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THE SUPPLY CHAIN DUE DILIGENCE ACT

Options for action for German co-determination actors and trade unions

Prof. Dr. Reingard Zimmer

Foreword

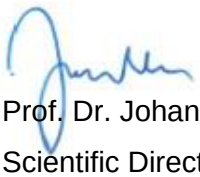
Violations of human rights and environmental destruction are still a reality in parts of the internationalised value chains. The "Supply Chain Due Diligence Act" (LkSG) is an expression of a paradigm shift that the international trade union movement and actors such as the UN Human Rights Council have long worked towards with the "Guiding Principles on Business and Human Rights". The law makes companies more accountable for respecting global, labour-related human rights in supply chains. The law also aims to ensure that environmental risks are avoided more effectively than before.

The Act is thus in line with initiatives for transparency and corporate due diligence in states such as France, the Netherlands, the United Kingdom and California. The Act, which was passed by the German Bundestag in June 2021 after long negotiations, came into force on 1 January 2023. From a systematic point of view, it belongs less to labour law and more to commercial law. However, due to its objectives, it represents an „important component of a transnational labour law", as Rüdiger Krause rightly puts it (RdA 2022, 303). Not only with its reference to freedom of association does the LkSG contain levers for the transnational protection of interest representation.

Reingard Zimmer, Professor at the Berlin School of Economics and Law, provides a profound overview of the provisions of the Act that are particularly relevant for business practice in this report. She elaborates which legal instruments workers' representatives and trade unions in Germany and abroad are given with the LkSG to increase corporate diligence for the observance of human rights and environmental protection in supply chains. In particular, the linkage with the Works Constitution Act is being examined. This text was first published in German under the title “Das Lieferkettensorgfaltspflichtengesetz”.

While there is still a dispute in Brussels about a uniform European regulation after the European Commission presented a draft directive on the due diligence obligations of companies with regard to sustainability in February 2022, it is clear: companies that profit from the cross-border division of labour will be held more accountable. Even if the effectiveness of the law has yet to be proven in practice, this report shows that co-determination bodies and trade unions are important actors in achieving the goals of the law.

We are very pleased to contribute to the international debate with the English version of the expertise and to enrich it with first perspectives on the German supply chain law in the work of workers' interest groups. Our sincere thanks therefore go to the author for preparing the present translation of her expert opinion, which is based on the legal situation as of the beginning of 2023.



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Contents

A. Introduction

As is well known, globalisation has led to increased outsourcing of production, with goods being purchased in far-flung corners of the world, not least because of lower wages, weaker labour and environmental regulations and fewer controls. Such an environment is difficult for trade unions to operate and union density therefore is rather low. As a result, working conditions in the countries of the Global South (and East) are predominantly catastrophic. Due to outsourcing, companies' profit margins have increased significantly, but they are not prosecuted for labour and environmental violations in other countries (along the supply chain). In order to improve compliance with key internationally recognised human, labour and environmental rights along the value chain, the legislator has established "requirements for responsible management of supply chains for companies - above a certain size" with the Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz - LkSG),[1] the Act was passed by the German Bundestag on 11 June 2021.[2] The aim of the legislator is to ensure that companies based in Germany fulfil their responsibility in the supply chain with regard to respect for internationally recognised human and labour rights by implementing core elements of human rights due diligence in their business activities.[3]

The substantive requirements for responsible corporate management of supply chains go back to the United Nations Guiding Principles on Business and Human Rights (UN Guiding Principles) of the UN Human Rights Council of 2011, which formulated the three pillars of protect, respect and remedy. On this basis, a National Action Plan on Business and Human Rights[4] was defined for Germany.[5] The adoption of the LkSG is thus embedded in a debate that has been growing in intensity for years on the responsibility of transnational corporations for violations of human, labour and environmental rights along the value chain of their products or services. Since the Federal Government's monitoring of the National Action Plan showed that between 2018 and the end of 2020 only between 13 and 17 per cent of the companies surveyed fulfilled the requirements of the National Action Plan,[6]

[1] BT-Drs. 19/28649, p. 2.
[2] Act on Corporate Due Diligence in Supply Chains of 16 July 2021, BGBl. I p. 2959.
[3] BT-Drs. 19/28649, p. 2, 23.
[4] For more information, see the BMAS website at: https://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/NAP/nap.html (20.9.2023).
[5] BT-Drs. 19/28649, p. 23.
[6] Federal Foreign Office, Monitoring of the National Action Plan on Business and Human Rights (2020), online: https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2124010 (20.09.2023).

the legislator decided to take action and create binding regulations.[7]

Similar developments can be seen in other countries where legislation has also been created as part of the corporate accountability debate,[8] such as the Dodd-Frank Act (Section 1502) in the United States (2010),[9] the California Transparency in Supply Chain Act on slavery and human trafficking in the global supply chain (2012),[10] the United Kingdom Modern Slavery Act (2015),[11] the French Due Diligence Act (2017),[12] the Australian Modern Slavery Act (2018),[13] the Dutch Child Labour Act (2019),[14] as well as the Norwegian Transparency Act (2021)[15] on fundamental human and labour rights,[16] which was passed on the same day as the German LkSG. At the EU level, the Timber Regulation 995/2010[17] was already adopted in 2013, in which due diligence obligations to prevent illegal logging worldwide are anchored. In addition, the CSR Reporting Obligations Directive 2014/95/EU[18] and the EU Conflict Minerals Regulation 2017/821 of 2021 were adopted in 2014.[19] In the meantime, there is also a draft EU Directive on the due diligence obligations of companies with regard to sustainability (due diligence directive).[20]

However, even the best regulations are of little use if they are only inadequately implemented. There is no question that the obligation of implementation lies with the companies, as the regulations are addressed to them. Government agencies are responsible for monitoring - but neglected in the debate is the question which role co-determination actors and trade unions can play in the implementation and

[7] BT-Drs. 19/28649, p. 2.
[8] See in depth Grabosch, Unternehmen und Menschenrechte. Legal Due Diligence Obligations in Global Comparison (2019), p. 6 et seq.
[9] Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), Section 1502 requires companies to disclose the origin of conflict minerals, reprinted in: Grabosch (2019), p. 15 f.
[10] California Transparency in Supply Chains Act, Section 1714.43 Civil Code (the Act is part of the tort section of the California Civil Code), reprinted in: Grabosch (2019), p. 21.
[11] Modern Slavery Act (2015 c. 30), the text of the Act is available at: https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted (03.08.2022).
[12] Loi relative au devoir de vigilance ("Loi de vigilance"), loi n° 2017-399, JORF n° 0074 v. 28.03.2017, in-depth: Frappard, AuR 6/2018, p. 277 et seq.
[13] In-depth Grabosch (2019), p. 42 et seq.
[14] Wet Zorgpflicht Kinderarbeid, Staatsblad 2019, 401; in depth: Stöbener de Mora/Noll, NZG 2021, 1285 (1288).
[15] The law refers to transparency of companies regarding basic human and labour rights, LOV-2021-06-18-99. Unauthorised English translation https://lovdata.no/dokument/NLE/lov/2021-06-18-99 (02.10.2023).
[16] Further information: Krajewski/Tonstat/Wohltmann, Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?, BHRJ 6/2021, p. 550 (551 et seq.).
[17] Regulation No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OLJ 295, 12.11.2010, pp. 23-34.
[18] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014.
[19] Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017 establishing supply chain due diligence obligations for Union importers of tin, tantalum, tungsten, their ores and gold from conflict-affected and high-risk areas, OJL 130, 19.05.2017, p. 1 et seq.
[20] Proposal for a Directive of the European Parliament and of the Council on corporate due diligence with regard to sustainability and amending Directive (EU) 2019/1937 of 23 October 2019.

monitoring of the LkSG. This question will be examined here. In the following, the provisions of the LkSG are first presented, with partial consideration of the proposal of the European due diligence directive (as proposed). Furthermore it is analysed to which extent the LkSG can be used by co-determination actors and trade unions and in which way they can strengthen the implementation of the LkSG.

B. Human rights due diligence obligations of companies under the LkSG

I. Scope of application of the law (Section 1 LkSG)

Pursuant to Section 1 para. 1 sentence 1 LkSG, the Supply Chain Due Diligence Act applies from 01.01.2023 to all companies that "have their head office, their principal place of business, their administrative headquarters[21] or their statutory headquarters in Germany" (No. 1) and generally employ at least 3,000 employees in Germany (No. 2). The same applies to foreign companies with a branch within the meaning of Section 13d HGB in Germany (Section 1 (1) sentence 2 Nos. 1 and 2), provided the threshold number of employees in Germany is reached. A branch office is a permanent establishment that is organisationally independent, which goes beyond a mere representative office, a shop or warehouse.[22] Although the organisational unit participates independently in legal transactions, it acts here in the name of the (foreign) company to which it belongs and is therefore not a legal entity in its own right, so that the duty of care must be carried out by the foreign parent company.[23] If there are several branches of a foreign company in Germany, their employees must be added together. Subsidiaries of foreign groups are to be distinguished from branches; as independent legal entities, they only fall within the scope of the law if they themselves meet the threshold.[24] The law applies to all sectors and enterprises of all legal forms (Section 1 (1) sentence 1 LkSG) and thus also applies to foundations and church-run enterprises.[25] As the legislator did not restrict the law to commercial activities, non-profit enterprises are also covered.[26] Legal persons under public law also fall within the scope of the law; only those that perform administrative tasks of a territorial authority and are not entrepreneurially active on the market are not covered.[27]

The wording of the law in Section 1 (1) LkSG refers to companies. However, since Section 1 (3) LkSG stipulates for affiliated companies as defined in Section 15 AktG that "the employees employed in Germany by all companies belonging to the group must be taken into account when calculating the number of employees (...) of the

[21] Office and administrative seat denote the same thing, namely the place from which business is managed, Grabosch-Grabosch, LkSG, § 3, marginal No.11.
[22] Grabosch/Schönfelder, AuR 12/2021, 488 (489).
[23] Grabosch-Grabosch, LkSG, § 3 marginal No.13; Valdini, BB 2021, 2955 (2956).
[24] Grabosch-Grabosch, LkSG, § 3 marginal No.14.
[25] Nietsch/Wiedmann, NJW 2022, 1 (5); Sagan/Schmidt, NZA-RR 6/2022, 281 (283); Spindler, ZHR 186 (2022), 67 (73); Wernicke, AuA 7/2022, 8 (9). With regard to areas of the Catholic Church as "enterprises", already Spießhofer, Unternehmerische Verantwortung (2017), p. 476 et seq.
[26] Nietsch/Wiedmann, NJW 2022, 1 (5).
[27] BT-Drs. 19/28649, p. 33.

parent company", the attribution is group-related. However, the group attribution clause of Section 1 (3) LkSG only refers to employees employed in Germany, plus seconded employees, similar to Section 5 MitbestG.[28] A loophole arises, for example, in the case of a construct of many individual family businesses, if these do not fulfil the requirements of the provisions of company law, so that there is no group. Pursuant to Section 1 (2) of the LkSG, temporary agency workers must be taken into account when calculating the number of employees of the user enterprise if they are deployed for a period of more than six months. The number of temporary agency workers used must be taken into account, even if they change personnel or are used at different workplaces in the user company.[29] Workers posted abroad are also be taken into account (Section 1, paragraph 3, subsection 2, LkSG). The threshold will be reduced to 1,000 employees as of 1 January 2024 (Section 1 para. 1 sentence 2 LkSG), although it remains to be seen whether this threshold will not be reduced by European law. For example, the draft of an EU directive on corporate due diligence[30] provides for a significantly lower threshold and in Art. 2 para. 1 lit. a) is only based on generally more than 500 employees (with more than 150 million € net turnover/year) or on 250-500 employees (and 40 million € net turnover/year). 250-500 employees (and € 40-150 million net turnover/year, Art. 2 para. 1 lit. b), provided that at least 50 % of the net turnover comes from one of the explicitly mentioned sectors (e.g. textiles, agriculture, food, raw material extraction, metal processing, except: Mechanical engineering), Art. 2 para. 1 lit. b) i-iii.[31] In this respect, it remains to be seen which amendments the Directive will still impose on the German legislator. For good reason, the German legislator has planned an evaluation of the LkSG at the end of June 2024 on the basis of the company reports to be submitted pursuant to Section 10 para. 2 LkSG[32] in order to determine whether the scope of application of the law should be expanded by lowering the threshold value.[33]

II. Scope of the supply chain (Section 2 para. 5 LkSG)

The law uses the term "supply chain", which is inappropriate, as it refers to the delivery of products. However, according to the wording of the law in Section 2 para. 5 sentence 1 LkSG, not only all products are included, but also all services

[28] Spindler, ZHR 186 (2022), 67 (75).
[29] BT-Drs. 19/28649, p. 34.
[30] Draft Directive of the European Parliament and of the Council on corporate due diligence with regard to sustainability and amending Directive (EU) 2019/1937.
[31] Hübner/Habrich/Weller, NZG 2022, 644 (645 et seq.).
[32] Supplemented by surveys of companies and stakeholders.
[33] BT-Drs. 19/28649, p. 32.

of a company, i.e. all steps in Germany and abroad that are necessary for the production of the products and for the provision of own services, including transport (Section 2 para. 5 sentence 2 LkSG). According to the will of the legislator, the supply chain "begins with the extraction of the raw materials used and ends with the delivery of the product to the end customer", whereby "the components of a supply chain may vary depending on the type of product or service".[34] Covered are all "activities that ensure that the product reaches its final destination, for example with the help of distributors, warehouses, physical shops or online platforms".[35] The supply chain is structured differently depending on the sector, e.g. in the financial sector "a significant part of the production takes place simultaneously with the provision of the service to the customer and releases (...) further production processes".[36] In this respect, "for such services, the relationship with the end customer and the downstream stages of the supply chain are also covered". [37]

In social sciences, the terminology of the supply chain ([38]) has not been used for some time, but that of the value chain,[39] which linguistically includes all sectors, i.e. also the service sector.[40] The widespread division of labour is also described as production in network structures, in which transnational corporations form the axis around which economic activity is realised.[41] The terminology used by the legislator is predominantly used here; in some cases the term "value chain" is also used for clarification.

III. Human rights and environmental risks

Pursuant to Section 2 para. 2 LkSG, the law obliges companies to ensure that key human and environmental rights are not violated in their supply chains, whereby labour law provisions are included under human rights. Situations that contribute to the non-observance of the human and environmental rights listed below with sufficient probability are considered inadmissible human rights risks within the meaning of the LkSG.[42]

[34] Cf. also BT-Drs. 19/28649, p. 40.
[35] BT-Drs. 19/28649, p. 40.
[36] BT-Drs. 19/28649, p. 40.
[37] BT-Drs. 19/28649, p. 40.
[38] On the concept cf. Gereffi (1994), p. 95; Fichter/Sydow, IB 4/2002, p. 357 (364).
[39] Cf. Hendersen et al. (2002), p. 439 et seq.
[40] On the concept, see Zimmer, Soziale Mindeststandards und ihre Durchsetzungsmechanismen (2008), p. 39.
[41] Dicken et al, Global Networks 1/2001, 89 (107); Fichter/Sydow (2002), IB 4/2002, p. 357 (363 f.); Hendersen et al, RIPE 3/2002, p. 436 (442 et seq.); Zimmer (2008), p. 39.
[42] Dutzi/Schneider/Hasenau, DK 11/2021, p. 454 (455).

1. Introduction

The fundamental rights to be observed are based on the content of international treaties, since Section 2 (1) of the LkSG defines the conventions listed in the Annex to the Act as "protected legal positions within the meaning of the Act.[43] These are primarily the conventions of the International Labour Organization (ILO), on which the ILO core labour standards are based, as well as the UN Civil and Social Covenant[44] and the UN Minamata Conventions on Mercury[45] and on Persistent Organic Pollutants.[46]

2. Human rights risks to be considered (Section 2 para. 2 LkSG)

A human rights risk exists if "due to actual circumstances, there is a sufficient probability of a violation of" the key human or labour rights outlined below.

a) Minimum age and worst forms of child labour (Nos. 1 and 2)

The obligation to analyse the risks in the value chain of a transnationally active company includes compliance with a minimum age and the avoidance of the worst forms of child labour. The permissible minimum age for employment is determined by the respective national law according to Section 2 para. 2 no. 1 LkSG, but may not be less than 15 years (Art. 2 para. 3 ILO Convention No. 138), whereby young people may only be employed after completing compulsory schooling. Countries lagging behind in development may - under certain conditions - set a minimum age of 14 years (Art. 2 para. 3 ILO Convention No. 138).[47]

Lighter activities of a smaller scale, which are in line with compulsory education, may exceptionally be permitted from the age of 13 (Art. 7 para. 1 ILO Convention No. 138).[48] For work that is "likely to endanger the life, health or morals of young persons", the minimum age is 18 years, Art. 3 para. 1 of ILO Convention No. 138. If the hazardous activity goes hand in hand with vocational training and measures are taken for the special protection of the trainee, the activity is also permitted from the age of 16.[49] Section 2 (2) (3) also prohibits activities classified as worst forms

[43] International Covenant on Civil and Political Rights of 19 December 1966, Federal Law Gazette 1973 II 1553.
[44] International Covenant on Economic, Social and Cultural Rights of 19 December 1966, Federal Law Gazette 1973 II, pp. 1569, 1570.
[45] Minamata Convention on Mercury of 10 October 2013, BGBl. 2017 II, p. 610, 611.
[46] Stockholm Convention of 23 March 2001 on Persistent Organic Pollutants (POP Convention), Federal Law Gazette 2002 II, pp. 803, 804.
[47] See in depth Zimmer, Section 5 (ILO), in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 2019, para. 166.
[48] See in depth Zimmer, Section 5 (ILO), op. cit., para. 167.
[49] See in depth Zimmer, Section 5 (ILO), op. cit., para. 167.

of child labour under ILO Convention No. 182.[50]

b) Forced labour and all forms of slavery (Nos. 3 and 4)

Protection against forced labour and against all forms of slavery are also protected legal positions under the LkSG (Section 2 (2) Nos. 3 and 4 LkSG). The law defines forced labour in Section 2 (2) as "any work or service which is required of a person under threat of punishment and for which he or she has not voluntarily made himself or herself available". The legal definition is linked to Art. 2 para. 1 ILO Convention No. 29, which was taken almost word-for-word. The law cites debt bondage and human trafficking as examples, the latter being punishable in Germany under Sections 232et seq. of the Criminal Code (StGB, German Criminal Code).[51] The corporate duty of care refers to forced labour by state agencies as well as those in favour of private individuals and companies, regardless of whether the activities are legal or illegal under national law.[52]

The punishment does not have to be via direct violence; psychological or financial pressure are also possible; the threat of denunciation to authorities such as the police or immigration authorities is sufficient.[53] The same applies to the threat of deprivation of food, shelter or other necessities, as well as the loss of rights and privileges or other subtle forms of threats. Also covered are financial disadvantages, such as threats of dismissal from current employment or exclusion from future employment, or transfer to a job with even worse conditions.[54]

Forced labour also presupposes that the work is not performed voluntarily; psychological coercion must also be taken into account, e.g. the reinforcement of a work order by the credible threat of punishment for non-compliance. An induced debt, e.g. through book falsification, exaggerated prices, depreciation of the value of the goods or services produced, usurious interest, etc., is also to be regarded as coercion. There is also an element of coercion when workers are deprived of identity cards or other valuable personal items, or are induced to undertake work by deception or false promises as to the nature and conditions of the work. Coercion also occurs when wages are withheld or threatened.[55] An activity can be

[50] This includes all forms of forced labour or slavery (section 2 para. 2 no. 3 lit. a), prostitution (lit. b), drug trafficking and the like (lit. c) or other harmful work (lit. d), cf. Zimmer, Section 5 (ILO), loc. cit., para. 168 et seq.
[51] In-depth Knospe, RdA 2011, 348 et seq.
[52] ILO, Global Estimate of Forced Labour, 2012, p. 19; in-depth: Zimmer, Kommentierung von Section 2 Abs. 2 Nr. 3 und 4 LkSG.
[53] Frenz, NZA 2007, 734 (736).
[54] ILO, A Global Alliance Against Forced Labour, 2005, p. 6.
[55] Zimmer, Kommentierung von § 2 Abs. 2 Nr. 3 und 4 LkSG.

started voluntarily and become forced labour when the worker can no longer voluntarily end the activity. According to the ILO Committee of Experts (CEACR), these criteria can be met in the case of forced overtime, provided that the overtime exceeds the legal requirements on the one hand, and an element of coercion is added, such as locked doors or the threat of dismissal, which is not infrequently the case in global production. The element of coercion is also present if the minimum wage can only be achieved by means of additional overtime.[56] All forms of forced labour can also occur in Germany. For example, trafficking in human beings for the purpose of exploitative working conditions can occur when Bulgarian harvest workers in Germany have their passports taken away by their employers after they arrive or when they agree to work for less than the applicable minimum wage by signing a contract in a language that they could not understand.[57]

c) Occupational health and safety (No. 5)

The obligation to analyse the risks in the value chain of a transnationally active enterprise includes occupational health and safety according to Section 2 para. 2 No. 5 LkSG, whereby the legislator has only provided for compliance with the protective provisions applicable under the law of the place of employment. It refers to safety standards with regard to the workplace and to work equipment (No. 5 lit. a) and suitable protective measures against "chemical, physical or biological substances" must not be lacking (No. 5 lit. b). In addition, work organisation measures must be taken to "prevent excessive physical and mental fatigue" caused by excessive working hours and insufficient rest breaks (No. 5 lit. c). Employees must also be adequately trained and instructed for their work (No. 5 lit. d).

d) Freedom of association (No. 6)

The obligation to analyse the risks in the value chain of a transnationally active company includes, according to Section 2 (2) no. 6 LkSG, the guarantee of freedom of association and the right to collective bargaining (collective bargaining autonomy). This applies both to the supply chain abroad and in Germany. Individual and collective freedom of association are guaranteed, which corresponds to the guarantee content of ILO Convention No. 87.[58]

[56] ILO, General Survey (forced labour), 2007, para. 132.
[57] Zimmer, Kommentierung von § 2 Abs. 2 Nr. 3 und 4 LkSG.
[58] Zimmer, Commentary on Section 2 para. 2 No. 6 LkSG (2023).

(1) Individual freedom of association

Pursuant to Section 2 para. 2 No. 6 lit. a) LkSG, workers have the right to "freely" form or join trade unions, subject only to compliance with the statutes of the respective organisation (Art. 2 ILO Convention No. 87).[59] Art. 1 para. 1 Convention No. 98 prohibits any difference in treatment related to freedom of association. Pursuant to Sec. 2 (2) No. 6 (b) LkSG, unjustified discrimination or retaliation on the grounds of trade union membership or activity is explicitly prohibited. It is also unlawful to "make the employment of a worker conditional upon his (her) not joining or leaving a trade union" (Art. 1 para. 2 lit. a) ILO Convention No. 98).[60]

(2) Collective freedom of association

Under Section 2 (2) (6) (c) of the LkSG, collective freedom of association is also protected, which significates that trade unions are free to operate and to decide wow to operate. According to the text of the law, this also includes the right to strike and the right to collective bargaining. However, the legislature has stipulated that the free activity of coalitions must be "in accordance with the law of the place of employment". The text of the LkSG does not provide any further interpretative guidance. However, the explanatory memorandum does not mention the law of the place of employment, but refers exclusively to the international conventions (Art. 22 of the UN Civil Pact[61] and Art. 8 of the Social Pact,[62] as well as ILO Conventions Nos. 87 and 98), which, according to the explanatory memorandum, are to be interpreted in their entirety in accordance with the relevant supervisory bodies of the UN and of the ILO.[63] The legislator cannot have intended a complete supersession of international law by national law.[64] Since Article 8 (3) of the Social Covenant stipulates ILO Convention No. 87 as the lower limit to be complied with, international law consequently sets the standard for possible restrictions and constitutes a lower limit to be complied with.[65]

The guarantee of freedom of association includes, for example, the right to form a (company) trade union or to register a trade union for the company; this may not

[59] Zimmer, Commentary on Section 5 (ILO, 2019), para. 73.
[60] See in depth: Zimmer, Commentary on Section 2 para. 2 No. 6 LkSG (2023).
[61] International Covenant on Civil and Political Rights of 19 December 1966, Federal Law Gazette 1973 II, p. 1553.
[62] International Covenant on Economic, Social and Cultural Rights of 19 December 1966, Federal Law Gazette 1973 II, pp. 1569, 1570.
[63] BT-Drs. 19/28649, p. 34, 37.
[64] Rather, the explanatory memorandum to the law states: "As a general rule, all enterprises must take care within their sphere of activity not to hinder associations or other groups in their formation and activities through their entrepreneurial actions and thereby violate the regulations to be observed under Article 22 of the International Covenant (...) on Civil and Political Rights, Article 8 of the International Covenant (...) on Economic, Social and Cultural Rights, ILO Convention No. 87 and ILO Convention No. 98".
[65] See in depth on the applicable law: Zimmer, Commentary on Section 2 par. 2 No. 6 LkSG (2023).

be hindered by the employer.[66] Since it is the free decision of workers to choose a particular trade union, the competent supervisory body at the ILO, the Committee on Freedom of Association, has consistently ruled in favour of trade union plurality.[67] This means that there may be several different trade unions in a company. The employer is therefore not allowed to drive an unwelcome, militant union out of the workplace or even dismiss its members.[68] As the Committee has pointed out in its long-standing practice, ILO Convention No. 87 also provides for the right of access of trade union representatives to the workplace,[69] both to enable them to carry out their functions,[70] and for membership recruitment purposes, with due regard for the right of ownership and management.[71] The right of access is also available to external trade union representatives, at least if the trade union already has members in the enterprise and this does not jeopardise the operation of the enterprise.[72]

According to the text of the law, the right to strike is explicitly covered by the guarantees of Section 2, subsection 2, No. 6 c), second sentence of the LkSG. National law is decisive insofar as it conforms to the guarantees of ILO Convention No. 87 and the statements of the ILO supervisory bodies (Committee of Experts and Committee on Freedom of Association).[73]

(3) Workplace employee representation (works council)

It is questionable whether the formation of a works council is also covered by the provision. The wording of Section 2 (2) No. 6 LkSG only refers to trade unions, therefore some voices in legal literature deny the application of the provision to

[66] Cf. ILO, Compilation of decisions of the Committee on Freedom of Association (2018), para. 419 et seq., where the statements (in line with the addressing of Convention No. 87) refer to state interference.
[67] 67th Report of the CFA, case No. 303 (Ghana), para. 260, 264; 95th Report, case No. 448 (Uganda), para. 124; 127th Report, case No. 878 (Nigeria), para. 109; 197th Report, case No. 905 (USSR), para. 633; 265th Report, case No. 1431 (Indonesia), para. 127; 270th Report, case No. 1500 (China), para. 324; 338th Report, case No. 2348 (Iraq), para. 995; see also General Survey 1983, paras. 136-138, or Gitzel, Der Schutz der Vereinigungsfreiheit, 2014, p. 156 et seq.
[68] See in depth: Zimmer, Commentary on Section 2 para. 2 No. 6 LkSG (2023).
[69] Case law in Germany has not referred to ILO Convention No. 87 in the central decisions on this issue (cf: BVerfG 14.11.1995, BVerfGE 93, 352 ff, as well as BAG v. 22.06.2010, NZA 2010, 1365 ff; 28.02.2006, NJW 1982, 2279 ff; 19.01.1982, NJW 1982, 2279 ff).
[70] 318th Report of the CFA, case No. 2012 (Russia), para. 426; 378th Report of the CFA, case No. 3171 (Myanmar), para. 491; 377th Report, case No. 3140 (Montenegro), para. 395.
[71] Report of the CFA, case No. 1852 (UK), para. 338; 327th Report, case No. 1948/1955 (Colombia), para. 358; 330th Report, case No. 2208 (El Salvador), para. 604; 332nd Report, case No. 2046 (Colombia), para. 446; 333rd Report, case No. 2255 (Sri Lanka), para. 131; 335th Report, case No. 2317 (Moldova), para. 1087.
[72] 334th Report of the CFA, case No. 2316 (Fiji), para. 505; 378th Report, case No. 3171 (Myanmar), para. 491; also: Schubert, Arbeitsvölkerrecht, p. 175. The same applies in principle to access to church institutions, ILO, Report of the committee of experts on the application of conventions and recommendations (Report III (4A) 1985, para. 149 f; 1987, para. 179, as well as 1989, para. 166 and 1991, para. 174.
[73] See in depth: Zimmer, Commentary on the ILO (2019), in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, § 5 Rn. 85 et seq.

works councils.[74] However, the explanatory memorandum to the Act lists "trade unions or other employee representative bodies", so that the legislator obviously did not intend to limit the protection afforded by the provision to trade unions; the intention of the legislator expressed in the explanatory memorandum is clear in this respect. Consequently, the wording has to be interpreted in a supplementary manner to the effect that elected employee representatives such as works council members also fall under the protection of the standard,[75] at least to the extent that they are provided with rights and protected in the respective legal system. The legislator obviously wanted to see the employee representation provided for in a country protected, whereby in most countries of the world these are trade unions.[76]

e) Equal treatment (No. 7)

The prohibition of discrimination in employment is also a protected legal position under the LkSG. Section 2 (2) No. 7 LkSG refers to the grounds of discrimination of national and ethnic origin, social origin, health status, disability, sexual orientation, age, gender, political opinion and religion or belief; the list is not exhaustive.[77] The standard thus goes beyond the discrimination grounds of the German General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, AGG). In contrast to the AGG, however, no facilitation of proof was standardised, which would correspond to that in Section 22 AGG.[78] Unequal treatment is justified if it is "justified by the requirements of the employment".[79] The legislator has chosen pay discrimination as a standard example ("the payment of unequal remuneration for work of equal value)". As the gender pay gap in Germany is still significant at 18 per cent,[80] this norm makes it particularly clear that the LkSG does not only refer to risks and violations along the value chain abroad, but also to those in Germany.

f) Reasonable wage (No. 8)

The withholding of an appropriate wage is considered a human rights risk in the value chain of a transnationally active company according to Section 2 para. 2 No.

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[74] Sagan/Schmidt, NZA-RR 6/2022, 281 (285); doubtfully Krause, Das Lieferkettensorgfaltspflichtengesetz als Baustein eines transnationalen Arbeitsrechts - Teil II, RdA 6/2022, 327 (331).
[75] I.E. as here Ehmann, ZVertriebsR 2021, 141 (144); Nietsch/Wiedmann, CCZ 2021, 101 (105); Zimmer, Kommentierung zu § 2 Abs. 2 Nr. 6; probably also Grabosch/Schönfelder, Das neue LkSG, § 4 Rn. 34.
[76] Cf. Zimmer, Kommentierung zu § 2 Abs. 2 Nr. 6.
[77] Sagan/Schmidt, NZA-RR 6/2022, 281 (286).
[78] Baade, DStR 2022, 1617 (1620).
[79] In-depth: Räuchle/Schmidt, § 4 (Das Arbeitsvölkerrecht der Vereinten Nationen), para. 49 f; Zimmer, § 5 (ILO), in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 2019, para. 148 et seq.
[80] Destatis, Press Release of 30.01.2023, online: https://www.destatis.de/DE/Presse/Pressemitteilungen/2023/01/PD23_036_621.html (20.09.2023).

8 LkSG; according to the text of the law, this is "at least" the minimum wage determined according to the "applicable law". This is, moreover, determined according to the law of the place of employment. The term "according to the applicable law" shows that it can also be a contractually agreed remuneration, as long as it is not below the minimum wage applicable at the place of employment.[81] It is questionable whether the legislator merely made a formal consideration according to which a wage that is not below the statutory minimum wage[82] is already appropriate[83] or whether only a living wage can be classified as appropriate. Since the legislator in the explanatory memorandum refers to Art. 7 a) ii) of the UN Social Covenant[84] and wants “the local living expenses of the employee and his/her family members as well as the local social security benefits (…) to be taken into account",[85] a formal approach does not do justice to the will of the legislator. For example, the Committee on Economic, Social and Cultural Rights, which is responsible for interpreting the Social Covenant, emphasises in its General Comments on Art. 7 a) that fair wages must generally be above the minimum wage; the necessity of living wages is implied,[86] but more precise specifications are not given. If the statutory minimum wage is not sufficient to secure a family's livelihood, higher wages must be paid that are living wages and thus fair.[87] In the international debate, the definition of what constitutes a living wage is now based on the statements of the European Committee of Social Rights.[88] According to this definition, 60 per cent of the average net wage, including bonuses and special payments, are to be classified as a living wage.[89] It makes sense to follow these calculations for the classification of a wage as adequate according to the LkSG.

Since the Federal Office of Economics and Export Control (BAFA), which is responsible for monitoring under Section 19 (1) LkSG, also acts upon application (Section 14 (1) No. 2 LkSG),[90] employees who are deprived of the minimum wage in Germany have the option of reporting this to BAFA. The right to file an application under Section 14 (1) No. 2 LkSG presupposes a (possible) violation of one's own

[81] Sagan/Schmidt, NZA-RR 6/2022, 281 (286).
[82] Or the collectively agreed wage, if such a wage exists.
[83] Sagan/Schmidt, NZA-RR 6/2022, 281 (286).
[84] International Covenant of 19 December 1966 on Economic, Social and Cultural Rights.
[85] BT-Drs. 19/28649, p. 38.
[86] General Comment No. 23 (2016), para. 10 and fn. 9 (p. 4)
[87] Grabosch-Schönfelder, § 2 marginal No.39.
[88] Räuchle/Schmidt, § 4 (The International Labour Law of the United Nations), marginal No.48; Zimmer, Transfer 3/2019, 285 (292). Cf. incidentally Art. 4 ESC. The European Committee of Social Rights is the body empowered to interpret the ESC.
[89] If only between 50 and 60 % of the average net wage is reached, this is considered sufficient if the respective country proves that a livelihood is nevertheless ensured, ESC Digest (2018), p. 85; also Conclusions France (2003), p. 120.
[90] Edel/Frank/Heine/Heine, BB 2021, 2890 (2894).

rights,[91] only then will the authority take action in any case. If a report is made to the BAFA by the workscouncil or by trade union representatives, it is at the discretion of the authority under Section 14 (1) No. 1 whether it will take action. However, this discretion is likely to be reduced to zero in the case of a notification that does not only refer to the possibility of a violation of the law, but to a concrete violation of the law (cf. under C., p. 51).

g) Causing harmful environmental changes affecting people (No. 9)

Section 2 (2) No. 9 LkSG prohibits the bringing about of harmful environmental changes through the economic activity of a company. This includes harmful soil changes, water and air pollution, harmful noise emissions or excessive water consumption, insofar as these have an impact on people. This can be the case, for example, if "the natural basis for the preservation and production of food is significantly impaired" (lit. a), "a person is denied access to safe drinking water" (lit. b), "access to sanitary facilities is impeded or destroyed" (lit. c) or if "the health of a person" is damaged. In this respect, the norm is a hybrid between environmental and labour law norms; for example, it has been documented time and again in global textile and garment production that workers are limited in how often they can use the toilets, which are often locked.[92]

h) Unlawful taking of land, forests and waters (No. 10)

Section 2 (2) No. 10 of the LkSG prohibits companies "in the acquisition, construction or other use of land, forests or waters" from unlawful seizure or unlawful eviction if their "use secures the livelihood of a person". The norm is intended to secure an adequate standard of living so that sufficient "food, shelter, water as well as sanitation" are provided.[93] This does not only apply to the employees of a company, but is also intended to protect local residents.

i) Use of security forces with excessive use of force (No. 11)

Pursuant to Section 2 para. 2 No. 11 LkSG, it is also prohibited to hire or use public or private security forces for the protection of business projects if torture or other cruel, inhuman or degrading treatment occurs (lit. a), the body or "life is injured" (lit. b) or "the freedom of association and freedom of association are impaired" (lit. c), whereby the use of security forces can only be attributed to the company in

[91] BT-Drs. 19/28649, p. 54.
[92] Zimmer, Soziale Mindeststandards und ihre Durchsetzungsmechanismen, p. 133; 355.
[93] BT-Drs. 19/28649, 38.

case of "lack of instruction or control" by the company. Suggestions for dealing with security forces in a way that is in conformity with human rights can be found in a manual developed with the participation of the International Red Cross.[94]

j) General clause (No. 12)

The legislator has also provided a general clause in Section 2 para. 2 No. 12 LkSG, which covers further threats or violations of rights that are "directly capable" of violating "in a particularly serious manner a protected legal position". In addition, the unlawfulness of the entrepreneurial action must be obvious. The catch-all provision is partly considered invalid due to a lack of certainty,[95] which, however, is not plausible in view of the obviousness requirement, since only those cases are covered in which the violation of human rights is explicit.[96]

3. Environmental risks to be considered (Section 2 para. 3 LkSG)

In addition to labour-related human rights, the LkSG also aims to ensure compliance with selected environmental rights. Section 1 (3) LkSG formulates the relevant environmental rights with reference to the international conventions listed in the Annex to the Act. According to Section 2 para. 3 LkSG, the following are considered environmental risks in the value chain of a transnationally active company

- Manufacture of products containing mercury (Section 2 para. 3 No. 1).[97]
- Prohibition of the use of mercury and mercury compounds in manufacturing processes (Section 2 para. 3 No. 2).[98]
- Prohibition of the treatment of mercury waste contrary to the requirements of Art. 11 para. 3 Minamata Convention (Section 2 para. 3 No. 3).[99]
- Prohibition of the production and use of chemicals under the Stockholm Convention (POPs Convention, Section 2 para. 3 No. 4).[100]
- Prohibition of non-environmentally sound handling, collection, storage and disposal of waste (Section 2 para. 3 No. 5).[101]

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[94] DCAF/ICRC, Addressing security and human rights challenges in complex environments, 3rd ed. 2015.
[95] Keilmann/Schmidt, WM 2021, 717 (720); Sagan/Schmidt, NZA-RR 6/2022, 281 (287); Spindler, ZHR 186 (2022), 67 (78); Wagner/Ruttloff, NJW 2021, 2145 (2147).
[96] IE also: Grabosch/Schönfelder-Schönfelder, § 4 LkSG, marginal No.55; Thalhammer, DÖV 2021, 825 (833); Krause, Das Lieferkettensorgfaltspflichtengesetz als Baustein eines transnationalen Arbeitsrechts - Teil II, RdA 2022, 327 (335).
[97] In this respect, reference is made to Art. 4 para. 1 and Annex A Part I Minamata Convention on Mercury of 10 October 2013, Federal Law Gazette 2017 II, pp. 610, 611.
[98] In this respect, reference is made to Art. 5 para. 2 and Annex B Part II of the Minamata Convention on Mercury of 10 October 2013, Federal Law Gazette 2017 II, pp. 610, 611.
[99] Minamata Convention on Mercury of 10 October 2013, BGBl. 2017 II, p. 610, 611.
[100] In this respect, reference is made to the provisions of the applicable legal system, subject to Art. 6 of the POPs Convention.
[101] In this respect, reference is made to Art. 3 para. 1 li. a) and Annex A of the Stockholm Convention of 23 May 2001 on Persistent Organic Pollutants, BGBl. 2020, OJ L 62, 23.02.2021, p. 1.

– Prohibition of export of hazardous waste (Section 2 para. 3 No. 6).

IV. Entrepreneurial duties of care to be observed

According to Section 3 para. 1 LkSG, human rights or environmental risks are to be prevented by complying with due diligence obligations, the content of which is "based on the human rights due diligence concept" of the UN Guiding Principles on Business and Human Rights (as well as on the national action plan).[102] The due diligence obligations are not designed as performance obligations, but rather as effort obligations[103] and are subject to a reasonableness proviso. Which activities are appropriate is determined according to the criteria of Section 3 (2) LkSG, based on the "nature and scope of the enterprise's business activities" (No. 1), i.e. how susceptible the business activity is to endangering or violating human and labour rights. The company's "ability to influence the direct perpetrator" of the risk or violation of rights is also of essential importance (No. 2). The size of the company and the volume of orders are decisive here; the proximity to the risk also has an impact on how intensively a company must comply with the due diligence obligations.[104] Also of importance are the "probability" and "expected severity" as well as the "reversibility" of a violation (No. 3), which is greater in high-risk sectors.[105] The "nature of the contribution to causation" (No. 4) is also a factor to be taken into account; a distinction must be made here as to whether the company alone has caused the risk (or the infringement) or whether causation by others is also involved.[106] The legislator thus focuses on criteria that are known in compliance debates as the principle of risk-based assessment.[107]

With regard to the value and supply chain, a graduated responsibility applies, which is stricter for the company's own business sector (Section 2 para. 6 LkSG) and the actions of a direct supplier (Section 2 para. 7) than for indirect suppliers (Section 2 para. 8). According to Section 2 (6) sentence 1, the own business sector includes "any activity of the enterprise to achieve the objective of the enterprise". This includes everything that is necessary "for the production and utilisation of products and for the provision of services", irrespective of whether it is carried out abroad or in Germany, Section 2 (6) sentence 2.[108] The own business sector is

[102] BT-Drs. 19/28649, 41.
[103] BT-Drs. 19/28649, 2 and 41; Grabosch-Grabosch, § 2 marginal No. 58; Sagan/Schmidt, NZA-RR 6/2022, 281 (282); Stöbener de Mora/Noll, NZG 2021,1237 (1240); Wagner, ZIP 2021, 1095 (1099).
[104] BT-Drs. 19/28649, 42.
[105] BT-Drs. 19/28649, 42.
[106] BT-Drs. 19/28649, 43.
[107] Gehling/Ott/Lüneborg, CCZ 2021, 231 (233), cf. also Dutzi/Schneider/Hasenau, DK 11/2021, 454 (456 et seq.).
[108] Within a group, group companies are included in its own business area if the parent company "exercises a determining influence", section 2 (6) sentence 3 LkSG.

partly interpreted very narrowly and is based only on the actual business purpose, without including indirect value-added factors.[109] However, this is too narrow, since indirect value-added factors, such as office equipment or vehicles used for business purposes, also contribute to achieving the business objective. Therefore, indirect value creation factors are also covered by the due diligence obligations. In view of the wording of the standard, the borderline is probably to be drawn at activities such as the production of food in the canteen, since this is not necessary for the provision of the service[110] and many companies do not have such a facility. The fulfilment of due diligence obligations is not a one-off process, but a "repetitive cycle of the various (...) procedural steps".[111]

1. Risk management (Section 4 LkSG)

The due diligence obligations to be fulfilled by the company include risk management (Section 4 para. 1 LkSG), which is therefore no longer voluntary with regard to hazards or violations of the human and environmental rights protected by the LkSG along the supply chain.[112] According to section 2 para. 2, a risk is defined as a condition "in which, due to actual circumstances, there is a sufficient probability of a violation of" the standardised human rights and environmental law prohibitions.

a) Effectiveness of risk management

The supply chain risk management to be introduced is subject to a requirement of appropriateness (section 4 para. 1 sentence 1 LkSG). On the one hand, this results in a limitation of the obligation for companies to act; they only have to act to the extent that is appropriate, i.e. they only have to invest an appropriate amount of financial resources in risk management. On the other hand, "appropriate" also means that the system to be set up must be "appropriate" in the sense of effective. Thus, an effective risk management system must be established, which has to include all business processes (Section 4 para. 1 p. 2). A CSR department, for example, that functions completely independently of procurement would not fulfil this requirement. According to Section 4 para. 2, risk management measures are effective if they identify risks and prevent, end or reduce legal violations in the value

[109] Gehling/Ott/Lüneborg, CCZ 2021, 231 (233).
[110] Nietsch/Wiedmann, NJW 2022, 1 (3); Wernecke, AuA 7/2022, 8 (10).
[111] BT-Drs. 19/28649, 41.
[112] Grabosch/Schönfelder, AuR 2021, 488 (490). With the entry into force of the Act to Strengthen Financial Market Integrity (FISG), the legal obligation to establish an "effective internal control system and risk management system" was explicitly standardised for listed AGs under section 91 (3) AktG (new version), cf. in more detail: Dutzi/Schneider/Hasenau, DK 2021, 454 (457).

chain. However, this only applies if the company has "caused or contributed to" the risks and legal violations within the supply chain. There is potential for dispute in this wording, as the wording could suggest a narrow interpretation and the explanatory memorandum to the law is not really clarifying either. The only stipulation is that causality for the creation or increase of the risk of an infringement must have been set in the own business area, at a direct supplier or at an indirect supplier.[113] However, the purpose of the law, to prevent or minimise infringements along the value chain, cannot be achieved with a narrow interpretation, so that a broad interpretation of the attributed contribution is indicated. As stated in the literature, a causal contribution can be made, for example, if a company promotes production in problematic regions where numerous violations of human and labour rights have already been documented. This could be the case, for example, if business relations are maintained with companies in countries where trade unions are banned.[114]

b) Internal monitoring of risk management

Pursuant to Section 4 para. 3 sentence 1 LkSG, an internal position must be established to monitor risk management, e.g. in the form of a human rights officer. The legislator recommends that this position should report directly to the management,[115] but does not specify where the position should be located in the company. The legal, compliance, sustainability or human resources departments are possible candidates, but an independent body could also be created, e.g. with the participation of the works council (see below p. 71 et seq.). On the other hand, it would not make sense to establish the position in the purchasing department, as its activities in particular are to be monitored and a conflict of interest is likely to arise.[116] Since risk management has to be "appropriate", a certain independence of the representative is necessary, and the position has to be equipped with competences and resources.[117] To increase effectiveness, it is recommended that the individual business areas also have contact persons.[118] The legally standardised organisational duty remains with the management, which is responsible for select-

[113] BT-Drs. 19/28649, 43.
[114] Grabosch/Schönfelder, AuR 12/2021, 488 (492).
[115] BT-Drs. 19/28649, 43.
[116] Wernecke, AuA 7/2022, 8 (10).
[117] Spindler, ZHR 186 (2022), 67 (75); also in favour of the appointment of a human rights commissioner, but without statement on competences: Frank/Edel/Heine/Heine, BB 2021, 2165 (2167). For classification in the compliance system: Dutzi/Schneider/Hassenau, DK 2021, 454 (460).
[118] BT-Drs. 19/28649, 43.

ing a suitable person and providing him/her with sufficient competences and financial resources.[119] Due to the documentation obligation of Section 10 (1) LkSG, the division of responsibilities in the executive board must be laid down in writing, e.g. in the rules of procedure of the executive board.[120]

c) Consideration of the interests of the employees

Section 4 (4) of the LkSG stipulates that the interests of employees must be adequately taken into account when establishing and implementing risk management. This applies not only to the interests of the company's own employees, but also to those along the value chain. The interests of those who may otherwise be directly affected by the economic activity must also be safeguarded. These may include, for example, residents or users of neighbouring properties.[121] The focus is not only on the company's own economic activities, but also on those of other companies along the entire value chain. According to the purpose of the law, which is to ensure effective human rights protection, a broad definition of “employees” is to be applied. According to the explanatory memorandum, this also includes "self-employed persons who supply a company and informally employed persons", e.g. undeclared workers. The term "economic activity" is also to be understood broadly.[122]

The interests of the company's own employees can be safeguarded most effectively through the involvement of the co-determination actors, i.e. through the participation of works or staff councils, economic committees and employee representatives on the supervisory board, where these exist (see below p. 57 et seq.). However, the legislator has not specified mandatory co-determination rights; the explanatory memorandum to the law refers to "consultations". However, depending on the design in the individual case, the introduction and design of the risk management or individual parts thereof may also be subject to the co-determination rights from the catalogue of Section 87 (1) of the Works Constitution Act (BetrVG).[123] The same applies to the right to complain (for more details see below p. 74 et seq.). In the case of a company bound by collective agreements, trade unions can also be involved in the design of risk management (see below p. 84 et seq.).

However, domestic trade unions and workers' representatives have no mandate

[119] Grabosch/Schönfelder, AuR 2021, 488 (492 f.).
[120] Grabosch-Grabosch, § 5 marginal No. 42.
[121] BT-Drs. 19/28649, 44.
[122] BT-Drs. 19/28649, 44.
[123] Sagan/Schmidt, NZA-RR 6/2022, 281 (287).

for workers abroad and therefore cannot represent their interests.[124] In the explanatory memorandum to the law, the legislator refers to consultations with legitimate interest groups/representatives of those directly affected.[125] Since outside Europe (unlike in Germany), not works councils but exclusively trade unions represent the interests of workers according to the respective legal system, consultations with trade unions from the corresponding countries of the global South are recommended, which can be done with the involvement of the global trade union federations. With regard to risk prevention along supply chains within Europe, it is to be referred to to the European Works Council (EWC) as well as the European sectoral trade union confederations (see below p. 79 et seq., 95).

2. Risk analysis (Section 5 LkSG)

A component of the risk management is a risk analysis, which is intended to identify risks of legal threats and violations. This typically detects relevant risks in the company, which are assessed in terms of their probability of occurrence and their impact on the company.[126] Based upon the analysis, preventive and remedial measures are then determined.[127] The regular risk analysis with regard to the supply chain must only be carried out for the company's own business division and for direct suppliers in accordance with Section 5 para. 1 sentence 1 LkSG. It must include risks in Germany as well as risks in the EU or in countries of the global South.[128] However, if a direct supplier relationship is abusive or a circumvention transaction has been undertaken to evade the due diligence requirements, indirect suppliers are considered direct suppliers according to Section 5 para. 1 sentence 2 and are thus subject to the regular risk analysis. According to the explanatory memorandum, this could be indicated by the fact that the third party interposed between the company and the supplier "does not engage in any significant business activity of its own or does not maintain a permanent presence in the form of business premises, personnel or equipment".

Pursuant to setion 5 para. 1 LkSG, the analysis is subject to a requirement of appropriateness; Section 5 para. 2 to 4 LkSG specify the key points of the risk analysis:

[124] Sagan/Schmidt, NZA-RR 6/2022, 281 (287).
[125] BT-Drs. 19/28649, 44.
[126] Kirchner, Risikobewertung (2002), p. 39 f.; Romeike/Hager, Erfolgsfaktor-Risikomanagement (2020), p. 88 et seq.; Steinhaus/Guttzeit, MB-Praxis No. 42 (2021), p. 13.
[127] BT-Drs. 19/28649, 44.
[128] Grabosch-Grabosch, § 5 marginal No. 63.

– Identification of risks and prioritisation according to the criteria of appropriateness formulated in Section 3 para. 2 (severity of the risk, possibilities of influence and contribution to causation)[129] (Section 5 para. 2).
– Internal communication of the results to the relevant decision-makers (Section 5 para. 3).
– Carrying out the analysis at least once a year and on an ad hoc basis in the event of a significantly changed/expanded risk situation (Section 5 para. 4 sentence 1).

a) Risk identification and risk assessment (Section 5 para. 2 LkSG)

The process of risk analysis according to the LkSG forms the basis for determining effective preventive and remedial measures.[130] The risk assessment is about gaining an overview of one's own procurement processes, i.e. identifying the structure and actors in one's own business area and at direct suppliers. This also includes identifying the groups of people who may be affected by the company's business activities or those of direct suppliers. In the explanatory memorandum to the law, it is suggested that this be done by means of risk mapping "according to business areas, locations, products or countries of origin". Using such a risk matrix, the risks identified through core questions are categorised according to their hazard potential.[131] Context-dependent factors, such as the political framework conditions or vulnerable groups of people, are to be included in the analysis.

Such an approach corresponds to the general compliance risk analysis, in which risks are identified in particular according to specific countries, sectors and transactions. Non-compliance cases from the past and protective measures taken so far can also be evaluated with regard to supply chains. In addition to risk mapping, discussions and workshops are usually held with members of management and employees so that compliance risks can be identified "using a combined top-down/bottom-up approach".[132] Furthermore, the regular risk analysis must take into account findings from the complaints procedure pursuant to Section 8 para. 1 LkSG; the same applies to any results of dispute resolution procedures pursuant to Section 8 para. 1 sentence 4 LkSG (see under B. VI., p. 29).[133]

Large companies that fall within the scope of the LkSG will usually already have

[129] Sagan/Schmidt, NZA-RR 6/2022, 281 (287).
[130] BT-Drs. 19/28649, 44.
[131] Steinhaus/Guttzeit, MB-Praxis No. 42 (2021), p. 34.
[132] Gehling/Ott/Lüneborg, CCZ 2021, 231 (234); on the "bottom-up" or "top-down" approach cf. Zilles/Deutsch, ZCG 4/2010, 180 et seq.
[133] BT-Drs. 19/28649, 45.

implemented a compliance management system (CMS) that is oriented, for example, to the auditing standard of the Institute of Public Auditors in Germany (IDW PS 980)[134] or to the ISO (ISO 19600[135]).[136] The legislator leaves it to the discretion of the company to choose the "appropriate method of information gathering and assessment" with regard to risks along the supply chain, depending on "risk, industry and production region".[137] Corporate counsels recommend integrating value chain due diligence into the overall risk and compliance management system.[138] However, existing systems, training and processes must be adapted and expanded to meet the requirements of Sections 3 et seq. LkSG, especially since CMS focus on the risks for the company, but according to the LkSG, the rights of those affected, i.e. employees as well as those of local residents, must be observed.[139] In addition to the procedures, compliance guidelines, contracts and risk recording databases, the reporting system to the executive board and the audit committee of the supervisory board in particular should be adapted to the requirements of the LkSG.[140] However, it will not be possible to determine supply chain risks effectively on the basis of records in Germany.[141]

b) Effectiveness of the risk analysis

(1) Compliance management not sufficient

Simply expanding the existing risk analysis of companies in the context of compliance management, is in any case not sufficient to identify human rights or environmental risks, as compliance is designed to identify risks such as corruption, money laundering, cartels, etc. and is not qualified to identify human rights and environmental risks.[142]

(2) Previous experience with social audits

Companies with long value chains, for example in the textile and garment sector, have had a supply chain management system in place for quite some time. As part of the monitoring of compliance with the company's own codes of conduct, the

[134] Principles of proper auditing of compliance management systems, further information at: https://www.idw.de/idw/verlautbarungen/idw-ps-980/43124 (11.9.2023).
[135] ISO 19600 Compliance Management Systems - Guidelines, online: https://www.iso.org/standard/62342.html (11.9.2023).
[136] Grabosch-Grabosch, § 5, marginal No. 23.
[137] BT-Drs. 19/28649, 45.
[138] Gehling/Ott/Lüneborg, CCZ 2021, 230 (234).
[139] Grabosch-Grabosch, § 5 paras. 23 and 26.
[140] Gehling/Ott/Lüneborg, CCZ 2021, 231 (234).
[141] As a result as here: Grabosch-Grabosch, § 5 marginal No.54 f; Nietsch/Wiedmann, CCZ 2021, 101 (106 et seq.).
[142] Gehling/Ott/Lüneborg, CCZ 2021, 231 (234); for classification in the compliance management system: Dutzi/Schneider/Hassenau, DK 2021, 454 et seq.

accounts of supplier companies are evaluated in addition to factory inspections. Such monitoring can be carried out internally, as well as externally by third parties. Procedures range from the usual use of auditors to multi-stage (social) audits in which long checklists are worked through,[143] based upon concepts increasingly sophisticated over the years.[144] However, studies show that these monitoring procedures have hardly led to a substantial improvement in working conditions,[145] which is primarily due to the fact that the audits are not really carried out independently, and the methodology is also in need of improvement in some cases. As a rule, the social audits are commissioned and paid for by the company, so that there is an economic dependency on the client.[146] In addition, the on-site factory inspections are usually preannounced, which applies to both the internal company inspections and the inspections carried out by external audit companies. The inefficiency of classic company audits is best illustrated by the "catastrophes" that have occurred in textile and garment production in the global South in recent years, all of which could have been foreseen. For example, the Ali Enterprises factory fire in Pakistan in 2012, which killed more than 250 workers because windows and doors were locked, the Tazreen factory fire in Bangladesh in 2012, which killed more than 112 workers, and last but not least, the Rana Plaza factory collapse in Bangladesh in 2013, which killed 1,134 workers and injured countless others. Each of these factories was audited and found to be safe by several audit providers, including TÜV Rheinland, Bureau Veritas and RINA, each of which used the classic methodology, following the standards of leading compliance initiatives, including Amfori BSCI 8[147] and Social Accountability International (SAI).[148] In the case of both the Ali Enterprise and Rana Plaza factories, accredited auditors had assessed the premises as safe only a few weeks or months earlier; in the case of Ali Enterprise, the monitoring was carried out by auditors who had demonstrably never been on site.[149] The problems of monitoring supply chain management have thus been known for some time. While factory inspections are part of an effective risk analysis, they should not be carried out by commercial auditors in the same way that is known to be flawed.

[143] Zimmer, Soziale Mindeststandards udn ihre Durchsetzungsmechanismen (2008), p. 205 et seq., comprehensive on the monitoring process: Ascoly/ Zeldenrust (SOMO), Monitoring and Verification (2003), Monitoring (p. 6).
[144] Comprehensive: Starmanns/Barthel/Mosel (2021), Social audits, p. 36 et seq.
[145] Anner, P&S 4/2012, p. 609 ff; Brown, JOEH 8/2017, 130 ff; CCC, Fig leaf for Fashion (2021), p. 6 ff; Gordon (2017), p. 4 ff; LeBaron/Lister 2016, p. 3 ff; Starmanns/Barthel/Mosel (2021), Social audits, p. 13. See also earlier criticism: CCC, Quickfix (2005), esp. pp. 57 ff, but also O'Rourke (2002), in: Jenkins/Pearson/Seyfang (eds.), p. 196 et seq.
[146] Zimmer (2008), 210.
[147] See Amfori BSCI System Manual Annex 8.
[148] Cf. https://sa-intl.org/ (10.09.2023).
[149] CCC, Fig leaf for Fashion (2021), p. 6; in-depth: Ali Enterprises Factory Fire Affectees Association (AEFFAA) et al. 2018, p. 11.

(3) Aspects for a recommendable implementation of the risk analysis

The elements of risk analysis developed by the compliance system can serve as a basis for the risk analysis of supply chains. However, an analysis based on files cannot achieve the legislative goal of improving the international human rights situation,[150] as the vast majority of risk situations cannot be identified from behind a desk. This does not only apply to occupational health and safety: violations of rights, such as discrimination against workers or obstruction of the work of trade unions, can only be identified in direct discussions with those affected and their representatives. Factory inspections at the suppliers' premises should therefore also be part of this,[151] whereby the previous problems with the effectiveness of social audits must be taken into account. Since on-site inspections are to be carried out anyway as part of the preventive measures according to Section 6 para. 5 LkSG, these can be used for the risk analysis without any problems. The audits must not be announced, so that producers cannot temporarily conceal deficiencies and deceive the inspectors. In addition, the audits must not be too short and too superficial, and in particular workers must be interviewed outside the factory. If this is done in the presence of management, there is a high risk that workers will be intimidated and not report problems. Above all, relevant local trade unions, women's organisations or other local NGOs should be consulted, e.g. those representing local residents as well as workers.[152] It is also important which parameters are used as a basis for the risk analysis and the audits.[153] In this respect, it is advisable to develop the criteria together with the employee representatives and/or those at the supervisory board (see E., p. 56 et seq.). The risk analysis can be usefully supplemented by the knowledge gained in the implementation of an international framework agreement.[154]

The problem of direct engagement of an audit firm by the transnational company can be solved by the interposition of multistakeholder initiatives (MSI), which were founded due to the diverse criticism in different sectors. These organisations have so far carried out monitoring of codes of conduct and are characterised by the fact that the relevant interest groups (trade unions and NGOs) are adequately repre-

[150] BT-Drs. 19/28649, p. 23.
[151] Similarly, the explanatory memorandum, BT-Drs. 19/28649, p. 45.
[152] BT-Drs. 19/28649, p. 45; Nietsch/Wiedmann, CCZ 2021, 101 (106); Stiftung Arbeit und Umwelt der IG BCE (2019), Verantwortung in Liefer- und Wertschöpfungsketten: Globale Rahmenvereinbarungen, p. 7.
[153] Cf. comprehensive on effective measures: ECCHR/Bread for the World/Misereor (2021), pp. 25-39
[154] Stiftung Arbeit und Umwelt der IG BCE (2019), Responsibility in supply and value chains: Global framework agreements, p. 7.

sented in the entire system of the organisation, this applies in particular to the highest decision-making body.[155] The audits are carried out according to the above-mentioned criteria and are embedded in a more comprehensive system of improvement that also includes training; the Fair Wear Foundation, for example, is exemplary in the textile and clothing sector.[156]

Another possibility is to involve co-determination actors in the risk analysis process, such as the economic committee, the general or group works council (GBR or KBR), the European works council (EWC), if available, the world works council or global trade union federations (see below p. 56 et seq.). For example, international framework agreements (IFAs) concluded between global union federations (GUFs) and transnational companies or corporations usually provide for a monitoring committee, which often carries out factory inspections itself and also learns about legal violations through local trade union affiliates (see F. II., p. 86).

c) Occasion-related risk analysis in the event of a changed risk situation (Section 5 para. 4 LkSG)

In addition to the regular annual risk analysis, Section 5 para. 4 sentence 1 LkSG requires an event-related risk analysis to be carried out in the event of significant changes. Such a significant change occurs when the company must expect a changed or expanded risk situation in the supply chain, e.g. before entering into a new business relationship or a new business activity, for example by entering a new market or introducing a new product.[157] The event-driven risk analysis due to significant changes in the risk situation or in the event of substantiated knowledge of risks (as defined in Section 9 par. 3 LkSG) must also be carried out with regard to indirect suppliers (cf. p. 49).[158]

3. Relevant decision-makers (Section 5 para. 3 LkSG)

The relevant decision-makers may not ignore the results of the risk analysis, but have to take them into account in their decisions.[159] The legislator includes the "executive board" or the "purchasing department" among the decision-makers who must be informed of the results of the risk analysis (Section 5 para. 3 LkSG), but has only listed these bodies exemplarily. From the factual proximity, compliance

[155] Comprehensive introduction to monitoring by MSI: Zimmer (2008), p. 211.
[156] Https://www.fairwear.org/programmes/audits (10.08.2023).
[157] BT-Drs. 19/28649, p. 45.
[158] Grabosch-Grabosch, § 5 marginal nos. 9 and 56.
[159] Nietsch/Wiedmann, CCZ 2021, 101 (107).

might also come into question. Since the supervisory board is responsible for monitoring the work of the management (Section 111 para. 1 AktG), and thus monitors the risk management and compliance measures, the members of the supervisory board or the responsible audit committee (from the workers` side, see below p. 56 et seq.) are also among the decision-makers to be informed about the results of the risk analysis according to Section 5 para. 3 LkSG.

Section 4 para. 4 of the LkSG stipulates that the interests of employees must be taken into account in the establishment and implementation of the risk management. Consequently, the bodies of company employee representatives in Germany would also have to be included to the group of decision-makers to be informed according to Section 5 para. 3 LkSG. The relevant decision-makers must not ignore the results of the risk analysis but have to take them into account in their decisions.[160]

4. Prevention measures (Section 6 LkSG)

The result of the risk analysis according to the LkSG forms the basis for determining effective preventive measures.[161] If a risk is identified, according to Section 6 para. 1 LkSG, appropriate preventive measures must be taken without delay for the company's own business (Section 6 para. 3) and vis-à-vis direct suppliers (Section 6 para. 4). The measures must therefore be taken "without culpable delay" within the meaning of Section 121 para. 1 sentence 1 German Civil Code (Bürgerliches Gesetzbuch, BGB), i.e. immediately after the risk has been identified. Section 6 para. 5 LkSG stipulates that the effectiveness of the preventive measures must be reviewed once a year and on an ad-hoc basis.

a) Prevention meaures in their own business area (Section 6 para. 3 LkSG)

The human rights strategy must be implemented in the company's own business unit in the "relevant business processes" (Section 6 para. 3 No. 1 LkSG); for this purpose, internal and external rules of conduct or guidelines must be developed in the areas relevant to risk management.[162] If these contain binding instructions for the employees, co-determination rights of the works council according to Section 87 para. 1 No. 1 BetrVG may be affected (see below p. 71 et seq.).[163] In particular, the human rights strategy must be integrated into the procurement process (Section 6 para. 3 No. 2

[160] Nietsch/Wiedmann, CCZ 2021, 101 (107).
[161] BT-Drs. 19/28649, 44.
[162] BT-Drs. 19/28649, 46.
[163] Grabosch-Grabosch, § 5 marginal No.84; Sagan/Schmidt, NZA-RR 6/2022, 281 (288); on co-determination in ethics guidelines, cf. Kock, ZIP 2009, 1406; Wisskirchen/Jordan/Bissels, DB 2005, 2190.

LkSG), which must be designed to minimise risk. This point is particularly important because the determination of delivery times and purchase prices as well as the duration of the contractual relationship can foster the violation of labour rights.[164] For example, if delivery times are kept extremely short, the producer will order overtime. As an exception, this is unproblematic, but if the delivery times are consistently too short, this leads to the permanent use of overtime, as documented in some cases in global production,[165] with the risk of violating labour protection regulations. Furthermore, the employees of the "relevant business areas" must be trained (Section 6 para. 3 No. 3). This includes, for example, staff in purchasing, who must be enabled to apply the anchored standards in day-to-day business and to recognise possible labour law violations, e.g. due to short delivery times.[166] For the design of such trainings, participation rights of works councils have to be respected. Furthermore, "risk-based control measures" must be carried out (Section 6 para. 3 No. 4); here, risk analysis is intertwined with prevention.

Pursuant to Section 6 subSection 2 LkSG, the preventive measures in the company's own business area also include a policy statement to be issued by the company's management on its human rights strategy, in which the procedures and identified risks are reported. Section 6 para. 2 sentence 2 LkSG specifies a minimum scope that the policy statement must contain: Procedural Statement (No. 1), prioritisation of human rights and environmental risks (No. 2), and the setting of expectations for employees and suppliers (No. 3), the latter reminiscent of codes of conduct or ethical guidelines of transnational corporations.[167] The legislator has provided that the policy statement can "serve as a basis for the development of internal as well as external codes of conduct or codes of ethics".[168] The declaration must be made public and communicated to the company's own employees as well as to its suppliers (Section 6, paragraph 2, no. 3 LkSG), but also to the public.[169] Companies are hereby obliged to be transparent, also about their procurement.[170] If there is an economic committee, it must be informed about the policy statement according to Section 106, subSection 3, no. 5 b) BetrVG (see p. 61 et seq.).[171] Communication to the central works council as representative of the employees is

[164] BT-Drs. 19/28649, 47.
[165] Siu, P&O, 4/2017, p. 533 (540 et seq.); Teipen/Mehl, WSI-Mitteilungen 1/2021, 12 (16); see also comments by the Textile Alliance: https://www.textilbuendnis.com/themen/sektorrisiken/arbeitszeiten/ (12.09.2023).
[166] BT-Drs. 19/28649, 47.
[167] Dutzi/Schneider/Hasenau, DK 11/2021, 454 (457).
[168] BT-Drs. 19/28649, 46.
[169] BT-Drs. 19/28649, 46; Nietsch/Wiedmann, CCZ 2021, 101 (107).
[170] Dutzi/Schneider/Hasenau, DK 11/2021, 454 (457); Grabosch-Grabosch, § 5 marginal No.81; Nietsch/Wiedmann, CCZ 2021, 101 (107).
[171] Sagan/Schmidt, NZA-RR 6/2022, 281 (288).

also possible (see below p. 69 et seq.).[172] With the obligation to communicate, the legislator is taking up the debate on disclosure of the value chain that has been going on for some time. Likewise, the members of the supervisory board or of the audit committee are to be informed about the policy statement.

b) Prevention measures vis-à-vis direct suppliers (Section 6 para. 4 LkSG)

Section 6 para. 4 LkSG requires that appropriate preventive measures also have to be taken with regard to direct suppliers. Thus, according to No. 1, already during the selection of the contractual partner, consideration must be given to whether the supplier can comply with the relevant human and environmental rights standards along its value chain. This must also be included in the procurement or service contracts (No. 2), which have to be provided with appropriate contractual control mechanisms (No. 4), whereby it must be possible to change the requirements even after conclusion of the contract if the results of the risk analysis suggest this.[173] Section 6 para. 4 No. 3 LkSG also obliges the company to train and educate the staff of direct suppliers. Research has shown that this is of particular importance in achieving compliance with core labour rights.[174] Only if local management is clear about the rights of a trade union, for example, these rights can be respected. This is where preventive and remedial measures dovetail, which also applies to the obligation to carry out inspections of direct suppliers under No. 4. According to the explanatory memorandum to the law, these can be carried out both through the company's own factory inspections and through third parties commissioned by the company to carry out audits.[175] Due to the necessity of preventive measures at direct suppliers according to Section 6 para. 4, audits that include factory inspections can also already be used for risk analysis. However, inspections that are designed in such a way that defects are not found cannot meet the requirement of adequacy. In this respect, reference should be made to the explanations on an adequate risk analysis (see above p. 31 as well as 36 et seq.). The legal obligations under the LkSG cannot be shifted to third parties deploid by the company.[176]

5. Remedial measures (Section 7 LkSG)

If a violation of the covered human or environmental rights is identified in the own business area or at a direct supplier, or if such a violation is imminent, appropriate

[172] This is also considered in the explanatory memorandum, cf. BT-Drs. 19/28649, 46.
[173] BT-Drs. 19/28649, 47.
[174] Zimmer (2021), The Indonesian FoA Protocol, pp. 5, 22,
[175] BT-Drs. 19/28649, 48.
[176] BT-Drs. 19/28649, 48.

remedial measures must be taken without delay pursuant to Section 7 para. 1 sentence 1 LkSG. These are intended to prevent or end legal violations in the best case and at least reduce the damage to the affected parties in the worst case.

A catalogue of possible remedial measures should already have been developed from the risk analysis.[177] However, remedy does not only mean preventing an infringement or restoring the original situation but may also include financial compensation for the harm suffered. Remedies may also include an apology, non-financial reparation or rehabilitation, and in some cases preventive measures are also considered as possible forms of remedy.[178]

In order to be appropriate,[179] remedial measures in its own business area must in any case lead to a cessation of the infringement in Germany according to Section 7 para. 1 sentence 2 LkSG. Abroad as well as within the group "the remedial measure must usually lead to a cessation of the infringement".

If the infringement cannot be remedied by a direct supplier in the foreseeable future, Section 7 para. 2LkSG provides for the following catalogue of measures: Pursuant to No. 1, a remedial action plan must be developed together with the supplier company; cooperation with other companies may also be undertaken by means of industry initiatives (No. 2). During the implementation of the remedial plan, business relations may be temporarily suspended (No. 3), whereby the final termination of business relations should be the last resort; assistance in eliminating the violation of the law has priority, Section 7 para. 3 Nos. 1-3 LkSG. The effectiveness of the remedial measures must also be reviewed annually as well as on an ad hoc basis; information obtained through complaint procedures must be taken into account (para. 4). It is recommended to document the review as well as any adjustment measures.

6. Complaints procedure (Section 8 LkSG)

According to Section 8 LkSG, the due diligence obligations also include the establishment of a complaints procedure, which, like the other obligations of the LkSG, must also be "appropriate" (Section 8 para. 1).[180] The procedure is of great practical importance for the detection of risks or violations of the law, as a well-functioning complaints procedure can serve as an early warning system.[181] On the one

[177] Dutzi/Schneider/Hasenau, DK 11/2021, 454 (458).
[178] Wenzel/Dorn, ZKM 2/2020, 50 (52).
[179] BT-Drs. 19/28649, 48.
[180] BAFA, Organise, implement and evaluate complaints procedures, 2022, https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung_beschwerdeverfahren.pdf?__blob=publicationFile&v=3.
[181] Gläßer/Pfeiffer/Schmitz/Bond (2021), ZKM 6/2021, 228 f.

hand, the legislator has provided for a classic complaints procedure which, according to general legal understanding, is called in when a complaint is made, but mixed with a whistleblower system.[182]

Whistleblowers have to receive an acknowledgement of receipt (Section 8 para. 1 sentence 3) and are entitled to have the facts of the case discussed with them. An overlap with the Whistleblower Directive 2019/1937/EU[183] (WB-Directive) exists only very selectively due to the different objectives of the standards, e.g. in the case of information on violations of the ban on the export of hazardous waste.[184]

According to the conception of the legislator, companies have the choice whether they want to establish an internal or external complaints system (Section 8 para. 1 sentence 1 in conjunction with sentence 6 LkSG). Cross-company systems can be offered, for example, by an industry association[185] or by a multi-stakeholder initiative, such as the Fair Wear Foundation for the textile and clothgarment sector.[186] It would also be conceivable to have a complaints system that is agreed with a global trade union federation for various companies that have suppliers or other contractual partners in a certain country, as for example appointed for Bangladesh in the International Accord[187] (see p. 93). The results of a research project at the University of Viadrina suggest that cross-company grievance systems are more effective than internal ones. The main argument is based on the fact that individual companies cannot exert such a strong influence on the handling of complaints in cross-company grievance systems. In addition, there are clear efficiency gains through institutionalisation, especially in the implementation of the mechanism and the professionalisation of the staff. Quality assurance as well as jointly financed training and further education also bring about a greater effectiveness of the complaints system. Moreover, remedial and preventive measures against supplier companies seem to be more enforceable due to the collective incentive system of several companies. Overall, there is a pooling of resources;[188] cross-company complaints systems are thus likely to be even less cost-intensive than in-house complaints procedures.

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[182] Whistleblowing is the disclosure of a wrongdoing without the whistleblower having to be adversely affected, see Sagan, ZIP 2022, 1419.
[183] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons reporting infringements of Union law, OJ L 305, 26.11.2019, pp. 17-56.
[184] Cf. Art. 2 para. 1 lit. a) Directive 2019/1937/EU in conjunction with. Section 1 Annex I with § 2 (3) no. 7 LkSG, in depth: Sagan, ZIP 2022, 1419 f. Stemberg points out the possibility that the legislator will remove ambiguities regarding the overlaps when implementing the Whistleblower Directive, CCZ 2022, 92 (93).
[185] BT-Drs. 19/28649, p. 49.
[186] Cf. https://www.fairwear.org/programmes/complaints-helplines (15.09.2023).
[187] On the Bangladesh Accord, in depth: Saage-Maaß/Korn, Vom Accord lernen?, 2021; Zimmer, Unternehmensverantwortung im "Bangladesh-Accord" (2016) as well as Zimmer, IOLR 2020, 178 (197 et seq.).
[188] Gläßer/Pfeiffer/Schmitz/Bond (2021), ZKM 6/2021, 228 (229).

It is also conceivable that an external provider operates the grievance system for the company, as was agreed in some international framework agreements (IFAs), for example, in the IFA between the global union federation IndustriALL and ThyssenKrupp (in 2015). Such a provider is also in a certain business relationship with the client due to the service contract, but ultimately acts more autonomously and independently,[189] especially if a supervisory body with equal representation is involved in which workers' representatives also have a seat, as is usually the case with an IFA (see below, p. 87 et seq.).

In Section 8 para. 2-4 LkSG, the legislator specifies basic requirements for the procedure, which must be "accessible to potential participants", and must also ensure "confidentiality of identity" and effective "protection against discrimination or punishment on the basis of a complaint". Pursuant to Section 8 para. 2 LkSG, rules of procedure must be laid down in writing and must be publicly accessible, e.g. on the company's website.[190] According to the explanatory memorandum to the law, this is intended to "establish a predictable time frame for each stage of the procedure as well as clear statements on the types of procedures available".[191] Since not only external parties but also employees of the company can be considered as whistleblowers, the works council, if there is one, must be mandatorily involved in the drafting of the rules of procedure according to Section 87 para. 1 No. 1 BetrVG (see in more detail under p. 74 et seq.). The effectiveness of the grievance procedure must be reviewed annually and on an ad hoc basis in accordance with Section 8 para. 5 sentence 1 LkSG. It is advisable to document this and any adjustments made.

a) Entitlement to complain (Section 8 LkSG)

Although Section 8 para. 1 sentence 2 LkSG stipulates that the procedure should uncover human rights and environmental risks or violations caused by the economic activities of the company itself or of a direct supplier, Section 9 para. 1 LkSG stipulates that the complaints procedure must also make it possible to point out risks or violations of the law at indirect suppliers.[192] It is therefore only logical that the right to complain is not limited to employees of the company; external "persons" (Section 8, para. 1, sentence 2) can also submit a complaint, it is not necessary that they are personally affected.[193] This means that beyond the company public,

[189] Dutzi/Schneider/Hasenau, DK 11/2021, 454 (458).
[190] BT-Drs. 19/28649, p. 50.
[191] BT-Drs. 19/28649, p. 49.
[192] In-depth: Stemberg, CCZ, 2022, 92.
[193] Sagan, ZIP 2022, 1419 (1427).

trade unions, works councils, NGOs and individuals worldwide can submit information on existing or feared violations of the law via the complaints procedure which has to be created.

b) Complaints officer (§ 8 para. 3 LkSG)

Complaints officers have be impartial and independent according to Section 8 para. 3 sentence 1 LkSG, and they must not be subject to instructions from the company. These requirements are easily met by an external complaints system, which is why some argue that only an external system is permissible.[194]

Such a system is preferable, as studies show that external complaints systems are more effective.[195] However, the legislator expressly leaves it up to the companies to decide whether an internal or external system is set up, cf. Section 8, para. 1, sentences 1 and 5 LkSG. The decisive factor is that the complaints officer(s) is/are actually independent and not bound by instructions, which is not necessarily linked to an external authority. For example, members of the works council (as well as of other bodies) are subject to a special protection against dismissal Section 15 para. 1 of the KSchG in conjunction with Section 103 of the BetrVG. The same applies to data protection officers of companies,[196] Section 38 in conjunction with Section 6 para. 4 Federal Data Protection Act (Bundesdatenschutzgesetz). Representatives of severely disabled employees and members of the cross-company and cross-administration representative bodies for severely disabled employees also have comparable special protection against dismissal under Section 179 para. 3 Social Security Code IX (SGB IX). Moreover, members of these bodies may not be discriminated because of the performance of their duties, cf. Section 78 p. 2 BetrVG, Section 38 para. 3 p. 2 Data Protection Basic Regulation (DS-GVO), Section 179 para. 2 SGB IX. Such protection is standardised for a large number of other commissioners in the company, as for example the Occupational Safety and Health Officer or the Environmental Protection Representative.[197] These protective norms can be understood as a limitation of the employer's right of direction.[198] Without such protection, however, there is no independence from instructions and the work cannot be carried out independently. Since the legislator has not standardised comparable protection for the complaints officer (and for the Human Rights

[194] Sagan, ZIP 2022, 1419 (1420).
[195] Gläßer/Pfeiffer/Schmitz/Bond (2021), ZKM 6/2021, 228 (229); Wenzel/Dorn, ZKM 2020, 50 (52).
[196] Data protection officers of non-public bodies.
[197] See comprehensive list of further prohibitions of discrimination against employee representatives as well as labour, environmental and other representatives, Zimmer in: Däubler/Beck (eds.), § 2 AGG marginal No. 273 et seq.
[198] Grabosch-Grabosch, § 5 marginal No.128; Kotulla, NuR 2020, 16 (21).

Commissioner) under the LkSG, as things stand only an external complaints system fulfils the requirement of independence standardised in Section 8 para. 3 sentence 1 LkSG.[199]

According to the case law of the Federal Labour Court (Bundesarbeitsgericht, BAG) on the complaints body under the General Equal Treatment Act (AGG), the works council is not required to be involved under Section 87 para. 1 No. 1 BetrVG with regard to the staffing and location of the complaints body[200] (see p. 76 below).

c) Accessibility and transparency (Section 8 para. 4 LkSG)

According to Section 8 para. 4 p. 2 LkSG the complaint procedure must be "accessible to potential participants". "Clear and comprehensible information on accessibility and responsibility as well as on the procedure must be made publicly accessible in a suitable manner (...)," Section 8 para. 4 p. 1 LkSG. Submitting a complaint by e-mail, internet and telephone is possible,[201] the company's website has to provide barrier-free information on this.[202] In addition to online services, the possibility of making a complaint by telephone is important, as there is a not inconsiderable percentage of illiterate persons who are not to be excluded from the possibility of making a complaint.[203] It is also important that the complaints procedure is transparent, which can also be derived from Section 8 para. 4 LkSG. Whistleblowers "should be informed regularly about how their information is handled in order to build confidence in its effectiveness".[204] The publication of statistics and case studies also contributes to transparency,[205] as does the disclosure of the value chain.[206]

Since the text of the statutory provisions explicitly requires that information about the complaints system has to be made publicly available "in an appropriate manner", it is also necessary that the information on the website is not only provided in English. Already in Southern or Central and Eastern Europe, employees do not speak English to a sufficient degree. This counts even more for the "production countries" of the global South, workers do not have sufficient foreign language skills. Information about a complaints system on the website that is only available in English thus cannot be classified as "comprehensible" and therefore does not

[199] Also Dutzi/Schneider/Hasenau, DK 11/2021, 454 (458); Sagan, ZIP 2022, 1419 (1420).
[200] BAG 21.07.2009 – 1 ABR 42/08, NZA 2009, 1049.
[201] Grabosch-Grabosch, § 5 marginal No.127; Gehling/Ott/Lüneborg CCZ, 2021, 230 (238); probably also Lüneborg DB 2022, 375 (380); Nietsch/Wiedmann CCZ, 2021, 101 (108); Stemberg, CCZ 2022, 92 (95).
[202] BT-Drs. 19/28649, p. 50; Nietsch/Wiedmann, CCZ 2021, 101 (108); Stemberg, CCZ 2022, 92 (94).
[203] Stemberg, CCZ 2022, 92 (95).
[204] BT-Drs. 19/28649, p. 49.
[205] Wenzel/Dorn, ZKM 2020, 50 (52).
[206] Gläßer/Pfeiffer/Schmitz/Bond, ZKM 2021, 228 (230).

fulfil the will of the legislator "in an appropriate manner", which even a reference to translation programmes available online cannot cure if it is in English and therefore cannot be understood.[207] The complaints system to be created must be appropriate, but also effective. Companies therefore have to take into account the localities of their value chain and provide information on the complaints system in the respective national languages.[208]

d) Confidentiality and protection against discrimination

According to Section 8 para. 4 p. 2 Var. 1 LkSG, "the confidentiality of the identity" of the complainant must be maintained, and the complaints officer is also obliged to maintain secrecy (Section 8 para. 3 p. 2 LkSG). Such protection of identity is an important component of the protection against discrimination, which is to be guaranteed according to Section 8 para. 4 sentence 2 var. 2 LkSG. It also ensures that complaints are investigated regardless of the specific person.[209]

The text of the law does not give any further indications as to what is meant by "confidentiality of identity". Due to similarities in wording and objectives regarding the protection of whistleblowers, the interpretation can be based on Art. 16 para. 1 sentence 1 WB-directive 2019/1937/EU,[210] according to which the identity of the whistleblower may not be disclosed without explicit consent. This clearly shows the importance of the independence of the complaints officer, who must also be resistant to pressure from the company to disclose the identity of the complainant. Confidentiality is not identical with anonymity, which means that a whistleblower does not have to reveal his/her identity at any time. The law only requires confidentiality, but it would be possible to design the system in such a way that anonymous reports are also possible. This would make sense, as experience has shown that some whistleblowers prefer to report anonymously for fear of repression.[211]

7. Documentation and reporting obligations (Section 10 and 12 LkSG)

The fulfilment of the due diligence obligations must be continuously documented within the company and the information must be kept for at least 7 years (Section 10 para. 1 LkSG). In addition, according to Section 10 para. 2 LkSG, an annual report on the implementation of the due diligence obligations must be published on

[207] But so Sagan, ZIP 2022, 1419 (1424); more open: Dutzi/Schneider/Hasenau, DK 11/2021, 454 (458); Stemberg, CCZ 2022, 92 (94).
[208] Similarly here: Stemberg, CCZ 2022, 92 (94).
[209] Stemberg, CCZ 2022, 92 (96).
[210] Stemberg, CCZ 2022, 92 (96).
[211] Frank/Edel/Heine/Heine, BB 2021, 2165 (2168); Grabosch-Grabosch, section 2 marginal No.113.

the website no later than 4 months after the end of the business year and must be kept accessible for 7 years (free of charge). The report must provide information on whether or which risks or violations of the law the company has identified (No. 1), as well as information on further measures taken by the company (No. 2), including measures taken as a result of complaints. The company also has to evaluate the effectiveness of the measures and its conclusions (Nos. 3 and 4). In the case of the report, there is a danger of whitewashing if the criteria are not clear, as is well known from the CSR debates.[212]

8. Risk management for indirect suppliers (Section 9 LkSG)

In the case of indirect suppliers, the due diligence obligations only apply in the case of substantiated knowledge, i.e. if the company has "factual indications" that the "violation of a human rights-related or environmental obligation at indirect suppliers appears possible" (Section 9 para. 3 LkSG). According to Section 5 para. 4, this is the case if the company must expect a significant change in the risk situation, e.g. due to "the introduction of new products, projects or a new business field".[213] In this case, an event-related risk analysis and appropriate preventive measures have to be carried out. The EU's draft directive goes much further with regard to risks or infringements of the law in the case of indirect suppliers; the standardised obligations cover all established business relationships, cf. Art. 1 para. 1 and Art. 6 para. 1 of the draft directive.

[212] For more on CSR, see Zimmer, Will Corporate Social Responsibility Help to Improve Working Conditions? (2012), p. 280 et seq.
[213] See in depth: Stemberg, NZG 2022, 1093 et seq.

C. Montoring

The enforcement and monitoring of the LkSG is governed by public law and its structure corresponds to that of hazard prevention under state law.[214] The competent authority for official control is the Federal Office of Economics and Export Control (BAFA), which is subordinate to the Federal Ministry for Economic Affairs and Energy. The BAFA must receive the annual due diligence reports within the meaning of Section 10 para. 2, which are reviewed and evaluated by the BAFA (Section 13 para. 1). The authority also has comprehensive powers and can enter business premises (Section 16), question staff (Section 17), order measures, etc. In contrast to the customs administration,[215] BAFA also acts upon application (Section 14, paragraph 1, no. 2), if the applicant substantiates his or her claim that a protected legal position has been violated or that such a violation is imminent.[216] According to the explanatory memorandum to the law, freelancers or those working illegally are also entitled to file an application.[217] If the provisions of the LkSG are not implemented properly, the BAFA can be informed, which can also be done by the workplace representation or trade union representatives. However, the right to file an application under Section 14 para. 1 No. 2 LkSG requires a (threatened) violation of one's own rights. Whistleblowers who are not themselves affected fall under Section 14 para. 1 No. 1 LkSG. According to this, it is at the discretion of the authority whether it takes action. However, the discretion is likely to be reduced to zero in the case of a tip-off that refers not only to the possibility of a violation of the law, but to a concrete violation of the law.

The authority is not a toothless tiger, as according to Section 24, fines of considerable amounts can be issued for violations of the LkSG. In the case of purely formal violations, up to € 100,000 can be assessed, in the case of violations of important duties up to € 500,000, and in the case of violations of particularly important duties up to € 800,000 (cf. Section 24). However, in the case of corporations and associations of persons, these sums increase to up to € 5 million and up to € 8 million respectively (Section 24, subSection 2, sentence 2 LkSG), this should include most companies that covered by the LkSG.[218] Violations of the establishment of an adequate complaints procedure could, for example, be punished by the BAFA ac-

[214] Sagan/Schmidt, NZA-RR 6/2022, 281 (282); Stöbener de Mora/Noll, NZG 2021, 1237 (1240).
[215] The Customs Administration shall act solely at its discretion.
[216] Edel/Frank/Heine/Heine, BB 2021, 2890 (2894).
[217] BT-Drs. 19/28649, p. 54.
[218] Grabosch/Schönfelder, AuR 12/2021, 488 (493).

cording to Section 24 para. 1 no. 8, para. 2 p. 1 and 2, para 3 LkSG up to a maximum of € 8 million or 2 % of the annual turnover. Companies that have been fined at least € 175,000 may also be excluded from public procurement for up to three years pursuant to Section 22.

D. Reparation for violations of the law

In the case of legal violations pursuant to Section 3 para. 3 sentence 1 LkSG, those affected cannot base their claims for damages on norms of the LkSG, as civil liability is decidedly excluded. Reference is rather made to existing civil law bases for claims (Section 3 para. 2 p. 2 LkSG). Furthermore, it is recommended "to avoid reputational risks or with the aim of reparation" to offer a procedure for consensual dispute resolution in addition to the complaint procedure.[219]

The exclusion of tortious liability is incomprehensible and can only be explained by political compromises, as this would most effectively achieve the legislator's goal. However, tortious liability could be introduced via the Brussels diversions, since the EU draft directive - in contrast to the German LkSG - also contains provisions on tortious liability of companies. If a violation of the law (damage) could have been avoided by dutiful fulfilment of the prevention and remedial duties, Art. 22 para. 1 of the draft directive provides for corporate liability for damages.[220]

I. Law of the place of damage

The already existing bases for claims under civil law rarely lead to success, since according to Art. 4 para. 1 of the Rome II Regulation[221] the law of the place of damage is generally applicable to these actions for damages.[222] In the case of an action for damages against a German company before a German court, for example, Pakistani law would be applicable, as was the case with the action against KiK after the fire in the Ali Enterprise textile factory in Karachi.[223] However, the tort law of other countries will also be based on fault and there will be indeterminate legal norms in need of interpretation that represent a counterpart to the German duty of care. The use of the duty of care according to the LkSG for the interpretation of the safety obligations is partly rejected with reference to the sense and purpose of Section 3 para. 3 sentence 1 LkSG, whereby the authors refer to German law (Section 823 para. 1 BGB),[224] which mostly would not be applied. Since duties of care are rules of safety obligations and rules of conduct within the meaning of Art.

[219] BT-Drs. 19/28649, 49.
[220] In-depth: Grabosch, AuR 6/2022, 244 (246); Hübner/Habrich/Weller, NZG 2022, 644 (648 f.).
[221] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007.
[222] In-depth: BMJV (2019), Menschenrechtsverletzungen im Verantwortungsbereich von Wirtschaftsunternehmen: Access to Law and Courts, p. 11 et seq. and Grabosch, Rechtschutz vor deutschen Zivilgerichten gegen Beeinträchtigungen von Menschenrechten durch transnationale Unternehmen (2013), p. 69 (83 et seq.).
[223] Saage-Maaß (2021), Legal Interventions and Transnational Alliances in the Ali Enterprises Case. in: Saage-Maaß/Zumbansen/Bader/Shahab (eds.), Transnational Legal Activism in Global Value Chains. The Ali Enterprises Factory Fire and the Struggle for Justice, p. 25 et seq.
[224] Sagan/Schmidt, NZA-RR 6/2022, 281 (283).

17 of the Rome II Regulation, the courts will have to take the German LkSG into account when interpreting the foreign legal bases for claims. [225]

II. Statutory Litigation Status (litigation in one's own name on another's behalf, Section 11 LkSG)

In most cases, however, it will hardly be possible for the persons concerned to conduct legal proceedings abroad, both organisationally and financially, which is why the legislator has provided for special legal standing for domestic trade unions and NGOs in Section 11 of the LkSG. These can thus be authorised by the parties concerned to conduct proceedings in Germany (Section 11 para. 1 sentence 2 LkSG). This presupposes that the trade union or NGO not only "maintains a permanent presence of its own", but also, according to its statutes, "works on a non-commercial and not merely temporary basis to realise human rights or corresponding rights in national law (...)". This is a case of litigation by virtue of legal authorisation. Pursuant to Section 11 para. 1 LkSG, this refers to the "paramount legal position from Section 2 para. 1 LkSG"; consequently, only the violation of human rights can be asserted, for environmental rights violations no special litigation status is provided.[226] In the case of litigation, the litigant asserts the right of the proxy holder in his or her own name, but the damages are to be paid to the injured party (as the holder of the right).

A prerequisite for the exercise of legal standing is an effective authorisation by the aggrieved party.[227] The NGO or trade union bringing the action is a party to the legal dispute as a litigant, the aggrieved person is considered a third party in the proceedings and can be a witness.[228] Without such a legal provision, the only option available is the voluntary litigant status, in which the authority to conduct proceedings in one's own name is transferred by virtue of a legal transaction, whereby the authorised party must prove that it has a legitimate interest in conducting the proceedings in its own name.[229] This can be a legal interest, but for some time now case law has also recognised an economic interest.[230] This, however, would not apply to the violation of the labour rights of a Bangladeshi worker, in relation to a

[225] Grabosch/Schönfelder, AuR 12/2021, 488 (493); Grabosch (2013), p. 69 (88); Schmidt-Räntsch, ZUR 2021, 387 (394); similarly: Joseph, Corporations and transnational Human Rights Litigation (2004), pp. 4-6 and 11-12; undecided: Hübner/Habrich/Weller, NZG 2022, 644 (648).
[226] Grabosch-Engel, § 7 marginal No.4.
[227] BT-Drs. 19/28649, p. 51.
[228] Musielak/Voigt, § 51 ZPO marginal No.24.
[229] Musielak/Voigt, § 51 ZPO marginal No.27.
[230] BGH 31.07.2008 – I ZR 21/06, BeckRS 2008, 21196; BGH 19.09.1995 – VI ZR 166/94, NJW 1995, 3186; BGH 03.12.1987 – 7 ZR 374/86, BGHZ 102, 293; OLG Hamm 03.03.1989 – V ZR 212/86, NJW 1989, 463.

trade union's voluntary capacity to institute legal proceedings. However, this pre-requisite does not apply under Section 11 LkSG, as the litigant's own interest in litigation, which is worthy of protection, is now enshrined in law.[231]

[231] Grabosch-Engel, § 7 marginal No.3; Wagner, ZIP 2021, 1095 (1101).

E. Involvement of the co-determination actors

The legislator has explicitly provided for the involvement of German co-determination actors in the implementation of the obligations of the LkSG only in a very selective manner, only the economic committee is directly mentioned. However, employee representatives on the supervisory board and works councils can also play a central role in the implementation of the LkSG. Since the legislator has stipulated in Section 4 para. 4 LkSG that the interests of (also) the company's own employees must be adequately taken into account in the establishment and implementation of the risk management (see above p. 33 et seq.), the participation of co-determination actors can also be in the employer's interest, since this takes into account the legal requirement. However, the legislator has not specified which body is to be involved and to what extent.

I. Employee representatives on the supervisory board

The supervisory board is responsible for monitoring the work of the management (Section 111 para. 1 German Stock Corporation Act, AktG). With the entry into force of the LkSG, the supervisory board must also ensure that the obligations of the new law are complied with. The members of the supervisory board are already obliged to monitor measures of risk management (RMS) and compliance (CMS). From 01.01.2023 onwards, measures to implement the LkSG must also be taken into account. With the implementation of the CSR Directive 2014/95/EU[232] 2017 into German law,[233] reporting on risks relating to environmental and human rights as well as the fight against corruption has already been introduced for certain companies,[234] which is also to be monitored by the supervisory board and audited by it like the annual financial statements.[235] The topic of corporate responsibility thus thas already been part of the package of duties of supervisory board members up to now, which is now deepened with the LkSG. This reporting obligation and its scope of application for the companies concerned will probably be further extended

[232] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 on disclosure of non-financial and diversity information by certain large companies and groups; for more details on the Directive: Ahern, ECFR 4/2016, 599 et seq.
[233] Act to strengthen non-financial reporting by companies in their management and group management reports (CSR Directive Implementation Act) of 11 April 2017, BGBl. 2017 I No. 20, p. 802 et seq.
[234] See in depth: Prangenberg/Tritsch/Beile/Vitols (2020), Nichtfinanzielle Berichterstattung - Prüfung durch den Aufsichtsrat, Arbeitshilfen für Aufsichtsräte Nr. 20.
[235] Prangenberg/Tritsch/Beile/Vitols (2020), Non-Financial Reporting - Review by the Supervisory Board, Arbeitshilfen für Aufsichtsräte Nr. 20, p. 14 et seq.

in the future with the CSRD Directive, which is about to be adopted.[236] Since company violations of the obligations of the LkSG can be punished with severe fines (possibly several hundred million euros, cf. under C., p. 51), the importance of the supervisory board's control increases exponentially with the entry into force of the LkSG. Violation of the corresponding duties of care in this context may also result in liability consequences for supervisory board members.

In listed companies, an audit committee must be formed to monitor risk management (Section 107, paragraph 3, sentence 2, paragraph 4, sentences 1, 2 AktG). Codertermined companies with employee representation must also include employee representatives in the audit committee. However, the overall responsibility remains with the full supervisory board. Corporate lawyers recommend that in addition to the reporting to the executive board, the reporting to the supervisory board or its audit committee should also be adapted to the requirements of the LkSG.[237] If no such committee exists, the supervisory board itself is obliged to monitor the risk management.

1. General aspects of supervision of risk management and risk analysis by the supervisory board

Although risk management and risk analysis are part of the management's tasks, so that it is not the responsibility of the employee representatives on the supervisory board to carry out these processes independently. Nevertheless, it is recommended to members of the board from the workers` side to familiarise themselves with the topic and to critically deal with it,[238] in order to achieve an effective monitoring of the risk management, as the monitoring of the risk management system is the task of the supervisory board (Section 107 para. 3 sentence 2 AktG). According to Section 4 para. 1 LkSG, the risk management has to be "appropriate" and "effective", i.e. effective in relation to supply chains. It is therefore advisable to try to already influence the criteria of the risk analysis or at least to examine them intensively. A prerequisite for an effective risk analysis is the creation of transparency about the value chain, which means listing the countries in which the company has branches or contractual partners, as well as identifying the countries in which indirect suppliers or indirect contractual partners of services are located. This already reveals a number of risks, for example the risk of trade union rights being violated is very high in some countries. The index of the International Trade

[236] Prangenberg/Tritsch/Beile/Vitols (2020), Non-Financial Reporting - Review by the Supervisory Board, Arbeitshilfen für Aufsichtsräte Nr. 20, p. 14 et seq.
[237] Gehling/Ott/Lüneborg, CCZ 2021, 231 (234), similarly also Göpfert/Burkard, NZA 2022, 452 (453).
[238] Steinhaus/Guttzeit, MB-Praxis No. 42 (2021), p. 13.

Union Confederation can serve as an indicator for this.[239] In strict Islamic countries, for example, there is a higher risk of discrimination against women. Some sectors may also be classified as particularly vulnerable, for example mining in terms of occupational health and safety, but also the textile and garment sector concerning the violation of workers` rights.

Identifying potential risks, assessing them and managing preventive and, if necessary, remedial measures is not an easy task for supervisory board members, as they are often on the supervisory board of the group and accordingly receive the risk management and compliance documents for the entire group. The information on the processes and the results of risk management of the individual companies is then usually only available in aggregated form to the supervisory board members of a group-wide supervisory board. However, since the risks related to the value chain can vary greatly from company to company, depending on the specific product to be manufactured or the specific service to be provided by the companies and countries involved, an effective risk analysis can only be carried out at the company level. In this respect, in the case of the supervisory board of a parent company, the networking of the employee members with the other group supervisory boards, the economic committees and the works councils of the individual companies - within the framework of the legal duty of confidentiality (Section 116, sentence 2 AktG) - is of great importance in order to draw their attention to possible problems, but above all to obtain information from them about problems in risk management and in preventive and remedial measures within the individual companies. This helps the members of the board (from the workers` side) in particular to better understand the reports submitted. The same applies to complaints management, which is dealt with separately, as it falls (at least partially) within the scope of mandatory co-determination (see below p. 61 ff).

On the supervisory board, employee representatives regularly have more detailed knowledge of the processes in the company and in this respect have an information advantage over the co-determination actors in the company. In this respect, supervisory board members must observe the duty of confidentiality. However, this only applies to facts that are only known to a narrowly defined group of people and are therefore not public knowledge,[240] whereby confidentiality must be in the objective

[239] Https://www.ituc-csi.org/violations-workers-rights-seven-year-high?lang=en (24.09.2023).
[240] Köstler, Verschwiegenheitspflicht (2010), p. 9; Spindler, beck-online Großkommentar, Section 116 AktG marginal No.118.

interest of the company.[241] Consequently, what is already known elsewhere cannot be subject to confidentiality. For example, the policy statement on the human rights strategy of the company must be made public according to Section 6 para. 2 LkSG (see above, p. 41 et seq.). This contains information on procedural instructions (No. 1), prioritisation of human rights and environmental risks (No. 2) and the definition of expectations of employees and suppliers (No. 3). These topics cannot be subject to the duty of confidentiality; the same applies to the reporting on the implementation of due diligence required under Section 10 para. 2 LkSG (see above, p. 49). It is questionable what the situation is with details about current problems in risk management. In part, this information will be included in the aforementioned reporting and thus even made available to the public. Information from risk analysis or complaint management could be subject to confidentiality if it could result in a major reputational risk. However, this would probably only be the case if there was a risk of a scandal, as the threatened damage would have to be of considerable weight.[242] In any case, documents may not be passed on, but the information would have to be processed and "generalised", so to speak. The problem of secrecy is not necessary if members of the economic committee or the general or group works council hold a supervisory board mandate and obtain information through the supervisory board that enables them to ask questions in depth in the economic committee or in the works council body.

If necessary, an attempt should be made to influence the factors of the risk analysis, i.e. the core questions to be prepared (see above, p. 41 et seq.) as well as the internal and external rules of conduct or guidelines for the human rights strategy, which are to be developed in the areas relevant to risk management according to Section 6 para. 3 no. 1 LkSG.[243] Whereby these are subject to the mandatory co-determination of the works council, so that an interlocking with the competent works council body is recommended. It would also make sense to influence the criteria for preparing the annual external report (Section 10 para. 2 sentence 1 LkSG). If these are too vague, there is a risk that the report will contain little more than fine words and hot air, as is known from CSR reporting.[244] It must also be checked whether the criteria laid down by law in Section 6 para. 2 sentence 2 LkSG for the policy statement on the company's human rights strategy to be drawn up

[241] BGH 05.06.1975 - II ZR 156/73, BGHZ 64, 325 (329); BGH 26.03.1997 - III ZR 307/95, NJW 1997, 1985 (1987); Köstler, Verschwiegenheitspflicht (2010), p. 10; Meincke, WM 1998, 749 (750); Säcker, FS Fischer, 1979, 635 (638); Nagel, BB 1979, 1799 (1802); Spindler, beck-online Großkommentar, Section 116 AktG Rn. 118.
[242] Köstler, Verschwiegenheitspflicht (2010), p. 10.
[243] BT-Drs. 19/28649, 46.
[244] For more on CSR, see Zimmer, Will Corporate Social Responsibility Help to Improve Working Conditions? (2012), p. 280 et seq.

for its own business area have been complied with, in which the procedures and the risks identified are to be reported. The policy statement must contain at least the following points:

– It must include a procedural instruction (No. 1);
– prioritise the identified human and environmental risks (No. 2);
– set expectations for workers and suppliers (No. 3).

If risk management is to be integrated into general compliance, care should be taken to ensure that the employees involved in it are intensively trained in human rights and environmental rights issues. Audits will also have to include on-site inspections, which should, however, involve local actors (trade unions and NGOs) (see above). Alternatively, a separate monitoring body can be created, taking into account the principles listed, as already exists for monitoring international framework agreements (see below p. 89 et seq.). The extent to which the design of the company's risk management can actually be influenced will certainly depend on the standing in the respective body. In any case, it is important who is internally responsible for the risk management with regard to compliance with key human and environmental rights along the supply chain and who, as the human rights representative, is responsible for monitoring the risk management within the company in accordance with Section 4 para. 3 sentence 1 LkSG.

2. Information rights and the right to take insight

The members of the supervisory board or of the responsible audit committee are among the relevant decision-makers according to Section 5 para. 3 LkSG (see above p. 39 et seq.) and must therefore be informed about the results of the risk analysis according to the LkSG. In order to be able to effectively fulfil their audit mandate, they also have to be provided with the policy statement according to Section 6 para. 2 LkSG, and they must also be given access to the internal documentation according to Section 10 para. 1 LkSG. The same applies with regard to the human rights strategy for the own business unit, also about the internal and external rules of conduct or guidelines to be developed within this framework in the areas relevant for risk management.[245] According to the draft for a reformed CSRD directive of the EU, the operational levels are consulted with regard to sustainability reporting and the supervisory board is to be informed about the opinion of the

[245] BT-Drs. 19/28649, 46.

works council (Art. 19a para. 4 CSRD).

It is advisable for employee representatives on the supervisory board to inform the members of the economic committee to the extent permissible so that they can ask the employer more specific questions on the individual issues (see above). The works councils should also be informed on the subject, especially since in some areas there are mandatory co-determination rights. If a due diligence committee with equal representation is set up (see below, p. 69 et seq.), it would also be advisable to consult with it.

II. Economic Committee

The participation of the economic committee in the implementation of the LkSG was explicitly provided for by the legislator. The economic matters on which the employer must inform the economic committee in a timely and comprehensive manner pursuant to Section 106 para. 2 of the Works Council Constitution Act (BetrVG) also include, as of 1 January 2023, pursuant to Section 106 para. 3 BetrVG, under the newly inserted No. 5b, "questions of corporate due diligence in supply chains pursuant to the Supply Chain Due Diligence Act (Lieferkettensorgfaltspflichtengesetz)". It is questionable whether this only applies to companies which alone or in a group of companies employ at least 3,000 workers[246] in Germany (Section 1, subSection 1, sentence 1, No. 2 LkSG). This provision of the BetrVG refers to the duties of care regulated in the LkSG, without it being relevant whether the scope of application of the LkSG is opened and accordingly whether the obligations of the law apply to the company. The regular examples mentioned in the enumeration of Section 106 para. 3 LkSG serve to clarify which facts are to be regarded as economic matters - the supply relations and the due diligence measures taken to reduce human rights and environmental risks are undoubtedly such matters.

Section 106 para. 3 No. 5b of the Works BetrVG is the only new provision on workplace (or company) co-determination that makes explicit reference to the LkSG; it goes back to a resolution recommendation of the Bundestag Committee on Labour and Social Affairs. The committee classified the reduction of human rights or environmental risks as a significant factor for the economic activities of the company, as this can have an impact on the "reputation and performance risk", which can lead to "direct effects on the economic situation of the company".[247]

[246] From 01.01.2024, the threshold will be reduced to 1,000 employees.
[247] BT-Drs. 19/30505, p. 44.

Since the economic committee is formed at the company level, it receives the information on the implementation of due diligence for the company level and therefore has more detailed insights into the concrete company-related measures than the members of the supervisory board, which not infrequently supervise the group-wide risk and compliance management. Although the economic committee is an auxiliary body of the works council,[248] it has an independent right to comprehensive information that includes all information on which the company's decisions are based.[249]

1. Information on corporate due diligence issues

Pursuant to Section 106, subSection 2, sentence 1 BetrVG, the economic committee must be informed "in good time and comprehensively about the economic affairs of the enterprise" and the "necessary documents" must be submitted to it. Pursuant to Section 106, subSection 3, no. 5b BetrVG, as of 1 January 2023, these refer to "questions of corporate due diligence in supply chains pursuant to the LkSG"; the legislator has chosen a broad wording with regard to the information to be submitted. In terms of content, the information is largely identical to that to which the supervisory board is also entitled. However, the role of the economic committee is different since, unlike the supervisory board, it does not have the task of controlling the executive board. In addition, the information only relates to the company's risk management and not that of the group.

The required information have to be transmitted to the economic committee in time so that suggestions of the committee can still be taken into account,[250] the obligation already arises with the decision to plan. If the information is submitted after it has already been made in the relevant corporate body, the information is too late.[251] Consequently, the members of the economic committee are entitled to receive the draft of the policy statement pursuant to Section 6 para. 2 LkSG. The same applies to the human rights strategy of the company's own business unit and to the internal and external rules of conduct or guidelines to be developed in the areas relevant to risk management, whereby these are partially subject to co-determination by the works council (see p. 71 et seq.). Also with regard to the criteria to be defined for the risk analysis, information must be provided to the economic committee already in the planning phase. In our view, this also applies to the pos-

[248] DKW-Däubler, § 106 marginal No.2.
[249] DKW-Däubler, § 106 marginal Nos. 36, 47.
[250] LAG Berlin-Brandenburg, 30.03.2012 – 10 TaBV 2362/11 (juris); DKW-Däubler, § 106 marginal No.43.
[251] ErfK-Kania, Sec. 106 BetrVG marginal No.4.

sible personal details of the persons responsible for the risk analysis and the human rights representative, as this is the only way to ensure that the information is complete.[252] This is due to the importance of the above-mentioned personnel for the effective implementation and control of risk management, which has a direct impact on the "reputation and performance risk" of the company and can consequently lead to a direct "impact on the economic situation of the company".[253] The business committee is also entitled to information on details of the planned grievance procedure, whereby this may not be adopted without the involvement of the works council due to mandatory co-determination (see below p. 74 et seq.). Due to the early flow of information provided for by law, it is quite possible that the flow of information with the employee members of the supervisory board also runs in the other direction and that the economic committee can inform the members of the supervisory board or the audit committee about critical points of the implementation of the LkSG from their company before the issue has landed on the agenda of the supervisory board.

Once the risk management system has been installed, the economic committee must be informed of the results of the risk analysis pursuant to Section 5 LkSG, of the preventive (Section 6 LkSG) or remedial (Section 7 LkSG) measures taken and of the complaints received (Section 8 LkSG). In addition, the economic committee shall be entitled to inspect the internal documentation pursuant to Section 10 par. 1 LkSG and the report to be prepared annually pursuant to Section 10 par. 2 LkSG on the company's compliance with due diligence obligations, which shall be prepared for submission to the Federal Office of Economics and Export Control (BAFA) and for publication on the company's website. The economic committee may also propose further measures for the implementation of the LkSG on its own initiative.[254]

2. Networking with other bodies

As the economic committee is not an independent co-determination body but an auxiliary body of the works council,[255] an important task is to pass on the information obtained to the competent works council bodies. As a rule, this will be the general works council (Gesamtbetriebsrat, GBR). As an economic committee is to

[252] As here: DKW-Däubler, § 106 marginal No.58; different view ErfK-Kania, § 106 BetrVG marginal No.5, who only considers a duty to inform about the effects on personnel planning as given.
[253] This has already been stated by the Committee for Labour and Social Affairs of the German Bundestag (without specifically addressing personal details), cf. BT-Drs. 19/30505, p. 44.
[254] Baade, DStR 2022, 1617 (1624).
[255] DKW-Däubler, § 106, margin No. 2, 34; ErfK-Kania, § 106 BetrVG margin No. 1.

be set up "in all companies" under Section 106 para. 1 sentence 1 BetrVG, if the threshold of more than 100 permanently employed workers is reached, however, it is not linked to the existence of a general works council (GBR). An economic committee must also be established in companies that have only one establishment. In such atypical constellations, the economic committee should not only provide information on risk management to the (local) works council, but also to the group works council (Konzernbetriebsrat, KBR), if existant.

As has been worked out, an effective risk analysis can generally be carried out more easily at company level than at group level (see above), so the economic committee has an important function as a control body alongside the supervisory board and in interaction with it. Overall, it is advisable to work together with the employee members of the supervisory board, as already explained.

3. Economic committee at group level

There is no right to establish an economic committee at group level.[256] For the effective design, implementation and monitoring of risk management and the other obligations under the LkSG, such a group-wide committee should not be absolutely necessary, as there is always an economic committee at company level. Should this be different in individual cases, however, an economic committee can also be concluded on a voluntary basis between the competent trade union and the group management by means of a collective agreement (between trade union and employer) or between the KBR (group works council) and the group management by means of a group works council agreement.[257] It is up to the parties which responsibilities of the group-wide economic committee are included in such an agreement.

III. Works Council

Corporate responsibility has been a topic of interest for works councils for many years, as shown by numerous best practice examples of company and service agreements.[258] A study conducted in 2021 also found that in companies with an established tradition of social partnership, works council agreements on sustainability issues can be initiated, negotiated and implemented with relatively few problems and conflicts.[259] Corporate responsibility has so far been present as a

[256] BAG 23.08.1989, NZA 1990, 863; ErfK-Kania, § 106 BetrVG marginal No.2.
[257] DKW-Däubler, § 106 marginal nos. 4, 19.
[258] See list in Maschke/Zimmer, CSR – Gesellschaftliche Verantwortung von Unternehmen, 2013, p. 21 et seq.
[259] Haunschild et al. (2021), Sustainability through co-determination, p. 10.

topic for works councils mainly when they are internationally engaged via the European or World Works Council or were actively involved in the process of creating and implementing an international framework agreement (IFA). However, the activities recorded so far mainly relate to CSR and sustainability aspects of their own company or direct suppliers. Corporate responsibility along the entire value chain is a new topic for most works council bodies. As studies suggest, works councils tend not to have in-depth knowledge of the UN Guiding Principles,[260] the same might be true for in-depth knowledge of the new German Due Diligence Act, which is based on the UN Guiding Principles and the National Action Plan. However, connections can easily be made, as the internationalisation of production on the one hand significates that corporate activities are globally interlinked, which became particularly clear through supply chain bottlenecks in the pandemic. In addition, the LkSG covers labour law violations along the entire value chain, which significates that a violation under the LkSG (Section 2, paragraph 2, No. 6) would also exist, for example, if the establishment of a works council at a supplier company in Germany was obstructed (see p. 30 above). Moreover, the downward spiral of social standards has already reached Germany, so that it is not least in the interest of co-determination actors (and other local stakeholders) to contribute to securing core labour rights in other countries, as well.

According to Section 4 para. 4 LkSG, the interests of the company's own employees must be adequately taken into account when setting up and implementing the risk management. However, this cannot take place abstractly via a desk analysis in which the interests of the employees are elicited and taken into account in the conception. Although the legislator has not codified any mandatory co-determination rights of the works council, it has clearly assumed an active involvement of the employees or their representatives, as the explanatory memorandum to the law refers to "consultations".[261] In companies without a works council, an information event of the (own) employees or an involvement via modern communication technologies may be sufficient; if there is a works council, it must be involved as the representative of the employees.[262] Although the legislator has only codified the rights of the economic committee (see p. 61), as this is not an independent co-determination body but an auxiliary body of the works council,[263] the obligation under Section 4 para. 4 LkSG is not fulfilled with the involvement of the economic committee alone. Rather, the works council, which represents the interests of the

[260] Hadwiger/Hamm/Vitols/Wilke (2017), Durchsetzen Menschenrechte im Unternehmen, p. 189 et seq.
[261] BT-Drs. 19/28649, p. 44.
[262] Similarly: Sagan/Schmidt, NZA-RR 6/2022, 281 (287).
[263] DKW-Däubler, § 106, margin no. 2, 34; ErfK-Kania, § 106 BetrVG margin No. 1.

employees as an elected body, must be involved; the same applies to staff councils in the public sector.

1. Competent body

It must be clarified which works council level is to be involved in the implementation of the obligations under the LkSG.

a) Due diligence obligations to be fulfilled throughout the company

Since the LkSG focuses on the implementation of corporate due diligence at the company level, the local works council is only the competent body in exceptional cases if the company has only one establishment and there is no central or group works council. According to the principle of strict separation of competences as developed by case law,[264] the competence of the works council and the general works council (GBR) are mutually exclusive.[265] Pursuant to Section 50 para. 1 BetrVG, company-wide matters are assigned to the GBR, which is therefore the works council body to be involved in the introduction and implementation of the obligations under the LkSG.[266] This applies at least to those parts of risk management that are implemented company-wide. Within group structures, however, there may be a conflict with the groups` works council, as will be explained below. However, if the parent company of the group is located abroad, so that in the opinion of the BAG no group works council can be established,[267] the GBR is in any case responsible for the implementation of the obligations of the LkSG.[268]

b) Due diligence obligations to be fulfilled throughout the group

Within group structures, risk management and compliance are not infrequently set up on a group-wide basis, so that the question arises as to whether the KBR is not responsible in groups with regard to the group-wide implementation of the LkSG

[264] BAG 19.11.2019 – 3 AZR 127/18, NZA 2020, 452 (para. 24); BAG 30.01.2019 – 5 AZR 442/17, NZA 2019, 1076 (para. 95); BAG 14.11.2006 – 1 AB04/06, AP Nr. 43 zu § 87 BetrVG Überwachung (para. 34).
[265] DKW-Deinert, § 50 marginal No.14; GK-Kreutz/Franzen, § 50 BetrVG marginal No.18.
[266] DKW-Deinert, § 50 marginal No.25 et seq.
[267] BAG 23.05.2018 - 7 ABR 60/16, NZA 2018, 1562 (para. 26); BAG 16.05.2007 - 7 ABR 63/06, NZA 2008, 320; critical of this case law: DKW-Wenckebach, Vor. § 54 Rn. 23 et seq. (with further references). For proposed amendments see: the DGB's BetrVG reform proposal, Allgaier et. al, Betriebliche Mitbestimmung für das 21. Jahrhundert (Bill for a modern Works Constitution Act), 2022, Section 54 para. 3.
[268] BAG 23.05.2018 - 7 ABR 60/16, NZA 2018, 1562 (para. 26).

and in this respect displaces the responsibility of the GBR. According to the principle of strict separation of responsibilities,[269] only one of the bodies can be concerned with an issue.[270] Pursuant to Section 58 para. 1 BetrVG, the KBR is responsible for matters "which concern the group (...) and cannot be regulated by the single general works councils within their companies"; the decisive factor is the personal and factual scope of the respective measure.[271] In this respect, the competence of the GBR or KBR must be clarified with regard to the involvement of the works council in each individual measure. If the measures are to be implemented throughout the group, e.g. the introduction of a complaints management system in the group as required by Section 8 of the LkSG (see B. IV. 6., p. 44 et seq.), the KBR is exclusively responsible. The same applies if internal and external codes of conduct with regard to duties of conduct for the implementation of the LkSG (see below III. 2. c), p. 71 et seq.) are to be introduced for the entire group[272] or if staff questionnaires within the meaning of Section 94 BetrVG are to be used throughout the group[273] (see below, p. 73 et seq.). With regard to participation under Section 80 para. 1 and 2 BetrVG, information is requested on specific measures of the own company, e.g. the declaration of principles under Section 6 para. 2 BetrVG is to be submitted for the individual company. In this respect, the participation rights of the individual works councils apply. In the case of measures taken both for the individual companies and for the group, it must be examined whether, exceptionally, both the GBR and the KBR may be responsible.

c) Exceptional competence of both the general and group works council

According to the principle of strict separation of competences,[274] which also applies here, the competence of the works council bodies is mutually exclusive,[275] so that either the GBR or the KBR is competent. Exceptionally, however, both bodies may have jurisdiction if the instruments are different for the individual company than for the group and therefore there is no overlap in content. This is the case, for example, in relation to the risk analysis or also in the case of remedial measures that are only to be taken in relation to identified risks or violations of the law in a company. In this case, the GBR is responsible, while the KBR is responsible for group-

[269] BAG 19.11.2019 - 3 AZR 127/18, NZA 2020, 452 (para. 24); BAG 30.01.2019 - 5 AZR 442/17, NZA 2019, 1076 (para. 95); BAG 14.11.2006 - 1 ABR 04/06, AP Nr. 43 zu § 87 BetrVG Überwachung (para. 34).
[270] DKW-Deinert, § 50 marginal No.14; GK-Kreutz/Franzen, § 50 BetrVG marginal No.18.
[271] DKW-Wenckebach, § 58 marginal No.14.
[272] DKW-Wenckebach, § 58 marginal No.22
[273] BAG 11.12.2018 - 1 ABR 13/17, NZA 2019, 1009; DKW-Wenckebach, § 58 marginal No.24.
[274] BAG 19.11.2019 - 3 AZR 127/18, NZA 2020, 452 (para. 24); BAG 30.01.2019 - 5 AZR 442/17, NZA 2019, 1076 (para. 95); BAG 14.11.2006 - 1 ABR 04/06, AP Nr. 43 zu § 87 BetrVG Überwachung (para. 34).
[275] DKW-Deinert, § 50 marginal No.14; GK-Kreutz/Franzen, § 50 BetrVG marginal No.18.

wide risk management measures or group-wide reporting.

If the legislator were to comply with the DGB's demands for a reform of the BetrVG and expand the range of bodies to be agreed by collective agreement, so that, for example, multi-jurisdictional general works councils could be created under (an expanded) Section 3 of the BetrVG,[276] this would close a gap that arises when, for example, no group structure exists for family-owned individual companies and there is therefore neither a GBR nor a KBR. A further gap could be closed by an amendment to Section 54 BetrVG, if it were stipulated by law that within group structures where the top management of the group is located abroad, a KBR can be formed in any case.[277]

2. Participation rights of the central or group works council

The legislator has not explicitly provided for the participation of the (general or group) works council, although the GBR (or works council) will already be familiar with the issue through its members in the economic committee. There are various participation rights of the works council in the introduction and implementation of the corporate duty of care according to the LkSG, as will be explained in the following.

a) General duty to provide information under Section 80 para. 1 BetrVG

Since the obligations of the LkSG are legal provisions which must be complied with by the employer and which, at least in its own business area, also work in favour of its own employees, dealing with the implementation of the obligations of the LkSG is one of the tasks of the works council according to Section 80 para. 1 No. 1 BetrVG.[278] The works council's duty to monitor compliance with the standards listed in Section 80 para. 1 sentence 1 BetrVG is intended to ensure that the protective regulations for the benefit of employees are also observed in practice.[279] This corresponds with Section 4 para. 4 LkSG, which obliges the company to "give due consideration" to the interests of its workers in supply chain management.

Pursuant to Section 80 para. 2 BetrVG, the committee must be provided with in-

[276] Allgaier et. al, Workplace Co-determination for the 21st Century. Bill for a Modern Works Constitution Act (2022), section 3 (1) no. 4.
[277] See in depth the DGB's BetrVG reform proposal, Allgaier et. al, Betriebliche Mitbestimmung für das 21. Jahrhundert. Gesetzentwurf für ein modernes Betriebsverfassungsgesetz (2022), § 54 para. 3.
[278] DKW-Buschmann, § 80 marginal No.10; Zimmer, AiB 9/2022, p. 21 (23). As already pointed out, the Company Works Council and Group Works Councils are the competent bodies. This is assumed when the terminology "works council" is used here.
[279] ErfK-Kania, Sec. 80 BetrVG marginal No.3.

formation on compliance with the obligations under the LkSG, which must be provided "comprehensively" and "in good time"; in this regard, reference can be made to the comments on the economic committee (see p. 6 et seq.). The information to be provided to the works council is partly identical to the information to be provided to the economic committee, although not all information to which the economic committee is entitled is also provided to the works council. In this respect, it makes sense to coordinate the bodies in order to use capacities sensibly. The works council is entitled to the draft policy statement under Section 6 para. 2 LkSG.[280] The same applies to the human rights strategy relating to the company's own business area, which under Section 6 para. 2 No. 3 LkSG (among others) must be made public to the company's own employees.[281] The works council must also be provided with information on the criteria to be used in the risk analysis during the planning phase. However, with regard to the persons responsible for the risk analysis and the human rights representative, there is only a right to information on the filling of the position, but not on the personal details. This is based on the fact that the works council has the task of ensuring that protective regulations for the benefit of employees are complied with in practice,[282] but its task does not lie in assessing the economic situation of the company, insofar as this does not involve structural changes which, for example, entail rights under Sections 111 et seq. BetrVG.

If a risk management has been installed, there is the right to receive the results of the risk analysis according to Section 5 LkSG, on the preventive measures taken (Section 6 LkSG) or remedial measures taken (Section 7 LkSG) as well as on the complaints received. The works council also has the right to inspect the internal documentation pursuant to Section 10 para. 1 LkSG as well as the annual report on the fulfilment of the company's due diligence obligations pursuant to Section 10 para. 2 LkSG, which must be made available on the company's website anyway.

A right to information on the internal and external rules of conduct or guidelines to be developed in the areas relevant to risk management is based on the co-determination of the works council under Section 87, para. 1, No. 1 BetrVG; the same applies to the introduction of a complaints management system under Section 8 of the LkSG (see explanations below).

It is questionable to what extent the works council can also conduct its own inves-

[280] BT-Drs. 19/28649, 46; also in agreement: Edel/Frank/Heine/Heine, BB 2021, 2890 (2895).
[281] Nietsch/Wiedmann, CCZ 2021, 101 (107).
[282] ErfK-Kania, Sec. 80 BetrVG marginal No.3.

tigations on compliance with the provisions of the LkSG. This can certainly be assumed with regard to the above-mentioned points, as monitoring compliance with these provisions is undoubtedly one of its duties under Section 80 para. 1 No. 1 BetrVG. But how about, for example, investigations on compliance with the human rights standards to be observed abroad (according to Section 2 subSection 2 LkSG)? One barrier could be the traditional principle of territoriality, which is still present in the case law of the Federal Labour Court (Bundesarbeitsgericht, BAG).[283] In view of the fact that the mandate of works councils is limited to Germany and only applies to the company's own employees, such investigations by the GBR or KBR would probably be limited to matters in Germany. However, it is correct that the competence of the works council must be based on the location of the establishment,[284] so that the activities of the works council of an establishment located in Germany abroad are not excluded from the outset. The situation is also different for the European works council (EWC), whose mandate extends beyond national borders; the same applies to a global group works council if such a council has been agreed with the management.[285] Moreover, with regard to such investigations, reference should be made to the interlocking of works councils with trade unions and non-governmental organisations (NGOs).

If the works council finds out that the employer is in breach of obligations under the LkSG, it too can inform the Federal Office of Economics and Export Control (BAFA) as the competent supervisory body (see above, p. 51 et seq.)

b) Works meeting (Section 42 et seq. BetrVG)

It is advisable to inform the company public by raising the issue of corporate responsibility along the supply (value) chain at a works meeting; the issue can also be included in the employer's report (Section 43, para. 2, sentences 2 and 3 BetrVG).[286] In his report, the employer can also provide information on the declaration of principles on the human rights strategy of the company according to the LkSG. Pursuant to Section 6 para. 2 No. 3 LkSG, this declaration must be made public, inter alia, to the company's own employees.[287]

[283] For a comprehensive and critical discussion, see Deinert, Betriebsverfassung in Zeiten der Globalisierung, p. 9 et seq.
[284] Deinert, Betriebsverfassung in Zeiten der Globalisierung, p. 31 f.
[285] World group works councils (WKBR) or world works councils have been agreed on the basis of voluntary agreements at some large corporations, see under E. III. 5. On the WKBR at VW, see Roch (2009), Der Weltkonzernbetriebsrat von Volkswagen. On the instrument in general, see Rüb, Weltbetriebsräte und andere Formen weltweiter Arbeitnehmervertretungsstrukturen in transnationalen Konzernen, 2000, p. 9 et seq.; DKW-Däubler, Einl. Rn. 243.
[286] Zimmer, AiB 9/2022, 21 (23).
[287] Nietsch/Wiedmann, CCZ 2021, 101 (107).

With regard to the issue of corporate due diligence along the value chain, the relevant trade union will certainly provide support, and external experts could also be involved in a works meeting. Such a procedure is particularly recommended if the works council is considering to set up a working group on the topic according to Section 28a BetrVG and employees belonging to the company are to be involved. A framework agreement should be concluded with the employer on the mandate of the working group in accordance with Section 28a para. 1 BetrVG, whereby it is recommended that the working group is not given final decision-making power,[288] as it is the works council which, as the elected representative of the employees, has been given a mandate by them. In this respect, the works council should also make the final decision on the content of company agreements.

c) Co-determination in the introduction of internal codes of conduct (Section 87 para. 1 No. 1 BetrVG)

In order to implement the human rights strategy in "relevant business processes" of its own business unit (Section 6 para. 3 No. 1 LkSG), internal and external rules of conduct or guidelines must be develloped.[289] Also within the framework of the policy statement to be submitted, the company must, among other things, formulate its human rights and environment-related "expectations" directed at its own employees (Section 6 para. 2 sentence 3 No. 3 LkSG) and update these if necessary (Section 6 para. 5 sentence 3 LkSG).[290] Irrespective of the detailed formulation of such a regulation, however, only the company's own employees, but not outside third parties, can be obliged to behave in certain ways, as a regulation to the detriment of third parties is inadmissible.[291] In order to be binding, such codes of conduct must be implemented in the employment relationship, which can be done via the right of direction, an addendum to the employment contract or via a works agreement.[292] As codes of conduct contain binding instructions for employees, co-determination rights of the works council under Section 87 para. 1 No. 1 BetrVG are affected.[293] This concerns both the structuring of the company's order by creating generally valid, binding rules of conduct, as well as all measures through which the behaviour of the employees is to be influenced with regard to

[288] Zimmer, AiB 9/2022, 21 (23).
[289] BT-Drs. 19/28649, 46.
[290] Edel/Frank/Heine/Heine, BB 2021, 2890 (2894).
[291] BGH 12.11.1980, BGHZ 78, 369 (374 f.); related to ethics guidelines: Wisskirchen/Jordan/Bissel, DB 2005, 2190 (2195), as well as Mengel/Hagemeister, BB 2007, 1386 (1390) and Wagner, Ethikrichtlinien - Implementierung und Mitbestimmung, 2008, p. 41.
[292] Baade, DStR 2022, 1617 (1621 f.); Edel/Frank/Heine/Heine, BB 2021, 2890 (2894); Schneider, Die arbeitsrechtliche Implementierung von Compliance und Ethikrichtlinien (2009), p. 98 et seq.
[293] Grabosch-Grabosch, § 5 marginal No.84; Sagan/Schmidt, NZA-RR 6/2022, 281 (288); on co-determination in ethics guidelines, cf. Kock, ZIP 2009, 1406; Wisskirchen/Jordan/Bissels, DB 2005, 2190.

the company's order. Regulations that are subject to co-determination are those that affect organisational behaviour, which must be distinguished from work behaviour that is not subject to co-determination. Whether a regulation concerns the organizational conduct or the conduct of work is not determined by the subjective ideas of the employer, but rather by the objective purpose of the regulation, which is determined by the content of the measure and the nature of the operational events to be influenced.[294] Co-determination therefore applies to the coexistence and interaction of employees in the workplace, insofar as it is not a question of directly concretising and demanding the duty to work.[295] For example, a request how to supervise suppliers would be a work instruction not subject to co-determination.

In the Honeywell decision, the BAG clarified that a works council's right of co-determination in individual parts of a code of conduct does not lead to a right of co-determination in the entirety, as the code does not constitute an indissoluble whole. According to the case law of the BAG, this is not the case even if the code contains a "whistleblower clause" which obliges employees to report any violation of the code and a violation of this obligation entails sanctions under labour law.[296] Such a sanctioned reporting obligation does not link the different parts of the code in such a way that it cannot be amended without destroying the overall context. What is decisive is not the more or less random listing of the employer's ideas, but rather the content of the individual provisions. It is therefore necessary to examine in relation to all provisions of the code of conduct whether there is a right of co-determination of the works council.[297] However, the works council's co-determination rights only apply if employees as defined by Section 5 para. 1 BetrVG are affected. If instructions on how to behave are also given to executive employees within the meaning of Section 5 para. 3 BetrVG, they are not subject to co-determination. However, this does not exclude co-determination as a whole, as this part of the workforce only constitutes a small minority.

Regulatory behaviour subject to co-determination is affected, for example, if an obligation to report supply chain risks or legal violations is codified, which is to be implemented in compliance with a standardised procedure.[298] It is sufficient if employ-

[294] BAG 11.06.2002 – 1 ABR 46/01, AP Nr. 38 zu § 87 BetrVG 1972, Ordnung des Betriebes.
[295] LAG Düsseldorf 14.11.2005, NZA-RR 2006, 81 (84) with further references.
[296] However, Hess. LAG v. 18.01.2007, AiB 2007, 663 ff, with comments by Lewek.
[297] BAG 22.07.2008 - 1 ABR 40/07, NZA 1248 (1252).
[298] Baade, DStR 2022, 1617 (1622); Edel/Frank/Heine/Heine, BB 2021, 2890 (2895).

ees are "encouraged" to contact their superiors "in the event of perceived or suspected violations" of "values and principles of business conduct"[299] or to call a hotline established in the context of complaint management pursuant to Section 8 LkSG. Mere announcements on human rights or environmental due diligence according to the LkSG, on the other hand, are not subject to co-determination.[300]

If group-wide regulations are established in a code of conduct, the KBR is responsible according to the general rules of competence under the works constitution law (Section 58 subSection 1 BetrVG).[301] If the code of conduct is merely an ethical guideline for a company, the GBR is responsible according to Section 50 subSection 1 BetrVG.[302]

d) Co-determination in the use of staff questionnaires (Section 94 para. 1 BetrVG)

The works council may also have a right of co-determination when carrying out the risk analysis, e.g. if employees are to be asked about possible human rights or environmental risks. Such a standardised survey is to be regarded as the use of a personnel questionnaire within the meaning of Section 94 para. 1 sentence 1 BetrVG. Such personnel questionnaires are questions in a form intended to provide information about the person as well as knowledge and skills.[303] All formalised and standardised surveys of information by the employer on employee data are covered,[304] even if no paper questionnaire is used but an online survey is conducted. When personnel questionnaires are used, the mandatory co-determination of the works council under Section 94 para. 1 BetrVG applies. It is conceivable, for example, to ask about experiences of discrimination at the workplace (cf. Section 2 para. 2 No. 7 LkSG) or compliance with occupational health and safety measures (cf. Section 2 para. 2 No. 5).[305] However, the right of co-determination does not apply if participation in the survey is voluntary.[306] For group-wide surveys, the responsibility lies with the KBR.[307]

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[299] LAG Baden-Württemberg 03.06.2019 - 11 TaBV 9/18, juris (para. 92); in detail on the necessary degree of obligation: Schneider, Die arbeitsrechtliche Implementierung von Compliance und Ethikrichtlinien, p. 196 et seq.
[300] Cf. BAG 22.07.2008 - 1 ABR 40/07, NZA 2008, 1248 (para. 42).
[301] BAG 17.05.2011 - 1 ABR 121/09, para. 17; DKW-Wenckebach, § 58, para. 22.
[302] BAG 22.07.2008 - 1 ABR 40/07, NZA 2008, 1248 et seq. (para. 67); Edel/Frank/Heine/Heine, BB 2021, 2890 (2894); Schneider, Die arbeitsrechtliche Implementierung von Compliance und Ethikrichtlinien (2009), p. 183 et seq.
[303] BAG 09.07.1991 – 1 ABR 57/90, DB 92, 143 (144); BAG 02.12.1999 - 2 AZR 724/98, BB 2000, 1092 (1093); DKW-Wankel, § 94, marginal No.3; ErfK-Kania, § 94 BetrVG, marginal No.2.
[304] Baade, DStR 2022, 1617 (1623).
[305] Baade, DStR 2022, 1617 (1623); Edel/Frank/Heine/Heine, BB 2021, 2890 (2895).
[306] BAG 11.12.2018 - 1 ABR 13/17, BB 2019, 1529 m. Comm. Weller (marginal No.36).
[307] BAG 11.12.2018 - 1 ABR 13/17; DKW-Wenckebach, § 58, marginal No.24.

e) Co-determination in the creation and implementation of a complaints procedure according to Section 8 LkSG

Pursuant to Section 8 LkSG, the corporate due diligence obligations include the establishment of a complaints procedure, for which, pursuant to Section 8 para. 2 LkSG, rules of procedure are to be laid down. The subject of complaints in this context are indications of possible human rights and environmental risks or violations. The general rights of complaint under works constitution law (Sections 84, 85 BetrVG) remain unaffected.

(1) Participation of the works council under Section 87 para. 1 No. 1 BetrVG

In addition to external "persons", employees of the company are also entitled to file complaints (Section 8, para. 1, sentence 2 LkSG), and complaints can also be directed against misconduct by employees of the company. Therefore, the works council's right of co-determination under Section 87 para. 1 No. 1 BetrVG has to be respected when setting up and structuring the complaints procedure and the works council must be involved if necessary. However, the organizational behavior subject to co-determination requires a certain degree of binding force. If the employees are completely free to lodge a complaint, this has only a minor effect on the employees' conduct with regard to order, so that Section 87 para. 1 No. 1 BetrVG is not relevant.[308] If no mere appeals are made, but rather generally applicable rules of conduct are set up, the works council must be involved under Section 87 para. 1 No. 1 BetrVG.[309] The BAG has considered the works council's right of co-determination under Section 87 para. 1 No. 1 BetrVG to be relevant if employees are required to report suspected violations of rules of conduct of an ethics guideline to a "telephone hotline" set up for this purpose.[310] Consequently, the setting up of a hotline or an internet-based input mask is also subject to the right of co-determination under Section 87 para. 1 No. 1 BetrVG,[311] according to previous case law at least if it is not completely up to the own employees whether and what kind of violations are to be reported.[312] Since violations of the LkSG threaten reputational damage, it can be assumed that corresponding notifications of impending risks or even legal violations can even be classified as a secondary duty of the employees, so that with the entry into force of the LkSG it can no longer be assumed that reporting is voluntary and the works

[308] Schneider, Die arbeitsrechtliche Implementierung von Compliance- und Ethikrichtlinien, p. 198.
[309] Ibid.
[310] BAG 22.07.2008 - 1 ABR 40/07, NZA 1248
[311] BAG 22.07.2008 - 1 ABR 40/07, NZA 1248 (1255).
[312] Baade, DStR 2022, 1617 (1623); Edel/Frank/Heine/Heine, BB 2021, 2890 (2895).

council must therefore be involved in any case.[313]

(2) Participation of the works council under Section 87 para. 1 No. 6 BetrVG

Irrespective of the degree of the reporting obligation, however, the right of co-determination under Section 87 para. 1 No. 6 BetrVG may be relevant. This regulates the co-determination of the works council in the introduction and use of technical equipment which is objectively suitable for monitoring the behaviour or performance of employees.[314] Technical equipment within the meaning of Section 87 para. 1 No. 6 BetrVG is any optical, mechanical, acoustic or electronic device with which a monitoring process is or can be carried out by collecting or evaluating data.[315] The purpose of this right of co-determination is to protect individual employees against anonymous monitoring devices, the right of personality is therefore protected (Art. 1 para. 1 in conjunction with Art. 2 para. 1 of the Basic Law). The BAG has consistently held that it is sufficient if the device is suitable for monitoring,[316] as for example in the case of the automatic recording of telephone data or charges.[317] The conduct of employees is affected when a complaint is lodged under a complaints system[318] under the LkSG. As the complaints procedure will be predominantly an electronic complaints procedure, e.g. in the form of an online input mask or an e-mail, the establishment of this system is subject to co-determination if the IP addresses of the complainants are stored.[319] This is usually the case with modern communication technology, and the same applies to modern telephone systems. Consequently, the involvement of the works council is also mandatory under Section 87 para. 1 No. 6 BetrVG.[320] Co-determination under Section 87 para. 1 No. 6 BetrVG also applies if the company commissions an external provider to operate the grievance system or participates in a cross-company grievance system operated by a third party under Section 8 para. 1 No. 6 LkSG. If this is the case, it must be ensured through appropriate contractual arrangements with the provider that the works council's right of co-determination is safeguarded.[321]

[313] Sagan, ZIP 2022, 1419 (1422).
[314] BAG 11.12.2018 - 1 ABR 13/17, BB 2019, 1529 m. Comm. Weller.
[315] ErfK-Kania, § 87, marginal No.49; DKW-Klebe, § 87, marginal No.168; Schneider, Die arbeitsrechtliche Implementierung von Compliance- und Ethikrichtlinien, p. 209.
[316] BAG 06.12.1986 - 1 ABR 43/81, NJW 1984, 1476; BAG 27.05.1986, AP Nr. 15 zu § 87 BetrVG 1972, monitoring BAG 09.09.1975 - 1 ABR 20/74, NJW 1976, 261.
[317] BAG 27.05.1986, AP No. 15 to § 87 BetrVG 1972, Supervision.
[318] Schneider, Die arbeitsrechtliche Implementierung von Compliance- und Ethikrichtlinien, p. 212.
[319] Edel/Frank/Heine/Heine, BB 2021, 2890 (2895).
[320] Edel/Frank/Heine/Heine, BB 2021, 2890 (2895); too narrow in this respect: Sagan, ZIP 2022, 1419 (1423).
[321] Edel/Frank/Heine/Heine, BB 2021, 2890 (2895); cf. BAG 30.09.2014 - 1 ABR 106/12, NZA 2015, 314 (on occupational health and safety).

(3) What is covered by the right of co-determination?

If Section 87 para. 1 No. 1 and/or No. 6 BetrVG are relevant, then, based upon the case law of the BAG on the involvement of the works council in setting up a complaints office in accordance with the AGG,[322] there should be no right of co-determination with regard to the location and staffing of the complaints office under the LkSG, but with regard to the structure of the complaints procedure.[323] The context is quite comparable, but the complaints procedure to be established under Section 8 of the LkSG goes beyond the company, as external persons can also be considered as whistleblowers. However, since employees of the company can also report violations, the scope of application of mandatory co-determination is opened, so that the works council must be involved in the development and adoption of the rules of procedure required under Section 8 para. 2 LkSG. As the mandatory co-determination of Section 87 para. 1 No. 1 BetrVG also contains a right of initiative,[324] the works council may also initiate action by the employer according to the known procedure and force the establishment of procedural rules for the complaints procedure via the conciliation board.

According to the opinion expressed here, however, currently only an external complaints system fulfils the requirement of independence stipulated in Section 8, para. 3, sentence 1 of the LkSG,[325] as complaints officers must offer a guarantee of impartiality and must not be subject to instructions from the company. According to the current status, this is not the case with company employees, as they have no special protection against dismissal and no special protection against reprimand (see above p. 47 et seq.).

As long as the legislature does not codify such protection, only an external solution for the grievance procedure is therefore possible. An internal solution would only be conceivable if the central actors and the complaints officer were given protection against reprimands and special protection against dismissal through a collective agreement (see p. 84 et seq.).

If a technical system with an input mask is introduced for the grievance procedure, the works council's right of co-determination already relates to the selection of the software used.[326]

[322] BAG 21.07.2009 - 1 ABR 42/08, NZA 2009, 1049.
[323] Zimmer, AiB 9/22, 21 (23).
[324] DKW-Klebe, § 87 marginal No.60.
[325] IE also: Dutzi/Schneider/Hasenau, DK 11/2021, 454 (458); Sagan, ZIP 2022, 1419 (1420).
[326] DKW-Klebe, § 87 marginal No.171.

(4) Implementation in practice

Since according to Section 8 para. 4 p. 1 LkSG clear and comprehensible information must indicate how to reach the complaints system, this information must be posted on the website in the various national languages. The accessibility required under Section 8 para. 4 sentence 2 LkSG also makes it necessary that complaints can be filed in the respective national languages. In addition to an internet-based system via input mask or e-mail, a telephone complaint option also has to be created. Regulations on this are to be made with the rules of procedure to be created. It should also be specified how the confirmation of receipt required under Section 8 para. 1 sentence 3 LkSG is to be issued and how the discussion of the facts required under Section 8 para. 1 sentence 4 LkSG is to take place. The rules of procedure should also contain regulations on the criteria to be used to clarify the facts of the case and the internal competences of complaints officers. There should also be provisions on how the grievance officer can be recalled. The works council should monitor whether the regulations are being adhered to.

3. Establishment of a new body with equal representation of shareholders and employees[327]

Since both the employee- and employer sides are likely to have a great interest in implementing the LkSG in such a way that the legal obligations are fully met, it makes sense to tackle the task together. For this purpose, a due diligence committee committee with equal representation of the employer and the workers` side could be created by means of a voluntary works agreement according to Section 88 BetrVG or on the basis of a collective agreement concluded between the employer and the relevant trade union. Within this framework, the central questions of the implementation of due diligence in the company or group could be dealt with, prioritisation could be carried out within the framework of the risk analysis, complaints received could be evaluated and preventive and remedial measures could be determined. The draft of the annual report could also be written within this framework, and the committee would also be responsible for the company's website on the fulfilment of due diligence obligations. A contingency plan should also be developed in order to be able to act appropriately and ad hoc in challenging situations. This should include a catalogue of possible remedial measures. If problems are identified in the supply chain, a task force could be convened, which would also have to be composed of equal numbers of members. Depending on the

[327] Many thanks to Christian Weis for his suggestions on this section.

region in which the risk or rights violations originate, it should be possible to appoint employee representatives from trade unions in the country concerned or, if not available, representatives of the sectoral global trade union federation to the task force in addition to the internal representatives. It is also advisable to regulate the extent to which the committee can independently obtain information (if necessary also abroad) on compliance with the LkSG. The due diligence committee periodically passes on its findings to the responsible bodies on both sides. On the employer side, this is the compliance department; on the employee side, the GBR or KBR, EWC and World Works Council (WBR,[328] if available) should be informed. The same applies to the members of both sides in the audit committee of the supervisory board responsible for monitoring risk management, to which the committee with equal representation would submit proposals for prevention and, if necessary, for remedial action. However, the activities of the due diligence committee must not undermine the legally provided participation rights of the works council; in this respect, dovetailing with the committees would be necessary.

The committee with equal representation of both sides would thus be the central body for implementing the obligations of the LkSG. It would be chaired by the Human Rights Officer, who is responsible for the operational implementation of the due diligence obligations in the company. In order to do justice to this responsibility, the chairperson should have double voting rights in decisions, and the procedure could correspond to that of the conciliation board. It would also be possible to integrate the complaints system to be set up into the work of the committee and to run online complaints via the website to be maintained by the body. In this case, a collective agreement is recommended as a basis for the work of the committee, as it could include protection against reprimand and dismissal for the complaints officer, and the same applies to the human rights officer. Such protection would ensure the necessary independence and allow for an internal solution within the company.

4. Participation of the European Works Council

European Works Councils (EWCs) are created under Section 1 para. 1 of the EWC Act (Europäisches Betriebsrategesetz, EBRG) "to strengthen the right to cross-border information and consultation". They are to be informed and consulted in cross-border matters if companies (or groups of companies) operating in the EU

[328] This is a worldwide body of employee representatives that is modelled on the EWC and is agreed with the employer on a voluntary basis. Sometimes other terminology is used, such as World Employee Forum or World Works Council.

as a whole or at least companies/enterprises from two countries are affected, Section 1 para. 2 EBRG.[329] As a cross-border body, the EWC plays an important role in the transnational aspects of the due diligence obligations standardised in the LkSG. It is true that in the course of creating the LkSG, the legislator did not expand the catalogue of topics from Section 29, subSection 2 EBRG, about which the EWC must be informed in any case by central management. In contrast to the economic committee, information on "issues of corporate due diligence in supply chains pursuant to the LkSG" was not included in the catalogue of topics, but this catalogue is not exhaustive.[330] Pursuant to Section 29 para. 1 EBRG, the duty of central management to inform and consult the EWC relates to perspectives of the company operating throughout the European Union, which can also include questions of corporate due diligence obligations pursuant to the LkSG. In this respect, the EWC is comparable to the economic committee,[331] unlike the latter, however, it is not an auxiliary body of the works council, but an independent, cross-border representative body.

Central management or group management must inform the EWC in accordance with Section 29 para. 1 EBRG at least once per calendar year about the issues relevant according to the EBRG (or the EWC establishment agreement), "submitting the necessary documents in good time". If the information is provided after the management-decision has already been taken in the relevant company body, the information is provided too late.[332] This shall be carried out in accordance with the requirements of the EWC Directive 2009/38/EC "on the basis of a report submitted by central management", Annex I (Subsidiary Requirements), No. 2 p. 1. Consequently, for companies with registered office in Germany to which the EBRG applies, the report to be submitted to the EWC from 01.01.2023 onwards must include information on the fulfilment of due diligence obligations according to the LkSG with regard to Europe-wide value chains. After the documents have been reviewed by the EWC, a consultation with the employer shall follow.

Due to the cross-border reference, the documents to be submitted include the declaration of principles according to Section 6 para. 2 LkSG, the same applies to the human rights strategy of the own business division. Since the internal and external rules of conduct for risk management in a company operating on a Europe-wide basis will also have Europe-wide components, they must also be submitted to the

[329] Cf. in depth: BHKC-Blanke/Kunz, Einleitung-EBRG, marginal No. 2 et seq.
[330] BHKC-Blanke/Hayen, § 29 EBRG, margin no. 9; 13; DKW-Bachner/Deinert, § 29 EBRG marginal No.4.
[331] DKW-Bachner/Deinert, § 29 EBRG marginal No.4.
[332] BHKC-Blanke/Hayen, § 29 EBRG marginal No.10.

EWC; the same applies to the criteria to be defined for the risk analysis; these must also be submitted to the EWC already in the planning phase. The EWC can also formulate proposals to supplement the criteria of the risk analysis, and the same applies to remedial measures in the event of imminent risks or identified violations. The information can be forwarded to the central management within the framework of the consultation; in addition, it is recommended that they be forwarded to the German co-determination actors.

Since complaints can also be submitted from other European countries, the EWC is also entitled to information on details of the planned complaints procedure, whereby the co-determination rights of the German works council must be observed. After the installation of the risk management system, the EWC shall also be informed about the results of the risk analysis according to Section 5 LkSG, about the preventive measures (Section 6 LkSG) or remedial measures taken (Section 7 LkSG) as well as the complaints received from European countries. In addition, the EWC shall be entitled to inspect the internal documentation in accordance with Section 10 subSection 1 LkSG.

European works councils from companies with headquarters in Germany are already in communication with the German co-determination actors GBR or KBR, in some cases also with the economic committee,[333] especially as there is usually an overlap in personnel. This communication should be extended to include the issue of corporate due diligence. If a due diligence committee is set up in the company (group), one of the German EWC delegates should also have a seat on the committee.

It is true that neither the EWC Directive nor national transposition laws explicitly assign European works councils the competence to conclude EWC agreements on various topics with central management. It is therefore disputed whether EWCs are legally authorised to conclude agreements with central management beyond the conclusion of their founding agreements.[334] Due to the negotiation-oriented conception of the EWC Directive, there are good reasons for deriving a negotiating and concluding competence of European works councils from the EWC Directive, at least within a framework that does not collide with collective bargaining autonomy and does not impair the rights of trade unions. At least for agreements that deal with projects or competences of the EWC and do not conflict with the rights of national trade unions, a competence of European works councils to conclude

[333] Zimmer, AiB 4/2005, 207 et seq.
[334] On the debate see: Zimmer, EYIEL 2019, 167 (176 et seq.).

agreements can be affirmed according to this view.[335] Beyond the question of a legal bases, a diverse practice has developed and EWCs have concluded numerous agreements on various topics.[336] Such "participation-oriented" EWCs, which have developed an intensive consultation practice with central management and are perceived by management as negotiating partners,[337] could also seek to conclude a due diligence agreement with central management. In order to avoid conflicts with the European trade union confederations, it is advisable that EWCs only become active with a mandate from the European confederations; an additional mandate from German trade unions can also serve to avoid collisions with national actors.[338]

5. Involvement of the World Works Council

In view of the increasing internationalisation of the economy, some large corporations some time ago began to create employee participation bodies with a worldwide scope of competence, usually through a corresponding extension of the EWC. In the absence of corresponding legal provisions, the establishment of world works councils as an international body of company-related social dialogue is based either upon agreement with or on the basis of a corresponding decision by the employer.[339] The first world works council was created in the Danone group, where a "World Group Works Committee" was set up as early as 1981, although it ultimately only established itself as an extension of the EWC with limited rights.[340] The German car manufacturer VW followed in 1986 with the establishment of a Eworld works council, based upon an agreement with management. In addition to the members of the EWC and the German KBR, employee representatives from the sites in South Africa, the USA and Asia are also represented in this body,[341] other companies followed.[342] At the French telecommunications company Orange,

[335] Zimmer, EuZA 4/2013, 459 (463, 466 et seq.) with further references.
[336] Zimmer, EuZA 4/2013, 459 (461 et seq.); Zimmer (2013b), p. 133 (140 et seq.); cf. also the listing of all transnational agreements on the website of the EU Commission, which, however, also receives agreements with global scope in addition to European ones: https://ec.europa.eu/social/main.jsp?catId=978 (5.10.2023).
[337] Zimmer, EuZA 4/2013, 459 (462); Zimmer (2013b), 133 (140 et seq.).
[338] As early as 1996, the predecessor of IndustriAll Europe (the European Metalworkers' Federation, EMF) adopted binding guidelines on the procedure relating to the conclusion of European agreements by EWCs, and in 2006 the EMF drew up a mandating procedure for the negotiation of European company agreements, which was later adopted by the other sectoral federations.
[339] Rüb, World Works Councils and Other Forms of Worldwide Employee Representation Structures in Transnational Corporations, 2000, p. 9 ff; Eurofound, Global Works Councils, online: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/global-works-council (03.10.2023).
[340] Rüb, Weltbetriebsräte und andere Formen weltweiter Arbeitnehmervertretungsstrukturen in transnationalen Konzernen, 2000, p. 16.
[341] Cf. Roch (2009), Der Weltkonzernbetriebsrat von Volkswagen.
[342] See list in Rüb: Weltbetriebsräte und andere Formen weltweiter Arbeitnehmervertretungsstrukturen in transnationalen Konzernen, 2000, p. 22.

a world works council was set up in 2010, also based on an agreement with management. This body is responsible for all sites worldwide that have more than 400 employees.[343] The Belgian chemical group Solvay also set up a world wide body, called Global Forum, which includes four EWC members and four trade unionists from Brazil, China, South Korea and the USA.[344] At the Swedish SKF Group, a global trade union body has been set up in the form of the World Union Council, which meets regularly for consultations with management.[345] A global network of workers' representatives can also be found at several other companies without a world works council having been set up, for example at Nestlé.[346] In some companies no new body was set up, but non-European delegates were included in the EWC, e.g. at Renault.[347]

With regard to the implementation of the LkSG, it is advisable to participate in the in-depth risk assessment according to Section 5 LkSG; the committee should also be informed about the results and be given access to the internal documentation. The same applies to the preventive measures taken (Section 6 LkSG) or remedial measures (Section 7 LkSG) as well as the complaints received (Section 8 LkSG). As some bodies correspond to an extended EWC, reference is made to the above explanations on EWC participation. In the case of the globally operating worker representative bodies, there is also usually a strong involvement of the global trade union confederations, so that reference can be made to the corresponding explanations (see under F. II.).

IV. Conclusion on the possibilities for action of the co-determination actors

It remains to be summarized, that the implementation of the LkSG is certainly an issue for works councils and employee members of the supervisory board, even though the legislator has hardly explicitly stipulated this. Works councils can use this current issue to position themselves and try to expand their scope of action. On the employer side, not least because of the high possible penalties, there is likely to be a great interest in implementing the obligations of the LkSG in accordance with the law, which opens up options for consensual solutions by the social

[343] Eurofound, Global Works Councils, online: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/global-works-council (03.10.2023).
[344] In 2017, a formal basis for the body was laid by agreement, see Eurofound, Global Works Councils, online: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/global-works-council (03.10.2023).
[345] Https://www.industriall-union.org/skf-world-union-council-meets-with-top-management (03.10.2023).
[346] Rüb, Weltbetriebsräte und andere Formen weltweiter Arbeitnehmervertretungsstrukturen in transnationalen Konzernen, 2000, p. 14 et seq.
[347] Eurofound, Global Works Councils, online: https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/global-works-council (03.10.2023).

partners. If it turns out that the employer does not comply with his obligations, the only option in view of the limited legal enforcement options is to inform the Federal Office of Economics and Export Control (see above under C., p. 51 et seq.) or to go public. Trade unions and NGOs are available as allies for this.

F. Role of the trade unions

Trade unions can engage in a variety of ways as actors to enforce companies' due diligence obligations and to ensure minimum social standards along the value chain.

I. Trade Unions in Germany

In addition to or in cooperation with other civil society actors such as NGOs, trade unions in particular have also played an important role in achieving the introduction of a Supply Chain Duty of Care Act.[348] However, the legislator did not explicitly assign a role to trade unions in Germany with the LkSG. Although the explanatory memorandum refers in various places to consultations with workers' representatives as a possible option, this is not specified in more detail.[349]

Only Section 11 para. 1 LkSG refers directly to trade unions. Alongside NGOs, trade unions play a special role in the enforcement of rights. Trade unions can be authorised by effected persons to take legal action in Germany, which could be particularly important for persons from abroad, as they have neither the knowledge nor the financial means to take legal action in Germany against a German company if fundamental labour rights are violated. Section 11 para. 1 LkSG standardises the power to bring legal action in one's own name by virtue of statutory authorisation, which relates to "paramount legal position from Section 2 para. 1 LkSG", so that only the violation of human rights can be asserted; no special authority to bring legal action is provided for environmental rights violations.[350]

A prerequisite for the exercise of legal personality is the effective authorisation by the aggrieved person.[351] The trade union or NGO to be mandated must also "maintain a permanent presence of its own" and, in accordance with its statutes, "work on a non-commercial and not merely temporary basis" to "realise human rights or corresponding rights in national law (...)". The trade union bringing the action is then a party to the legal dispute as a litigant, the aggrieved person is considered a third party in the legal proceedings and can be a witness if necessary.[352] Without such a legal provision, only voluntary litigation would be possible, in which the

[348] See: https://www.dgb.de/lieferkettengesetz; https://www.dgb.de/presse/++co++3934c244-bfa2-11eb-9793-001a4a160123; https://lieferkettengesetz.de (24.09.2023).
[349] Cf. inter alia BT-Drs. 19/28649, 44.
[350] Grabosch-Engel, § 7 Rn 4.
[351] BT-Drs. 19/28649, p. 51.
[352] Musielak/Voigt, § 51 ZPO marginal No.24.

power to bring a case in one's own name is transferred by virtue of a legal transaction, whereby the authorised party must prove that it has a legitimate interest in bringing the case in its own name,[353] which would not be the case if the labour rights of a Bangladeshi worker were violated and IG-Metall, for example, was commissioned to bring the case. This prerequisite does not apply under Section 11 of the LkSG, as the litigant's own interest in conducting the case, which is worthy of protection, is now enshrined in law[354] (for more details, see p. 54 above). It remains to be seen whether a trade union, which is primarily defined by its own members and legitimised by them, would want to take on such litigation on behalf of a non-member and would certainly only do so in individual cases if the litigation were of particular strategic interest.[355]

However, even without an explicit legal mandate, trade unions can get involved in the implementation of the LkSG at other points. On the one hand, through their company supporters, they play an important role in supporting the co-determination actors in the company in carrying out their tasks to enforce the LkSG. In the context of the social dialogue, trade unions can also urge that the supply chain actually be disclosed and that the report on the fulfilment of due diligence obligations, which is to be published on the website according to Section 10 para. 2 LkSG, actually is published online or be written in a meaningful way (see above, p. 49). Trade unions, or their full-time employees, can also use the complaints mechanism of the LkSG to point out existing risks or violations of the law (on the complaints mechanism, see above, p. 44 et seq.).

If a company does not comply with its due diligence obligations, it is also possible to raise a scandal in cooperation with other actors. A large number of NGOs are involved in the implementation of due diligence along the value chains, with which the DGB has so far primarily cooperated on the trade union side.[356] These are also potential alliance partners for the individual trade unions. Trade unions also have the possibility to inform the Federal Office of Economics and Export Control as the competent authority about the non-compliance of individual companies with their obligations under the LkSG (see under C., p. 51 et seq.).

Above all, however, the implementation of all measures to fulfil the entrepreneurial due diligence obligations can also be regulated by collective agreement. According

[353] Musielak/Voigt, § 51 ZPO marginal No.27.
[354] Grabosch-Engel, § 7 marginal No.3; Wagner, ZIP 2021, 1095 (1101).
[355] The union would be liable for due process, much like a lawyer who is appointed as counsel.
[356] For example, in addition to the DGB, only the IGM is active in the textile alliance, cf. https://www.textilbuendnis.com/uebersicht/#formanchor (30.09.2023).

to the opinion represented here, collective agreements that affect business decisions are also covered by the collective bargaining autonomy standardised in Article 9 para. 3 of the Basic Law.[357] For example, the voluntary establishment of a due diligence committee can be covered by collective agreements. It is also possible to collectively bargain individual components, e.g. grievance mechanisms, which is particularly appropriate for inter-company grievance systems. If an internal complaints system is to be set up, it would be possible, for example, to agree on protection against reprimand and dismissal for the complaints officer in an in-house collective agreement. Such protection would ensure the necessary independence and make it possible to find a solution within the company. However, grievance systems or other due diligence measures can also be agreed upon in a global collective agreement, i.e. an international framework agreement (IFA), as examples below will show. This is often done with the participation of the trade union from the country of the company's headquarters.

II. Global Union Federations

As the negative effects of globalisation became more apparent at the end of the 1980s, the Global Union Federations (GUFs) began to reach global agreements with transnational companies to secure minimum social standards. The aim of these agreements is to defend labour rights in an internationalised economy and to counterbalance the power of transnational corporations. The agreements set a framework for industrial relations in the individual countries and are therefore referred to as International Framework Agreements (IFAs). Some of the agreed IFAs already contain provisions on similar elements to those established by the German legislator for the implementation of corporate due diligence along value chains. These instruments can therefore complement corporate measures to implement the obligations of the LkSG.

1. International framework agreements as instruments for securing social standards

In the meantime, more than 180 international framework agreements from all sectors can be identified,[358] most of them were concluded with companies or groups from the metal and electrical industry (including automotive) by the global federation IndustriALL. The global union federations thus have decades of practice in

[357] Comprehensive: Däubler, Tarifverträge zur Unternehmenspolitik? Rechtliche Zulässigkeit und faktische Bedeutung (2016), p. 26 et seq.
[358] Own listing. The agreements are usually available on the website of the respective GUF.

securing central internationally recognised human and labour rights along the value chain,[359] which corresponds to the guiding motivation of the German legislator, even if the conclusion of IFAs implements own interests of the actors and collective law elements. Thus, in contrast to unilateral CSR instruments, international framework agreements come about through negotiation.[360] By concluding such an agreement, the GUF is accepted as a negotiating partner and therefore a long-term relationship is created between the trade union and the transnational company at global level.[361] The negotiation of the agreements is led at least by the responsible GUF, which also signs the IFA, often involving trade unions from the country of the headquarters, in Germany sometimes also the KBR. Rights are agreed that are essentially based on ILO standards, and the agreements also contain a mechanism for monitoring implementation.[362] The principles laid down in an initial framework agreement often are revised in a later agreement and not infrequently new issues are included, so that the framework expands over time.[363] The content of the agreements has therefore changed with the time.

In the initial phase, the agreements usually applied only to the group's own sites, but later IFAs usually contain a subcontracting clause,[364] which at least includes all direct contract partners in the scope of application. However, the subcontracting clauses are not always binding; often they merely contain the obligation to "inform" contract partners about the IFA or to "encourage" them to comply with it. Examples of such language can be found in the IFAs with BMW, Carrefour,[365] Euradius, GEA, Röchling, IKEA,[366] Leoni, Lukoil, Norske Skogindustrier, Rheinmetall, Telefónica, SCA, Skanska, Statoil, Umicore and VW.[367] In some very early agreements, the issue of labour rights violations along the supply chain is not even addressed, for example in the agreements with AngloGold, Arcelor, Bosch, Danone, Endesa, Eni, Faber-Castell, Fonterra,[368] H&M, Lafarge, NAG, Prym, RAG, SKF and WAZ. However, debates on the need to secure social standards along the entire value chain

[359] Cf. Stiftung Arbeit und Umwelt der IG BCE (2019), Verantwortung in Liefer- und Wertschöpfungsketten: Globale Rahmenvereinbarungen, p. 16 et seq.
[360] Krause, CLLPJ 2012, 749 (750).
[361] Drouin (2015), p. 222; Miller 2004, 216; Thomas, LSJ 2/2011, 269 (274); Zimmer, FoA-Protocol (2020), p. 12.
[362] Zimmer, § 8 (International Framework Agreements), in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 2019, marginal No.1.
[363] Zimmer, From International Framework Agreements towards transnational Collective Bargaining? EYIEL 2019, 167 (169).
[364] Zimmer, § 8 (International Framework Agreements), in: Schlachter/Heuschmid/Ulber, Arbeitsvölkerrecht, 2019, marginal No.2.
[365] In the IFA between UNI and Carrefour, it is already stated that an application to suppliers (at least) is intended.
[366] IKEA suppliers are to be "influenced" and "supported" to comply with the principles set out in the Code of Conduct, to which the IFA refers.
[367] Zimmer, FoA Protocol (2020), p. 15.
[368] Joint venture partners must be informed.

have also been intensified by GUFs over the years, so that more recent agreements have increasingly succeeded in including the supply chain in a binding way. A good example is the IFA revised in 2019 between IndustriAll Global Union and Renault, which supplements the 2013 agreement on origin. Here, compliance with the contents of the agreement is a prerequisite for contractual relations; the same applies to the IFA extended in 2021 with Daimler or the one agreed with TK Elevator in 2022. However, subcontractors are not yet very often included in the scope of the agreements, positive examples being the IFAs between IndustriALL and Tchibo or between UNI Global Union and ABN AMRO. In the IFA renewed by IndustriALL with ENI in 2019, compliance with the provisions of the IFA will become a contractual element of the supplier agreements, which in turn will have to assure that the standards are also met by subcontractors, similar to the IFA with the PSA Group, which was revised in 2017.

2. Implementation mechanisms of international framework agreements[369]

As already elaborated on the LkSG, regulations on implementation and monitoring are of central importance for the effectiveness of a system, and this also applies to international framework agreements. An important factor for implementation is that workers worldwide are informed about the content of the agreement. Most IFAs therefore provide for the provisions of the agreement to be translated into national languages and for workers to be informed about them. As the study on the implementation of a specific agreement in Indonesia (the Freedom of Association Protocol) shows, effectiveness can be significantly increased if, for example, training measures are provided,[370] as also recommended in IndustriAll's Guidelines for the Conclusion of Global Agreements. In some recent agreements, such training and educational measures for local trade unions and HR departments are already provided for,[371] as for example in the IFAs with BESIX (2017), Esprit (2018), Renault (2019), Lukoil (2018) or UniCredit (2019).

The signatory parties usually meet periodically or as needed to exchange information on the implementation of the IFA. Often a joint forum is responsible for implementation, in which representatives of management and GUFs meet annually, sometimes with the participation of trade unionists from the country where the

[369] Parts of this section are based on Zimmer, FoA-Protocol (2020), pp. 16-20, supplemented with more up-to-date information.
[370] Zimmer, FoA Protocol (2021), p. 17.
[371] Hadwiger 2017, p. 409 ff; Stiftung Arbeit und Umwelt der IG BCE (2019), Verantwortung in Liefer- und Wertschöpfungsketten: Globale Rahmenvereinbarungen, p. 18 f.

company/group is headquartered,[372] as for example agreed in the IFAs with ABN AMRO, Aker, Ballast Nedam, BESIX, Chiquita, Daimler, EDF, Endesa, Eni, Fonterra, Freudenberg, Impregilo, Norske Skogindustrier, Lukoil, OTE, Portugal Telecom, RAG, Renault, SCA, Schwan-Stabilo, Siemens, Solvay, Statoil, Staedtler, Telefónica, ThyssenKrupp, TK Elevator, Veidecke and others. In some IFAs even two meetings per year were agreed (Chiquita, Endesa, Esprit, France Telecom, IKEA and Unilever).

In some cases, the participation of delegates from the EWC or the KBR or GBR from the country of the headquarters is also provided for,[373] as agreed in the IFAs with Air France, Aker, BESIX, BNP Paribas, Euradius, SCA, Siemens, Skanska, Staedtler, Triumph International, ThyssenKrupp, TK Elevator or Umicore, to name but a few. Trade union delegates from the producing countries of the Global South are hardly represented at these meetings, only a few IFAs provide for this (ArcelorMittal, Nampak and Waz). At Euradius, Staedler and SCA, delegates from the producing countries do not have a regular place, but there is the possibility of participation on request.

Some agreements also provide for trade union representatives from the main geographical areas to attend the monitoring group meeting, such as the case in the IFA with BNP Paribas, similarly the new agreements with Renault (2019) and Solvay (2022). Sometimes the EWC or World Works Council meeting is also used for monitoring the agreement,[374] as agreed in the IFAs with Air France, Bosch, BMW, GEA, Röchling, Leoni, Merloni, Peugeot-Citroën, Prym, Rheinmetall and Securitas, to name but a few. At BESIX, the EWC meeting is used in addition to the monitoring group meeting. This is not without problems, as EWC members only have a mandate for Europe and are not necessarily informed in depth about the problems in other regions of the world. Recent IFAs often contain detailed provisions on how to prepare and conduct the meeting of the monitoring committee, such as those agreed in the IFAs of UNI Global Union with ABR AMRO and BNP Paribas. The IFA agreed between IndustriAll and Solvay for example, provides for an assessment document with agreed indicators to be presented at the annual review by Solvay.

A few IFAs codify that breaches of the agreement are reported to the executive board or senior management, e.g. Hochtief, Veidecke, Bosch and EADS, to name

[372] Hammer 2008, pp. 89 and 102; Zimmer IOLR 2020, 178 (187).
[373] Or from their respective equivalents in other countries.
[374] Welz (2011), A qualitative Analysis of International Framework Agreements: Implementation and Impact, p. 39 et seq.; Zimmer IOLR 2020, 178 (187).

just a few agreements. Monitoring can also be part of the company's internal compliance mechanisms (IKEA) or the company's own audit unit (Daimler, Leoni and Staedler). In contrast to the monitoring of unilateral codes of conduct, audits by external parties, such as commercial auditors, are rarely foreseen.[375] In this respect, the case of Umicore is an exception, where external auditors present their report on compliance with the agreement at the annual meeting of the monitoring committee.[376] At Daimler, too, external actors are now to be involved in monitoring, the implementation of the IFA with Renault is also to be carried out "with the participation of local experts".[377] However, this is still an exception, as the Global Unions concept is based on the fundamental idea that workers organise themselves in GUF-affiliated unions and that complaints about violations of the IFA reach the body responsible for monitoring through this direct channel. Newer concepts of "worker-centred" or "worker-driven" monitoring have a similar starting point, where workers themselves play a central role in the monitoring process, which should lead to necessary changes in the labour process.[378]

In some cases, site visits by the monitoring committee are also planned; for example, at the construction company BESIX, one construction site is inspected annually. At Solvay, inspections were agreed in the 2022 agreement to identify health and safety problems on site, similarly at TK Elevator. However, it is widely known that announced inspections can conceal grievances and workers have often been so intimidated that they do not dare to report grievances in the workplace, i.e. in a way that is comprehensible to supervisors.[379] To ensure effective implementation of the IFA, ASOS discloses the locations of its suppliers and all subsidiaries to IndustriAll twice a year.[380]

In many cases, grievance mechanisms have been established which vary in terms of how the grievance can be filed and is handled, and the decision-making processes may also vary. Differences also exist with regard to the evaluation of the chosen mechanism. Complaints can be filed via internal mechanisms such as drop boxes, e-mail, hotlines or by informing superiors, complaint officers and the HR de-

[375] Zimmer, IOLR 2020, 178 (188); on problems with auditing: Outwaite/Martín-Ortega, Competition & Change 2019, 378 (381 f.).
[376] Art 5.4 of the 2014 IFA agreed between IndustriAll and Umicore.
[377] Art. 6.2 of the 2019 IFA agreed between IndustriAll and Renault.
[378] Outwaite/Martín-Ortega, Competition & Change 2019, 378 (386 f.).
[379] Zimmer, Soziale Mindeststandards (2008), p. 209 et seq.; cf. on problems with auditing: Mock/Turner 2005, IJA, 55 (62 et seq.); Terwindt/Saage-Maaß (2016), Liability of Social Auditors in the Textile Industry, p. 4 et seq.
[380] Stiftung Arbeit und Umwelt der IG BCE (2019), Responsibility in supply and value chains: Global framework agreements, p. 33.

partment. In some cases, external mechanisms are also provided for, such as external mail addresses, hotlines or websites.[381] In some cases, specific contact persons are named who can be contacted by business partners and customers, but also by employees, as is the case at Chiquita, Daimler, Hochtief, Nampak and Quebecor. These are mostly internal contact persons, but the complaints model would also be conceivable with external staffing, as envisaged with ThyssenKrupp or TK Elevator. In some cases, however, it is merely agreed that a grievance mechanism is to be established, although it remains open how this is to be structured, for example in the IFA with Esprit.

In practice, small details in the design can often make a significant difference. For example, workers from the global South will not dial a hotline in an industrialised country if it is not free of charge, and it must also be possible to report a violation in their own language. An exemplary grievance system has been agreed and set up for Thyssen-Krupp workers worldwide, who can file a grievance through a website, by email or through the local union, anonymously if they wish. An international committee with equal representation from employers and trade unions monitors the process and examines each individual complaint. Already in the first year after it came into force,[382] 17 cases from 10 countries have been documented. The agreement renewed in 2021 between Daimler and IndustriAll also contains notable provisions on a whistleblower system. Complaints can be filed either through this system or through Daimler's global employee representation. The grievance system can be reached in various languages by post, email or reporting form via the internet, and in some countries[383] via external toll-free hotlines.[384] In Germany, whistleblowers who wish to remain anonymous can also contact an independent lawyer who acts as a neutral mediator. Such solution-oriented strategies are more proactive in their design[385] and can usefully complement mechanisms that derived from traditional monitoring.[386]

Most agreements do not include a dispute resolution mechanism. A 2017 survey identifies only 10 per cent of all IFAs as having a dispute resolution mechanism that provides for either mediation or arbitration.[387] Only very few IFAs provide for such an arbitration board jointly designed by the parties or a conciliation mechanism with binding decisions. Such provisions can be found in the IFAs between BWI and

[381] Zagelmeyer/Bianchi 2018, p. 23 f. and 34 f.
[382] The IFA was signed by IndustriAll and Thyssen-Krupp in 2015.
[383] These are Brazil, Japan, South Africa and the USA.
[384] Https://group.mercedes-benz.com/unternehmen/compliance/bpo/?r=dai (31.10.2023)
[385] Ter Haar/Keune 2014, p. 14.
[386] Ter Haar/Keune 2014, p. 20.
[387] Hadwiger 2017, p. 409.

Skanska (2001), UNI and ABN AMRO (2015) and BNP Paribas (2018) or UniCredit (2019), as well as in IndustriAll's agreements with Aker (2012), Esprit (2018) and Solvay (2022). In the case of the latter, it was agreed that in the event of a dispute, a neutral "arbitrator" from the ILO would be called in and that the workers would submit to his or her decision. A prime example of such a dispute resolution mechanism is the Bangladesh Accord, now the International Accord, (2013/ 2018/ 2021) agreed by IndustriAll and UNI with over 180 companies. In the event of a dispute, this mechanism provides for the first instance to be referred to the Steering Committee, which is chaired by a neutral representative of the ILO. If the dispute cannot be resolved at this level within 21 days, the next step is to refer the dispute to arbitration, which operates under the UNCITRAL Rules of International Commercial Arbitration and whose award is enforceable in the country of the signatory company's headquarters, in accordance with the New York Convention.[388] The arbitral tribunal will be established at the request of the signatory company.[389] In December 2022, with the conclusion of the 'Pakistan Accord on Health & Safety in the Textile & Garment Industry' ('Pakistan Accord'), the International Accord had also been agreed for Pakistan.[390] These examples have visibly inspired the parties to other IFAs, and the number of agreements with a binding dispute settlement mechanism has increased in recent years.

A study of the implementation of an agreement to protect trade union rights in Indonesia shows that the effectiveness of an IFA increases significantly when training is included, as recommended in IndustriAll's Guidelines for Global Agreements.[391] In some recent agreements, such training and educational measures for local trade unions and human resources departments are already provided for,[392] as for example in the IFAs with BESIX (2017), Esprit (2018), Lukoil (2018) or UniCredit (2019).

3. International framework agreements as instruments for implementing obligations of the LkSG

International framework agreements can be important building blocks for the implementation of due diligence obligations under the LkSG. However, the obligations are not automatically fulfilled with the conclusion of an IFA; the agreement

[388] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, for more information: https://www.newyorkconvention.org/ (20.9.2023).
[389] Zimmer (2016), Bangladesh Accord, p. 5
[390] Https://internationalaccord.org/countries/pakistan/ (6.10.2023).
[391] Zimmer (2020), FoA Protocol, pp. 17, 50.
[392] Hadwiger 2017, p. 409; Zimmer 2019, p. 252.

must also cover the content of the legal obligations and will in any case only have a supplementary function to the corporate risk management measures. If there are active trade unions in the countries of the global South, violations of the IFA are passed on through trade union channels and reported to the responsible monitoring committee (at the latest) at the annual meeting. In this respect, the mechanism agreed in the IFA can strengthen risk management. However, it will be more effective if it is not necessary to wait for the annual meeting and if violations are reported directly, e.g. through a grievance mechanism, so that corrective measures can be taken in a timely manner. The best practice examples mentioned fulfil the legal requirements to a large extent, especially if an external neutral body is involved, as is the case at Daimler, for example.

Most of the corporate due diligence obligations under the LkSG only apply to the company's own business and to direct suppliers. However, according to Section 9 para. 3 LkSG, this changes in the case of concrete indications of imminent risks or legal violations at indirect suppliers; furthermore, the complaints system must also record information about problems at indirect suppliers. In order to be considered as an instrument for implementing LkSG obligations, IFAs would therefore have to extend their scope of application to the entire value chain. However, due to the need to comply with the legal provisions of the LkSG, it can be assumed that companies or groups based in Germany are open to adapting an existing agreement accordingly or to concluding a corresponding agreement for the first time.

It should also be noted that the standards contained in the IFA (which must correspond to those of the LkSG) must already be taken into account in the selection of the contractual partner (Section 6 para. 4 No. 1 LkSG), which is only addressed in a few agreements. Compliance with these standards must also be included in the procurement or service contracts (Section 6 para. 4 No. 2 LkSG), which must be provided with corresponding appropriate contractual control mechanisms (Section 6 para. 4 No. 4 lkSG), which - with a few exceptions - has not yet been the case for the most part. In addition, Section 6 para. 4 No. 3 LkSG obliges the staff of direct suppliers to be trained and further educated. In some sectors, this is already practised by some companies, but has only been agreed in a few IFAs so far.

In particular, the parameters for the complaints system to be created can also be defined in IFAs, as the practical examples cited show. However, since cross-company grievance systems are more effective, it would be advisable to conclude special agreements for one country at a time, which a large number of companies could join. The Bangladesh Accord could serve as a model for this. The complaints

system must also be effective and accessible and fulfil the other requirements of Section 8 of the LkSG (see p. 44 et seq.). However, a system is only accessible within the meaning of Section 8 para. 4 sentence 2 LkSG if the complaint can be lodged in the language of the country, and the system should not rely exclusively on electronic complaints, but should also provide a hotline.

The legislator has provided for consultations with workers' representatives at various points. These can also take the form of a social dialogue between Global Union Federations and management under the mechanism agreed in an IFA.

III. Trade Unions in the Global South (and East)

The legislator makes various references to consultations with legitimate interest groups of those actors directly affected.[393] However, German domestic trade unions and workers' representatives have no mandate for workers abroad and therefore cannot represent their interests.[394] Since - unlike in Germany - worldwide it is predominantly not works councils but trade unions that represent the interests of workers according to the respective legal system, consultations with trade unions from the corresponding countries of the Global South are recommended, which can be done with the involvement of the global trade union federations. It is also possible to agree on an appropriate consultation mechanism in an IFA. In any case, trade unionists from the Global South (and East) should be included as respondents in the in-depth risk assessment according to Section 5 LkSG.[395]

[393] BT-Drs. 19/28649, 44.
[394] Sagan/Schmidt, NZA-RR 6/2022, 281 (287).
[395] Lorenzen, WSI-Mitteilungen 1/2021, 66 (68).

G. Summary and conclusion

With the LkSG, the legislator has standardised an important first set screw for securing minimum social standards along the value chains, even if the design has fallen short of expectations and there will be important changes in the next few years with the introduction of an EU directive on due diligence. Co-determination actors and trade unions can play an important role in the implementation of this law, but a prerequisite for active participation is transparency, both about the supply chains and about corporate measures under the LkSG. The possibilities for participation of co-determination actors and trade unions can be summarised as follows:

The monitoring of risk management and compliance measures is one of the duties of the **supervisory board;** with the entry into force of the LkSG, it must also monitor compliance with the duties of the new law. Since company violations of the obligations of the LkSG can be punished with severe fines, the importance of the supervisory board's monitoring increases with the entry into force of the LkSG. Interested employee representatives could be elected to the audit committee responsible for monitoring risk management. As key decision-makers, members of the supervisory board must be informed about the results of the risk analysis according to the LkSG, and they also have to be provided with the policy statement according to Section 6 para. 2 LkSG. They also have to be given access to the internal documentation according to Section 10 para. 1 LkSG. The same applies with regard to the human rights strategy for their own business unit. If possible, an attempt should be made to influence the criteria of the risk analysis as well as the other documents to be created. Since the introduction of some instruments is subject to the mandatory co-determination of the works council, it is advisable to interlock with the responsible works council committee. In order to facilitate the work of the economic committee, it is also advisable to dovetail with the committee.

Pursuant to Section 106, subSection 2, No. 5b of the BetrVG, "questions of entrepreneurial due diligence in supply chains pursuant to the Supply Chain Due Diligence Act" are, as of 1 January 2023, among the economic matters on which the entrepreneur must inform the **economic committee** in a timely and comprehensive manner. The economic committee is entitled to receive the draft of the policy statement according to Section 6 para. 2 LkSG. The same applies to the human rights strategy of the own business unit and to the internal and external rules of conduct to be developed in the areas relevant to risk management. Since these

are partially subject to co-determination by the works council, dovetailing with the GBR/KBR is important. Information on the criteria to be defined for the risk analysis must also be provided to the economic committee already in the planning phase. The committee must also be informed who in the company is to be responsible for the risk analysis and who is to be appointed as the human rights representative. The business committee shall be informed about the results of the risk analysis according to Section 5 LkSG, the preventive (Section 6 LkSG) or remedial measures taken (Section 7 LkSG) as well as the complaints received (Section 8 LkSG); it shall also be entitled to inspect the internal documentation according to Section 10 para. 1 LkSG as well as the report on the fulfilment of the due diligence obligations of the enterprise to be prepared annually according to Section 10 para. 2 LkSG.

The **works council,** as the representative of the employees, also has to be involved in the implementation of the LkSG. For measures that are implemented company-wide, such as the risk analysis related to the company, the works council is responsible according to Section 50, paragraph 1 BetrVG. In the case of group-wide measures, such as the introduction of ethics guidelines and complaints management in accordance with Section 8 LkSG, the KBR is the competent body. Exceptionally, both bodies may be responsible if the instruments are different for the individual company than for the group and therefore there is no overlap in content. Since the obligations of the LkSG are legal provisions which, at least in the company's own business area, also have an effect in favour of its own employees, dealing with the implementation of the obligations of the LkSG is one of the tasks of the works council under Section 80 para. 1 No. 1 BetrVG. The right to information essentially relates to the same issues that the economic committee can discuss with the employer, but with regard to the person responsible for risk analysis and the human rights officer, there is only a right to information on the filling of the position, but not on the personal details.

Corporate responsibility along the supply chain and the obligations of the LkSG can be addressed at a **works meeting**, the employer may provide information in its report on the policy statement on the company's human rights strategy as well as on other LkSG issues.

The introduction of ethics guidelines is subject to the **mandatory co-determination of** the works council according to Section 87, paragraph 1, No. 1 BetrVG, insofar as the orderly conduct of employees is affected. This is the case if an obligation to report supply chain risks or legal violations is codified, which is to be

implemented in compliance with a standardised procedure. The same applies if the contacting of a hotline established according to Section 8 LkSG is foreseen. The introduction of the complaints procedure itself is also subject to mandatory co-determination under Section 87 para. 1 No. 1 BetrVG. As a rule, modern communication technology is used in this process, so that Section 87 para. 1 No. 6 BetrVG also applies, as the technology is suitable for monitoring.

If employees are asked about possible human rights or environmental risks in the course of a risk analysis by means of standardised surveys, this constitutes the use of a **personnel questionnaire,** so that the mandatory co-determination of the works council under Section 94 para. 1 BetrVG applies.

On a voluntary basis, a **due diligence committee** with equal representation could be created to deal with the central issues of implementing due diligence in the company/corporation. It could be chaired by the human rights representative who is responsible for the operational implementation of due diligence in the company. If problems are identified in the supply chain, a task force could be convened, including workers' representatives from trade unions in the country concerned or, if not available, representatives of the sectoral Global Union Federation. The committee shall periodically report its findings to the relevant bodies on both sides. However, the activities of the due diligence committee must not undermine the legally provided participation rights of the works council; in this respect, an interlocking with the committees would be necessary. The complaints system to be set up could be integrated into the work of the committee. The legal basis for the work of the committee could be an in-house collective agreement, which could also include protection against reprimand and dismissal for the grievance officer, and the same applies to the grievance representative. Such protection would ensure the necessary independence and allow for an internal solution within the company.

The topics on which the central management must consult the **European works council** at least once per calendar year pursuant to Section 29, para. 1 of the EWC Act also include questions of corporate due diligence obligations pursuant to the LkSG. The report to be submitted by the central management has to include information on the fulfilment of due diligence obligations pursuant to the LkSG with regard to Europe-wide value chains in the case of companies with their registered office in Germany from 01.01.2023 onwards. After the documents have been reviewed by the EWC, a consultation with the employer shall follow. The documents to be submitted include the declaration of principles in accordance with Section 6 para. 2 LkSG, the human rights strategy of the company's own business unit as

well as the internal and external rules of conduct for Europe-wide risk management. The criteria to be defined for the risk analysis shall also be submitted to the EWC already in the planning phase. The EWC is also entitled to information on details of the planned complaints procedure. After the risk management system has been installed, the EWC must also be informed about the results of the risk analysis in accordance with Section 5 LkSG, about the preventive (Section 6 LkSG) or remedial measures taken (Section 7 LkSG) and about the complaints received from European countries. In addition, the EWC has the right to inspect the internal documentation. If a due diligence committee is set up in the company (group), one of the German EWC delegates should also have a seat on the committee. "Participation-oriented" EWCs could also seek to conclude a due diligence agreement with central management with a mandate from the European Trade Union Federations.

Pursuant to Section 11 para. 1 LkSG, **German trade unions** can be authorised by affected persons (from abroad) to conduct a test case in Germany in the event of a violation of central labour rights and would thus have the authority to conduct proceedings in their own name by virtue of legal authorisation. Until now, such an authorisation failed because the authorised party had to prove to have a legitimate interest in bringing the case in his or her own name.

Trade union **shop stewards** (trust persons) also have an important role in supporting co-determination actors in carrying out their duties to enforce the LkSG. Trade union employees can also file complaints to highlight existing risks or violations of the law. Trade unions have the possibility to inform the Federal Office of Economics and Export Control (BAFA) as the competent authority about the non-compliance of individual companies with their obligations under the LkSG. In addition, implementation measures for the fulfilment of corporate due diligence obligations can also be regulated by collective agreements, which could be of particular importance for the voluntary establishment of a due diligence committee. If an internal complaints system is to be set up, protection of the complaints officer(s) against reprimand and dismissal could be agreed in a company collective agreement, so that the necessary independence is maintained and an internal company solution would be possible. International framework agreements could also be used as regulatory instruments, with the involvement of the relevant Global Union Federation.

Global Union Federations can play an important role in the effective implementation of the LkSG if the standards to be met and a sophisticated set of tools for

implementation and monitoring are agreed in an international framework agreement. Global union federations already have decades of experience with these instruments to secure global minimum standards, and the implementation mechanisms have become more complex and effective over time. However, to complement corporate action as instruments for implementing the LkSG, IFAs need to cover the entire value chain, which is only rudimentary the case, so far. The mechanism agreed in the IFA can also strengthen risk management when trade unions from the Global South pass on violations of the IFA through trade union channels. Best practice examples show that the complaints system to be established under Section 8 of the LkSG can also be agreed by means of IFAs. The above-mentioned examples of practice fulfil the legal requirements, especially if an external neutral body is involved, as this ensures the necessary independence.

Consultations with **trade unions from the countries of the Global South** can contribute to the implementation of the LkSG, which can be realized with the involvement of the Global Union Federations. An appropriate consultation mechanism can be agreed in an IFA. In any case, trade unionists from the Global South (and East) should be involved as respondents in the in-depth risk assessment according to Section 5 LkSG.

In this framework, the participation of co-determination actors and trade unions can make an important contribution to democratising the economy as well as to secure basic human rights standards for working life worldwide.

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