

Liability for Unsustainable Supply Chain Practises, Nothing Less

Contesting Narratives of Contractual Boundaries in Transnational Chains of Supply



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What is a Supply Chain?



Missing link:

Harnessing the power of purchasing for a sustainable future

Written on behalf of 89 organizations representing US\$2.7 trillion of procurement spend



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World-Systems Theory (1977-)

...we start with a radically different presumption. Let us conceive of something we shall call, for want of a better conventional term, "commodity chains". What we mean by such chains is the following: take an ultimate consumable item and trace back the set of inputs that culminated in this item – the prior transformations, the raw materials, the transportation mechanisms, the labor input into each of the material processes, the food inputs into the labor. This linked set of processes we call a commodity chain. If the ultimate consumable were, say, clothing, the chain would include the manufacture of the cloth, the yarn, etc., the cultivation of the cotton, as well as the reproduction of the labor forces involved in these productive activities.



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Global Value Chain Theory (2005-)

The GVC framework focuses on globally expanding supply chains and how value is created and captured therein. By analyzing the full range of activities that firms and workers perform to bring a specific product from its conception to its end use and beyond, the GVC approach provides a holistic view of global industries from two contrasting vantage points: top down and bottom up. The key concept for the top-down view is the 'governance' of GVCs, which focuses mainly on lead firms and the organization of global industries; the main concept for the bottom-up perspective is 'upgrading,' which focuses on the strategies used by countries, regions and other economic stakeholders to maintain or improve their positions in the global economy.



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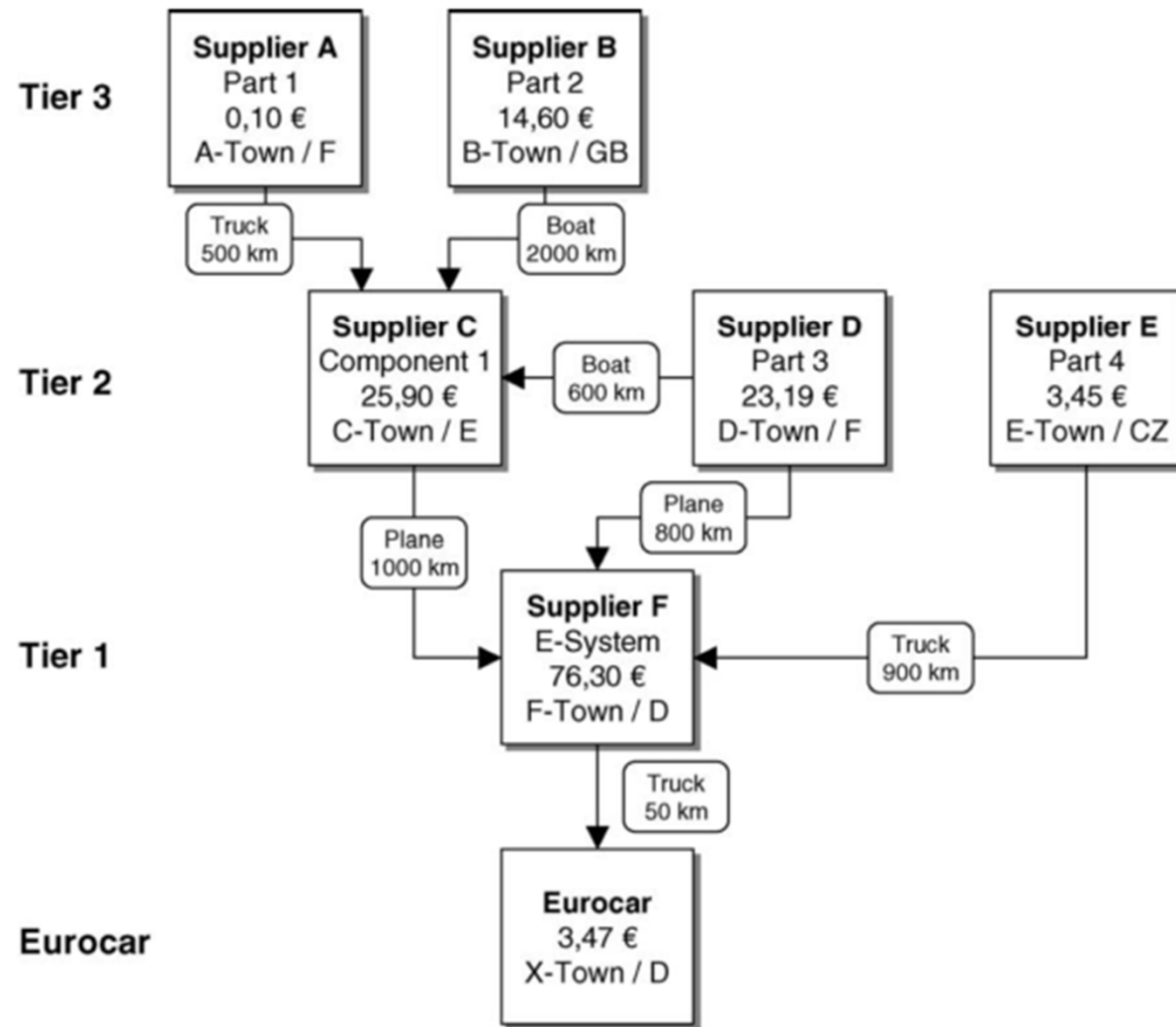


Fig. 3. Value chain flow chart.



TID
KJØTT

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kjøtt og
ing.



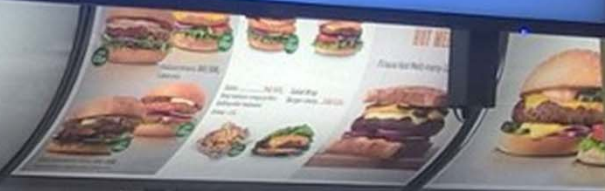
VI KOMPENSERER FOR
ALL VÅR MILJØPÅVIRKNING
- FRA BONDENS JORD TIL
RESTAURANTENS BORD -
VED Å PLANTE TRÆR
I AFRIKA.

VÅR P

Vi lever for å finne nye smaker,
spennende kombinasjoner og de beste
råvarene. Og ambisjonen er den samme
som i 1968 - å kunne servere deg
Norges beste hamburgere.
Velkommen til Max!



6142	6143	6144	1919
6145	6146	6147	
6148	1920		
			1917



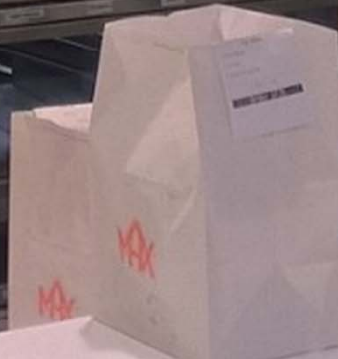
Vi lager hamburgeren
din på bestilling.

Dip



Seattle's Best
Coffee

Seattle's Best
Coffee



Governance Mechanisms Beyond Privity

Market (no governance beyond privity)

Modular (codes, monitoring, audits)

Relational (from capability building to partnering)

Hierarchy (vertical integration)



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Mineral Supply Chain (OECD 2011-)

The process of bringing a raw mineral to the consumer market involves multiple actors and generally includes the extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacturing and sale of end product. The term supply chain refers to the system of all the activities, organisations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers.



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Garment Supply Chain (OECD 2017-)

Risk areas covered by the Guidance



CHILD
LABOUR



SEXUAL
HARASSMENT



FORCED
LABOUR



TRADE
UNIONS



HEALTH AND
SAFETY



WATER



WAGES



WORKING
TIME



BRIBERY AND
CORRUPTION



RESPONSIBLE
SOURCING



HAZARDOUS
CHEMICALS



GREENHOUSE GAS
EMISSIONS



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Legislative Practice 1

Various statutes have implemented vague and unstructured reporting requirements on 'supply chain' related activities. There is little, if any sense of what 'supply chain' or 'reporting' means in practice.

California Transparency in Supply Chains Act (2010)

(Dodd Frank Sec. 1502 (2010))

EU Non-Financial Reporting Directive (2014)

UK Modern Slavery Act / Transparency in Supply Chains etc. (2015)



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Legislative Practice 2

Under the 2017 French *loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*:

Companies are required to establish and implement a vigilance plan to identify and prevent the human rights, health and safety, and environment related risks of to their operations, including in relation to their directly or indirectly controlled subsidiaries and suppliers and subcontractors to which they have a *relation commerciale établie*.



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Legislative Practice 2 cont'd

Under the French *loi de vigilance* the plan must include:

- 1) Identification, analysis, and a relative ranking of risks;
- 2) Procedures for the regular monitoring of subsidiaries, subcontractors, and suppliers with whom the company has an established commercial relationship in relation to the identified risks;
- 3) Appropriate actions for mitigating risks and preventing serious violations;
- 4) A mechanism for monitoring signals related to the existence or materialization of risks, established together with labor organizations representative of the relevant companies; and
- 5) A scheme for monitoring implemented measures and evaluating their effectivity.



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Problems of Going Further with Supply Chain Reporting Requirements

A) Definitions of supply chains and relevant interventions.

B) Liability instigating effects of going further.



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Relevant Supply Chain Parameters?

Equity v Non-Equity?

Governed v Ungoverned?

(Governable v Ungovernable?)

Limited v Unlimited Scope?



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Current Limits of Supply Chain Liability

1. Jurisdiction dependent but increased control typically entails increased liability.
2. Under the common law there is currently no general duty to prevent harm to others by third parties. See e.g. *Das v George Weston Limited* (2017) and *Rahaman v J.C. Penney* (2015).
3. Assumption of control implies liability for negligent control under so-called theories of *Good Samaritans*. E.g. *Rodriguez-Olvera v Salant Corp* (1999).



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Problems of Going Further With Supply Chain Reporting Requirements, Cont'd.

The problem with reporting: Under present systems of liability, true reporting on supply chain governance practices could open up liabilities by revealing in detail levels of control and potential control, which both may entail liability. Thus it could be argued that liability must come first in order to make true reporting feasible.



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Countering the Liability Deficit?

- Development of Governance Mechanisms
 - Development of Private Law
 - Spectre of Regulation



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Can Something Be Done?

OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector

The underlying argument seems to be that control over supply chains *is* possible for all, big and small, global and local, developed and undeveloped.



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Can Something Be Done? Cont'd.

Product Liability—Liability for Defective Production Practices Beyond Privity, Defined Through 'Product'

Companies do outsource production and have liability over it towards third parties. Many rules relevant for production liability have already been developed in the product liability context, e.g. apportionment of liability.



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Private International Law as a Situationalizer of Disputes



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