

**Trafficking in Human Beings for the Purpose of Labor Exploitation:
Strengthening the Role of Corporations in Preventing Trafficking in
Human Beings by Enhanced Transparency**

Working Paper (August 2015)

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Austrian Marshall Plan Foundation

The UC Berkeley Program

April-May 2015

*The working paper was drafted during a research stay at the University of California, Berkeley, generously funded by the Austrian Marshall-Plan-Foundation. The author would like to thank the Institute for European Studies at UC Berkeley for their hospitality.

Abstract

Today's global supply chains are very complex and include many layers of suppliers in different regions. THB for labor exploitation can take place down the supply chain. Consequently, companies can be directly or indirectly involved in THB for labor exploitation. The paper analyzes one possibility to strengthen the role of companies to prevent THB for labor exploitation, in particular in supply chains: enhanced transparency of companies' measures to prevent exploitation. The paper gives an overview and compares current legal initiatives for enhanced transparency and focuses on one of those legal acts, the implementation of the California Transparency in Supply Chains Act (CTSCA). This act aims at preventing trafficking in human beings (THB) for labor exploitation by obliging companies to publish their efforts against slavery and THB. Recently, in the UK a similar legal initiative entered into force, but efforts at the level of the European Union (EU) are lagging behind. Therefore, the paper identifies lessons learned of the CTSCA's implementation and formulates recommendations for potential future legal initiatives in the EU.

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Abbreviations

CoE	Council of Europe
CSR	Corporate Social Responsibility
CTSCA	California Transparency in Supply Chains Act
DIR	Directive
EU	European Union
GP	Guiding Principle (Guiding Principles on Business and Human Rights)
NGO	Non-Governmental Organization
OECD	Organization for Economic Co-operation and Development
PIE	Public-Interest Entities
PRR	Protect, Respect and Remedy (Framework)
SME	Small and Medium-Sized Enterprises
SRSG	Special Representative of the Secretary-General
THB	Trafficking in Human Beings
UN	United Nations
UK	United Kingdom

1 Introduction

Trafficking in human beings (THB) has gained increased attention in international and national politics. THB takes place when a person is for instance recruited by means of deception or force for the purpose of exploitation, which may consist of sexual or labor exploitation or other forms of exploitation.¹ In recent years more knowledge has been gained on THB for the purpose of labor exploitation. More and more cases have come to the fore in many economic sectors, including agriculture, construction, garments, care and cleaning work.²

Companies can be involved in THB for labor exploitation in several ways. They may recruit and exploit trafficked persons or they may benefit from formal or informal recruitment systems, which supply them knowingly or unknowingly with those workers. Companies may also be indirectly associated with THB when their suppliers or subcontractors supply goods or services, which are produced or performed by exploited persons.³ Today's global supply chains are very complex and include many layers of suppliers in different regions.⁴ Combined with high economic pressure and unequal power relations they therefore bear high risks of labor exploitation.

The Guiding Principles on Business and Human Rights (GPs)⁵ include the State's duty to protect against human rights abuses within their territory by third parties, including companies, by means of appropriate policies, regulation, and adjudication.⁶ This duty to protect can be implemented by laws against THB for labor exploitation and enforcing those laws against companies that benefit from the use of labor exploitation.⁷ At the same time, the Guiding Principles include also a companies' responsibility to respect human rights, which for instance means that companies should implement a human rights policy. The following analyzes current trends in the implementation of the State's duty to protect and the corporate responsibility to respect, focusing on legislative efforts for enhanced transparency of corporate measures aiming at trafficking-free supply chains.

¹ United Nations, Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Woman and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000 (A/RES/55/25/, adopted 15 November 2000, entered into force 25 December 2003), Art. 3 a.

² See for example on UK the report of Jean Allain et al, *Forced labour's business models and supply chains* (2013); country studies on trafficking for the purpose of labour exploitation in Austria, Romania, the Netherlands, Serbia and Spain in Conny Rijken (eds), *Combating Trafficking in Human Beings for Labour Exploitation*, (Wolf Legal Publishers 2011).

³ United Nations, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/67/261, 7 August 2012.

⁴ United Nations, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/67/261, 7 August 2012, para 11.

⁵ Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations „Protect, Respect and Remedy“ Framework*, A/HRC/17/31 (21 March 2011).

⁶ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para. 27 and United Nations, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/67/261, 7 August 2012, para. 25.

⁷ Karin Dryhurst, 'Liability up the Supply Chain: Corporate Accountability for Labor Trafficking', 45 N.Y.U. J. Int'l L. & Pol. 641 2012-2013, 654.

Based on the GPs, the UN Special Rapporteur on trafficking in persons endorsed benchmarks and indicators for ensuring trafficking-free supply chains. These guidelines should help businesses to exercise due diligence in their supply chains in order to detect and prevent trafficking cases.⁸ In June 2013, the Human Rights Council adopted a resolution, which calls upon States and businesses to strengthen legislation and initiatives in order to combat trafficking for the purpose of labor exploitation, including in the supply chain.⁹ Also the EU's latest strategy concerning THB seeks to establish measures to avoid THB in supply chains and suggests enhanced cooperation with the business sector in this regard.¹⁰ The California Transparency in Supply Chains Act (CTSCA) of 2010, which went into effect on January 2012, is an example for enhanced transparency by obligatory reporting that already influenced recent legislation in the EU. It obliges companies to inform the public about what they are doing to prevent slavery and THB in their supply chain.¹¹ In the following, experiences and obstacles in implementing the CTSCA will be assessed in order to be able to formulate lessons learned that should be taken into account for further, upcoming initiatives in the EU.

2 The human rights framework for enhanced transparency of corporations' measures against THB

SRSG Ruggie's Framework for Business and Human Rights rests on three pillars: the State's duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.¹² The later Guiding Principles on Business and Human Rights (GPs) 'should provide guidance' for the implementation of the 'Protect, Respect and Remedy'-Framework (PRR Framework).¹³ Based on the example of enhanced transparency concerning corporation's measures against THB in supply chains and subsidiaries, the following will discuss the extent of the State's duty to protect and the extent of the corporate's responsibility to respect.

The three pillars are linked to each other and 'form a complementary whole'.¹⁴ The State's duty to protect human rights can lead to an 'indirect imposition of duties on the

⁸ United Nations Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children – Expert consultation on human trafficking and global supply chains*, A/HRC/23/48/Add.4 (4 March 2013).

⁹ United Nations Human Rights Council, *Trafficking in persons, especially women and children: efforts to combat human trafficking in supply chains of businesses*, A/HRC/RES/23/5 (19 June 2013).

¹⁰ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, COM(2012) 286 final, Brussels, 19 June 2012, in the following 'EU Strategy against THB'.

¹¹ The California Transparency in Supply Chains Act of 2010, S.B. 657, codified as Cal. Civ. Code § 1714.43 and Cal. Rev. and Tax Code § 19547.5, hereinafter CTSCA.

¹² Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, A/HRC/8/5 (7 April 2008), hereinafter SRSG Report 2008.

¹³ Special Representative of the Secretary-General, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations „Protect, Respect and Remedy“ Framework*, A/HRC/17/31 (21 March 2011), hereinafter Guiding Principles.

¹⁴ SRSG Report 2008, para. 9.

corporation', but only if the State first fulfills its duty to protect, by for instance enacting laws and by developing mechanisms for enforcing human rights standards. Following this argumentation, corporations can face *hard*, but indirect, human rights obligations besides *soft* responsibilities.¹⁵ Within the duty to protect, States have to implement their human rights obligations concerning THB. Part of these human rights obligations is the State's obligation to prohibit THB, to investigate, prosecute and punish traffickers, to protect trafficked persons and provide reparation as well as addressing the causes and consequences of THB.¹⁶ These measures have to be also addressed to corporations. Member States of the EU¹⁷ and States, which ratified the Council of Europe Convention (CoE) on Action against Trafficking in Human Beings¹⁸, have to ensure criminal liability of corporations with regard to THB. State duty to protect is interpreted by *Jägers and Rijken* in a way that it also includes, besides the obligation to be able to hold companies accountable for the crime THB, the obligation of States to impose obligations on corporations to implement measures to prevent THB.¹⁹ However, as stated by *Jägers and Rijken*, such obligations 'are not (yet) placed on corporations when it comes to fighting the crime of THB'.²⁰

Analyzing the corporate responsibility to respect human rights, it is understandable why it is referred to – and criticized²¹ – as *soft* responsibility. Corporations 'should respect human rights' and 'should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.'²² The corporate responsibility exists 'over and above compliance with national laws and regulations protecting human rights'²³ and is 'distinct from issues of legal liability and enforcement'.²⁴ The responsibility of corporations to respect human rights is not legally binding²⁵, hence whether corporations commit or not is their decision. In addition, pushing the implementation of the corporations' responsibility to respect human rights is 'left largely to market forces, including peer pressure and NGO and consumer

¹⁵ Justine Nolan, 'All Care, No Responsibility? – Why Corporations Have Limited Responsibility and No Direct Accountability for Human Rights Violations under International Law', in Lara Blecher et al (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (Chicago, IL : Section of International Law, American Bar Association 2014) 6-7.

¹⁶ Julia Planitzer, *Trafficking in Human Beings and Human Rights – The Role of the Council of Europe Convention on Action against Trafficking in Human Beings* (NWV 2014) 74.

¹⁷ Art. 5 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

¹⁸ Art. 22 (4) of CoE Convention on Action against Trafficking in Human Beings, CETS No. 197, adopted 16 May 2005, entered into force 1 February 2008.

¹⁹ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 37-40.

²⁰ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 39.

²¹ See for instance Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 35.

²² Guiding Principle 11.

²³ Commentary to Guiding Principle 11.

²⁴ Commentary to Guiding Principle 12.

²⁵ Justine Nolan, 'All Care, No Responsibility? – Why Corporations Have Limited Responsibility and No Direct Accountability for Human Rights Violations under International Law', 14. See also Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 91 and Robert McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights', in Lara Blecher et al (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (Chicago, IL : Section of International Law, American Bar Association 2014) 64.

activism'.²⁶ Requesting enhanced transparency of corporations' actions is for instance one option to support the implementation of the responsibility to respect.

Part of the responsibility to respect is that business enterprises should implement a human rights due-diligence process 'to identify, prevent, mitigate and account for how they address their impacts on human rights'.²⁷ Practical measures to implement this comprise having a human rights policy, assessing the actual or potential adverse human rights impact of actions, integration of findings of the assessment into the management systems and tracking the effectiveness of their actions.²⁸ However, what exactly the due diligence standard requires is not clearly defined.²⁹ The usage of the term 'due diligence' leads to confusion, since the term is used with two different meanings. On the one hand 'due diligence' describes the 'international human rights legal obligation of due diligence in relation to the actions of nonstate actors', on the other hand it describes the voluntary business practice of due diligence, meaning the practice of companies in particular during mergers to assess risks.³⁰ This leads to different interpretation of standards of due diligence required.

One example for the different interpretation of 'due diligence'-standard can be found in General Principle 13. Business enterprises should 'avoid causing or contributing to adverse human rights impacts through their own activities'³¹, but only have to 'seek to prevent or mitigate adverse human rights impacts'³² which are linked to their operations, for instance entities in the value chain. In the latter situation, appropriate action of the enterprise is made dependent on several factors such as the enterprise's leverage over the entity concerned and the severity of the abuse.³³ Therefore, the required standard of due diligence is higher for preventing adverse human rights impacts in its own activities, than the standard of due diligence required for activities of other enterprises down the supply chain.³⁴

Important measures for the operationalization of the responsibility to protect human rights are, among others, the adoption of a human rights policy and the responsibility to track and report performance. Concerning THB, a human rights policy has to also show that the company is committed to apply national and international standards against THB. Subsidiaries and the supply chain have to be part of the human rights policy, depending on different factors

²⁶ Justine Nolan, 'All Care, No Responsibility? – Why Corporations Have Limited Responsibility and No Direct Accountability for Human Rights Violations under International Law', 14.

²⁷ Guiding Principle 15 (b).

²⁸ Guiding Principles 17-20, cited after Robert McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights' 68.

²⁹ Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 (78) *Utrecht Journal of International and European Law* 7, 16.

³⁰ Robert McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights' 68-69.

³¹ Guiding Principle 13 (a).

³² Guiding Principle 13 (b).

³³ Commentary to Guiding Principle 19.

³⁴ Robert McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights', 71.

though as discussed above. The human rights policy has to be publicly available.³⁵ The impact of preventive policies should also be made publicly available. Information about the results of preventive policies should be published internally and externally.³⁶

States could support the process of due diligence by obliging corporations to conduct due diligence and defining its parameters. Legislation that mandates companies to carry out due diligence would again fall under the State's duty to protect human rights. Nevertheless, how far this obligation to carry out due diligence could go and whether such obligations could also encompass companies in the supply chain or subsidiaries is not clear. The GPs take a 'more conservative view' and limit the State's action to regulate corporate activities within its borders and jurisdiction.³⁷ Also the report of the previous Special Rapporteur on trafficking in persons, especially women and children, Joy Ezeilo, states that in case of THB in supply companies or subsidiaries, it is primarily the responsibility of the State in which these companies are based to hold them accountable³⁸, not the State in which the company is based that for instance subcontracted or receives the supplies. Nevertheless, in order to increase the companies' respect for human rights and to support private regulatory mechanisms, legislation by States that obliges companies to improve transparency about their global action would be necessary.³⁹ This necessary legislation for enhanced transparency requires also a specific focus on THB aiming at trafficking-free supply chains, since private regulatory mechanisms as corporate social responsibility programmes 'often do not treat human trafficking as a priority issue'.⁴⁰

As *Jägers and Rijken* show, slavery and the *jus cogens* character of the prohibition of slavery lead to an obligation of States to impose obligations on corporations to adopt preventive strategies.⁴¹ However, the GPs do not place a legal obligation upon States to enact legislation leading to an obligation of corporations to implement measures against THB throughout their supply chain. It is unclear whether the State's duty to protect encompasses also the obligation to enact legislation, which includes also subsidiaries or suppliers down the supply chain operating abroad. Nevertheless, States can impose further obligations for transparency across the supply chain in a company. The following discusses examples of State's actions for enhanced transparency by obligatory reporting.

³⁵ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 62.

³⁶ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 95.

³⁷ Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 (78) Utrecht Journal of International and European Law 7, 16-17.

³⁸ United Nations, *Report of the Special Rapporteur on trafficking in persons, especially women and children, A/67/261*, 7 August 2012, para 12.

³⁹ Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 (78) Utrecht Journal of International and European Law 7, 18.

⁴⁰ United Nations, *Report of the Special Rapporteur on trafficking in persons, especially women and children, A/67/261*, 7 August 2012, para 28.

⁴¹ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 40.

3 The role of companies in preventing THB – enhanced transparency by obligatory reporting

3.1 The California Transparency Act and its implementation

The California Transparency in Supply Chains Act of 2010 (CTSCA)⁴² identifies a lack in 'legislative efforts to address the market for goods and products tainted by slavery and trafficking'⁴³ and states that the market forms a 'key impetus'⁴⁴ for crimes such as THB and slavery. The aim of CTSCA is to provide consumers with information about the efforts of companies to supply products that are free from THB and slavery. California's consumers should be able to use the information when deciding to purchase a product or not.⁴⁵ California has chosen to take the approach of a 'mandatory disclosure regime for companies'⁴⁶ and companies have to disclose their efforts. In January 2012, the CTSCA took effect.

A company, which has to comply with the CTSCA has to fulfill each of the following three criteria:⁴⁷

(1) The company has to be a 'retail seller and manufacturer'.

(2) The company has to do business in California.⁴⁸

(3) The company has an annual worldwide gross receipt of more than \$ 100 million.

CTSCA does not require companies to implement measures to prevent THB and slavery in its supply chain.⁴⁹ However, the CTSCA obliges companies to inform the public about their efforts, irrespective the number or extent of their efforts. These efforts, if any, have to be posted on the company's website or, in case there is no website, the company provides consumers with a written report upon request.⁵⁰ Despite the fact, that companies do not have to implement any efforts, CTSCA sets a framework of how the information should be structured. Companies should disclose information about (1) verifications of product supply chains to evaluate and address risks of THB and slavery, (2) audits to evaluate the compliance of suppliers with company standards, (3) their requests addressed to direct suppliers to certify that materials used are THB- and slavery-free, (4) internal accountability standards for employees or contractors not meeting company standards concerning THB and slavery and (5) trainings on THB and slavery

⁴² The California Transparency in Supply Chains Act of 2010, S.B. 657, codified as Cal. Civ. Code § 1714.43 and Cal. Rev. and Tax Code § 19547.5, hereinafter CTSCA.

⁴³ CTSCA, Section 2 (f).

⁴⁴ CTSCA, Section 2 (f).

⁴⁵ http://www.fairlabor.org/sites/default/files/documents/reports/fla_ctisca.pdf (accessed 15 April 2014).

⁴⁶ Alexandra Prokopets, 'Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010' (2014) 37 *Hastings Int'l & Comp. L. Rev.* 2, 354.

⁴⁷ Cal. Civ. Code § 1714.43 (a) (1).

⁴⁸ A company is doing business in California if it fulfills at least one of the criteria: 1) The company is domiciled in California, 2) the company's sales in California exceed \$500,000 or 25% of the company's total sales per year, 3) \$50,000 or 25% of the company's property is in California, 4) \$50,000 or 25% of the total compensation paid by the company is paid in California. See Matthew A. Fischer, 'Complying with the California Transparency Supply Chains Act', 10 *Mass Torts Litigation* 4 (2012) 16.

⁴⁹ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 *Nw.J.INT'L HUM. RTS.* 47 (2014) para 48.

⁵⁰ Cal. Civ. Code § 1714.43 (b).

for staff dealing with supply chain management.⁵¹ In case the company is not implementing any measures, it has to disclose for each of the five categories that it does not take any actions.⁵² Ultimate sanction is an action by the California Attorney General for injunctive relief.⁵³ Further possibility for enforcement offers the California's Business and Professions Code, which allows consumers to claim for unfair business practices and for false advertising.⁵⁴ Additionally, the Franchise Tax Board should provide the Attorney General with an annual list showing all companies that have to disclose information.⁵⁵ The list is not publicly available, although a published list would improve monitoring of compliance, also by civil society organizations representing the consumers. Initial estimates indicate that around 3200 companies would have to comply with the act.⁵⁶ However, for instance the initiative 'KnowTheChain' lobbies for a publication of the list in order to know how many and which companies actually have to comply with the act, which did not take place thus far.⁵⁷

Recently, California's Attorney General published further guidelines for implementation for companies.⁵⁸ The guidelines give more detailed information on how companies are supposed to disclose their efforts, if any, and include model disclosures. Concerning the CTSCA's requirement to put information with a 'conspicuous and easily understood link'⁵⁹ on a website, the guidelines clarify that this means that the link shall be obvious or attract attention. In order to reach consumers, the link should be put not only on the company's corporate and retail website, but also on the websites of all its brands.⁶⁰ The link should explicitly mention the CTSCA. A reference to Corporate Social Responsibility and discussing CTSCA under this heading is seen as too confusing for consumers. Furthermore, the guidelines show what is expected concerning the five categories mentioned above (verification, audits, certification, internal accountability and training). Interestingly, the guidelines explicitly identify labor brokers as a critical component of a company's supply chain and see possible risks, if a broker uses a sub-broker or subcontractor. Therefore, this issue has to be disclosed under the umbrella of verification.⁶¹ With regard to audits, the guidelines stress the importance of independent audits and companies have to disclose whether the auditors are independent or not.⁶²

⁵¹ Cal. Civ. Code § 1714.43 (c).

⁵² Kamala D. Harris, *The California Transparency in Supply Chains Act - A Resource Guide* (2015) <http://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf>? (accessed 22 April 2015), 4.

⁵³ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 48.

⁵⁴ Section 17200 and 17500 of the California Business and Professions Code, cited after Erika R. George, 'Influencing the Impact of Business of Human Rights', in Lara Blecher et al (eds), *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (Chicago, IL: Section of International Law, American Bar Association 2014) 278. George shows that for instance this code has been used by a consumer of Nike concerning false information of Nike about labor conditions in Nike's factories in Asia.

⁵⁵ Revenue and Taxation Code § 19547.5 (a) (1).

⁵⁶ Erika R. George, 'Influencing the Impact of Business of Human Rights' 277.

⁵⁷ See 'Attorney General Guidance: One Step in a Long Road', <http://blog.knowthechain.org/attorney-general-guidance-one-step-in-a-long-road/> (accessed 21 April 2015).

⁵⁸ Kamala D. Harris, *The California Transparency in Supply Chains Act - A Resource Guide* (2015) <http://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf>? (accessed 22 April 2015).

⁵⁹ Cal. Civ. Code § 1714.43 (b).

⁶⁰ Kamala D. Harris, *The California Transparency in Supply Chains Act - A Resource Guide* (2015) 5-6.

⁶¹ Kamala D. Harris, *The California Transparency in Supply Chains Act - A Resource Guide* (2015) 12.

⁶² Kamala D. Harris, *The California Transparency in Supply Chains Act - A Resource Guide* (2015) 15.

Despite the importance of an initiative such as the CTSCA, it shows several shortcomings. The most striking weakness of CTSCA is that companies, which have to comply with the CTSCA, do not have to implement any measure to prevent THB or slavery. However, companies have to disclose the information that they are not implementing any measures. This may lead on the one hand to companies, which 'are not incentivized to change their status quo' since there are no legal consequences and therefore no need to change.⁶³ On the other hand though, civil society creates pressure on companies. Companies behind well-known brands, for instance, which disclose that they are not implementing any measures, are named and published and asked for statements.⁶⁴ This public pressure can have the effect that companies might get motivated to start assessing risks in their supply chains and disclose their efforts.

Further weakness of CTSCA is the weakness of certain terms used in the act, despite the recently published guidelines by the Attorney General. *Prokopets* points for instance out that the term 'direct supplier' is not clearly defined and could be interpreted differently. Are direct suppliers those, which oversee cotton picking or only those companies, which turn cotton into clothing? The lack of a definition might lead to a narrow interpretation used by companies, which consequently leads to a loss of information for the consumer. In addition, she shows that in the reporting area of certification it is not clear which country's laws the supplier has to follow, the law of the company falling under CTSCA or the law of the country in which the supplier is located.⁶⁵

In addition, enforcement of CTSCA is considered as too weak. An action for injunctive relief by the Attorney General can be brought, but this did not take place thus far.⁶⁶ 'KnowtheChain' elaborated a database with companies falling under CTSCA, which shows whether companies have posted a statement or not.⁶⁷ As can be easily seen on the database, several companies did not post a statement thus far. At the same time though, actions for injunctive reliefs were not brought either. It seems that the risk of facing an injunctive relief is rather low for a company not complying with the CTSCA. Additionally, the list of all companies falling under the CTSCA provided by the Franchise Tax Board is not made publicly available to date, which diminishes possibilities of effective monitoring. However, one major issue of CTSCA is not monitored in particular: there is no mechanism in place to evaluate whether companies are in fact implementing what they are disclosing in their CTSCA-statements.⁶⁸

⁶³ Alexandra Prokopets, 'Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010' (2014) 37 *Hastings Int'l & Comp. L. Rev.* 2, 362.

⁶⁴ See press release, 'Ten companies statements under California supply chain law say they are not taking action on human trafficking', 9 July 2014, http://business-humanrights.org/sites/default/files/documents/Press-release-re-SB-657-statements-9-July-2014_2.pdf (accessed 23 April 2015).

⁶⁵ Alexandra Prokopets, 'Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010' (2014) 37 *Hastings Int'l & Comp. L. Rev.* 2, 360-361 and 372.

⁶⁶ Alexandra Prokopets, 'Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010' (2014) 37 *Hastings Int'l & Comp. L. Rev.* 2, 374.

⁶⁷ <https://www.knowthechain.org/companies/> (accessed 24 April 2015).

⁶⁸ Alexandra Prokopets, 'Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010' (2014) 37 *Hastings Int'l & Comp. L. Rev.* 2, 373.

A further weakness of CTSCA lays within its core idea: CTSCA states that consumers are 'inadvertently promoting and sanctioning these crimes' through buying goods and products which might have been produced under exploitative conditions.⁶⁹ The aim is that the consumers' decisions make supply chains, which are maybe not free from THB and slavery, less profitable. This should finally lead to less THB and slavery. In order to reach this goal, various assumptions have to be in place: first, the consumer has to be interested in a THB- and slavery-free supply chain. Secondly, the consumer tries to get the information, which companies now have to provide under the CTSCA, and thirdly, the information has to be available. Finally, the consumer takes a decision to buy a specific product. This decision impacts the profit of other companies, which might not disclose information on their website or which disclose that they are not implementing specific measures against THB and slavery. Hence, many steps have to be taken before a limited impact can be caused. Under the CTSCA, consumers bear the burden of a possible impact since it is up to their decision. Companies do not have to do anything against THB and slavery; it is enough to disclose information. CTSCA creates a power imbalance between those who would be able to create substantive change and those who have only limited impact with their decisions. Researchers point out that the role of consumers and their decisions to purchase specific products or not should not be overestimated. Individual consumer choices cannot eradicate THB and slavery.⁷⁰ Nevertheless, the consumers' decision is indeed powerful, but not powerful enough to prevent THB for labor exploitation and to eradicate it. *Doubossarskaia* for instance shows that the CTSCA does not tackle the unequal power distribution between companies and suppliers which would be necessary to create change in the working situations in the suppliers.⁷¹ Additionally, the disclosure of information as requested under CTSCA is shown as not compatible with the consumer's daily routine. Consumers would need access to the disclosures just before or at the exact moment of purchasing.⁷² Consequently, information might miss its primary target, the consumers. Civil society initiatives such as 'KnowtheChain' fill this gap and make information easier accessible for consumers.

⁶⁹ CTSCA, Section 2 (h).

⁷⁰ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 92 and Julia O'Connell Davidson, 'Tackling the 'Demand Side' of Trafficking?', Presentation at conference "Stolen Lives, Stolen Money: The Price of Modern-Day Slavery" (25-26 June 2013).

⁷¹ Elizaveta Doubossarskaia, *CA Transparency in Supply Chains Act: Can It Stop Worker Abuses Among Suppliers in the Developing World?* (University of San Francisco, Master's Theses, Paper 51, 2012) 39.

⁷² Alexandra Prokopets, 'Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010' (2014) 37 *Hastings Int'l & Comp. L. Rev.* 2, 367.

3.2 Legal Developments in the European Union

3.2.1 *The amendment of Dir 2013/34/EU ('Accounting Directive')*

The latest amendments of Dir 2013/34/EU ('Accounting Directive')⁷³ are assessed in literature as being influenced by the CTSCA.⁷⁴ The following will analyze to which extent the CTSCA is actually incorporated in recent developments in the EU.

The amended Accounting Directive requires specific companies to report not only on financial, but also on non-financial matters and outlines in greater detail, compared to its predecessors, which information the non-financial report should include. The amendments are a result of the EU's strategy for Corporate Social Responsibility (CSR)⁷⁵, which identifies the need to improve company disclosure of social and environmental information. Only a small fraction of companies operating in the EU disclose this information. The Accounting Directive should create a level playing field for transparency on social and environmental information disclosed by companies.⁷⁶ In parallel, the EU Strategy against THB also identified the need to include the business sector in its measures to prevent THB. However, this strategy vaguely refers to an exchange of best practices and initiatives aiming at eliminating THB from the supply chains of businesses. In a 'European Business Coalition against Trafficking in Human Beings', which still needs to be created, businesses should discuss measures to prevent trafficking in human beings.⁷⁷ However, the EU Strategy against THB refers to CSR, but a clear link or reference to improved transparency on non-financial matters is not made. Hence, a clear link between the two strategies is missing.

Before and after the latest amendment of the Accounting Directive, a company's management report should also include 'non-financial key performance indicators', but only 'where appropriate' and limited to environmental and employee matters.⁷⁸ Member States can exempt SMEs from this rule, which all Member States did.⁷⁹ Since the latest amendment, companies, which are public-interest entities (PIEs)⁸⁰ with more than 500 employees during the

⁷³ Dir 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, amended by Dir 2014/95/EU of the European Parliament and of the Council of 22 October 2014, in the following 'Accounting Directive'.

⁷⁴ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 51 and Kilian Moote, 'Corporate Transparency: A lasting Trend', <http://blog.knowthechain.org/corporate-transparency-a-lasting-trend/> (accessed 17 April 2015).

⁷⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681 final, Brussels 25 October 2011, in the following 'EU Strategy for CSR'.

⁷⁶ EU Strategy for CSR, point 4.5.

⁷⁷ EU Strategy against THB, see Priority B: Stepping up the prevention of trafficking in human beings, Action 1 and Action 2.

⁷⁸ Art. 19 of Dir 2013/34/EU.

⁷⁹ EU Strategy for CSR, point 4.5 at footnote 21.

⁸⁰ PIEs are defined as entities whose transferable securities are admitted to trading on a regulated market, credit institutions, insurance companies and companies which are designated by Member States as public-interest entities, see Art. 2 (13) of Dir 2006/43/EC of the European Parliament and of the Council on statutory audits of annual accounts and consolidated accounts.

financial year, are obliged to include a non-financial statement in their management report.⁸¹ This new rule will apply to approximately 6000 companies and groups across the EU.⁸²

Member States have to implement the latest amendments of this directive by laws, regulations and administrative provisions until 6 December 2016. From the financial year 2017 onwards⁸³, these companies will have to include in their future annual reports information on environmental, social and employee matters, respect for human rights and concerning anti-corruption and bribery matters. Companies have to describe which policies concerning these matters they pursue, including due diligence processes implemented, which includes also due diligence processes regarding the supply and subcontracting chains.⁸⁴ In addition, the report has to show for instance possible human rights risks in the operations of the company and in its business relationships.⁸⁵

If companies do not pursue policies in these matters, they have to include a 'clear and reasoned explanation for not doing so'.⁸⁶ The new provisions on non-financial reporting set out in greater detail the issues companies are expected to report. Nevertheless, only information that is considered as 'necessary for an understanding of the undertaking's development, performance, position and impact of its activity' is required. Consequently, companies can decide which matters are relevant to report on and which not. The directive does not indicate the consequences of non-compliance of companies.⁸⁷

In addition, companies can choose how they will report on these matters. Member States are obliged to regulate at national level, that companies can use a specific framework for the presentation of the non-financial information. Companies can use national, Union-based or international frameworks, such as the UN Global Compact, the Guiding Principles on Business and Human Rights implementing the UN 'Protect, Respect and Remedy' Framework, Global Reporting Initiative or the OECD Guidelines for Multinational Enterprises.⁸⁸ Companies do not have to use one of these frameworks, but the Directive obliges Member States to suggest the usage of one of the frameworks.

There are certain indicators that the CTSCA was indeed a source of inspiration when Dir 2013/34/EU was amended by Dir 2014/95/EU, nevertheless implementation of the Accounting Directive will be crucial in order to strengthen the idea of CTSCA.

CTSCA and the Accounting Directive have certain features in common. Similar to CTSCA, the Accounting Directive follows and strengthens the approach of a mandatory disclosure

⁸¹ Art. 19 a of Dir 2013/34/EU. See also Art. 29 a of Dir 2013/34/EU including the same obligation for public interest entities (PIEs) which are parent undertakings of a large group and which has more than 500 employees.

⁸² See http://ec.europa.eu/finance/accounting/non-financial_reporting/index_en.htm (accessed 20 April 2015).

⁸³ Art. 4 of Dir 2014/95/EC.

⁸⁴ Recital 6 of Dir 2014/95/EC.

⁸⁵ See Art. 19a (1) and Art. 29a (1) of Dir 2013/34/EU.

⁸⁶ See Art. 19a (1) of Dir 2013/34/EU.

⁸⁷ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 51.

⁸⁸ Recital 9 of Dir 2014/95/EC.

regime for companies. Both instruments oblige companies to disclose information. The Accounting Directive goes beyond CTSCA since the directive requires the information in the annual reports. Consequently, companies are supposed to disclose updated information regularly. Within CTSCA it is sufficient to publish a statement, but updates are not required, which may lead to very outdated information. Further commonality of both instruments is, that based on these instruments, companies are not obliged to implement measures against THB or slavery. Concerning companies which are not implementing any measures, the Accounting Directive requires in this case more information than the CTSCA. In the case of CTSCA, a company has to 'simply disclose that (...) it does not take any actions'.⁸⁹ The Accounting Directive goes further and requires companies, which do not pursue policies, to give a 'clear and reasoned explanation for not doing so'.⁹⁰

Despite the fact that in both instruments companies are not obliged to implement actual measures, the CTSCA defines as its aim to fight slavery and THB in the supply chain by making it less profitable. The CTSCA specifically singles out slavery and THB, whereas the Accounting Directive speaks about the respect for human rights, without explicitly mentioning slavery or THB. In the Accounting Directive, slavery and THB are issues covered under the umbrella of human rights that have to be respected by companies. Respecting human rights however implies also that companies have to show which measures to prevent THB and slavery they implement.

Both instruments use the approach of mandatory disclosure regime for companies but differ greatly concerning which contents and how information has to be disclosed. Compared to CTSCA the Accounting Directive is rather reluctant concerning its disclosure requirements. Firstly, the directive suggests using reporting frameworks, but companies decide which topics they consider as relevant to be reported on. The CTSCA in contrast defines areas, which have to be discussed by the companies. Secondly, companies under the Accounting Directive have to disclose the information in the management report, which are published. Information under the CTSCA is more accessible since the specific information should be published on a website. The relevant information, measures to prevent THB and slavery, does not have to be extracted from a management report.

Linked to this issue is the common lack in CTSCA and the Accounting Directive of regulating a central storage or, as elsewhere called, a central online repository⁹¹ for all non-financial statements of companies in financial reports. Access would be facilitated if information would be gathered at one central online space, in particular when taking into account that one of the reasons for the amendments of the Accounting Directive was the 'need to provide consumers

⁸⁹ Kamala D. Harris, *The California Transparency in Supply Chains Act – A Resource Guide* (2015).

⁹⁰ Art. 19a (1) of Dir 2013/34/EU.

⁹¹ See Ruth Chambers, 'New UK Law Pushes for Business Engagement on Trafficking', <http://blog.knowthechain.org/new-uk-law-pushes-for-business-engagement-on-trafficking/> (accessed 5 May 2015).

with easy access to information on the impact of business on society'.⁹² 'Easy access' for consumers would be provided if information of non-financial statements of all companies would be available at one central point. The Accounting Directive could follow the example of the latest amendment of the 'Transparency Directive'⁹³ that will lead to the implementation of a central storage system⁹⁴ in the EU for information specific companies have to disclose for the purpose of protecting investors. The argument concerning the Transparency Directive is that for investors, one single, central access point for the information is desirable. Clearly this is also desirable for consumers and should therefore also be established for them.

Further common weakness of both instruments is the lack of monitoring of implementation. The Accounting Directive remains silent upon consequences of non-compliance. The CTSCA provides for a consequence, but this remained unused so far.

To conclude the comparison between CTSCA and the Accounting Directive, the Accounting Directive intends to broaden disclosure-obligations of companies concerning human rights, which forms an important step within the EU. Analyzing the potential of the directive as an instrument against trafficking in human beings though, the provisions seem to be a rather diluted version of the provisions of CTSCA. The non-financial statement should include information on the due diligence processes implemented concerning supply and subcontracting chains 'where relevant and proportionate'.⁹⁵ This vague terminology can lead to a great limitation to transparency in supply chains and subcontracting. Due to the 'where relevant and proportionate'-clause, companies are able to limit disclosure significantly. In addition, a reporting obligation on supply and subcontracting chains is not obvious, the Accounting Directive speaks about supply and subcontracting chains exclusively in the recital and not in the relevant articles itself. Furthermore, it does not mention THB or labor exploitation specifically at all.

Consequently, the Accounting Directive has potential to be used as an instrument against THB, but implementation of the directive and monitoring of implementation will be crucial for that. Guidelines should be developed which define topics the companies have to discuss in their management reports. The guidelines have to show that information about the company's measures against THB form part of the requested measures to comply with human rights in general. Otherwise, there might be the risk that the management reports neglect this issue. As has been shown in a mapping in Austria on company's Corporate Social Responsibility measures among construction companies, currently, companies in their publicly available non-financial

⁹² Recital 3 of Dir 2014/95/EC.

⁹³ Dir 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. Amendments have to be implemented by the Member States until November 2015 (24 months after entering into force), see Art. 4 of Dir 2013/50/EU.

⁹⁴ See Recital 15, Art. 21a and Art. 22 of Dir 2013/50/EU.

⁹⁵ Recital 6 of Dir 2014/95/EC.

reports do not discuss THB and labor exploitation in the supply chain.⁹⁶ The European Commission organizes implementation workshops⁹⁷, which should be used by the EU Anti-Trafficking Coordinator in order to make THB a topic in these workshops.

3.2.2 UK's Modern Slavery Act 2015

In the UK, the Modern Slavery Act passed the last stage of law making, the Royal Assent, in March 2015.⁹⁸ The Modern Slavery Act includes also a section on transparency in supply chains⁹⁹, which is clearly influenced by the CTSCA.¹⁰⁰ Companies will have to provide a 'slavery and human trafficking statement' for each financial year. The size of companies, which will fall under the Modern Slavery Act 2015, was determined by way of public consultation.¹⁰¹ 80% of the respondents in the consultation opted for the lowest level proposed, a turnover of £ 36 million, which is supported by the government.¹⁰² A company obliged to provide a slavery and human trafficking statement 'carries on a business, or part of a business, in any part of the United Kingdom'.¹⁰³ Whereas the CTSCA clearly defines, what 'doing business in California' means, the Modern Slavery Act does not define it at all. The idea behind it is that it does not matter how big or small the business done in the UK is, the company has to provide this report. Differently put, the company does not have to meet a certain level of 'footprint' in the UK. This should support the identification of companies falling under the Modern Slavery Act. In addition, it does not matter whether the company is UK-based or not.¹⁰⁴

Differently from CTSCA, the Modern Slavery Act covers not only companies providing goods but also services.¹⁰⁵ Similar to CTSCA, the slavery and human trafficking statement has to include information about certain areas. This includes for instance the trainings available to staff and information about the company's due diligence processes in relation to slavery and THB in its business and supply chains.¹⁰⁶ The statement has to be published on the company's

⁹⁶ See in particular chapter 4.1. in Barbara Linder, Julia Planitzer, Astrid Steinkellner, *Corporate Social Responsibility to Prevent Human Trafficking – The Construction Sector in Austria, a Mapping* (2013), http://bim.lbg.ac.at/sites/files/bim/attachments/mapping_csr_construction_sector_austria.pdf (accessed 27 April 2015).

⁹⁷ See http://ec.europa.eu/finance/accounting/non-financial_reporting/index_en.htm

⁹⁸ <https://www.gov.uk/government/collections/modern-slavery-bill> (accessed 29 April 2015).

⁹⁹ Section 54 of the Modern Slavery Act 2015.

¹⁰⁰ See for instance Home Office, *Modern Slavery and Supply Chains Consultation – Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (2015) 10, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403575/2015-02-12_TISC_Consultation_FINAL.pdf (accessed 03 August 2015).

¹⁰¹ Home Office, *Modern Slavery and Supply Chains Consultation – Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (2015) 8. The consultation gives an overview how many companies would be obliged to prepare a slavery and human trafficking statement according to the chosen turnover thresholds. For example, a turnover threshold of £ 36 million would lead to 12,259 companies, £ 1 billion to the comparably low 724 companies, see *ibid.* 15 and sec. 54 (2) (b) of Modern Slavery Act 2015.

¹⁰² Home Office, *Modern Slavery and Supply Chains Government Response – Summary of consultation responses and next steps* (2015) 7 and 16.

¹⁰³ sec. 54 (12) (a) and (b) of Modern Slavery Act 2015.

¹⁰⁴ Home Office, *Modern Slavery and Supply Chains Consultation – Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (2015) 14-15.

¹⁰⁵ Home Office, *Modern Slavery and Supply Chains Consultation – Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (2015) 12 and sec. 54 (2) (a) of Modern Slavery Act 2015.

¹⁰⁶ sec. 54 (5) (c) of Modern Slavery Act 2015.

website¹⁰⁷ and has to get approval from the company's top management, by for instance the board of directors.

Comparing the CTSCA with the Modern Slavery Act shows common features. The Modern Slavery Act goes beyond the CTSCA, but also includes weaknesses that could impact its successful implementation. One commonality is the CTSCA's weakness that companies actually do not have to implement any measure against THB or slavery. However, they have to disclose if they have 'taken no such steps'.¹⁰⁸ Public pressure should motivate companies to implement measures¹⁰⁹, and not a legal obligation. The Modern Slavery Act did not take up the Accounting Directive's step forward in requesting a 'clear and reasoned explanation'¹¹⁰ in case the company does not implement any measures.

Being framed in the Modern Slavery Act, the aim of the act is improving transparency explicitly concerning slavery and THB. In addition, the act intends to improve transparency in supply chains and 'in any part of its own business'.¹¹¹ The wording 'in any part of its own business' used can be interpreted in a way, that also subsidiaries of the commercial organization are encompassed by the reporting obligation. Consequently, the company has to disclose also information concerning its subsidiaries, whether the subsidiary itself does business in the UK or not. Further indicator for this line of argumentation might be the wording used in the consultation, which for instance says that slavery should not occur 'anywhere in the entirety of their operations'.¹¹² The consultation points out that in case the parent company and the subsidiary both exceed the turnover threshold and both are doing business in the UK, both could be required to produce a statement. It is suggested that in this case, the parent company can prepare one statement that covers both, parent company and subsidiary.¹¹³ However, following the interpretation that the company has to ensure that slavery and human trafficking does not take place 'in any part of its own business', meaning that this covers also the subsidiaries of a parent company, a statement of a parent company would need to cover all its subsidiaries, including those which provide goods and services not coming to the UK, in the report anyway. Nevertheless, the text of section 54 of the Modern Slavery Act gives room for interpretation leading to ambiguity as to which extent parent companies have to cover also their subsidiaries.¹¹⁴ As a consequence, the forthcoming statutory guidance¹¹⁵ will play a crucial role

¹⁰⁷ Identical to CTSCA, the statement can be requested in writing in absence of a website, see sec. 54 (7) and (8) of Modern Slavery Act 2015.

¹⁰⁸ sec. 54 (4) (b) of Modern Slavery Act 2015.

¹⁰⁹ Home Office, *Modern Slavery and Supply Chains Consultation – Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (2015) 13.

¹¹⁰ Art. 19 a of Dir 2013/34/EU.

¹¹¹ sec. 54 (4) (a) of Modern Slavery Act 2015.

¹¹² Home Office, *Modern Slavery and Supply Chains Consultation – Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (2015) 14.

¹¹³ Home Office, *Modern Slavery and Supply Chains Consultation – Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (2015) 14.

¹¹⁴ See Parosha Chandran, 'A loophole in the slavery bill could allow companies to hide supply chain abuses' *The Guardian* (24 March 2015). Chandran claims that sec. 54 of the Modern Slavery Act 2015 would not oblige companies in the UK to report concerning their wholly owned subsidiaries abroad producing goods and providing services not coming to the UK.

in defining the actual extent of reporting obligations concerning subsidiaries. The current consultation concerning the guidance does not tackle this issue specifically. Nevertheless, it would be desirable if it would be pointed out as issue to be clarified in the guidance.

Concerning the content of the statement to be delivered, the Modern Slavery Act follows the example of CTSCA and describes which information is expected. The statement has to cover six areas: (1) information on the company's structure and supply chains, (2) the company's policies concerning slavery and THB, (3) due diligence processes including auditing processes implemented¹¹⁶, (4) information on how the company assesses and manages possible risks of slavery and THB, (5) key performance indicators, so that readers can assess the effectiveness of measures and (6) information about relevant trainings available to staff. Comparing to the CTSCA, the CTSCA explicitly mentions two issues in the text of the legal act, which would be also desirable for the implementation of the Modern Slavery Act. Concerning due diligence processes, the CTSCA requires audits of suppliers and requests also to inform the reader if the audit was not an independent and unannounced audit. This is crucial for the implementation and would be necessary to be defined in more detail in the process of the consultation of the Modern Slavery Act. The Modern Slavery Act speaks about due diligence processes but the CTSCA requires also explicit information about certification of materials used by suppliers. This particular information is at the moment not requested under the Modern Slavery Act's due diligence obligation. Also concerning this point, further clarification in the future guidance to be produced would be desirable.

Similar to the CTSCA also the Modern Slavery Act lacks a strong instrument for monitoring the implementation. A lesson learned from CTSCA is the necessity of a central online repository for all reports.¹¹⁷ The Modern Slavery Act includes an instrument in case of non-compliance: an injunction brought in by the Secretary of State. It needs to be ensured that information about non-compliance can find its way to the Secretary of State. A publication of list of companies that are obliged to publish a statement in combination with an online repository of all statements would also be very conducive in order to assess which companies fulfill or not.

In concluding, the Modern Slavery Act is an important step within the EU in relation to transparency concerning acts against slavery and THB. It goes beyond both, the CTSCA and the Accounting Directive, and can therefore be an important impetus for other States within the EU. However, at its core, this act does not oblige companies to implement certain standards or measures. It is the choice of the company to implement certain standards. Public pressure is used in order to motivate companies to implement specific measures. Public pressure can form

¹¹⁵ Home Office, *Modern Slavery and Supply Chains Consultation – Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (2015) 17 et seq.

¹¹⁶ Home Office, *Modern Slavery and Supply Chains Consultation – Consultation on the transparency in supply chains clause in the Modern Slavery Bill* (2015) 18.

¹¹⁷ See Ruth Chambers, 'New UK Law Pushes for Business Engagement on Trafficking', <http://blog.knowthechain.org/new-uk-law-pushes-for-business-engagement-on-trafficking/> (accessed 5 May 2015).

an incentive, but in order to be a successful tool, implementation of the transparency clause is crucial. At the moment, monitoring of implementation is assessed as too weak in order to ensure successful implementation. As suggested, a central online repository for the statements would be necessary in order to allow civil society to have an overview and to strengthen monitoring of non-compliance. The statutory guidance to be developed needs to define the extent of reporting obligations of companies concerning its subsidiaries, including subsidiaries that are not doing business themselves in the UK. Further guidance would be necessary concerning the extent of the supply chain. The due diligence processes requested should include also the obligation to report on the auditing process.

4 Conclusions and recommendations

In order to improve the corporation's responsibility to respect human rights in all their activities, including activities in their supply chains abroad, States should implement legislation that obliges companies to be more transparent concerning their global business operations¹¹⁸ including measures to prevent THB. This is part of the States' duty to protect human rights. Specific elements have to be fulfilled in order to reach an actual impact on the companies' responsibility to respect human rights, covering not only the company's own activities but also its supply chain and subsidiaries.

Each of the current legal initiatives for enhanced transparency discussed above contain some of these conducive factors: Firstly, the CTSCA and the transparency clause in the UK's Modern Slavery Act both tackle exclusively and explicitly the issue of THB. Regulations for enhanced transparency should cover all relevant human rights abuses, but need to explicitly require also reporting on THB. Otherwise THB for the purpose of labor exploitation in the supply chain for instance might be neglected. Secondly, CTSCA and the transparency clause of the Modern Slavery Act mandate companies to publish their reports in an accessible manner, so that the information can be easily retrieved. Thirdly, by the Modern Slavery Act, companies are obliged to provide a report annually, and not one initial statement that fulfills the transparency requirement. Fourthly, based on the Accounting Directive, EU Member States have to implement legislation that obliges companies to provide a 'clear and reasoned explanation' in case no policies to prevent human rights abuses are implemented.

Current legislative initiatives requiring more transparency are steps in the right direction. Nevertheless, legislation is required that not only requests enhanced transparency from corporations, but obliges corporations to implement specific measures to prevent THB. Common to all the discussed transparency regulations is the fact that companies are not obliged

¹¹⁸ Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 (78) *Utrecht Journal of International and European Law* 7, 18.

to implement measures. Arguments for the necessity of legislation that poses an obligation upon corporations to implement measures and disclose them, such as the argument based on the *jus cogens* character of the norm prohibiting slavery¹¹⁹, can be established. Enacting legislation that obliges companies to prevent THB, in cases in which THB amounts to slavery, would consequently be within the States' duty to protect human rights. Corporate responsibility is framed in *soft law*, therefore States have to take actions in *hardening* the application of these responsibilities,¹²⁰ by, for instance, mandating companies in domestic legislation to implement measures against THB. At the moment, soft law mechanisms are prevailing concerning the corporate responsibility to respect human rights. Concerning THB, legislation targeted at corporations encompasses criminal liability for the company's acts. Concerning *preventing* THB, more transparency in the supply chain is requested, but current efforts do not go further than that. The required 'smart mix of measures – (...) mandatory and voluntary – to foster business respect for human rights'¹²¹ seems to be unbalanced at the moment. Although the legal possibility of States would be given to do so, it seems that often the political will is lacking.¹²²

Further missing element in the current legislative initiatives is the issue of access to remedy. The corporate responsibility to respect means that companies have to implement a policy commitment, apply due diligence processes and have to enable remediation of any adverse human rights impacts they cause or to which they contribute.¹²³ Enhanced transparency, which includes for instance reporting about due diligence and audit processes, needs to include also reporting about remediation processes. Whereas the first two pillars of corporate responsibility are included in the CTSCA and the Modern Slavery Act, the third pillar concerning remedial action is not. Although companies are not required to provide remediation for human rights abuses, which took place in the supply chain and to which the company did not contribute or cause them, they may however 'take a role in doing so'.¹²⁴ Concerning THB, this means that companies should have remedial measures in place, in case THB cases are found in the supply chain. These measures should ensure the victims' access to grievance mechanisms.¹²⁵

Resulting from this analysis, future legal transparency instruments aiming at strengthening the role of corporations to prevent THB should take into account the following necessary elements.

¹¹⁹ Nicola Jägers, Conny Rijken, 'Prevention of Human Trafficking for Labor Exploitation: The Role of Corporations', 12 Nw.J.INT'L HUM. RTS. 47 (2014) para 40.

¹²⁰ Justine Nolan, 'All Care, No Responsibility? – Why Corporations Have Limited Responsibility and No Direct Accountability for Human Rights Violations under International Law', 19.

¹²¹ Commentary to Guiding Principle 3, cited after Robert McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights', 55.

¹²² Justine Nolan, 'Refining the Rules of the Game: The Corporate Responsibility to Respect Human Rights' (2014) 30 (78) Utrecht Journal of International and European Law 7, 19 and Justine Nolan, 'All Care, No Responsibility? – Why Corporations Have Limited Responsibility and No Direct Accountability for Human Rights Violations under International Law', 25.

¹²³ General Principle 15.

¹²⁴ Commentary to General Principle 22.

¹²⁵ United Nations, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/67/261, 7 August 2012, para 38.

Enhanced prevention of THB in the supply chain can be a specific aim under the broader umbrella of the corporation's responsibility to respect human rights. States should enhance the implementation of human rights policies by corporations by for instance obligatory reporting about these policies such as included in the Accounting Directive. However, these initiatives need to have a specific focus on necessary measures against THB in the supply chain and subsidiaries and formulate a particular reporting obligation concerning THB for the purpose of labor exploitation.

Lessons learned from the experience of the CTSCA are essential for the creation of further similar legislation. This includes the necessity of annual reporting by companies as included in the Modern Slavery Act.

Further necessary element is a functioning monitoring of implementation. Various stakeholders such as NGOs or consumers can support the monitoring. Essential for monitoring is a central and easily accessible storage for all non-financial statements and reports of companies and a publicly available list of all companies that have to apply the legislation. Information needs to be easily accessible for consumers in order to be effective and ideally has to be accessible at the moment or before purchasing decisions. Non-compliance with the legislation needs to have consequences, which have to be enforced. Specific guidance for reporting and appropriate implementation for corporations should be developed in a participatory process.

Legislation has to clearly indicate that also subsidiaries of a parent company are falling under the legislative act, in order to prevent creating loopholes for companies. Companies should be asked to disclose whether audits are conducted to implement and monitor the implementation of measures and whether these audits are conducted by external independent stakeholders and unannounced. Since the impact of consumers is limited, impact would be enhanced, if legislation would also include mandatory measures to prevent THB in supply chains.

Measures to ensure trafficked persons' access to grievance mechanisms are not included in current legal initiatives, but form part of the corporate responsibility and therefore has to be included in future legal acts.

Pushing towards more mandatory regulations concerning measures to prevent THB in supply chains is the aim in order to create more impact in combating THB for labor exploitation within the State's obligation to protect on the one hand and the corporate responsibility to respect on the other hand. However, until reaching this aim, a probably long and challenging way lays ahead. Until then, existing legal tools have to be used in order to increase corporation's motivation to implement measures to prevent THB.

The CoE Convention against THB and Dir 2011/36 obliges States to implement legislation that allows holding companies criminally liable in case of THB. However, corporate criminal liability is implemented and applied in practice to a limited extent only. Enhanced

enforcement of corporate criminal liability for THB would lead to stronger interest of corporations to – and thereby using the wording of General Principle 13 (a) – ‘avoid causing or contributing’ to THB through their own activities.

Within the EU, the Accounting Directive would be one of these existing tools to prevent THB in the first place. The Accounting Directive forms an opportunity to enhance reporting also on measures to prevent THB. Measures to prevent THB might face the risk of being neglected under the broad term of ‘human rights’. It is recommended, that the EU Anti-Trafficking Coordinator and the network of national rapporteurs and equivalent mechanisms lobby for the explicit inclusion of measures to prevent THB in the EC’s implementation workshops on the Accounting Directive as well as in the later to be developed implementation-guidelines for corporations. At national level, it is vital that the national rapporteurs or equivalent mechanisms cooperate with the governmental bodies being in charge of implementing the Accounting Directive in order to make sure that in the national implementation, legislation and initiatives for better information of corporations, also the requirement to report on measures to prevent THB are included.

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