

SUPPLY CHAIN LAW IN GERMANY: CURRENT STEPS TOWARDS A MANDATORY HUMAN RIGHTS DUE DILIGENCE LAW

22 July 2020 | Germany
Legal Briefings

Germany is currently working on a mandatory human rights due diligence law (“Lieferkettengesetz” or “Sorgfaltspflichtengesetz”) that would oblige large German companies to take appropriate measures to prevent human rights violations in their business activities and supply chains. If companies fail to comply with the law, they may face civil liability for damages and risk sanctions.

Although Chancellor *Angela Merkel* (Christian Democratic Union, CDU) has put plans for a Supply Chain Law on hold during Covid-19, results of a [survey regarding the compliance of companies with human rights and social minimum standards](#) as well as the immense pressure on the legislature resulting from the public debate suggest that a Supply Chain Law is very likely to be passed before the end of this legislative period in autumn 2021. Companies should therefore prepare themselves, review their internal processes and, if necessary, adapt their compliance systems accordingly.

An internal position paper summarising the key elements of the law, which was jointly authored by the Minister for Labour and Social Affairs *Hubertus Heil* (Social Democratic Party, SPD) and the Minister for Economic Cooperation and Development *Gerd Müller* (Christian Social Union, CSU), was recently leaked to the public and reported in the German newspaper *Handelsblatt*.

KEY POINTS OF THE PROPOSED DRAFT SUPPLY CHAIN LAW

The draft Supply Chain Law is based on the requirements of the [UN Guiding Principles for Business and Human Rights](#) and the [OECD Guidelines for Multinational Enterprises](#). A Supply Chain Law would place mandatory legal obligations on companies based in Germany with more than 500 employees to ensure that social and ecological standards are observed through all tiers of the value chain, meaning that suppliers from developing and emerging countries must also comply with them. It would oblige these companies to analyse whether their business activities (potentially) have an adverse effect on internationally recognised human rights. Following this comprehensive risk analysis, the companies would need to take adequate measures to prevent such adverse effects and to provide access to remedies. The measures required shall be appropriate and proportionate in view of the business activity and risk profile of the company. The closer the relationship with the supplier and the greater the scope for influence, the greater the responsibility for implementing corporate due diligence. In addition to an annual report publicly available on their website, companies would also have to report to a (not yet specified) federal authority on the measures they have taken. This federal authority shall be responsible for individual case reviews in the event of suspected serious violations.

Any violation of these legal requirements would create a cause of action and form the basis for damage claims by private parties before German courts. Yet, according to newspaper reports, this does not imply unlimited liability for the misconduct of third parties. The obligation to exercise human rights due diligence under the Supply Chain Law does not mean that companies would have to monitor all processes of thousands of subcontractors in the global value chain. Instead, for reasons of practicability and proportionality, a company would only be liable if the damage was foreseeable and avoidable if appropriate due diligence measures had been carried out. Companies should therefore concentrate on *major foreseeable* risks, for example with regard to certain geographical regions (e.g. crisis areas) or relevant problem areas (e.g. child labour, human trafficking). A company would not be liable for any violation of human rights that may occur if it has done everything reasonable within its actual and legal possibilities. According to press reports, civil liability would even be limited to intent and gross negligence, if companies implement a state-approved industry standard (“Safe Harbour”).

In addition to civil liability, a sanctions regime is also envisaged. The competent federal authority can impose fines if the measures taken to protect human rights are not sufficient and the company fails to take corrective action. In the event of a severe fine, the company concerned may even be excluded from public procurement for a certain period of time.

DESPITE CRITICISM - THE SUPPLY CHAIN LAW SEEMS WITHIN REACH

The legislative initiative has been met with great approval in civil society and even in parts of the business community. More than 60 renowned companies have stated support for the legislative proposal, including REWE, Tchibo, Nestlé and Ritter Sport. However, the introduction of a Supply Chain Law remains controversial in some areas, with the Minister for Economics *Peter Altmaier* (Christian Democratic Union, CDU) expressing concern that such a law would put additional burdens on companies already shaken by Covid-19. German business associations have also criticised the proposal, expressing concern that a Supply Chain Law would make companies *de facto* liable for third parties' actions even in lower tiers where influence on sub-contractors cannot be exercised.

STATUS QUO: “PATCHWORK APPROACH” OF DIFFERENT WORLDWIDE REGULATIONS

The concept of human rights due diligence is not new and is already a common practice in many companies as well as legally regulated in certain countries. It is addressed in soft law regulations, such as the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, which provide for compliance with human rights standards as a voluntary requirement. France introduced the [Law on the Corporate Duty of Vigilance](#) in 2017, which made it the first country in the world to introduce mandatory human rights due diligence, albeit only for large companies. The [European Union](#) and a number of countries, such as [Switzerland](#), are currently debating similar initiatives. A related question is whether countries having modern slavery legislation, such as the UK, [would shift toward mandatory human rights due diligence in the future](#).

In an international comparison, Germany lags behind other countries in terms of a legal framework for mandatory human rights due diligence. So far, Germany has merely introduced minor supply chain due diligence obligations by adopting the so-called “Mineral Resources Due Diligence Act” (“*Mineralische-Rohstoffe-Sorgfaltspflichten-Gesetz*”, “MinRohSorgG”). This law requires that from 2021 onwards companies importing designated minerals and resources will need to maintain risk management systems and ensure transparency in their supply chain.

NAP - MONITORING PHASE 2020 - NEED FOR LEGISLATIVE ACTION AT NATIONAL LEVEL

Since 2016, however, there has been some movement to remedy the lack of a legal framework for human rights due diligence in Germany. The German government approved its National Action Plan on Business and Human Rights (“**NAP**”) in line with the UN Guiding Principles for Business and Human Rights. The NAP expects that all companies shall implement a human rights due diligence by establishing processes that identify, prevent and mitigate the adverse effects of their business activities, and sets as a goal that 50% of the German companies with more than 500 employees should implement respective systems until 2020. In case of a failure to achieve this goal a legislative action would follow. This was confirmed in 2018 in the coalition agreement which the current German government is based on.

To examine whether the 50% goal has been achieved, two [voluntary surveys](#) amongst companies with more than 500 employees were conducted. In the first survey in 2019, only 465 of 3,325 randomly selected companies responded and not even 20% of the surveyed companies fulfilled the requirements of the NAP. The results of the second survey, published on July 14, 2020, are similarly disappointing: 455 of 2,250 surveyed companies participated and only 22% meet the NAP's requirements.

Thus it became clear that the approach of voluntary self-commitment is insufficient and that there is a need for a mandatory human rights due diligence law in Germany. This would presumably also lead to greater equality in competition, because companies that have already taken steps to respect human rights would be no longer economically disadvantaged.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



SYLVIA SCHENK
CONSULTANT,
GERMANY
+49 69 2222 82514
Sylvia.Schenk@hsf.com



**DR NATHALIE
ISABELLE
THORHAUER**
LIC. EN DROIT (LYON)
| SENIOR ASSOCIATE,
GERMANY
+49 69 2222 82515
Nathalie.Thorhauer@hsf.com



QUENIE HUBERT
ASSOCIATE,
GERMANY
+49 69 2222 82519
Quenie.Hubert@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

**SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND
MORE**

Close

© HERBERT SMITH FREEHILLS LLP 2020