# Business and human rights – access to remedy

# Germany - Country report 2019

FRANET contractor: German Institute for Human Rights [1]

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## Contents

## 1. Introduction

This explorative study entitled: 'business and human rights – access to justice' is based on four qualitative interviews with experts in the field of business related human rights abuses.

A desktop research to identify 20 organisations and institutions with work that is relevant to the subject matter of this study was conducted by the Institute. A large part of experts working in the field of business and human rights was excluded from the research based on FRA criteria, which excluded the subject of labour exploitation, and furthermore focused on cases involving persons who claim an infringement of their rights residing within the EU. An additional sample criterion was to conduct the majority of interviews with experts who focus on consumer protection. During the sampling process, several potential interviewees pointed out that they only had experience in cases involving third-country nationals, or that they could not see how their casework in consumer protection would have any immediate relevance to the human rights context. All four interviewees which eventually participated in the study are attorneys at law working for law firms or non-governmental organisations active in consumer protection or the enforcement of human rights. Of the final sample, only one of four interviewees had her main line of work focused on case law with a transnational component.

Three out of four interviews were conducted face-to-face, while a fourth interview (DE_3) was conducted via Skype. Interviewees were asked to reflect on a case relevant to the study prior to the interview, so that the relevant information would be available. Interviewees were asked to discuss their experience in accessing justice for persons impacted by legal infringements in the business and human rights context in Germany with a view to that particular case study in the first half of the interview. The second half of the interview was used to ask interviewees to reflect about their experiences in a more general manner, and to follow up on subjects that had not been addressed in the first half of the interview.



To remain within the central focus of the study as defined by FRA, two interviews were held with experts working in consumer protection. This line of work usually does not involve legal infringements that have been identified by a court as concrete human rights violation, but can rather involve case work with possible implications on human rights. As a consequence, not all of the case work discussed below has been depicted to involve a concrete violation of human rights. However, interviewees were open to discuss their case work under the framework of human rights that the legal infringements in question may be linked to on a conceptual level. It was furthermore a challenge for interviewees to make any generalised statements about the 'accessibility of remedy in the business and human rights context' as their expertise was rather specific, relating to a specific legal field or a specific remedy. Hence, the following analysis is based solely on this specific individual expertise. It is furthermore important to note that his report only reflects the experience and opinion of experts representing or working with persons who claim to have been affected in their rights through business's actions, other perspectives of actors in this context are not represented in this report.

## 2. General assessment of remedies in business related human rights abuses

The following chapters provide a summary of the experiences and opinions shared by four experts whose work relates to business related human rights abuses. As the legal system applicable to the potential business related human rights

violations in Germany is broad and layered, their expertise provides spotlights on the situation at hand. Hence, this report does not aim to provide a full assessment of the system available for victims of business related human rights abuses. Two experts working in consumer protection and a lawyer specialised in administrative law discussed their experience with cases involving the right to property, the right to health and environmental rights in administrative and civil law. The remaining interviewee discussed her experience in developing civil and criminal law litigation for human rights violations related to business enterprises, as well as with the OECD Guidelines complaints procedure in Germany. Her cases related to the right to life, the right to health and bodily integrity, and the right to a safe working environment, among others.

Mechanisms discussed in this report can be divided into (1) mechanisms aimed at accessing financial remedy which experts discussed in relation to civil law and adhesion procedures in the context of criminal proceedings, (2) mechanisms aiming at preventing (further) harm (Schadensverhütung), which experts discussed in relation to civil law, aiming directly at the business causing the damage, and in relation to administrative law, aimed at the state authority's duty of regulatory intervention (aufsichtsrechtliches Einschreiten) (3) mechanisms aiming for punishment under criminal law and (4) mediation between persons claiming an infringement of their rights and businesses through the OECD complaint mechanism.

Next to individual claims under civil law, administrative law and criminal law, as well as the OECD complaint mechanism, this report discusses compensatory and non-compensatory collective redress mechanisms (as defined by the European Commission, see Chapter 6), including:

(a) **Sample Declaratory Actions in Civil Proceedings**[1], which provide registered associations with legal standing to file a claim under civil law with its main goal to establish the wrong-doing of a business. Persons who have registered with the association's action can claim financial damage after a wrong-doing of the business has been established (see Chapter 6 for further detail)

(b) **Association Action under the Environmental Appeals Act**[2]**,** which provides recognised associations with legal standing to initiate administrative proceedings against the authorities for environmental authorisation decisions ('Zulassungsentscheidungen', see Chapter 6 for further detail).

(c) **Actions for an injunction under the law on actions for an injunction**[3] which can be filed by an association against a company under

[1] German Parliament (2018), 'Law on the introduction of a Sample Declaratory Action in Civil Law' 12 July 2018, available at: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/BgBl_Musterfeststellungsklage.pdf;jsessionid=A504861D8B0EB3624AD4E2022D176A80.2_cid297?__blob=publicationFile&v=1

[2] German Parliament (2018), 'Environmental Appeals Act' Umwelt-Rechtsbehelfsgesetz in der Fassung der Bekanntmachung vom 23. August 2017 (BGBl. I S. 3290), das durch Artikel 4 des Gesetzes vom 17. Dezember 2018 (BGBl. I S. 2549) geändert worden ist.', available at: https://www.gesetze-im-internet.de/umwrg/

[3] German Parliament (2001), 'Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen (Unterlassungsklagengesetz - UKlaG)', 26 November 2001. Available at: https://www.gesetze-im-internet.de/uklag/BJNR317300001.html

civil law, with the goal to enforce an injunction that will prevent further harm. This instrument was discussed with regards to case work relating to legal infringements with a potential environmental and health impact (see Chapter 6 for further detail).

These mechanisms were created as instruments of consumer protection (a/c) or environmental law (b), rather than specifically for the purpose of providing access to justice for victims of human rights violations. As will be highlighted in Chapter 6, all three instruments have been used in case work involving claims of infringements of rights with a potential relevance to human rights. However, the instruments remain limited in their applicability, relevant only to case work in consumer protection or environmental law.

A theme that was common to the interviewees' assessment of remedies in business related human rights abuses was the inaccessibility of mechanisms aimed at providing financial compensation for persons who claim an infringement of their rights. Interviewees explained that individual claims aiming for financial compensation under civil law or through an adhesion procedure within the framework of criminal proceedings, usually stand little chance of success, and are seldom to be recommended by lawyers.

The various rules on the burden of proof discussed in Chapter 3 and 5, as well as a high financial risk for individual claimants were seen as a major barrier for persons who claim an infringement of their rights and a shortcoming of the current legal system (see Chapter 3 and 5). Even higher barriers were seen for third-country nationals who have been affected by a violation of the law through businesses seated in Germany, seeing the additional organisational effort and financial risk caused by factors as distance and language barriers (see Chapter 7). As the interviewee with experience in individual claims filed on behalf of third country nationals highlighted, such claims are currently more effective as a tool for advocacy, rather than an effective remedy instrument for a larger group of persons (see Chapter 7 for more detail). While the OECD complaint mechanism is said to provide an alternative access mechanism for third-country nationals, an interviewee described it as an opportunity to enter into talks with little to no relevance for a realistic chance to receive financial compensation (see Chapter 7 for further detail).

Interviewees state that opportunities for compensatory collective action are limited. While civil law provides for a joinder of claims if similar claims or obligations form the subject matter in dispute and such claims are based on an essentially similar factual and legal cause (sections 59 ff ZPO), this option does not allow submitting one petition on behalf of all claimants. Accordingly, this instrument does not provide any substantial reduction in effort and financial burden or risk. As was highlighted by several interviewees, the shortcomings of the system in terms of collective redress were in the center of public attention in the wake of the so called Dieselscandal, which resulted in the introduction of the Sample Declaratory Action, in 2018. As will be discussed in Chapter 6, this instrument enables persons who claim an infringement of their rights to register with a claim filed by an association, which determines whether a business has violated the law. Persons who have registered do have the option to claim financial compensation in an individual claim after the court has made a decision on the Sample Declaratory action. Experts appreciate that the instrument provides a way for persons who claim an infringement of their rights to await the court's decision which will provide more clarity on their chances of success in claiming for financial compensation without a financial risk and with a suspension of the limitation

period. Nonetheless, overall, the instrument was described to be ineffective in providing compensation for victims of business related human rights violations due to the fact that first, persons who claim an infringement of their rights will have to make their individual claim after the legal facts have been established; and second, the instrument is restricted to matters linked to consumer protection and therefore only encompasses a limited selection of rights that may be relevant in the business related human rights context.

The currently most accessible option for remedy was seen to be the remedy of prevention of (further) harm (Schadensverhütung), accessible through actions for an injunction under civil law as well as through administrative proceedings against responsible authorities. Interviewees discussed two mechanisms which aim to reach a larger group of affected persons, namely Association Actions under Environmental Law and Actions for an Injunction. These are non-compensatory collective action instruments, which aim to prevent future harm. While these two mechanisms were seen to be effective, it was highlighted that they are limited in scope and that access for an individual with a claim without political or otherwise larger societal relevance may be challenging (see Chapter 6). With a view to the possibilities for an individual claiming an infringement of their rights to demand a hold to harmful actions of businesses, it was highlighted that the German legal system is 'simply not constructed' in a way that would allow individuals to address a claim for injunction directly against the business causing harm (DE_1). Instead, individuals are held to address the authorities with a demand for supervisory power intervention against the business action in question. Such a claim under administrative law generally requires individuals to proof that they are directly affected by the wrongdoings of the business (unmittelbare Rechtsbetroffenheit). Providing such proof is considered close to impossible due to the rules on the burden of proof and connected costs (see Chapter 5 for further detail). Furthermore, it was criticized that an individual person's right towards authorities is limited to error-free exercise of discretionary powers (Ermessensanspruch), rather than a binding responsibility for authorities to act (Verpflichtungsanspruch). The lack of options to address businesses directly, as well as the fact that authorities do not have a binding responsibility to act was argued to be a violation, and incomplete implementation of the UNECE Aarhus Convention.[4] (see Chapter 6).



## 3. Major obstacles for victims of business related human rights abuses

The following should be understood as a summary of the findings on obstacles for persons who aim to claim a business related infringement of their rights and according recommendations provided by the interviewees. Further detail is provided in the Chapters that follow. According references are provided in the text.

**Rules on the burden of proof:** Depending on the legal system that persons affected by a business's actions choose to claim their rights through, they are required to provide various types of proof, including first and foremost the requirement to establish direct legal concern and various levels of causality. All four experts see a considerable challenge in the rules on the burden of proof, as such evidence can be difficult or impossible to generate and implicate a

[4] UNECE (1998), 'Convention on access to information, public participation in decision-making and access to justice in environmental matters'. Available at: http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf

considerable financial risk (see below). As an exacerbating factor to this challenge, interviewees addressed what they view as a heavy imbalance in the equality of arms in favour of businesses. For further details on the rules on the burden of proof and according criticism by experts please refer to Chapter 5. To address this obstacle, experts offer the following recommendations:

- Introduce a shift in the burden of proof regarding causality between conduct and damage that becomes effective once a court has established that a business has violated a law. Those found to have violated a legal norm should be required to proof that ensuing damages are not the result of this violation. According to the expert, such a shift in the burden of proof should apply in administrative and civil law (DE_1).
- Allowing individuals to initiate administrative proceedings against the authorities without the requirement to establish direct legal concern, i.e. without having to proof that they are directly affected by a business's action ( (DE_1, see Chapters 5 and 6 for further information)
- Introduce an equivalent to pre-trial discovery (as it is practiced in the US) in civil law to ensure that persons affected by a business's actions are able to access information/documents which are relevant to their claim (DE_1, DE_4).

**Lack of clear rules on the attribution of liability (Haftungszurechnung) within businesses and throughout the supply chain** (see Chapter 5 and 7 for further detail): To address this obstacle, experts offer the following recommendations:

- Introduce binding due diligence regulations that set out the responsibilities of companies across corporate groups and supply chains with respect to human rights at the EU level (DE_2).[5]
- Supplementary to binding due diligence rules, the Rome II Regulation[6] should be reformed to allow for persons affected by a business's actions who file a claim under civil law to choose the governing law their claim should be discussed under. So far, according to the Rome II regulation, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively (DE_2).

**Financial implications and risks:** Experts appreciate the fact that persons affected by a business's actions can access legal aid irrespective of their nationality. Nonetheless, the financial implications and risks of administrative and civil litigation are considered extremely high. This is mainly due to a combination of a gap in the scope of legal aid (see Chapter 7), and requirements set out by the rules on the burden of proof that can result in claimants having to provide

[5] The National Action Plan Business and Human Rights (Implementing of the UN Guiding Principles on Business and Human Rights 2016-2020) sets the goal: ‚that at least 50% of all enterprises based in Germany with more than 500 employees will have incorporated the elements of human rights due diligence described in this chpater into their corporate processes by 2020. (...) If fewer than 50% of the enterprises defined above have incorporated the elements of human rights due diligence described in Chapter III of the National Action Plan into their corporate processes by 2020 and the target is thus missed, the Federal Government will consider further action, which may culminate in legislative measures.' The coalition agreement between CDU,CSU and SPD of 2018 reconfirms that legislative measures may be taken where voluntary commitment of businesses fails to realize the goals of the National Action Plan (see https://www.bundesregierung.de/resource/blob/975226/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1 , p.156)

[6] Regulation (EC) NO 864/2007 of the European Parliament and oft he Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

extensive proof in form of expert opinions and scientific research (see Chapter 5). Interviewees agree that the costs for a claim under administrative, civil and criminal law usually exceed the amount in dispute. This aspect was highlighted in the context of casework affecting non-EU claimants, with interviewees pointing out that transnational litigation is often unfeasible. For recommendations on this subject offered by the experts that were interviewed, please refer to the recommendations on the rules on the burden of proof, as well as the recommendations on collective redress (both of which would mean a potential relieve in the financial implications and risks for claimants).

**Lengthy procedures and short limitation periods:** short limitation periods can become an obstacle in a variety of constellations, be it where individuals await the court decision on a civil claim of another person affected by the business's actions in order to file their own claim, or in criminal proceedings with a transnational component (see Chapters 6 and 7). To address this obstacle, experts offer the following recommendations:

- Amend the Code of Civil Procedure (Zivilprozessordung) to make sure that claims do not become time-barred while a sample proceeding is pending in relation to that particular case (DE_1)
- Provide resources and training for business-related human rights violations for staff of prosecution authorities, so that the duration of an investigation can be held to a minimum (DE_2)

**Limited options for collective redress**: Experts criticise that the law does not provide for a collective redress mechanism with considerable chances to claim financial compensation. Existing options are limited to violations of consumer rights. Furthermore, experts point to high bars for being recognised as a 'qualified organisation' with legal standing to file collective redress proceedings and to high efforts and financial risks for such associations to take up respective litigation. As a consequence, persons affected by a business's actions may encounter difficulties to find an association that will stand in for their cause (see Chapter 6). To address these obstacles, experts offer the following recommendations:

- Extend the opportunities for nongovernmental organisations to acquire legal standing for various collective redress mechanisms (DE_2)
- Extend options for persons affected by a business's actions to file a joint claim without the support of an organisation, while reducing associated financial risks (see Chapter 2 on 'joinder of claims', DE_1)
- Extend the scope of application for Association Actions under the environmental appeals act (DE_1)
- Make sure that the validity of financial claims is determined within the framework of collective redress mechanisms (rather than to only determine a wrongdoing of the business) (as intended in ongoing legislative processes on EU level) (DE_1, DE_3, DE_4)



## 4. Good practices

Interviewees did not highlight any major good practices with regards to access to justice for victims of business related human rights violations. However, several aspects of the existing legal system were highlighted to have a positive effect on access to justice for persons affected by a business's actions:

- Legal standing for environmental associations in administrative proceedings were named as an effective tool to prevent further harm in the field of consumer protection (DE_3, limitations to the effectiveness of the tool were also highlighted (see Chapter 6)

With regards to access for third-country nationals with a claim regarding companies seated in Germany, the following aspects were mentioned:

- Where businesses based in Germany or their subsidiaries or subcontractors are the subject of the claim, third country nationals are generally free to file a claim in civil law or to file a complaint with investigating authorities which may potentially end in criminal proceedings in Germany (DE_1, DE_2)
- third country nationals are, by law, able to apply for legal aid in Germany (DE_1, DE_2)
- The German Code for Civil Procedure (Zivilprozessverodnung) allows for the court to travel to a consulate to hear witnesses, or for the consul to be in charge of hearing witnesses (DE_2).

Aspects from other jurisdictions that experts highlighted as worthwhile to draw from include:

- Pre-trial discovery in the US:

  Interviewees criticise that German law does not provide for a rule that would require both parties to civil proceedings to make their evidence/internal documents accessible to their opponent prior to proceedings in court. The lack of access to internal documents of their opponents can pose a considerable challenge for persons claiming to have been harmed by a business's action in court (see Chapter 5 for further detail). Experts highlight pre-trial discovery in the US as a good practice that may be drawn from to improve the balance of powers between persons affected by the wrongdoings of a business, and the business itself in civil court. According to Rule 26 of the US Federal Rules of Civil Procedure, parties must, without awaiting a discovery request, provide various information on persons who may hold information, a copy and information on documents which may be of relevance to the case, as well as a computation of each category of damages claimed by the disclosing party. (Pre-trial discovery rules in the US are complex, and have not remained without criticism on the part of German legal scholars[7]. A summary of all requirements and exceptions would go beyond the scope of this study. For further information, please see Rule 26 of the US Federal Rules of Civil Procedure.[8]

- Due diligence rules in France:

  Interviewees highlight the manifold barriers created by a lack of due diligence rules for transnational companies under German law (see Chapter 7 for further detail). They highlight due diligence rules in France, which have been strengthened through a law adopted in February 2017. According to a study published by the policy department of the directorate-general for external policies of the Union, the law aims to strengthen the responsibility of parent companies for their subcontractors by imposing a legal duty on the parent company to carry out human rights due diligence in relation to its own activities,

[7] See e.g. Dannemann, G. (2014) Commenting Maxeiner, James R. , with Gyooho Lee, Armin Weber: Failures of American Civil Justice in International Perpective. Foreword by Philip K. Howard. Cambridge 2011. The Rabel Journal of Comparative and International Private Law, Volume 78 (2).
[8] Available at: https://www.law.cornell.edu/rules/frcp/rule_26


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as well as to various actors in their supply chain. Amongst other aspects, the law places a legal obligation on such companies to 'put in place, disclose and effectively implement a vigilance plan, detailing vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms (…)'.[9]

## 5. Burden of proof

All four interviewees identified rules regarding the burden of proof as one of the major challenges faced by persons affected by a business's actions. The following section discusses the interviewees' comments and opinions on the rules regarding the burden of proof applicable to remedy mechanisms in the business and human rights context under civil law, administrative law, and criminal law.

### a. Direct legal concern and causality

To elaborate on the challenges posed by rules on the burden of proof in the context of business and human rights, interviewee DE_1 refers to the example of a person living next to a road that cars which surpass emission limits pass by. Should individuals aim to initiate administrative proceedings against authorities to enforce emission limits and take action against the car manufacturers, the concept of subjective legal protection (Subjektiver öffentlicher Rechtsschutz) would apply. This means that the claimants need to prove that they are directly affected by the surpassing of emission limits of the respective cars (unmittelbare Rechtsbetroffenheit). In the case for a person living nearby above mentioned road, this would mean that they would have to prove that emission limits have indeed been surpassed in the place where they live, which would be challenging given that claimants may not necessarily live next door of a measuring station. He therefore welcomes the fact that environmental associations are now able to file a claim against the authorities without having to prove that individuals are directly affected, yet criticizes the fact that individuals remain nearly unable to initiate such proceedings in practice. (Association Actions under the Environmental Appeals Act, for the interviewee's assessment of this instrument and remaining criticism regarding the position of individuals see below).

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According to the interviewee, a similar challenge would arise for persons affected in their rights through legal infringements by businesses if they file a civil law claim against that business. Under German civil procedural law, the claimant is required to provide proof for several levels of causality between their claim and the actions of the business in question. Interviewee DE_1 elaborated on the challenge for individuals to establish **causality** under civil law in two dimensions, (a) between the wrongdoing of the company and the violation of their rights ('haftungsbegründende Kausalität', §823 Abs. 1 German Civil Code (Bürgerliches Gesetzbuch, BGB)[10]), e.g. proof that their asthma has been caused by emissions by cars in question) and (b) to **establish causality between the violation of their rights and the financial damage that they claim** ('haftungsausfüllende Kausalität', §823 Abs. 1 BGB). The main challenge regarding this latter aspect is

[9] Information from the report: Policy Department of the Directorate-General for External Relations of the Union (2019) ‚Access to legal remedies for victims of corporate human rights abuses in third countries.'

[10] Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page42, 2909; 2003I page738),last amended by Article 4para.5 of the Act of 1October 2013(Federal Law Gazette I page 3719). Available in English at: http://www.gesetze-im-internet.de/englisch_bgb/index.html.

seen in putting a number to the damage that the claimant has suffered. Proving such causality can be extremely challenging, according to the interviewee. He explains that he knows of many cases where lawyers recommended to persons affected by a business's actions not to pursue the claim as causality would be impossible to prove. He recommends amending existing rules in a way that will shift the burden of proof to the business, once it has been established that a business has violated a legal norm. According to the interviewee, those found to have violated a legal norm should bear the burden of proof that all ensuing damages are not the result of this violation. The interviewee points to case law where the Federal Court of Justice (BGH) found that, based on § 823 BGB, the owner of a plant that had exceeded emission limits had to proof that the damage on a car parked nearby were not caused by the emissions.

### b. Measurements and expert opinions

All interviewees identified costs and requirements linked to measurements and expert opinions as a challenge in cases of human rights violations in the business context. Interviewee DE_3 draws from her extensive experience in having to produce proof in environmental and health related matters, referring to three aspects, (1) that the law does not provide any clear rules on how exactly complex environmental and health related aspects should be measured, i.e. claimants run the risk that a measurement will be rejected by the court, (2) that, in particular in complex environmental and health related aspects, there are only few organizations who can provide measurements that would be relevant to establish the environmental/health impact (3) expert opinions are costly and, in case the claimant loses the case, they will have to bear the costs. Asked about the chances of individual consumers to obtain compensation for health or property damages, she expresses her opinion that 'individual consumers won't engage in such costly proceedings' as 'there is also an evidence problem'. (DE_3)

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Interviewee DE_1 has experienced comparable challenges in the context of claims for damages under civil law. He explains that the costs for expert opinions needed to establish causality can easily surpass the value of the subject matter. While he acknowledges that such costs would be covered by legal aid (Prozesskostenhilfe), he also points out that legal aid will only be available for the less affluent claimants. He describes the associated financial risk for middle income households as 'disproportionate', explaining that, in his opinion, 'no sensible person would take that risk'. Confirming his impression, DE_2 elaborates on an 'enormous financial litigation risk' for associations which support third-country nationals in filing a claim under German civil law. She refers to a case where the company which they sued was able to obtain a detailed legal expert opinion, while the association did not have the financial means to order such an extensive legal opinion, and struggled to find a law firm that would do so without according remuneration. According to the interviewee, the expert opinion alone carried a financial risk amounting to a five digit number in €.[11]

### c. Rules on access to internal documents

Several interviewees pointed to the disadvantageous situation of persons affected by a business's actions with regard to their insight on internal documents of the businesses relevant to their case. These may be relevant in particular with regards to the question, whether or not the wrongdoing was in fact that of the business as

[11] Case will not be indicated here based on wishes of interviewee.

a legal person. Interviewees criticise that German law does not provide for a rule that would require both parties to make their evidence/internal documents accessible to their opponent prior to proceedings in court. DE_1 elaborates:

*'If I file a claim against an authority in administrative law, the authority has a duty to send all relevant documents to the court, where the claimant will have access to these files/documents. Such a rule does not exist for claims under civil law.'*

He refers to pre-trial discovery in the US, where both sides involved in a legal dispute under civil law have to make their documents accessible to the other party and where failure to do so will be sanctioned (see Chapter 3 for further detail). The interviewee explains that while the law provides an opportunity for the claimant in civil proceedings to apply for access to a specific document held by the other party, jurisprudence demands that an according request is extremely detailed and specific, so much so that the claimant will only succeed in their request if they already know the content of the file. In his experience, these types of applications have never worked. DE_4 expressed his concern regarding an ongoing case, stating that, without insight on relevant internal documents, he may be unable to establish that the wrongdoing was in fact that of the business as a legal person (Zurechnung Fehlverhalten auf das Unternehmen als juristische Person). According to the interviewee, the concept of secondary burden of proof (sekundäre Darlegungslast) has the potential to mitigate this obstacle with limitations. [12] The concept of secondary burden of proof is a concept developed in civil law cases. According to the concept, if the party to proceedings that is responsible for proving their claim (primäre Beweislast) cannot possibly do so, or it would be unreasonable to demand from that party to offer proof, while the opponent knows all relevant facts and it is reasonable to demand from that opponent to offer the proof, the court may impose a secondary burden of proof on the opponent, i.e. require the opponent to set forth an argument that disproves the claimant's claim. According to the interviewee, this concept has been applied to comparable situations by several courts. Nonetheless, he is aware of the limits of that concept, as it requires the opponent to set forth an argument rather than to provide actual proof. If well argued, this argument would have to be rebutted by the claimant who, in turn, would have to provide proof.

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Interviewee DE_2 highlights the role of investigative authorities in acquiring proof in criminal proceedings, yet points to a potential challenge arising from a lack of information and training on transnational case law (see Chapter 7 for further detail).

## 6. Collective redress

The following provides an insight on the experts' experience with and opinions on legal mechanisms which can be qualified as collective redress mechanisms as defined by the EU Commission in 2011. This definition describes collective redress as 'a broad concept that includes injunctive relief (lawsuits seeking to stop illegal behavior) and compensatory relief (lawsuits seeking damages for the harm caused)', clearly distinguishable from the so-called 'class actions' that are common under the US legal system.[13] As has been discussed in Chapter 2, experts shared their experience with three mechanisms which fall under this definition, including Sample Declaratory Actions in civil proceedings, actions for an injunction under

[12] For examples for the concept of the secondary burden of proof being applied to case law see e.g. Federal Court of Justice (2017), '27.07.2017 – I ZR 68/16'

[13] For further information, see: http://europa.eu/rapid/press-release_IP-11-132_en.htm.

the law on actions for an injunction, as well as association actions under the Environmental Appeals Act. Three experts had extensive experience regarding one or two of the three mechanisms discussed below. It should therefore be noted that the description and evaluation below is largely based on the contribution of one expert per mechanism, with additional information offered by other experts added where applicable. Experts highlighted that, beyond consumer protection law (and in particular in non-contractual civil law) there are no effective collective redress mechanisms which would be accessible for victims of business related human rights abuses regarding the right to life, bodily integrity, property, freedom or private life. They highlighted a need to extend the options for collective redress so to allow for those mechanisms to have broader outreach, as well as to provide for a realistic chance for the individual claimants to receive financial compensation.

**Sample Declaratory Actions in Civil Proceedings (Zivilprozessuale Musterfeststellungsklage)**

The sample declaratory action constitutes a new instrument of collective action in consumer protection in Germany which was introduced as a reaction to a lack of viable options for consumers to claim their rights in the context of the so called Dieselgate in 2018. Sample Declaratory Actions were introduced to circumvent the so called 'rational disinterest'- phenomenon ('rationales Desinteresse'), i.e. that businesses will profit from violating a legal norm as individual consumers will avoid costly and time consuming legal action against a relatively small individual damage (DE_4).

The instrument of Sample Declaratory Actions in Civil Proceedings provides recognized consumer protection organizations[14] the legal standing to file a civil action against a company to determine the existence or non-existence of the legal and factual requirements giving rise to claims involving mass damages to consumer rights. Consumers can opt into this claim by way of registering at the Federal Office of Justice (BfJ).[15] For those who do, limitation periods for their individual legal claim are stayed until the action filed by the association has been decided upon. The consumer can then file individual proceedings on the basis of the action's findings in order to achieve financial compensation. The Sample Declaratory Action is limited in its material scope, applicable only to matters affecting consumers. So far, it has only been applied to matters relating to the right to property. However, interviewee DE_4 argued that it could also be used in consumer protection proceedings affecting, for example, the right to health (product liability). In addition, with amendments discussed below, it was seen as a suitable model for extending collective redress also to other business related human rights violations not affecting consumers.



Interviewees name three major advantages of the Sample Declaratory Action as an instrument to enable access to remedy: First, the instrument can cover a large number of persons claiming to have been affected by a business' actions. Second, the initial claim is free of charge for the persons who have registered with the association's action, the association filing the claim will have financial responsibility. Third, registration will automatically suspend the limitation period

[14] Consumer organisations can apply for legal standing for Sample Declaratory Actions at the Federal Office of Justice (BfJ).

[15] The Federal Office of Justice is the central service authority of the federal justice system (Bundesjustiz) in Germany. It is assigned to the BMJV.

(Verjährungshemmung), meaning that persons who have registered will be able to await the court's decision and can then decide whether to file their own claim for damages.

DE_4 also voices criticism in terms of accessibility and effectiveness of the instrument. First, the lawyer criticizes that aspects linked to the registration of persons claiming to have been affected remain unclear. In order to register, it is required to elaborate on the subject and reason for their claim. It remains unclear how detailed such elaborations have to be in order for the registration to be effective. Whether registration was effective will only be checked by the authorities once registered persons file their individual claims based on the court's decision. The interviewee points to the risk that persons who have registered will only learn whether their registration was effective once proceedings are finalized, meaning their limitation period may have passed without their knowledge.

Second, the interviewee criticizes that persons who register with the claim will be bound to the decision of the court, regardless whether that decision is in their favor or not (Positive und negative Bindewirkung). These persons will be unable to access remedy, should the Sample Declaratory Action not be decided in their favor, while the association making the claim carries the financial risk in case of negligent conduct (fahrlässiges Handeln). In such a case, persons who have registered with the action are able to claim compensation (Schadensersatz) from the association. This implies a great financial risk for the association which, according to the interviewee, will not be covered by applicable insurances.

The interviewee explains that, due to these high financial risks, and the fact that the requirements to obtain legal standing as an association can be difficult to meet for associations, only a small number of organizations is currently able or willing to file a Declaratory Action. Two interviewees criticize that the limited number of associations able and/or willing to file a claim will make it difficult for individual consumers to access this remedy (DE_3, DE_4).



The main criticism voiced by the experts (DE_1, DE_3, DE_4) relates to the effectiveness of the instrument. Declaratory actions aim to determine the legal question underlying any financial claims. DE_1 describes the instrument as mere 'window dressing' ('Augenwischerei'), and explains that he does not expect an improvement of the situation as, in his opinion, the instrument 'stops half way'. Persons who have registered with the action will have to file their own claim for damages (Schadensersatzklage), for which they will have to carry their own financial risk and furthermore put a financial value to the damage they have suffered (see also Chapter 5). DE_1 elaborates on his reservations towards the mechanism as follows:

*'From a political perspective one could say once the main question, whether they (the business) acted unlawfully, has been resolved, (the business) will give in. But what if they don't, then everyone has to sue (the business) on their own (…) who would do that (…) many won't. That's why I think it is window dressing, it does not replace a real right to sue in summary or collective action. (…)in environmental law it (collective action) has been done to a relatively far reaching extent, in consumer protection it has been done half way, and where it hasn't been done at all is genuine human rights matters.' (DE_1, p.10)*

The Sample Declaratory Action in Civil Proceedings is not a classical collective redress mechanism as the term is understood in Germany. It was criticized not only by the government's opposition in Parliament, but also by the Deutscher

Juristentag e.V. (Association of German Jurists, DJT)[16]. The DJT criticized that the instrument does not unburden courts and does not address scatter damages (Streuschäden) – i.e. smaller damage caused to a multitude of affected persons – to a sufficient extend. They have demanded collective redress mechanisms that, rather than simply to determine a violation of the law, can make a decision on the claims of persons affected by the business's wrong doing. They have furthermore demanded an option for summary proceedings, where claimants can file a joint suit as a group.[17]

In light of this criticism, interviewees voice a number of recommendations aimed at strengthening collective redress mechanisms to improve access to remedy for victims of business related human rights violations.

DE_1 recommends that, next to an extension of the option for associations to claim the rights of persons who claim to have been affected by a businesses' actions, these persons should be able to join together as a group and claim their rights as such without the support of an organization. While he recognizes that summary proceedings ('gebündelte Rechtsdurchsetzung'), already exists in the form of a joinder of parties ('Streitgenossenschaften'), according to him, this options brings only a small reduction in costs and furthermore requires proof for each individual case. He stresses that an effective instrument should come with lower cost risks and should cover the full claim of the claimants, rather than only the legal question underlying the claim.

Interviewees DE_1, DE_2 and DE_3 make specific mention of the proposal for representative actions drafted by the European Commission, which would allow for representative actions to determine the financial claim for individual persons who claim to have been affected, given that it is possible to generalize these claims to a certain degree.[18] DE_4 expresses his hopes for the influence of EU legislation as follows:



'*We hope that the EU Commission will go a step further so that Germany will have to conform as well. (…) We have been making this demand for a long time, that the new instrument is not restricted to determining the circumstances, but will also allow for consumers to receive immediate compensation. So far, it has not been politically feasible to push that through in Germany.*'

**Action for an injunction under the law on actions for an injunction (UklaG)**

Action for an injunction (Unterlassungsklage) is a civil law instrument which, amongst others, can be found under the law on actions for an injunction (UklaG). It provides consumer associations the right, to address a business with a request to stop their harmful actions, as well as to file a civil claim should the business refuse to do so. The business, in turn, can declare that they will stop their action by way of a cease-and-desist declaration, which means that they enter into a contractual relationship with the association. The association can claim financial compensation should the business fail to comply with their contractual obligations. The Act on actions for an injunction is an instrument aimed at consumer protection. Associations can file a complaint in cases where they feel that existing laws on

[16] For further information, see: https://www.djt.de/

[17] For further information see: https://anwaltsblatt.anwaltverein.de/files/anwaltsblatt.de/anwaltsblatt-online/2018-698.pdf

[18] European Commission (2018), 'Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC', 11.04.2018.

consumer protection have been violated. In order to file such a claim, associations need to register with the Ministry of Justice.[19] While interviewees mainly discussed this instrument with regards to the right to health, life and bodily integrity (given the association's mandate), the law can also be applied to cases involving other human rights, as e.g. the right to privacy or the right to housing. It is not necessary for the associations to identify or name any persons who claim an infringement of their rights. For persons whose rights have been violated by the business's action, the action for injunction does not provide any financial compensation, yet is aimed at preventing any future damage.

DE_3 sees the main value of an action for an injunction in the fact that the requirement to establish that a person has been directly affected by the businesses action does not apply and that it is not required to name any persons who claim an infringement of their rights. The interviewee explains that, while the organization also bears a financial risk having to proof the illegal conduct of the business (see also Chapter 5), these costs can be mitigated by the financial income that the organization retrieves from claims against those businesses who do not abide by the requirements of their cease-and-desist declaration. The interviewee furthermore highlights that this aspect of some associations' work can be and has been the subject of a political controversy where others claim that the association is making use of that tool in an excessive manner The interviewee furthermore explains that this argument (allegation of abuse of rights, 'Vorwurf des Rechtsmissbrauchs') can be used against them in court.

According to the interviewee, the only shortcoming of the action for injunction as a mechanism to access remedy for persons who claim an infringement of their rights through business related actions is the fact that individuals will not be able to claim any financial compensation through this instrument. She refers to the act on actions for an injunction as a 'future oriented measure'.



**Association Actions under the Environmental Appeals Act (Umweltrechtliche Verbandsklagen)**

Given the challenge to prove a violation of subjective rights in the context of environmental law, interviewee DE_1 highlights the high value of the environmental appeals act. The environmental appeals act (Umwelt-Rechtsbehelfsgesetz[20]) provides recognised associations with legal standing to initiative administrative proceedings against the authorities for a selection of environmental authorisation decisions (for details on the act's scope see §1), without having to establish a subjective rights violation. This law, introduced in 2006, implemented EU Directive 2003/35[21], which in turn implemented the Aarhus Convention, and constituted a fundamental break with German administrative procedural law that is based on the principle that legal standing generally depends

[19] An updated list of registered associations is available here: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKEwiA-8eq9b3iAhVJyqQKHVtnBpUQFjAEegQIARAC&url=https%3A%2F%2Fwww.bundesjustizamt.de%2FDE%2FSharedDocs%2FPublikationen%2FVerbraucherschutz%2FListe_qualifizierter_Einrichtungen.pdf%3F__blob%3DpublicationFile%26v%3D32&usg=AOvVaw2pPoj0-E60joTGdF5aJACL

[20] German Parliament (2018), 'Environmental Appeals Act' Umwelt-Rechtsbehelfsgesetz in der Fassung der Bekanntmachung vom 23. August 2017 (BGBl. I S. 3290), das durch Artikel 4 des Gesetzes vom 17. Dezember 2018 (BGBl. I S. 2549) geändert worden ist.', available at: https://www.gesetze-im-internet.de/umwrg/

[21] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

on a violation of the subjective rights of the claimant.[22] According to interviewee DE_1, this instrument usually functions well, not least because a wide selection of case law has been established which can assist the associations in their claims. Despite this rather positive evaluation, interviewee DE_1 also voices criticism of the instrument's scope based on recent case law. As the interviewee argues, Art. 9(3) of the Arhus Convention regarding access to justice has not been implemented to its full extend, as the Environmental Appeals Act (1) is only applicable to selected factual situations, rather than to all environmental authorisation decisions (2) limits legal standing to a specific type of organisations, rather than to allow for individuals to initiate proceedings. The limit to the law's applicability has been reconfirmed through recent case law relating the environmental aspect of the emissions of vehicles.[23] Similar demands to reform the Environmental Appeals Act so as to provide individuals with legal standing independently of having suffered damage and remove limitations to legal standing of associations have been formulated by the Greens in 2016.[24]

## 7. Cross border liability

- **Liability of EU companies in third countries**

All four experts view litigation across borders as a particularly challenging endeavor in business related human rights cases. The following aspects are named to create these additional challenges:

For lawyers and organizations working with them, transnational litigation requires considerable financial and organizational effort, meeting with and staying in touch with clients, gathering evidence or becoming familiarized with the legal system in the country that the affected persons reside in (DE_1, DE_2, DE_3). Experts explain that, as a result of above outlined additional financial and organizational effort, the costs for litigation are usually higher than the value of the subject matter (DE_1, DE_2). According to DE_1, DE_2, without external support of civil society organizations, persons who claim an infringement of their rights residing outside the EU struggle to find firms to represent them, as law firms cannot recover the costs of developing such litigation due to the restrictive lawyers' fees regime. A major criticism voiced by DE_2 is that it is currently unclear whether German company managers are subject to criminal or civil law responsibilities in the field of human rights vis-á-vis their subsidiaries and suppliers. Persons claiming to be affected by a business's wrongdoing may therefore fail to access compensation or other remedies simply because nobody can be held responsible for the action in question.



For third-country nationals, experts name the distances and a language barrier as a challenge to approach help in Germany, while it is also highlighted that financial aid carries a financial risk for the claimants if the court decides in their opponent's favor (DE_1). Due to this additional effort, in the experience of DE_2, in many cases, the limitation period has already been exhausted by the time actors involved in the case have made any progress. For those claiming a remedy either as financial compensation through an adhesion procedure or remedy as punitive sanctions through criminal proceedings, procedures are usually even lengthier in

[22] Article 42, paragraph 2, Code of Administrative Court Procedure.
[23] (For further information please see Annex)
[24] For further information, see http://dip21.bundestag.de/dip21/btd/18/121/1812161.pdf

her experience, as prospection authorities lack know-how and resources needed to address such cases.

Aspects of the legal system which are highlighted as positive in include:

- Where the actions of businesses based in Germany or their subsidiaries or subcontractors are the subject of the claim, third country nationals are generally free to file a claim in civil law or to file a complaint with investigating authorities which may potentially end in criminal proceedings in Germany (DE_1, DE_2)
- third country nationals are by law able to apply for legal aid (DE_1, DE_2)
- the equivalent of international human rights law is usually easy to be identified under criminal law in Germany (DE_2)
- The German Code for Civil Procedure (Zivilprozessverodnung) allows for the court to travel to consulate to hear witnesses, or for the consul to be in charge of hearing witnesses (DE_2)

- **Liability of third country corporations and authorities in the EU**

Two experts shared their experiences regarding cases involving third country corporations or authorities responsible for their regulation. An expert working in consumer protection confirms the additional financial burden and effort linked to litigation against companies seated outside the European Union and voices concern about the risks involved for individual consumers:

*'We also conduct proceedings against companies seated outside the European Union. […] There are special difficulties. The proceedings take a lot longer. The delivery of the claim can sometimes take six to nine months. The documents need to be translated. The delivery of the claim alone is unbelievably complex. And if you win, enforcement is a lot more difficult. For us, this is fairly manageable. But for individual consumers, it is practically unfeasible. They will shy away from the additional effort and the additional litigation cost risk.' (DE_4)*



Interviewee DE_3, who works for an association that can initiate actions for an injunction, explains that they usually file a claim against the distributor, not the business that constructs the product in question, to avoid having to act across national borders. She points to the limits of their work and expresses her wish for comparable organizations in other EU-countries to do similar work, so that her association does not have to go against distributors selling goods produced in other EU countries in Germany. She calls litigation across national borders within the EU an 'unparalleled drama' (drama ohnegleichen'). When the association initiates administrative proceedings with a transnational component, they usually try and work through the relevant authorities in the other countries, rather than to address the businesses directly. The association gets in touch with German authorities which in turn, are required to contact authorities in the other country.[25] She adds that the situation is even worse where proceedings involve countries outside the EU, as the organization as well as German authorities are unlikely to receive feedback from authorities in third-countries.

[25] According to the interviewee, it depends on both, the type of product as well as the location in question which authorities will be contacted with such a request.

- The OECD complaint mechanism

Interviewee DE_2 discussed her experience with the OECD complaint mechanism. Any individual or organisation can file a complaint with the OECD's National Contact Point if they consider a business's action a violation of the OECD guidelines for multinational enterprises.[26] Since adherence to the guidelines is voluntary for businesses, the OECD complaint mechanism is of non-judicial nature. Decisions cannot be enforced in court. If the case is found admissible by the NCP (who evaluates the cases admissibility in close cooperation with the relevant ministries and the Interministerial Steering Group for the OECD guidelines) a mediation procedure between the business and the claimant takes place.[27]

The interviewee's main criticism addresses the basic construct and aim of the mechanism, i.e. that it is aimed at mediation between those claiming to have been affected by the business's actions and businesses. During mediation, the NCP provides a neutral discussion forum, and decisions are not legally binding, which means that, according to the interviewee, the success of such mediation is heavily dependent on the good will of businesses. Overall, the interviewee described the complaint mechanism as a good way to enter into discussion with the businesses, yet she was unaware of any cases where the procedure led to significant impacts for the complainants in terms of remedy. Overall, she expresses her reservations towards the mechanism seeing that it is prone to political influence, given that the National Contact Point, which administers the proceedings, is based at the Federal Ministry for Economic Affairs and Energy. It is her opinion that the work of the German National Contact Point has lacked transparency and political will to enter into proceedings in the past. The interviewee furthermore made mention of cases where complainants were required to agree to strict confidentiality clauses, prohibiting them to speak about their experience or the case as such. While these clauses where suggested by the attorneys of the companies against which the complaint was directed, according to the interviewee, the NCP's interpretation of the clauses was so strict, that even a very general mentioning of the case facts was viewed as a breach of the clause. More recently, she has seen a development making the mechanism more effective and transparent which she mainly relates back to internal development at the NCP (new staff).



## Conclusion

This study discusses the experience and opinions of four experts whose work is linked to case law relevant to human rights in the business context. All four experts agree that access to remedy in the form of financial compensation through a claim against a business filed by persons who claim to have been affected by their actions remains largely ineffective due to an accumulation of practical and procedural obstacles, including a high financial risk, rules on the burden of proof, as well as a lack of effective collective remedy mechanisms and limited legal standing for non-governmental organisations. Similarly, adhesion procedures in the context of

[26] For further information, please see: http://www.oecd.org/corporate/mne/

[27] For further information, please see: https://www.bmwi.de/Redaktion/EN/Textsammlungen/Foreign-Trade/national-contact-point-ncp.html

criminal proceedings, as well as the non-judicial OECD-complaint mechanism are described as tools which are ineffective in providing remedy. While consumer protection mechanisms have introduced several ways for associations to prevent further harm through claims under civil law against individual companies as well as through an initiation of administrative proceedings against authorities, these mechanisms remain limited in their applicability and do not provide any financial compensation for persons affected by business actions. Experts highlight that, beyond consumer protection law (and in particular in non-contractual civil law) there are no effective collective redress mechanisms which would be accessible for victims of business related human rights abuses. They highlighted a need to extend the options for collective redress so to allow for those mechanisms to have broader outreach, as well as to provide for a realistic chance for the individual claimants to receive financial compensation.

As regards a potential role of the EU in addressing the shortcomings of the current legal system ensuring consumer protection, interviewees put high hopes in the ongoing legislative process on an EU-level. All four interviewees highlight a potential positive effect of the EU Commission's Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers of 2018. Interviewees express their hopes that an according law will continue to include the rule that is currently included in the proposal, allowing for representative actions to determine the financial claim for individual persons who claim to have been affected, given that it is possible to generalize these claims to a certain degree. As regards third-country nationals harmed by a company based in the EU, interviewees furthermore address their concern that any material law changes in favor of persons affected by the actions of businesses would not apply to persons in third countries who are affected by the actions of businesses based in the EU, due to according rules under the EU Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations). According to the Regulation, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively. Interviewees recommend amending Rome II so to allow persons affected to choose between the governing law of the country where the damage occurred or where the business is based. Furthermore, to address a lack on concrete rules on due diligence obligations, one interviewee recommends developing an EU regulation that defines the due diligence obligations of EU-based companies relating to their foreign activities and that applies to all EU countries.