

DISPATCH NO. 47

THE GERMAN LIEFERKETTENSORGFALTPFLICHTENGESETZ (LKSG) – A STEP TOWARDS MORE HUMANITY IN SUPPLY CHAINS?

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I. ENACTMENT OF THE LKSG

After controversial discussions¹, on 11 June 2021, the German legislature finally passed the “Gesetz über unternehmerische Sorgfaltspflichten in Lieferketten—Lieferkettensorgfaltspflichtengesetz (LkSG)”—“Corporate Due Diligence in Supply Chains Act”.

To understand why this Act was passed in Germany, it’s important to look at past supply and value-chains rules.

Currently, neither rules are providing due diligence for contractors nor statutory requirements about building compliance management systems. Nevertheless, many corporations have already established third-party-due-diligence as part of their compliance system.² Even though these clauses are widely used as part of the terms & conditions³, they are either void because they are at the expense of third parties, as they try to oblige companies that are not part of the contract itself⁴ or shift the burden of proof unfairly to the

1. For the legislative procedure *see* Bundestag verabschiedet das Lieferkettengesetz (German Bundestag Passes Supply Chain Law), <https://www.bundestag.de/dokumente/textarchiv/2021/kw23-de-lieferkettengesetz-845608> (Feb. 5, 2022).

2. *See* Andreas Gilch & Christian Pelz, *Compliance-Klauseln – Gut gemeint aber unwirksam? (Compliance Clauses-Well-Intentioned but Ineffective)*, CCZ, 131, 131 (2008); Henning Tabbert & Dennis Frederik Hanstein, *Typische Regelungen in Compliance-Klauseln – Ideen und Herausforderungen aus der Praxis (Typical Regulations in Compliance Clauses - Ideas and Challenges from Practice)*, CCZ, 242, 242 (2019).

3. *See* Klaus Moosmayer, § 4, C, IV, in COMPLIANCE (2021); Gilch & Pelz, *id.*

4. *See* Gilch & Pelz, *supra* note 2, p. 133; *cf.* Christian Grüneberg, *Einf. vor § 328 BGB, Rn. 10*, in GRÜNEBERG BÜRGERLICHES GESETZBUCH (Greenberg Civil Code) (2022).

favor of the user of the clause⁵; or they are practically inconsequential due to a lack of an associated accountability obligation.⁶

In Guiding Principle 17 of the UN Guiding Principles on Business and Human Rights (UNGP) “human rights due diligence” is set out.⁷ In 2016 the German Government tried to implement the UNGP into German Law through a national action plan (NAP)⁸, stipulating that at least 50% of companies with more than 500 employees should implement certain due diligence requirements.⁹ This strategy of economic self-regulation failed, which became clear following a monitoring, conducted by the Federal Ministry of Foreign Affairs (*Auswärtiges Amt*) in 2020.¹⁰ According to this study, only 13-17% of the affected companies did implement adequate measurements to meet the requirements of due diligence, while another 10-12% were on their way to doing so.¹¹ The discussion about a law concerning due diligence in supply chains subsequently restarted, leading to the adoption of the LkSG in 2021, which has come into force by January 1, 2023.

II. THE CONTENT OF THE LKSG

1. *Scope of Application*

The Act applies to all companies with their registered office, headquarters, or administrative office in Germany, irrespective of their legal form, with generally at least 3,000 employees.¹² This threshold will be lowered to 1,000 employees by January 1, 2024.¹³ Of importance is the requirement of “generally” 3,000 (or 1,000) employees. This means that the number of employees needs not to be above or below the threshold at a

5. See Gilch & Pelz, *supra* note 2, p. 133; cf. Wolfgang Wurmnest, § 309 Nr. 12 BGB, Rn. 16 f., in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH (Munich Commentary on the German Civil Code) (2022).

6. See Gilch & Pelz, *supra* note 2, p. 134.

7. UN HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK, HR/PUB/11/04 (2011), p. 17.

8. See German Federal Foreign Office, *National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights 2016 – 2020*, S. 1 ff.

9. See German Federal Foreign Office, *id.*, S. 10.

10. *Monitoring of the German Federal Foreign Office for the National Action Plan* (in German) (Mar. 05, 2022) available at: <https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2124010>.

11. *Id.*

12. See Gesetz über unternehmerische Sorgfaltspflichten in Lieferketten – Lieferkettensorgfaltspflichtengesetz (LkSG), Section 1 I, <https://www.gesetze-im-internet.de/lksg/>.

13. See *id.*, Section 1 I 3.

certain cut-off date, but rather the headcount is considered over a longer period.¹⁴

The material scope of the law applies to the entire supply chain, meaning every product or service provided by a company, including every step needed to build the products or services in- and outside Germany.¹⁵ Therefore, the activities of the company's own business unit and those of direct and indirect suppliers are covered by the LkSG.¹⁶

2. Obligations

Section 3 LkSG imposes obligations to endeavor to implement the human rights due diligence.¹⁷ Therefore success of the measurements taken is not required.¹⁸ These obligations are subject to adequacy, so that the company has margins of discretion and action.¹⁹ Which measurements are adequate depends on the business activities of the company, its actual ability to exert influence, the severity and reversibility of the violation, and the weight of the company's contribution to the cause.²⁰ The obligations are enforceable by public authorities only²¹; Section 3 III 1 LkSG excludes each form of enforcement by civil agents. On the other hand, the authorities also act upon request. Every person affected by the economic activity of the company or its suppliers is entitled to initiate public enforcement by filling out an application.²²

14. See the explanatory memorandum to the LkSG: BT-Drs. 19/28649, 33; Robert Grabosch, § 3, Rn. 8, in GRABOSCH, DAS NEUE LIEFERKETTENSORGFALTPFLICHTENGESETZ (LKSG) (2021); Adam Sagan & Alexander J. Schmidt, *Das Lieferkettensorgfaltspflichtengesetz - Ein Überblick aus der Perspektive des Arbeitsrechts (Corporate Due Diligence in Supply Chains Act- An Overview from the Perspective of Labor Law)*, NZA-RR, 281, 283 (2022).

15. See Section 2 V, LkSG.

16. So called "Abgestufte Verantwortlichkeit", See Annette Keilmann & Falko Schmidt, *Der Entwurf des Sorgfaltspflichtengesetzes - Warum es richtig ist, auf eine zivilrechtliche Haftung zu verzichten (The Draft of the Due Diligence Act - Why It is Right to Waive Civil Liability)*, WM, 717, 718 (2021); Giesela Rühl & Constantin Knauer, *Zivilrechtlicher Menschenrechtsschutz? Das deutsche Lieferkettengesetz und die Hoffnung auf den Europäischen Gesetzgeber (Civil Law Human Rights Protection? The German Supply Chain Act And The Hope for the European Legislator)*, JZ, 105, 107 (2022); Hans-Georg Kamann & Philipp Irmischer, *Das Sorgfaltspflichtengesetz - Ein neues Sanktionsrecht für Menschenrechts- und Umweltverstöße in Lieferketten (The Due Diligence Act - A New Sanction Law for Human Rights and Environmental Violations in Supply Chains)*, NZWiSt, 249, 251 (2021).

17. See Dieter Leuring & Daniel Rubner, *Lieferkettensorgfaltspflichtengesetz (Supply Chain Sourcing Obligations Act)*, NJW-Spezial, 399, 399 (2021); Eva-Maria Kieninger, *Miniatur: Lieferkettengesetz - dem deutschen Papiertiger fehlen die Zähne (Miniature: Supply Chain Act - The German Paper Tiger Lacks Teeth)*, ZfPW, 252, 252 (2021).

18. See Eric Wagner & Marc Rutloff, *Das Lieferkettensorgfaltspflichtengesetz - Eine erste Einordnung (The Supply Chain Due Diligence Act - An Initial Classification)*, NJW, 2145, 2145 (2021); Leuring & Rubner, *id.*

19. See Leuring & Rubner, *supra* note 17.

20. See Sagan & Schmidt, *supra* note 14.

21. See Sagan & Schmidt, *supra* note 14, p.282.

22. See the explanatory memorandum to the LkSG: BT-Drs. 19/28649, 53 f.; Justus Frank et al., *Pionierarbeiten in der Lieferkette - Praxisfolgen für das Handels- und Arbeitsrecht (Teil I) (Pioneering*

The German Federal Ministry of Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle – BAFA*) is responsible for monitoring compliance with due diligence duties and sanctioning violations.²³ Particular mention should be made here of the possibility of fines of up to two percent of the average annual turnover of that company.²⁴ The LkSG is therefore the first German Act (not including acts that are based on legal acts of the European Union), which authorizes revenue-based fines.²⁵

a) Implementing due diligence

Section 3 I 1 LkSG states the different forms of due diligence exhaustively.²⁶ The duties described there entail a continuously repeating cycle of various interrelated procedural steps and are not duties to be fulfilled once.²⁷

First, the companies have to build up a risk management system for observing their supply chains, which includes the appointment of a responsible person for this system.²⁸

Furthermore, a risk analysis, consisting of three steps is mandatory.²⁹ First, the risks shall be prioritized under the tenet of adequacy, meaning that the company has to regard the seriousness of the risk, the influence of the company on the risk, and in what sense the company caused the risk itself. Second, the result shall be communicated to the managing directors of the company. Third, this analysis has to be repeated at least once a year, or when the risk situation changes.

If a risk has been identified through the risk analysis, the company must take appropriate steps.³⁰ Such measures may include the issuing of a policy statement by the company on its human rights strategy³¹, activities in its own

the Supply Chain - Practical Implications for Commercial and Labor Law (Part I)), BB, 2165, 2170 (2021); Kamann & Irrmscher, *supra* note 16; Sebastian Lutz-Bachmann et al., *Menschenrechte und Umweltschutz in Lieferketten - der Regierungsentwurf eines Sorgfaltpflichtengesetzes (Human Rights and Environmental Protection in Supply Chains - The Government Draft of A Due Diligence Law)*, BB, 906, 911 (2021); Gerald Spindler, *Verantwortlichkeit und Haftung in Lieferantketten – Das Lieferkettensorgfaltpflichtengesetz aus nationaler und Europäischer Perspektive (Responsibility and Liability in Supplier Chains - The Supply Chain Due Diligence Act from A National and European Perspective)*, ZHR No. 186, 67, 92 f. (2022).

23. Section 19, LkSG.

24. *See* Section 24 III, LkSG.

25. *See* Sagan & Schmidt, *supra* note 14; Kamann & Irrmscher, *supra* note 16; Jens Ekkenga et al., *Offene Fragen zur rechtlichen Steuerung nachhaltigen Unternehmertums (Open Questions on the Legal Control of Sustainable Entrepreneurship)*, NJW, 1509, 1512 (2021).

26. *See* Sagan & Schmidt, *id.*, p. 287.

27. *See id.*; explanatory memorandum to the LkSG: BT-Drs. 19/28649, 41.

28. *See* Section 4, LkSG.

29. *See* Section 5, LkSG.

30. *See* Section 6, LkSG.

31. *See* Section 6 II, LkSG.

business area, such as employee training,³² and measures taken concerning direct suppliers³³, by including specific clauses in the contracts with them. Such clauses could be, for example, assurances about future compliance with human rights or contractually agreed control mechanisms.

If, after all these measures have been taken, a violation of human rights or environmental duties has already occurred or is imminent, Section 7 LkSG requires corrective actions. Violations of human rights or environmental laws in the own business area have to be completely stopped with immediate effect and for the future. Human rights violations by direct suppliers, if they cannot be stopped immediately, have to result in a plan to cease the violation, worked out consensually with the supplier. If such plan does not materialize, a temporary suspension of business relations must be considered. Termination of business processes with this supplier is the remedy of last resort.

b) Human rights and environmental due diligence in detail

Section 2 III LkSG deals with environmental risks, which essentially refers to risks that may arise when dealing with mercury, organic pollutants, and dangerous waste.³⁴

Section 2 II Nr. 1-12 LkSG contains certain prohibitions regarding human rights. These prohibitions include certain typical offenses in which a protected legal position is violated.³⁵ These relate to:

- child labor (No. 1 and 2);
- compulsory labor, following Art. 2 I ILO Convention 29.³⁶ (No. 3);
- violations against health and safety measures (No. 5);
- violations against the freedom of association (No. 6);
- discrimination, especially equal pay (No. 7);
- and fair wages (No. 8).

If none of the protected legal positions in Section 2 II Nr. 1-11 LkSG is affected, there is a catch-all element in Nr. 12 for special cases in which a protected position according to Section 2 I LkSG is obviously at high risk.

III. PECULIARITIES

Particularly interesting from a legal point of view is Section 11 LkSG. This provision legitimates national unions or NGOs derivative rights of action for exceptionally significant legal positions of Section 2 I LkSG.

32. See Section 6 III, LkSG.

33. See Section 6 IV, LkSG.

34. See Sagan & Schmidt, *supra* note 14, 284.

35. See *id.*

36. See also ILO, General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), 2007, 19 ff.; Sagan & Schmidt, *id.*, p. 285.

Unions may assert these rights on their behalf. Questionable here is already which of the human rights is *not* to be seen as “exceptionally significant”.³⁷ Even more problematic is the question of how a union can assert these rights on their behalf since civil liability is explicitly excluded from the LkSG:³⁸ Section 11 LkSG only gains significance in combination with Section 3 III 2 LkSG, which states, that civil liability independent from the LkSG is guaranteed.³⁹ This provision suggests that liability may arise between contractors based on rules outside the LkSG.⁴⁰ In particular, liability under tort law is a possibility.⁴¹ Although it is currently assumed that no such liability exists⁴², Section 3 III 2 LkSG could now represent a turning point in the discussion about tort law based on human rights violations in supply chains.⁴³

IV. CONCLUSION AND PROSPECT

The German legislature has tried to make the world a better place by using the economic potential of corporations to better protect human rights and the environment. Several countries already have similar Acts, like France with its “loi de vigilance”.⁴⁴ With the LkSG, a catalog of human rights that are a subject to special protection is provided. Any German Act will not be able to completely stop human rights violations. Long and complex supply chains and limited opportunities for companies to exert influence make this impossible. The LkSG takes these circumstances into account. Whether it contributes to improving the human rights situation and environmental circumstances in transnational supply chains will be evaluated by June 30, 2026.

However, it is already predictable that the LkSG will probably need an overhaul shortly. While these lines are being written, the European legislature is working on a Directive on due diligence duties of companies regarding

37. See Wagner & Rutloff, *supra* note 18, p. 2150.

38. Cf. Justus Frank et al., *Pionierarbeiten in der Lieferkette - Praxisfolgen für das Handels- und Arbeitsrecht (Teil II) (Pioneering the Supply Chain - Practical Implications for Commercial and Labor Law (Part II))*, BB, 2890, 2892 (2021).

39. See Rühl & Knauer, *supra* note 16, p. 109; cf. Frank et al., *id.*, 38.

40. See Rühl & Knauer, *id.*, p. 108.

41. Cf. *id.*

42. For further information about this discussion see August Reinisch et al., *Rühl*, in *UNTERNEHMENSVERANTWORTUNG UND INTERNATIONALES RECHT (Corporate Responsibility and International Law)*, 89, 125 f. (2020).

43. See Rühl & Knauer, *supra* note 16, p. 109; Erik Ehmann, *Das Lieferkettensorgfaltspflichtengesetz (LkSG) kommt! (The Supply Chain Sourcing Obligations Act (LkSG) is coming!)*, ZVertriebsR, 205, 206 (2021).

44. Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1) [Law No. 2017-399 of March 27, 2017 on the duty of care of parent companies and ordering companies (1)], JORF n° 0074 v. 28.3.2017, Mar. 29, 2017.

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sustainability.⁴⁵ Germany is not the first EU Member State to have adopted an Act on corporate due diligence, but it may be the most recent EU Member State to establish such due diligence duties before the European legislature takes over this subject.

45. *Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, COM/2022/71 final (Feb. 23, 2022).