Federal Ministry of Labour and Social Affairs

Federal Ministry for Economic Cooperation and Development

Draft key points of a Federal law on strengthening corporate due diligence to prevent human rights violations in global value chains (Due Diligence Act)*

1. MAIN CONTENTS OF THE LAW

The law is intended to oblige companies based in Germany with more than 500 employees to meet their responsibilities in the value chain. In the future, companies will have to examine whether their activities have a negative impact on human rights and take appropriate measures for prevention and remedy.

a) Scope of application

The law should cover companies that are

. resident in Germany, and

. have more than 500 employees.[1]

The duty bearer under the law will be an individual legal entity. Within a group of companies, the employees in all affiliated companies will be taken into account to reach the number of 500 employees for the parent company.

The criterion of "residency" means that there is a strong domestic connection and that entrepreneurial management decisions are taken in Germany. Mere commercial activities in Germany are not sufficient.

b) Design of the corporate due diligence

The corporate due diligence obligations defined in the law will be derived from the requirements of the UN Guidelines for Business and Human Rights (and) the OECD Guidelines for Multinational Enterprises. They describe a process standard (Due Diligence Standard). The law establishes an obligation of efforts and not of result.

The principle of empowerment before withdrawal applies; companies should be encouraged to first seek solutions for better protection of human beings and the environment, either together with the supplier or within the industry. The Federal Government provides appropriate support services. Key points of a Due Diligence Act.

The due diligence contains the following aspects:

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* German original: Entwurf für Eckpunkte eines Bundesgesetzes über die Stärkung der unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in globalen Wertschöpfungsketten (Sorgfaltspflichtengesetz), available at https://die-korrespondenten.de/fileadmin/user_upload/die-korrespondenten.de/Lieferkettengesetz-Eckpunkte-10.3.20.pdf (29 June 2020). Translation by Markus Krajewski (markus.krajewski@fau.de) with help from https://www.deepl.com/de/translator

[1] Approximately 7,280 companies are affected. Both partnerships and corporations under German and foreign law are covered.

- **Identify risks**: Businesses assess whether their activities and business relationships have a potential or actual adverse impact on internationally recognized human rights. To this end, relevant risk areas will be identified, in particular forced labour, child labour, discrimination, violation of freedom of association, violation of occupational health and safety, problematic employment and work conditions (working hours, wages, annual leave, etc.), violation of land rights; damage to health, shelter or subsistence goods, for example through water, soil or air pollution. Environmental protection and anti-corruption measures with a connection to human rights will be included in the risk assessment obligation.
- **Analyse risks**: Companies establish procedures to identify and assess (potential) adverse human rights impacts in an appropriate form - also along the value chain. Companies must assess individually whether their own activities adversely affect the above-mentioned risks. They must also address those risks that are associated with their business activities, products or services as a result of a business relationship. In doing so, significant risks must be prioritized.
- **Take actions**: Companies take appropriate measures to prevent, minimize and eliminate negative effects.
- **Check effectiveness**: Companies check whether the measures taken are effective.
- **Establish a complaint mechanism**: Companies set up their own complaint procedure to identify human rights violations at an early stage or participate in external procedures.
- **Transparent and public reporting**: Companies report annually in a transparent and public manner that they are aware of the actual and potential adverse effects of their business activities on human rights and that they take appropriate action to counteract them. Each of the core elements described above must be addressed. The reports must be accessible to everyone on the Internet.

2. PRINCIPLE OF APPROPRIATENESS

The required risk management is designed to be appropriate, i.e. proportionate and reasonable, in view of the nature and scope of the business activity. The appropriateness is determined in particular by

- **Type of business activity and its individual context**, e.g. with regard to the situation at the place of production, the industry and size of the company and the type of product or¬ service
- **Probability** with which risks can materialize
- **Seriousness** of the actual or potential damage. Priority must be given to risks that may be associated with a severe impairment.
- **Ability to influence:** Remedial action depends on whether the risks occur at the company's own site, at a direct supplier or at the end of the supply chain. The closer the relationship with the supplier and the higher the level of influence, the greater the responsibility for implementing corporate due diligence.

The **concretization** of the due diligence requirements is based on existing suitable, recognized guidelines and frameworks. Furthermore, the Act is open to the consideration of sector-specific and cross-industry standards as an aid to interpretation and formulates corresponding minimum requirements.

3. ENFORCEMENT

a) Civil liability

Rights of affected persons are strengthened

A violation of the law can be the basis for actions for damages brought by private parties before German courts within the scope of their international jurisdiction, provided that the other conditions for a claim for damages are met.

Liability risk for companies is limited

A company is liable for an impairment which was **foreseeable** and **avoidable** when fulfilling the due diligence obligation. In principle, the burden of proof lies with the plaintiff.

A company is not liable if did the appropriate within the limits of factual and legal possibilities and the damage has nevertheless occurred (**obligation of effort**). Proximity to the supplier and the possibilities to influence his behaviour are particularly relevant to determine the appropriateness.

Liability is limited to **essential legal interests** such as life, body, health, freedom, property and the general right of personality. A violation of these legal interests can also result from causing environmental damage.

Ensuring legal certainty:

- The law will be designed in such a way that it meets the requirements of an "overriding mandatory provisions" under EU law.[2] Hence, German law is applicable in this respect (as the law of the place of action where the supply chain management takes place) and supersedes the law of the country of production (the law of the place where the damage occurs), which is usually applicable in cross-border cases. In this respect, it will no longer be necessary to obtain time-consuming and costly legal opinions to determine the content of foreign law.
- Parallel actions for damages in different EU Member States are generally excluded.[3]

b) Administrative enforcement

Electronic reporting procedure

- Sending a report to the competent federal authority;
- Examination and, if necessary, objection to the report by the competent federal authority;
- Possibility of rectification by the company and renewed examination
- if rectification was unsuccessful, the authority will impose an appropriate fine.

Case-by-case enquiries in case of suspected serious infringements:

- A federal authority with experience in monitoring compliance with entrepreneurial due diligence obligations will review violations of the law on a case-by-case basis using a

[2] Article 16 of EU Regulation No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations - 'Rome II Regulation'.
[3] Article 29 of EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters - Brussels Ia Regulation.

risk-based approach and following information provided by third parties. Enforcement tools should be coherent with existing mechanisms and standards, for example in monitoring trade in conflict minerals.
- Any infringements found may result in an appropriate fine.

c) In-house enforcement

The management is responsible for the operational implementation of the due diligence obligations. Details can be regulated internally, such as the appointment of a human rights officer.

4. SAFE HARBOUR

Companies that join and implement an officially recognised (industry) standard can limit their civil liability to intent and gross negligence.

The act will list criteria for such an official recognition. The standard must

- cover the entire supply chain;
- take into account all the core elements of due diligence;
- have been developed in the framework of a multi-stakeholder process.

The company's compliance with the standard is externally audited. The Safe Harbour option provides positive incentives for exemplary conduct.

5. PUBLIC PROCUREMENT

- Companies applying for public contracts that have been fined above a certain level for violation of due diligence should be excluded from public contracts for a reasonable period of time.
- to this end, the authority responsible for the enforcement of the law shall enter the imposition of the fine in a register suitable for that purpose.
- Procuring authorities must access the register above a certain volume of contracts.
- the competent authority must provide information to the procuring authorities

6. ENTRY INTO FORCE AND SCOPE OF APPLICATION

- The law enters into force upon promulgation.
- In order to give companies the opportunity to be sufficiently prepared, a transitional period of three years is granted before the application of the law.

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