

Implementing the **German Supply Chain Due Diligence Act**

Why is there a **Supply Chain Due Diligence Act**?¹

¹ Disclaimer: This does not,
and is not intended to,
constitute legal advice.

International trade and business operations by German and European companies represent an opportunity to create jobs and generate prosperity along global supply chains. On the downside, these activities can also have substantial negative effects on the people and the environment along those same supply chains. In addition to the duty of the state to respect, protect and fulfil human rights, companies also have the responsibility to respect human rights. In order to ensure the practical implementation of this responsibility as well as to create clear rules and the same conditions for all companies in Germany, the German Government has adopted the Supply Chain Due Diligence Act.

The Act will **enter into force in January 2023**.

Beyond this Act, your company may also be subject to EU and other legislation requiring the implementation of human rights due diligence.

What does **due diligence** mean?

The Act requires companies operating in Germany with a certain number of employees to take the necessary steps to prevent, end or minimise adverse impacts on people and the environment. In practice, this means that companies need to set up a management system to identify if and where their business activities could potentially cause or contribute to human rights abuses or environmental damage. The Act specifies which elements such a management system must include.

The **due diligence requirement is not an obligation to succeed** as companies will not be able to guarantee that no human rights or environmental obligations have been violated in their supply chains. Instead, companies will have to prove that they are following the due diligence obligations as set out in the Act to the best of their ability, considering their individual context and the appropriateness of their actions. The appropriateness as set out by the Act is defined by considering, among other things, the type and scope of the business activity, the severity of the violation and its likelihood as well as the company's ability to influence it. We have been working successfully with companies for many years to define this individually for each company.

Who does the **Supply Chain Due Diligence Act** apply to?

The Act applies to all businesses which have their central administration, principal place of business, administrative headquarters, statutory seat or branch office in Germany.

Initially, this applies to businesses with more than 3,000 employees; after 1 January 2024, it will apply to businesses with more than 1,000 employees.

This figure must include, for example, temporary employees as well as employees of all affiliated companies.

Additionally, the effects of the Act are also expected to impact smaller companies, as requirements may be passed along in the supply chain.








The **supply chain** refers to all products and services of a company (from raw material to finished product) and includes:

- the actions of a company in its **own area of business** (including controlled subsidiaries abroad),
- the actions of a **direct supplier**, and
- the actions of other **indirect suppliers**. (§2.5)



What does the **Supply Chain Due Diligence Act** require?

According to the Supply Chain Due Diligence Act, companies are required to **set up a management system to fulfil their due diligence obligations**. This management system must ensure that human rights and environmental risks are identified and any potential violations are prevented, ended or minimised. The risk management system must be **appropriate and effective**, should be anchored in all relevant business activities through respective measures and should cover the following aspects:

1	Setting up a governance structure		5	Taking remedial action	
2	Formulating a policy statement		6	Establishing a grievance mechanism	
3	Conducting regular risk analyses		7	Documenting continuously and reporting annually	
4	Adopting concrete preventive measures				

1 Setting up a governance structure



LkSG
§ 4.3

Delegating in-house responsibility for the topic of human rights and the risk management system, for example, by appointing a human rights officer.

Human rights are those arising from the conventions listed in number 1 to 11 of the Annex to the Act §2.1.

A **human rights risk** is a condition in which, on the basis of factual circumstances, there is sufficient likelihood of a violation of one of **the following prohibitions** for the protection of the human rights listed in the conventions (of the Annex):

- child labour
- forced labour
- all forms of slavery
- disregard for occupational health and safety
- disregarding for freedom of association
- unequal treatment
- withholding of reasonable wages
- causing **environmental** damage (harmful soil change, water and air pollution, harmful noise emission and excessive water consumption) and impairing food safety, access to drinking water and sanitary facilities or a person's health
- unlawful eviction and deprivation of land
- hiring of security forces, which make abusive use of the force
- any other prohibition of an act or omission in breach of duty, directly capable of infringing in a serious manner the human rights set out in §2.1

2 Formulating a policy statement



LkSG
§ 6.2

Formulating a **policy statement** on the respect for human rights and the environment and having it adopted and endorsed at the highest management level.



The policy must contain a description of the implemented due diligence management system, namely the main human rights and environmental risks identified through the risk analyses and how they are being / will be addressed. The policy statement should also be used as a clear formulation of expectations towards employees and suppliers (e.g., through a code of conduct).

3 Conducting regular risk analyses



LkSG
§ 5

Conducting **regular risk analyses** to identify human rights or environmental risks in the company (including its own operations) and at direct suppliers.

The risk analyses should be conducted annually and ad hoc whenever necessary (e.g. when expanding business activities, dealing with new suppliers or when new evidence arises). Understanding and assessing risks is a continuous process. Risk analyses should be revised each year to ensure the continuous improvement of their scope and degree of detail.

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4 Adopting concrete preventive measures



LkSG
§ 6.1-4

Adopting **concrete measures to prevent** violations of human rights and environmental provisions connected to the company's own business activities as well as those attributable to direct suppliers, based on the risks identified as relevant for the company. The effectiveness of the measures will have to be assessed regularly.

- Measures **in a company's own business areas** could include, among others, delivering employee training, adapting procurement strategies and buying practices as well as implementing control measures.
- Measures **for direct suppliers** can include, for instance, the selection of suppliers according to human rights and environmental considerations, contractual assurance by direct suppliers to comply with the expectations, implementing risk-based control mechanisms, such as audits, or training sessions on the measures.

5 Taking remedial action



LkSG
§ 7.1-4

Taking remedial actions, should any human rights or environmental provisions be violated by the company or a direct supplier. The effectiveness of these remedial actions must be assessed annually and on an ad hoc basis.

- In case a violation has occurred or is imminent, the company must **prevent, end or minimise** the violation. If the violation is in its own business area, the company must always ensure that the remedial action ends the violation.
- In the case of a direct supplier and if the company cannot end the violation, a concrete plan of action to minimise the violation must be implemented swiftly. Termination of the business relationship is only to be considered as a last resort.

6 Establishing a grievance mechanism



LkSG
§ 8, 9.1

Establishing **complaints procedures**, also known as **grievance mechanisms**. If a violation or imminent risk is identified, the responsible person in the company must be informed quickly. The Act thus requires companies to establish effective grievance mechanisms. The effectiveness of the procedures must be assessed annually and on an ad hoc basis.

- The complaints procedures are meant for persons who are **directly affected either by economic activities in the company's own business area or by those of a direct supplier** as well as for persons who are aware of a possible violation and would like to submit it.
- The procedures must fulfil certain criteria, such as – but not limited to – being impartial and confidential, and ensuring that the complainant is protected from disadvantage or punishment. The procedures must be accessible to the public in written form.
- Companies can participate in external mechanisms instead if these fulfil all relevant criteria.

The complaints procedure must also be open to persons who have knowledge of possible violations or whose rights have been affected by economic **activities of an indirect supplier**.

If the company has **substantiated knowledge** of possible violations in the deeper supply chain, it must immediately conduct a risk analysis, end or minimise the violation and/or establish appropriate preventative measures, such as joining a sector initiative, to prevent similar violations in the future.

7 Documenting continuously and reporting annually



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§ 10, 3.3

Due diligence activities must be **documented continuously** within the company, and include all responsibilities, processes and measures mentioned above as well as any identified violations. Such documentation, which the company is required to retain for seven years, serves as evidence that the company's due diligence was appropriate and effective and must be retained for seven years. The company also has to submit and publish on its website an **annual report** detailing the fulfilment of its due diligence obligations, with, for example, any human rights and environmental risks identified as well as the effectiveness of implemented measures. The official reporting guidelines by the Federal Office for Economic Affairs and Export Control (BAFA), the government agency responsible for the enforcement of the Act, outline the manner in which to integrate the documented information into the annual report.

Should companies subject to the Act fail to appropriately fulfil their due diligence obligations, the BAFA is authorised to issue **substantial fines**. Any additional civil liability is explicitly excluded.

Environmental obligations are those arising from the conventions listed in number 12 and 13 of the Annex (§2.3).

Environmental risk is a condition in which, on the basis of factual circumstances, there is reasonable likelihood of a violation of one of the **following prohibitions** arising from the environmental duties listed in §2.3:

- The ban on the manufacture, the use and treatment of mercury pursuant to the Minamata Convention
- Prohibition on the production and use of chemicals and the non-environmentally sound handling, collection, storage and disposal of waste arising from the Stockholm Convention
- The control of transboundary movements of hazardous wastes as defined by the Basel Convention

How can we support you?

We are an international management consultancy specialised in **human rights**. With our multinational and interdisciplinary team of experts, we help companies establish and integrate effective human rights due diligence processes such as specified by the German Supply Chain Due Diligence Act, for example by identifying:

- 1 where your most important risks are (**risk analysis**),
 - 2 what processes you have already embedded in your company (**gap assessment**), and
 - 3 what your next steps should be (**roadmap**).
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It will be our pleasure to answer any questions you may have in relation to your obligations under the Supply Chain Due Diligence Act, and more generally, in relation to managing your company's human rights risks.



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