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Private Standards between Soft Law and Hard Law: The German Case

Abstract: Codes of Conduct or private standards by transnational enterprises on the compliance of social minimum standards in production have a legal character, although they are usually not meant to be legally binding. Their legal character derives from their integration into private contracts on the one hand, and from the legal context of competition and consumer law on the other. We can realize this when we, for example, take a closer look at the German legal context. Legal theory should accept these private standards as a way of broadening the public debate over regulation of economic activity into a public discourse on legal standards. Legislation could also help by establishing a more specific and outspoken legal framework.

1. INTRODUCTION

Private Standards on social minimum standards, also called Codes of Conduct, are usually seen as opposed to binding legal standards. They are one example of modern soft law as opposed to hard law.

If we call 'legal' every norm that is binding as well as enforceable through litigation, not even most of international law can be considered hard law. And private standards such as Codes of Conduct certainly are 'soft law' due to the fact that the standard-setters do not intend them to

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create legal obligations; they are public declarations of intentions. As a consequence, they cannot be directly enforced through the courts (although they may be intended as binding rules). This does not necessarily mean that they cannot be enforced at all. However, the standard-setters themselves, i.e. the company, decides on if and how to implement them – usually by some kind of monitoring procedure.

Nevertheless, the need for such company-only standards is widely acknowledged, as they compensate for the lack of binding and/or enforceable international law in the area of transnational economic activity.[1] At a time when the ILO is not very well equipped to provide for an effective implementation of ILO Conventions, it is private standards that do in fact provide for the application of certain social minimum standards in transnational productive and commercial activities.

I will now argue that, if we take a closer look, rules of national law can be found which transform soft law such as Codes of Conduct into not only binding codes but also legal standards.

2. Incorporation of Codes of Conduct in Contracts

One method of transformation of private standards into hard law is used by the private actors themselves: contractual obligations of compliance with certain social standards can be created by incorporating Codes of Conducts into private contracts. In this context, we primarily have to think of contracts between suppliers in the Third World countries and purchaser companies in the First World as well as of contracts between transnational companies and consumers and/or public purchasers.

2.1. Contracts with Supplier Companies

The first way in which private standards are transformed into private law is their incorporation into commercial contracts with supplier companies in the Third World Countries.[2] In fact, this is the only way to enable companies in the retail trade in industrial countries to actively guarantee social minimum standards in production. The retail industry especially (where, for example, the Clean Clothes Campaign has been very active)

1 B. Hepple, 'The importance of law, guidelines and codes of conduct in monitoring corporate behaviour', *BCLR,* vol. 37, 2000, p. 7.

2 See G.van Liemt, 'Codes of Conduct and International Subcontracting: a 'private' road towards ensuring minimum labour standards in export industries', *BCLR,* vol. 37, 2000, pp. 167-192 (esp. p. 177).

has been under considerable pressure by the public to do so. The incorporation of Codes of Conduct into these contracts will usually be achieved via the buyer's Standard Contract Terms – which means the codes will not actually be negotiated with the supplier companies, but rather imposed by the transnational company.

2.2. Enforcement of Compliance in German Law

Questions of conflict of laws as well as of the jurisdiction of the German courts in cases where companies based in Germany are involved are hard to discuss in a general way. The answer will largely depend on the particulars of the contract in question.

Yet, according to Article 2 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,[3] German courts do have jurisdiction to decide in any case where a company based in Germany is being sued. Contrary to English law, the German interpretation (in accordance with Community interpretation) does not demand the issue to bear any relation to a State that is party to the Convention.

German International Private Law (as common in a conflict of laws of contract) allows the parties to determine contractually which law to apply (Art. 27 (1) EGBGB). Due to the balance of power in these contracts, a transnational company based in Germany will usually demand German law be applicable to the contract.

Now, German contract law allows for contractual obligations to be enforced directly by way of injunctions. This means that if we consider the duty to comply with a Code of Conduct a legal obligation (provided the Code forms an integral part of the contract), the transnational company would be able to force the supplier to respect it. However, we have to doubt whether this kind of contractual provision does actually create legal obligations. Doubts spring from provisions in those contracts that define how to monitor and implement compliance with the Code. Monitoring procedures are diverse and varied, but they have one aspect in common: they do not rely on legal and court mechanisms, but leave monitoring and implementation in the hands of the purchaser or some independent organization chosen according to the amount of political pressure weighing on the transnational.[4] Under these conditions, German contract law would

3 To be replaced by Council Regulation (EC) No. 44/2001 of 22 December 2000.

4 M. Colucci, 'Implementation and monitoring of codes of conduct. How to make codes of conduct effective?', *BCLR*, vol. 37, 2000, pp. 277-289; G.van Liemt, *BCLR*, vol. 37, 2000, p. 185; L. Dubin, 'The Direct Application of Human Rights Standards to, and by, Transnational Corporations', in A. Dieng (ed.), *Globalisation, Human Rights and the Rule of Law*, 1999, p. 62.

have to consider this mode of enforcement as exclusive – the agreement would have to be construed as not being legally enforceable.

Nevertheless, a fundamental breach of a contractual obligation in a long-term contract in German law may entitle the other party to end the contract even without notice.

However, in the cases we discuss in this context, none of these remedies will be of practical importance. The purchaser can always end the relationship with or without notice; it will usually just stop ordering[5] – the supplier and/or producer in the Third World country will not have the resources to resort to legal, political or economical remedies should it consider this behaviour unlawful. (Note that, in any case, the transnational will not end a long-term business relationship but for serious and economically relevant reasons, which means that non-compliance with social minimum standards will only induce it to end the relationship if there is serious political and/or consumer pressure 'at home').

2.3. The Case of Framework Agreements

The transnationals will usually exert pressure on their suppliers to contractually agree to these standards due to public pressure in the countries in which they sell their products. In the last years, this pressure has subsequently been more and more formalized. There have been more and more contracts between transnationals and social actors in the first world in which the transnationals undertake not only to comply with certain social minimum standards themselves, but also promise to guarantee the same in the production and with their suppliers – the so-called 'Framework Agreements'. Just look at the agreement of 15 March 2000 between *Hochtief*, a German transnational in the construction industry, the company works council and the respective German trade union *IG BAU* as well as the International Federation of Building and Wood Workers (IFBWW) or the agreement Faber Castell contracted in 1999 with IG Metall, the German trade union of workers in the metal industry, and IFBWW.[6] Most interestingly, and in contrast to most of the common

5 See the respective provisions in the 'C&A Code of Conduct for the Supply of Merchandise', *BCLR,* vol. 37, 2000, pp. 343-345; 'Levi's Code', *BCLR,* vol. 37, 2000, p. 365; 'Hennes&Mauritz Code of Conduct', *BCLR,* vol. 37, 2000, pp. 353-357.

6 See also the 'Agreement between IDEA and the IFBWW', *BCLR,* vol. 37, 2000, pp. 359-360; 'Agreement on a Code of Conduct between the Norwegian Confederation of Trade Unions and the Norwegian Goldsmiths' Association', *BCLR,* vol. 37, 2000, p. 373; the economical background of these framework agreements, at least as far as agreements by German firms are concerned, is direct investment rather than supply contracts (R. Köpke, *Codes of Conduct and Monitoring*, Report of the Research Project, 2001, p. 46 ff).

Codes of Conducts that are worked out unilaterally by a company, these framework agreements also cover compliance with the ILO-Conventions 87 (on freedom of association) and 98 (on collective bargaining).[7]

In our context, we should ask ourselves in which way these framework agreements can be seen as legally binding to the effect that the concluding trade unions could demand that the companies comply with it.

The answer may differ depending on the interpretation of the respective agreement. In general, we can only remark that here, even more probably than in the Standard Contract Terms of the supplier contracts, we will usually not find any hints that could enable us to find legal obligations. The Framework Agreements as well rather contain more or less precise provisions on more or less 'independent' monitoring.

2.4. Consumer Contracts

Compliance with certain social minimum standards agreed on in a Code of Conduct could also be incorporated into consumer contracts. As consumer contracts usually are not negotiated individually and the companies will not incorporate compliance with their Code of Conduct into their respective Standard Contract Terms, there is only one way in which such incorporation could take place: companies which have adopted a Code of Conduct due to public pressure by consumers will usually use it in their product advertisement.

The German Federal Court long ago made it clear that a specific advertising or labelling by the producer can define the quality and performance of the good as well as be objective of a specific warranty, with the consequence that lack of conformity with it entitles the consumer to his/her statutory rights (at the time paras. 459 ff. of the German Civil Code (BGB): reduction of the price, rescinding of the contract and in certain cases award of damages).[8] This will be made even clearer in the future: at this moment, German contract law is under way to be revised and adapted to the EU-Directive 1999/44 on certain aspects of the sale of consumer goods.[9] And in accordance with Art. 2 (2d) of the Directive 1999/44, para. 434 (1), which came into effect on 1 January 2002, reads (roughly translated): 'The quality and performance of the good that can reasonably be expected are defined taking also into account any

7 See also C. Engels, 'Codes of Conduct. Freedom of association and the right to bargain collectively', *BCLR*, vol. 37, 2000, pp. 219-231; L. Dubin, in Dieng, Adama (ed.), *Globalisation, Human Rights and the Rule of Law*, 1999, pp. 47-49.

8 BGH, 21.6.1967, *BGHZ* 48, p. 118.

9 OJ L 171, 07.07.1999 pp. 12-16.

public statements by the seller, the producer or his representative, on the specific characteristics of the goods particularly in advertizing or on labelling'.

However, under this provision, non-compliance with a publicly advertised Code of Conduct will only be considered non-compliance with the consumer contract if we can see the mode of production as a 'specific characteristics of the good'. In the past, German jurisdiction has been reluctant in recognizing circumstances that are not physically attached to the purchase as characteristics of the good. 'Although – apart from the physical characteristics – other economical, social or legal circumstances of the good that influence its usefulness or value can be considered. But those circumstances must be based on the quality of the good and be attached to it for some time…'.[10] The relevant negative case law mostly refers to the question of whether or not the good was subject to a certain taxation. On the other hand we find jurisprudence which recognizes the fact that a second hand car has been subjected to a garage check *(werkstattgeprüft)* as a characteristic of the car, and scholars also accept the hobby interest in the origin of a good as a possible object of an express warranty.[11]

Regarding these cases, it is hard to predict whether a German court would possibly regard a Code of Conduct on social minimum standards as a legal obligation towards a consumer. There is one strong argument in favour of it: at the moment where a company advertizes compliance with social minimum standards, we can suspect that it is not a private interest of one consumer, but that the market values this aspect of the product in a certain way – which makes this aspect of the mode of production a characteristic of the good itself. Non-compliance with a Code of Conduct that has been advertized publicly and in connection with a specific good, would then entitle the consumer to rescission of the contract.

2.5. Public Procurement and Subsidies

As a consequence of a selective purchasing policy, the compliance with certain social minimum standards in production is sometimes agreed upon on initiative of a public authority party to the contract. For example, in some states of the USA, selective purchasing has been regulated by law. Just remember the Massachusetts Myanmar Law and similar local

10 BGH, 28.3.1990, *BGHZ* 111, p. 75 (my translation).
11 BGH, 25.5.1983, *BGHZ* 84, p. 302; Putzo in Palandt, *Bürgerliches Gesetzbuch*, 60th ed. 2001, para. 459, para 20.

laws that give a 10 per cent preference for offers of companies that avoid trading with the military regime in Myanmar (formerly Burma).[12] For many years, German local administration followed a policy that excluded the purchase of wood from the tropics.

However, as a consequence of EU-legislation in the area, the law on public procurement has subsequently been more and more regulated. Especially after the ECJ-decision in the *Beentjes* case,[13] selective purchasing by public authorities in order to force private companies to comply with certain social standards, has been heavily questioned. From 1 January 1999 on, and with the intent of transposing the EU-Directives 93/37, 93/36, 92/50 and 93/38 on the award of public contracts, para. 97 (4) of the German Act against Restrictive Trade Practices *(Gesetz gegen Wettbewerbsbeschränkungen, GWB)* says that in evaluating the suitability of a competitor in order to decide if he should have access to the procedure, criteria other than economic can be used only if admitted by statute. When finally deciding on the contractor, the most economical offer has to be considered (para. 97 (5)).

On the other hand, the ECJ itself has interpreted the Directives on the award of public contracts differently. In its decision of 26 September 2000 *(Nord-Pas-de-Calais)* it accepted an additional award criterion linked to a campaign against unemployment. The French authorities had used such a criterion in a tendering procedure for a public works contract relating to the construction of school buildings. The Court accepted this kind of condition provided that it is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination.[14]

Therefore, it now has to be taken for granted that the award of public contracts can be linked to provisions demanding the application of certain social minimum standards as long as they do not discriminate against foreign tenders – the German para. 95 (5) GWB will have to be

12 The constitutionality of the Act has been questioned before the Supreme Court by the 'National Foreign Trade Council' which claims that it deals with foreign affairs where the States do not have legislative competence; for further details see C. McCrudden, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing" Laws Under the WTO Government Procurement Agreement', *The Journal of International Economic Law*, n. 2, 1999, pp. 3-48 (who also discusses the compatibility with WTO-law – which he answers in the affirmative); Avery, 'Business and Human Rights in a Time of Change', in M.T. Kamminga, S. Zia-Zarifi, *Liability of Multinational Corporations under International Law*, The Hague, Kluwer, 2000.

13 ECJ, 20.9.1988, C-31/87 *(Beentjes)*.

14 ECJ, 26.9.2000, C-225/98 *(Nord-Pas-de-Calais)*.

construed accordingly which means that the compliance with social minimum standards can constitute a criterion for the award of the contract as long as the criterion can be fulfilled by all tenders. According to German law, however, for a public authority to examine the compliance with social minimum standards in the course of evaluating the suitability of the tenderers, a formal federal or State Act is needed that establishes this criterion.[15]

Now, the procedure in these cases could be made considerably easier if there were a monitoring procedure that enabled the companies to acquire certificates in order to prove compliance with the respective standards. A similar procedure has been allowed for by law in the public evaluating of compliance with environmental standards, following the European Council Regulation No. 1836/92 on a Community eco-management and audit scheme.[16] A Code of Conduct in respect of the relevant criterion might, in this context, also be a means for tenders to prove fulfilment of the condition – if introduced.

The case of subsidies is easier than the case of public works. According to German law, when awarding subsidies, the State is not subject to restrictions but for equality principles. Equal treatment of all applicants provided, the award of a subsidy can be made dependent on any social criteria. That is why the 'Directions on the Consideration of Ecological, Social and Developmental Aspects in the Award of Federal Export Guarantees' of 26 April 2001 (Guiding Principles Environment – 'Umweltleitlinien')[17] have not been legally questioned. 'Federal Export Guarantees' refers to the German policy of giving public sureties that cover the eventual risks of insolvency of the client or host country an export company runs when investing in a developing country ('Hermes Bürgschaften'). The Directions or the so-called 'environmental guidelines' are meant to put in practice a respective declaration of intent by the OECD-Export Credit Group of 1998. Nevertheless, the Directions on social minimum standards are vague in a way that makes one doubt that they will not have considerable effect on a company's social policy.

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15 A statute ordering that public authorities demand compliance with collective agreements on wages when putting a construction contract out for tender, is to date being discussed in Parliament (*BT-Drucks.* 14/7796 and 14/8285).

16 The regulation has been transposed in German law by the *Umweltauditgesetz* of 15.12.1995; see *also* Council Regulation No. 880/92 on a Community eco-label award scheme; DIN ISO EN 14001 ff.

17 For more detailed information on these guarantees and the respective environmental guidelines: <www.ausfuhrgewaehrleistungen.de>.

3. The Human Rights Approach

Up to now, we have been supposing that the companies themselves or some other party to a contract give the Code of Conduct legal quality by integrating it into a private contract. Further on, we will be looking at the legal quality of Codes of Conducts conferred by extra-contractual private law. I will mainly use German law to show how general rules of private law can be used as a legal framework for the implementation of Codes of Conduct.

For this purpose, we can depart from two perspectives: firstly, we can look at norms that protect workers' physical health and other human rights. Secondly, consumer law and fair trading law can be examined in order to construe them in a way as to provide for the indirect enforcement of social minimum standards.

3.1. Jurisdiction of German Courts

German tort law as well as the tort law of any legal system does protect everyone's rights to physical integrity. The problems in applying it to transnational economical activities outside Germany is rather one of 'international private law' and 'international procedural law'. Under international private law or international procedural law, respectively, we understand the national legal rules on conflict of laws that define which legal system to apply in cases with international implications (conflict of substantive laws and conflict of procedural laws, respectively).

The issue of international procedural law, or rather the issue of the jurisdiction of German courts has been explained in more detail above; as we have seen, it is hardly worth discussing. The jurisdiction of the German courts on claims against companies based in Germany is guaranteed by Article 2 of the Brussels Convention.

3.2. Liability in German Tort Law

Issues of conflicts of substantial law are harder to discuss. Whether German tort law can be applied (or whether the tort law of the country where the worker was injured has to be applied) depends on whether you can prove that an act committed in Germany such as an entrepreneurial decision caused the injury – according to Art. 40 (1).1 EGBGB in a conflict of tort laws the law of the scene of the action will prevail.

The omission of certain safety and health standards that lead to injuries would then be treated according to German law if the corporate veil can be pierced in the sense that it can be proven that a transnational company based in Germany exercised significant influence on the decisions that

contributed to the injury. Such a responsibility of the parent company will be easier to show where there is a German company that directs foreign plants by itself. But more common are the cases of transnational commercial activities that make use of foreign and legally independent suppliers. In the retail trade especially, where the Clean Clothes Campaign has been very active in raising public awareness in respect of social minimum standards, it is not German companies or corporations, but their suppliers that make use of child labour or otherwise disrespect social standards. In these cases, it will be difficult to show that an action (such as an entrepreneurial decision) or an omission on the part of the German company that is being sued actually caused the injury for which damages are claimed. As far as I can see there has not been any litigation yet.

Codes of Conduct could play a major role in these cases. Such a standard-setting code will at least implicitly state duties of the German company in guaranteeing the compliance with social minimum standards in production. It may thus be legally considered to establish a duty of care towards the employees of the subsidiary or the supplier. An inactive parent company then could be held responsible for not having acted where it should have. The Code could make it easier to prove responsibility in these cases – but it could as well be used by a company to demonstrate that it exercised due diligence in a civil or penal negligence case.

3.3. Barriers to Justice

I will not go into further details concerning German tort law now or even the respective rules in Anglo-American, especially US-American law. As a general rule, we can only conclude that tort law provides remedies only in exceptional cases where the multinational corporation was actually involved in an activity that caused physical harm to the workers. In any way, such remedies will hardly work in a preventive sense. Nevertheless, compared to Anglo-American law, the legal rules of tort law in Germany are as apt and adequate to cover cases of violations of workers' integrity in transnational production as the respective rules in American or English law are. So why have there not been cases in Germany such as the USA and England have had?[18]

18 For interesting cases there: M. Byers, 'English Courts and Serious Human Rights Violations Abroad'; R. Meeran, 'Liability of Multinational Corporations: A Critical Stage in the UK'; B. Stephens, 'Corporate Accountability: International Human Rights Litigation Against Corporations in US Courts'; J. Green, P. Hoffman, 'US Litigation Update', all in M.T. Kamminga, S. Zia-Zarifi (ed.), *Liability of Multinational Corporations under International Law*, The Hague, Kluwer, 2000.

Here I want to mention just one aspect that might be able to explain some of the differences in legal culture. There is a lack of an infrastructure of public interest litigation in Germany as German procedural law does not offer any incentives for a law firm to take up public interest cases the way US-American law does.[19]

Just let me mention the main differences in lawyers' practice: contrary to the so-called American Rule, according to which it is up to each party to pay his/her representative, in German civil procedure the loser takes it all (para. 91 ZPO (Code of Civil Procedure): the loser has to pay all the costs). In consequence, the financial risk of litigation is much higher. Secondly, while in the USA it is possible to stipulate contingent fees and thus shift the risk of losing on the lawyer,[20] German law prohibits this kind of contract. Para. 49b (2) BRAO (*Bundesrechtsanwaltsordnung* – the Federal Lawyers' Act) also invalidates *quota-litis* contracts and orders lawyers to be paid minimum fees that are strictly fixed by the law and may not be waived (para. 49b (1) BRAO). The fees are even relatively lower where the total amount of money involved is higher. Lastly, there is no such thing as a class action. These rules first suggest to split up groups into individual cases and secondly to make it impossible for lawyers to manage cases in respect to their publicity and public interest value. In total, they do not consider a lawyer as an economic manager.

4. The Competition Law Approach

My second concern is with the implementation of social minimum standards via consumer and fair trading law. This option arises out of the fact that goods produced in Third World Countries will usually also be sold and traded in the industrial countries (such as Germany). Consequently, it could be examined if a violation of social minimum standards in the production process constitutes a violation of consumers' rights and/or co-competitors' rights, as well.

19 For public interest lawyering in the USA see L. Trubek, D. Trubek, 'Civic Justice Through Civil Justice: A New Approach to Public Interest Advocacy in the United States', in M. Cappelletti (ed.), *Access to Justice and the Welfare State*, Alphen aan den Rijn, Stuttgart, Brüssel, Florenz, Sijthoff, 1981, p. 126.

20 For the importance of *quota-litis* and contingence fees contracts in public interest cases see C. Consolo in R. B. Capalli, C. Consolo, 'Class Actions for Continental Europe?, A Preliminary Inquiry', *Temple International and Comparative Law Journal (Temple Int'l & Comp.L.J.)*, n. 6, 1992, ss. 217-292; J. F. Handler, 'Public Interest Law Firms in the United States', in M. Cappelletti, B. Garth (ed.), *Access to Justice,* Vol. III*: Emerging Issues and Perspectives*, Alphen aan den Rijn, Milan,1979, p. 433.

4.1. Unfair Competition

Article 1 of the German Act on Unfair Competition (UWG) says that whenever commercial activities do not respect good faith and morals in competition, co-competitors and certain associations can bring claims for damages or injunctions. There have been few decisions on the question whether disrespect of social minimum standards aimed at protecting workers constitutes unfair trading for the purposes of this rule.

However, the federal Civil Court has been clear enough in declaring that an entrepreneurial action that restricts itself to the production process will usually not be regarded a commercial trading activity. Thus, infringements of labour law standards constitute unfair competition only when the violation takes place in the commercial activity of selling itself. For example, violations of working time rules will not necessarily be considered unfair competition, but a violation of the rules on the closing time for shops or a violation of the prohibition for bakeries to bake at night, could be unfair trading.[21] Infringement of minimum standards on wages or on health and safety will be seen as a commercial activity only in exceptional cases, the federal Civil Court (BGH) held. It would have to be proven that there is a broad and systematic violation the profits of which are deliberately used to calculate the prices of the products more favourably.[22] We could easily apply these principles to cases of infringements of minimum standards of international and foreign law, although there have not yet been cases.

What the courts could additionally question in the cases of transnational production is the assumption of some scholars that an act which merely takes advantage of an international gradient in the level of protection without violating any legal norms could already be considered unfair competition. The federal Civil Court, in 1980, at least allowed the idea, under certain prerequisites, in a case where a producer of asbestos had purchased a considerable part of his products in South Korea, where the level of health and safety at work was lower than in Germany, which

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21 BGH, *GRUR,* 1989, p. 116 (prohibition to bake bread at night); BGH, 7.6.1996, *GRUR,*1996, p. 786 (selling of flowers at petrol stations); BGH, 19.5.1982, *BGHZ* 84, p. 130 (marketing on airports after the shop closing hours as unfair competition); BGH, 8.12.1983, *NJW* 1984, p. 872 ('information for housewives' after the shop closing hours as unfair competition); BGH, 26.11.1987, *NJW* 1988, pp. 2243 ff. (distribution of a advertising journal on Sundays as unfair competition).

22 BGH, 27.6.1958, *BGHZ* 28, p. 54 (direct marketing by wholesalers to consumers constitutes unfair competition only in exceptional cases, i.e. if the wholesaler takes advantages of his cost prices to undercut retail salers). For infringements of rules laid down in collective bargaining in detail: BGH, 3.12.1992, *NJW* 1993, pp. 1010-1012.

made it possible for him to undercut co-competitors' prices. As the production was legal according to South-Korean law, the court did not see any unfair competition, but recognized there would have been, had there been a common international understanding on basic moral standards in the area, such as an international Convention signed by a considerable number of States.[23] In case of the asbestos products, the Convention that was disrespected had been signed by only 15 of over 100 Member States of the ILO. But cases with, for example, infringements of the international standards on hours of work, minimum age, safety and health at work or the right to organize would have to be treated otherwise. Consequently, it can constitute unfair trading in German law if international minimum standards, although not legally binding, are disrespected in order to gain competitive advantages.

4.2. Unfair and Misleading Advertisement

Competition law can also cover the reverse constellation: is it misleading or unfair advertisement if a company praises its products in virtue of its respect for certain social minimum standards or its conclusion of a Code of Conduct? German civil courts have taken a rather strict and moralizing position on the issue. Certainly, an advertisement will be misleading if the company does not in practice respect the rules it advertises to comply with. But even further, the courts demand that advertizing an image be accompanied by a certain degree of information on what 'sensitive to the environment' (just to mention an example) is actually supposed to mean.[24] This will be an important issue if companies should, in the future, advertise their respect of certain social minimum standards or their adherence to certain monitoring procedures or use accredited 'social' certificates or labels.

But there is even a further aspect to consider: German courts have also been reluctant to accept so-called 'emotionalizing' advertisement. For example, institutions that employ people with disabilities for social purposes may not advertize their products as an achievement of a social institution, because, in the eyes of the federal Civil Court, consumers' compassion and feelings of social responsibility would then be commercially exploited.[25] This is just one example for the distrust of commercial

23 BGH 9.5.1980, *NJW* 1980, pp. 2018-2020 with a note by Knieper/Fromm.

24 BGH, 5.12.1996, *Der Betrieb (DB)* 1997, pp. 2119-2120; BGH 20.10.1988, *GRUR* 1991, pp. 548-550.

25 BGH, 22.3.1967, *GRUR* 1968, S. 44; BGH, 27.2.1980, *GRUR* 1980, s. 800. Further on the advertisement with social standards in production: BGH, 9.2.1995, *NJW* 1995, p. 1964.

motives among German jurists and their moralizing assessment of commercial activities. Last year, the federal Constitutional Court (BVerfG) has at least partially criticized this jurisdiction when allowing the Benetton advertisement campaign that used images of child labour and HIV-positive people. The federal Constitutional Court stated that the image of a company may actually be advertized independently of a specific product; it then makes use of the freedom of expression.[26] However, in spite of this judgment having been reconfirmed in 2002, the federal Civil Court has since shown reluctance to comply and still condemns exploitation of emotions for economical interest. It is this jurisprudence that has also established restricting rules on the advertisement of social labels such as the environmental label *'Umwelt-Engel'* (blue angel – it served as the model for the Community eco-label blue flower).[27] The outcome of the concurrence between the two courts will have to be awaited.

4.3. Overcoming Barriers to Justice?

What could further be interesting for us is that the Act on Unfair Competition also gives consumer associations standing to sue (para. 13 UWG). They could bring claims against firms that advertize misleadingly or claims against companies that sell products carrying competitive advantages arising out of a systematic violation of social minimum standards. If the product is advertized or marketed in Germany, the German courts have jurisdiction for claims against any company based in any of the Member States of the EU (Art. 5 No. 3 of the Brussels Convention (EuGVÜ)). Under the same conditions, German private law is applicable to the dispute.

The above-mentioned barriers to justice the victims face will not be overcome this way. But at least here we have one way in which consumer activists can act out on consumer responsibility for the working conditions in the production of the products they consume.

5. Propositions for Law Reform

Now, which conclusions can we draw from this analysis? The most important one in terms of legal theory may be that some soft law is not

26 BVerfG 12.12.2000, *NJW* 2001, pp. 591-594; BGH, *NJW* 1995, p. 2492; *NJW* 1995, p. 2488.

27 For these rules: BGH, 20.10.1988, *BGHZ* 105, p. 277; BGH, 5.12.1996, *DB* 1997, pp. 2119-2120; the relevant recent decisions are BVerfG, 1 BvR 952/90, of 2002.02.06, <www.bverfg.de>, and BGH, 6.12.2001 – I ZR 284/00 ('Benetton').

as soft as it looks. Codes of Conduct can gain legal quality in private law and constitute a bridge between internal rules of a company, private standards, and common understanding in a society and law. Considering that soft law is a necessary regulatory factor with certain advantages over hard law where legal procedures are not working adequately (as, for example, in the public regulation of economic activities), this bridge is essential if we want social control over transnational productive activities. For this bridge to become firmer, the law could provide a more adequate framework and shadow in order to be able to promote the development of social discourse. Codes of Conduct can then become one step towards the general acceptance of certain minimum standards. Their diffusion could help change accepted morals of international trade and create a common understanding which then can serve as a legal standard in private law.[28]

For German law, this could first mean that: German substantive law is in itself less hostile to litigation on transnational production involving German companies than the lack of case law suggests. But cases will have to be organized to force the German legal system to get used to the idea of this kind of litigation and accept the fact that respect of social minimum standards in transnational production is a legal issue.

Secondly, legislation could strengthen the existing legal framework by providing procedural ways to tackle the issue of social minimum standards in transnational production. Consumer associations have already proposed the introduction of some kind of class action or collective action in cases where a great number of consumers have suffered damages.[29] Similar measures could be helpful in cases where workers' rights and integrity abroad are infringed because of activities by a Germany-based company. Other measures could include the facilitation of public-interest-lawyering by changing the law on lawyers' fees and contracts.

Thirdly, a policy of social labelling could be established by building up an infrastructure of certificates and monitoring. The possible role of public authorities and the law in the building-up of such a labelling system will still have to be discussed. Nevertheless, public authorities and

28 J.M. Diller, 'Social conduct in transnational enterprise operations: the role of the International Labour Organization', *BCLR*, vol. 37, 2000, p. 26; H.W. Baade, 'The Legal Effects of Codes of Conduct for Multinational Enterprises', *German Yearbook of International Law*, 1979, pp. 26-35.

29 A. Stadtler, 'Bündelung von Verbraucherinteressen im Zivilprozess', *Gutachten im Auftrag der AgV (Association of Consumer Associations)*, presented 10.10.2000, <www.agv.de/politik/verbraucherrecht/polzporeform.htm>.

the law could help enhance public consciousness and competition in the field, by, for example, linking public purchasing and tendering to social criteria.

And lastly, why not also strengthen the individual consumer's rights? There already is an individual right to cancel a contract that was concluded due to deliberately misleading advertisement (para. 13 UWG). This right could be extended to cases where, contrary to product advertisement and publicity, social minimum standards had not been respected in the production of the purchased good. Such an individual right could be used collectively by groups of consumers and thus provide an efficient political means. The Bill on Consumer Information *(Verbraucherinformationsgesetz)* which the Government is preparing at the moment[30] could be one first step towards the strengthening of consumers' rights: when enacted, it will enable consumers to get information from companies on social conditions of production.

30 Press releases on <www.verbraucherministerium.de>.