

LEGAL UPDATE CORPORATE LAW & PUBLIC COMMERCIAL LAW

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Update on the German Act on Corporate Due Diligence Obligations in Supply Chains (LkSG): Timely risk analyses of due diligence obligations and possible civil liability of companies and their executive bodies in the event of breaches of duty

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The German Act on Corporate Due Diligence Obligations in Supply Chains (“Lieferkettensorgfaltspflichtengesetz – LkSG”) came into force on 1st January 2023. Accordingly, companies that fall within the scope of the LkSG must observe various due diligence obligations along the supply chain in order to avoid prosecution for misconduct by state authorities. The sanction mechanism laid down in the LkSG is not conclusive. In fact, civil liability for companies – as well as their bodies in their internal relationship – may also come into consideration.

From 1st January 2023, all companies, having their registered office in Germany and at least 3,000 employees, will have to fulfil comprehensive due diligence obligations. This primarily concerns human rights and environmental issues. The affected companies must identify, assess and prioritise risks in their own business areas and in the business areas

of their direct suppliers. From 1st January 2024, the LkSG will be applicable for companies with at least 1,000 employees.

At the beginning of 2022, we have already outlined the scope of application of the LkSG as well as possible impacts of a European Supply Chain Directive (“CSDDD”) in a Legal Update. You can access this [Legal Update from 23rd March 2022](#).

1. Assistance provided from BAFA and other Authorities

In due time before the LkSG came into force, the German Federal Office of Economics and Export Control (“Bundesamt für Wirtschaft und Ausfuhrkontrolle - BAFA”) published an initial guide with practical tips on how to implement the risk analysis as well as a questionnaire – both documents only in German. However, the

BAFA also provides some documents in English, such as the [“Impact on businesses in partner countries and support available from the German government”](#). The Federal Ministry of Labour and Social Affairs (“Bundesministerium für Arbeit und Soziales”) has published the survey – initially prepared by BAFA – in English. Access is available at this [link](#). The risk analysis is the core piece of the due diligence obligations. For this purpose, Section 3 LkSG depicts a comprehensive catalogue of various measures or procedural steps. The result of the risk analysis is the basis for determining effective preventive and remedial measures.

With the first handout from 17th August 2022, the BAFA fulfilled its role as the supervisory authority that will eventually also monitor the implementation of the entrepreneurial obligations under the LkSG. With the handout, the BAFA provided guidance in particular on the introduction of the risk analysis, from its preparation to its implementation, culminating in the evaluation of the results. Additionally, the handout provides support on the evaluation of the results of the risk analysis in order to develop suitable prevention measures.

With the survey on reporting published on 11th October 2022, the BAFA provided an overview of both mandatory reporting questions and questions that can be answered on a voluntary basis. The questionnaire intends to reflect the survey that is offered on the homepage of BAFA from January 2023 onwards. Hence, affected companies can already make themselves known with the content. [You can access the questionnaire here.](#)

2. Civil liability of the company in its external relationship and of the organ in its internal relationship

With the due diligence obligations introduced in the framework of the LkSG, which have to be observed by the enterprises in the supply chain, the question arises to what extent the enterprise itself can be held liable to recourse by an injured party or an organ of an enterprise in the internal relationship.

a) General Principle: No additional liability risks for companies due to LkSG

The LkSG contains the following provision in Section 3 (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.”

The LkSG is thus based on the understanding that the newly introduced due diligence obligations (including risk analyses) and their compliance – with the purpose of improving the human rights situation in international supply chains – should be enforced and sanctioned in administrative proceedings and by means of administrative offence law (“Ordnungswidrigkeitenrecht”). However, the second sentence of Section 3 (3) LkSG also expresses that if liability is already established under the current legal situation, i.e. irrespective of the newly created due diligence obligations under the LkSG, this also remains unchanged and a corresponding claim can be enforced under civil law. The existence of Section 11 LkSG concerning a special capacity to sue underpins this understanding.

b) Liability of companies in the external relationship

Whether liability exists in the external relationship within the supply chain is thus to be assessed according to general principles of civil

law. As the *LkSG* has only recently entered into force, there is no publicly accessible case law on this constellation so far. At least the recognised principle of the violation of traffic duty (“Verkehrspflichten”) vis-à-vis other participants in legal transactions could be used as a connecting factor.

According to the Supreme Court case law, every participant in legal transactions has the obligation to conduct his or her own behaviour in such a way that others are not exposed to avoidable dangers. An enterprise within the scope of the *LkSG* is thus obliged to establish reasonable defence measures in its supply chain. In this context, the due diligence obligations under Section 3 *LkSG* can be used as a scale for the liability under traffic duty, with the consequence that a company (also) has to observe these due diligence obligations in order not to be held liable under civil law by an injured party through the legal institute of traffic duty.

c) Recourse liability of a governing body against a company in the internal relationship

If the company is liable for damage, the company can, in accordance with general principles of civil law – applying the general rule of traffic duty – also make a claim against the executive body in the internal relationship, insofar as the executive body has breached its duties towards the company. Among others, the basis for these claims can arise from the Stock Corporation Act (“Aktengesetz - AktG”), Act on Limited Liability Companies (“Gesetz betreffend die Gesellschaft mit beschränkter Haftung - GmbHG”) and

also from the German Civil Code (“Bürgerliches Gesetzbuch - BGB”).

The general traffic duty, which must be strictly observed by a company in its external relationship, must therefore also be regularly observed by an executive body in its internal relationship vis-à-vis the company, in order not to be held liable by the company itself following liability in its external relationship.

3. Recommendation for action and outlook

Since the *BAFA* is the competent supervisory authority under the *LkSG*, its assistance should be carefully evaluated and – if relevant – taken into account when implementing the risk analyses. In doing so, the questionnaire can also be used as part of a test run in order to already deal with the questions that may arise for an affected company. According to the *BAFA*, further handouts will follow. Thus, a monitoring of the homepage is highly recommended.

It is advisable that affected companies – and also the respective executive bodies themselves – deal with the *LkSG* in due time in order to comply with the additional due diligence obligations. Although the *LkSG* does not intend to entail any additional liability under civil law, the law itself clearly states that at least indirect liability is possible through general principles of civil law.

This means that reasonable defensive measures must be developed and implemented in affected companies at an early stage.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the authors Emre Özbek on +49 030 884 503-131 or by email to eozbek@goerg.de and Freya Elisabeth Humbert on +49 030 884 503-187 or by email to fhumbert@goerg.de. For further information about the author visit our website www.goerg.com.

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