

Supply Chain and Liability

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- I. Introduction
- II. Duties of care under company law
- III. Liability
- IV. Other sanctions

- Companies are being given responsibilities for socio-political purposes – **transformative company law**
 - EU-CSR-Reporting-Directive
 - Conflict Minerals Regulation
 - Gender Equality through FöPoG I und FöPoG II
 - Sustainability versus short term goals
 - Environmental, Social, Governance (ESG), Sustainable Development Goals (SDG)
 - Lieferkettensorgfaltspflichtengesetz (Supply Chain Act)
 - Proposal on corporate sustainability due diligence directive

- **Supply Chain Act** of 16 July 2021
 - Applies to all enterprises, irrespective of legal form
 - Companies that have their central administration, principal place of business, headquarter or their statutory seat in Germany
 - From 1 January 2023, the Act applies to all companies that have at least 3000 employees; from 1 January 2024, the Act will apply to companies that have at least 1000 employees in Germany
 - Human rights risks such as child labour, forced labour, slavery, discrimination, disregard of occupational health and safety obligations, disregarding the freedom of association
 - Environmental risks, e.g. Minamata Convention (Mercury), Stockholm Convention (Pesticides, Insecticides), Basel Convention (dangerous waste disposal)

II. Duties of care under company law



1. Appropriate Measures

- Measures have to be appropriate to the individual risk situation of the company; **criteria to determine appropriate measures** (sec. 3 subs. 2 LkSG):
 - Nature and extent of the company's business activities
 - Ability of the enterprise to influence the party directly responsible
 - Typical severity, reversibility and probability of a violation
 - Nature of the causal contribution of the enterprise
- Term „**Bemühenspflicht**“ (duty to make an effort) pertains to discretion of the board, which is obliged to take measures that are necessary and appropriate
 - No breach of duty if appropriate measures were used

II. Duties of care under company law

2. Risk Management System

- **Compliance** with all human rights and environmental duties of care (sec. 4 subs. 1 LkSG)
- Risk management must be enshrined in all **relevant business processes**
- Measures must be **appropriate** und **effective**
- **Identify and minimise** human rights and environment-related risks
- **Prevent, end and reduce** violations within the supply chain
- Enterprise must give due consideration to the interests of its **employees**, employees within its supply chain and those who may otherwise be directly affected (sec. 4 subs. 4 LkSG)

II. Duties of care under company law

3. Risk analysis

- Basis for supply chain risk management
- **Identification, assessment and prioritisation** of the relevant risks within own business and direct suppliers (sec. 5 subs. 1, 2 LkSG)
- Specific risks of countries, industries and transactions to be taken into account
- Risk analysis must be carried out **once a year** and on an **ad hoc** basis if there is a significant change of the risk situation (sec. 5 subs. 4 LkSG)
- Enterprise must ensure that results of the risk analysis are **communicated internally** to the relevant decision makers, i.e. board of directors or the purchasing department (sec. 5 subs. 3 LkSG)

II. Duties of care under company law



4. Further elements

- **Policy statement** on human rights strategy (sec. 6 subs. 2 LkSG)
 - Risk management, specific exposure to risk, expectation of employees and suppliers
- **Preventive measures** where a risk is identified (§ 6 LkSG)
 - Implementation of human rights strategy, procurement strategies, internal directives for procurement, training and supervision
- **Remedial action** if violation is discovered (sec. 7 LkSG)
- Internal or external **whistle blowing procedure** (sec. 8 LkSG)
- **Documentation** and **reporting obligation** (sec. 10 LkSG)

- **No liability under private law** for violations **according to LkSG** (sec. 3 subs. 3 s. 1 LkSG)
 - LkSG is not a statute intended to protect another persons, so no liability under sec. 823 subs. 2 BGB
 - Liability under sec. 823 subs. 1 BGB is disputed
 - Affirmativ approach: sec. 3 seqq. LkSG specify the traffic safety obligations under tort law (“Verkehrssicherungspflichten”)
 - Negative approach: sec. 3 subs. 3 s. 1 LkSG establishes a blocking effect as to tort claims
 - Intention of law maker is not to impose “new” obligations on the companies under the LkSG

- **No liability under private law** for violations **according to LkSG** (sec. 3 subs. 3 s. 1 LkSG)
 - Fundamental legal policy decision in favor of public enforcement and against private enforcement
 - Companies are only responsible for the risks they create and can rely on third parties to comply with their obligations (principle of trust)
 - LkSG goes further than recognized tortious duties, as LkSG imposes duties on companies regardless of whether the purchasing company itself created a source of danger or caused corresponding traffic expectations
 - If duties of the LkSG would be recognized in the context of tort liability, the ratio of sec. 3 subs. 3 s. 1 LkSG that the LkSG is not a protective law would be circumvented via the detour of the traffic safety obligation

- Liability according to **general principles of private law** (sec. 3 subs. 3 s. 2 LkSG) – Liability of the **company**
 - Human rights are not amongst the legally protected rights under **sec. 823 subs. 1 BGB**
 - If there is a violation of life, body, health, liberty, property or any other absolutely protected right, still the application of sec. 823 subs. 1 BGB is an exception under German tort law
 - In principle, everyone is only responsible for their own behavior and their own sphere, but not for the behavior and sphere of third parties

- Liability according to **general principles of private law** (sec. 3 subs. 3 s. 2 LkSG) – Liability of the **company**
 - The parent company has a traffic safety obligation if it treats the subsidiary as a dependent operating department
 - There is an obligation to ensure traffic safety if the parent company interferes in the risk management of the subsidiary or gives it specific instructions in a dangerous situation
 - Control and exercise of power by parent company over the source of danger (subsidiary) can also be considered if
 - mother has a high level of control intensity
 - mother has superior knowledge of risk and danger management or
 - there is a particular seriousness of the impending violation of rights



- Liability according to **general principles of private law** (sec. 3 subs. 3 s. 2 LkSG) – Liability of the **company**
 - In principle, German tort law does not recognize any duty of care with regard to the behavior of independent third (contractual) parties
 - Supplier himself is responsible for traffic safety
 - Traffic safety obligation comes into consideration if
 - company manages suppliers like a dependent operating unit
 - monitors them particularly closely
 - exerts significant influence on the day-to-day business of the supplier or
 - has control at the supplier's premises

III. Liability



- Liability according to **general principles of private law** (sec. 3 subs. 3 s. 2 LkSG) – liability of the **directors**
 - Principle of liability concentration within **internal legal relationship** between directors and corporation
 - Directors are only liable for a breach of their **duties of organisation** if they are personally in charge of these duties or if they have a specific duty of care
 - The regulations to be observed by the directors as part of the legality obligation include the obligations of the LkSG
 - **External liability** only applies to directors if they have **personally assumed** traffic safety obligations or if they hold a **personal guarantor position** towards the third party under tort law

IV. Other sanctions

- **Locus standi (capacity to sue)** of national unions and NGOs if rights of paramount importance are violated (sec. 11 LkSG)
- Duties of care derived from the LkSG are primarily enforced by way of **administrative procedures** and the law on regulatory offences
- Federal Office for Economic Affairs and Export Control (**BAFA**)
 - audits company's report and has authority to demand amendments (sec. 13 LkSG)
 - authority to take measures to end violations of obligations (sec. 15 LkSG)
 - is authorised to enter and inspect the enterprise's premises (sec. 16 LkSG)

IV. Other sanctions



- Negligent violations may be sanctioned as **regulatory offences** (sec. 24 LkSG)
- **Fines** of up to 8 Mio. Euro or **2 %** of the company's **annual turnover** (sec. 24 subs. 1 Nr. 1b, subs. 2, 3 LkSG)
- Calculation according to **worldwide** turnover of all natural and legal persons as well as associations of persons constituting an economic unit
- **Fine** varies according to motives and objectives, significance, effect and duration of the violation
- **Exclusion** from the award of public contracts (sec. 22 LkSG)
- **Directors** are **liable** for fines imposed on companies for failure by directors to fulfill their due diligence obligations



**Thank you for your
attention!**

