

DIPSATCH NO. 46 - GERMANY

SOCIAL SUSTAINABILITY IN GLOBAL VALUE CHAINS—NEW SUPPLY CHAIN ACT IN GERMANY

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I. INTRODUCTION

About ten years ago, the Ali Enterprises Factory in Pakistan burned down and 258 workers lost their lives.¹ Just over six months later, in April 2013, the Rana Plaza Factory in Bangladesh collapsed and 1,136 people died.² In both cases, the disaster was caused by a lack of safety and health protection at work. As both factories produced clothes for international and especially German textile discounters and fashion brands, these catastrophes not only showed the results of failing essential worker rights in Pakistan and Bangladesh, but also the lack of social sustainability in global value chains. They fuelled a political and legal discussion about the responsibility of German companies for respecting human rights in countries of the Global South. This discussion resulted in the adoption of the “Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in

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1. For details, see, European Center for Constitutional and Human Rights, KiK: Paying the price for clothing produced in South Asia, ECCHR, <https://www.ecchr.eu/en/case/kik-paying-the-price-for-clothing-production-in-south-asia>.

2. For details, see, European Center for constitutional and Human Rights, BSCI complaint on TÜV Rheinland’s audit report for Rana Plaza Manufacturer, ECCHR, https://www.ecchr.eu/en/case/more-for-show-than-safety-certificates-in-the-textile-industry/?file=t_l_files%2FDokumente%2FWirtschaft%20und%20Menschenrechte%2FFallbeschreibung_TUeV%20Rheinland_RanaPlaza_20150707.pdf&cHash=a1124d0ab03cbd21e0c24856456a25e7.

Supply Chains” (short: Supply Chain Act)³, which entered into force on 1 January 2023.⁴

II. THE GERMAN SUPPLY CHAIN ACT

The Supply Chain Act establishes a paradigm shift in German policy on business and human rights by creating legally binding human rights-related obligations for enterprises, enforceable by the authorities. However, whether German enterprises are to be held liable for human rights violations committed by their suppliers remains an open question: violating obligations under the Supply Chain Act establishes no distinct civil law liability but merely preserves civil law liabilities created by other legal sources (section 3(3) of the Act).

1. Aim

The Supply Chain Act follows the UN Guiding Principles on Business and Human Rights (so-called Ruggie Principles).⁵ It is based on the idea that enterprises are responsible for respecting human rights in their supply chains and that this responsibility is independent of the ability and willingness of states to fulfil their obligation to protect human rights.⁶ Considering that the previous voluntary commitment was not sufficient to implement the due diligence obligations proposed in the UN Guiding Principles in the business processes of German enterprises, the Supply Chain Act established specific legal obligations for enterprises to be enforced by the Federal Office for Economic Affairs and Export Control.⁷

The Supply Chain Act aims to improve the international human rights situation and the protection of the environment by increasing the responsible design of supply chains by German enterprises.⁸ In addition, the law must

3. Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten [Corporate and Due Diligence in Supply Chains Act], July 16, 2021, Bundesgesetzblatt [BGBl] (Federal Law Gazette) 2021, I, 2959, English version and further information available online at <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/supply-chain-act.html>.

4. The debate has also been ongoing in the European Union. In February 2022 the EU Commission presented a proposal for a Directive on Corporate Sustainability Due Diligence, see COM(2022) 71 final, available online at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52022PC0071> (27 December 2022). On 1 December 2022, the Council adopted its General Approach with a revised compromise text framing its position for negotiations with the Parliament (Document ST 15024 2022 REV 1). The Parliament's Committee on Legal Affairs published a draft report on 7 November 2022. However, the final positioning of the Parliament is still pending.

5. UN document A/HRC/17/31; the Guiding Principles are available online at: https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

6. Bundestagsdrucksache (German Parliament Document) 19/28649, at 1.

7. Bundestagsdrucksache (German Parliament Document) 19/28649, at 23.

8. Bundestagsdrucksache (German Parliament Document) 19/28649, at 23.

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take into account the enterprise's legitimate interests in legal certainty and a level playing field.⁹

2. Scope

The scope of application is regulated by section 1 of the Supply Chain Act. The act applies to enterprises regardless of their legal form having their central administration, their principal place of business, their administrative headquarters, or their statutory seat in Germany as well as to foreign enterprises having a branch office in Germany. It enters into force in two steps: From January 1, 2023, it applies to enterprises regularly employing at least 3,000 staff in Germany, and from January 1, 2024, a threshold of 1,000 employees will apply.

At first glance, the Supply Chain Act seems to cover only large enterprises. However, the due diligence obligations stipulated indirectly affects several smaller enterprises, as well. This follows from section 6(4) no. 2 of the act. According to this provision, enterprises covered must obtain contractual assurances from their direct suppliers that they will comply with the human rights-related and environment-related expectations required by the enterprise's senior management and address them along the supply chain. The human rights-related and environment-related expectations arising from the statutory due diligence obligations must therefore be passed on to direct and indirect suppliers through contractual cascading along the supply chain, even if suppliers do not directly fall within the scope of the act.¹⁰ Hence, smaller companies are effectively forced to take on the very contractual human rights-related and environmental-related obligations that, for large enterprises, result directly from the Supply Chain Act. This consequence of the law has been labelled "privatization of human rights protection" representing a new form of horizontal effect of human rights.¹¹

3. HUMAN RIGHTS-RELATED AND ENVIRONMENT-RELATED RISKS AND OBLIGATIONS

The Supply Chain Act defines protected human rights (as "protected legal positions") by reference to existing international human rights standards listed in the annex to the act (section 2(1)). In detail, the annex lists the International Covenant on Civil and Political Rights, the International

9. Bundestagsdrucksache (German Parliament Document) 19/28649, at 1.

10. Krause, Das Lieferkettensorgfaltspflichtengesetz als Baustein eines transnationalen Arbeitsrechts – Teil I [The Supply Chain Due Diligence Act as a Building Block of Transnational Labor Law – Part I], *Recht der Arbeit (RdA)* 303, 310 (2022).

11. Wiater, Unternehmerische Menschenrechtsbindung nach Maßgabe des Lieferkettengesetzes [Corporate human rights commitment in accordance with the Supply Chain Act], *Juristen Zeitung (JZ)* [Lawyers Newspaper] 859, 863 (2022).

Covenant on Economic, Social and Cultural Rights, and the ILO Conventions No. 29 (including the Protocol of 11 June 2014), 87, 98, 100, 105, 111, 138 and 182, which incorporate ILO core labour standards¹² From these international standards, the Supply Chain Act derives twelve human rights-related prohibitions in section 2(2) including:

- the prohibition of the employment of a child under the age of 15 and the worst forms of child labour for children under 18 years,
- the prohibition of the employment of persons in forced labour,
- the prohibition of all forms of slavery and other forms of domination or oppression in the workplace,
- the prohibition of disregarding the occupational safety and health obligations applicable under the law of the place of employment,
- the prohibition of disregarding the freedom of association,
- the prohibition of unequal treatment in employment,
- and the prohibition of withholding an adequate living wage.

These prohibitions form the basis for two central definitions of the law:

Firstly, the law defines a “human rights risk” as a situation in which a violation of one of these prohibitions is probably imminent (section 2(2)). Secondly, a “violation of a human rights-related obligation” is defined as a violation of one of these prohibitions (section 2(4) sentence 1). Both terms form a reference point for due diligence obligations, which according to section 3(1), aim at preventing or minimizing human rights risks and ending violations of human rights-related obligations. Thereby, the enterprises’ obligations are linked to international human rights standards listed in the annex. As a result, firstly, the Supply Chain Act legally makes private enterprises subject to human rights set out in international agreements.¹³

Secondly, it follows from the linkage that the scope of the human rights obligations under the Supply Chain Act depends on the interpretation of the above-mentioned international standards. This could provide more attention to the interpretation by the competent international bodies (in particular the

ILO Committee of Experts on the Application of Conventions and

12. ILO Conventions No. 155 and 187, which also contain core labor standards, are not listed in the annex.

13. Krause, Das Lieferkettensorgfaltspflichtengesetz als Baustein eines transnationalen Arbeitsrechts – Teil II [The Supply Chain Due Diligence Act as a Building Block of Transnational Labor Law – Part II], *Recht der Arbeit (RdA)* [Lab. L.] 327, 328 (2022).

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Recommendations, the UN Committee on Economic, Social and Cultural Rights, and the UN Committee on Civil and Political Rights) in the future.¹⁴

Similar to human rights obligations, the Supply Chain Act additionally creates environment-related obligations which will only be briefly mentioned here: Section 2(3) defines environment-related prohibitions with reference to the Minamata Convention, the Stockholm Convention, and the Basel Convention. (Potential) violations of these prohibitions constitute either an environment-related risk (section 2(3)) or the violation of an environment-related obligation (section 2(4) sentence 2). The due diligence obligations under section 3(1) then also refer to these terms.

4. DUE DILIGENCE OBLIGATIONS

The Supply Chain Act imposes several due diligence obligations on enterprises (see division 2 of the act). An overview can be found in section 3(1) sentence 2, according to which the obligations include

- establishing a risk management system,
- designating a responsible person or persons within the enterprise,
- performing regular risk analyses,
- issuing a policy statement,
- laying down preventive measures in its own area of business and vis-à-vis direct suppliers,
- taking remedial action,
- establishing a complaints procedure,
- implementing due diligence obligations with regard to risks at indirect suppliers and documenting and reporting.

Enterprises must observe these obligations in managing their supply chain. The latter includes all steps taken in Germany and abroad that are necessary to produce products or provide services, starting from the extraction of the raw materials to the delivery to the end customer (section 2(5)). It covers the actions of the enterprise in its own business area as well as the actions of its direct and indirect suppliers.

Risk Management

As a first step, the enterprise must identify human rights-related risks. To this end, section 4 obliges the enterprises to establish an appropriate and effective risk management system that must be enshrined in all relevant

14. Bundestagsdrucksache (German Parliament Document) 19/28649, at 34; Zimmermann & Weiß, Völker- und verfassungsrechtliche Parameter eines deutschen Lieferkettengesetzes [International and constitutional parameters of a German supply chain law], 58 Archiv des Völkerrechts (AVR) [Archives Int' L.] 424, 450 (2020).

business processes through appropriate measures. As part of risk management, the enterprise must conduct an appropriate risk analysis (section 5). These obligations apply to the enterprise in its own business area and the actions of its direct suppliers. Concerning the actions of indirect suppliers, the obligations exist only on an ad hoc basis: Only if an enterprise has actual indications for a violation of a human rights-related obligation at indirect suppliers, must it adapt its risk management system and carry out a risk analysis (see section 9).

Complaints Procedure

As an important instrument to identify risks, enterprises must establish a complaints procedure (section 8). This procedure must enable persons to report human rights-related risks as well as violations of human rights-related obligations arising from the economic actions of the enterprise or its direct suppliers. It must be accessible to potential parties involved, maintain confidentiality, and protect them effectively against disadvantage or punishment because of a complaint. Complaints can be made by employees of the enterprise or a supplier and by any other person. Complainants don't need to be affected by the risk or violation themselves.¹⁵ Therefore, for example, trade unions or NGOs can also submit complaints.¹⁶

The complaints procedure is of particular importance in relation to the actions of indirect suppliers. The procedure must be set up in such a way that risks and violations arising from the actions of an indirect supplier can also be reported (section 9(1)). Therefore, the complaints procedure enables enterprises to become aware of risks and violations at their indirect suppliers. Based on this knowledge, the enterprise must adapt its risk management system and perform a risk analysis (section 9(3)).

Preventive Measures

Enterprises are not merely obliged to take action once a human rights violation has already occurred, but immediately upon identifying a human rights-related risk. In the latter case, they must take appropriate preventive measures without undue delay (section 6). Such measures include

issuing a policy statement on its human rights strategy (including the description of the procedure by which the enterprise fulfils its obligations, the enterprise's priority human rights-related risks, and the definition of the

15. Sagan, Das Beschwerdeverfahren nach § 8 LkSG [The complaints procedure according to § 8 LkSG], *Zeitschrift für Wirtschaftsrecht (ZIP)* [Bus. L. Mag.] 1419 et seq. (2022).

16. Zimmer, Das Lieferkettensorgfaltspflichtengesetz [The Supply Chain Due Diligence Act], *Bund Verlag Frankfurt am Main* 46 (2023).

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human rights-related expectations placed by the enterprise on its employees and suppliers in the supply chain),

enshrining appropriate preventive measures in the area of business (including implementation of the human rights strategy in the relevant business processes, development and implementation of appropriate procurement strategies and purchasing practices, training in the relevant business areas, implementation of risk-based control measures),

and laying down appropriate preventive measures vis-à-vis a direct supplier, including contractual assurances from a direct supplier that it will comply with the human rights-related expectations and address them along the supply chain as well as agreeing on appropriate contractual control mechanisms and their risk-based implementation.

In relation to indirect suppliers, the enterprise is only required to take preventive measures if it has actual indications suggesting a potential violation of a human rights-related obligation (section 9(3)). In this case, the enterprise must lay down appropriate preventive measures vis-à-vis the party responsible, such as the implementation of control measures, support in the prevention and avoidance of a risk, or the implementation of sector-specific or cross-sector initiatives to which the enterprise is a party (section 9(3) no. 2).

Remedial Action

If a violation of a human rights-related obligation has already occurred or is imminent, the enterprise must take appropriate remedial action to prevent, end, or minimize the extent of this violation (section 7). The extent of this obligation depends on the enterprise's degree of influence: In the enterprise's own domestic business area, the remedial action must end the violation.

If the violation occurs at a direct supplier, the enterprise must undertake to bring the infringement to an end. To this end, it must draw up and implement a concept for ending or minimizing the violation following a concrete timetable (section 7(2)). Possible measures to be considered are the development and implementation of a plan jointly with the enterprise causing the violation, joining forces with other enterprises in sector initiatives or sector standards to increase the ability to influence, and a temporary suspension of the business relationship while efforts are made to minimize the risk. As a last resort, the enterprise may even be forced to terminate the business relationship with a direct supplier. However, this action can harm the workers concerned, as they may lose their jobs.¹⁷ Therefore, the

17. Krause, *supra* note 13, at 337..

termination of a business relationship is only required once a very serious violation of a human rights-related obligation cannot be remedied by other measures (section 7(3)). It must first be examined whether other, less severe means are available, or whether an increase in the ability to exert influence on the supplier might be successful. Specifically, a business relationship does not have to be terminated merely because the state in which a supplier is located has not ratified or implemented into its national law one of the conventions listed in the Annex (section 7(3) sentence 2).

If the enterprise has substantiated knowledge about a violation at an indirect supplier's premises, the enterprise must draw up and implement a prevention, cessation, or minimization concept (section 9(3) no. 3).

Appropriateness as the Limit of the Obligations

The due diligence obligations are limited by the principle of appropriateness. No company can be required to do something that is legally and factually impossible.¹⁸ Enterprises are merely obliged to take appropriate measures to identify, prevent or remedy violations of human rights-related obligations. The appropriateness of actions depends on four criteria:

- the nature and extent of the enterprise's business activities,
- the ability of the enterprise to influence the party directly responsible for a risk to human rights or the violation of a human rights-related obligation,
- the severity of the violation that can typically be expected, the reversibility of the violation, and the probability of the occurrence of a violation of a human rights-related obligation,
- and the nature of the causal contribution of the enterprise to the risk to human rights or to the violation of a human rights-related obligation.

Based on these criteria, an overall consideration and assessment of all individual circumstances is required.¹⁹ This permits a specification of due diligence obligations on a case-by-case basis and gives enterprises the necessary flexibility in choosing suitable measures.²⁰

5. ENFORCEMENT OF THE LAW

The enforcement of the Supply Chain Act has been one of the most controversial issues in the political debate. In the end, the demand for private

18. Bundestagsdrucksache (German Parliament Document) 19/30505, at 38.

19. Fleischer, Grundstrukturen der lieferkettenrechtlichen Sorgfaltspflichten [Basic structures of the supply chain legal due diligence obligations], Corporate Compliance (CCZ) 205, 212 (2022).

20. Bundestagsdrucksache (German Parliament Document) 19/28649, at 42.

enforcement of the law did not prevail.²¹ As mentioned above, a violation of the obligations under this Act does not give rise to any additional liability under civil law (section 3(3) sentence 1). Instead, the legislator has opted for public enforcement and risk-based control. The competent authority is the Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, abbreviated BAFA),²² which performs its task under the supervision of the Federal Ministry for Economic Affairs and Energy (section 19). The BAFA shall act ex officio at its due discretion, and upon request of an affected person (section 14). The authority can make the appropriate and necessary orders and take the appropriate and necessary measures to detect, end, and prevent violations of the due diligence obligations (section 15). Upon request of the authority, enterprises are obliged to provide information and surrender documents (section 17). Furthermore, they must accept the measures of the authority and support them in their implementation (section 18).

Several violations of the due diligence obligations are punishable by a fine (section 24). The fine is up to 800,000 euros, depending on the obligation violated. In the case of a legal person or association of persons, the maximum amount of the fine is increased tenfold, for a legal person or association of persons with an average annual turnover of more than 400 million euros, the fine may even be up to 2 percent of the annual turnover (section 24(3)). In addition, enterprises that have been fined for a violation that has been established by a final and binding decision shall, as a rule, be excluded from public procurement until they have proved that they have cleared themselves (section 22).

IV. CONCLUSION

In summary, the protection of human rights in global value chains has become the goal of legislative activities in Europe. Given the obvious human rights deficits in many international supply chains, policymakers no longer trust voluntary commitments, which have proven to be insufficient. This paradigm shift in human rights policy can be observed in several countries and at EU level. While the goal is the same, mostly based on the UN Guiding Principles, the regulatory approaches differ on some details. The German Supply Chain Act is a typical compromise. On the one hand, there is a shift from voluntary to legally binding requirements. On the other hand, however, the question of civil liability remains insufficiently effective.

21. See Rühl & Knauer, Das deutsche Lieferkettengesetz, *Juristen Zeitung (JZ)* 105, 107 et seq. (2022).

22. See, Bundesamt für Wirtschaft und Ausfuhrkontrolle [Federal Office of Economics and Export Control], <https://www.bafa.de>.