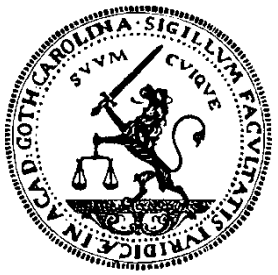

FACULTY OF LAW
Lund University

Helena Westöö

Shopping for a better world

whether supply chain transparency can assure clarity within the pursuit of goods untainted by intolerable practices

LAGM01 Graduate Thesis

Graduate Thesis, Master of Laws program
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Contents

Summary

As legislators in recent years have adopted regulations demanding companies to disclose information on their supply chains, a new chapter of corporate transparency has been opened. However, what power such regulations have to initiate a change of corporate behaviour is questionable. In this thesis the most topical of the recently adopted supply chain transparency and due diligence regulations, are assessed concerning what power they have to initiate change and assure clarity in regards the origin of product manufactured by the affected companies. Included in the discourse are the UK Modern Slavery Act, the California Transparency in Supply Chains Act, the Dodd-Frank Act Section 1502, EU directive 14/95/EU on Non-Financial Reporting and the French Law on a Corporate Duty of Vigilance. In common for all of these supply chain regulations is a dependency on society to assess the new information brought to light and react by favouring the companies that comply well with the regulations and exercise due diligence. However, this cornerstone is a heavy responsibility placed on society. Many factors affect whether or not stakeholders are able to reward the better performing companies such as if the information made available is comprehensive and assessable or whether or not third-party audits effectively can assist consumers in distinguishing better performing companies and their products.

In this thesis the case of Kaksy v. Nike is assessed as well as the sustainability label Fairtrade, which both exemplify a well-motivated scepticism towards corporate sustainability claims. These examples are moreover assessed from the perspective of unfair commercial practices in regards to sustainability commitments. As long as consumers aren't able to thoroughly evaluate companies concerning their human rights related practices, they have little power to react to the new information brought to light. The early stage of supply chain-related regulations and such regulations ability to assure a supply of products untainted by intolerable practice is targeted in this thesis, as well as the question of the various obstacles posed that can obstruct the consumer's ability to make humane and sustainable consumption choices.

Sammanfattning

Ett nytt kapitel för företagsansvar har påbörjats genom att lagstiftare har antagit ny lagstiftning för att reglera företags leverantörskedjor. Att sådan lagstiftning kommer att skapa förbättrade förhållanden i leverantörskedjorna är dock inte självklart. I denna uppsats analyseras och diskuteras de mest omdiskuterade av dessa nyligen tagna initiativ för mer transparanta leverantörskedjor i relation till vilken möjlighet dessa regleringar har att initiera förändring samt skapa klarhet gällande ursprunget av de produkter företagen i fråga levererar. Flertalet lagar från Europa och U.S.A. är inkluderade i diskussionen och gemensamt för dem alla är att de sätter stor tilltro till samhället. Förväntningarna innebär att samhället, bland andra konsumenter och oberoende organisationer, ska fungera som utvärderare av denna nya information som offentliggörs genom lagstiftningen. Dock vilar denna förutsättning på en möjlighet att effektivt kunna utvärdera och bedöma den nya information som blir offentliggjord. Flertalet aspekter kan påverka och försvåra denna möjlighet vilket i sin tur även påverkar vilken genomslagskraft dessa nya lagar kommer ha. Dessa aspekter diskuteras i denna uppsats. Vidare förekommer även det välkända rättsfallet Kasky mot Nike, samt hållbarhetsmärket Fairtrade, vilka båda utgör exempel på olika sätt företag kan försöka marknadsföra sig genom sina hållbarhetsåtaganden. Dessa exempel granskas utifrån bestämmelserna om otillbörliga affärsmetoder. I relation till konsumenters svårigheter att noggrant utvärdera företagen med avseende på deras hållbarhetsarbete, har de även begränsade möjligheter att verka som morot för företag att förbättra sin praxis. Denna nyckelfaktor är därmed även vad som kan påverka om de nya lagarna effektivt kommer att skapa förbättrade villkor i leverantörskedjorna.

Preface

While our consumerism peaks and the wear and tear phenomenon is worse than ever before, the ones who pay the price for the cheap products we use daily are the factory workers. Due to a lack of adequate safety measures and decent working conditions, they are subjected to intolerable practices in the manufacturing factories. Due to fierce competition, the salaries furthest down in the supply chains have in recent years decreased and likewise have the safety measures.[1] The Rana Plaza factory collapse in 2013 reminded of the urgent need for action and brought attention to the poor working conditions in Bangladesh's garment factories[2]. While the world's attention on this tragedy eventually diminished, yet today objects are identified as products of forced or child labour[3] and intolerable working conditions is a commonly known fact[4]. The existing voluntary standards for corporate responsibility, such as self-regulation, OECD Guidelines for Multi National Enterprises and the UN Global Compact, have been quite ineffective in shaping corporate behaviour[5] and are thus insufficient in ensuring the products we use daily aren't tainted by intolerable practices. Although in recent years, legislators have opened a new chapter and enforced supply chain-related disclosure, initiating to bring supply chains out of the shadows and into the light. Accordingly, ignorance is no longer a scapegoat, as more information is made available on what's going on behind companies' logos. For consumers unwilling to contribute to human rights violations and intolerable practices through their consumption choices, the pursuit of untainted products could be facilitated by these new regulations. In this thesis it will be assessed whether the new regulations are sufficient in shingling light on global supply chains, as well as the question of the various obstacles posed that can obstruct the consumer's ability to make humane and sustainable consumption choices.

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[1] See E.g. The True cost, 'Documentary', <https://truecostmovie.com> viewed 19 May 2017.
[2] Nolan Justine, *Business and Human Rights: From Principles to Practice,* p. 27.
[3] E.g. the U.S. identified 122 objects from 72 different countries believed to be products of forced or child labour. See California Department of Justice, *The California Transparency in Supply Chains Act: A Resource Guide* (2015), p. 1. Available at: https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.
[4] E.g. In many Bengalese factories the workers are subjected to abuse, forced overtime, it's common for them not to get paid on time or in full and less than 10 per cent of the garment factories have unions. See Human Rights Watch, *Whoever Raises their Head Suffers the Most: Workers' Rights in Bangladesh's Garment Factories (*Report April 2015), p. 6. Available at: https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment.
[5] Galit A Sarfaty, *Shining Light on Global Supply Chains* (Harvard international Law Journal Vol 56, Issue 2, 2015), p. 427.

Abbreviations and Key Terms

Abbreviations

Organisation for Economic Cooperation and Development	OECD
International Labour Organisation	ILO
Human Rights Watch	HRW
Corporate Social Responsibility	CSR
Non Governmental Organisation	NGO
Corporate Human Rights Benchmark	CHRB
Democratic Republic of Congo	DRC
U.S. Securities and Exchange Commission	SEC
UK Modern Slavery Act	MSA

Key Terms

Untainted products	Products known for *sure* to be produced under decent conditions, both in regards to the workers in the manufacturing, and in regards to the material in the product. In other words, products where neither forced labour[6] nor any intolerable working conditions in violation of the core labour standards[7] have occurred along the supply chain, as well as that the product isn't made of or contain any material which have financed armed groups, i.e. conflict minerals[8].

[6] As defined by the ILO: "situations in which persons are coerced to work through the use of violence or intimidation, or by more subtle means such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities".

[7] In accordance with the fundamental labour rights enshrined in the eight core ILO conventions guaranteeing "(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation". (See ILO Declaration on fundamental Principles and Rights at Work and its Follow-up, § 2.

[8] In accordance with the definition in the Dodd-Frank Wall Street Reform and Consumer Protection Act, section 1502 subsection (p)(1)(D): "conflict minerals that directly or indirectly finance or benefit armed groups". Observe that the Section 1502 definition also include the origin of the mineral, which is defined as "the Democratic Republic of Congo or an adjoining Country". The origin requirement has not been included in this definition.

Due Diligence	A company's process to "identify, prevent, mitigate and account for how they address their adverse human rights impacts [including] assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed, [as well as include] the adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships"[9].
Greenwashing	"disinformation disseminated by an organization so as to present an environmentally responsible public image"[10].
Sustainability	Such practices that are within the above described framework in regards to untainted products.
- Labels/claims	- Labels certifying such practises or claims assuring of such practices.

[9] UN Guiding Principles on Business and Human Rights, principle 17.
[10] Oxford Dictionary: Definition of Greenwash.
<https://en.oxforddictionaries.com/definition/greenwash> accessed 14 May 2017.

1 Introduction

1.1 Purpose

On today's market it's difficult to know the true origin of a product and whether or not it has been produced under any intolerable conditions. The purpose with this thesis is to examine whether the recently initiated supply chain-related regulations for corporate transparency are sufficient in assuring consumers a supply of untainted products. Products known for *sure* to be produced under decent conditions, both in regard to the workers in the manufacturing, and in regard to the material in the product, are henceforth referred to as untainted products in accordance with the above-presented definition. A term used parallel with untainted is 'sustainability', which also refers to such practices. As this is a legal thesis there will be no thorough assessment of consumer behaviour per se, but the focus is rather on whether the legislation in question is sufficient in assuring products are untainted. Therefore a broad variety of various supply chain-related transparency laws have been included to assess their ability to assure clarity of products' origin. As the potential obstacles that may obstruct the pursuit of untainted products also are within this study, this thesis involves two bodies of law; firstly supply chain-related regulations legislating transparency, and secondly legislation on unfair commercial practices. In the second part, assessing the potential competition aspects of corporate human rights commitments, the focus is primarily Eurocentric and focuses exclusively on the EU directive of unfair commercial practices.

1.2 Research Questions

Are the currently existing legal efforts for corporate transparency sufficient in assuring consumers a supply of untainted products and if not, why? Furthermore are there efforts for ensuring that products are untainted that may affect or undermine one another, if so, how does that affect the consumers' pursuit of untainted products?

1.3 Delimitations

Apart from a brief overview of the UN Guiding Principles on Business and Human Rights, addressing primarily the first two pillars, this thesis focuses specifically on domestic supply chain-related regulations, i.e. hard law. Soft legal instruments such as guiding principles from the Organisation of Economic Cooperation and Development have accordingly not been included in this thesis. Moreover, due to a wide range of various supply chain-related regulations, this thesis is delimited only to assess five of the most recent and topical initiatives and no other such laws will therefore be assessed. In addition, due to limitations on behalf of the author a fellow law student and French native speaker has been consulted and assisted in translation in regards to the French legislation featured in the discourse.

1.4 Structure

Firstly an overview of the business and human rights challenge will be discussed, including the UN Guiding Principles of Business and Human Rights, the corporate human rights responsibility from a business point of view, as well as the part consumers play in this regard. Thereafter the recently initiated efforts in Europe and the U.S. for the disclosure of relevant information to assess companies' human rights and environmental impacts, as well as the established and potential results of this legislation will be presented and assessed. Aspects that could undermine or complicate an assessment of whether a product is untainted or not will follow in the third chapter, which also entail a measurement of where we globally are at today in regards to corporate human rights responsibility. The various laws and other aspects presented throughout this thesis will be analysed and discussed simultaneously. The following chapter will nevertheless include a encompassing discourse on whether the currently existing efforts for corporate transparency that are addressed in chapter two, are sufficient in assuring a supply of untainted products as well as the various factors facilitating or obstructing this pursuit of untainted products.

1.5 Methodology and Perspective

The primary methodology in this thesis is a legal dogmatic method, although as some domestic laws are similar with one another, in chapter two some comparative elements are also included. Furthermore, economical and sociological considerations are also featured in the discourse. Additionally, this thesis is written from a consumer perspective, thus meaning how the *consumer* can be assured that the products he or she buys are untainted. Furthermore, reflections and thoughts in the discussion are the author's own unless otherwise stated.

1.6 Material

As there's a wide range of various initiatives to regulate corporations' adverse human rights impacts, this thesis focus exclusively on the hard legal initiatives to regulate supply chain transparency. The laws included are the UK Modern Slavery Act, The California Transparency in Supply Chains Act, the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act, the EU Directive on Non-Financial Disclosure and the French Law on the Corporate Duty of Vigilance. In regards to the addressed legislation, all references are to the original domestic legislations but the French, for which a third-party translation has been used. In focus is also two well-known brands, the sports brand Nike and the sustainability label Fairtrade. Various articles, reports and studies have been assessed targeting specifically Fairtrade and additionally legal briefs and Court rulings were assessed in relation to the Nike discourse. The forth key element in this thesis is the discourse on unfair commercial practice in relation to sustainability competition. For this assessment the EU directive 2005/29/EC on Unfair Commercial Practice as well as Commission reports and guidance is evaluated and discussed. Lastly an assessment of the results presented by the Corporate Human Rights Benchmark are examined and debated measuring, from this point of view, at what stage we globally are at in terms of corporate human rights responsibility.

1.7 Previous research

Supply chain-related regulations is a field of law at its infancy. It is only in recent years legislators have begun to impose obligations on companies within their jurisdiction to disclose information on their suppliers. Due to the young age of the supply chain regulations, non the least the French law on the corporate duty of vigilance which became effective on the 27th of March 2017, the research conducted on supply chain-related transparency and due diligence is thus quite limited.

The second part of the thesis, focussing on companies sustainability commitments and their competition of such is a more studied field. Particularly the EU directive on unfair commercial practices has been in place since 2005 making it a more studied document, which also facilitates the assessment of its effectiveness and deficiencies. Likewise both the sustainability label Fairtrade and the case of Kasky v. Nike have been subjects of various wide-ranging debates and also been assessed by various scholars and/or studies. Lastly the Corporate Human Rights Benchmark was published as late as in March 2017 and is the first benchmark of its kind and thus a yet untested approach for assessing companies performances in terms of human rights. A study over time, which could have been a better indicator on the trend of corporate human rights commitments, will therefore be left for future assessments, while in this thesis settling for evaluating the results at hand.

2 The rise of transparency for supply chains

2.1 UN Guiding Principles – an effective tool to prevent corporate adverse human rights impacts?

In recent decades the number of global corporations has increased almost exponentially, which, among other things has caused a decrease of power for many governments. We have also witnessed numerous catastrophes connected to transnational corporations such as the Rana Plaza and Bhopal[11] catastrophes, which have triggered the today widely recognised responsibility for companies to address human rights.[12] The UN special representative for Business and Human Rights, John Ruggie, has noted that the "root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences"[13]. Thus the activities of corporations that are operating in countries lacking the will or capacity to protect the rights of their people are difficult to monitor. In 2011 the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights (The UN Guiding Principles). This was a major development in the field of Business and Human Rights as some of the most powerful global actors today aren't governments but companies.[14] The UN Guiding Principles are based on three pillars that apply to all states and all business enterprises regardless of their size, location, ownership or structure and entail the following:

- "States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;"[15]

[11] Bhopal was a gas leak in India in 1984, which to this day remains a symbol of corporate impunity for human rights violations alongside governments' weak response to such impunity. (Nolan Justine, *Business and Human Rights: From Principles to Practice,* p. 27).
[12] Nolan Justine, *Business and Human Rights: From Principles to Practice,* p. 2-4.
[13] Ibid, p. 32.
[14] Ibid, p. 32.
[15] OHCHR, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (HR/PUB/11(04), p. 1. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

- "The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;"[16]
- "The need for rights and obligations to be matched to appropriate and effective remedies when breached"[17].

The first pillar clarifies the state's full range of human rights responsibility including preventing, investigating, punishing as well as redressing corporate human rights violations. This obligation includes ensuring that effective measures such as policies and legislation are in place. UN Guiding Principle 2 declares that "[s]tates should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations"[18]. This doesn't mean that States are expected to regulate how companies domiciled within their jurisdiction conduct their operations overseas, although it has been suggested that the Guiding Principles don't go far enough in this regard.[19] Contrary to States' responsibility, corporations' responsibility is mainly to "avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur"[20]. Furthermore it includes the obligation to "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations"[21]. As highlighted in Guiding Principle 12, the measures corporations are expected to take include all internationally recognised human rights, which considerably is one of the greatest achievements of the Guiding Principles and could settle the discourse on which human rights corporations are supposed to respect. In contrast, what may be one of the greatest deficiencies of the Guiding Principles is that no monitoring or enforcement mechanism has been set up, therefore enforcement is left to the states and companies themselves.[22]

[16] OHCHR, *Guiding Principles on Business and Human Rights*, General principles.
[17] Ibid.
[18] Ibid, Principle 12.
[19] Nadia Bernaz, *Business and Human Rights: History, Law and Policy: Bridging the Accountability Gap* (1st edn, Routledge 2017), p. 194-195.
[20] OHCHR, *Guiding Principles on Business and Human Rights,* Principle 13 a).
[21] Ibid, 13 b).
[22] Nadia Bernaz, p. 194-195.

2.1.1 The corporate attitude towards a human rights responsibility

Arvind Genesan, director of the business and human rights division of the Human Rights Watch, has recalled that in the late 1990s there was hardly any recognition that companies had human rights responsibilities[23]. UN Guiding Principles affirm the fundamental responsibility for companies to take responsibility for the effects of their activities. The Guiding Principles also call upon companies to demonstrate how they work to ensure meeting the requirements. As the Guiding Principles is the first clear baseline for how businesses should conduct their activities to avoid negative impacts on people, many companies are only at the beginning of the implementation or improvement of their human rights related policies.[24] The Intelligence Unit of the Magazine 'The Economist' made a survey in regards to corporate attitudes towards today's more extensive human rights[25] responsibilities and contrary to the view of companies' responsibilities in the 1990s, many now have a different attitude in this matter. Out of 853 senior executives from a wide range of industries, 83 per cent of the respondents agree, of whom 74 per cent agree strongly, that human rights are a matter for businesses as well as governments. Relatedly, 71 per cent responded that the corporate responsibility to respect human rights goes beyond the simple obedience of local laws. Companies tend to mainly see human rights as either a stakeholder or an ethical issue, and the business argument for respecting human rights is mainly to protect the company's brand and reputation. Only 21 per cent of the leaders said that driving a human rights policy is a clear business case for them. When this survey was made, only 22 per cent of the respondent had some kind of publicly available human rights policy. Uncertainty of where to start was the description many executives used. The most common barriers are among other things referred to as a lack of understanding of corporations' responsibility in this field, additionally a lack of training and education amongst the employees. At the top of the list of initiatives the

[23] The Economist Intelligence Unit, *The Road from Principles to Practise: Today's Challenges for Business in Respecting Human Rights 2015,* p. 4-5. Available at: https://www.eiuperspectives.economist.com/sites/default/files/EIU-URG%20-%20Challenges%20for%20business%20in%20respecting%20human%20rights%20WEB_corrected%20logos%20and%20UNWG%20thx.pdf last accessed 20 May 2017.

[24] Corporate Human Rights Benchmark, *Corporate Human Rights Benchmark Pilot Methodology 2016,* p. 12. Available at: https://business-humanrights.org/sites/default/files/CHRB_report_06_singles.pdf last accessed 20 May 2017.

[25] Human rights as defined in this report include the following: conditions of work and employment, workplace dialogue, no gross human rights abuses, adequate standard of living, the right to privacy and family life, rights related to land, civil life and participation, access to justice, intellectual spiritual and cultural life, rights related to the environment and education and access to technology (See p. 3 in the report).

respondents believed would be of assistance, was about providing data where 39 per cent believed in public benchmarking of company performance.[26] A benchmark on how well corporations perform in terms of human rights was recently conducted, assessing many companies with strong public brands that are possessing a large market capitalisation in high-risk industries[27]. The companies were assessed on several different indicators designed to portray the quality of companies' commitments to assure the compliance with the UN Guiding Principles. The majority of the companies assessed scored as low as 29 per cent or below[28], thus reflecting the early stage of implementation of the UN Guiding Principles that these companies are at, which is a very uncomfortable finding as the UN Guiding Principles were adopted nearly six years ago.[29]

2.2 Consumers' demand for sustainability

Among the first companies to be confronted and condemned for their human rights violations was Nike. Nike initially tried to defend itself with the argument that it was the responsibility of their independent subcontractors to provide decent working conditions, and not Nike itself.[30] There's been a substantial change of attitude and nowadays, attempting to use such an argument would not be well received. As presented above it's a commonly shared view today that human rights concerns also are corporate concerns and consumers' have shown an increasing demand for products that are produced under decent conditions. However, consumers face a challenge in terms of understanding and assessing companies' sustainability commitments.

In theory, consumers have the power to push companies for better sustainability commitments if they are selective and choose only the products that meet their sustainability demands[31]. Although the idea that corporate social responsibility

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[26] Economist Intelligence Unit, p. 4-5.
[27] Corporate Human Rights Benchmark, *Corporate Human Rights Benchmark Key Findings 2017*, p. 12-13. Availabe at: https://www.corporatebenchmark.org/sites/default/files/2017-03/CHRB_Findings_web_pages.pdf last accessed 20 May 2017.
[28] Ibid, Table 4: Company Results by Brand.
[29] Ibid, p. 12-13.
[30] Michael Connor, 'Business and Human Rights: Interview with John Ruggie', (30 October, 2011) Business Ethics: the magazine of corporate responsibility <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/> accessed 14 May 2017.
[31] Hajin Kim, *Eco-labels and Competition: Eco-certification Effects on the Market for Environmental Quality Provision* (N.Y.U. Environmental Law Journal, Vol. 22, Issue 2, 2015), p. 182-183.

(CSR) performances results in consumer loyalty, and that consumers are consumers of CSR, are in scholars' view considerably quite naïve. Likewise is the assumption made by some Non-Governmental Organisations (NGO) that putting pressure on corporations to change production conditions, automatically also will lead to a change in consumer behaviour. Such an approach relies on a 'naming and shaming' method, which doesn't challenge much of the consumer behaviour they claim.[32] Although, the online shopping market has exponentially increased the consumption choices and transformed the market from a sellers' to a buyer's market giving the consumer a much stronger position to determine which goods are to be purchased and also how they are to be offered. The Internet has moreover opened up for a whole new chapter in terms of transparency; allowing consumers to gain access to a lot more information on the companies they buy products from. This has additionally opened up the opportunity for independent organisations to conduct examinations of corporations' human rights impacts. Consequently companies have little control of what is being said about them.[33]

Arguably many consumers do care about the adverse impacts of the products they buy. The many examples of consumer reactions on the market and the trend of sustainable brands and sustainability labels can testify to this increasing demand for untainted products on today's market. For instance the very popular and successful retail brand H&M has invested in renewable products and has started to address issues of equality[34], and sustainability labels like Fairtrade have gotten people to spend billions on Fairtrade products[35]. Furthermore the many different boycott campaigns against certain companies with deficient human rights policies[36] also confirm the increasing awareness of consumers. Studies have also testified to how consumers are willing to pay more for products manufactured under decent

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[32] Palazzo Guido, Morhart Felicitas, Schrempf-Stirling Judith, *Business and Human Rights: From Principles to Practice*, p. 200.
[33] Ibid, p. 202-203.
[34] H&M Vision and Strategy: "Our vision is […] to use our size and scale to lead the change towards circular and renewable fashion while being a fair and equal company. This vision applies to every brand in the H&M group, all of which share the same passion for fashion and quality, as well as the ambition to serve our customers in a sustainable way". H&M's webpage, 'Vision and Strategy', <http://sustainability.hm.com/en/sustainability/our-vision-and-strategy.html> accessed 14 May 2017.
[35] William MacAskill, *Doing Good Getter: How Effective Altruism Can Help You Help Others Do Work that Matters, and Make Smarter Choices About Giving Back* (1st edn Penguin Random House LLC 2015), p. 133.
[36] E.g. The amazon boycott for exploitation of workers: Joseph Conroy 'Would you boycott amazon this christmas' (2 December, 2014), Newstalk <http://www.newstalk.com/POLL:-Will-you-be-boycotting-Amazon-this-Christmas> accessed on 24 April 2017).

conditions[37]. However, assessing whether a company has tolerable policies and provide products that are untainted is difficult. Studies have shown that in regards to claims concerning a products' environmental impact, consumers have found various labels and environmental claims overwhelming and confusing[38]. Similarly as consumers struggle with corporations' environmental claims, the same issue arguably applies also for other corporate commitments, such as human rights related claims. Scholars argue that "[t]he problem with an information-based approach […] is that in actual decision-making situations, most consumers might lack the ability, time and willingness to process the information necessary to consider human rights in their decision making"[39]. Thus there's an information-gap making it too challenging or hard for consumers to incorporate human rights considerations into their consumption habits. Consumers also lack the knowledge to assess relevant information to verify the companies' claims. Although, it has been suggested that consumers do trust third-party certification, which also can facilitate the verification of various environmental claims made by vendors.[40] Similarly as third party verification could strengthen the trust in a claim of a product's environmental features, it could do the same in regards to human rights related features.

2.3 Hard law transparency regulations – a step in the processes for expanded corporate responsibility

Although the UN Human Rights council unanimously endorsed the UN Guiding Principles and they have been highly praised as a major progress, this soft legal

[37] E.g. Michael J Hiscox and Nicholas F.B. Smyth, *Is there Consumer Demand For Improved Labour Standards?: Evidence from Field Experiments in Social Product Labelling* (Department of Government, Harvard University). Available at: https://scholar.harvard.edu/files/hiscox/files/consumerdemandfairlaborstandardsevidencesocial.pdf last accessed 20 May 2017.
[38] E.g.: Cone Communications, *Consumers take Responsibility for "Green" Actions but aren't Following Through, According to Latest Cone Communications Research* (Trend tracker 2013). "48 % per cent say they are overwhelmed by environmental messages". Available at: http://www.greenactions.it/wp-content/uploads/2013/04/2013_cone_communications_green_gap_trend_tracker_press_release_and_fact_sheet.p) df last accessed 20 May 2017.
[39] Palazzo Guido, Morhart Felicitas, Schrempf-Stirling Judith, *Business and Human Rights: From Principles to Practice,* p. 202.
[40] Hajin Kim, p. 182-183.

framework has been mostly ineffective in shaping corporate behaviour. Companies are unsure of where to start and how to work with human rights related queries in their supply chains and moreover the framework lacks an independent monitoring mechanism and have been criticised for greenwashing.[41] While observing that the UN Guiding Principles haven't effectively initiated a change of corporate behaviour, and that is has been criticized for not going far enough in regulating companies' operation overseas, one could argue that domestic supply chain-related regulations may be the response. Such regulations potentially have the power to bring about change.

On the front-line of arguing for transparency of companies' supply chains is the Human Rights Watch (HRW). The HRW has shined light on the poor working conditions in many supplier factories and addressed the urgent need for corporate action. Among other things there's a difficulty for human rights advocates to alert companies of abuses in their supplier factories. Advocates often have to expend substantial time and efforts to identify which brand employs a factory where they've identified human rights abuses. Moreover they've noticed a commonly occurring issue of unauthorised subcontracting. Particularly in the garment industry it's common that factories contracted by apparel companies employ smaller factories with fewer regulations to meet the production demand. Such factories are even more difficult to monitor. As an important tool to assess workers rights in factories, the HRW highlights transparency. The disclosure of relevant information can be a powerful tool to assert workers' human rights, for instance to identify what companies employ factories in which human rights abuses occur, they stress.[42]

In the past years we've seen a great development in this field as governments have opened a new chapter by enforcing transparency regulations for corporations. This is an increased recognition of the environmental and human rights violations that third party suppliers are responsible for, and is a step in the process for mitigating the risks of such[43]. Supply chain-related regulations could serve not only to change corporate behaviour but also as an alternative to international law for shaping the

[41] Galit A Sarfaty, p. 427.
[42] Human Rights Watch, *Follow the Thread: the Need for Supply Chain Transparency in the Garment and Footwear Industry,* (Report, 20 April 2017), p. 4-5. Available at: https://www.hrw.org/sites/default/files/report_pdf/wrdtransparency0417_brochure_web_spreads_3.pdf last accessed 20 May 2017.
[43] Galit A Sarfaty, p. 424.

behaviour of host governments. Through domestic supply chain-related regulation, home states reaches beyond their own borders with legislation that will operate extraterritorially and can set human rights related, as well as environmental, norms for third party suppliers and their host governments. Pressure from third party suppliers have the potential to make developing countries pass legislation and strengthen the rule of law to comply with the newly established demands in order to maintain business with corporations operating within their jurisdiction. A major challenge has consequently been brought before companies with such extraterritorial legislation as they don't only have to comply themselves, but also have to serve as regulators and impose standards on their third-party suppliers in other countries.[44]

The following supply chain-related regulations all have in common that they are domestic regulations with the power to initiate global harmonization of standards and practices, a phenomenon that commonly is referred to as 'the California Effect' since the phenomenon was first initiated there[45]. "Unilateral regulatory globalization occurs when a single state is able to externalize its laws and regulations outside its borders through market mechanism, resulting in the globalization of standards"[46], a phenomenon for instance the EU regulation of household chemicals exemplifies; in 2007 the EU enforced strict safety standards for household chemicals for the purpose of assuring a high environmental and health standard within the union. Even though the standards weren't as high in the U.S., American companies operating on both markets altered their products to align with the higher EU standards.[47] Another example is EU privacy regulations. Technical limitations can force a company like Google that operates worldwide to amend its operations not only in the EU but everywhere, as it's simpler and less costly to do so than having different versions of data collection systems in different parts of the world[48].

Various countries have taken different approaches in regards to regulating supply chains and the different laws vary in purpose and range, and naturally some have

[44] Galit A Sarfaty, p. 420-21.
[45] Remi Moncel, *Cooperating Alone: The Global Reach of U.S. Regulations on Conflict Minerals* (Berkley Journal of International Law, Vol. 34, Issue 1, 2016), p. 231.
[46] Anu Bradford, *The Brussels Effect* (Northwestern University Law Review, Vol. 107 No 1, 2012), p. 3.
[47] Remi Moncel, p. 219.
[48] Ibid p. 235.

gotten further than others, both in terms of transparency legislation and due diligence requirements. A few examples from the UK, the US, France and an all-covering EU directive will follow, which all can play a vital role for providing information enabling thorough assessment of corporations' human rights and environmental impacts. Nevertheless, the concept of supply-chain related regulations is at its infancy, and the question is if it will be an effective mechanism to initiate a change of corporate behaviour.

2.3.1 Targeting modern slavery

On the first of January 2010 the California Transparency in Supply Chains Act (also referred to as the California Transparency Act) was adopted[49]. This Act requires any retail seller or manufacturer in the state of California, who has an annual worldwide gross receipt exceeding one hundred million dollars, to disclose its efforts to eradicate slavery and human trafficking[50] from its direct supply chain for tangible goods offered for sale[51]. Similarly the UK passed the Modern Slavery Act (MSA) in 2015, which strengthen the existing offences of slavery[52] and human trafficking[53] and increases the maximum penalty for such offences and introduces a number of measures aimed at supporting and protecting victims of modern slavery.[54]

The California Transparency Act requires supply chain-related disclosure, which to a minimum *shall* include whether the retail seller: 1) engages in any verification of product supply chains within the effort to evaluate and address risks of slavery and human trafficking, and specifically state whether the verification is conducted by a third party, 2) conducts audits of suppliers to evaluate the compliance of those with company standards for trafficking and slavery in supply chains and specifically clarify if the verification was not an independent and unannounced audit, 3)

[49] California Civil Code §1714.43, subd. (e).
[50] California Penal Code § 236.1, subd. (a).
[51] "[a]ny person who deprives or violates the personal liberty of another with the intent to obtain forced labour or services. See California Civil Code §1714.43, subd. (a)(1).
[52] In accordance with article 4 of the ECHR on the prohibition of slavery and forced labour. See Modern Slavery Act 2015 Chapter 30, part 1, § 1 subd. (2).
[53] I.e. to arrange or facilitate the travel of another person with a view of exploiting them. See Modern Slavery Act 2015 Chapter 30, part 1, § 2 subd. (1).
[54] UK Government, *Explanatory notes to the Modern Slavery Act 2015*, p. 1. Available at: http://www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpgaen_20150030_en.pdf last accessed 20 May 2017.

requires certification from direct suppliers to ensure that materials incorporated into the products, comply with the laws of the country or countries in which they're doing business, 4) upholds international accountability standards and procedures in regards to employees or contractors who fail to meet the policies of the company as concerns slavery and human trafficking, and 5) provides training for company employees and management that have direct responsibility for supply chain management, particularly in regards to mitigating risks within the supply chain[55].

In a similar way the MSA also legislate transparency in supply chains. A commercial organisation that supplies goods or services and has a turnover as high as prescribed by regulations from the Secretary of State (36 million GBP[56]), must prepare a slavery and human trafficking statement for each financial year[57]. Such a statement shall include steps taken to ensure that there is no slavery or trafficking in its supply chains or within its own business.[58] Subsection 5 of this paragraph sets out six areas of information that *may* be included in the slavery and human trafficking statement. The statements may inter alia include: (a) the organisation's structure, its business and supply chains, (b) its policies in relation to trafficking and slavery, (c) its due diligence process, (d) the parts of its supply chains where there's a risk of trafficking or slavery and the measures taken to assess and manage that risk, (e) its effectiveness in the prevention of these issues and (f) the training in regards to slavery and human trafficking that's available to its staff[59].

The California Transparency Act requires the above-described disclosure to be posted on the retail seller's or manufacturer's Internet website, if such exists, with a "conspicuous and easily understood link to the required information placed on the business' homepage"[60]. When lacking a website retailers and manufacturers are obliged to provide consumers written disclosure within thirty days after receiving a written request[61]. The MSA include a much similar requirement[62].

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[55] California Civil Code §1714.43, subd. (c)(1-5).
[56] UK Home Office, *Transparency in Supply Chains: A Practical Guide* (29 October 2015), p. 5. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf last accessed 20 May 2017.
[57] Modern Slavery Act 2015, Chapter 30, part 6, § 54 subd. (2),(3).
[58] Ibid, subd. (4)(a),(b).
[59] Ibid, subd. (5),(a-f).
[60] California Civil Code §1714.43, subd. (b).
[61] Ibid.
[62] See: Modern Slavery Act 2015 Chapter 30, part 6, § 54 subd. (7) and (8).

Both othese laws require companies to disclose if any measures have been taken for the prevention of slavery and human trafficking in their supply chains. The California Transparency Act legislate what *shall* be included in a slavery and human trafficking statement, as opposed to the younger act in the UK which only suggests what *may* be listed. Though neither acts require the companies to implement any particular preventative measures per se. As the California Transparency Act and the MSA refers to companies' responsibility to ensure that slavery and human trafficking are not taking place in their supply chains, it doesn't mean that the company in question has the obligation to guarantee that the entire supply chain is slavery free, but merely that is has to publish whether any preventative measures have been taken. Thus consumers are provided with information on whether the companies are making any efforts to root out and prevent slavery and human trafficking domestically or overseas, and not whether such actually occur or not. With the current legislation the California residents accordingly have to settle for receiving information on what actions companies do take and thus know little of whether their efforts are successful, likewise for the British people who may even have to settle only for information disclosing whether a particular company take any actions against modern slavery or not.

Nevertheless, the Californian approach to eradicate modern slavery is considerably more effective than the MSA as the disclosure requirements in the UK are more lenient. The British government underlines that following the suggestive disclosure aspects in the slavery and human trafficking statements is encouraged and that it would facilitate the assessment of companies' compliance[63]. Although, it's reasonable to question whether the estimated 12, 000[64] UK companies affected by the regulations will invest time and effort in providing non-mandatory disclosure. Particularly as the regulations concern companies' adverse impacts critics have found it unlikely that companies will provide comprehensive and accurate information, especially if it could lead to legal liability[65]. Due to the suggestive rather than mandatory disclosure aspects, it's not unlikely to presume that some companies could draft a statement that may meet the legal requirement, but be deficient in providing sufficient information for a proper understanding of the measures taken by the company in the prevention of modern slavery. It is expected

[63] UK Government: MSA Explanatory Notes, p. 37.
[64] International Trade Union Confederation, *Closing the Loopholes: How Legislators Can Build on the UK Modern Slavery Act* (Report 2 February 2017), p. 6. Available at: https://www.ituc-csi.org/IMG/pdf/uk_modern_slavery_act.pdf last accessed 20 May 2017.
[65] E.g. International Trade Union Confederation, p. 6.

though that consumers, NGOs and investors, will apply pressure on the businesses that aren't taking satisfactory efforts to change their policies and practices[66]. Although in accordance with forthcoming discussion on the complexity of outside assessments, this is a major responsibility to place on society. It's furthermore noteworthy that identifying potential victims of modern slavery could be challenging. Abuse may not always be clear and easily identified and there may also be cases of exploitation that don't necessarily meet the threshold for modern slavery. For instance very poor and unsafe working conditions, including very long working hours may not meet the threshold for modern slavery if the worker in question chooses to work under such conditions and can leave freely.[67] Although this example only applies to forced labour and not in in regards to human trafficking, as consent is an irrelevant factor in such cases[68].

Questions arise in regards to who is expected to examine all of the statements that annually will be made available as a result of the MSA, likewise as the on the internet published information in accordance with the California Transparency Act. The MSA created the Anti-Slavery Commissioner whose functions are to encourage good practise in the prevention, detection, investigation and prosecution of slavery and human trafficking offences and the identification of victims of such offences[69]. Nevertheless, the assessment of the 12,000 different companies which all may choose different approaches to disclose their modern slavery reports, appear as an enormous challenge. Though despite the young age of the MSA it has already resulted in a company found liable for modern slavery in a landmark judgement involving the exploitation of Lithuanian workers who were trafficked to the UK and forced to work in inhuman and degrading conditions[70].

Furthermore, a bill very similar to the California Transparency Act was introduced in the U.S. House of Representatives in 2015: The Business Supply Chain Transparency on Trafficking and Slavery Act of 2015. This bill proposes an amendment of the Securities and Exchange Act of 1934, empowering the Securities and Exchange Commission (SEC) to issue regulations requiring companies that

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[66] UK Home Office Practical Guide, p. 6.
[67] Ibid, p. 19.
[68] Modern Slavery Act 2015, Chapter 30, part 1, § 2 subd. (2).
[69] Ibid, part 4.
[70] Fecility Lawrence, 'Court finds UK gangmaster liable for modern slavery victims' (10 June, 2016) The Guardian <https://www.theguardian.com/global-development/2016/jun/10/court-finds-uk-gangmaster-liable-for-modern-slavery-victims-kent-chicken-catching-eggs.> accessed 18 April 2017.

have annual worldwide global receipts excessing $100 million, to include in its mandatory annual report a disclosure of whether it has taken any measures during the year to identify and address conditions of forced labour, human trafficking, slavery and the worst forms of child labour within the supply chains.[71] This bill could be an important step towards more extensive transparency. Unlike the California Transparency Act this proposed bill would require annual reports to be filed with the U.S. Securities and Exchange Commission similarly as under the Dodd-Frank Act, which will be addressed in the next section[72]. This proposed bill would cover many large American enterprises, though whether it will be adopted is still very uncertain. The latest action on the bill was in August 2015 when the bill was referred to the Committee on Banking, Housing and Urban Affairs for assessment[73].

2.3.2 Eradicating conflict minerals

Another American act relevant in regards to untainted products is the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which as opposed to the California Transparency Act apply for all states in the U.S.. The highly contested, and still controversial section 1502 of the Dodd-Frank Act[74], from 2010 was adopted to "promote financial stability […] by improving accountability and transparency in the financial system […] to protect consumers form abusive financial services practises"[75]. In section 1502 of the Dodd-Frank Act the congress holds that the extreme levels of violence and the emergent humanitarian situation in the Democratic Republic of Congo (DRC) is assisted by the exploitation and trade of conflict minerals[76]. This act amends Section 13 of the Securities Exchange Act of 1934 and adds disclosure and reporting requirements for corporation regarding conflict minerals. The provision entails a requirement to

[71] U.S.A Congress, 'Summary of the Business Supply Chain Transparency on Trafficking and Slavery Act (2015)', Section 2 (a)(3)), <https://www.congress.gov/bill/114th-congress/house-bill/3226> accessed 19 April 2017.
[72] Galit A Sarfaty, p. 430.
[73] U.S.A. Congress, 'All Actions S.1968 – 114th Congress (2015-2016)' <https://www.congress.gov/bill/114th-congress/senate-bill/1968/all-actions?q=%7B%22search%22%3A%5B%22Business+Supply+Chain+Transparency+Trafficking+and+Slavery+Act+2015%22%5D%7D&r=1> accessed 19 April 2017.
[74] Galit A Sarfaty, p. 440.
[75] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), preamble.
[76] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Sec. 1502 (a).

annually disclose whether conflict minerals, necessary to the functionality or production of a product manufactured by the company, originates from the DRC or an adjoining country[77].[78] A description of the measures taken to exercise due diligence in the source and chains of custody of such minerals is required, and products manufactured or contracted to be manufactured that aren't DRC conflict free needs to be described[79]. A product that "does not contain conflict minerals that directly of indirectly finance or benefit armed groups in the Democratic Republic of Congo or an adjoining country"[80] may be labelled as 'DRC conflict free'. Companies are thus required to examine their supply chains to determine whether they use certain 'conflict minerals', such as coltan or gold, and thoroughly report their sources. The due diligence must meet nationally or internationally recognised standards such as the OECD Due Diligence guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas[81]. The disclosure process is a three-stage process including firstly the determination of whether the company is subject to the provision, secondly, if so, investigate the country of origin of their materials and thirdly, if necessary prepare a Conflict Minerals Report. The second and third stages trigger mandatory reporting.[82] These rules directly affect approximately 6, 000 companies and additionally thousands of these companies' suppliers[83]. The EU estimated that approximately 150,000 – 200,000 EU companies are involved, mostly downstream, in the supply chains of the companies affected by section 1502[84]. This legislation thus have the power to make companies, from anywhere in the world that supply companies covered by section 1502 of the Dodd-Frank Act, to investigate their suppliers in order to be able to provide information about the origin of certain material. In the event of using material from DRC or its adjoining countries, suppliers and manufactures may also need to exercise due diligence to maintain their business with the U.S. based ordering company.[85]

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[77] Adjoining countries: Angola, Burundi, Central African Republic, Rwanda, South Sudan, Tanzania, Uganda and Zambia.
[78] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Sec. 1502, subsection (p), (1)(A), (2)(B).
[79] Ibid, subsection (p), (1)(A).
[80] Ibid, subsection (p), (1)(D).
[81] Galit A Sarfaty, p. 422.
[82] Mehra Amol, Blackwell Sara, *Business and Human Rights: From Principles to Practice,* p. 289.
[83] Galit A Sarfaty, p. 431.
[84] Remi Moncel, p. 224.
[85] Global Witness, *Tackling Conflict Minerals: How a New Chinese Initiative Can Address Chinese Companies* (October 2014), p. 17. Available at: https://www.globalwitness.org/sv/reports/tackling-conflict-minerals/ last accessed 20 May 2017.

While some companies have embraced the new legislation and initiated measures to assess their supply chains, others have taken legal action to challenge the law in court as they have considered it burdensome and arbitrary. Section 1502 was questioned on constitutional grounds by asserting the right to freedom of expression under the First Amendment. The U.S. Court of Appeals (for the District of Colombia Circuit) upheld the act, although the ruling did come with a backlash as the labelling of products that are not 'DRC conflict free' was in the Courts view to be considered as a violation of freedom of expression[86].

The EU have also initiated legislating more extensive corporate responsibility in regards to conflict minerals. In May 2015 the European Parliament endorsed a mandatory regulation to prevent the minerals trade from funding conflict and human rights violations. This legislation will require the majority of EU importers to disclose relevant information and exercise due diligence in their supply chains.[87] The proposed law is estimated to affect more than 800,000 companies operating in the EU-market and would have a broader scope than section 1502 of the Dodd-Frank Act as it will apply to all conflict affected areas and not just the DRC-region[88]. The obligations are not expected to come into effect until 2021 however and will therefore not be described further in this thesis[89].

The Dodd-Frank Act is the oldest of the laws included in this discourse and is therefore the one of which the effects best can be assessed. Section 1502 of the act has been in place for about six years and the first reports were filed with the U.S. Securities and Exchange Commission in 2014[90]. In this first year of reporting 1,313[91] companies filed reports, though the SEC had estimated that approximately

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[86] Global Witness, 'U.S. appeals court ruling on conflict minerals maw is a partial victory, says global witness: Court's decision on free speech violation disappointing' (Press Release, 15 April, 2014) <https://www.globalwitness.org/sv/archive/us-appeals-court-ruling-conflict-minerals-law-partial-victory-says-global-witness-courts-0/> accessed 7 May 2017.

[87] European Parliament News, 'Conflict minerals: MEPs secure due diligence obligations for importers' (press release, 16 March, 2017) <http://www.europarl.europa.eu/news/en/news-room/20170308IPR65672/conflict-minerals-meps-secure-due-diligence-obligations-for-importers> accessed 8 May 2017.

[88] Galit A Sarfaty, p. 440, See also European Parliament, 'Audiovisual Services for Media' (News alert 16 March 2017) <http://audiovisual.europarl.europa.eu/conflict-minerals> accessed 24 May 2017.

[89] European Parliament News, Conflict minerals.

[90] Global Witness and Amnesty International, *Digging for Transparency: How U.S. Companies are Only Scratching the Surface of Conflict Minerals* (Report, 2015), p. 4. Available at: https://www.globalwitness.org/en/campaigns/conflict-minerals/digging-transparency/ last accessed 20 May 2017.

[91] Olga Usvyatsky, 'An initial look at conflict minerals & Dodd Frank section 1502' (audit analytics, 23 June, 2014) <http://www.auditanalytics.com/blog/an-initial-look-at-conflict-minerals-dodd-frank-section-1502/> accessed 18 May 2017.

6000 companies would file conflict minerals disclosure, thus an overestimation on approximately 350 per cent[92]. The majority of the reporting companies took advantage of the freedom established as a result of the court ruling and gave no conclusion of the conflict status of their products. While approximately 80 per cent listed no conflict status, circa 20 per cent choose to list their products as 'conflict undeterminable'. While most didn't disclose why, some referred to the smelters and refiners process, where ores from different regions are combined making the origin of the minerals almost impossible to track.[93] Unsurprisingly, no companies reported to be sourcing from a militarised mine[94]. In a *Harvard Business Law Review* article entailing a thorough assessment of the first year of reporting the author stated that "[t]he filing lacks the type of specifics that could inspire investors to reallocate their money or consumers to reassess their purchasing habits"[95]. The requirements are thus not demanding enough to assure comprehensive reporting to initiate a change of consumer behaviour.

In a report on the effectiveness of the Dodd-Frank Act conducted by Amnesty International and Global Witness, one hundred companies were assessed to evaluate if they had met the minimum requirements of the Act. The assessment included the top five companies by market capitalisation across the ten most relevant sectors; additionally another fifty companies were randomly selected.[96] Among others included in the assessment were *Apple, Boeing Company, Costco Wholesale, Microsoft, Tessla Motors, Tiffany & Co.,* and *Macy's* [97]. The minerals encompassed by section 1502 are used in the production of among other things jewellery, mobile phones, airplanes and medical equipment[98]. The Amnesty International and Global Witness report found that in this first year of reporting, 21 per cent of the companies assessed met the minimum requirements of the conflict minerals legislation[99]. Sixteen per cent of the companies disclosed names of at least one country from where the minerals in their products originated and only one company, *Boeing,* disclosed information of what particular mine some of its

[92] Jeff Schwartz, *The Conflict Minerals Experiment* (Harvard Business Law Review, Vol 6, 2016), p. 141 and 195.
[93] Jeff Schwartz, p. 152-154.
[94] Ibid, p. 159.
[95] Ibid.
[96] Global Witness: Digging for Transparency, p. 6.
[97] Ibid, Annex I p. 35.
[98] Ibid, p. 9.
[99] Ibid, p. 5.

minerals came from[100]. Despite the low percentage of companies meeting the minimum requirement of the reporting, Amnesty International and Global Witness features this as a positive aspect, showing that reporting of this kind is possible and highlights the great potential of improvement that's expected in years to come.

Although, however positive Amnesty International and global Witness may be, the opinions differ as to whether section 1502 of the Dodd-Frank Act has had a positive impact or not. Critics of section 1502 claim that the act has brought much hardship for the people in the DRC and other countries affected by the legislation. The prominent journalist Lauren Wolfe writes in an article for *Foreign Policy* in February 2015 that only a minimal part of the conflict in the DRC has to do with natural resources. The armed groups are not dependent on minerals for their existence and can easily turn to other means to get capital as for instance the selling of palm oil, cannabis or exercise extortion or illegal taxation. In her article, Wolfe shines light on the mining ban that was placed on mines in certain provinces by the Congolese President Joseph Kabilua, as a result of section 1502. Supposedly this ban robbed many of their livelihoods.[101] In a *Washington Post* article it's reported that in 2014, four years after the amendment had passed, the Congolese miners by estimation got 3 USD less per kilogram of tin even though the global market price had increased[102]. Wolfe also addresses how some minerals with a questionable origin falsely are being labelled as 'Conflict Free' since many officials are poor and therefore easily bribed. Moreover some minerals are illegally shipped to other countries, which is obstructing the identification of their actual origin.[103] Hence, the issue is very complex and the Dodd-Frank Act is not a perfect solution. As we see changes of corporate behaviour we also witness undesired effects, particularly the people who have lost their livelihood due to section 1502 of the Dodd-Frank Act. Although one important thing should be highlighted as a result of section 1502 of the Dodd-Frank Act: it has initiated a small change of corporate behaviour.

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[100] Ibid, p. 27.
[101] Lauren Wolfe, 'How Dodd-Frank is failing Congo' (2 February, 2015) Foreign Policy <http://foreignpolicy.com/2015/02/02/how-dodd-frank-is-failing-congo-mining-conflict-minerals/> accessed 7 May 2017.
[102] Sadarsan Raghavan, 'How a well-intentioned U.S. law left Congolese miners jobless' (30 November, 2014) The Washington Post <https://www.washingtonpost.com/world/africa/how-a-well-intentioned-us-law-left-congolese-miners-jobless/2014/11/30/14b5924e-69d3-11e4-9fb4-a622dae742a2_story.html?utm_term=.89a75ead5428> accessed 7 May 2017.
[103] Lauren Wolfe.

In the Berkley Journal of International Law, Remi Moncel makes an assessment of whether Section 1502 of the Dodd-Frank Act could result in the previously-mentioned California Effect and conclusively finds that a probability[104]. Primarily the access to the U.S. stock market could be an important factor, which comes with complying with the section 1502 regulations[105]. While some companies disclose more facts than previously on their supply chains to comply with section 1502, others could feel the pressure to meet the these standards, not the least to lessen potential suspicion from consumers in regards to conflict minerals in their supply chains.[106] Even though the U.S. regulations are not as strict as they could be, particularly as they only target the DRC and adjoining countries, the regulations are nevertheless far-reaching. As long as one powerful player has stricter rules than its foreign counterparts, companies who want to enter the market of the stricter actor must align with the those regulations. Hence that the Dodd Frank Section 1502 regulations aren't as strict as they could be does not disqualify them from being able to initiate the California effect. Moreover, whether companies need to adjust their practices worldwide to comply with the U.S. regulations is a vital assessment in regards to the California effect. Section 1502 does not limit the requirement to exercise due diligence only concerning minerals that end up in the U.S. but all companies trading on the U.S., stock market are affected. In addition, rather than complying with the regulations due to a legal obligation, companies may choose to comply with the regulations for economic or technical reasons.[107]

In accordance with the above-presented assessment it's likely that Section 1502 of the Dodd Frank Act can initiate the California effect, though as the first reports were published in 2014 and no more than 1,313[108] companies then filed reports, its yet too soon to tell. Nevertheless due to the fact that as many as 6,000 U.S. companies and an estimation of up to 200,000 EU companies acting as suppliers to these, the impact can be major. Especially as the future EU regulations will affect even more companies and also have the potential to mend the gap left by section 1502 due to its narrow focus only on the DRC and adjoining countries since the EU targets not only minerals from the DRC but all conflict minerals. Likewise the EU

[104] Remi Moncel, p. 244.
[105] Ibid, p. 236.
[106] Ibid, p. 237-8.
[107] Ibid, p. 239-240.
[108] Olga Usvyatsky, 'An initial look at conflict minerals & Dodd Frank section 1502' (audit analytics, 23 June, 2014) <http://www.auditanalytics.com/blog/an-initial-look-at-conflict-minerals-dodd-frank-section-1502/> accessed 18 May 2017.

regulations may also thwart the attempts to circumvent the regulations by shipping minerals from the DRC region to other countries not subjects of the regulations as no such 'free zones' from conflict mineral regulations will be left. Although, this argument has not taken into consideration the 'Trump effect'. The newly inaugurated president of the U.S.A. is very sceptical to the conflict mineral reporting. He has criticised them for being to onerous on business and hurtful for the economy and have made efforts to roll back the regulations[109]. Whether or not he succeeds and if the regulations will be altered or repealed completely is yet too soon to tell.

2.3.3 Supply chain reporting and a corporate duty of vigilance

In addition to the future conflict minerals regulations, the EU has recently opened a new chapter of corporate responsibility by demanding corporations to disclose significantly more information than they've been obliged to do before. The European Parliament has acknowledged the importance of businesses disclosing information on various social and environmental factors to be able to identify sustainability risks as well as increase consumer and investor trust[110]. Therefore the European Parliament called upon the Commission to bring forward a legislative proposal "in order to take account of the multidimensional nature of corporate social responsibility (CSR) and the diversity of the CSR policies implemented by business matched by a sufficient level of comparability to meet the needs of investors and other stakeholders as well as the need to provide consumers with easy access to information on the impact of business on society"[111]. In October 2014 the European Union adopted Directive 2014/95/EU amending Directive 2013/34/EU as regard disclosure of non-financial and diversity information by certain large undertakings and groups, to be further on referred to as the non-financial reporting directive. In the preamble to the directive, the need is emphasized to raise the transparency of the social and environmental information

[109] Dominic Rushe, 'Trump orders Dodd-Frank review in effort to roll back financial regulation' (3 February, 2017) The Guardian <https://www.theguardian.com/us-news/2017/feb/03/trump-dodd-frank-act-executive-order-financial-regulations> accessed 23 May 2017.
[110] European Parliament, *Corporate Social Responsibility: Accountable, Transparent and Responsible Business Behaviour and Sustainable Growth*, (Report, January 2013): Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0017+0+DOC+XML+V0//EN last accessed 20 May 2017.
[111] Directive 2014/95/EU, preamble § 3.

provided by undertakings in all sectors, to a similarly high level across all Member States, likewise is the importance of disclosure, for the measuring, monitoring and managing of companies' performance and the impact they have on society[112].

The core of the directive is a requirement for public-interest entities with an average number of at least 500 employees during the financial year to provide a non-financial statement containing information necessary for understanding the company's development, performance, position and the impact of its activities. The statement *shall* to a minimum include environmental, social and employee matters, as well as human rights and anti-corruption matters. The statement shall include the following: a) a brief business model description, b) a description of the policies pursued by the company including due diligence measures, c) the outcomes of those policies, d) the primary risks related to such matters that are linked to the corporation's operations, and e) the key performance indicators. For companies lacking such policies, an explanation for not having them needs to be provided. The directive also entails an "emergency exit" clause as regards disclosure that seriously could be prejudicial to the company's commercial position. In the event of such a risk, Member States may allow information that relates to impending developments or matters under negotiation to be omitted in exceptional cases.[113] The commission is supposed to publish non-binding guidelines on the methodology for the reporting of this non-financial information[114]. The implementation of the directive shall be reviewed, as well as a report on the scope and effectiveness of the directive and the level of guidance and methods provided. That report shall be published no later than December 6, 2018[115]. The member states had to finalise the transposition into national legislation by the 6th of December 2016[116]. Thus the effects won't be made available for assessment before the beginning of 2018 when the reports on financial year 2017 are published. The exception clause and some interpretational aspects of the directive have been criticized, though the directive is generally warmly welcomed as a new chapter for corporate responsibility.[117] The directive entails no due diligence requirements, but similarly as the modern slavery

[112] Ibid, preamble § 1.
[113] Directive 2014/95/EU, Article 1.
[114] Ibid, Article 2.
[115] Ibid, Article 3.
[116] Ibid, Article 4.
[117] European Coalition for Corporate Justice, *Assessment of the EU Directive on the Disclosure of Non-Financial Information by Certain Large Companies* (May 2014). Available at: http://corporatejustice.org/documents/eccj-briefing---assessment-of-the-nfr-reform-short-public-version.pdf last accessed 20 May 2017.

laws, companies lacking the policies that are subjects of disclosure must make it known why such policies are absent. Naturally companies will not admit to not caring or not wanting to make an effort, meaning that many presumably rather than disclose the absence of efforts, will publish statements on the goals set for the future or similar declarations, to portray the image of a serious and committed company.

The front-runner in terms of corporate human rights responsibility may be France that, as recently as in March 2017, passed a law legislating corporate vigilance. Initially the proposed bill was an ambitious far-reaching law placing extensive responsibility on corporations. The proposition was introduced in the French Parliament in 2015, following the Rana Plaza disaster in Bangladesh and a ground-breaking criminal case regarding the Erika oil spill[118]. The Erica oil spill was a criminal case in 2012 following the tanker Erika, which sank of the coast of Brittany dumping 30 000 barrels of heavy fuel oil into the Atlantic sea. The French oil giant *Total*, the owner of Erika and its manager were found guilty of negligence alongside *Rina*, the Italian company that had declared the ship seaworthy. *Total* was fined 375, 000 euros and ordered to pay nearly 200 million euros in damages to the French state and the local fishing industry.[119]

The first version of the French bill that was presented in the Parliament was very ambitious including obligations for companies to prevent sanitary, environmental and human rights damages. The proposition included the possibility of holding companies liable if damage occurs; unless the company could prove it did everything it could to prevent the damage. This responsibility was to be dependent on the company's means and position, meaning that bigger companies would have had more extensive responsibility than small ones. Furthermore the bill included a presumption of responsibility if the company could not demonstrate that all necessary measures had been adopted to prevent damages. This would thus have meant a reversed burden of proof, placing the burden on the company if a claim of such damage had been brought before a court.[120] The first proposition was not adopted and emerged into a second seriously modified draft that was put forward in

[118] Nadia Bernaz, 'Unpacking the French bill on corporate due diligence; a presentation at the international business and human rights conference in Sevilla' (21 October 2016) Rights as Usual <http://rightsasusual.com/?p=1087> accessed 19 April 2017.
[119] BBC, 'France upholds total verdict over Erika oil spill' (25 September, 2012) <http://www.bbc.com/news/world-europe-19712798> accessed 19 April 2017.
[120] Nadia Bernaz (Rights as Usual).

February 2015. The French 'Assemblée Nationale' adopted the second proposition, though the Senate rejected it. In March 2016 the 'Assemblée Nationale' adopted the bill again during a second reading and the Senate thereafter adopted a modified version of the bill. [121]

As a result of this chaotic course the bill was referred to the Constitutional Council, which rendered its decision on the 23rd of March 2017 leading to the law becoming effective on the 27th of March 2017[122]. The law states (in its English translation) that "[a]ny company that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad but operates in France, must establish and implement an effective vigilance plan"[123]. Thus the French law doesn't use profits as a criterion but focus on the size of the company instead. The mandatory vigilance plan shall include reasonable vigilance measures for the identification of risks of severe human rights violations, serious physical injuries, health risks and environmental damage that directly or indirectly could result form the company's operations and of companies that it controls[124]. The vigilance plan shall include the following measures: 1) an identification, analysis and ranking of risks, 2) procedures to regularly assess subsidiaries, subcontractors or suppliers with whom the company has business relationships with, 3) appropriate actions to mitigate risks or prevent serious violations, 4) a, with trade union representatives, developed alert mechanism that collects reporting of risks, and 5) a monitoring system to follow up the implemented measures and assess the efficiency. The vigilance plan and an implementation report shall be publicly disclosed. For not meeting the obligations of the provision to set up a vigilance plan the company could have been liable to pay a fine of up to € 30 million.[125] The Constitutional

[121] Nadia Bernaz (Rights as Usual).
[122] Morgan Lewis, 'French companies must show duty of care for human and environmental rights' (4 April, 2017) <http://www.jdsupra.com/legalnews/french-companies-must-show-duty-of-care-56981/> accessed 19 April 2017.
[123] European Coalition for Corporate Justice, *French Duty of Vigilance Law: English translation,* article 1. *Available at: http://corporatejustice.org/documents/publications/ngo-translation-french-corporate-duty-of-vigilance-law.pdf* last accessed 20 May 2017.
[124] French Duty of Vigilance Law: English translation Art 1.
[125] Ibid, Art 1.

Council however removed this penalty, while allowing penalties to apply for companies defaulting on vigilance obligations[126].

The EU directive is the first step in the process of including corporate responsibility in EU law and the very ambitious amendment requires approximately 6, 000 large companies listed on EU markets or operating in the banking and insurance sectors, to disclosure relevant information. The French domestic legislation is estimated to affect about 150 companies[127] and pursues the aim to impose a major duty on companies to actively care for their employees and the environment, not excluding subcontractors in countries with a weaker human rights and environment protection[128]. The new French bill allows for concerned parties and victims to report companies that fail to monitor themselves or publish reports. Though there are concerns that an unfair burden of proof has been placed on victims. In the event of an incident, a company can verify that it has implemented a vigilance plan and thus be found not liable for damages, which leads many to question the power of this law to generate change, non-the-least since companies aren't obliged to show proof of improvement, but merely proof of effort.[129] Nevertheless, this law goes further than any of the others in terms of corporate due diligence responsibility and similarly as public pressure is expected to incentivise companies to improve their human rights related policies, this law has much potential to initiate change. The first rejected proposition of the French law that included more far-reaching corporate obligations arguably testifies to a step yet not ready to be taken. Reiterating the UN Guiding Principles merely indicating the corporate responsibility to refrain from adverse human rights impacts, rather than taking active precautionary measures, also suggests it may yet be premature to place such responsibility on companies. Nevertheless the French vigilance law stands out from all other laws addressed in this chapter as it does not only ensure transparency of corporations' sustainability policies, but also demand measures to be taken; observe the requirement to "establish and *implement* an

[126] European Coalition for Corporate Justice, *France: Constitutional Council Reaches Favourable Decision on Corporate Duty of Vigilance Law* (March 24 2017). Available at: http://corporatejustice.org/news/435-last-hurdle-overcome-for-landmark-legislation-french-corporate-duty-of-vigilance-law-gets-green-light-from-constitutional-council last accessed 20 May 2017.
[127] Cassidy Slater, 'How the French are tackling modern slavery' (24 March 2017) <http://www.humanrightsfirst.org/blog/how-french-are-tackling-modern-slavery> accessed 20 April, 2017.
[128] Morgan Lewis.
[129] Cassidy Slater.

effective vigilance plan"[130](authors own italics). Thus a legal, *hard law,* responsibility of acting for the prevention of severe human rights violations has been placed on French companies affected by the legislation. This legislation is of immediate application meaning that the companies, which fall within the scope of the law, instantaneously must draft their vigilance plans, though as this law very recently came into force[131] it's not yet possible to establish its effectiveness. Likewise the EU directive has just passed the date for the Member States' implementation meaning that the first reports are expected to be made available in the beginning of 2018.

2.4 A new chapter of transparent supply chains

The most powerful aspect of all the above addressed laws is their wide-reaching effect. While the laws are domestic the supply chains are not, but rather stretched over many countries, sometimes in different continents. For electronic components for instance there can be more than fifty different entities in the supply chain[132]. Likewise as the California Effect could be initiated as a result of the Dodd-Frank act, the same potential could lie with the other laws as well. Viewing them all combined, they have all set new standard for the disclosure of information on suppliers and what policies companies have towards such. Any company wanting to operate within the EU for instance must to the very least make considerations concerning modern slavery. Hence as the UK has initiated Brexit, presumably it cannot be expected to abide by the more extensive EU regulations. Nevertheless, likewise as the EU initiated higher standards for household chemicals in 2007 the same effect could come of the requirements of supply chain transparency. With such powerful players as the U.S. and soon the EU in regards to conflict minerals, as well as the EU[133] supported by California and maybe also the entire U.S. if the proposed bill on modern slavery is approved, a strong trend of corporate transparency has been initiated. While powerful companies holding large market

[130] French Duty of Vigilance Law: English Translation, article 1.
[131] Morgan Lewis.
[132] Galit A Sarfaty, p. 431 & 440.
[133] Modern Slavery is included within the EU directive as it entails the disclosure of "environmental, social, employee, human rights and anti-corruption. See Directive 2014/95/EU, Article 1.

shares[134] are covered by the new regulations and set new standards in their supply chains, not to be excluded, suppliers also need to comply with the ordering companies new demands. Presumably, a company with a large market share may be able to impose higher demands towards its suppliers, as it presumably is a large actor in the field. Though while pondering on such an effect, it may take years before it reaches the suppliers furthest from the retailer. It's also important to observe that exercising due diligence, improving labour conditions and human rights policies can be costly and challenging[135] not the least since some suppliers provide little or no information on the origin of products[136].

Whether the new laws will initiate a domino effect of improved standards in supply chains depend much on the power of the disclosed information, as all but the French law merely demands transparency and not due diligence measures per se. In regards to all of the previously addressed laws it's underlined that the legislated reporting is expected to facilitate for outside evaluators to assess corporations' adverse human rights impacts. Thus for such reporting to be of use, it's crucial that it is comprehensive and assessable. An issue stressed in regards to all the laws requiring supply chain-related disclosure, is the risk of companies filing incomplete reports or incomprehensive disclosure[137]. Weak efforts only to meet the minimum requirement of the transparency legislation undermines the purpose of supply chain-related regulations and great responsibility is therefore also placed on society to assess and react. Reporting does not automatically equal accountability, though it enables stakeholders to get access to valuable information on a company's human rights impacts and therefore it has the power to enable accountability[138]. Thus the Californian approach for eliminating modern slavery for instance could be more effective than the British attempt as the transparency regulations in California are less lenient. A lack of clear standards for measurement as in the UK, could jeopardize the purpose of the transparency requirements since general disclosure that is disconnected from the actual conditions on the ground is pointless. Whether or not the hypothesis of incomprehensive disclosure is true can't be clarified before some time has passed when independent audits of the disclosed information have determined its comprehensiveness and accuracy. Although surely it ought to be helped by laws allowing concerned parties as well as independent citizens to hold

[134] E.g. L'Oréal, Renault, Apple, H&M.
[135] See E.g. Economist Intelligence Unit, p. 4-5.
[136] Galit A Sarfaty, p. 431 & 440.
[137] See E.g. E.g. International Trade Union Confederation p. 6, and Remi Moncel, p. 238.
[138] Mehra Amol, Blackwell Sara, *Business and Human Rights: From Principles to Practice,* p. 282.

companies accountable for the failure to comply with the regulations, as for instance the California Transparency in Supply Chains Act and the French Corporate Duty of Vigilance Law.

What might pose a great obstacle for improved human rights related policies for supply chains is also the risk of audits made for show or corrupted officials. As Wolfe underlined in regards to the audits of minerals, an economical remuneration might be an incentive to look the other way when, for instance conducting audits of labour conditions in factories. Hence, that a product appears to be untainted and therefore also appear as a product that can be bought without a guilty conscience undermines the purpose of the supply chain-related regulations to improve and shine light on the conditions and circumstances in the supply chains. Concerning certification of products, a simplified view of companies' efforts to comply with the new regulations may be that companies either will implement new policies themselves, or turn to consulting firms to assist them with the compliance. Within the pursuit of untainted products, the question surfaces whether consumers will rely equally on companies working on their own to ensure compliance, or if an independent audit will inspire more confidence in the company's' commitment to assure its products are untainted. These queries will be discussed in the following chapter.

2.4.1 The business argument for corporate transparency

In regards to the power of transparency, if exercised responsibly by corporations, it may not only serve a purpose for consumers' thirst for relevant information and for workers' whom are expected to benefit from better working conditions, but there's also a business aspect. While there are many reasons companies could want to avoid disclosing information on such as legal liability issues, and the risk of market and investor reactions, advocating for the opposite however there are many positive aspects. Adequate due diligence measures and the efforts made to ensure that relevant information is being disclosed can protect and enhance an organisation's reputation and brand. Such effort can also protect and contribute to a growing customer base as it's predicted that more consumers will tend to seek out businesses with high ethical standards. Furthermore, reporting on responsible

business conduct is expected to improve investor confidence, increase loyalty amongst the staff due to the protected values, as well as result in development of more responsible, stable and innovative supply chains. Accordingly the reporting requirements have the potential to drive for better strategic understanding of the risks and impacts of organisations' core activities that concerns human rights and the environment.[139] Moreover, another aspect that has been brought forward as an argument for the disclosure of supplier information is that some factories publish information on their business relationships that might not be updated or is misleading. By publishing supplier information themselves, companies can also protect themselves from wrongly being associated with factories accountable for human rights abuses, as well as eliminate or at least mitigate as the risk of workers demanding remedy from the wrong company for such abuses.[140] Hence there are many positive aspects of corporate transparency and companies can have much to gain from being transparent. The reflection outwards as a serious and responsible company can add to a positive perception of the brand and appeal to the consumers. Thus while maintaining the perspective of the responsible consumer in the market for untainted products, the access to relevant product information portrays the image of a serious and responsible company. Furthermore a policy to disclose information on its business conduct might incentivise more internal investigations and due diligence actions to assure the information made available is accurate. Responsible business conduct is furthermore an increasingly common business strategy to meet the demands of consumers in the pursuit of untainted products.

[139] UK Home Office Practical Guide, p. 5.
[140] Human Rights Watch: Follow the Thread, p. 4-5.

3 Assessing companies' human rights impacts and its challenges

In the previous chapter it was addressed how consumers find it too challenging to incorporate human rights considerations into their consumption habits. With the transparency legislation in place there's a lot more available information of corporations human rights impacts. However, consumers arguably don't want to be flooded with information, but rather want clear and comprehensive knowledge that make the difference between companies and their products easily assessable. Various tools and external bodies are available to assist in that assessment, but unfortunately they're not simply to be relied on for making the evaluation for us. As will be demonstrated in the case of Kasky v. Nike there are regulations in place for the protection of consumers against companies' marketing and those also include the marketing of companies' human rights commitments. The first part of this chapter will discuss and tackle this subject and the second part will then evaluate at what stage we currently are at globally concerning corporate human rights responsibility.

3.1 Corporations' marketing of their human rights commitments

In a simplified view, there are two types of sustainability certifications; producer-led certification and NGO conducted certification. Additionally there might also be a hybrid constituted of NGOs put together by a group of companies for the certifying of their products. The easy verifiable claims, such as price or taste that are directly assessable just before or after a product has been purchased, are for the consumer more trustworthy than claims which are more abstract such as the well being of the workers that have had a part in the making of the product.[141] Studies of eco-labels have shown that consumers tend to have more trust in NGO certifications than producer-led certifications as the NGO certifications are presumed to be more independent and serve a better purpose than a company's

[141] Hajin Kim, p. 190-191.

own certification[142]. In the following sections the previously mentioned case of Kasky v. Nike and the product certification organisation Fairtrade will be addressed. The case of Kasky v. Nike took place when corporate responsibility for human rights was at its infancy and entails many thought-provoking aspects and also serves as an example of producer-led sustainability claims that motivate the scepticism towards such statements. Likewise is Fairtrade an example of NGO certification.

3.1.1 The case of Kasky v. Nike

In the start of 1996, the sports brand Nike received a lot of negative attention due to serious allegations of human rights violations in their factories. Nike claimed the conditions in their factories were favourable though according to the allegations factory workers were being paid less than minimum wage and required to work overtime as well as subjected to verbal, physical and sexual abuse. The allegations also included that the workers were exposed to noise, heat, toxic chemicals and likewise without adequate safety equipment in violation of local health and safety regulations.[143] Allegedly Nike had also made false claims of guaranteeing decent living wages for its workers, which a letter written by a director of Nike's labour practices department testifies to as false by acknowledging that the wages paid to workers was insufficient to support the needs of a small family[144].

The California resident Marc Kasky sued Nike for practices he claimed were unfair and deceptive under the California Competition Law and False Advertising Law "on behalf of the General Public of California and on information and belief"[145]. Kasky alleged that Nike "in order to maintain an/or increase its sales […] made a number of […] false statements and/or omission of fact"[146]. Kasky sought an order requiring Nike to disgorge all the earnings Nike had made due to this allegedly unlawful conduct and sought a court-approved public information campaign correcting the alleged mistreatment including an injunction to prohibit future misrepresentation of the working conditions in Nike's supply chains. Nike filed a demurrer claiming that the First Amendment (Freedom of expression) constituted a

[142] Hajin Kim, p. 199-201.
[143] Marc Kasky v. Nike, Inc., et al.: S087859 (2002).
[144] Tamara R. Piety, *Why the ACLU was Wrong About Nike, INC. v. Kasky* (41 Tulsa L. Rev. 715, 2005-2006), p. 734.
[145] Nike, Inc., et al v. Kasky: 539 U.S. 654 (2003), p. 656.
[146] Nike v. Kasky, p. 656.

full protection for its statements.[147] Both the Trial and Appeals Court dismissed the case, though the California Supreme Court had another view and held that Nike's statements did constitute commercial speech and therefore were not barred by the First Amendment as Nike had claimed and subsequently reversed the case. Nike then appealed this ruling to the U.S. Supreme Court, which in term dismissed the writ of certiorari as improvidently granted.[148] Consequently the California Supreme Court ruling was let stand.

Returning to the California Supreme Court ruling, the issue the Court addressed was whether Nike's "statements [were] commercial or non commercial speech for purposes of constitutional free speech analysis under the state and federal Constitutions"[149]. The purpose of the California Unfair Competition Law is to "protect both consumers and competitors by promoting fair competition in commercial markets for goods and services"[150] and includes the prohibition of unlawful, unfair or fraudulent business acts, as well as deceptive, untrue or misleading advertising.[151] Furthermore, according to the California False Advertising Law, it's unlawful for a corporation to make a statement "with intent directly or indirectly to dispose of real or personal property or to perform services… or to induce the public to enter into any obligation relating thereto […] which is untrue or misleading, and which is known, or […] should be known, to be untrue or misleading"[152]. The Court subsequently recognised that a violation of the False Advertising Law also violates the Unfair Competition Law[153].

Nike had stated the following in regards to their labour policies in a letter written to a newspaper: "[c]onsumers are savvy and want to know they support companies with good products and practices [and d]uring the shopping season, we encourage shoppers to remember that Nike is the industry's leader in improving factory conditions"[154]. The Court conclusively held that "[b]ecause the messages in question were directed by a commercial speaker to a commercial audience, and because they made representations of fact about the speaker's own business operations for the purpose of promoting sales of its products, […] these messages

[147] Nike, Inc., et al v. Kasky: 539 U.S. 654 (2003), p. 656.
[148] Ibid.
[149] Marc Kasky v. Nike, Inc., et al.: S087859 (2002).
[150] Ibid.
[151] Ibid.
[152] Ibid.
[153] Ibid.
[154] Ibid.

are commercial speech for purposes of applying state laws barring false and misleading commercial messages"[155], such speech accordingly need to be truthful[156]. The Court didn't consider the fact that Nike responded to publicly raised charges and thus engaged in a public debate, as excluding the statement from being considered as commercial. In fact the Court didn't even think that aspect mattered. After the US Supreme Court's decision, instead of continuing the proceeding in the Trial Court, Nike and Kasky agreed to settle the case for 1.5 million USD. The settlement also included investments for Nike to improve its policies for its factories.[157]

An interesting aspect of the Nike case is that the American Civil Liberties Union (ACLU) sided with Nike in this case and focused on the freedom of expression aspect, as opposed to addressing the issue of the alleged ill treatment of workers. The ACLU argued that the California Supreme Court ruling opened the door to allowing First Amendment rights to be weakened due to an expansion of the commercial speech definition. The organisation underlined how the public has an interest in hearing a balanced debate and observed that the limitation of Nike's First Amendment rights prohibits such a balance. That one side is held more accountable than the other for the accuracy of its statements based on its economic interests, was in ACLU's opinion a distortion of the debate.[158] The arguments used by Nike as well as the ACLU's position in the case, have been the subject of extensive criticism. Tamara R. Piety, who wrote a brief amici curiae on Marc Kasky's behalf, stated how she finds it interesting that Nike managed to convince the Court that it had a say in a public debate and that it thus was speaking on matters of public concern rather than marketing itself[159]. A corporation is a person for many legal issues, though for constitutional purposes, its not.[160] As Nike "encourage[d] shoppers to remember that Nike is the industry's leader in improving factory conditions"[161] it did indeed tell consumers they won't contribute to intolerable working conditions by buying Nike products. Why should such a

[155] Marc Kasky v. Nike, Inc., et al.: S087859 (2002).
[156] Ibid.
[157] Business and Human Rights Resource Centre, 'Nike lawsuit (Kasky v Nike, re denial of labour abuses)' (18 February, 2014) <https://www.business-humanrights.org/en/nike-lawsuit-kasky-v-nike-re-denial-of-labour-abuses-0#c9325> accessed 29 April 2017.
[158] American Civil Liberties Union, *NIKE, INC., et al.,v. Marc Kasky: Brief amici curiae of the American Civil Liberties Union and the ACLU of northern California in support of the petitioner* (No. 02-575), p. 3-4.
[159] Tamara R. Piety, p. 720.
[160] Ibid, p. 725.
[161] Marc Kasky v. Nike, Inc., et al.: S087859 (2002).

statement be protected form liability if it's not true? The ACLU noted: that to safeguard the consumer's interest in a "free flow of information and ideas"[162], commercial speech is protected. Though, what interest does consumers have in information that's not accurate? Ensuring that the information was accurate was what Kasky sought with the lawsuit. "Nike had, and continues to have, the most powerful incentive to disseminate its message of any of the speakers involved – a financial one"[163] Piety states while questioning what possibly could be a decent justification for protecting manufacturers from liability for false information[164].

3.1.2 Fairtrade

As opposed to sustainability efforts linked to a particular brand as Nike can exemplify, another approach for sustainable products is labels. The eco-label Index claims to be the largest global directory of eco-labels, tracking 465 eco-labels alone in almost 200 countries[165]. It's consequently safe to argue that the supply of eco-labels is enormous, which also makes it difficult for the consumer to know which ones to use. Fairtrade, as a well-known label with high popularity exemplifies many of the aspects of the reliance on labels for guilt free shopping.

The Fairtrade label is according to its own portrayal an alternative approach to conventional trade. The concept is based on a partnership between producers and consumers, where the farmers selling on Fairtrade terms is provided with a better deal and improved terms of trade, allowing them the opportunity to improve their lives. "Fairtrade offers consumers a powerful way to reduce poverty through their every day shopping"[166] it says on Fairtrade's website. Products carrying the Fairtrade mark mean the assurance that producers have met the Fairtrade Standards, which are designed to address the imbalance of power in trading relationships and the injustices of conventional trade. One set of these standards apply to smallholders working together in cooperatives or other organisations with a democratic structure, and the other set applies to workers whose employers pay decent wages, guarantee the right to join trade unions, ensure health and safety standards as well as provide adequate housing when relevant. The Fairtrade

[162] ACLU amici curiae, p. 7.
[163] Tamara R. Piety, p. 731.
[164] Ibid, p. 733.
[165] Eco-labels Index, 'Home' <http://www.ecolabelindex.com> accessed 2 May 2017.
[166] Fairtrade, 'What is Fairtrade?' <https://www.fairtrade.net/about-fairtrade/what-is-fairtrade.html> accessed on April 21 2017.

standards exist for the production of foodstuffs such as tea, coffee, nuts and fruits and are also available for products such as flowers, plants and seed cotton.[167] Fairtrade was launched in 1988 and has been highly popular amongst consumers in the wealthier countries. As a measurement, 6.9 billion USD was spent on Fairtrade products worldwide in 2014.[168]

In regards to the effectiveness of Fairtrade products, among others William MacAskill, associate professor in philosophy at the University of Oxford and cofounder of the 'Effective Altruism Movement' has shown severe scepticism towards the Fairtrade concept. According to MacAskill's study there are quite a few issues with the Fairtrade label. Firstly, the Fairtrade standards are difficult to meet and the poorest people cannot afford living up to them. Therefore the majority of for instance Fairtrade coffee comes from comparatively rich countries like Mexico and Costa Rica that by estimation are ten times richer than the very poorest countries such as Ethiopia. Secondly MacAskill criticises Fairtrade for the fact that very little of the extra money spent by the consumer ends up with the farmers as a lot of it goes to middlemen.[169] According to Dr. Peter Griffith, an economist who among other things has worked as a consultant for the World Bank and the UN, one of the largest café chains in Britain has charged up to 10p extra per Fairtrade cup of coffee, but only 1 per cent of that extra money reached the third world exporter[170]. Furthermore MacAskill informs that the little money that eventually reaches the producer doesn't necessarily ensure higher wages for the workers. "It guarantees a higher price for goods from Fairtrade-certified organisations, but that higher price doesn't guarantee a higher price for the farmers who work for those organizations"[171]. According to a study on 'Fairtrade, employment and poverty reduction in Ethiopia and Uganda', Fairtrade workers had systematically lower wages than the workers in non-Fairtrade production[172]. Christopher Cramer, one of the main authors of this study report, concluded that "the British public has been led to believe that by paying extra for Fairtrade certified coffee, tea and flowers

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[167] Fairtrade, 'What is Fairtrade?'.
[168] William MacAskill, p. 133.
[169] Ibid, p. 133-134.
[170] Peter Griffiths 'Ethical objections to Fairtrade' (July 2011) Journal of Business Ethics <http://www.griffithsspeaker.com/Fairtrade/Ethical%20Objections%20to%20Fairtrade%20web.pdf > accessed 16 May 2017.
[171] William MacAskill, p. 134.
[172] Christopher Cramer and others, *Fairtrade, Employment and Poverty Reduction in Ethiopia and Uganda* (University of London, April 2014). Available at: https://www.fairtrade.at/fileadmin/AT/Was_ist_FAIRTRADE/Wirkung/Studien/SOAS_Studie_2014.pdf last accessed 20 May 2017.

they will 'make a difference' to the lives of poor Africans […]. Careful fieldwork and analysis in this four-year project leads to the conclusion that in our research sites, Fairtrade has not been an effective mechanism for improving the lives of wage workers, the poorest rural people."[173].

3.1.3 Concuding observations

The case of Kasky v. Nike and Fairtrade exemplifies two different approaches of making a business case out of human rights commitments as both appeal to the consumers' conscience encouraging them to buy "good" products. In Nike's case, it's products untainted from intolerable labour conditions and Fairtrade refers to the opportunity to "*reduce poverty* through […] every day shopping"[174](authors own italics). Although in line with the previous discussions, both of these examples have portrayed a misleading image of their label. The Nike label promises decent working conditions and Fairtrade assures poverty reduction for the extra money spent on Fairtrade products. As Nike made false statements of their commitments to the respect of decent labour conditions it becomes apparent that Nike's in the best position to assess whether their statements are accurate or not and as Piety observed, what interest does consumers have in information that's not accurate? When using human rights commitment as a market strategy it's vital that the statements made are accurate as consumers are expected to make their decisions based on the information made available. Furthermore, as Piety stressed it's noteworthy that Nike managed to convince the Trial and Appeals Courts it had a say in a public debate. This aspect arguably reflects the powerful position a global enterprise can have. From a consumer perspective it's highly questionable why corporations should have the same fundamental rights and freedoms as private individuals, particularly so as the primary purpose of a company is to generate profit[175].

In regards to Fairtrade it can be established that Fairtrade might not be as great an initiative as people might have believed. The label does assure untainted products,

[173] Carl Mortished, 'Fairtrade coffee fails to help the poor, British report finds', (26 May, 2014) Globe and Mail Toronto <http://www.theglobeandmail.com/report-on-business/international-business/fairtrade-coffee-fails-to-help-the-poor-british-report-finds/article18852585/> accessed on 21 April 2017.
[174] Fairtrade, 'What is Fairtrade?'.
[175] See e.g. Akteibolagslagen Chapter 3 § 3.

but the impact of the label might even be negative as testimonies of how Fairtrade workers are paid less than non-Fairtrade workers have shown. Such deficient or even negative impacts as the above referred to study implies, may give cause for a Fairtrade consumer to feel as they've been taken advantage of. It can subsequently be questioned whether Fairtrade really is fair trade. In the following sections Fairtrade's practices will be discussed further, while concluding that the concept of untainted products is complex and that it's very difficult to fully assess and understand all features of a products and its adverse impacts.

3.2 Competing sustainability efforts

As previously highlighted its expected that consumers and independent audits will assess companies' compliance with the supply chain-related regulations and particularly the consumer power to choose the better products from transparent supply chains is expected to be a factor driving companies to improve their standards. The issue thus surfaces of consumers' struggle to assess and compare various companies' sustainability commitments. In a study of companies' marketing in relation to environmental claims, the author observed many noteworthy aspects of consumer's trust in companies' commitment to environmentally harmless practices. Arguably the same scepticism may apply also for other corporate sustainability commitments. Likewise as consumers find if difficult to assess the truthfulness of a company's claims to provide environmentally harmless products, equal difficulty comes also when assessing a company's claim of providing products untainted from intolerable practices. This assumption forms the basis for the following discussion while the term sustainability will refer to such practices as described in the introductory chapter while also including environmentally harmless practices.

The above introduced study suggests that companies, which are less committed to investing in sustainability, "tag along" with companies that are taking serious efforts to improve their sustainability policies. The risk is that while one company invests in making their production more sustainable and market their efforts, another less serious company may then also market such efforts though by exaggerating its own more scarce efforts, perhaps by using general and vague portrayal of its commitments. The then quite costly efforts made by the more

serious company may not pay off, as the less committed company's products, to the consumer may appear equally good.[176] Supporting this argument is a U.S. study on eco-labels in which almost a third of the products found carried fake labels[177] and other studies have shown how consumers find the various labels and sustainability claims overwhelming and confusing[178]. Thus stressing the previously addressed issue that the new supply chain-related regulations are very costly, many companies may be expected to make a business case of their human rights related policies, also to meet the demand for untainted products. However such an approach relies on a consumer trust and both the Nike case and the Fairtrade example testifies to why such trust mightn't always be easily earned. As noted earlier only about twenty per cent of the business executives in the Economist survey held that human rights was a clear business case for them strengthening the incentive to be sceptical to corporations marketing of their human rights commitments.

As independent certification holds a distinct set of standards, such certification is suggested to work against the consumer scepticism and inspire more trust[179]. Although the Fairtrade example tells us we need to be sceptical also to the independent certifications. Moreover, what might pose complications is that labels both require exclusivity to maintain credibility, but also a large market share for recognition, as familiarity tends to signal something that's tried and trusted[180]. For instance Fairtrade was widely criticized when considering allowing products from large plantations carry the Fairtrade mark that contained as little as 10 per cent Fairtrade ingredients, as opposed to 20 per cent which otherwise is the minimum. Critics accused Fairtrade of "watering down the standards, perhaps motivated by the bigger fees to be earned from certifying a higher volume of products"[181] while expressing the fear that small famers may loose their market share to the big

[176] Hajin Kim, p. 193.
[177] "more than 32% of "greener" products found in this study carried such a fake label, compared to the 26.8% in 2009". Underwriters Laboratories, *The Sins of Greenwashing Home and Family Edition 2010 (Terrachoice: Part of the UL Global Network).* Available at: http://sinsofgreenwashing.com/index35c6.pdf last accessed 20 May 2017.
[178] "48 % percent say they are overwhelmed by environmental messages". Cone Communications, *Consumers take Responsibility for "Green" Actions but aren't Following Through, According to Latest Cone Communications Research* (Trend tracker 2013). Available at: http://www.greenactions.it/wp-content/uploads/2013/04/2013_cone_communications_green_gap_trend_tracker_press_release_and_fact_sheet.p) df last accessed 20 May 2017.
[179] Hajin Kim, p. 193.
[180] Ibid, p. 218-219.
[181] William Neuman, 'A question of fairness' (13 November, 2011) the New York Times <http://www.nytimes.com/2011/11/24/business/as-fair-trade-movement-grows-a-dispute-over-its-direction.html> accessed 11 May 2017.

plantations.[182] Fairtrade was thus accused of infringing upon its standards to gain a larger market share. "We're all debating what do we want [Fairtrade] to be as it grows up [… d]o we want it to be small and pure of do we want it to be fair trade for all?"[183], the chief executive of Fair Trade USA said. Relatedly, also in the U.S., the Marine Stewardship Council had a certification to ensure high environmental standards in seafood that was highly popular. However, a study found that more than a third of the products carrying the label didn't meet the standards, causing the certification to be shamed for having too lenient and discretionary requirements that mislead consumers.[184]

Another issue that might come with label certification of sustainability is that while producers unite under one banner, the strive upwards to reach higher standards of sustainability might stagnate[185]. Nevertheless studies have shown that consumers do have more trust in NGO certifications than producer-led certifications, and rightly so as producer-led certifications are likely to have lower sets of standards because of their inability to reach the standards set by independent organisations. Had they met the standards there would be less incentive for them to establish their own certification.[186] While there's a risk of a stagnation of the efforts to improve sustainability policies if the majority of companies in an industry join a particular certification, contrarily such a wide-covering certification may create minimum quality standards. Subsequently that could initiate competition amongst the certified companies. Although that would depend on consumers being able to distinguish different levels of sustainability quality, which its questionable if they can do effectively.[187] What might mend this potential stagnation, are labels with different levels, for example: bronze, silver, gold and platinum. Such certification can ensure both exclusivity through a high set of standards (for the higher levels) and inclusivity as many companies can be embraced by the certification by entering on the lowest level and then work upwards.[188]

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[182] William Neuman.
[183] Ibid.
[184] Emily Tripp, 'Study finds low standards for sustainable seafood certification' (19 April, 2013) Marine Science Today <http://marinesciencetoday.com/2013/04/19/study-finds-low-standards-for-sustainable-seafood-certification/> accessed 12 May 2017.
[185] Hajin Kim, p. 195.
[186] Ibid, p. 199-201.
[187] Ibid, p. 207-208.
[188] Ibid, p. 222.

3.3 Fair commercial practices?

The EU Unfair Commercial Practices Directive, 2005/29/EC[189], was adopted on the 11th of March 2005. The purpose of this directive, as stated in article 1 is to achieve a high level of consumer protection within the internal EU market on commercial practices that are unfair and can harm consumers' economic interest. The directive applies to all business-to-consumer commercial practises that are unfair and is not only valid during, but also before and after, a commercial transaction in relation to a product has been carried out[190]. The directive ensures a high level of consumer protection and ensures that consumers are not mislead and that the claims made by traders within the EU market is clear, accurate and substantiated, as stated by the European commission[191]. The scope of this directive is wide since it's designed to cover practically all business-to-consumer transactions in all sectors. The relevant aspect of this directive in regards to the research question is whether this directive can assure clarity for consumers concerning companies disclosure and marketing of various sustainability commitments, as well as ensure that consumers are not mislead as to the effects of such.

3.3.1 Sustainability claims

The practise of falsely or misleadingly suggesting or creating the impression that a product has positive or no environmental impacts, or is less harmful for the environment than other products has been called 'greenwashing'. This can include anything from statements, information, symbols, logos, brand names, labelling and advertising made by organisations that engage in commercial practise with consumers and qualifies as a trader.[192] The similar issue concerning statements of human rights impacts is not mentioned in any of the relevant reports, presumably

[189] Directive 2005/29/EC concerning unfair business-to-consumer commercial practises in the internal market and amending directive 84/450/EEC, directives 97/7/EC, 98/27/EC and 2002/65/EC.
[190] Directive 2005/29/EC, article 3.1.
[191] European Commission, *Communication From the Commission to the European Parliament, the Council and the European Economic and Social Committee: on the Application of the Unfair Commercial Practices Directive: Achieving a High Level of Consumer Protection: Building Trust in the Internal Market* (Brussels 14.3.2013, COM(2013) 138 final), p. 2. Available at: http://ec.europa.eu/justice/consumer-marketing/files/ucpd_communication_en.pdf last accessed 20 May 2017.
[192] European Commission, *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* (Brussels, 25 may 2016, SWD (2016) 163 Final), p. 105. Available at: http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf last accessed 20 May 2017.

as it's a quite new concept, though in many aspects the core issue remains the same; statements of product characteristics' that make consumers' believe buying them is guilt free. Hence the Nike case may exemplify such practice as it for promotional purposes made human rights and sustainability claims which were untrue and thus mislead such consumers in the market for untainted products.

The Directive in question does not set up any particular rules on environmental or similar claims, though it does set up the legal basis for ensuring that traders do not make such claims that are unfair to consumers. In the implementation and application guidance to the directive it's underlined that the directive can help traders to invest in sustainability as well as communicate their efforts to consumers, while also preventing such claims that are misleading[193]. The articles that primarily become relevant in this regard are article 6 and 7 that legislate misleading actions and misleading omissions. Firstly, article 6 states that a "commercial practice shall be regarded as misleading if it contains false information and therefore is untruthful or in any way, […] deceives or is likely to deceive the average consumer, even if the information is factually correct [and] causes or is likely to cause him to take a transactional decision that he would not have taken otherwise"[194]. The deceiving information need be the existence or nature of the product, the main characteristics of the product, the extent of the trader's commitments, the price, need for service, the nature and rights of the trader, or lastly the consumer's rights[195]. This article thus implies that the consumer needs to be able to trust environmental (or similar) claims brought forward by a trader, which also the California Supreme Court confirmed in the Nike case[196]. Article 7 similarly state "a commercial practice shall be regarded as misleading if, in its factual context […] it omits material information that the average consumer needs […] to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise"[197]. Moreover misleading omission also includes information presented by a trader in an unclear, unintelligible, ambiguous or

[193] European Commission, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, p. 105.
[194] Directive 2005/29/EC, article 6.1.
[195] Ibid, article 6.1. a)-g).
[196] European Commission, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, p. 109.
[197] Directive 2005/29/EC, article 7.1.

untimely manner or that fails to identify the commercial intent if it's not already apparent[198].

The application of these two articles in regards to environmental claims have been clarified and summarised by the European Commission in two main principles. These can arguably also be applicable on other sustainability claims.

- "[T]raders must present their green claims in a clear, specific, accurate and unambiguous manner, to ensure that consumers are not mislead"[199].
- "[T]raders must have the evidence to support their claims and be ready to provide it to competent enforcement authorities in an understandable way if the claim is challenged"[200].

Moreover, Annex I of the directive lists practices, which in all circumstances are considered unfair. Some of these practices are particularly relevant in regards to sustainability claims. Such practices include falsely claiming to be a signatory to a code of conduct, the unauthorised use of logos, falsely claim approval or endorsement of trader or product by a public or private body and falsely claim a particular code of conduct has been endorsed by a public or private body[201]. Nevertheless, in spite of all these efforts, stakeholders have raised the issue that this legal framework isn't used responsibly and many sustainability claims are often not only general, but also vague and not well defined. In addition the truthfulness of the claims is many times difficult to verify.[202] In a commission report on the application of the directive, the Commission states that this problem, rather than legislative changes of the directive, can be addressed by measures related to enforcement and development of best practises.[203] Exactly what that means is not further described in the report.

[198] Directive 2005/29/EC, article 7.2.
[199] European Commission, Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices, p. 108.
[200] Ibid, p. 108.
[201] Directive 2005/29/EC, Annex I § 1-4.
[202] European Commission, *Communication* (Brussels 14.3.2013, COM(2013) 138 final), p. 4.
[203] European Commission, *Report* (Brussels 14.3.2013, COM(2013) 139 final), p. 21.

3.3.2 Is Fairtrade fair commercial practice?

Concerning the practices prohibited for the protection of consumers, the Fairtrade certificate can be assessed towards these regulations. The substantially popular Fairtrade label relies on consumers' willingness to pay extra money for "good" products. In accordance with the principles put together for green claims to ensure they're in conformity with the unfair commercial practice directive, such claims need to be clear and accurate and ensure that consumers are not misled. After conducting the Fairtrade study in Ethiopia and Uganda, Cramer concluded that people have ben *led to believe* that the extra money spent will improve the lives of others, while underlining that Fairtrade was *not* an effective mechanism for improving the lives of the Fairtrade workers included in the study. Hence from this point of view, Fairtrade's portrayal of its certificate is not only questionable in regards to whether the trade really is *fair*, but also appear to be misleading as to the effects of the label. In regards to whether Fairtrade products are untainted from intolerable practices, the answer ought to be yes. Nevertheless according to Cramer's study the Fairtrade workers were paid less than workers on non-Fairtrade plantations even though Fairtrade guarantee decent wages. MacAskill also stated that the Fairtrade label "doesn't guarantee a higher price for the farmers who work for [Fairtrade] organizations"[204]. While viewing Fairtrade's own portrayal of its certificate stating that the label "offers consumers a *powerful* way to *reduce poverty* through their every day shopping" and their assurance to pay decent wages, it does seem to imply that spending extra money on Fairtrade products will help the people working within the supply chains out of poverty. Thus Fairtrade may provide untainted products, while also portraying an arguably misleading image of where the extra money spent on Fairtrade actually goes.

The above-made argument raises the question whether Fairtrade could be considered as unfair commercial practice? While stressing that such an assessment naturally is for a Court to determine, a brief assessment may nevertheless be conducted. In accordance with directive 2005/29/EC as stated above, misleading practice is such practice that contains false information, alternatively deceives or is likely to deceive the consumer "*even if the information is factually correct*"[205] (authors own italics) and causes the average consumer to make decision he or she

[204] William MacAskill, p. 134.
[205] Directive 2005/29/EC, article 6.1.

otherwise wouldn't have made. Similarly misleading omission is at hand if material information is omitted and whose absence could cause the average consumer to make a decision he or she otherwise wouldn't have made. Presuming that a consumer believes that the extra money he or she spends on Fairtrade will go to the beneficiaries, the person in question might feel mislead and would have acted otherwise if he or she was aware of the very low percentage of the money that does end up where the he or she intended. Conclusively there's room to argue that the Fairtrade label does mislead consumers[206], and most importantly, the discrepancy between the expected impact of the label in relation to it's actual effects, motivates a scepticism towards relying on such clams made by vendors.

3.3.3 Product information and comparison tools

Recalling previously mentioned prophecies of the expected effects of the transparency legislation, it also becomes relevant to address comparison and product information tools in regards to this directive. The digital revolution has brought the possibility to gain access to product information in new ways and in recent years consumer reviews, social media and comparison websites have become very common, henceforth to be referred to as product information and comparison tool or website. Such tools have a great potential to increase consumer power and can also serve the purpose for vendors to improve their market position and reach a broader consumer base. Important to observe however, is that they only serve their purpose from the perspective of the consumer if they provide accurate and clear information.[207]

Product information and comparison tools are not included in an all-covering EU legal framework though they can be placed under the Unfair Commercial Practice

[206] Also supported by scholars; E.g. Peter Griffiths (Ibid [170]) and Fairtrade, Employment and Poverty Reduction in Ethiopia and Uganda (Ibid [172]).
[207] Multi-Stakeholder Dialogue, *Comparison Tools: Report from the Multi-Stakeholder Dialogue: Providing Consumers with Transparent and Reliable Information* (Report presented on the European Consumer Summit March 2013), p. 6. Available at: http://ec.europa.eu/consumers/documents/consumer-summit-2013-msdct-report_en.pdf last accessed 20 May 2017.

Directive and a few other provisions[208] depending on the tool in question. For consumer protection legislation to be applicable the key factor is whether the product information and comparison tool qualifies as a trader or as somebody acting on behalf of the trader in the meaning of the directive. Such a situation can for instance be a product information and comparison website that provides a direct link for the consumer to purchase a product assessed via the site[209]. The Unfair Commercial Practice Directive accordingly demands clarity in regards to whether such a product information and comparison tool is operated independently or is sponsored by a trader[210]. Moreover "falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer"[211] is a practice in Annex I prohibited in all circumstances. Likewise as article 6 and 7 applies in regards to sustainability claims, these articles also become relevant in regards to product information and comparison tools and prohibit for instance such websites from making misleading statements or omitting relevant information.

In a Multi-Stakeholder dialogue concerning comparison tools and consumers' right to transparent and reliable information, a concern was raised that the nature of the relationship between a seller and an operator of a product information and comparison tool, to consumers is often unknown. In this dialogue many shared the opinion that comparison results need to be impartial, which only can be guaranteed if the tool in question is fully independent from sellers.[212] Even though many product information and comparison tools structurally and operationally may be independent, they are often bound to traders in one way or another, for instance to get access to relevant data that subsequently is vital to be able to carry out an assessment and comparison. Moreover a lack of transparency in regards to the business model is a common issue amongst product information and comparison tools, making it uncertain whether a particular trader has paid to be portrayed on the web page. Commonly used financing models of product information and comparison websites are among others 'pay-per-click', 'Pay-per-order', or companies paying for enhanced visibility.[213] Furthermore it's very common that

[208] E.g. the Directive 2006/114/EC on misleading and comparative advertising. This directive concerns business-to-business practises though and hade therefore not been included within this thesis.
[209] Multi-Stakeholder Dialogue, Comparison Tools, p. 6.
[210] Directive 2005/29/EC, Article 6.1 (c), (f) and Article 7.
[211] Directive 2005/29/EC, Annex I § 22.
[212] Multi-Stakeholder Dialogue, Comparison Tools, p. 18.
[213] Multi-Stakeholder Dialogue, Comparison Tools, p. 19-20.

product information and comparison websites don't provide information on how often information on the sites is updated. Consumers have additionally been disappointed by discrepancies between on product information and comparison websites featured information and the de facto price or characteristics of a product offered on the site[214]. Another concern that has been raised is online subscription databases that purchase information and then provide it in a searchable format for subscripting customers. For instance in the US the custom authorities collect information on the shipments entering the U.S. ports and this data is purchased by subscription databases that collect and store the information. However, the costs of accessing this information is high, and while companies using the information to keep track of their competitors can afford it, independent audit bodies, workers and labour advocates cannot, thus causing an imbalance of access to information.[215]

3.4 The risk of placing faith in third-party audits

As previously addressed it's difficult for consumers to get a comprehensive image of all the characteristics of a product, including its manufacturing history and its contextual circumstances. Moreover it has been observed how consumers find it hard to compare price and quality of different goods, which also undermines their confidence in different tools for product information and comparison. Various stakeholders have had problems with particularly price comparison websites and other product information gathering tools, especially in regards to transparency and incompleteness of the information provided. It's also a major problem in this regard that such databases don't clearly identify the trader and whether it pays to be displayed on the page in question.[216] Furthermore, voices have also been raised, questioning whether the disclosed information does provide further insight in companies' business operations or if the information is insufficient and just for show. Human Rights Watch has for instance pointed out that particularly amongst apparel companies, the companies that do disclose information don't disclose information that is comprehensive. Often the details are inconsistent or only a fragment of all information that's necessary for a comprehensive understanding of

[214] Multi-Stakeholder Dialogue, Comparison Tools, 25.
[215] Human Rights Watch: Follow the Thread, p.13.
[216] European Commission, *Report* (Brussels 14.3.2013, COM(2013) 139 final), p. 22.

their business[217]. The unlikeliness of corporations providing accurate and comprehensive information about a company's adverse impacts if it could lead to legal liability has also been stressed by critiques. As an example, many of the annual statements drafted under the MSA have been considered to be not much more than PR, and have moreover been insufficient in disclosing such information as recommended by the MSA and non-binding guidelines[218]. Moreover in relation to the Dodd-Frank Act section 1502 many reports were considered as insufficient in providing consumers with enough information for a 'naming and shaming'. Although, the reports were still considered to be of some use as advocates can be able to differentiate amongst the companies based on how diligently they complied with the regulations[219].

Reiterating the expected effects of the above-discussed laws much responsibility is placed on society to assess and react. Although in accordance with the, in this chapter addressed, complications, many factors impact consumers' ability to reward the companies that are assuring a responsible business conduct. While the consumers that do choose to rely on price information and comparisons tools often receives inaccurate or misleading information, the ones who don't face the struggle of assessing an extensive flow of product information, including marketing claims of sustainability and good practices. Such information could overwhelm and confuse the consumers and accordingly influence his or her ability to select the products of the best performing companies. Furthermore, having established a well-motivated scepticism towards third party audits, while some serve no other purpose than objectively assess different companies and their various products and how well they perform in terms of human rights, from a consumer perspective it's difficult to know which ones to trust. Distinguishing the serious institutions is challenging and the serious audits need to motivate trust for consumers to rely on them. Third-party audits that do not have a financial incentive ought to be the ones best to be relied on. Furthermore governmental institutions tasked with assessing disclosed supply chain information have the potential as trustworthy sources of information. However, despite having some trustworthy sources for assessment, the distance between the targeted problem and the key to the solution is vital to address. The regulations in question serve the purpose to shine light on supply chains in order to make it possible for stakeholders, primarily investors and

[217] Human Rights Watch: Follow the Thread, p.3.
[218] International Trade Union Confederation, p. 6.
[219] Jeff Schwartz, p. 159.

consumers, to assess and react. Thus the legislator places the regulating responsibility on companies, and the judging is left to stakeholders that have little ability to get insight in the truthfulness of the disclosed information.

3.5 A corporate human rights benchmark

Before discussing and evaluating the above pointed out deficiencies of the recently taken measures for better ensuring the respect for human rights by corporations in their supply chains, another relevant factor needs to be addressed. For further understanding of where we're at today in terms of corporate responsibility, one must ask the question: as of today, which company performs the best in human rights terms? This question has been asked many times over but has been impossible to answer objectively[220]. The Corporate Human Rights Benchmark has made an attempt and the key findings were published in March 2017.

3.5.1 CHRB background and methodology

The Corporate Human Rights Benchmark (CHRB) was conducted by, among others, the Business and Human Rights Resource Centre, the Institute for Human Rights and Business and the asset management company Aviva Investors. As stakeholders conduct the assessment and the evaluation is not for the purpose of portraying a wishful image, but rather an accurate one, this benchmark is to be considered as an independent assessment. In the same way as consumers, investors have little interest in non-accurate information, hence assessments made by investors should be a reliable sources for third-party assessment. The Benchmark rank almost 100 companies from three different industries on the implementation of the UN Guiding Principles on Business and Human Rights as well as other internationally recognised human rights and industry standards.[221] This first Benchmark is as stated by Steve Waygood, Chair of the Corporate Human Rights Benchmark Steering Committee, a "snapshot of a company's human rights performance at one point in time"[222]. In years to come the Corporate Human Rights

[220] CHRB Key Findings 2017, Forewords.
[221] Ibid.
[222] Ibid.

Benchmark can grow to provide increasing incentive for corporations to race to the top, driven by choice based on what values companies reflect, Waygood states.

The current, which is also the first Benchmark, includes three industries that are known to have significant impacts on human rights: the agricultural industry, the apparel industry and the extractives industry. Waygood acknowledges though that a full image is far from accomplished and there are many more industries to assess.[223] To be able to carry out this assessment the Corporate Human Rights Benchmark is dependent on reports from companies and other publically available information to conduct a thorough examination of the corporations' human rights impacts.[224] The benchmark is based on publicly available information such as provided on companies' websites as well as document and additional company input to the CHRB Disclosure Platform. The report underlines that companies might hold non-public information, which consequently haven't been included in the 2017 results.[225] It's for instance mentioned that a score of 0 on an individual indicator may not necessarily mean bad practice but can rather be the effect of the CHRB being unable to identify the relevant element in publicly available information.[226] The Benchmark has its roots in the UN Guiding Principles and for the 2017 assessment 98 companies were selected on the basis of their size in terms of market capitalisation, their revenues as well as with regards to geographical and industry balance. Through careful consultation with stakeholders, six Measurements Themes with different weightings have been developed.[227] A company will get 0 in score if they do not provide sufficient evidence to fulfil the requirements for a score of 1, and a score of 2 will be earned if the company fulfil the requirements for score 1 and 2[228]. Companies operating in more than one industry may be assessed in the second if they derive at least 20 per cent of their revenues form the industry in question.[229] The Measurement Themes used are: A) *Governance and Policy Commitments*, B) *Embedding Respect and Human Rights*

[223] CHRB Key Findings 2017, p. 6.
[224] Ibid.
[225] Ibid.
[226] Ibid. p. 9.
[227] Ibid, p. 6.
[228] CHRB Pilot Methodology 2016, p. 40. The score is calculated by adding the number of points awarded in each Theme and divide that by the maximum of points available. Observe that in the CHRB Key Findings 2017 report it says that companies can be awarded a score of either 0,1 or 2 points as opposed to the Methodology report from 2016. In an email from the CHRB it's clarified that the statement means that for any given indicator, a company can be awarded a score of zero, one, or two (except for indicators in the Transparency section where there are no score two and the maximum is a one). There are no decimal scores.
[229] CHRB Key Findings 2017, p. 6.

Due Diligence, C) *Remedies and Grievance Mechanisms*, D) *Performance: Company Human Rights Practices*, E) *Performance: Responses to Serious Allegations*, and F) *Transparency*. Each theme constitutes different percentages of the overall score in the benchmark, from 10 to 25 per cent.

3.5.2 The findings of the report

In the three industries assessed, many of the giants in each industry were included in the benchmark. 35 of the largest companies in the agriculture were assessed, out of whom eight also were assessed in the apparel industry. Amongst agriculture companies *Transparency* was the measurement theme companies scored the highest in, followed by *Policy* (measurement theme F and A). The companies scored lowest in *Company Human Rights Practises* and the average score over all indicators was 28.8 per cent. Similarly in the apparel industry the overall score was 27.3 per cent. In this industry 30 of the largest companies in the world were assessed and the highest scoring Measurement Theme was *Transparency*, followed by *Policy*. Though unlike agriculture, apparel companies scored the lowest in *Remedies and Grievance Mechanisms*. Lastly, the extractives industry where forty-one of the largest extractives companies were assessed; the companies scored the highest in *Transparency*, followed by *Policy* in this industry as well and the lowest scores were from in the Measurement Theme *Embedding Respect and Human Rights Due Diligence*. The overall score in the extractives industry was 29.4 per cent.[230]

The three companies that received the highest score of 60-69 % on an across industry and category ranking, were *Marks & Spencer Group*, *Rion Tinto* and *BHP Billiton and Ground*. *Marks & Spencer* is a retail company and was assessed in both agriculture and apparel and the two latter companies operate in the extractives industry. *Nestle*, *Adidas* and *Unilever* scored 50-59 %, followed by twelve companies within the 40-49 % range, including *H&M*, *Gap*, *The Coca-Cola Company*, *Nike* and the previously mentioned company in the extracting industry *Total*. The majority of the companies assessed scored between 20 and 29 per cent. Amongst those we find *Christian Dior*, *Starbucks*, *Canadian Natural Resources*,

[230] CHRB Key Findings 2017, p. 16, 18, 20.

Prada, *PetroChina*, *Woolworths* and *PepsiCo*. Thus perhaps Pepsi's much lower score in relation to Coca-Cola can finally put an end to the never-ending debate on which brand is better than the other. Furthermore *Wal-Mart Stores* and *McDonald's* were found in the 10-19 % range and the bottom score of 0-9 per cent points out among others *Coal India*, *Macy's* and *Costco Wholesale* as the losers in the human rights benchmarking race.[231]

3.5.3 The potential power of public preassure

A noteworthy aspect is the Benchmark scoring of *Total, Nestlé* and *Nike.* Nike was the subject of severe criticism due to their human rights policies as addressed in the beginning of the chapter. Additionally as briefly described in section relation to the French law on the corporate duty of vigilance, *Total* was responsible for the Erica oil spill and was therefore found liable for the serious damages and had to pay hundreds of million euros to the French state and the local fishing industry. *Nestlé* has been the subject of a long litigation due to allegations of forced and child labour on cocoa plantations in the Ivory Coast. The story began in 2005 with a lawsuit against among others *Nestlé* for the trafficking of child slaves and the case has taken several court rounds including bringing forward the case under the U.S. Alien Tort Claims Act. Yet we haven't seen the last of this case as the plaintiffs are expected to appeal a by the Supreme Court in March 2017 dismissed amendment complaint.[232] Hence it's interesting to observe that companies like *Nike, Total* and *Nestle* that have been the subjects of much negative publicity due to litigations because of their human rights or environmental impacts, are the among the front-runners of the companies included in this assessment, scoring between 40 and 59 per cent. It's not unreasonable to assume that all the negative publicity these companies have been the subjects of may have provided them with the incentive to thoroughly assess their human rights policies and make some extensive improvements to protect their brand.

Human Rights Watch has also made an assessment of some multinational corporations in regards to their adverse human rights impacts alongside an effort of

[231] CHRB Key Findings 2017, Table 4: Company Results by Brand.
[232] Business & Human Rights Resource Centre, 'Nestlé, Cargill, Archer Daniels Midland lawsuit (re Côte d'Ivoire)' <https://business-humanrights.org/en/nestlé-cargill-archer-daniels-midland-lawsuit-re-côte-divoire> accessed 27 April 2017.

encouraging companies to take 'the transparency pledge', a commitment towards greater transparency in the manufacturing supply chains[233]. Among companies reached out to with the call to take the transparency pledge that currently has no commitment to make their factory lists public, were *Walmart,* which scored in the 10-19 % range in the CHRB, *Footlocker, MANGO, Hugo Boss* and *Primark*. Moreover among others *Forever 21, Urban Outfitters, Ralph Lauren, River Island* and *Rip Curl* didn't even respond to the coalitions call.[234] Some companies declined to publish information on their suppler factories due to competition concerns, though HRW points out how many giants in the industry do disclose supplier information, proving that being competitive doesn't has to be undermined by the disclosure of such information.[235]

3.5.4 Concluding observations

The CHRB concludes that the many low scoring companies reflect the early stage of implementation of the UN Guiding Principles that these companies are at. As the UN Guiding Principles were endorsed nearly six years ago this is as an uncomfortable finding. Though the benchmarking of future years will indicate whether this average will improve. As many of the companies assessed are strong public brands possessing a large market capitalisation also including high-risk industries for human rights, it's troubling to see so many companies in the low range of 20-29 per cent.[236]

Benchmarking of this kind has the potential to shape corporate behaviour. Transparency regulations, in accordance with the previous discussion, have the power to make companies lacking human rights policies to adopt such since a lack thereof becomes public. Subsequently benchmarking assesses whether policies are adopted only for show, or if they're effectively implemented. Poor results in such assessments accordingly reflect poorly on the company's brand. Nevertheless the effects of the legislated mandatory disclosure relies on the public pressure it triggers for better corporate human rights efforts and accountability for a lack thereof and it's up to civil society to use the information provided. Information

[233] Human Rights Watch: Follow the Thread, p. 3-4.
[234] Ibid, p. 12.
[235] Ibid, p. 12-13.
[236] CHRB Key Findings 2017, p. 12-13.

disclosed by companies made it possible for the Corporate Human Rights Benchmark to make this assessment and it has accordingly provided consumers with some valuable intelligence. In years to come we'll see if the results will initiate a change in consumption habits and/or a change of corporate behaviour. Furthermore the obstacles posed for the CHRB during the 2017 assessment of a lack of available information ought to be mended by the new regulations, at the very least in regards to the companies covered by the laws. Whether the CHRB will alter the indicators and no longer include transparency due to a legal requirement to disclose information is perhaps a probability, and it will moreover be interesting to observe if the general scores will improve over time.

4 The challenging pursuit of untainted products

The supply chain-related regulations come with parallel aspects; firstly it's expected that the supply chain-related regulations per se will make companies improve the conditions in their supply chains due to the requirement to disclose information that previously hasn't been public. This disclosure is simultaneously expected to trigger pressure from the public on companies to improve the conditions in their supply chains. Linked to this is also the expectation that consumers will prefer companies that are responsible and sustainable and accordingly choose their products over the products from other less committed companies, i.e. sustainability competition. Hand in hand with this expectation goes the business case of corporate human rights commitment. While consumers are expected to be selective, some companies can be expected to market themselves by emphasizing their human rights commitments and try to distinguish themselves and highlight how well they perform in terms of human rights. This presumption does of course not apply for all companies and many can be expected to only commit to meeting the minimum requirements and incentivising such companies to fall in line may pose a challenge. Within the pursuit of untainted products however, the focus of this discussion is primarily set on the companies that do commit to comply to the newly enforced disclosure regulations. As most of these aspects are intertwined with one another, the discussion of the two research questions will be parallel.

4.1 The new chapter of transparent supply chains

For the supply chain-related regulations to be able to assure products are untainted it requires companies that commit to the new disclosure requirements and investigate their own supply chains properly. While the disclosure of supply chain-related information is expected to make companies introduce new policies for the protection of human rights within their operations, it's vital that such principles not only are adopted, but also applied effectively. To begin with, the aspects speaking for a positive development are the potential California effect that could come with the new laws, various third-party assessments working as a stick alongside the

anticipated carrot from consumers in the pursuit of untainted products, i.e. public pressure, as well as the human rights business strategy.

4.1.1 The potential global effect

In accordance with previous discussions the U.S. and the EU, two powerful players on the global field have opened a new chapter by enforcing supply chain-related disclosure. What all of these supply chain-related regulations have in common is that they are domestic regulations with the power to initiate global harmonization of standards and practices. While so many companies affected by the new regulations are expected to disclose their supplier information a new trend could be set of making such information available, not only for consumers but for all stakeholders. The potential California effect could accordingly initiate a raise of standards in regards to transparency globally. With a trend of such wide range, not disclosing supplier information could be a competition disadvantage due to that it might suggest that there's something to hide. Such companies could thus raise suspicions from third-party audits and thus be examined more closely.

4.1.2 The friction between a human rights business strategy and sceptical consumers

4.1.2.1 Pressure from society

In common for all of the above-introduced supply chain-related regulations are that all rely on public pressure. Although, this is a circle argument as comprehensive and assessable disclosure depends on public pressure, while the public pressure can't be applied without comprehensive and assessable information. Presumably the reliance lies in a public 'naming and shaming' of those companies not disclosing comprehensive information, which is expected to incentivise such companies to better comply with the disclosure requirements. While complying with the new regulations at first may be challenging and costly, if the initial uphill road is rewarded, there's an incentive to continue along the same path. It's therefore crucial that the well performing companies do experience positive aspects

from committing to comply, not only to the minimum requirements of the law, but do it fully and introduce new policies at the core of the company.

4.1.2.2 Trusting the sustainability claims

As was established in chapter 3, consumers are well motivated to be sceptical towards various sustainability claims. While being required to disclose information on suppliers and the actions taken to assure no intolerable practises occur in the supply chains, companies can be expected to portray the image of a responsible and serious corporation. Thus information on the occurrence of intolerable practices will presumably not be disclosed. Rather than acknowledging that, companies may disclose the goals set and visions they have to portray a positive image. As long as consumers are overwhelmed or experience incomprehensible or vague information in regard to companies various sustainability commitments, and fail to fully understand what really goes on behind companies' logos, the scepticism will remain unchanged. In that regard the legislators' reliance on the consumer power to assess and react may thus be too optimistic.

Furthermore, certification that allergy facilitates for consumers to distinguish the 'good' products from the 'bad', don't necessarily provide much assistance. Companies having their own certification schemes may have such due to not meeting the standards of independent certification. After having assessed Fairtrade it can additionally be established that maintaining scepticism also towards third-party certification is well motivated. Various product information and price comparison tools have also been demonstrated to be of little help. As the tools expected to facilitate for consumers to orientate themselves amongst the overwhelming supply of allegedly untainted products not always are helpful, the core argument for what encourages companies to change lacks strength.

4.1.2.3 What power lies in the public pressure?

As initially addressed scholars argue a 'naming and shaming' doesn't change much of corporate behaviour, though for instance *Nike*, known for running sweatshops and accordingly being responsible of intolerable working conditions, scored higher than most companies in the CHRB, likewise did *Total* and *Nestlé.* The legislators

enforcing the supply chain transparency requirements have placed a lot of faith in public pressure, thus perhaps it has been given too little credit. The limited effect of public pressure could presumably be the result of incomprehensive information consumers' are faced with. While many care and do react when intolerable practices are made known, most often the unawareness could be the main cause for a lack of action. Whether this hypothesis is accurate can't be determined until years have passed when the disclosed supply chain information no longer is at it's infancy but ripe for evaluation. One thing is certain though, as the supply-chain regulations much rely on society to assess and react, this factor can determine whether the disclosure actually will make a difference or if it just will be another mandatory box to tick. In accordance with previous discussions it's highly questionable if the current conditions are favourable for placing so much responsibility on a third party.

4.1.2.4 Internal business benefits from transparent supply chains

A third aspect affecting whether a positive development will be assured as a result of the more transparent supply chains is whether companies will experience positive aspects on their own, hence an internal carrot to work for improved standards. This factor could additionally be more powerful than many others as it's not dependent on a third party, but rely on companies themselves experiencing a reason to disclose information not only because the law or stakeholders require so. For example transparency can facilitate companies' efforts to forestall harm by investigating its suppliers and terminate their business relationships with those not meeting adequate standards. Companies can also shield themselves from being subjects of wrongly raised criticism that could be the result of entities many tiers down in the supply chain that wrongly claim to supply a particular company.

4.1.3 Negative side effects of the laws

Not to be forgotten are the unexpected negative effects of the new regulations and other sustainability efforts. In line with the above addressed severe consequences section 1502 of the Dodd-Frank brought, hopefully a lesson was learned in regards to targeting only specific regions. The narrow aim of the law resulted in some companies turning elsewhere to escape the supply chain investigations, causing the

DRC to loose much badly needed trade. Robbing people of their livelihood is a side effect unacceptable while making efforts for improved human rights policies in supply chains. The aim is contrarily to maintain business relationships but ensure they're harmless rather than harmful. The future EU regulations on conflict minerals will presumably mend this and remove what has been referred to as a de facto embargo of the DRC[237]. Moreover it's vital that the supply chain investigations and audits are conducted thoroughly and not just for show. Audits testifying to inaccurate conditions in the supply chains may obstruct the efforts for further improving the conditions and provide a false portrayal of the actual conditions.

4.1.4 A continued pursuit of untainted products

Yet, we don't know the end of this new transparency chapter, nor what the next chapter in the book of corporate human rights responsibility might hold. What we do know however is the great responsibility that now has been placed partly on companies to investigate their own supply chains, and partly on society to assess the information provided and react accordingly. Finding untainted products is still very challenging as it's apparent that many sustainability efforts are more complex than one might think. While some sustainability certification could assure products are untainted in line with the above-presented definition, their impacts could still be negative. Competition amongst sustainability labels per se and the balancing between being inclusive to have a large market share, and maintain exclusivity not to infringe upon the standards, could hinder the strive upwards for achieving better standards. Finding untainted products is thus much harder than one initially might have thought. The sense of doing a good deed by spending extra money on Fairtrade products is much contaminated after knowing more about what goes on behind the logo. Similarly might it feel hopeless to investigate various products before purchasing since much of the information available is incomplete or vague. As long as consumers can't distinguish the better companies from others as well as better products, corporations carrot to continue the strive for better human rights related policies could stagnate. As it's yet challenging to find reliable and understandable comparisons and assessments of companies' sustainability commitments, the pursuit of untainted products goes on. In addition, as the core

[237] Jeff Schwartz, p. 142.

argument for supply chain-related disclosure to bring shadowed supply chains into the light is dependent on a society's ability to assess and react, it's questionable if it will be an effective trigger for a change of corporate behaviour.

4.2 Concluding remarks

While the newly enforced supply chain transparency assures much new information is made available, many factors determine whether the new disclosure requirements actually will have an impact. The very complex supply chains makes it difficult to fully understand all aspects of a product's path from the first tire in the supply chain to the shelf in the retailer stores and the various tools and organisations available to assist aren't always reliable. For these reasons, knowing all the adverse impacts of a product is still disappointingly difficult and the new regulations are not demanding enough to assure comprehensible and assessable information is made available. Therefore, the consumers looking to make sustainable and harmless consumption choices still face a challenging task which also cripples the transparency regulations from effectively assuring companies improve their human rights related policies as it is dependent on society to assess and react. Nevertheless, the supply chain-related regulations is at its infancy and is the first step in the process for assuring corporations take responsibility for human rights in relation to their operations. This first step provided several important lessons for the future and hopefully further steps will be taken not too long from now.

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