse human rights impacts that they have caused or contributed to.

The establishment of effective and accessible corporate grievance mechanisms/internal complaints procedures is one of the core elements of the German Government's human rights due diligence concept with a view to businesses. This is reflected in the German National Action Plan on implementing the UN Guiding Principles.

In the draft law, adopted by the German Government in March 2021, companies are required to set up grievance mechanisms that allow risks and violations to be identified in good time. Access to these mechanisms must provide low thresholds for all relevant parties. Companies must ensure that complaints can be filed securely and do not result in repression and retaliation. If a report is received from a person who is directly affected, its receipt must be acknowledged. The company must discuss the facts with the whistleblower and it may offer a procedure for amicable settlement. The company could also participate in an appropriate external complaints procedure (for more details on the draft law on mandatory human rights due diligence, see answer to question 2).

In 2018, the German Government organised a full-day workshop with national and international experts and a variety of stakeholder representatives dedicated to the issue of good corporate grievance mechanisms. By establishing and facilitating ambitious multi-stakeholder initiatives related to UNGPs in various industry sectors, the German Government has made grievance mechanisms and remedial action an essential and ongoing topic of discussion and action in the field of business and human rights.

6. Under the CSR Directive Implementation Act (CSR-Richtlinie-Umsetzungsgesetz) /Clause 289(c), companies are required to report on their labour practices, such as compliance with the ILO core labour conventions, including the prohibition of forced labour. Please indicate how this Directive is implemented and what the results thereof have been, including by providing information on the number of reports submitted in this regard.

Under section 289c (2) 2. of the German Commercial Code (Handelsgesetzbuch, HGB) companies are required to report on their employee matters, such as working conditions or the implementation of fundamental conventions of the International Labour Organization. Currently, around 500

companies in Germany are subject to this reporting requirement. Companies must disclose the required information either in a (consolidated) management report or in a separate report (published together with the (consolidated) management report or making it available on the undertaking's website within four months of the balance sheet date, and referred to in the (consolidated) management report).

7. Please indicate if your Excellency's Government has the intention of introducing legislation which would require a disclosure of contemporary forms of slavery, including forced labour, in activities of all Germany-based businesses overseas, similar to the UK Modern Slavery Act.

The draft law on mandatory human rights due diligence requires companies to adopt a policy statement outlining their human rights strategy. Companies must establish a risk management system and perform regular risk analyses. Prevention measures and remedial action must be enshrined in their own business area, vis-à-vis direct suppliers and with regard to indirect suppliers if the company obtains substantiated knowledge of a possible infringement. Furthermore, the draft law provides for the establishment of a complaints procedure as well as documentation and reporting to fulfil certain responsibilities regarding conclusively listed, internationally recognised human rights conventions. Public annual reporting must include the human rights risks identified along the supply chain, the measures undertaken, an analysis of the impact and effectiveness of these measures and its conclusions taken into consideration for future measures.

The German draft law takes a horizontal approach on mandatory due diligence which includes the requirement of disclosure, but reaches beyond. It aspires to be clear in defining the relevant human rights that form the normative basis of the corporate risk assessments. Relevant legal positions can be found in the two international human rights pacts (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) and the eight ILO core conventions. This includes, but is by no means limited to, the prohibition of child labour and forced labour (for more details on the draft law on mandatory human rights due diligence, see answer to question 2).

As mentioned in the answer to question 2, the expectation of the German Government vis-à-vis enterprises to publish a policy statement and to report on their human rights due diligence is enshrined in the German National Action Plan addressing all companies, regardless of their size and sector.