

INITIATIVE LIEFERKETTENGESETZ: OPINION FOR THE EU COMMISSION'S PUBLIC CONSULTATION OF THE PROPOSED REGULATORY INITIATIVE FOR SUSTAINABLE CORPORATE GOVERNANCE



Central features of an EU law imposing a corporate due diligence obligation

NEED FOR AND OBJECTIVES OF AN EU LEGAL FRAMEWORK FOR THE SUPPLY CHAIN DUE DILIGENCE OBLIGATION

EU legislation imposing a Community-wide corporate due diligence obligation in the areas of human rights, labor and social rights as well as environmental protection is urgently needed, in order to unify across the EU single market the statutory requirements of this nature imposed on corporations at the national level and thus to create a so-called “level-playing field” that ensures fair competition and strengthens companies’ resilience to crisis.

Several case-studies published by NGOs and CSOs such as Bread for the World, Misereor, Germanwatch and Oxfam, as well as others – for example, the study of MSIntegrity entitled “Not fit for purpose” – demonstrate that voluntary initiatives by private actors are insufficient to effectively prevent the negative impacts of business activities on human and labor rights, the environment, the climate, and other societal interests. Rather, it is imperative to adopt legislation obligating multinational corporations to conduct their business operations in compliance with international standards such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines.

Moreover, it should be a central objective of the EU legislation to provide the victims of human rights abuses with access to effective legal remedies in the courts of EU member states. A provision to this effect would put the EU member states in a position to discharge their duty under international law to protect human rights.

APPLICABILITY TO SMALL AND MEDIUM-SIZED ENTERPRISES

Given that the UN Guiding Principles and other regulatory codes apply to all companies, the proposed EU legislation should in principle also apply to small and medium-sized enterprises (SMEs). In accordance with the principle of proportionality under EU law, however, the provisions to be introduced should include risk-based gradations of accountability, so that SMEs are subject to the law’s obligations only to the extent they are active in a high-risk sector. The definition of high-risk sectors could be based on the EU’s NACE 2 regulation. The German Ministry of Labor and Social Affairs (*Bundesministerium für Arbeit und Soziales*) has likewise published a study on German high-risk sectors. Many SMEs already carry out due diligence as defined in the UN Guiding Principles – the German companies Vaude and ISA Traesko, for instance. The association Unternehmensgrün, comprised of ca. 350 companies, predominantly SMEs, has spoken out in favor of introducing a supply chain due diligence statute in Germany.

Support measures for SMEs, such as a help desk or capacity building and training, would be helpful.

APPLICABILITY TO COMPANIES NOT DOMICILED IN THE EU

The proposed EU legislation should be equally applicable to non-EU companies that have a branch or subsidiary in the EU or that regularly export products to or provide services in the EU. The 2017 Dutch law “Wet Zorgplicht Kinderarbeid” likewise provides that its coverage extends to all such companies as deliver goods or provide services to final customers in the Netherlands at least twice a year. The advantage of thus extending the scope of the law’s application would be to ensure equal competitive conditions for domestic and foreign companies doing business in the EU. The conduct of business operations in the EU provides the necessary basis for subjecting foreign companies to EU law without violation of the principle of territorial sovereignty under international law. Comparable legislation such as the U.S. Dodd Frank Act, the EU Timber Regulation, the UK Modern Slavery Act, and California’s Supply Chain Transparency Act likewise apply under specified circumstances to foreign companies.

SUBSTANCE OF THE DUE DILIGENCE OBLIGATION

Companies should be obligated, in carrying out their business activities both domestically and internationally, to apply due diligence with respect to human rights, labor standards, and environmental protection. **The due diligence obligation should extend to a company’s entire value chain, from the extraction of raw materials to waste disposal, as well as to its financing arrangements, exports and investments.** In accordance with the UN Guiding Principles, the due diligence obligation should include a risk analysis of the impacts of their business operations on people and the environment, involving stakeholders such as unions ; the implementation of remedial and preventive measures; and compensation through the establishment of appropriate complaint mechanisms. The principle of proportionality should limit this obligation in requiring companies to take only such measures as are commensurate, i.e., appropriate, in light of their size, the leverage they wield over suppliers, and what may be deemed a reasonable expenditure, given the seriousness of the human rights violations at stake. For example, companies should be expected to take appropriate measures to prevent modern forms of slavery such as child labor in textile factories in India and Bangladesh – given this practice has been widely reported on in the media – even at the level of their sub-contractors.

The due diligence obligation should thus encompass both the **specified procedural requirements and applicable international human rights conventions, including the ILO Conventions, as well as other relevant conventions. The minimum standards could where necessary be supplemented by sector-specific guidelines or additional provisions.** Moreover, **in the area of environmental protection, the proposed law should require that companies orient themselves toward the objectives defined in international treaties and conventions,** with the support of any agreements that may be reached by relevant research communities concerning important aspects of ecological sustainability, as for instance the goal of reaching climate neutrality by 2050, the goal of achieving no net loss of biodiversity, and other objectives defined in international documents. The protected interests in the field of environmental protection should in any event be defined to include water, air, soil, climate, and biodiversity.

ENFORCEMENT IN THE FORM OF CIVIL LIABILITY AND ADMINISTRATIVE LAW

The victims of human rights abuses or their families often cannot obtain compensation in court owing to the absence of effective legal remedies in the relevant jurisdiction. An **effective provision for civil liability** should therefore form a central feature of the proposed EU legislation.

The **liability** to be imposed **in accordance with the standards of tort law should extend to damages caused by suppliers** and should apply whenever legal interests protected under civil law, such as life, limb, and property, are violated, but also whenever international human rights such as the right of access to drinking water and the right to earn a living – for example, in the case of people displaced or deprived of their livelihood by the building of a dam – are implicated. **Liability** should be **ruled out** – in accordance with the principle of proportionality – to the extent that **damages to people or the environment could not have been foreseen or prevented**. Given that the public media have been reporting for years on the precarious conditions existing in textile factories in Bangladesh, for example, companies should be able to buy textiles there without exposing themselves to civil liability claims only if they have, in cooperation with unions, taken adequate measures to prevent factory accidents and establish a fair minimum wage.

Over and above the civil liability provisions, the administrative law of EU member states should foresee administrative offenses, entailing fines in the event that companies fail to discharge their due diligence obligations or fail to file a complete and accurate due diligence plan. The regulatory authorities should be obligated, when warranted by the circumstances or in response to information from a third party, to investigate possible infractions ex officio, and should be furnished with powers adequate to ensure the effective performance of its supervisory function.

It is crucial to reverse the burden of proof in favor of impacted parties. The proposed legislation should provide that companies generally bear the burden of showing and proving that they have complied with their due diligence obligations. An exceptional but still rebuttable presumption of compliance with due diligence obligations – and therefore of freedom from liability – is conceivable only in the event that the company in question is active in a private multi-stakeholder initiative recognized by the state as promoting the implementation of jointly defined sustainability industry-wide standards.

HIGH LEVEL OF REGULATORY DETAIL AT THE EU LEVEL

The advantage of legislation on the level of the EU, as opposed to the national level, consists in the law's applicability to many more companies, thus ensuring equality of conditions of competition at least within the EU. To achieve this, however, it is necessary that the European legislation be implemented with as much uniformity as possible in the laws of the member states. This means that member states should have little leeway for diluting the law's substance on the national level. As a result, the law's core content and specific features, as well as the mechanisms for its implementation by member states, should be developed ambitiously and in as much detail as possible at the EU level.

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