

Due Diligence in German Business Law

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The German Act of Corporate Due Diligence Obligations in Supply Chains of 16 July 2021

- Background, history and comparative context
- **Scope**
- **Core obligations**
- **Enforcement**
- Assessment





Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten

Vom 16. Juli 2021

Act on Corporate Due Diligence Obligations in Supply Chains Of July 16 2021

The Bundestag has passed the following Act:

English (and Spanish) version available at:

https://www.bafa.de/DE/Lieferketten/Multilinguales_Angebot/multilinguales_angebot_node.html



Information on the Supply Chain Act

On this page, non-German speakers can find information on the Supply Chain Act.

Further information and FAQs in English

Further information on the Supply Chain Act can be found on the [website](#) of the Federal Ministry of Labour and Social Affairs. The website contains, inter alia, a list of [Frequently Asked Questions](#) concerning the Supply Chain Act.



Bundesamt
für Wirtschaft und
Ausfuhrkontrolle

Identifying, weighting and prioritizing risks



Guidance on conducting a risk analysis as required by the German Supply Chain Due Diligence Act 'Lieferkettensorgfaltspflichtengesetz' or 'LkSG'

[download \(PDF, 2MB, accessible\)](#)

https://www.bafa.de/DE/Lieferketten/Multilinguales_Angebot/multilinguales_angebot_node.html



MARTIN-LUTHER-UNIVERSITÄT
HALLE-WITTENBERG

German court rejects Pakistani KiK lawsuit

Shamil Shams
01/10/2019

A German court has rejected a lawsuit from Pakistanis against German retailer KiK over responsibility for a factory fire in Karachi. KiK said the blaze was an act of terrorism. Shamil Shams reports from Dortmund.



LG Dortmund, 10.1.2019 - 7 O 95/15



Source: Spiegel Online of 10.1.2019, picture © Arno Burgi

Source: LTO of 10.1.2019 and 29.11.2018, picture © Carola Vahldiek

I. History of the LkSG

- Background: **UN Guiding Principles for Business and Human Rights (2011)**
- Implementation: **National Action Plan for Business and Human Rights (NAP)** of the Federal Government (2016)
- Enterprise surveys in 2019 and 2020: only 20% or 17% of the enterprises comply voluntarily with the conditions of the NAP
- Legal regulation envisaged (based on NAP); first draft 28 February 2021; second draft 3 March 2021
- LkSG is adopted 16 June 2021 (Federal Law Gazette 2021 I, p. 2959 of 22.7.2021)
- LkSG enters into force **1 January 2023 (1 January 2024 with broadened scope)**



I. Comparative context of the LkSG



LkSG, adopted 16.7.2021; effective date: 1.1.2023



Konzernverantwortungsinitiative (responsible business initiative), 2020 failed; effective date of the indirect counter-proposal: 1.1.2022



Loi de Devoir de Vigilance, 2017; effective date: 27.3.2017



Wet Zorgplicht Kinderarbeid, 24.10.2019; Bill on responsible and sustainable business conduct, 11.3.2021 (revision 2.11.2022)



Transparency Act, 10.6.2021; effective date: 1.7.2022



Modern Slavery Act, effective date: 31.10.2015



II. Overview of the German LkSG

- **Main characteristics and limitations**
 - (1) Limited personal scope and concept of the supply chain
 - (2) Limited due diligence duty
 - (3) Relies exclusively on public enforcement



1. Staggered personal scope of application

From 1 January 2023

> 3000 employees

Central admin, principal base of business, admin headquarters or statutory seat in Germany **or**

Domestic branch office in Germany

From 1 January 2024

> 1000 employees

Central admin, principle base of business, admin headquarters or statutory seat in Germany **or**

Domestic branch office in Germany

High-impact sectors and annual turnover are not criteria for determining the scope of application!



1. Material Scope of Application

Section 2: Definitions

[...]

(5) **The supply chain** within the meaning of this Act refers to all products and services of an enterprise. It includes **all steps in Germany and abroad that are necessary to produce the products and provide the services**, starting from the extraction of the raw materials to the delivery to the end customer and includes

1. the actions of an enterprise in its own business area,
2. the actions of direct suppliers and
3. the actions of indirect suppliers.

→ Concept of the supply chain seems comprehensive, but only few obligations are imposed on indirect suppliers.



What is the own business area? Responsibility in groups?

Section 2 Para. 6

The own business area within the meaning of this Act covers every activity of the enterprise to achieve the business objective. This includes any activity for the creation and exploitation of products and services, regardless of whether it is carried out at a location in Germany or abroad.

In affiliated enterprises, the parent company's own business area includes a group company if the parent company exercises a decisive influence on the group company.



2. The Due Diligence Duty

Section 3: Due diligence obligations

(1) Enterprises are under an obligation to exercise due regard for the human rights and environment-related due diligence obligations set out in this Division in their supply chains with the aim of **preventing or minimising any risks to human rights or environment-related risks or of ending the violation of human rights-related or environment-related obligations.**

The due diligence obligations include:

1. establishing a **risk management system** (section 4 (1)),
2. designating a **responsible person** or persons within the enterprise (section 4 (3)),
3. performing **regular risk analyses** (section 5),
4. issuing a **policy statement** (section 6 (2)),
5. laying down **preventive measures** in its **own area of business** (section 6 (1) and (3)) and vis-à-vis **direct suppliers** (section 6 (4)),
6. taking **remedial action** (section 7 (1) to (3)),
7. establishing a **complaints procedure** (section 8),
8. implementing due diligence obligations with regard to risks at **indirect suppliers** (section 9) and
9. **documenting** (section 10 (1)) and **reporting** (section 10 (2)).

→ **Problem: Obligations are not clearly formulated**



2. The Due Diligence Duty

Human rights and environmental aspects:

- LkSG models the concrete obligation of companies with reference to various international agreements.
- Out of a total of 14 agreements, 11 deal with human rights issues and 3 with environmental issues
- sectoral approach, first and foremost human rights concerns are protected, while environmental aspects only play a secondary role.
 - clear focus on human rights!
- this referencing technique makes the application of the law considerably more difficult.



2. The Due Diligence Duty

Section 3: Due diligence obligations

(2) The appropriate manner of acting in accordance with the due diligence obligations is determined according to

1. the nature and extent of the enterprise's business activities,
2. the ability of the enterprise to influence the party directly responsible for a risk to human rights or environment-related risk or the violation of a human rights-related or environment-related obligation,
3. 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 or an environment-related obligation as well as
4. the nature of the causal contribution of the enterprise to the risk to human rights or environment-related risk or to the violation of a human rights-related or environment-related obligation.

→ **Problem: Obligations remain unclear**



3. Enforcement

Section 3: Due diligence obligations

[...]

(3) A violation of the obligations under this Act **does not give rise to any liability under civil law**. Any liability under civil law arising independently of this Act remains unaffected.

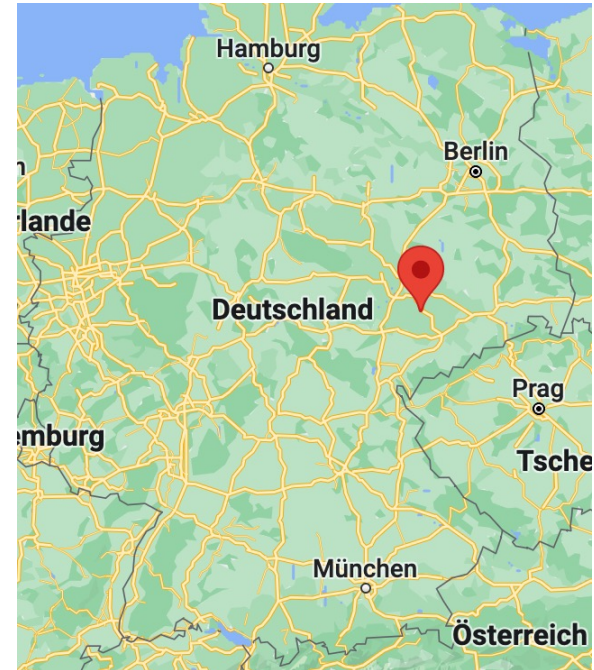
Section 19: Competent authority

(1) The **Federal Office for Economic Affairs and Export Control** is responsible for the **official monitoring and enforcement** under this Division. [...]

(2) The competent authority takes a **risk-based approach** in the performance of its tasks.



3. Public enforcement by BAFA



- Guidance on (1) risk analysis (2) complaint procedure and (3) appropriateness and effectiveness.
- Reporting questionnaire



3. Public enforcement by BAFA: **Transparency under the LkSG**

- annual report on the fulfillment of their due diligence obligations
- submit to (BAFA) as the supervising authority of the LkSG
- Autonomous report – no combination with NFRD-reporting!



How to report under the LkSG?

Section 10

Documentation and reporting obligation

(1) The fulfilment of the due diligence obligations pursuant to section 3 must be continuously documented within the enterprise. The documentation must be kept for at least seven years from its creation.

(2) The enterprise must prepare an annual report on the fulfilment of its due diligence obligations in the previous financial year and make it publicly available free of charge on the enterprise's website no later than four months after the end of the financial year for a period of seven years. The report must at least state in a comprehensible manner,

1. whether the enterprise has identified any human rights and environment-related risks or violations of a human rights-related or environment-related obligation, and if so, which ones,
2. what the enterprise has done to fulfil its due diligence obligations with reference to the measures described in sections 4 to 9; this also includes the elements of the policy statement pursuant to section 6 (2) as well as the measures taken by the enterprise as a result of complaints pursuant to section 8 or section 9 (1),
3. how the enterprise assesses the impact and effectiveness of the measures and
4. what conclusions it draws from the assessment for future measures.





Supply Chain Act

SECTION MENU

Overview

Reporting Obligation

Risk Analysis

Appropriateness and Effectiveness

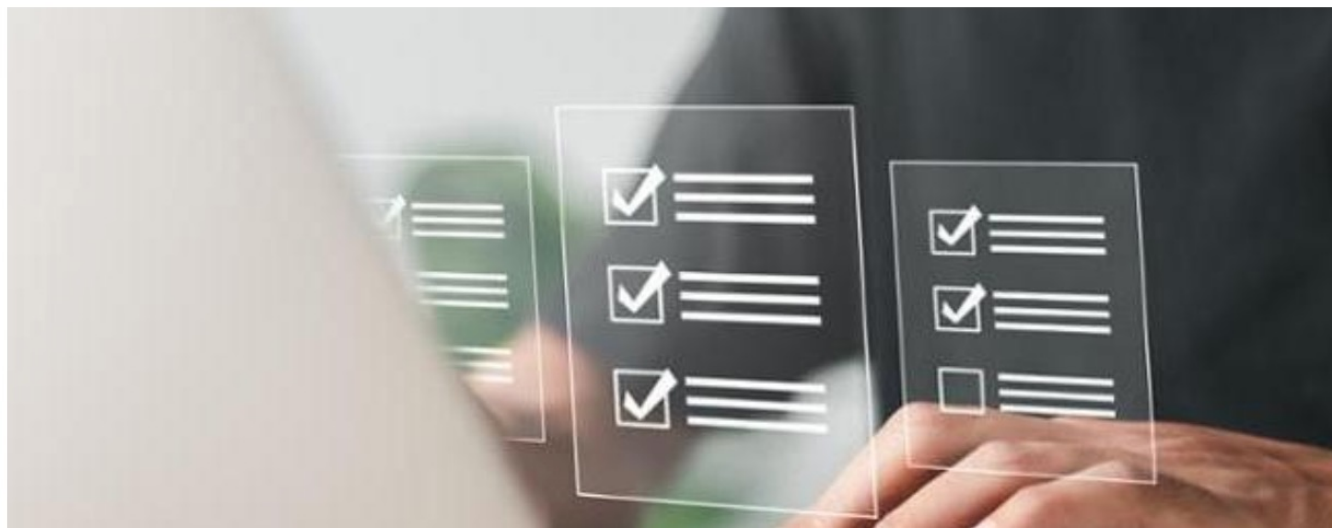
Complaints Procedure

Submit a Complaint

About Borna

Reporting obligation

On this page, you will find information about the reporting obligation as required by the German Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz, or LkSG).



3. Public enforcement: Extensive rights of the authority

Section 13: Report audit by the authorities [...]

Section 16: Access rights

Section 17: Obligation to provide information and surrender documents

Section 22: Exclusion from the award of public contracts (up to 3 years)

Section 23: Financial penalty (up to 50,000 Euros)

Section 24: Provisions on administrative fines

[...]

(2) The regulatory offence maybe punished [...] with a fine of up to eight hundred thousand euros,

(3) In the case of a legal person or association of persons with an average annual turnover of more than 400 million euros, a regulatory offence under paragraph (1) nos. 6 or 7 (a) may be punished with an administrative fine of up to 2 percent of the average annual turnover.



III. Assessment

Core points of criticism

- Narrow scope (high risk industries and turn over rates are irrelevant)
- Lack of concreteness of obligations (“duty of endeavour”)
- The regulation technique that references international standards is problematic
- Clear focus on human rights, environmental aspects play only a small role
- Public enforcement does not provide victims of human rights violations or environmental violations with claims for damages against companies

→ The implementation of the EU-CSDDD will answer some of these points



IV. Literature

- *Mittwoch/Bremenkamp*, The German Supply Chain Act – A Sustainable Regulatory Framework for internationally active Market Players?, in: Tietje/Kraft/Mittwoch (Eds.), Beiträge zum Transnationalen Wirtschaftsrecht, 2022, Heft 182.

Available at: <https://omp.bibliothek.uni-halle.de/iwr/catalog/book/294>

- *Mittwoch*, Supply chain regulation made in Germany – a tentative step towards sustainability, Blogging for Sustainability, University of Oslo

Available at: <https://www.jus.uio.no/english/research/areas/sustainabilitylaw/blog/companies-markets-and-sustainability/2021/supply-chain-regulation--mittwoch.html>

- *Mittwoch*, Nachhaltigkeit und Unternehmensrecht, 2022.



Thank you very much for your attention!

Questions and Feedback:
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LET'S GET THE JOB DONE

