

## BUSINESS AND HUMAN RIGHTS – TOWARDS MANDATORY DUE DILIGENCE IN GERMANY



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Find out more at: [www.globalcompact.de/de/themen/Menschenrechte-und-Arbeitsnormen.php](http://www.globalcompact.de/de/themen/Menschenrechte-und-Arbeitsnormen.php)

When earlier this year the Ministers for Economic Cooperation, Labour and Economic Affairs stepped in front of the press to announce the compromise they had reached on a new law on human rights due diligence, they ended

a debate that had essentially been going on since the process to develop a German National Action Plan (NAP)<sup>1</sup> for the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs)<sup>2</sup> kicked off in 2015: Do we need binding rules to ensure companies do business with respect for human rights?

At the time, the government opted for a compromise: It would monitor the extent to which German companies with more than 500 employees implement human rights due diligence as described in the UNGPs and the NAP on a voluntary basis. However, it committed to introduce binding requirements if it were to find that by 2020 less than half of them had appropriate due diligence processes in place.<sup>3</sup> The results of the monitoring process were clear: Two large-scale representative surveys in 2019 and 2020 found that less than 20% of the concerned German businesses had implemented appropriate human rights due diligence.<sup>4</sup> Against this background, the Government developed and ultimately agreed upon the draft Due Diligence in Supply Chains Law, known as 'Sorgfaltspflichtengesetz' or 'Lieferkettengesetz' in Germany.

- 1 The Federal Government. (2016) *National Action Plan – Implementation of the UN Guiding Principles on Business and Human Rights 2016–2020*. Available at: <https://www.auswaertiges-amt.de>
- 2 Office of the High Commissioner for Human Rights (2011) *Guiding Principles on Business and Human Rights*. Available at: <https://www.ohchr.org>
- 3 The NAP specifically states that 'if fewer than 50% of the enterprises defined above [based in Germany and with more than 500 employees] have incorporated the elements of human rights due diligence (...) into their corporate processes by 2020 (...), the Federal Government will consider further action, which may culminate in legislative measures' (The Federal Government, 2016, p.10). The current government's coalition treaty went even further, stating that should the monitoring process of the NAP show that companies' voluntary commitments are not sufficient, it will take legislative action nationally and advocate for EU-wide regulation. See *Koalitionsvertrag zwischen CDU, CSU und SPD. (2018)* Available at: <https://www.bundesregierung.de>
- 4 EY, adelphi, sustain & focusright. (2020) *Monitoring des Umsetzungsstandes der im Nationalen Aktionsplan Wirtschaft und Menschenrechte 2016–2020 beschriebenen menschenrechtlichen Sorgfaltspflicht von Unternehmen – Zwischenbericht Erhebungsphase 2020*. Available at: <https://www.auswaertiges-amt.de>

## Key provisions

The draft law expressly builds upon the UNGPs and the NAP, particularly the concept of human rights due diligence contained therein. It thus joins a growing body of law that attempts to translate responsible business conduct into specific legal requirements. These include, for instance, the *UK Modern Slavery Act*, the French *Loi sur le Devoir de Vigilance* or the *EU Conflict Minerals Regulation*. Noting that the draft Due Diligence Law is currently being discussed in Parliament and might therefore still be subject to change, let us have a look at some of its key provisions.<sup>5</sup>

## Who is in scope?

Supposed to enter into force in 2023, the law would initially apply to businesses headquartered in Germany with more than 3,000 employees (around 600 companies). From 2024, the scope would be extended to German companies with more than 1,000 employees (approximately 2,900 companies). Temporary agency workers ('Leiharbeiter\*innen') are included in this number if their placement within the company exceeds six months. Companies that are not headquartered in Germany would currently not fall within the scope of the law.

## What is in scope?

In terms of human rights issues, the draft law covers the rights laid out in a defined list of international human rights instruments, notably the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, as well as the *Fundamental Conventions of the ILO*. The scope of the draft also includes a defined set of environmental treaties, such as the *Minamata Convention on Mercury*.

## What is required in terms of due diligence?

In general, the objective of due diligence as described in the proposed law is to identify, mitigate and prevent risks of negative impacts on the aforementioned human

rights and environmental standards associated with a company's own activities and supply chains. In principle, the responsibility to carry out due diligence applies to a company's entire supply chain, i.e. all inputs used by a company to manufacture a product or provide a service, from raw materials to the end consumer. The specific scope of due diligence obligations as currently foreseen in the draft, however, is tiered:

- For its **own operations and direct suppliers**, a company would – in essence – be obliged to regularly assess human rights risks and develop effective strategies to mitigate and prevent them.
- With regard to human rights risks at **indirect suppliers** further down the supply chain, the company would have to take such steps when it acquires 'substantiated knowledge' of a potential violation. This could, for instance, be an NGO report or a complaint alleging misconduct on the part of an indirect supplier.

The draft also requires companies to establish or participate in effective grievance mechanisms accessible to those potentially affected by their own operations, direct and indirect suppliers and to report annually on their due diligence efforts, including the effectiveness of measures taken.

## What about sanctions and enforcement?

The Federal Office for Economic Affairs and Export Control is named as the authority that would be in charge of monitoring compliance with the law. As it currently stands, non-compliance would be subject to a fine and companies fined above a certain threshold could face exclusion from participating in public tenders for up to three years.

## Implications for businesses

For some, these plans feel like an additional burden in an already burdensome time. For others, the proposed law does not go far enough, for instance in terms of liability and access to remedy for affected rightsholders.<sup>6</sup> While

<sup>5</sup> This section refers to the draft text of the law as of 03 March 2021: *Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten*. Available at: <https://www.bmas.de>

<sup>6</sup> The Federal Ministry for Labour and Social Affairs has published statements on the draft law from NGOs, business associations, trade unions and other stakeholders: Available at: <https://www.bmas.de/DE/Service/Gesetze-und-Gesetzesvorhaben/gesetz-unternehmerische-sorgfaltspflichten-lieferketten.html>

we have to wait for the outcome of the parliamentary process to know what exactly the requirements will look like, the draft law does provide important orientation and enables businesses (as well as other stakeholders) to engage with, make sense of and prepare for what is likely to come. Although more and more companies have been working to understand and address the human rights impacts of their operations, human rights due diligence is still far from being a mainstream element of corporate practice. Nevertheless, there are many established processes that companies can (and should) build upon when developing their human rights approach. This includes integrating human rights aspects into procurement processes, environmental and social impact assessments, or compliance management systems. It also requires creative thinking about the use of leverage and collaboration with others, as many human rights risks occur outside a company's direct control and influence.<sup>7</sup> And, perhaps most importantly, human rights due diligence will only be successful if there is broad buy-in across the organisation, encompassing both commitments from the top and engagement from those at the operational level.

While the shift in perspective from 'risk to business' to 'risk to people' may be challenging for many companies at first, a proactive approach to human rights impacts ultimately makes perfect sense from a business perspective. Not only can it help reduce reputational, operational, financial or (increasingly) legal and compliance risks, but it is also crucial in terms of moving towards more sustainable, resilient and 'future-proof' business models – something that plays an increasingly important role in the competition for talents, customers and investments.

## From minimum standards to a 'smart mix'

At the same time, many human rights issues businesses face are complex and/or systemic challenges that cannot be effectively (and in some cases legitimately) be solved by one actor or one measure alone. Tackling these issues and bringing about real, positive change will require not only binding minimum standards, but also consistent attention to business support and incentives to go beyond compliance. This demands coherence across different areas of policy and law as well as a commitment to cooperation, partnership and transparency on behalf of relevant stakeholder groups. For this reason, the UNGPs call on states to make use of a 'smart mix' of measures to ensure and encourage corporate respect for human rights by combining mandatory and voluntary approaches, at national and international level.<sup>8</sup> With mandatory human rights due diligence now firmly on the agenda of policy makers not only in Germany (and a number of other countries) but also at the European Union, as witnessed in the Commission's plans for a legislative initiative on sustainable corporate governance,<sup>9</sup> the coming years will be crucial to actually bring the smart mix to life. Businesses can choose to wait it out – or they can see this as an opportunity, invest now in the development of sound processes, prepare for what is to come and bring their perspectives to the discussion.

By Laura Curtze, Director for Human Rights & Labour Standards at Global Compact Network Germany

<sup>7</sup> Leverage is a key concept of the UNGPs and understood 'to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.' (OHCHR, 2011: p.21).

<sup>8</sup> Shift, the leading centre of expertise on the UNGPs, have elaborated on the different dimensions of a smart mix as well as their interplay in a briefing note: Shift Project. (2019) *Fulfilling the State Duty to Protect: A statement on the role of mandatory measures in a "smart mix" when implementing the UNGPs*. Available at: [http://shiftproject.org/wp-content/uploads/2020/05/Shift\\_SmartMix.pdf](http://shiftproject.org/wp-content/uploads/2020/05/Shift_SmartMix.pdf)

<sup>9</sup> See European Commission. (n.d.) 'Sustainable corporate governance'. Available at: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en)

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