

Role of domestic regulations in advancing Human Rights Due Diligence: The German Supply Chain Law and its impact on CEE and CA

Prof. Dr. Markus Krajewski

Business and Human Rights in CEE and Central Asia
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- Human Rights Due Diligence Legislation: Background
 - German Supply Chain Due Diligence Act
 - EU Directive on Corporate Sustainability Due Diligence
 - Impact of due diligence laws on CEE and Central Asia
 - Conclusion

Human Rights Due Diligence Legislation: Background

Legal basis

- International human rights obligations of states include state duty to protect = regulating corporate activities
 - Jurisdictional scope: corporations subject to domestic law
 - Territorial scope: protecting human rights outside of state territory (= Extraterritorial human rights obligations?)
 - UN Guiding Principles on Business and Human Rights (2011)
 - Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights (2011)
 - CESCR, General Comment No 24 (2017) on State Obligations in the Context of Business Activities

Key questions and principles

- Coverage
 - Company size (number of employees, annual turnover)
 - Sectoral scope
- Scope (human rights, environmental obligations)
- Key obligations
 - Due diligence (as based on UNGP)
 - Reporting
- Enforcement
 - Private enforcement (civil liability, competition law etc)
 - Public enforcement (administrative or criminal law)

Typology of due diligence laws

- Transparency and reporting laws
- Human rights due diligence requirements
- Due diligence and civil liability

Transparency and
reporting
requirements
EU NFR-Directive
UK MSA

General due diligence
laws
French LdV
Norwegian Act

Detailed due diligence
laws
German LkSG
EU CSDDD

German Supply Chain Due Diligence Act

German Supply Chain Due Diligence Law = Lieferkettensorgfaltspflichtengesetz (LkSG)



Legislative history

- Reliance on voluntary implementation of human rights due diligence in German NAP on BHR (2016-2020)
- Indication that mandatory instrument could be adopted if voluntary approach is insufficient
- Evaluation of voluntary approach: Only 13-18% of companies engage in human rights due diligence
- Civil society campaign towards mandatory due diligence law
- Proposal by Federal Government in March 2021
- Law adopted by Parliament on 11 June 2021

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- Companies registered in Germany or with secondary establishment in Germany
 - Only large companies
 - From 1 January 2023: Companies with more than 3000 employees (ca. 900 companies)
 - From 1 January 2024: Companies with more than 1000 employees (ca. 4800 companies)
 - Foreign companies only offering goods and services in German market not covered

Substantive content

- Requirement to exercise human rights and environmental due diligence in supply chain, including
 - Risk management system and analysis
 - Preventive measures, inter alia policy statement, contractual assurances, trainings
 - Remedial measures inter alia sector-wide initiatives, plan to mitigate human rights risks, termination of business relationship as *ultima ratio*
 - Complaints procedure
 - Internal documentation
 - Public reporting

- Human rights
 - All human rights as enshrined in international human rights treaties listed in annex (ICCPR, ICESCR and ILO core labour conventions)
 - Focus on child labour, forced labour, work place safety, collective labour rights, discrimination, adequate remuneration, water and soil pollution, enforced evictions, torture and other ill-treatment by security forces
- Environmental obligations as listed in three multilateral environmental treaties

Extent of obligations

- Due diligence obligations apply to
 - own activities (includes subsidiaries) and
 - direct („first tier“) supplier
- Obligations vis-à-vis indirect supplier only if company has „substantiated knowledge of potential violation“

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- Administrative oversight by Federal Office for Economic Affairs and Export Control (BAFA)
 - Enforcement means
 - Administrative measures and sanctions
 - Administrative fines
 - Civil liability
 - based on Supply Chain Due Diligence Law explicitly excluded
 - But possible based on general tort law
 - Special procedural standing for NGOs and trade unions

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- Supply Chain Law placed human rights and environmental due diligence on agenda of German businesses and industries
 - Some companies will engage in substantive compliance, some will only exercise „box-ticking“
 - Despite limited scope law will also affect small and medium enterprises as part of supply chain
 - Significant increase of consultancy services
 - Level of enforcement by BAFA unclear

EU Directive on Corporate Sustainability Due Diligence

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- National human rights due diligence laws in France, Netherlands, Germany and proposals in other EU Member States
 - Civil society campaign
 - European Parliament: Recommendations to the Commission on corporate due diligence and corporate accountability (March 2021)

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- EU Commission Proposal of 23 March 2022
 - Council position adopted on 1 December 2022
 - European Parliament
 - Discussions and Reports in various committees
 - Final Report by Committee on Legal Affairs: 8 May 2023
 - Plenary vote 1 June 2023, 11:00 AM
 - Next steps
 - Trilogue
 - Adoption in 2023/2024?
 - Implementation in domestic law of Member States

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- Scope
 - „large“ companies (500 employees, 150 Mio € turnover)
 - Smaller companies in specific risk areas
 - Incorporated in Member State or operating on EU market
 - Detailed requirements of corporate due diligence
 - Human rights and environmental obligations (including climate change, but not part of due diligence)
 - Enforcement
 - Civil liability
 - Administrative sanctions

Impact of due diligence laws on CEE and Central Asia

Impact on CEE and CA countries

- EU Member States (and Accession Countries prospectively)
 - Obligation to implement EU Corporate Sustainability Due Diligence Directive from 2024/2025 onwards
 - Need to adopt national due diligence laws
 - Many companies will be subject to due diligence obligations directly and many more indirectly
 - Capacity building by EU Commission and institutions
- Indirect effects on other countries → HRDD to be included in association and free trade agreements?

Impact on businesses in CEE and Central Asia

- Direct suppliers of (German/EU) companies will be subject to human rights / environmental risk assessment
- Effect may be handed down through supply chain
- Danger of restructuring supply chains?
 - if suppliers actively oppose risk assessment and management disengagement of German/EU companies possible
 - Risk can be reduced if CA countries support human rights due diligence / corporate responsibility through NAP or own legislation
 - Potential for CEE and CA in context of “de-risking”

Impact on business practices

- Will mandatory human rights due diligence change business models towards more sustainable and human rights-friendly products and production cycles also in context of “just transition”?

Conclusion

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- Mandatory due diligence legislation may contribute to more effective implementation of corporate responsibility to respect human rights
 - Effects of legislation may reach beyond companies subject to legislation
 - Critique
 - Imposition of „Western standards“ on businesses and societies in other parts of the world
 - Negative impact on competitive advantage of companies and economies (danger of disengagement)
 - Adoption of HRDD laws without stakeholder consultation from affected communities and countries
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- HRDD laws part of emerging transnational and pluralist normative framework of business and human rights
 - Transnational: includes domestic, EU and international law, soft law and corporate codes of conduct
 - Pluralist: Different legal instruments operate next to each without formal hierarchy or mutual exclusivity
 - Can HRDD legislation contribute to fairer globalized supply chains and production networks?

Thank you very much for your attention!
markus.krajewski@fau.de