

Germany: Mandatory Human Rights Due Diligence

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The German government has adopted a draft human rights due diligence regulation, the so-called Supply Chain Act (*Lieferkettengesetz*) (the “Act”), aimed at ensuring companies’ compliance with human rights with respect to their business activities throughout their global supply chains. The draft act is scheduled to enter into force in 2023 and will initially apply to companies with more than 3,000 employees.

Background. In 2011, the United Nations Human Rights Council endorsed the Guiding Principles on Business and Human Rights (the “Guiding Principles”), a set of principles for states and companies to protect, respect and remedy adverse human rights impacts that companies cause or to which they directly contribute. From the beginning, a major pillar in this undertaking was the implementation of so-called supply chain due diligence laws, which require businesses to monitor and assess compliance with basic human rights standards such as the prohibition of child and forced labor. Various European countries, including France, the Netherlands and the United Kingdom, have since developed domestic binding compliance standards for companies with international supply chains.

In February 2021, the German government reached an agreement on the implementation of a Supply Chain Act. The Act in its current form will require Germany-based entities to take measures to address compliance with human rights standards throughout their supply chains on a global scale. The Act is currently scheduled to enter into force at the beginning of 2023 and will initially apply only to companies which have their head office, principal place of business, administrative headquarters or registered seat in Germany and employ more than 3,000 employees (currently more than 600 companies in Germany). In 2024, the threshold will be lowered to 1,000 employees (currently approx. 2,900 companies in Germany). For the purpose of this calculation, temporary employees who have been employed for more than six months count towards a company’s total headcount, and employees of all affiliated group companies count towards the number of employees of the group parent company.

Due Diligence Obligations. Under the Act, companies will be required to implement the following measures:

- A policy statement on respect for human rights;
- Risk analysis, *i.e.*, implementing procedures to identify potential adverse impacts on human rights;
- A risk management system (including remedial measures) to avoid potential adverse impacts on human rights;
- A grievance mechanism to allow for the reporting of potential human rights violations which must then be investigated by the company; and
- Documentation and transparent reporting towards the public.

At the core of the Act are the so-called due diligence obligations. German companies within the scope of the draft Act will be required to take measures to counter the risks of adverse human rights impacts in their worldwide supply chains, as set forth in the Guiding Principles. Companies are required to establish a risk management system, define clear internal responsibility for the compliance with human rights, review whether their business activities adversely affect human rights (*i.e.*, carry out regular risk analyses) and employ appropriate mitigation and corrective measures to counter risks associated with their business, products or services. In particular, companies are required to ensure fair working conditions at the level of the supplier. Child and forced labor are strictly prohibited, working conditions must be safe and not harmful to the workers' health and workers' interests must be properly represented, *e.g.*, through unions. Companies must also take measures to avoid environmental damage, however, only insofar as it affects human rights.

These due diligence obligations extend to the entire supply chain of a company, *i.e.*, from the production of raw materials to the manufacture of finished products. However, the obligations are tiered depending on the extent of the company's business activities, the degree of influence of the company over the supply-chain entity potentially committing the violation and the expected severity of the human rights impact. The most thorough diligence standards apply to the operations of the in-scope German company itself, while the requirements are slightly reduced with regard to direct suppliers. *Vis-à-vis* indirect suppliers, an audit and, if necessary, further measures are only required on an ad hoc basis, *i.e.*, if the German company becomes aware of potential human rights violations. Additionally, the Act contains an annual reporting obligation with respect to actual and potential human rights impacts caused by the company's operations.

Sanctions. The German Federal Office of Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*) is charged with monitoring compliance with the due diligence requirements and will be the competent authority to investigate alleged violations of the Act, including conducting searches and seizing evidence.

In the event of an infringement, the Act does not create any new basis for civil law liability but does provide for substantial fines by the German Federal Office of Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*). The current draft Act sets out that the exact amount will be determined by reference to the company's annual turnover. It remains to be seen whether the turnover to be considered means the entire group's turnover (as stipulated, *e.g.*, by German antitrust laws) or just the affected entity's turnover. In the event of a serious infringement, the company may also be excluded from public tenders for up to three years.

As regards special procedural provisions, victims of adverse human rights impacts will be entitled to initiate legal actions before the German civil courts by way of representative action in order to claim damages. However, while the Act provides for the possibility for a non-governmental agency or trade union to act as a litigant in civil proceedings before a German court on behalf of the victim, German companies typically cannot be held responsible for damage caused by a supplier under German tort law unless the supplier acts as a vicarious agent of the company (which will not usually be the case with a normal supply chain). As such, as things stand at present (and will likely remain in the future), German companies will not be liable for adverse human rights impacts caused by other companies in their global supply chain.

Measures Taken by the European Legislator. The German initiative is one of several recent mandatory human rights due diligence initiatives, including at the European Union level. In April 2020, the European Union's Commissioner for Justice, Didier Reynders, announced the European Union's intention to introduce legislation requiring mandatory human rights due diligence.¹ As [previously reported](#), on 11 September 2020, the European Parliament's Committee on Legal Affairs published recommendations and a legislative proposal for a directive on mandatory supply chain due diligence that would cover human rights, environmental and governance risks across a business's entire value chain. The proposed legislation is broad in scope and envisages a variety of penalties for businesses that fail to comply.² A second report, published on 12 February 2021,³

¹ For more information on the EU Commissioner for Justice's official commitment for an EU initiative on mandatory Human Rights and Environmental Due Diligence, see EUROPEAN COALITION FOR CORPORATE JUSTICE, Commissioner Reynders announces EU corporate due diligence legislation, Brussels, 30 April 2020, available [here](#).

² European Parliament, Draft Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 September 2020, p. 6, available [here](#).

included a resolution for the EU Parliament to formally request the EU Commission to enact legislation along the lines of the Committee's proposal. The resolution was passed in March. The European Commission is expected to decide upon a binding due diligence directive for all companies operating in the EU market by this June.

The European Union's initiative was motivated by a study commissioned by the European Commission, which surveyed business and other stakeholders. A majority of all survey respondents stated that the current legal landscape did not provide them with sufficient legal certainty regarding due diligence obligations.

Compared to the German draft, the European directive looks set to be broader in scope. In its current form, it will apply to listed companies as well as SMEs and extend the scope of due diligence to environmental protection. It is also expected to contain stricter rules on liability.

Outlook. In the future, German companies may have to make considerable legal and organizational efforts in order to comply with the requirements set forth by the Act and any prospective EU legislation. In addition to the establishment and coordination of internal company procedures for compliance with human rights standards, contractual adjustments and audits of direct suppliers may be necessary to ensure an appropriate flow of the information necessary to fulfill these new due diligence obligations. Furthermore, businesses may need to carry out a human rights impact assessment, review their key (compliance) functions and resources and reinforce internal complaints mechanisms in light of the additional obligations.

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Please do not hesitate to contact us with any questions on how these developments may impact your business.

³ European Parliament, Report with recommendations to the Commission on corporate due diligence and corporate accountability, Committee on Legal Affairs, 11 February 2021, available: [here](#).

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