



CLIENT INFO

New draft German legislation on protection of human rights in supply chains adopted by Federal Government

Overview

- German Government plans to have a new law on protection of human rights in the supply chain adopted by June 2021.
- Companies based in Germany will have to implement substantial new due diligence policies and procedures on human rights protection by 2023.
- Non-compliance with new law may trigger fines of up to 2% of the annual group turnover for larger businesses.
- German NGOs and labour unions can enforce claims of potential victims in German courts.

On March 3, 2021, the Federal Government adopted a draft Act on Corporate Due Diligence in Supply Chains¹ (Due Diligence Act). The Due Diligence Act creates a new legal regime for the protection of human rights throughout the supply chain. Following adoption of the draft law by the Federal Government, it will be submitted to the legislative process. The Due Diligence Act is expected to be passed by Bundestag by June 2021.

I. German Due Diligence Act

The Due Diligence Act provides for far reaching obligations of German companies to protect human rights in their supply chains.

- The Due Diligence Act applies to all companies having their head office, principal place of business, administrative headquarters or registered office in Germany which employ a minimum of 3000 employees. As of 2024, the Due Diligence Act will apply to companies with a minimum of 1000 employees. Employees of affiliates are considered when determining this employee headcount.
- The Due Diligence Act aims to protect human rights as defined by specific international treaties referenced in its annex. This includes in particular the prohibition

¹ Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Sorgfaltspflichtengesetz).

“reliable and with very good competence and technical knowledge.”

Client quoted
in Chambers Europe 2019

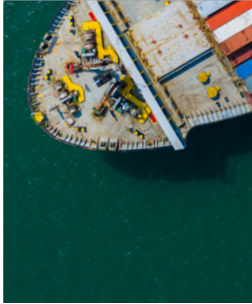


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of child labour, forced labour, slavery, servitude and the prohibition to disregard occupational health and safety, freedom of association, etc. Environmental goods are protected to the extent the environmental damage results in an infringement of certain human rights or in case specific provisions of international treaties are violated, such as the Minamata Convention on Mercury.

- The due diligence obligation to protect human rights in principle extends to the entire supply chain of a company. The definition of a supply chain is extensive and includes all products and services of a company. The supply chain comprises all steps in and outside of Germany that are required to manufacture products and provide services of the company. The supply chain starts with the extraction of raw materials and ends with the delivery to the end customer. Financial services, such as banking, may be part of the supply chain, for instance when a loan obtained by a direct supplier is part of the supply chain of the manufacturer of a consumer good. The explanatory memorandum of the draft Due Diligence Act may even be interpreted as requiring lenders to carry out human rights due diligence on the borrower if the loan amount is material in the sense that the lender will typically have specific information and control rights.
- The specific due diligence obligations of a company include:
 - Risk Management, Internal Responsibility and Risk Analysis:
Companies have to implement a risk management system and conduct a risk analysis to identify risks for human rights and environmental goods within their own organization and the operations of their direct suppliers (e.g. Tier 1 supplier of an OEM). A risk analysis has to be conducted as appropriate, especially in case of significant changes of the risk portfolio, but at least once a year. Companies have to allocate clear responsibilities within their organization to identify and prevent human rights risks and to remediate violations, such as by designating a human rights officer (*Menschenrechtsbeauftragter*). Senior management has to be informed regularly on these activities and it has to be ensured that the findings are appropriately reflected in their business activities.
 - Policy Statement, Preventive and Corrective Measures:
Companies have to adopt a detailed policy statement on human rights protection in their supply chain and implement preventive measures in case the risk analysis identifies a potential risk. In case of violations, the company has to take remediation measures to end any violation caused by its own direct operations or take the necessary steps to end violations caused by their direct suppliers. The company has to address violations of indirect suppliers (e.g. Tier 2 suppliers of an OEM) as well, provided the company becomes aware of it by gaining substantial knowledge of a potential violation. The remediation obligations in case of violations caused by indirect suppliers are less stringent than the obligations in case of a violation caused by the company's own operations or those of direct suppliers.
 - Grievance Procedure:
Companies will have to implement grievance procedures to allow for the reporting of human rights violations and ensure appropriate follow-up measures.



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- Documentation and Reporting:

Companies have to extensively document their compliance with the diligence obligations and publish an annual report covering specific topics within four months after the end of the business year. The report has to be available on the homepage of the company for at least seven years.

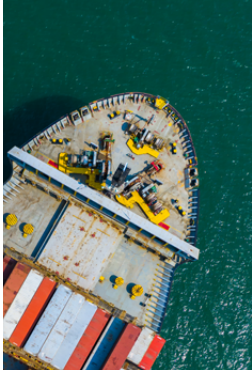
- Civil Liability and Legal Representation: NGOs and labour unions based in Germany may represent potential victims in case of violations of highly important human rights before German courts. The provisions of private international law remain unaffected.
- Enforcement: The Federal Office for Economic Affairs and Export Control (BAFA) will enforce the new law. Enforcement measures may include inter alia information and discovery requests, remediation orders as well financial penalties. The law stipulates fines of EUR 100,000, EUR 500,000 and EUR 800,000 depending of the nature of the violation. For companies with an annual turnover of more than EUR 400 million, fines of up to 2 % of the total worldwide annual group turnover may be imposed. Companies, which have committed an infringement, subject to a fine of at least EUR 175,000, may be barred from public procurement for up to three years.
- The major substantive provisions of the Diligence Act shall enter into force on January 1, 2023. Some provisions, in particular those providing a legal basis for enacting (implementing) regulations and preparing the Federal Office for Economic Affairs and Export Control (BAFA) for the new enforcement tasks, are due to enter into force upon publication of the law in the official journal.

II. Initiative on European Union level

In parallel to the German national legislative proposal, a largely similar draft legislation is currently being discussed on the European Union level. On January 27, 2021 the Committee of Legal Affairs of the European Parliament approved a recommendation to the Commission on corporate due diligence and corporate accountability including a draft directive (Due Diligence Directive).² The European Parliament has to approve the initiative. Didier Reynders, European Commissioner for Justice, plans to have the Due Diligence Directive adopted prior to 2024, which seems to be an ambitious timeline.

Although the German Due Diligence Act and the EU Due Diligence Directive are similar to some extent, the European Commission is aiming for even stricter regulation on the European Union level. According to the current draft, the EU Due Diligence Directive would apply to large companies, all publicly listed companies as well as high-risk small and medium-sized companies, conducting business in the European Union. It would extend most due diligence obligations to the entire supply chain. The EU Due Diligence Directive would provide for damage claims of individuals against companies to be ascertained before national courts of the European Member States.

² <https://emeeting.europarl.europa.eu/emeeting/committee/en/agenda/202101/JURI>



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As only very few European Member States have any human rights related supply chain regulations enacted so far, and amid an increasing economic competition of the European Union with China and the United States, it remains to be seen whether the current European Union approach of a strict supply chain regulation will get the required support.

III. Outlook

Given the early stages of the European Union initiative, it is uncertain whether the envisaged Due Diligence Directive will be adopted by 2024. In contrast, the German Due Diligence Act will likely be passed by June 2021. The current German Federal coalition government wants the Due Diligence Act to be adopted before the end of the current legislative term this autumn. Most likely, it will have the required votes in the relevant German legislative bodies, i.e. Bundestag and Bundesrat.

Given the quite intense discussions within the coalition government prior to reaching the most recent agreement on the Due Diligence Act, it is unlikely that the legislative process will fundamentally modify the concept and basic principles of the law. Due to the rather limited time period until the envisaged entering into force of the Due Diligence Act at the beginning of 2023, companies based in Germany are likely to accelerate their efforts to further strengthen human right due diligence in their supply chain related policies and procedures in the near future.

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