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# The German Supply Chain Act - A Sustainable Regulatory Framework for internationally active Market Players?

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by

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## A. Introduction

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

The article examines the role of the German LkSG and analyses whether it is a suitable instrument to promote sustainable businesses across borders and to structurally adjust German civil and corporate law to social and ecological responsibility.

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

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

2 The promotion of sustainable development in corporate law has its origins at the international level; in particular since the adoption of the UN Guiding Principles on Business and Human Rights on March 21, 2011 (UN Doc A/HRC/17/31), a large number of international initiatives and regulations for the implementation of the stipulated goals can be observed, for a comprehensive overview see: *L. Smit* et al, Study on Due Diligence Requirements through the Supply Chain: Final Report, European Commission, 2020, 156 and 158 ff. In Germany in particular for instance: *Fleischer*, AG 15 (2017), 509 (510f.); *Habersack*, AcP 1 (2020), 594 (603 ff.); soon also A.-C. *Mittwoch*, Nachhaltigkeit und Unternehmensrecht, (forthcoming, Tübingen: Mohr Siebeck, 2022), chapter 2.

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

## B. Human rights and environmental due diligence in the context of corporate sustainability

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

### I. Current regulatory initiatives

Although many regulatory initiatives take up the concept of sustainability, they fail to address what exactly sustainability means and how this concept can be operated in law.[5] Terms such as 'social and ecological concerns' or 'ESG factors' are often used; legal scholars mainly take the consideration of the "public good" or "common good" concerns as the starting point for the topic, especially in German corporate law. Considering the "common good" through the traditional discussion of a corporation's public interest is established in the practice of German corporate law; it has been used, with varying degrees of strength, throughout the entire history of the German Aktiengesellschaft (stock corporation).[6] In accounting law, sustainability concerns have been established since the implementation of the directive on non-financial reporting as opposed to financial reporting.[7] This unfortunate dichotomy will, however, be replaced in the foreseeable future by more far-reaching sustainability reporting; a corresponding proposal for a directive, which is intended to considerably expand the scope and depth of the directive on non-financial reporting, was recently published.[8] The

4 Public as well as Private Law.

5 An important exception marks the EU Taxonomy Regulation in the area of sustainable finance. Regulation No. 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation No. 2019/2088, OJ. EU No. L 198/13 of 22 June 2020, available at: <https://eur-lex.europa.eu/eli/reg/2020/852/oj> (15.04.2022).

6 On this *Habersack*, AcP 1 (2020), 594 (603–614); for the current sustainability discourse A.-C. *Mittwoch*, Nachhaltigkeit und Unternehmensrecht, forthcoming, 2022, Section 3, chapter 9.

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

8 Proposal for a Directive of the European Parliament and of the Council amending Directive No. 2013/34/EU, Oj. EU No. L 182 of 29.6.2013, p. 19–76, available at: <https://eur-

discussion of corporate social responsibility in transnational supply chains focuses mostly on the protection of human rights, especially labour rights. [9] Conversely, the EU's Sustainable Finance Strategy concentrates on environmental sustainability and explicitly does not treat social aspects with the same intensity.[10] The EU Action Plan on Financing Sustainable Growth explicitly declares environmental sustainability to be the core regulatory objective and even specifies the problem of climate change; the social dimension of sustainability is explicitly recognised as its defining element, but its legal regulation is postponed to a later point in time.[11]

The use of different terminologies results in incoherence and raise questions about the application and interpretation of the respective provisions. The lack of coherence that comes from inconsistent terminology is obvious with regard to different regulatory projects, at least as far as different regulators are at work. It is not only the German legislature that has dedicated itself to the regulation of transnational supply chains; in France and the United Kingdom, the Loi de vigilance[12] and the Modern Slavery Act[13] have been in place for some years. Recently there have also been proposals in Switzerland and Norway,[14] and the Netherlands has introduced a new proposal on top of the

lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A32013L0034> (15.04.2022), Directive No. 2004/109/EC, Oj. EU No. L 390 of 31.12.2004, p. 38–57, available at: <https://eur-lex.europa.eu/eli/dir/2004/109/oj> (15.04.2022), Directive No. 2006/43/EC, Oj. EU. No. L 157 of 9.6.2006, p. 87–107, available at: <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A32006L0043> (15.04.2022) and Regulation No. 537/2014, Oj. EU No. L 158 of 27.5.2014, p. 77–112, available at: <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A32014R053> (15.04.2022) as regards corporate sustainability reporting, COM (2021) 189 final of 21 April 2021.

9 This is applicable to the LkSG. After a long discussion, environmental concerns were included. Besides, the LkSG refers only to a few agreements to this effect, see section 2 para. 1, s. 7 para. 3 s. 2 LkSG and for more details *Schmidt-Räntsch*, ZUR 7 (2021), 387 (388, 393).

10 Commission Action Plan, Financing Sustainable Growth, COM (2018) 97 final on 8 March 2018; EU Taxonomy Regulation, Regulation (EU) No. 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation No. 2019/2088, OJ. Eu No. L 198/13 of 22.6.2020, available at: <https://eur-lex.europa.eu/eli/reg/2019/2088/oj> (15.04.2022), recital 6; also *Möslein/Engsig Sørensen*, European Company Law 15 (2018), 221 (222, 227 f.).

11 EU-Action plan for Financing Sustainable Growth, p. 14 f.; see now Platform on Sustainable Finance, Final Report on Social Taxonomy, available at: <https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/280222-sustainable-finance-platform-finance-report-social-taxonomy.pdf> (22.03.2022).

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

13 Modern Slavery Act, available at: <www.legislation.gov.uk/ukpga/2015/30/contents/enacted> (22.03.2022).

14 In Switzerland the 'Concern-Responsibility-Initiative', Eidgenössische Volksinitiative 'Für verantwortungsvolle Unternehmen - zum Schutz von Mensch und Umwelt', BBl 2017, 6335 available at <www.bk.admin.ch/ch/d/pore/vi/vis462t.html> (22.03.2022) was rejected – decided and pronounced was the counterproposal of the Council of States (*Ständerat*) <www.parlament.ch/centers/eparl/curia/2016/20160077/S2-8%20D.pdf> (22.03.2022); more in detail *Bueno/Kaufmann*, BHRJ (2021), 542 (544); in Norway the Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold, short åpenhetsloven, will become effective on 1 July 2022, see <https://lovdata.no/dokument/NL/lov/2021-06-18-99> (22.03.2022).

already-adopted Wet Zorpflicht for Kinderarbeid.[15] In Austria, there are proposals for a supply chain law, or at least a so-called social responsibility law.[16] However, even the various EU initiatives are not always comprehensively coordinated with each other and development sometimes proceeds at quite different intensities. While the implementation of the Sustainable Finance Initiative has been advancing in leaps and bounds since the publication of the Action Plan for Financing Sustainable Growth in 2018, the Commission postponed the publication of a proposal for a directive on sustainable corporate governance three times before finally disclosing it in February 2022.[17]

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

## II. The principle of sustainability

The modern definition of sustainability, which has become the focus of various academic disciplines at the international level, originates from the work of the United Nations since the 1980s. The Brundtland Commission of the United Nations coined its initial concept when it described sustainable development in 1987 as 'meeting the needs of the present without compromising the ability of future generations to meet their own needs'.[18] This expresses in particular an orientation towards the future in the sense of intergenerational justice; the international orientation as a premise is self-evident due to the objective of the UN as its originator. In the following years, this definition was refined to reflect a three-dimensional approach of ecological, economic, and social sustainability.[19] In recent years, the UN has repeatedly emphasised the equal value of these three dimensions, most recently with the announcement of the Sustainable Development Goals (SDGs) in 2015.[20]

15 Wet Zorpflicht Kinderarbeid, see <https://zoek.officielebekendmakingen.nl/stb-2019-401.html> (22.03.2022); now there are ambitions for a cross-topic supply chain Act: <www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35761> (22.03.2022). cf. summary *Hoff*, A Bill for Better Business: Dissecting the new Dutch Mandatory Human Rights Due Diligence Initiative, Völkerrechtsblog, 05.05.2021, available at <//voelkerrechtsblog.org/de/a-bill-for-better-business/> (22.03.2022).

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

17 See n. 4.

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

19 In detail *Gehne*, Nachhaltige Entwicklung als Rechtsprinzip, 2011, 34 f.

20 United Nations, Resolution adopted by the General Assembly on 25 September 2015 (A/RES/70/1), available at:<www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf> (22.03.2022), p. 1 (Preamble) and 3; based on the UN Millennium Declaration of 2000, available at: <www.un-kampagne.de/fileadmin/downloads/erklaerung/erklaerung_englisch.pdf > (22.03.2022); also recital 2 of the EU Taxonomy Regulation.

In order to deal with the inherent contradictions resulting from the equal value of the economic, ecological, and social dimension, the idea of strong sustainability has been further spelled out in the natural sciences. The concept of planetary boundaries significantly improves the operability of the sustainability concept by modelling a framework for economic behaviour within which the stability of the current Holocene state can be maintained.[21] To achieve the goal of maintaining the Holocene state, the concept of planetary boundaries defines a 'safe operating space for humanity with respect to the Earth system and are associated with planet's bio-physical subsystems or processes.'[22] This framework is constituted by nine subsystems, each with its own thresholds, such as climate change, ocean acidification, air pollution, and biodiversity loss.[23] The understanding of planetary boundaries is dynamic. The individual components are subject to continuous development, which must lead to adjustments based on scientific research as soon as the complex interactions and feedback mechanisms between the individual ecological subsystems are better understood and new knowledge is available.[24]

The social dimension of sustainability can then be integrated into the model of planetary boundaries as the foundation for all human behaviour; this would allow a corridor to emerge that models the so-called 'safe and just operating space for humanity' as an extension of the concept of planetary boundaries.[25] Of course, compliance with fundamental and human rights, as expressed in the 1948 Universal Declaration of Human Rights of the United Nations, is pivotal to securing this social foundation. These include, in particular, the right to life, liberty and security of the person, the prohibition of slavery and servitude, the right to work, just and satisfactory working conditions, equal pay for equal work, and remuneration that ensures an existence for the individual and his or her family in accordance with human dignity. The German LkSG takes up all these aspects by leveraging central international agreements as the point of reference for national obligations in section 2 para. 1, para. 3, along with the conventions listed in the annex.

21 *Rockström/Steffen* et al., Planetary Boundaries: Exploring the Safe Operating Space for Humanity, Ecology and Society 14 (2009), 32; *Rockström/Steffen* et al., A safe operating space for humanity, Nature 461 (2009), 472; *Steffen/Rockström* et al., Planetary Boundaries: Guiding human development on a changing planet, Science 347 (6223) (2015), 1259855; from a legal perspective esp. *Sjåfjell/Bruner*, Corporations and Sustainability, in: id. (eds.), The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability (2020), 3, 7 ff.

22 *Rockström/Steffen* et al., Nature 461 (2009), 472.

23 The other five boundaries are the consumption of fresh water, the depletion of the ozone layer, chemical contamination, surface corrosion and the nitrogen and phosphor strain, *Rockström/Steffen* et al., Ecology and Society 14 (2009), 32, 37 ff.

24 *Häyhäa/Lucas/van Vuuren/Cornell/Hoff,* Global Environmental Change (2016), 60.

25 *Leach/Raworth/Rockström*, Between social and planetary boundaries: Navigating pathways in the safe and just space for humanity, in: UNESCO ISSC, World Social Science Report. Changing Global Environments, (2013), p. 84; *Raworth*, A Safe and Just Space for Humanity: Can We Live within the Doughnut?, Oxfam Discussion Papers (2012), 9; id., Doughnut Economics (2017), Chapter 1 et passim. Cf. *Griggs* et al., Sustainable development goals for people and planet, Nature (2013), 305 (306).

## III. The sectoral approach of the LkSG

Yet, the LkSG does not explicitly use the term sustainability. Instead, it obliges companies to observe human rights and environmental due diligence obligations (section 3 para. 1 LkSG). This set of obligations relates to economic, ecological, and social aspects- all three dimensions of sustainability. Accordingly, the explanatory memorandum to the Act emphasises that it is in line with the Federal Government's National Sustainability Strategy.[26] The German Government is using the National Sustainability Strategy to link the International and European sustainability strategy with German policy, implementing it step by step in the form of national regulations in all policy areas. The National Sustainability Strategy recognises the equivalence of the SDGs in terms of the comprehensive international sustainability concept.[27]

Consequently, it would have been a step forward to include the principle of sustainability as an overarching concept in the LkSG. Despite the formal declarations of intent of the provisions, this has not happened. Instead, the LkSG pursues a sectoral approach; while the primary purpose of the law is to improve the international human rights situation through responsible design of the supply chains of German companies, it does not provide equivalent protection for ecological concerns. On the contrary, environmental aspects are only indirectly protected, and then only if they have a retroactive effect on human rights concerns; otherwise environmental aspects are only protected if the LkSG explicitly refers to international environmental agreements.[28] Thus, the LkSG only includes environmental rights if they are related to human rights, e.g. in the case of poisoned drinking water. Further,explicit reference to environmental agreements is not made comprehensively- the LkSG obliges companies to comply with only three international environmental agreements, namely the Minamata Convention on Mercury,[29] the Stockholm Convention on Persistent Organic Pollutants,[30] and the Basel Convention on Hazardous Waste[31] (section 2 para. 3 LkSG). Moreover, these three agreements do not generate any protected legal positions within the meaning of section 2 para. 1 LkSG; ironically, the Basel Convention on Hazardous Waste is expressly reserved for human rights-related agreements. Hence, the LkSG does not protect ecological concerns effectively from the environmentally damaging influences of entrepreneurial activity in the supply chain.

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

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

28 Government draft, BT-Drs. 19/28649, p. 24; *Schmidt-Räntsch*, ZUR 7 (2021), 387 (393).

29 Minamata Convention on Mercury from 10. October 2013, BGBl. II 2017, 610 (611), implemented through the EU-Mercury-Regulation, Regulation No. 2017/852, Oj. EU No. L 137 of 24 May 2017, available at: <https://eur-lex.europa.eu/eli/reg/2017/852/oj> (18.04.2022) of the European Parliament and of the Council of 17 May 2017 on mercury, and repealing Regulation (EC) No 1102/2008.

30 Stockholm Convention about persistent organic pollutants of 23 May 2001, BGBl. II 2002, p. 803 (804) (POPs-Convention); last amended through the resolution of 6 May 2005, BGBl. II 2009, p. 1060 (1061).

31 Basel Convention about the control of the cross-border transfer of hazardous wastes and their disposal of 22 March 1989, BGBl. II 1994, p. 2703 (2704).

As mentioned, protecting ecological concerns from entrepreneurial damages in a comprehensive manner is not even the intention of the LkSG. It does not introduce general protection obligations. Instead, it lists the international agreements from which the respective concerns are deduced in an annex. This convention-based approach is also applied to human rights due diligence, though a stricter standard of protection is achieved in human rights due diligence using the convention-based approach due to the significantly higher number of conventions referred to.[32] The referral technique may have its advantages, but it does not achieve a precise implementation of the UN Guiding Principles. In view of current and future developments, a coherent approach based on the UN's comprehensive international sustainability concept, in conjunction with the concept of planetary boundaries and the introduction of an abstract and general obligation, would have been preferable. Current developments at the EU level suggest that the implementation of sustainability in economic and financial market law will gain momentum in the future. The approaches here are still predominantly sector-specific too; in particular, the EU Action Plan for Financing Sustainable Growth and its implementing acts focus strongly on the environmental dimension of sustainability. However, the planned further development of non-financial reporting towards sustainability reporting,[33] as well as the initiative for a sustainable corporate governance,[34] show efforts of coherence and consolidation in the sense of a comprehensive sustainability principle. The recently published proposal for a directive on corporate sustainability due diligence introduces a much more comprehensive approach than the German LkSG.[35] At least with regard to the promotion of the principle of sustainability through the LkSG, the German legislature has not taken the opportunity to play a pioneering role.

## C. Scope and enforcement of the due diligence duty

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

32 There are 11 human rights agreements of 1966 including in particular the 'Internationale Covenant on Civil and Political Rights' (BGBl. II (1973), p. 1533 (1534)) or the 'International Labour Organization Convention for the Protection of Workers', e.g. Convention No. 29 about Compulsory Labour of 1930 (BGBl. II (1956), p. 640 (641)) with protocol of 2014 (BGBl. II (2019), p. 437 (438)); more in detail *Schmidt-Räntsch*, ZUR 7 (2021), 387 (393).

33 See already Action Plan of the Commission on Financing Sustainable Growth COM (2018) 97 final of 18 March 2018, p. 12s. and based on this European Securities and Markets Authority (ESMA), 'Final Report: ESMA`S technical advice to the European Commission on integrating sustainability risks and factors in MIFID II' from 30 April 2019, ESMA 35–43–1737 and now Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No. 537/2014, as regards corporate sustainability reporting COM (2021)189 final from 21 April 2021.

34 See proposal for a directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final of 23.2.2022.

35 Cf. n. 4 and more details immediately.

Under section 3 para. 1 LkSG, companies must set up a risk management system that is intended to prevent human rights and environmental risks through regular risk analyses,provide for remedial measures, and ensure the establishment of an internal complaints system. Furthermore, according to section 6 para. 2 LkSG, the management must issue a policy statement on its human rights strategy. However, these obligations are not absolute. Firstly, they are not spelled out as a duty to succeed or even a strict liability in such a way that every violation of human rights or environmental concerns in supply chains is stopped and compensated for, but rather are designed as so-called 'duties of effort', a concept that German law is not familiar with.[36] Limits are also found with regard to both the scope of companies covered and the concept of the supply chain as such. Moreover, the LkSG enforces the due diligence obligation exclusively by means of administrative law, and thus expressly leaves unanswered the highly controversial question of the civil liability of companies for violations of human rights and environmental concerns along the supply chain. Overall, the Act shows considerable weaknesses with regard to the intended improvement of the protection of human rights and environmental concerns along the supply chain.

## I. Material scope of application: concept of the supply chain

This weakness is already evident from the material scope of application. Pursuant to section 3 para. 1 s. 1 LkSG, the due diligence obligations extend to the supply chain of the companies covered. Section 2 para. 5 LkSG defines the term supply chain as 'all steps in Germany and abroad that are necessary for the production of goods and the provision of services, starting with the extraction of raw materials up to the delivery to the end customer'. This should also include, for example, the transport or intermediate storage of the goods as well as the granting of a loan to finance the production at a supplier.[37] In addition to the actions of the company in its own business area, the actions of direct and indirect suppliers are also included. Overall, the term 'supply chain' is to be understood broadly – it covers the entire value creation process. This had already provoked considerable criticism in the drafting stage. In particular, it was feared that large German companies with many direct suppliers would not be able to fully oversee their entire supply chain, including indirect suppliers.[38]

However, the LkSG does not impose such an obligation on them. Rather, on closer examination, the obligations in the supply chain are quite limited; the duties of

[36] Government Explanatory Memorandum, BT-Drs. 19/28649, p. 2, 41; *Stöbener de Mora/Noll,* NZG 28 (2021), 1237 (1240); on the concept of 'duties of effort' *Wagner/Ruttloff,* NJW 30 (2021), 2145 (2145 f).

[37] Cf. for examples Government Explanatory Memorandum, BT-Drs. 19/28649, p. 40; more in detail on the expression "supply chain"in the LkSG *Grabosch,* in: Grabosch (ed.), Das neue Lieferkettensorgfaltspflichtengesetz (2021), p. 21 (36 ff.).

[38] Committees Corporate Social Responsibility and Compliance, Mercantile Law and Human Rights of the German Bar Association, 'Stellungnahme zum Regierungsentwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten', NZG 13 (2021), 546, p. 547–549 (see paras 2 and 16-20); Franke, *Working Paper*, under 1) and 3); against this with a differing view *Kieninger*, FAZ Nr. 211 from 10. September 2020; in detail also *Thalhammer*, DÖV 18 (2021), 825 (826 ff.).

care mentioned in section 3 para. 1 LkSG only apply to a company's own business area and to its direct suppliers. Indirect suppliers are only covered by section 9 para. 3 LkSG if a company receives substantiated knowledge on the basis of factual indications that such a company may be violating human rights or environmental obligations. Although some want to read the wording 'substantiated knowledge' in a broader sense and extend the obligation to indirect suppliers, the LkSG does not explicitly provide for a more far-reaching due diligence obligation regarding indirect suppliers.[39] Such a narrowing of the due diligence obligations to direct suppliers relativises the goal of protecting human rights and environmental concerns in the supply chain considerably. This is because human rights violations typically do not take place within German companies or their direct suppliers, but tend to be observed at the beginning of the value chain.[40] The approach is also not in line with the UN Guiding Principles on Business and Human Rights- principle 19 states that for the complex situation of the indirect supplier relationship, the determining factors should be the severity of the abuse and the company's ability to exert influence over the organisation in question. It should also be considered how crucial the relationship is for the company and whether its termination would in turn have adverse human rights consequences.[41] Such a differentiated approach is preferable to largely cutting back responsibility for indirect suppliers from the outset. The supply chain concept of the LkSG also lags behind its planned counterpart at the EU level; the Commission proposal on Corporate Sustainability Due Diligence extends the sustainability due diligence obligations to the entire supply chain without differentiating between indirect and direct suppliers.[42]

## II. Personal scope of application: Large German companies

The personal scope of application of the LkSG not been developed comprehensively either. The law provides for a staggered application to German companies in two phases, beginning on 1 January 2023. In the first year, the application is to be limited to companies with more than 3,000 employees, which means that only about 700 German companies will be included.[43] The LkSG thus exempts most German companies from human rights and environmental due diligence and potential liability.

39 *Ehmann/Berg*, GWR 15 (2021), 287 (290).

40 Already in the draft stage of the LkSG the Supply Chain Act Initiative, Statement to the draft bill, p. 4, available at <lieferkettengesetz.de/wp-content/uploads/2021/03/Initiative-Lieferkettengesetz_Stellungnahme-zum-Gesetzentwurf.pdf (15.12.2021) and Germanwatch, Statement to the draft bill, p. 1, available at <germanwatch.org/sites/default/files/Stellungnahme_Germanwatch_Ref.Entwurf_Sorgfaltspflichtengesetz.pdf> (15.12.2021), both quoted by *Thalhammer*, DÖV 18 (2021), 825, 834 (n. 168 f.).

41 UN Guiding Principles on Business and Human Rights – Implementing the United Nations 'Protect, Respect and Remedy' Framework, (2011), p. 21s.

42 Cf. already n. 4.

43 See also section 1 para. 1 s. 1 no. 2 LkSG; with information on the number of involved companies *Gehling/Ott/Lüneborg*, CCZ 2021, 230 (231); also *Wagner/Ruttloff*, NJW 2021, 2145 (2145); *Ehmann/Berg*, GWR 2021, 287 (287); *Stöbener de Mora/Noll*, NZG 2021, 1237 (1239); *Kamann/Irmscher*, NZWiSt 2021, 249 (250).

In the second phase, which begins on 1 January 2024, the threshold will be lowered to 1,000 employees, increasing the number of companies affected to about 3,000.[44] Otherwise, the Act applies to all companies – regardless of their legal form – which have their head office, main branch, or registered office in Germany. The employees of all affiliated companies of a group must be included in the calculation of the number of employees of the parent company, even if an affiliated company has its registered office abroad or has its head office or principal place of business there. This is to ensure that, particularly in a group situation, the parent companies fall within the scope of application of the Act, irrespective of whether the workers are employed by the parent or the subsidiary. In addition, section 2 para. 6 s. 3 of the LkSG stipulates that in affiliated companies, the parent company's own area of business also includes an affiliated company if the parent company exercises a decisive influence.

The fact that the LkSG is aimed exclusively at large companies is of particular importance for its effectiveness. After concerns were repeatedly expressed at the drafting stage that a broad supply chain concept combined with a rather general due diligence duty could disproportionately burden SMEs, these were ultimately excluded from the scope of application of the LkSG.[45] Regulators in other member states have gone much further in this regard. For example, the Norwegian Transparency Act provides for significantly lower thresholds despite a shorter transition period:[46] Norwegian companies fall within the scope of application from a minimum number of 50 employees, as long as certain turnover and profit thresholds are also exceeded.[47] The current Dutch legislative initiative[48] also includes significantly lower thresholds, namely a net profit of at least 40 million euros or a minimum number of 250 employees.[49] Originally, a similar approach was preferred at the EU level. In its recommendation, the European Parliament opted for linking the personal scope of application to the

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

45 Government Explanatory Memorandum, BT-Drs. 19/28649, p. 3 and p. 32; they can however be effected indirectly, if the directly addressed enterprises will pass this legal obligations on to them, cf. *Wagner/Ruttloff*, NJW 2021, 2145 (2145); *Hess*, NWB 2021, 2981 (2985 ff.) An evaluation of the personal scope of application should take place by June 30, 2024; see Government Explanatory Memorandum, BT-Drs. 19/28649, 32.

46 Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparacy Act) *(Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)),* Lovvedtak 176 (2020–2021)). Unofficial translation by the Ministry for Children and Families vom 12.10.2021, erhältlich im Internet: <lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent> (last accessed: 22.03.2022).

47 *Krajewski/Tonstad/Wohltmann*, BHJR 2021, 550 ff.

48 Proposal for an Act about a responsible and sustainable international conduct of duty care in production chains *(Wet verantwoord en duurzaam internationaal ondernemen)* vom 11.03.2021, erhältlich im Internet: <www.tweedekamer.nl/kamerstukken/wetsvoorstellen/detail?cfg=wetsvoorsteldetails&qry=wetsvoorstel%3A35761> (last accessed: 22.03.2022). For a summary see *Hoff*, A Bill for better Business. Dissecting the new Dutch Mandatory Human Rights Due Diligence Initiative, Verfassungsblog vom 05.05.2021 (last accessed 15.12.2021)

existence of risk factors, thereby including SMEs and even micro-enterprises.[50] Such an approach makes sense given that SMEs form the backbone not only of the German economy but also of the European internal market.[51] Unfortunately, the recent proposal by the Commission again bases the personal scope of application on the number of employees, as well as the net worldwide turnover; with thresholds in between the German and Dutch ones, the Commission's proposal generally excludes SMEs from the due diligence obligations.[52]

## III. Enforcement of the duties of care under the LkSG

### *1. Possible enforcement mechanisms and comparative overview*

To ensure compliance with legal measures, various mechanisms and sanctions are conceivable in principle. A purely voluntary approach, on which the National Action Plan was based, did not produce the desired effect in Germany.[53] For the enforcement of binding obligations, public enforcement via administrative measures and regulatory fines, private enforcement via civil liability mechanisms, and criminal sanctions can be considered. The active national regulators have so far chosen different approaches – a combination of public and private enforcement is proposed for the European Directive,[54] and the rejected Swiss corporate responsibility initiative had also envisaged a civil law liability provision with an exculpation solution.[55] In the Netherlands, an initiative for a law on responsible and sustainable international trade (*Wet verantwoord en duurzaam internationaal ondernemen*) to regulate due diligence in production chains was recently presented.[56] This law wants to introduce the whole range of enforcement mechanisms: criminal sanctions and civil liability, in addition to public enforcement.[57] The French Loi de Vigilance's core enforcement mechanism is a civil liability rule

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

51 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions an SME Strategy for a sustainable and digital Europe, COM(2020) 103 final of 10 March 2020, 1; recently monographic *A. Stöhr,* Kleine Unternehmen – Schutz und Interessenausgleich im Machtgefüge zwischen Arbeitnehmern, Verbrauchern und Großunternehmen; *M. F. Müller*, Kleinere und mittlere Unternehmen im Privatrecht – Auf dem Weg zu einem Sonderprivatrecht?.

52 Art. 2 Commission Proposal (n. 4) with explanation on p. 14 of the Proposal.

53 Government Explanatory Memorandum, BT-Drs. 19/28649, p. 1s; for instance *Helck,* BB 2021, 1603; to the restricted impact on voluntary standards in the international context also *Smit* et al., Study on Due Diligence Requirements through the Supply Chain: Final Report, 218 f.

54 See n. 4, Art. 16ss and Art. 22; among others Smit et al., Study on Due Diligence Requirements through the Supply Chain: Final Report, 209–213, 257–260.

55 Eidgenössische Volksinitiative 'Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt', erhältlich im Internet: <www.bk.admin.ch/ch/d/pore/vi/vis462t.html> (last accessed: 22.03.2022) und in BBl 2017, 6335. For further references see supra n. 23.

56 Proposal for an Act about a responsible and sustainable international conduct of duty care in production chains *(Wet verantwoord en duurzaam internationaal ondernemen)* vom 11.03.2021.

57 Hoff, A Bill for better Business. Dissecting the new Dutch Mandatory Human Rights Due Diligence Initiative Verfassungsblog vom 05.05.2021

according to which, in the event of a breach of duty, the French general clause in tort applies.[58] As further enforcement instruments, the Loi de Vigilance also provides for the threat of coercive measures and sanctioning with fines. The fine regulation has, however, been declared unconstitutional by the French Conseil Constitutionnel.[59]

The introduction of criminal sanctions for the enforcement of companies' duties in Germany faces hurdles similar to the criminal prosecution of competition law violations; criminal liability of companies as such is alien to German law because of the principle of culpability (*Schuldprinzip*). Accordingly, criminal sanctions can, in principle, only be linked to the (culpable) conduct of individuals.[60] In addition, if criminal and administrative sanctions coexist, there is a risk of conflicts of competence between the authority responsible under administrative law and the public prosecutor's office.[61] Therefore, a combined solution of official control and civil liability was initially considered for the enforcement of the due diligence duty under the LkSG.[62] Ultimately, the legislature opted for purely public enforcement and expressly excluded separate civil liability in section 3 para. 3 LkSG. The control and enforcement of the duties of care now consist of competent authorities (sections 12 and 13) reviewing the reports and official control measures under a risk-based approach (sections 4 to 18). The sanctions are listed in sections 5 and 6: In the case of violations and infringements, the competent authority can issue sanctions by ordering coercive fines under the Administrative Enforcement Act (VwVG) (section 23 LkSG) or regulatory fines under the Act on Regulatory Offences (OWiG) (section 24 LkSG) and, in serious cases, excluding the company from the award of public contracts under section 22 LkSG.

The initial response in the literature to the envisaged enforcement mechanisms is mixed. While some call it a 'toothless paper tiger',[63] others believe that the LkSG is 'equipped with a particularly strong enforcement mechanism under economic admin-

58 Art. L225-102-5 Code de Commerce; detailed on the French Regulation *Nasse,* ZEuP (019), 771, 774; *Rühl*, in: Bachmann/Grundmann/Mengel/Krolop (eds.), FS für Christine Windbichler, 1413, 1427–1430; *Brabant/Savourey*, Revue Internationale de la Compliance et de l'Éthique des Affaires N° 50 (2017), 1–3.

59 Conseil Consitutionnel, Décision n° 2017-750 DC of 23 March 2017.

60 BVerfGE 20, 323; see with further references Heger, in: Lackner/Kühl, StGB, Vor § 13 Rn. 22. Even under the Draft for an Association Sanctions Act (Verbandssanktionengesetz) of 16 June 2020, no real corporate penalty would be introduced, but rather a tightening of the catalogue of fines and regulation of a special association procedure.

61 For Competition law see *König/Bremenkamp*, in: T. Tóth (Ed.), The Cambridge Handbook of Competition Law Sanctions, under 22.4.2.4.

62 Gestaltungsmöglichkeiten eines Mantelgesetzes zur nachhaltigen Gestaltung globaler Wertschöpfungsketten und zur Änderung wirtschaftsrechtlicher Vorschriften vom 01.02.2019, erhältlich im Internet: <media.business-humanrights.org/media/documents/files/documents/SorgfaltGesetzentwurf_0.pdf> (last accessed: 22.03.2022); also: *Habersack*, AcP *220* (2020), 594 (643). On the first drafts see also *Wilks/Blankenbach*, Will Germany become a leader in the drive for corporate due diligence on human rights?, Business & Human Rights Resource Centre Blog vom 20.2.2019.

63 On the Government draft *Kieninger*, ZfPW 2021, 252; *Thalhammer*, DÖV 2021, 825, *Schmidt*, EUZW 2021, 273.

istration and public procurement law'[64] or even express concerns about the 'extraordinarily harsh sanctions'[65].

### 2. *Monitoring by BAFA*

The Federal Office of Economics and Export Control (BAFA) is responsible for monitoring and sanctions according to sections 19 para. 1, 24 para. 5 LkSG. The BAFA was not previously entrusted with responsibilities in this area, and a new competence has now been created for the purpose of implementing the EU Conflict Minerals Regulation for a different authority.[66] Even if the due diligence obligations according to the Conflict Minerals Regulation are specifically tailored to the risks of raw material procurement from conflict and high-risk areas, and a special expertise is certainly advantageous, it is still questionable whether the public enforcement of sustainability concerns in German companies should not have been better bundled under one roof, in light of greater coherence and consistency in the enforcement of sustainability concerns.

In addition to reviewing the records under sections 12 and 13 LkSG, BAFA acts either ex officio or upon application of an interested party (section 14 para. 1 LkSG). Actual violation of human rights or environmental concerns is not a necessary prerequisite for BAFA to intervene. Rather, the authority can act at its own discretion to monitor compliance with due diligence obligations, including taking preventive action (section 14 para. 1 no. 1 lit. a LkSG). This is part of a risk-based approach under sections 14 para. 2, 19 para. 2 LkSG, which does not rely on random sampling, but instead provides for inspections independent of concrete indications, on the basis of substantiated indications from third parties and on the basis of special risk profiles of the companies or sectors concerned,[67] such as the textile industry.[68] BAFA can therefore prioritise within its discretion depending on the size of the risk.[69]

If a permissible and sufficiently substantiated application is filed, the authority must take action according to section 14 para. 1 no. 2 LkSG. An interested party can file an application if it appears possible that the violation of a due diligence duty by the company will result in the violation of a protected legal position of the person filing the application or that such a violation is imminent. The prerequisite is therefore the possibility of personal involvement, which is typical in German administrative

64 *Engel/Schönfelder*, in: Grabosch, Das neue Lieferkettensorgfaltspflichtengesetz, 171 (172); *Ehmann*, ZVertriebsR 2021, 141 (151) views the sanction system as "convincing".

65 *Nietsch/Wiedmann*, CCZ 2021, 101 (109); *Gehling/Ott/Lüneborg*, CCZ 2021, 230 (240) denote the sanction as "draconic"; as "rigid" *Lutz-Bachmann/Vorbeck/Wengenroth*, BB 2021, 906 (912 ff.).

66 Sections 2, 3 MinRohSorgG ("Mineral-Resources-Duty-of-Care-Act"); web presence of DEKSOR: <www.bgr.bund.de/DE/Gemeinsames/UeberUns/DEKSOR/DEKSOR_node.html> (22.03.2022).

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

68 Here human rights abuses in supply chains have received special attention over the last years, see among others *Wagner*, AcP 216 (2016), 718 (720); *Kaltenborn/Norpoth*, RIW 2014, 402 (409); *Kaleck/Saage-Maaß*, Unternehmen vor Gericht, 99 ff.

69 *Engell Schönfelder*, in: Grabosch, Das neue Lieferkettensorgfaltspflichtengesetz, 171 (176).

law. This can be the case directly, as with employees of the company concerned or one of its suppliers, or indirectly, if the company is affected by the violation of environmental concerns in the supply chain.[70]

### *3. Regulatory measures*

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

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

Pursuant to section 16 LkSG, BAFA has special rights of access- it may enter or inspect company premises, business premises, and commercial buildings during normal business or operating hours (no. 1), and inspect and examine business documents and records relevant to the due diligence obligations (no. 2).

Furthermore, the enterprises must provide BAFA with information and evidence relevant to monitoring the compliance with the due diligence obligations. These obligations are limited by a right to refuse to testify pursuant to section 17 para. 3 LkSG – following from the *nemo-tenetur principle*:[71] The statement may be refused if it would otherwise put the person concerned or a relative in danger of prosecution under the Code of Criminal Procedure or the OWiG.

Finally, section 18 LkSG provides for duties of cooperation and acquiescence of the parties that go beyond what is customary in regular administrative proceedings; enterprises must not only tolerate the measures just described, but also cooperate in their implementation.

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

### *4. Sanctions regime*

Section 24 LkSG contains several regulatory offences for the negligent or intentional breach of certain duties of care provided for in sections 4 to 9 LkSG. There is criticism over the lack of specificity of these regulatory offences since they refer back to legal concepts in need to be interpreted,[72] at times with reference to the decision of

[70] E.g. as a resident. See Government Explanatory Memorandum, BT-Drs. 19/28649, 54.

[71] On the right to refuse testimony in Economic Administrative Law Gabriel, NVwZ 2020, 19.

[72] *Kamann/Irmscher*, NZWiSt 2021, 249 (153); *Lutz-Bachmann/Vorbeck/Wengenroth,* BB 2021, 906 (912).

the French Conseil Constitutionnel for the fining rules of the Loi de Vigilance.[73] The need for interpretation does not, however automatically imply a violation of the constitutional principle of definiteness (Article 103 para. 2 of the German Constitution), so long as the meaning is specifiable.[74]

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

Regulatory fines have three functions in German regulatory offences law: they have a repressive, preventive and profit-absorbing effect. The repressive effect of regulatory fines is, however, less severe than that of penalties under the Criminal Code. Regulatory fines are understood as an 'emphatic reminder of obligations'[75] and, for example, are not entered in the Federal Central Register like the criminal fine. The central function of the regulatory fines is thus prevention, both in the form of individual prevention and of general deterrent effect.[76] This goal is ultimately also served by the absorption of economic advantages gained from the offence. Pursuant to section 17 para. 4 s. 1 OWiG, the fine should exceed the economic advantage (even beyond the statutory maximum) that the offender has derived from the administrative offence. The fine can be up to 8 million euros in the case of legal persons, up to 2 percent of the average annual turnover in the case of legal persons with an average annual turnover of more than 400 million euros, and up to 800,000 euros in the case of natural persons, pursuant to sections 24 para. 2 s. 2 LkSG and 30 para. 2 s. 3 OWiG.[77]

Under section 24 para. 4 s. 1 of the LkSG, the assessment of the fine for legal persons and associations of persons is based on the significance of the regulatory offence; the criteria for this are, for instance weight, extent, and duration (no. 3) of the regulatory offence, as well as its effects (no. 5). The economic circumstances of the legal person are also considered (no. 2). Efforts on the part of the company to uncover the offence, as well as efforts to make amends, for example within the framework of proceedings for amicable settlement according to section 8 para. 1 s. 5 LkSG, can reduce the fine.[78] In the case of a negligent offence, according to section 17 para. 2 OWiG ,the amount of the fine is capped at half of the statutory maximum amount. The practice of the authorities should be defined by guidelines, as they are known from cartel law under Section 81d para. 4 GWB.[79]

73 Already at 3.3.1. Constitutional court, Décision n° 2017-750 DC of 23. March 2017.

74 See also *Engel/Schönfelder*, in Grabosch, Das neue Lieferkettensorgfaltspflichtengesetz, 171 (193).

75 BVerfGE 27, 18.

76 *Sackreuther*, in: Graf (ed.), BeckOK OWiG, § 17 Rn 6 ff.

77 Critical on using the average annual turnover as a reference for the calculation of the fine *Lutz-Bachmann/Vorbeck/Wengenroth*, BB 2021, 906 (913).

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

79 Guidelines for the setting of fines in cartel administrative offence proceedings vom 11.10.2021, erhältlich im Internet: <www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines_setting_fines_Oct_2021.html?nn=3591462> (last accessed: 22.03.2022).

Section 22 LkSG provides that the sanctioning effect of the fine is reinforced in serious cases by the exclusion from public tendering.

### 5. *Private enforcement?*

Section 3 para. 3 LkSG clarifies that the obligations under the LkSG do not give rise to civil liability.[80] This means, first, that the LkSG itself does not contain any civil liability norms of its own. According to the recommendation of the Committee on Labour and Social Affairs, however, it should follow that the norms of the LkSG also do not constitute a protective law within the meaning of section 823 para. 2 of the German Civil Code (BGB).[81] A protective law can, in principle, be any legal norm which, according to its purpose and content, at least also protects individuals; when determining the protective purpose, the intention of the legislature is decisive.[82] While the system of the law and the government's justification, as well as the legislative decision as a whole, in principle leaves space to interpret the duties under the LkSG as a protective law, the intention of the legislature is made clear in section 3 para. 3 LkSG. This must be considered as authoritative – civil liability for the violation of human rights and environmental duties of care can therefore only be established outside the LkSG.

Various liability models are proposed for this purpose.[83] Since contractual liability presupposes a contractual relationship between the injured party and the actor, it is generally of secondary importance. This is because the victims of German companies' violations of human rights or ecological concerns tend only to be their contractual partners in exceptional cases. Other contract law constructions (contract with protective effect for the benefit of third parties or contract for the benefit of third parties) for the buyer's liability in subcontracting relationships can only be justified with great effort.[84] Tortious liability is possible in principle under the general rule of section 823 para. 1 BGB. However, two central problems arise here. On the one hand, the scope of protection does not include all legal positions whose protection is intended by the LkSG. [85] On the other hand, it is difficult to establish duties of care on the part of the head of the value chain along the entire supply chain.[86] This is because Section 823 para. 1 BGB only sanctions the wrongdoer's own conduct (so-called principle of reli-

80 The Government draft left this question open, Government draft, BT-Drs.19/28649.

81 Recommended Resolution, BT-Drs. 19/30505, 39.

82 BGHZ 116, 7; BGHZ 186, 58 each with further references.

83 *Beckers*, ZfPW 2021, 220 (243); *Habersack/Ehrl*, AcP *219* (2019), 155 (190 ff.); an overview in Mittwoch, *Aktuelle Regulierungsfragen der Sustainable Corporate Governance*, report commissioned by Oxfam Deutschland e. V. (2021), p. 17s; *Wendelstein,* RabelsZ *83* (2019), 111 (124 ff.); *Weller/Kaller/Schulz*, AcP 216 (2016), 387, (398 ff.); *Weller/Thomale, ZGR* 2017, 509 (517ff.).

84 On this *Thomale/Murko*, EuZA 2021, 40 (50 f.); *Schneider*, NZG 2019, 1369 (1375 ff.), (1372 ff.); *Heinlein,* NZA 2018, 276 (279).

85 In view of human rights abuse also *Wagner*, ZIP 2021, 1095, (1102 f.); *Weller/Kaller/Schulz*, AcP 216 (2016), 387 (400) with further references.

86 On the controversial question of tort liability for human rights abuse along the supply chain for instance *Beckers*, ZfPW 2021, 220 (243); *von Falkenhausen*, Menschenrechtsschutz durch Deliktsrecht, 216 f., 240, 301; *Schneider*, NZG 2019, 1369 (1372 ff.)

ance, *Vertrauensgrundsatz*).[87] Comprehensive liability along the supply chain must therefore be well justified. Advocates link this to the case law of the Federal Court of Justice (BGH) on the duty of care under tort law or the duty to ensure safety of traffic, if one is responsible for a source of danger.[88] The criteria for liability developed in this context could, in principle, be applied to the constellation of the supply chain.[89] However, there are further obstacles in corporate law. The question of the scope of corporate organisational fault is extremely controversial, as is the responsibility of a parent company for its subsidiaries. The latter is fundamentally opposed by the legal entity principle under corporate law or the separation principle under group law.[90] It is a corporate law manifestation of the principle of trust under tort law and states that the conduct of several independent legal entities is not mutually attributable - this applies both between the companies of a group and in the relationship between a company and its shareholders.[91] But here too, both in literature and in the recent case law of various states, a trend towards breaking with the principle of separation can be observed. A claim against the parent company for the violation of human rights and ecological concerns by its subsidiary under section 823 para. 1 BGB therefore no longer seems to be excluded per se.[92] To support this development, the due diligence duty regime of the LkSG could be used to concretise the duty of care under tort law.[93]

Even if an opinion advancing in literature pleads for an extension of tort liability, private enforcement outside the LkSG remains uncertain, and within the LkSG it does not exist. This is regrettable, as the law thus loses effectiveness. Without a private-law liability regime, the deterrent effect is weaker. Since it sometimes also targets violations that fly under the radar of the risk-based approach of the LkSG, private enforcement can foster a broader enforcement. Furthermore, the prosecuting authority can use the resources it saves when violations are enforced by private law means for a more effective prosecution. The European proposal therefore includes civil liability.[94]

87 *Wagner*, RabelsZ 80 (2016), 717 (758), *ders.*, *ZIP* (2021), 1095, 1096.

88 Rechtsgutachten zur Ausgestaltung eines Lieferkettengesetzes vom Mai 2020, erhältlich im Internet: <https://lieferkettengesetz.de/wp-content/uploads/2020/02/200527_lk_rechtsgutachten_webversion_ds.pdf> (last accessed: 22.03.2022), with further references such as BGH, NJW 1965, 197; BGH, NJW 2001, 1865.

89 *Grabosch/Scheper,* Die menschenrechtliche Sorgfaltspflicht von Unternehmen.

90 Esp. *Wagner*, RabelsZ 80 (2016), 717, (759 ff.).

91 *Wagner,* RabelsZ 80 (2016), 717 (759 ff.); *König*, AcP 217 (2017), 611 (614 ff.).

92 Cf. esp. the fundamental decision of the UK Supreme Court in the case Okpabi v Royal Dutch Shell of 12.2.2021 and lately the more further reaching verdict of the Dutch Hague District Court in the case Royal Dutch Shell (RDS) of 26.5.2021; more in detail on this development *Schall*, ZGR 2018, 479 – 512; *Abdul*, ICCLR 2021, 32 (10), 548.

93 Still on the government draft *Wagner*, ZIP 2021, 1095 (1103). The rule of section 3 para. 3 s. 1 LkSG does not contradict this since this is not about the establishment of civil liability.

94 Art. 22 Commission proposal (n. 4).

## D. Summary assessment and outlook

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

Regarding the scope and enforcement of corporate due diligence, the German legislature also fails to achieve the goal of a comprehensive approach. On the one hand, the LkSG leaves out small and medium-sized enterprises. This does not bring the intended relief, but conversely leads to legal uncertainties to the detriment of SMEs, which, as the backbone of the German and European economy, play a central role in the transformation to a sustainable economy. On the other hand, the LkSG fails to bind companies comprehensively to their obligations along the supply chain. Although its supply chain concept is broadly defined in principle, the concrete due diligence obligations mostly concern the company's own business operations and direct suppliers. Indirect suppliers are only affected in exceptional cases; such a regulatory approach not only fundamentally questions the effectiveness of the law, but also contradicts parallel approaches in the UN Guiding Principles on Business and Human Rights, in other member states and at EU level.

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

If company law is to be used effectively as a vehicle for the transformation to a sustainable economy, this project requires more than a mere consideration of environmental and social concerns in various individual company law norms; it requires a coherent, cross-jurisdictional approach that is capable of meaningfully integrating a uniform and comprehensive understanding of sustainability into corporate law.[95] Due to the complexity of the subject matter in the multi-level legal system, the corresponding design of relevant legal rules places increased demands on the active regulators. The importance of the project can hardly be underestimated since it is about nothing less than providing a new regulatory framework for the behaviour of nationally and internationally active market players. The LkSG may be a first step in this direction. However, much remains to be done in the field of corporate sustainability.

[95] This attempt undertakes the French legislator with new regulations in the Commercial Code (Code de Commerce) through the Loi de Vigilance and in the Code Civil by the Loi Pacte. More critical of the latter *Poracchia*, Bulletin Joly Sociétés, 6 (2019), 40; *Schmidt*, Recueil Dalloz 2019, 633.

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