

The German Supply Chain Act – A Sustainable Regulatory Framework for Internationally Active Market Players?


Anne-Christin Mittwoch

Prof. Ph.D., Chair of Civil Law, European and International Business Law Martin-Luther-Universität Halle-Wittenberg, correspondence address: Universitätsplatz 3–5, 06099 Halle (Saale), Germany, e-mail: anne-christin.mittwoch@jura.uni-halle.de

 <https://orcid.org/0000-0002-0465-3397>

Fernanda Luisa Bremenkamp

Ph.D. Assistant Professor, Faculty of Law, Humboldt-Universität zu Berlin, correspondence address: Unter den Linden 6, 10099 Berlin), Germany, e-mail: fernanda.bremenkamp@hu-berlin.de

 <https://orcid.org/0000-0001-7110-9861>

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Abstract: On January 1, 2023, the German Act on Corporate Due Diligence in Supply Chains (LkSG) entered into force. It is the most important step taken so far by the German legislature in terms of promoting corporate sustainability and protecting human rights in globalized supply chains. Unfortunately, however, it did not make use of the opportunity to take on a pioneering role in the broader comparative context. The authors conduct a critical analysis of the sustainability concept of the Act, as well as its provisions on scope and enforcement. In both aspects, the Act falls short of expectations; it does not introduce a comprehensive concept of sustainability, small and medium-sized enterprises are excluded from the scope of application, and comprehensive due diligence along the supply chain is not achieved. On the enforcement level, the main weakness of the LkSG lies in its exclusion of civil liability.

1. Introduction

On July 16, 2021, after a long political struggle, the German legislature enacted the Act on Corporate Due Diligence in Supply Chains (Lieferkettensorgfaltspflichtengesetz, LkSG).¹ Affected companies have had little time to align their business activities with the new requirements, as the majority of the LkSG came into force on January 1, 2023. While the legislative process was met with fierce criticism, especially from German business associations, reactions to the finally passed regulations were quite positive. In any case, the overriding objective of the Act is finding ever broader global approval in research and practice; demands for sustainable businesses and financial markets, as well as the need for more sustainable economic activity in general, have become increasingly urgent.² Therefore, the German LkSG is not only to be seen in the context of a comprehensive transformation of German business law towards increasing sustainability, but at the same time, it is part of a regulatory development that is taking place globally and on multiple levels. German requirements stand alongside related legislative activities, notably those of other EU member states, and will soon have to be brought into line with a corresponding European regulation.³

The article examines critically how sustainability as a scientific and policy concept has been implemented in the German LkSG, and which scope and enforcement mechanisms have been chosen by the legislator, taking

¹ Act on Corporate Due Diligence in Supply Chains (LkSG) of 16 July 2021, BGBl. I 2021, p. 2959. [Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten (Lieferkettensorgfaltspflichtengesetz)].

² The promotion of sustainable development in corporate law has its origins at the international level; in particular since the adoption of the UN Guiding Principles on Business and Human Rights on March 21, 2011 (UN Doc A/HRC/17/31), a large number of international initiatives and regulations for the implementation of the stipulated goals can be observed, for a comprehensive overview see: Lise Smit et al., “Study on Due Diligence Requirements through the Supply Chain: Final Report,” European Commission, 2020, 156 and 158ss. In Germany in particular for instance: Holger Fleischer, “Corporate Social Responsibility, Vermessung eines Forschungsfeldes aus rechtlicher Sicht,” *Die Aktiengesellschaft* 62, no. 15 (2017): 509, 510f.; Mathias Habersack, “Gemeinwohlbindung und Unternehmensrecht,” *Archiv für die civilistische Praxis* 220, no. 4/5 (2020): 594, 603ss.; also Anne-Christin Mittwoch, *Nachhaltigkeit und Unternehmensrecht* (Mohr Siebeck, 2022), chapter 2.

³ Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final of 23 February 2022.

into account the broader comparative context. To this end, the LkSG's core regulation of human rights and environmental due diligence is first placed in the context of the general discussion on sustainability in corporate law (2). Based on this, the provisions of the LkSG on their scope and enforcement will be examined (3), to finally make assessments and recommendations for further development of the regulation of corporate sustainability (4).

2. Human Rights and Environmental Due Diligence in the Context of Corporate Sustainability

The LkSG is currently the German legislature's most important initiative to promote corporate sustainability. Its innovative core content can be found in section 3 para. 1, which obliges companies to observe human rights and environmental due diligence duties in their supply chains in an appropriate manner (so-called due diligence). However, the LkSG forms part of a whole bouquet of regulatory initiatives, primarily of a European nature, the goal of which is to oblige companies to take ecological and social concerns into account. These initiatives translate into the implementation of an overarching principle of sustainability in the legal systems,⁴ which is gaining importance worldwide. Company law is particularly suitable in that respect, as it directly addresses companies as the main actors in markets. Since developments are both transdisciplinary and transnational, it is of particular importance to first take a look at the concept of sustainability and its significance for the regulatory concept of a Supply Chain Act. For this purpose, the most important current regulatory initiatives have to be considered.

2.1. Current Regulatory Initiatives

Although many regulatory initiatives take up the concept of sustainability, they fail to address what exactly sustainability means and how this concept can be operated in law.⁵ Terms such as "social and ecological concerns" or

⁴ Public as well as Private Law.

⁵ An important exception marks the EU Taxonomy Regulation in the area of sustainable finance. Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198/13 of 22 June 2020.

“ESG factors” are often used; legal scholars mainly take the consideration of the “public good” or “common good” concerns as the starting point for the topic, especially in German corporate law. Considering the “common good” through the traditional discussion of a corporation’s public interest is established in the practice of German corporate law; it has been used, with varying degrees of strength, throughout the entire history of the German Aktiengesellschaft (stock corporation).⁶ In accounting law, sustainability concerns have been established since the implementation of the directive on non-financial reporting as opposed to financial reporting.⁷ This unfortunate dichotomy will, however, be replaced in the future by more far-reaching sustainability reporting; a corresponding directive on corporate sustainability reporting, which is intended to considerably expand the scope and depth of the directive on non-financial reporting, was enacted recently.⁸ The discussion of corporate social responsibility in transnational supply chains focuses mostly on the protection of human rights, especially labor rights.⁹ Conversely, the EU’s Sustainable Finance Strategy concentrates on environmental sustainability and explicitly does not treat social aspects with the same intensity.¹⁰ The EU Action Plan on Financing Sustainable Growth

⁶ On this Habersack, “Gemeinwohlbindung und Unternehmensrecht,” 594, 603–14; for the current sustainability discourse Mittwoch, *Nachhaltigkeit und Unternehmensrecht*, Section 3, chapter 9.

⁷ In Germany, the directive has been transposed with the CSR-Richtlinie-Umsetzungsgesetz of 11 April 2017, BGBl. I 2017, p. 802.

⁸ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

⁹ This is applicable to the LkSG. After a long discussion, environmental concerns were included. Besides, the LkSG refers only to a few agreements to this effect, see section 2 para. 1, s. 7, para. 3, s. 2 LkSG, and for more details Annette Schmidt-Räntsch, “Sorgfaltspflichten von Unternehmen – Von der Idee über den politischen Prozess bis zum Regelwerk,” *Zeitschrift für Umweltrecht* (2021): 387–8, 393.

¹⁰ Commission Action Plan, Financing Sustainable Growth, COM(2018) 97 final on 8 March 2018; EU Taxonomy Regulation, Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198/13 of 22 June 2020, recital 6; also: Florian Möslin and Karsten Engsig Sørensen, “The Commission’s Action Plan for Financing Sustainable Growth and its Corporate Governance Implications,” *Nordic & European Company Law Working Paper*, no. 18–17 (2018): 221–2, 227s.

explicitly declares environmental sustainability to be the core regulatory objective and even specifies the problem of climate change; the social dimension of sustainability is recognized as its defining element, but its legal regulation is postponed to a later point in time.¹¹

The use of different terminologies results in incoherence and raises questions about the application and interpretation of the respective provisions. The lack of coherence that comes from inconsistent terminology is obvious with regard to different regulatory projects; at least as far as different regulators are at work. It is not only the German legislature that has dedicated itself to the regulation of transnational supply chains; in France and the United Kingdom, the *Loi de Vigilance*¹² and the *Modern Slavery Act*¹³ have been in place for a number of years. Recently there has been a similar law in Switzerland¹⁴ as well as in Norway.¹⁵ The Netherlands has introduced a new proposal on top of the already-adopted *Wet Zorgplicht for Kinderarbeid*.¹⁶ In Austria, there are proposals for a supply chain law

¹¹ EU-Action plan for Financing Sustainable Growth, p. 14s; see now “Platform on Sustainable Finance’s Report on Social Taxonomy,” European Commission, accessed January 8, 2024, https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/280222-sustainable-finance-platform-finance-report-social-taxonomy.pdf.

¹² *Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*; for a first judgment, cf. CA Versailles, 10 October 2020, D. 2021, n° 1, 5.

¹³ “Modern Slavery Act 2015,” The National Archives, accessed January 8, 2024, www.legislation.gov.uk/ukpga/2015/30/contents/enacted.

¹⁴ In Switzerland the “Concern-Responsibility-Initiative,” Eidgenössische Volksinitiative “Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt,” BBl 2017, 6335, available at www.bk.admin.ch/ch/d/pore/vi/vis462t.html (22.03.2022), accessed January 8, 2024, was rejected – decided and pronounced was the counterproposal of the Council of States (*Ständerat*), accessed January 8, 2024, www.parlament.ch/centers/eparl/curia/2016/20160077/S2-8%20D.pdf (22.03.2022); more in detail Nicolas Bueno and Christine Kaufmann, “The Swiss Human Rights Due Diligence Legislation: Between Law and Politics,” *Business and Human Rights Journal*, no. 6 (2021): 542, 544.

¹⁵ In Norway the *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold*, short *åpenhetsloven*, has become effective on July 1, 2022, see: <https://lovdata.no/dokument/NL/lov/2021-06-18-99>, accessed January 8, 2024.

¹⁶ *Wet Zorgplicht Kinderarbeid*, see <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>, accessed January 8, 2024; now there are ambitions for a cross-topic supply chain Act: www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorstedetails&qry=wetsvoorstel%3A35761 (22.03.2022). cf. summary Anneloes Hoff, “A Bill for

or at least a so-called social responsibility law.¹⁷ However, even the various EU initiatives are not always comprehensively coordinated and the intensity with which they are developed may vary. While the implementation of the Sustainable Finance Initiative has been advancing in leaps and bounds since the publication of the Action Plan for Financing Sustainable Growth in 2018, the Commission postponed the publication of a proposal for a directive on sustainable corporate governance three times before finally disclosing it in February 2022.¹⁸

The common feature of all these initiatives is that they aim to improve the integration of sustainability concerns into corporate activities. Therefore, due to the diversity of approaches, it is of fundamental importance to define the term and concept of sustainability.

2.2. The Principle of Sustainability

The modern definition of sustainability, which has become the focus of various academic disciplines at the international level, originates from the work of the United Nations conducted since the 1980s. The Brundtland Commission of the United Nations coined its initial concept when it described sustainable development in 1987 as “meeting the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁹ This expresses, in particular, an orientation towards the future in the sense of intergenerational justice. The international orientation as a premise is self-evident, given that the idea originated from the UN. In the following years, this definition was refined to reflect a three-dimensional approach encompassing ecological, economic, and social sustainability.²⁰ In recent years, the UN has repeatedly emphasized the equal value of these three

Better Business: Dissecting the new Dutch Mandatory Human Rights Due Diligence Initiative,” *Völkerrechtsblog - International Law & International Legal Thought*, May 5, 2021, accessed January 8, 2024, <https://voelkerrechtsblog.org/a-bill-for-better-business/>.

¹⁷ Resolution motion No. 1454/A (E) of 25 March 2021, p. 8 (Supply chain law); Resolution motion No. 579/A of 28 May 2021 (Social responsibility law).

¹⁸ See n. 3.

¹⁹ UN-General Assembly, Report of the World Commission on Environment and Development, 11 December 1987, UN-Doc. A/RES/42/187 respectively WCED, our Common future, 43.

²⁰ In detail Katja Gehne, *Nachhaltige Entwicklung als Rechtsprinzip* (Mohr Siebeck, 2011), 34ss.

dimensions, most recently with the announcement of the Sustainable Development Goals (SDGs) in 2015.²¹

In order to deal with the inherent contradictions resulting from the equal value of the economic, ecological, and social dimension, the idea of strong sustainability has been further spelled out in the natural sciences. The concept of planetary boundaries significantly improves the operability of the sustainability concept by modelling a framework for economic behavior within which the stability of the Holocene state can be maintained.²² To achieve the goal of maintaining the Holocene state, the concept of planetary boundaries defines a “safe operating space for humanity with respect to the Earth system and are associated with planet’s bio-physical subsystems or processes.”²³ This framework is constituted by nine subsystems, each with its own thresholds, such as climate change, ocean acidification, air pollution, and biodiversity loss.²⁴ The understanding of planetary boundaries is dynamic and has been updated in 2015 and 2023.²⁵ The individual components are subject to continuous development, which must lead to adjustments based on scientific research as soon as the complex

²¹ United Nations, Resolution adopted by the General Assembly on 25 September 2015 (A/RES/70/1), accessed January 8, 2024, www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf, 1 (Preamble) and 3; based on the UN Millennium Declaration of 2000, accessed January 8, 2024, www.un-kampagne.de/fileadmin/downloads/erklaerung/erklaerung_englisch.pdf; also recital 2 of the EU Taxonomy Regulation.

²² Johan Rockström et al., “Planetary Boundaries: Exploring the Safe Operating Space for Humanity,” *Ecology and Society* 14, no. 2 (2009): 32; Johan Rockström et al., “A Safe Operating Space for Humanity,” *Nature* 461, (2009): 472; Will Steffen et al., “Planetary Boundaries: Guiding Human Development on a Changing Planet,” *Science* 347, no. 6223 (2015): 1259855; from a legal perspective esp. Beate Sjöfjell and Christopher M. Bruner, “Corporations and Sustainability,” in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, eds. Beate Sjöfjell and Christopher M. Bruner (Cambridge University Press, 2020), 3, 7ss.

²³ Rockström et al., “A Safe Operating Space for Humanity,” 472.

²⁴ The other five boundaries are the consumption of fresh water, the depletion of the ozone layer, chemical contamination, surface corrosion, and the nitrogen and phosphorus strain, Rockström et al., “Planetary Boundaries: Exploring the Safe Operating Space for Humanity,” 32, 37ss.

²⁵ See: “Planetary Boundaries,” Stockholm Resilience Centre, accessed January 8, 2024, <https://www.stockholmresilience.org/research/planetary-boundaries.html>.

interactions and feedback mechanisms between the individual ecological subsystems are better understood and new knowledge becomes available.²⁶

The social dimension of sustainability can then be integrated into the model of planetary boundaries as the foundation for all human behavior; this would allow a corridor to emerge that would model the so-called “safe and just operating space for humanity” as an extension of the concept of planetary boundaries.²⁷ Of course, compliance with fundamental and human rights, as expressed in the 1948 Universal Declaration of Human Rights of the United Nations, is pivotal to securing this social foundation. These include, in particular, the right to life, liberty, and security of the person, the prohibition of slavery and servitude, the right to work, just and satisfactory working conditions, equal pay for equal work, and remuneration that ensures an existence for the individual and his or her family with due respect for their human dignity. The German LkSG takes up all these aspects by leveraging central international agreements as the point of reference for national obligations in section 2 para. 1, para. 3, along with the conventions listed in the annex.

2.3. The Sectoral Approach of the LkSG

Yet, the LkSG does not explicitly use the term sustainability and does not propose a general definition of it. Instead, it obliges companies to observe human rights and environmental due diligence obligations (section 3 para. 1 LkSG). This set of obligations relates to economic, ecological, and social aspects, which represent the three dimensions of sustainability. Accordingly, the explanatory memorandum to the Act emphasizes that it is in line with the Federal Government’s National Sustainability Strategy.²⁸ The German

²⁶ Tiina Häyhä, Paul L. Lucas, Detlef P. van Vuuren, Sarah E. Cornell, and Holger Hoff, “From Planetary Boundaries to national fair shares of the global safe operating space – How can the scales be bridged?,” *Global Environmental Change* 40, (2016): 60.

²⁷ Melissa Leach, Kate Raworth, and Johan Rockström, “Between Social and Planetary Boundaries: Navigating Pathways in the Safe and Just Space for Humanity,” in *World Social Science Report. Changing Global Environments* (UNESCO ISSC, 2013), 84; Kate Raworth, “A Safe and Just Space for Humanity: Can We Live within the Doughnut?,” *Oxfam Discussion Papers* (2012): 9; Kate Raworth, *Doughnut Economics* (London: Random House Business Books, 2017), Chapter 1 et passim. Cf. David Griggs et al., “Sustainable Development Goals for People and Planet,” *Nature* 495, (2013): 305–6.

²⁸ See also Government draft, BT-Drs. 19/28649, p. 24 and already BR-Drs. 239/21, p. 22.

Government is using the National Sustainability Strategy to link the International and European sustainability strategy with German policy, implementing it step by step in the form of national regulations in all policy areas. The National Sustainability Strategy recognizes the equivalence of the SDGs in terms of the comprehensive international sustainability concept.²⁹

Consequently, it would have been a step forward to include the principle of sustainability as an overarching concept in the LkSG and to offer a general definition of what this concept entails.³⁰ Despite the formal declarations of intent of the provisions, this has not happened. Instead, the LkSG pursues a sectoral approach; while the primary purpose of the law is to improve the international human rights situation through the responsible design of the supply chains of German companies, it does not provide equivalent protection for ecological concerns. To the contrary, environmental aspects are only indirectly protected, and then only if they have a retroactive effect on human rights concerns; otherwise, environmental aspects are only protected if the LkSG explicitly refers to international environmental agreements.³¹ Thus, the LkSG only includes environmental rights if they are related to human rights, e.g. in the case of poisoned drinking water. Furthermore, explicit reference to environmental agreements is not made comprehensively; the LkSG obliges companies to comply with only three international environmental agreements, namely the Minamata Convention on Mercury,³² the Stockholm Convention on Persistent Organic Pollutants,³³

²⁹ In view of the LkSG lately the 16th Development Policy Report of the Federal Government of 20 October 2021, BT-Drs. 19/32715, p. 185ss.

³⁰ The European proposal for a directive on corporate sustainability due diligence COM(2022) 71 final does include the principle of sustainability and mentions the term 50 times, however fails to provide a definition in this respect.

³¹ Government draft, BT-Drs. 19/28649, p. 24; and Schmidt-Räntsch, “Sorgfaltspflichten von Unternehmen,” 387, 393.

³² Minamata Convention on Mercury from 10. October 2013, BGBl. II (2017), p. 610–1, implemented through the EU-Mercury-Regulation, Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury, and repealing Regulation (EC) No 1102/2008.

³³ Stockholm Convention about persistent organic pollutants of 23 May 2001, BGBl. II (2002), p. 803–4 (POPs-Convention); last amended through the resolution of 6 May 2005, BGBl. II (2009), p. 1060–1.

and the Basel Convention on Hazardous Waste³⁴ (section 2 para. 3 LkSG). Moreover, these three agreements do not generate any protected legal positions within the meaning of section 2 para. 1 LkSG; only the human rights-related agreements to which the LkSG refers do so. Hence, the LkSG fails to effectively protect ecological concerns from the environmentally damaging influences of entrepreneurial activity in the supply chain.

As mentioned, protecting ecological concerns from entrepreneurial damages in a comprehensive manner is not even the intention of the LkSG. It does not introduce general protection obligations. Instead, it lists the international agreements from which the respective concerns are derived in an annex. This convention-based approach is also applied to human rights due diligence, albeit a stricter standard of protection is achieved here thanks to the significantly higher number of conventions referred to at this point.³⁵ The referral technique may have its advantages, but it does not achieve a precise implementation of the UN Guiding Principles. In view of the current and future developments, a coherent approach based on the UN's comprehensive international sustainability concept, in conjunction with the concept of planetary boundaries and the introduction of an abstract and general obligation, would have been preferable. Current developments at the EU level suggest that the implementation of sustainability in economic and financial market law will gain momentum in the future. The approaches here are still predominantly sector-specific too; in particular, the EU Action Plan for Financing Sustainable Growth and its implementing acts focus strongly on the environmental dimension of sustainability. However, the further development of non-financial reporting towards sustainability reporting,³⁶ as well as the proposal for a direc-

³⁴ Basel Convention about the control of the cross-border transfer of hazardous wastes and their disposal of 22 March 1989, BGBl. II (1994), p. 2703–4.

³⁵ There are 11 human rights agreements of 1966 including, in particular, the “Internationale Covenant on Civil and Political Rights” (BGBl. II (1973), p. 1533–4) or the “International Labour Organization Convention for the Protection of Workers,” e.g. Convention No. 29 about Compulsory Labour of 1930 (BGBl. II (1956), p. 640–1) with protocol of 1947 (BGBl. II (2019), p. 437–8); more in detail Schmidt-Räntsch, “Sorgfaltspflichten von Unternehmen,” 387, 393.

³⁶ See already Action Plan of the Commission on Financing Sustainable Growth COM(2018) 97 final of 18 March 2018, p. 12s., and based on this European Securities and Markets Authority (ESMA), “Final Report: ESMA’S technical advice to the European Commission

tive on corporate sustainability due diligence³⁷ show efforts of coherence and consolidation in the sense of a comprehensive sustainability principle. The latter introduces a much more comprehensive approach than the German LkSG.³⁸ At least with regard to the promotion of the principle of sustainability through the LkSG, the German legislature has not taken the opportunity to play a pioneering role.

3. Scope and Enforcement of the Duty of Care

Considering the scope and enforcement of the due diligence duties in the LkSG, the legislature has not come up with a comprehensive approach either.

Under section 3 para. 1 LkSG, companies must set up a risk management system intended to prevent human rights and environmental risks through regular risk analyses, provide for remedial measures, and ensure the establishment of an internal complaints system. Furthermore, according to section 6 para. 2 LkSG, the management must issue a policy statement on its human rights strategy. However, these obligations are not absolute. Firstly, they are not spelled out as a duty to succeed or even a strict liability in such a way that every violation of human rights or environmental concerns in supply chains is stopped and compensated for, but rather are designed as so-called “duties of effort,” a concept that German law is not familiar with.³⁹ Limits are also found with regard to both the scope of companies covered and the concept of the supply chain as such. Moreover, the LkSG enforces the due diligence obligation exclusively by means of administrative law, excluding the civil liability stemming from the breach

on integrating sustainability risks and factors in MIFID II” from 30 April 2019, *ESMA 35-43-1737*, and now Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting COM(2021)189 final from 21 April 2021.

³⁷ See n. 3.

³⁸ Cf. n. 3 and more details immediately.

³⁹ Government Explanatory Memorandum, BT-Drs. 19/28649, p. 2, 41; Patricia Sarah Stöbener de Mora and Paul Noll, “Grenzenlose Sorgfalt? – Das Lieferkettensorgfaltspflichtengesetz,” *Neue Zeitschrift für Gesellschaftsrecht*, no. 28 (2021): 1237, 1240; on the concept of “duties of effort”: Eric Wagner and Marc Ruttloff, “Das Lieferkettensorgfaltspflichtengesetz – eine erste Einordnung,” *Neue Juristische Wochenschrift*, no. 30 (2021): 2145, 2145s.

of the Act. Overall, the Act shows considerable weaknesses with regard to the intended improvement of the protection of human rights and environmental concerns along the supply chain.

3.1. Material Scope of Application: Concept of the Supply Chain

One weakness is already evident from the material scope of application and the extent of the due diligence duties. Although the concept of the supply chain in the LkSG is rather broad, the extent of the due diligence duties is limited.

Pursuant to section 3 para. 1 s. 1 LkSG, the due diligence obligations extend to the supply chain of the companies covered. Section 2 para. 5 LkSG defines the term supply chain as “all steps in Germany and abroad that are necessary for the production of goods and the provision of services, starting with the extraction of raw materials and ending with the delivery to the end customer.” This includes, for example, the transport or intermediate storage of the goods as well as the granting of a loan to finance the production by a supplier.⁴⁰ In addition to the actions of the company in its own business area, the actions of direct and indirect suppliers are also included. Overall, the term “supply chain” is to be understood broadly; it covers the entire value creation process. This had already provoked considerable criticism at the drafting stage. In particular, it was feared that large German companies with many direct suppliers would not be able to fully oversee their entire supply chain, including indirect suppliers.⁴¹

However, the LkSG does not impose such an obligation on them. Rather, on closer examination, the due diligence duties along the supply chain

⁴⁰ Cf. for examples Government Explanatory Memorandum, BT-Drs. 19/28649, p. 40; more in detail on the expression “supply chain” in the LkSG Robert Grabosch, “§ 2 – Grundlagen, Prinzipien und Begriffe,” in *Das neue Lieferkettensorgfaltspflichtengesetz*, ed. Robert Grabosch (Nomos, 2021), 21, 36ss.

⁴¹ Committees Corporate Social Responsibility and Compliance, Mercantile Law and Human Rights of the German Bar Association, “Stellungnahme zum Regierungsentwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten,” *NZG* (2021), 546–9 (see paras. 2 and 16–20); against this with a differing view: Eva-Maria Kieninger, “Keine Angst vor einem Lieferkettengesetz,” *Frankfurter Allgemeine Zeitung*, no. 211 (2020); in detail also: Veronika Thalhammer, “Das umstrittene Lieferkettensorgfaltspflichtengesetz – Ein juristischer Blick auf Kritik aus Zivilgesellschaft, Wirtschaft und Politik,” *Die Öffentliche Verwaltung*, no. 18 (2021): 825, 826ss.

are limited; the duties of care mentioned in section 3 para. 1 LkSG only apply to a company's own business area and its direct suppliers. Indirect suppliers are only covered by section 9 para. 3 LkSG if a company obtains substantiated knowledge based on factual indications that such a company may be violating human rights or environmental obligations.⁴² Such a narrowing of the due diligence obligations to direct suppliers considerably relativizes the goal of protecting human rights and environmental concerns in the supply chain. This is because violations, human rights violations in particular, often do not take place within German companies or their direct suppliers but tend to be observed at the beginning of the value chain.⁴³

This approach is also not in line with the UN Guiding Principles on Business and Human Rights. Principle 19 states that for the complex situation of the indirect supplier relationship, the determining factors should be the severity of the abuse and the company's ability to exert influence over the organization in question. It should also be considered how crucial the relationship is for the company and whether its termination would in turn have adverse human rights consequences.⁴⁴ Such a differentiated approach is preferable to largely cutting back responsibility for indirect suppliers from the outset. The supply chain concept of the LkSG also lags behind its planned counterpart at the EU level; the Commission proposal on Corporate Sustainability Due Diligence extends the sustainability due diligence obligations to the entire supply chain without differentiating between indirect and direct suppliers, as long as there is an established business relationship.⁴⁵

⁴² There is some discussion on the interpretation of the term "substantiated knowledge"; see for instance: Erik Ehmann and Daniel F. Berg, "Das Lieferkettensorgfaltspflichtengesetz (LkSG): ein erster Überblick," *Gesellschafts- und Wirtschaftsrecht*, no. 15 (2021): 287, 290.

⁴³ This was criticized already in the draft stage of the LkSG the Supply Chain Act Initiative, "Statement on the draft bill," 4, accessed January 8, 2024, lieferkettengesetz.de/wp-content/uploads/2021/03/Initiative-Lieferkettengesetz_Stellungnahme-zum-Gesetzesentwurf.pdf, and Germanwatch, "Statement on the draft bill," 1, accessed January 8, 2024, germanwatch.org/sites/default/files/Stellungnahme_Germanwatch_Ref.Entwurf_Sorgfaltspflichtengesetz.pdf, both quoted by Thalhammer, "Das umstrittene Lieferkettensorgfaltspflichtengesetz," 825, 834 (n. 168s).

⁴⁴ UN Guiding Principles on Business and Human Rights – Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011, p. 21s.

⁴⁵ Cf. already n. 3.

3.2. Personal Scope of Application: Large German Companies

The personal scope of application of the LkSG has not been developed comprehensively either. The Act only applies to companies, regardless of their legal form, which have their head office, main branch, or registered office in Germany. With regard to size, the law provides for a staggered application in two phases, beginning on January 1, 2023. In the first year, the application was limited to companies with more than 3,000 employees, which means that only about 700 German companies will be included.⁴⁶ The LkSG thus exempts most German companies from human rights and environmental due diligence and potential liability. In the second phase, which began on January 1, 2024, the threshold was lowered to 1,000 employees, increasing the number of companies affected to about 3,000.⁴⁷ The employees of all affiliated companies in a group must be included in the calculation of the number of employees of the parent company, even if an affiliated company has its registered office abroad or has its head office or principal place of business there. This is to ensure that, particularly in the case of groups, the parent companies fall within the scope of application of the Act, irrespective of whether the workers are employed by the parent or the subsidiary. In addition, section 2 para. 6 s. 3 of the LkSG stipulates that in affiliated companies, the parent company's area of business also includes an affiliated company if the parent company exercises a decisive influence. Non-German companies can be affected if they have a branch in Germany (section 1 para. 1 s.1).

The fact that the LkSG is aimed exclusively at large companies is of particular importance for its effectiveness. After concerns were repeatedly expressed at the drafting stage that a broad supply chain concept combined with a rather general duty of care could disproportionately burden SMEs,

⁴⁶ See also section 1 para. 1 s. 1 no. 2 LkSG; with information on the number of involved companies Christian Gehling, Nicolas Ott, and Cäcilie Lüneborg, "Das neue Lieferkettensorgfaltspflichtengesetz – Umsetzung in der Unternehmenspraxis," *CCZ-Corporate Compliance*, no. 5 (2021): 230–1; also Wagner and Ruttloff, "Das Lieferkettensorgfaltspflichtengesetz," 2145; Ehmann and Berg, "Das Lieferkettensorgfaltspflichtengesetz (LkSG)," 287; Stöbener de Mora and Noll, "Grenzenlose Sorgfalt? – Das Lieferkettensorgfaltspflichtengesetz," 1237, 1239; Hans-Georg Kamann and Philipp Irmscher, "Das Sorgfaltspflichtengesetz – Ein neues Sanktionsrecht für Menschenrechts- und Umweltverstöße in Lieferketten," *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, (2021): 249–50.

⁴⁷ See section 1 para. 1 s. 2 LkSG; for information about the number of involved companies cf. the previous footnote.

these as well as micro-enterprises were ultimately excluded from the scope of application of the LkSG.⁴⁸ Regulators in other member states have gone much further in this regard. For example, the Norwegian Transparency Act provides for significantly lower thresholds despite a shorter transition period.⁴⁹ Norwegian companies that fall within the scope of the act's application may have a minimum number of 50 employees, as long as certain turnover and profit thresholds are also exceeded.⁵⁰ The current Dutch legislative initiative⁵¹ also includes significantly lower thresholds, namely a net profit of at least 40 million euros or a minimum number of 250 employees.⁵² Originally, a similar approach was preferred at the EU level. In its recommendation, the European Parliament opted for linking the personal scope of application to the existence of risk factors, thereby including SMEs and even micro-enterprises.⁵³ Such an approach makes sense given that SMEs form the backbone not only of the German economy but also of the European internal market.⁵⁴ Unfortunately, the recent proposal by

⁴⁸ Government Explanatory Memorandum, BT-Drs. 19/28649, p. 3 and p. 32; they can however be affected indirectly, if the directly addressed enterprises pass these legal obligations on to them, cf. Wagner and Ruttloff, "Das Lieferkettensorgfaltspflichtengesetz," 2145. An evaluation of the personal scope of application should take place by June 30, 2024; see: Government Explanatory Memorandum, BT-Drs. 19/28649, p. 32.

⁴⁹ Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (*Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)*), Lovvedtak 176 (2020–2021)). Unofficial translation by the Ministry for Children and Families, accessed January 8, 2024, <https://lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent>.

⁵⁰ Comparative legal analysis for Germany and Norway: Marcus Krajewski, Kristel Tonstad, and Franziska Wohltmann, "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?" *Business and Human Rights Journal* 6, no. 3 (2021): 550, esp. 554ss.

⁵¹ Proposal for an Act about a responsible and sustainable international conduct of duty care in production chains ("Wet verantwoord en duurzaam internationaal ondernemen"), accessed January 8, 2024, <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35761>.

⁵² For a summary see: Hoff, "A Bill for Better Business."

⁵³ See: Art. 2 para. 2 of the European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability.

⁵⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions an SME Strategy

the Commission again makes the personal scope of application dependent on the number of employees, as well as the net worldwide turnover; with thresholds falling between the German and Dutch ones, the Commission's proposal generally excludes SMEs from the due diligence obligations.⁵⁵ Therefore, the Act once again addresses only the tip of the iceberg and does not introduce sustainability due diligence at the core of business activities as a general rule.

3.3. Enforcement of the Duties of Care Under the LkSG

The efficiency of the enforcement mechanisms is important for the actual effectiveness of the duties of the LkSG in promoting sustainability in supply chains. A comparative overview illustrates the existing different approaches of national lawmakers and helps to assess the different measures.

3.3.1. Possible Enforcement Mechanisms and Comparative Overview

A purely voluntary approach to implementing the UN Guiding Principles on Business and Human Rights, on which the National Action Plan in Germany was based, did not produce the desired effect in Germany and led to the drafting of the LkSG.⁵⁶ For the enforcement of binding obligations, public enforcement via administrative measures and regulatory fines, private enforcement via civil liability mechanisms, and criminal sanctions can in principle be considered. The active national regulators have so far chosen different approaches; a combination of public and private enforcement is proposed for the European Directive,⁵⁷ and the rejected Swiss corporate responsibility initiative has also envisaged a civil law liability provision with

for a sustainable and digital Europe, COM(2020) 103 final of 10 March 2020, p. 1; recent monograph Alexander Stöhr, *Kleine Unternehmen – Schutz und Interessenausgleich im Machtgefüge zwischen Arbeitnehmern, Verbrauchern und Großunternehmen* (2019); Michael F. Müller, *Kleinere und mittlere Unternehmen im Privatrecht – Auf dem Weg zu einem Sonderprivatrecht?* (2021).

⁵⁵ Art. 2 Commission Proposal (n. 3) with explanation on p. 14 of the Proposal.

⁵⁶ Government Explanatory Memorandum, BT-Drs. 19/28649, p. 1s; for instance Thomas Helck, "Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, Worauf sich Unternehmen zukünftig vorbereiten müssen," *Betriebs-Berater*, (2021): 1603; to the restricted impact on voluntary standards in the international context also: Smit et al., "Study on Due Diligence Requirements through the Supply Chain: Final Report," 218s.

⁵⁷ See n. 3, Art. 16ss and Art. 22; among others Smit et al., "Study on Due Diligence Requirements through the Supply Chain: Final Report," 209–13, 257–60.

an exculpation solution.⁵⁸ The Dutch initiative for a law on responsible and sustainable international trade (*Wet verantwoord en duurzaam internationaal ondernemen*)⁵⁹ wants to introduce the full range of enforcement mechanisms: criminal sanctions and civil liability, in addition to public enforcement.⁶⁰ The French *Loi de Vigilance*'s core enforcement mechanism is a civil liability rule according to which, in the event of a breach of duty, the French general clause in tort applies.⁶¹ As further enforcement instruments, the *Loi de Vigilance* also provides for the threat of coercive measures such as a court order to perform duties ("injunction")⁶² and sanctioning with fines. The fine regulation has, however, been declared unconstitutional by the French Conseil Constitutionnel.⁶³

The introduction of criminal sanctions for the enforcement of companies' duties in Germany faces obstacles similar to the criminal prosecution of competition law violations; criminal liability of companies as such is alien to German law because of the principle of culpability (*Schuldprinzip*). Accordingly, criminal sanctions can, in principle, only be linked to the (culpable) conduct of individuals.⁶⁴ In addition, if criminal and

⁵⁸ Swiss people initiative "For responsible enterprises – to protect people and environment," BBl 2017, 6335, 6335, accessed January 8, 2024, www.bk.admin.ch/ch/d/pore/vi/vis462t.html. For further references see supra n. 23.

⁵⁹ "Wet verantwoord en duurzaam internationaal ondernemen," Tweedekamer.nl, accessed January 8, 2024, <https://www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cf-g=wetsvoorsteldetails&qry=wetsvoorstel%3A35761>.

⁶⁰ Summary of the proposal Hoff, "A Bill for Better Business."

⁶¹ Art. L225–102–5 Code de Commerce; detailed on the French Regulation: L. Nasse, "Devoir de Vigilance," *Zeitschrift für Europäisches Privatrecht*, (2019): 771, 774; G. Rühl, "Die Haftung von Unternehmen für Menschenrechtsverletzungen: Die französische *Loi de vigilance* als Vorbild für ein deutsches Wertschöpfungsgesetz?," in *Festschrift für Christine Windbichler zum 70. Geburtstag am 8. Dezember 2020*, eds. Gregor Bachmann, Stefan Grundmann, Anja Mengel, and Kasper Krolop (De Gruyter, 2020), 1413, 1427–30; Stéphane Brabant and Elsa Savourey, "A Closer Look at the Penalties Faced by Companies," *Revue Internationale de la Compliance et de l'Éthique des Affaires*, no. 50 (2017): 1–3.

⁶² Art. L225–102–4 II. C. Code de Commerce; in detail: Stéphane Brabant and Elsa Savourey, "Le champ de la loi – Les sociétés soumises aux obligations de vigilance," *Revue Internationale de la Compliance et de l'Éthique des Affaires*, (2017): 92, 18–25.

⁶³ Conseil Constitutionnel, Décision n° 2017–750 DC of 23 March 2017.

⁶⁴ German Constitutional Court (BVerfG) Decision of 25 October 1966, Case 2 BvR 506/63, BVerfGE 20, 323; see with further references: Martin Heger, "Vorbemerkung § 13 StGB," in *Strafgesetzbuch*, eds. Karl Lackner and Kristian Kühl (C.H. Beck, 2018), para 22. Even under

administrative sanctions coexist, there is a risk of conflicts of competence between the authority responsible under administrative law and the public prosecutor's office.⁶⁵ Therefore, a combined solution of official control and civil liability was initially considered for the enforcement of the due diligence duty under the LkSG.⁶⁶ Ultimately, the legislature opted for purely public enforcement and expressly excluded separate civil liability in section 3 para. 3 LkSG. The control and enforcement of the duties of care now consist of competent authorities (sections 12 and 13) reviewing the reports and official control measures under a risk-based approach (sections 4 to 18). The sanctions are listed in sections 5 and 6: In the case of violations and infringements, the competent authority can issue sanctions by ordering coercive fines under the Administrative Enforcement Act (VwVG) (section 23 LkSG) or regulatory fines under the Act on Regulatory Offences (OWiG) (section 24 LkSG) and, in serious cases, exclude the company from the award of public contracts under section 22 LkSG.

The initial response in the literature to the envisaged enforcement mechanisms was mixed. While some call it a "toothless paper tiger,"⁶⁷ others believe that the LkSG is "equipped with a particularly strong enforcement

the Draft for an Association Sanctions Act (Verbandssanktionengesetz) of 16 June 2020, no real corporate penalty would be introduced, but rather a tightening of the catalogue of fines and regulation of a special association procedure.

⁶⁵ For Competition law see: Carsten König and Fernanda Luisa Bremenkamp, "Competition Law Sanctions in Germany, under 22.4.2.4," in *The Cambridge Handbook of Competition Law Sanctions*, ed. Tihamer Tóth (Cambridge University Press, 2022).

⁶⁶ Draft by the Ministry of Economic Cooperation and Development (BMZ) of 1. February 2019, accessed January 8, 2024, media.business-humanrights.org/media/documents/files/documents/SorgfaltGesetztentwurf_0.pdf; also: Habersack, "Gemeinwohlbindung und Unternehmensrecht," 594, 643. On the first drafts see also: Saskia Wilks and Johannes Blankenbach, "Will Germany Become a Leader in the Drive for Corporate Due Diligence on Human Rights?" Business & Human Rights Resource Centre Blog, February 20, 2019, accessed January 8, 2024, www.business-humanrights.org/en/blog/will-germany-become-a-leader-in-the-drive-for-corporate-due-diligence-on-human-rights/.

⁶⁷ On the Government draft: Eva-Maria Kieninger, "Miniatur: Lieferkettengesetz – dem deutschen Papiertiger fehlen die Zähne," *Die Zeitschrift für die gesamte Privatwissenschaft*, no. 2 (2021): 252; Thalhammer, "Das umstrittene Lieferkettensorgfaltspflichtengesetz," 825; Jessica Schmidt, "Lieferkettengesetzgebung: Sorgfalt!" *Europäische Zeitschrift für Wirtschaftsrecht*, no. 7 (2021): 273.

mechanism under economic administration and public procurement law”⁶⁸ or even express concerns about the “extraordinarily harsh sanctions.”⁶⁹

3.3.2. Monitoring by BAFA

The Federal Office of Economics and Export Control (BAFA) is responsible for monitoring and sanctions according to sections 19 para. 1, 24 para. 5 LkSG. BAFA was not previously entrusted with responsibilities in this area. A new responsibility had been created for the purpose of implementing the EU Conflict Minerals Regulation, yet again with a different authority (not BAFA).⁷⁰ Even if the due diligence obligations according to the Conflict Minerals Regulation are specifically tailored to the risks of raw material procurement from conflict and high-risk areas, and special expertise is certainly advantageous, it is still questionable whether the public enforcement of sustainability concerns in German companies should not have been better bundled under one roof, in light of greater coherence and consistency in the enforcement of sustainability concerns.

In addition to reviewing the records under sections 12 and 13 LkSG, BAFA acts either *ex officio* or upon application of an interested party (section 14 para. 1 LkSG). Actual violation of human rights or environmental concerns is not a necessary prerequisite for BAFA to intervene. Rather, the authority can act at its own discretion to monitor compliance with due diligence obligations, including taking preventive action (section 14 para. 1 no. 1 lit. a LkSG). This is part of a risk-based approach under sections 14 para. 2, 19 para. 2 LkSG, which does not rely on random sampling,

⁶⁸ Christoph Engel and Daniel Schönfelder, “§ 6 Öffentlich-rechtliche Durchsetzung,” in Robert Grabosch, *Das neue Lieferkettensorgfaltspflichtengesetz* (Nomos, 2021), 171–2; Erik Ehmann, “Der Regierungsentwurf für das Lieferkettengesetz: Erläuterung und erste Hinweise zur Anwendung,” *Zeitschrift für Vertriebsrecht*, no. 3 (2021): 141, 151 views the sanction system as “convincing.”

⁶⁹ Michael Nietsch and Michael Wiedmann, “Der Regierungsentwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in der Lieferkette,” *CCZ-Corporate Compliance*, (2021): 101, 109; Gehling, Ott, and Lüneborg, “Das neue Lieferkettensorgfaltspflichtengesetz,” 230, 240 denote the sanction as “draconic”; as “rigid”: Sebastian Lutz-Bachmann, Kristin Vorbeck, and Lenard Wengenroth, “Menschenrechte und Umweltschutz in Lieferketten – der Regierungsentwurf eines Sorgfaltspflichtengesetzes,” *Betriebs-Berater*, (2021): 906, 912ss.

⁷⁰ Sections 2, 3 MinRohSorgG (“Mineral-Resources-Duty-of-Care-Act”); web presence of DEKSOR, accessed January 8, 2024, www.bgr.bund.de/DE/Gemeinsames/UeberUns/DEKSOR/DEKSOR_node.html.

but instead provides for inspections independent of concrete indications, based on substantiated indications from third parties and on special risk profiles of the companies or sectors concerned,⁷¹ such as the textile industry.⁷² BAFA can therefore prioritize within its discretion depending on the level of the risk.⁷³

If a permissible and sufficiently substantiated application is filed, the authority must, however, take action according to section 14 para. 1 no. 2 LkSG. An interested party can file an application if it appears possible that the violation of a duty of care by the company will result in the violation of a protected legal position of the person filing the application or that such a violation is imminent. The prerequisite is therefore the possibility of personal involvement, which is typical in German administrative law. This can be the case directly, as with employees of the company concerned or one of its suppliers, or indirectly, if the company is affected by the violation of environmental concerns in the supply chain.⁷⁴

3.3.3. Regulatory Measures and Sanctions

3.3.3.1. Regulatory Measures

In monitoring and enforcing compliance with the duties under the LkSG, BAFA can issue orders and take measures in accordance with sections 15 to 17 LkSG.

Section 15 s. 1 LkSG is a general clause, according to which BAFA can take the “appropriate and necessary orders and measures to detect, eliminate and prevent violations of the obligations under sections 3 to 10 para. 1.” The possibility to summon persons (No. 1), to impose a remedial plan on the enterprise (No. 2), and to impose concrete actions on the enterprise to make it fulfil its obligations (No. 3) are mentioned as standard

⁷¹ Government Explanatory Memorandum, BT-Drs. 19/28649, p. 56.

⁷² Here human rights abuses in supply chains have received special attention over the last years, see among others Gerhard Wagner, “Haftung für Menschenrechtsverletzungen in der Lieferkette,” *Zeitschrift für Wirtschaftsrecht*, no. 21 (2021): 718, 720; Markus Kaltenborn and Johannes Norpoth, “Globale Standards für soziale Unternehmensverantwortung,” *Recht der internationalen Wirtschaft*, (2014): 402, 409; Wolfgang Kaleck and Miriam Saage-Maaß, *Unternehmen vor Gericht. Globale Kämpfe für Menschenrechte* (Politik bei Wagenbach 2016), 99ss.

⁷³ Engel and Schönfelder, “§ 6 Öffentlich-rechtliche Durchsetzung,” 171, 176.

⁷⁴ E.g. as a resident. See: Government Explanatory Memorandum, BT-Drs. 19/28649, p. 54.

examples in section 15 s. 2. Pursuant to section 16 LkSG, BAFA has special rights of access to company premises and business documents and records. Furthermore, the enterprises must provide BAFA with information and evidence relevant to the monitoring of compliance with the due diligence obligations. These obligations are limited by a right to refuse to testify under section 17 para. 3 LkSG, which follows from the *nemo-tenetur principle*:⁷⁵ The statement may be refused if it would otherwise put the person concerned or a relative in danger of prosecution under the Code of Criminal Procedure or the OWiG. Finally, section 18 LkSG provides for duties of cooperation and acquiescence of the parties that go beyond what is customary in regular administrative proceedings; enterprises must not only tolerate the measures described above but also cooperate in their implementation.

To enforce these measures, BAFA may use the means of administrative enforcement under the German VwVG. In doing so, it must observe the general enforcement requirements, in particular, warning and official setting of a coercive measure before its enactment under sections 13 and 14 VwVG. However, the maximum penalty under the new LkSG is double the amount set by the VwVG.

3.3.3.2. Sanctions Regime

Section 24 LkSG contains several regulatory offences for the negligent or intentional breach of certain duties of care provided for in sections 4 to 9 LkSG. There is criticism over the lack of specificity of these regulatory offences since they refer back to legal concepts that need to be interpreted,⁷⁶ at times with reference to the decision of the French Conseil Constitutionnel for the fining rules of the Loi de Vigilance.⁷⁷ The need for interpretation does not, however automatically imply a violation of the constitutional principle of definiteness (Article 103 para. 2 of the German Constitution), so long as the meaning is specifiable.⁷⁸

⁷⁵ On the right to refuse testimony in Economic Administrative Law: Moritz Gabriel, “Das Auskunftsverweigerungsrecht im Wirtschaftsverwaltungsrecht,” *Neue Zeitschrift für Verwaltungsrecht* (2020): 19.

⁷⁶ Kamann and Philipp Irmscher, “Das Sorgfaltspflichtengesetz,” 153, 249; Lutz-Bachmann, Vorbeck, and Wengenroth, “Menschenrechte und Umweltschutz in Lieferketten,” 906, 912.

⁷⁷ Already at 3.3.1. Constitutional court, Décision no. 2017–750 DC of 23 March 2017.

⁷⁸ See also: Engel and Schönfelder, “§ 6 Öffentlich-rechtliche Durchsetzung,” 171, 193.

Pursuant to section 46 OWiG, which applies to the fining proceedings, the prosecuting authority has some of the investigative powers of the Code of Criminal Procedure (StPO); in particular, it can conduct searches and seize evidence under sections 102 and 94 et seq. StPO. Regarding the initiation of the fine proceedings and the amount of the sanction, BAFA has discretionary powers within the framework of section 24 LkSG.

Regulatory fines have three functions in German regulatory offences law: they have a repressive, preventive, and profit-absorbing effect. The repressive effect of regulatory fines is, however, less severe than that of penalties under the Criminal Code. Regulatory fines are understood as an “emphatic reminder of obligations”⁷⁹ and, for example, are not entered in the Federal Central Register like the criminal fine. The central function of the regulatory fines is thus prevention, both in the form of individual prevention and of general deterrent effect.⁸⁰ This goal is ultimately also served by the absorption of economic advantages gained from the offence. Pursuant to section 17 para. 4 s. 1 OWiG, the fine should exceed the economic advantage (even beyond the statutory maximum) that the offender has derived from the administrative offence. The fine can be up to 8 million euros in the case of legal persons, up to 2 percent of the average annual turnover in the case of legal persons with an average annual turnover of more than 400 million euros, and up to 800,000 euros in the case of natural persons, pursuant to sections 24 para. 2 s. 2 LkSG and 30 para. 2 s. 3 OWiG.⁸¹

Under section 24 para. 4 s. 1 of the LkSG, the assessment of the fine for legal persons and associations of persons is based on the significance of the regulatory offence; the criteria for this are, for instance, the weight, extent, and duration (no. 3) of the regulatory offence, as well as its effects (no. 5). The economic circumstances of the legal person are also considered (no. 2). Efforts on the part of the company to uncover the offence, as well as efforts to make amends, for example within the framework of proceedings for amicable settlement according to section 8 para. 1 s. 5 LkSG, can

⁷⁹ BVerfG, Decision of 16 July 1969, Case 2 BvL 2/69, BVerfGE 27, 18.

⁸⁰ Kai Sackreuther, “OWiG § 17,” in *Ordnungswidrigkeitengesetz OWiG*, ed. Jürgen Peter Graf, 32 ed. (C.H. Beck, 2021), marginal no. 6ss.

⁸¹ Critical on using the average annual turnover as a reference for the calculation of the fine Lutz-Bachmann, Vorbeck, and Wengenroth, “Menschenrechte und Umweltschutz in Lieferketten,” 906, 913.

reduce the fine.⁸² In the case of a negligent offence, according to section 17 para. 2 OWiG, the amount of the fine is capped at half of the statutory maximum amount. The practice of the authorities should be defined by guidelines, as they are known from cartel law under Section 81d para. 4 GWB.⁸³ Section 22 LkSG provides that the sanctioning effect of the fine is reinforced in serious cases by the exclusion from public tendering.

3.3.4. Missing Civil Liability and Conclusion

Civil liability directly stemming from the breach of the Act is expressly excluded under section 3 para. 3 LkSG. There is a controversy within the German legal community as to how and if the breach of the due diligence duties can nevertheless lead to civil liability under general contract law and, in particular, tort law.⁸⁴ The developments in antitrust law have shown that civil liability can have a beneficial effect on the effectiveness of sanctions.⁸⁵ This might be particularly true for the German LkSG, since the department responsible for the enforcement of its sanctions system is still in the process of being set up and it is doubtful that its staffing will be sufficient to ensure effective enforcement.⁸⁶ Overall, the regulatory measures applicable as well as the sanctions provided for by the LkSG are quite strong and may explain why some believe that the LkSG is “equipped with a particularly strong enforcement mechanism under economic administration and public

⁸² Cf. Government Explanatory Memorandum, BT-Drs. 19/28649, p. 49.

⁸³ Bundeskartellamt, “Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings,” October 11, 2021, accessed January 8, 2024, www.bundeskartellamt.de/Shared-Docs/Publikation/EN/Leitlinien/Guidelines_setting_fines_Oct_2021.html?nn=3591462.

⁸⁴ Discussing a liability under Contract law e.g. Chris Thomale and Marina Murko, “Unternehmerische Haftung für Menschenrechtsverletzungen in transnationalen Lieferketten,” *Europäische Zeitschrift für Arbeitsrecht*, no. 1 (2021): 40, 50s.; Björn Schneider, “Menschenrechtsbezogene Verkehrspflichten in der Lieferkette und ihr problematisches Verhältnis zu vertraglichen Haftungsgrundlagen,” *Neue Zeitschrift für Gesellschaftsrecht*, no. 35 (2019): 1375 ss, 1372 ss. Discussing liability under Tort Law e.g.: Anna Beckers, “Globale Wertschöpfungsketten: Theorie und Dogmatik unternehmensbezogener Pflichten,” *Zeitschrift für die gesamte Privatrechtswissenschaft*, (2021): 220, 248; Wagner, “Haftung für Menschenrechtsverletzungen in der Lieferkette,” 1095, 1103; Marc-Phillippe Weller and Chris Thomale, “Menschenrechtsklagen gegen deutsche Unternehmen,” *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, (2017): 509, 521s.

⁸⁵ See on this: König and Bremenkamp, “Competition Law Sanctions,” 189, 401.

⁸⁶ This has been criticized also by others, cf.: Engel and Schönfelder, “§ 6 Öffentlich-rechtliche Durchsetzung,” 171–2.

procurement law.⁸⁷ However, this view does not sufficiently take into account the importance of how these measures and sanctions will be applied in practice.

4. Summary Assessment and Outlook

To date, the German LkSG is the German legislatures' most important initiative in promoting corporate sustainability. To this end, it obliges companies to observe human rights and environmental due diligence duties in their business operations and supply chains in an appropriate manner. The LkSG is one of a multitude of regulatory initiatives, applied at the European level, all of which pursue the goal of obliging companies to take sustainability concerns more seriously. Yet, on closer examination of the provisions of the LkSG in the light of the concept of sustainability and the broader comparative context, the German legislature hardly assumes a pioneering role: The LkSG does not contain a comprehensive concept of sustainability, as the United Nations, in particular, has shaped at the international level. This is regrettable, especially since the German government has been explicitly striving for the implementation of the UN's sustainability approach at the national level for some time. Instead, the LkSG follows a purely sectoral approach, protecting first and foremost human rights concerns, with environmental aspects playing only a secondary role. Moreover, the LkSG models the concrete obligation of companies concerning various international agreements. Instead of establishing an abstract obligation to consider sustainability concerns in general, this referencing technique makes the application of the law considerably more difficult. For such a commitment, the concept of planetary boundaries combined with the social foundation would have been an adept concretization of the sustainability principle. This approach has not only received a lot of support from the scientific community but is also increasingly being taken up at the political level.

Regarding the scope and enforcement of corporate due diligence, the German legislature also fails to achieve a comprehensive approach. On the one hand, the LkSG leaves out small and medium-sized enterprises. This does not bring the intended relief but conversely leads to legal uncertainties

⁸⁷ Ibid.; Ehmman, "Der Regierungsentwurf für das Lieferkettengesetz," 141, 151 views the sanction system as "convincing."

to the detriment of SMEs, which form the backbone of the German and European economy, as they play a central role in the transition to a sustainable economy. On the other hand, the LkSG fails to bind companies comprehensively to their obligations along the supply chain. Although its supply chain concept is broadly defined in principle, the concrete due diligence obligations mostly concern the company's own business operations and direct suppliers. Indirect suppliers are only affected in exceptional cases. Such a regulatory approach not only fundamentally questions the effectiveness of the law, but also contradicts parallel approaches in the UN Guiding Principles on Business and Human Rights, in other member states and at the EU level.

As far as enforcement is concerned, the main weakness of the LkSG is its failure to provide for civil liability. Regardless of whether the official monitoring and sanctions now introduced can effectively enforce corporate due diligence, the legislature has failed to clarify numerous core civil law issues: What role will the principle of trust under tort law play in the supply chain in the future? How can the breakthroughs of the principle of separation under company law, which courts in various jurisdictions have already assumed several times, be categorized and depicted normatively? These important questions still await an answer. It appears that the German legislature will have to address these issues under EU Law in the future.

If company law is to be used effectively as a vehicle for the transition to a sustainable economy, this project requires more than a mere consideration of environmental and social concerns in various individual company law norms; it requires a coherent, cross-jurisdictional approach that is capable of meaningfully integrating a uniform and comprehensive understanding of sustainability into corporate law.⁸⁸ Due to the complexity of the subject matter in the multi-level legal system, the corresponding design of relevant legal rules places growing demands on the active regulators. The importance of the project can hardly be underestimated since it is about nothing

⁸⁸ This attempt undertakes the French legislator with new regulations in the Commercial Code (Code de Commerce) through the Loi de Vigilance and in the Code Civil by the Loi Pacte. More critical of the latter: M. Didier Poracchia, "De l'intérêt social à la raison d'être des sociétés," *Bulletin Joly Sociétés*, no. 6 (2019): 40; Dominique Schmidt, "La loi Pacte et l'intérêt social," *Recueil Dalloz*, (2019): 633.

less than providing a new regulatory framework for the behavior of nationally and internationally active market players. The LkSG may be a first step in this direction. However, a lot is still to be done in the field of corporate sustainability.

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