



**Statement on the
Draft Bill for a
SUPPLY CHAIN ACT**

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DRAFT SUPPLY CHAIN ACT: MASSIVE WEAKNESSES MAKE IMPROVEMENTS URGENTLY NECESSARY

On March 3, 2021, the draft law "Act on Corporate Due Diligence in Supply Chains" ("Supply Chain Act") was adopted by the cabinet and then submitted to the Bundestag. The draft law introduces an urgently needed paradigm shift in Germany: away from purely voluntary corporate social responsibility to binding human rights and environmental requirements.

In its present form, however, the draft law has massive weaknesses and urgently needs to be improved: Under pressure from business associations, the Economic Council of the Christian Democratic Union (CDU), the Federal Minister of Economic Affairs and Energy (BMWi) and the Federal Chancellor, the scope of companies' due diligence obligations has been limited so that they now only apply in full to their own business operations and direct suppliers (contractual partners). The Supply Chain Act would thus undermine applicable international human rights standards of the United Nations and the OECD, according to which companies must respect human rights throughout the value chain.

From the perspective of the civil society actors who have joined forces to form the Initiative Lieferkettengesetz (Supply Chain Act Initiative), such a restriction is completely unacceptable. After all, most human rights violations take place at the beginning of supply chains - and thus risk not being covered by the law.

Equally problematic: Unlike the French Due Diligence Act (Loi de Vigilance) and current plans for EU regulation, the German draft law does not include a civil liability provision and only marginally incorporates environmental standards. In addition, under pressure from Federal Minister of Economics Altmaier the number of companies covered has been reduced by 60 percent compared to the original plans of Federal Ministers Heil and Müller.

In its current form, the German law would send the wrong signal internationally. The Initiative Lieferkettengesetz (Supply Chain Act Initiative) will therefore campaign for significant improvements in the coming weeks and months of parliamentary debate.

More detail on points of critique:

LIMITED DUE DILIGENCE REQUIREMENTS FOR INDIRECT SUPPLIERS CONTRADICT INTERNATIONALLY RECOGNIZED HUMAN RIGHTS STANDARDS

The proposed legislation stipulates that due diligence obligations should only apply in full to the company's own business operations and to direct suppliers (direct contractual partners). For companies like Lidl and Aldi, this might mean that they would only have to examine a handful of German direct suppliers instead of the plantation operators in Ecuador. However, harmful pesticide use and exploitation take place on the plantations, not at the direct suppliers in Germany.

According to the internationally recognized UN Guiding Principles on Business and Human Rights, companies have a clear responsibility to respect human rights in their business operations and business relationships along the entire value chain. Therefore, the UN Guiding Principles stipulate that companies should first proactively and systematically analyse, assess, and prioritize all risks in their supply chain. As a next step, they should take necessary precautionary and remedial measures, as appropriate for the extent and scope of human rights violations and their actual ability to influence them.

It is, therefore, unacceptable that the Federal Minister of Economics has ensured that the draft law significantly limits due diligence obligations relative to indirect suppliers. For example, companies are only required to identify their human rights and environmental risks linked to indirect suppliers and take appropriate preventive measures if they obtain "substantiated knowledge" of a possible violation of human rights. Thus, they are not required to conduct precautionary risk analyses on their own initiative. Furthermore, there is a real danger that companies will only take action once damage has already occurred and is, therefore, no longer preventable. The draft bill contradicts the risk-based precautionary principle that is central to the UN Guiding Principles. For effective human rights protection, it is essential that companies act preventively and prevent violations before they occur. In its current form, the draft law sends the wrong signal for the planned EU regulation on human rights and environmental due diligence.

Moreover, the due diligence obligation, which is initially limited to direct suppliers, offers no incentive for companies to engage in multi-stakeholder initiatives or to disclose their value chains. On the contrary, companies would be incentivised to conceal their value chain so that they can claim to be unaware of human rights violations.

The bulk of human rights violations occur at the beginning of supply chains, such as child labour in cocoa farming or the displacement of indigenous peoples and environmental destruction from mining projects. The due diligence obligations of companies must, therefore, apply in full to the entire value chain.

DELETION OF THE CIVIL LIABILITY RULE

One of the central demands of the Initiative Lieferkettengesetz is that German companies be held liable under civil law for foreseeable and avoidable damages that they have caused or contributed to by failing to comply with due diligence requirements. The law would have to clarify that a violation of the law can be the basis for claims by affected parties before German courts, provided that the other requirements for a claim for damages are met. This was one of the key elements detailed by the Federal Ministry of Labour and Social Affairs (BMAS) and the Federal Ministry for Economic Cooperation and Development (BMZ).

However, under pressure from trade associations, the Minister of Economics, and the Chancellor, the draft bill does not include a civil liability provision. Consequently, victims of human rights violations would continue to have virtually no chance to hold German companies accountable for human rights violations before German civil courts. A central purpose of the law, namely improved access to courts and compensation for those affected, would be unmet. The deterrent and preventive effects of a civil liability rule for German companies would also be eliminated.

Instead, the draft law is limited to an innovation in representative action in civil proceedings, according to which injured parties would be able to authorize German trade unions and non-governmental organizations to conduct civil proceedings in Germany on their behalf. This provision would lower some practical hurdles for affected parties to sue for damages. However, it in no way replaces a civil liability rule that would strengthen the basis for claims by affected parties before German civil courts in the event of damage abroad.

NUMBER OF COMPANIES COVERED MORE THAN HALVED

In March 2020 in their statement on key elements for a due diligence law, Development Minister Müller and Labour Minister Heil had proposed that around 7,280 companies with over 500 employees be covered. This already fell short of the demand of the Initiative Lieferkettengesetz for a threshold of 250 employees. Economics Minister Altmaier was able to push through that initially, from January 1, 2023, only around 600 companies with over 3,000 employees will fall within the scope of the draft bill. From 2024, it will apply to all companies with more than 1,000 employees, currently 2,891 companies, according to the BMAS.

Thus, the number of companies covered has been reduced by 60 percent compared to the key elements of BMAS and BMZ. However, even far smaller companies in high-risk sectors such as textiles or agriculture can cause or contribute to serious environmental damage and human rights violations. Many large companies, as well as smaller companies such as Vaude, have spoken out in favour of significantly expanding the scope of coverage.

ENVIRONMENTAL OBLIGATIONS REMAIN SELECTIVE

The current environmental provisions of the draft law do not offer holistic and independent protection of the environment; for example, massive environmental destruction due to biodiversity loss is not even covered. The climate is also not considered a protected good. The envisaged human rights link to ecological assets such as soil, water, and air – which necessitates that environmental destruction be linked to human rights abuses - restricts environmental protection and increases demands on affected persons and other stakeholders when reporting environmental degradation. The chosen approach is not sufficient to meet the prevention principle of environmental law. This is particularly true in the case of progressive environmental degradation that does not directly and recognizably lead to human rights violations.

Analogous to the UN Guiding Principles on Business and Human Rights, the draft bill protects the rights enshrined in the International Covenant on Economic, Social, and Cultural Rights, the Covenant on Civil and Political Rights, and the core labour standards of the International Labour Organization (ILO). Environmental standards, on the other hand, are only marginally taken into account in the draft, which refers to individual provisions of the Minamata Convention on Mercury Emissions and the Stockholm Convention on Persistent Organic Pollutants, which aim to protect the environment and human health.

It is unclear, however, why other international agreements to which Germany has committed itself or additional European standards are not covered. A supposed comprehensive listing of individual agreements is not productive. Rather, it would be more advisable to have a general clause relating to damage and environmental goods.

CONFLICT OF INTEREST IN REGULATORY ENFORCEMENT?

Among the strengths of the draft law are the provisions on regulatory monitoring and enforcement. Companies will be required to document compliance with due diligence requirements on an ongoing basis and publish annual reports on their website. Sixty-five full-time positions will be created at the Federal Office of Economic Affairs and Export Control (BAFA) to review the reports, as well as to conduct risk-based inspections if affected parties claim that their rights are being violated or directly threatened by non-fulfilment of due diligence obligations.

According to the draft bill, if companies violate their obligations, they are committing an administrative offense and can be fined according to the severity of the offense as well as the company's total annual turnover. In cases of fines above 175,000 euros, companies will be excluded from public contracts for up to three years.

The effectiveness of regulatory enforcement will depend, among other things, on the legal ordinances specifying the procedures for administrative control by BAFA. These regulations are to be issued by the BMAS in agreement with the Economics Ministry (BMW). Another

cause for concern is the fact that BAFA is subordinate to the BMWi - which has decisively blocked an ambitious supply chain law in recent months. It will be important to ensure that the authority can act independently and perform its task without restriction.

Expectations of the Initiative Lieferkettengesetz:

The Initiative Lieferkettengesetz expects the Bundestag to pass the law this summer before the end of the current legislative period. However, if the law is to be effective and not fall behind international standards, the following substantial improvements are absolutely necessary in the legislative process in the Bundestag:

- Full due diligence obligations not only for the company's own business operations and direct suppliers, but also for indirect suppliers;
- An explicit civil liability rule under which companies are liable in German civil courts for damage caused by failure to comply with their due diligence obligations;
- The introduction of stand-alone environmental due diligence requirements;
- An extension of the scope to all companies with more than 250 employees and to small and medium-sized enterprises (SMEs) in high-risk sectors.

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Die Initiative Lieferkettengesetz wird getragen von:



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