

# GERMAN SUPPLY CHAIN DUE DILIGENCE ACT (LKSG)

A QUICK GUIDE BY FAU HUMAN RIGHTS AND BUSINESS CLINIC

AUGUST 2023



Friedrich-Alexander-Universität  
Erlangen-Nürnberg

## SUPPLY CHAIN DUE DILIGENCE ACT (LkSG)

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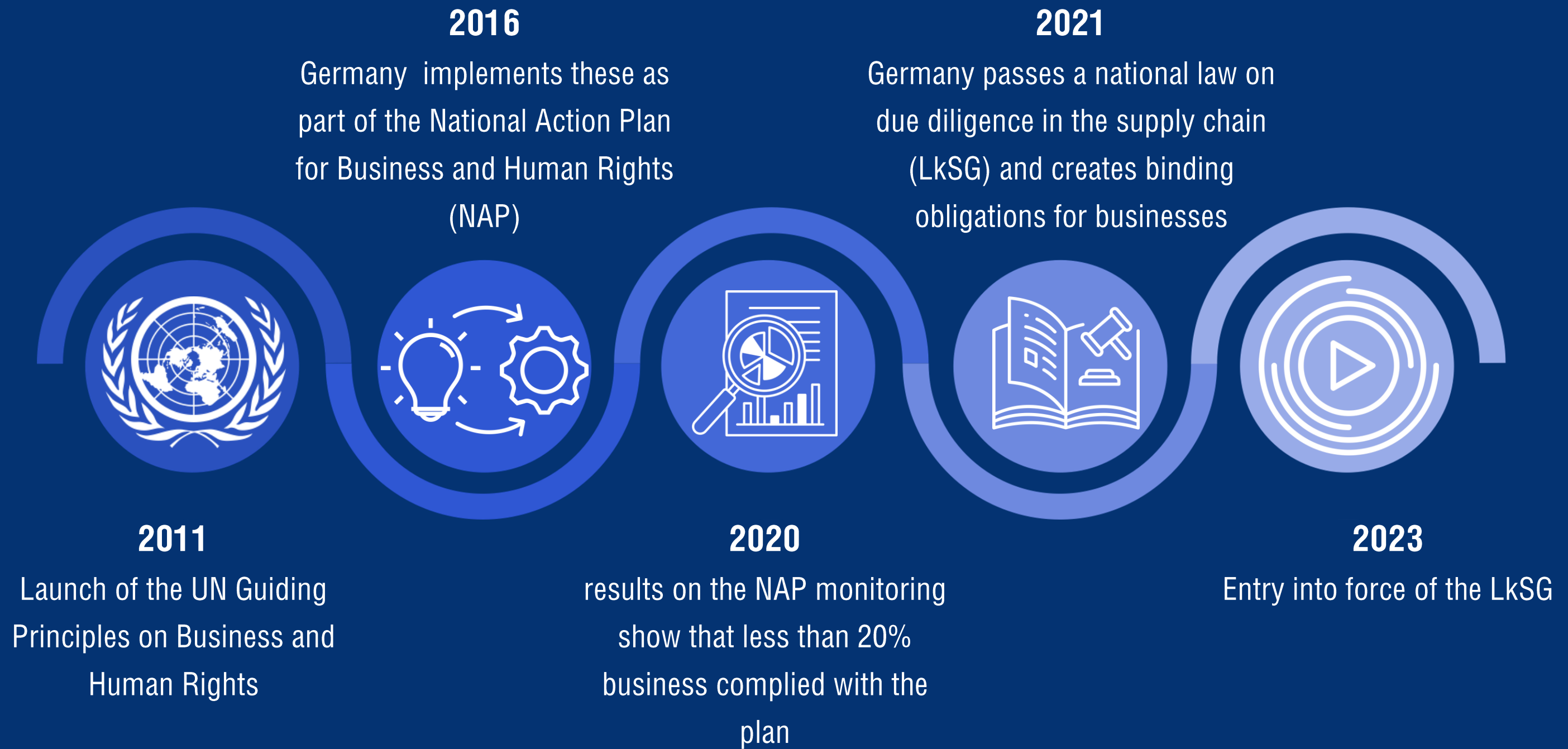
## HUMAN RIGHTS AND BUSINESS CLINIC

# ABOUT THE FAU HUMAN RIGHTS AND BUSINESS CLINIC

The [FAU Human Rights and Business Clinic](#) brings together students and academics at FAU with partner organizations to work on applied research projects.

Led by doctoral researchers of the International Doctorate Programme “[Business and Human Rights: Governance Challenges in a Complex World](#)”, the Clinic serves the dual function of helping students harness research skills to deliver timely and impactful projects in partnership with an external organization, and provides academic research capacities to the partner organization. By bringing academia and practice closer together, the Clinic aims to deliver mutually beneficial and impact-oriented research.

# FROM UNGP TO LKSG



# PERSONAL SCOPE



## SINCE JANUARY 2023

**Enterprises** that have their central administration, their principal place of business, their administrative headquarters or their statutory seat **in Germany** with at least **3,000 employees**.



## FROM JANUARY 2024

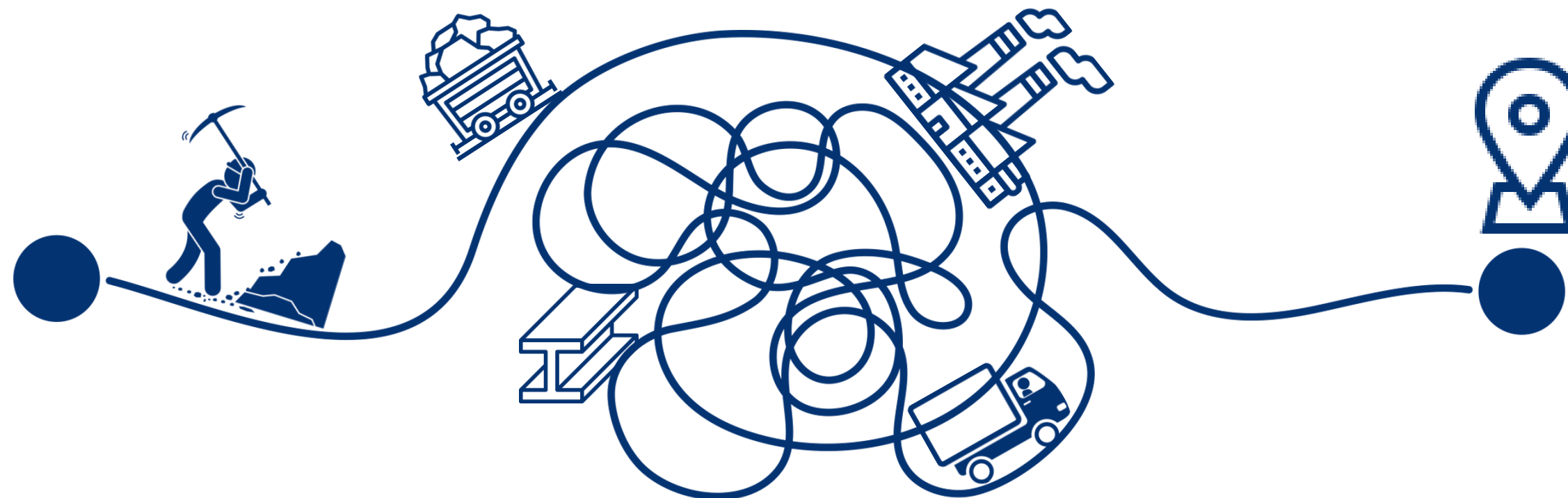
**Enterprises** that have their central administration, their principal place of business, their administrative headquarters or their statutory seat **in Germany** with at least **1,000 employees**.



## HOW TO CALCULATE THE NUMBER OF EMPLOYEES?

Regular full-time and part-time employees + Temporary workers in employment for more than six months + Employees posted abroad +  
Employees of affiliated enterprises employed in Germany\* + Special groups of employees\*\*

\*In the case of parent companies    \*\*those on probation, homeworkers, dependent sales agents, in short-time work scheme and on maternity leave



## SUPPLY CHAIN

### CONCEPT UNDER LkSG

the term “supply chain” is defined **broadly\***. It includes **all steps** in Germany and abroad that are necessary to produce the products and provide the services of an enterprise.

This includes the use of necessary services, such as **transporting or temporarily storing goods**.

\*This broad definition must be distinguished from the question of which supply chains and risks an enterprise must address first as part of its risk management system

### OWN BUSINESS AREA

Covers the enterprise's own business operations and affiliated enterprises if the parent company exercises a decisive influence on the affiliated enterprise.

### DIRECT SUPPLIERS

Partners to a contract for the supply of goods or the provision of services whose supplies are necessary for the production of the enterprise's product or for the provision of the enterprise's service.

### INDIRECT SUPPLIERS

Any enterprise which is not a direct supplier and whose supplies are necessary for the production of the enterprise's product or for the provision of the enterprise's service.

# HUMAN RIGHTS CONVENTIONS (CLOSED LIST)



- **CONVENTION NO. 29** - FORCED OR COMPULSORY LABOR
- **PROTOCOL TO CONVENTION NO. 29** - FORCED OR COMPULSORY LABOR.
- **CONVENTION NO. 87** FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANIZE AS AMENDED BY THE CONVENTION OF 26 JUNE 1961.
- **CONVENTION NO. 98** - APPLICATION OF THE PRINCIPLES OF THE RIGHT TO ORGANISE AND TO BARGAIN COLLECTIVELY, AS AMENDED BY THE CONVENTION OF 26 JUNE 1961.
- **CONVENTION NO. 100** - EQUAL REMUNERATION FOR MEN AND WOMEN WORKERS FOR WORK OF EQUAL VALUE.
- **CONVENTION NO. 105** - ABOLITION OF FORCED LABOR.
- **CONVENTION NO. 111** - DISCRIMINATION IN RESPECT OF EMPLOYMENT AND OCCUPATION
- **CONVENTION NO. 138** - MINIMUM AGE FOR ADMISSION TO EMPLOYMENT.
- **CONVENTION NO. 182** - PROHIBITION AND IMMEDIATE ACTION FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR.

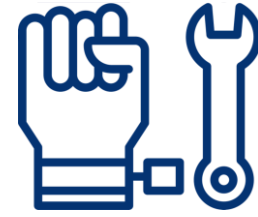


- **INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS** (1966)
- **INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS** (1966).

# HUMAN RIGHTS RISKS



- 1. CHILD LABOUR
- 2. WORST FORMS OF CHILD LABOUR



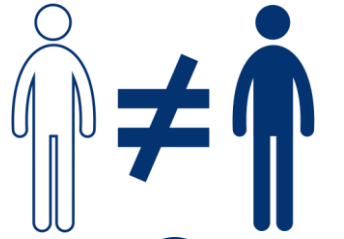
- 3. FORCED LABOUR
- 4. ALL FORMS OF SLAVERY



- 5. DISREGARDING OCCUPATIONAL SAFETY AND HEALTH



- 6. DISREGARDING FREEDOM OF ASSOCIATION



- 7. UNEQUAL TREATMENT IN EMPLOYMENT



- 8. WITHHOLDING ADEQUATE LIVING WAGE



- 9. DESTRUCTION OF VITAL NATURAL RESOURCES THROUGH ENVIRONMENTAL POLLUTION



- 10. UNLAWFUL TAKING OF LAND, FORESTS AND WATER WHICH SERVE THE LIVELIHOOD OF PEOPLE



- 11. HIRING OR USING SECURITY FORCES WHO RESORT TO VIOLENCE



- 12. ANY OTHER BEHAVIOUR CAPABLE OF HARMING HUMAN RIGHTS IN A PARTICULARLY SERIOUS MANNER AND WHICH IS OBVIOUSLY UNLAWFUL



12. ANY OTHER BEHAVIOUR  
CAPABLE OF HARMING HUMAN  
RIGHTS IN A **PARTICULARLY  
SERIOUS MANNER** AND WHICH  
IS OBVIOUSLY **UNLAWFUL**

Severity is to be determined on a case by case basis, but the body responsible for enforcing the act has determined some criteria\*:

"[t]he severity is determined by several (auxiliary) criteria. First, the **degree of impairment (intensity or depth of an injury)** determines the severity. In this context, for some injuries - such as forced labor and other forms of involuntary labor or the worst forms of child labor - a great intensity of injury must always be assumed. In addition, the **number of people affected or the size of the affected area of the environment** are relevant. Lastly, the **reversibility of the injury** must be considered. Here, it must first be examined whether it is at all possible to eliminate the negative effects. Irreversible effects weigh particularly heavily. In the case of reversible violations, the (time) effort and resources required to remedy the negative effects must also be taken into account."

Standards used to determine what are human rights-based prohibitions are to be defined. Bearing in mind the **principle of respect for international law**, enshrined in Art. 25 (1) of the German Constitution, the elements defining the scope of other prohibitions in the Act might be interpreted in line with international standards and the clarifications of **ILO and UN treaty bodies**, namely the **HRC and the Committee on Economic, Social and Cultural rights** since they have primary competence to give authoritative interpretations of the conventions listed in the Act.

# ENVIRONMENTAL CONVENTIONS (CLOSED LIST)



MINAMATA CONVENTION ON  
MERCURY



STOCKHOLM CONVENTION ON  
PERSISTENT ORGANIC  
POLLUTANTS



BASEL CONVENTION ON THE  
CONTROL OF  
TRANSBOUNDARY  
MOVEMENTS OF HAZARDOUS  
WASTES AND THEIR  
DISPOSAL

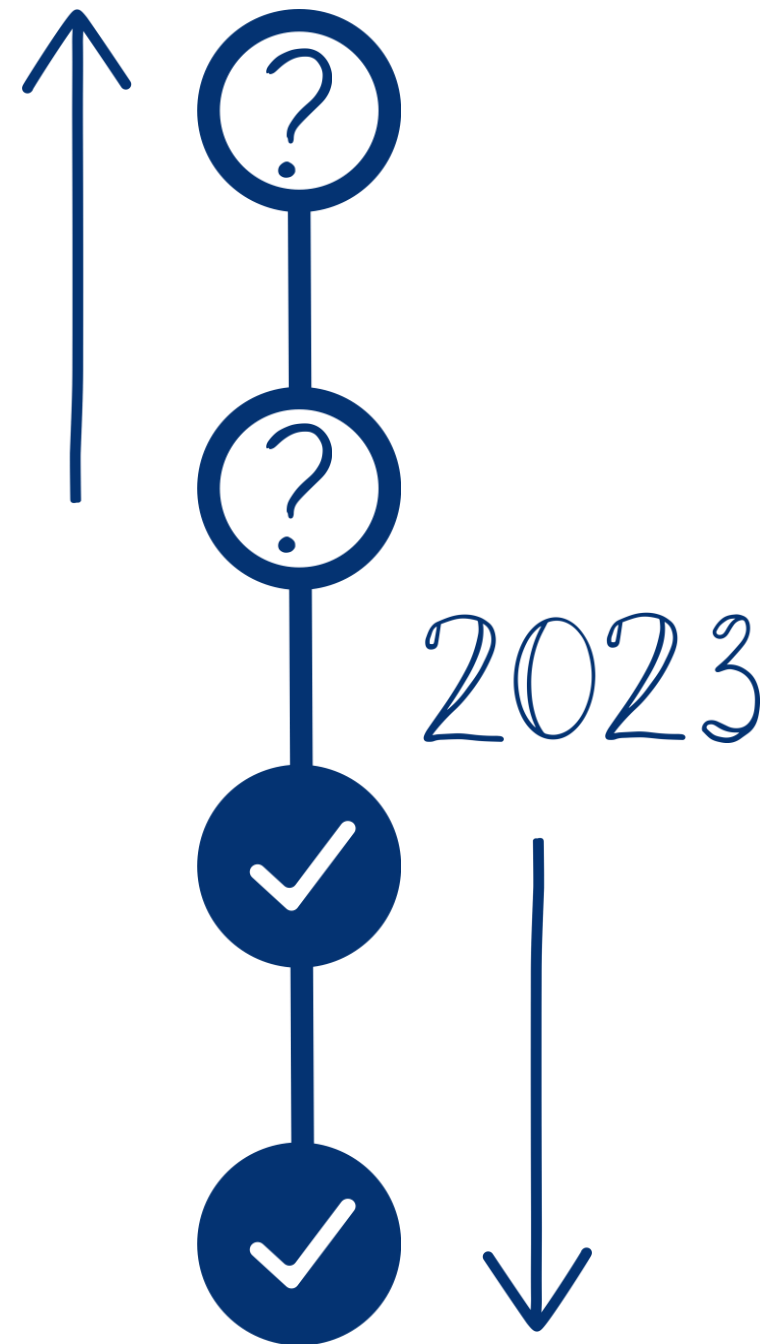


## DOES THE ACT COVER CLIMATE CHANGE?

Climate change causes environmental and social harm which affect human rights. However, although other environmental harms are covered to the extent that they affect human rights, **the Act does not cover climate change directly.**



## TEMPORAL SCOPE



The Act does not provide any specific guidance on this matter, nor does BAFA or the Government in their official draft bill. However, it is reasonable to assume that, **in principle, the duty to conduct due diligence processes** within the enterprises' supply chain **is not retroactive under the Act.**

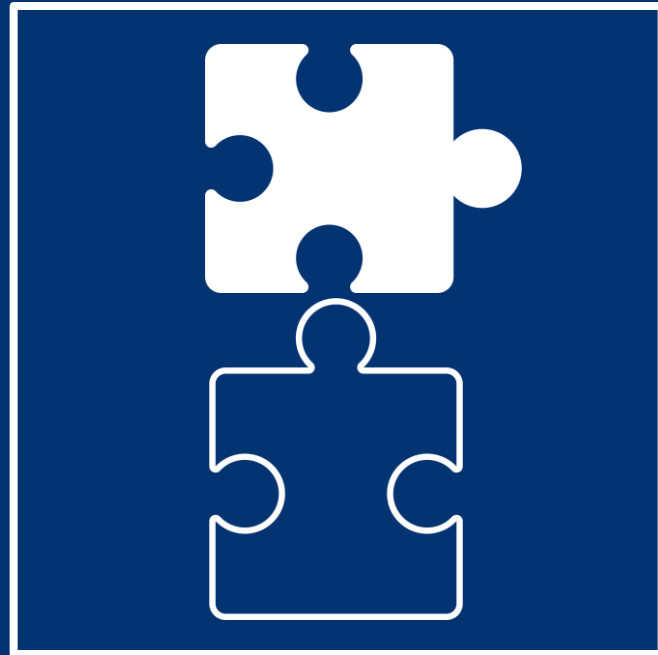
That said, it is important to note that the Act covers human rights risks and, insofar as there are violations, it provides for remediation measures. When it comes to the latter, **the extent to which enterprises may be obliged to provide remedial action to a violation that occurred prior to the LkSG's entry into force is still up for debate.** The distinction between instantaneous and continuing violations of human rights might be relevant.



### HOW ARE PAST VIOLATIONS RELEVANT?

Past human rights violations within the supply chain can inform present or future risks and can, therefore, be relevant for the risk analysis of the enterprises.

# KEY CONCEPTS



## APPROPRIATENESS

Enterprises must exercise due diligence in their supply chains in a manner that is appropriate **for them** considering:

- the nature and extent of the enterprise's business activities,
- the ability of the enterprise to influence the party directly responsible for a risk or violation,
- the severity and the probability of the occurrence of the violation
- the nature of the causal contribution to the risk or to the violation



## EFFECTIVENESS

The principle of effectiveness comes into play in the planning, implementation and further development of due diligence processes.

A measure is effective if it can **actually identify the risks** and improve or **contribute to the situation of people or the protection of the environment**.

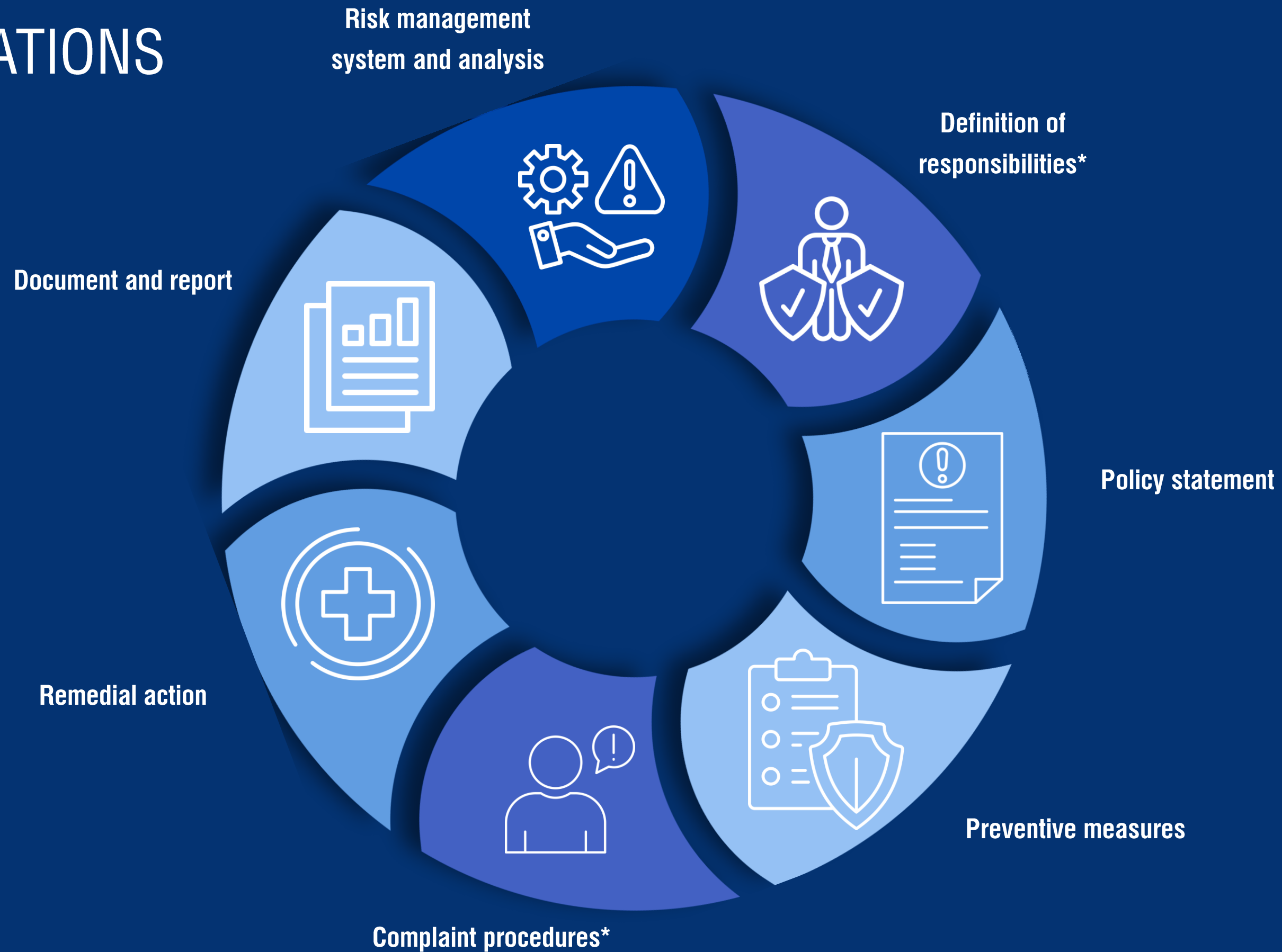


## SUBSTANTIATED KNOWLEDGE

This is relevant for processes concerning indirect suppliers. The enterprise must have actual **indications** that suggest that a violation may be possible. These include **for example**:

- notifications via the complaints mechanism,
- media reports, reports by NGOs and notifications on the internet if they are
- common knowledge or are passed on to the enterprise.
- information published by the competent authority

# OBLIGATIONS



\*Have to already be fulfilled upon entry into force of the Act or by the date on which an enterprise first falls within the Act's scope



## RISK MANAGEMENT SYSTEM AND ANALYSIS

- Enterprises must establish an **appropriate** and **effective** risk management. That means that all of the obligations of enterprises are to be **adapted to the specific enterprise**.
- As part of risk management, the enterprise must conduct an appropriate risk analysis. It must **identify**, **assess** and **prioritise** risks **appropriately**.
- The risk analysis must be carried out once a year in relation to the own business area and direct suppliers. In relation to indirect suppliers, it is triggered when there is substantiated knowledge of a violation or of its imminence.





## DEFINITION OF RESPONSIBILITIES

- Determine the person or persons who, within the company, will be responsible for monitoring risk management.
- The person/s does/do not have to be based in Germany.
- The person/s must be appointed within the enterprise. However, enterprises may use external assistance to support the person/s appointed for the task within the enterprise.



## POLICY STATEMENT

- Description of the human rights due diligence procedure.
- Enterprise's priority human rights and environment-related risks identified on the basis of the risk analysis.
- Definition, based on the risk analysis, of the human rights-related and environment-related expectations placed by the enterprise on its employees and suppliers in the supply chain.





## PREVENTIVE MEASURES

- Preventive measures to be **linked to prioritised risks**.
- Must be taken immediately if the regular risk analysis identifies any risks in the enterprise's own business area and at direct suppliers and insofar as these have been prioritised. In relation to indirect suppliers, it is triggered when there is substantiated knowledge of a violation or of its imminence.
- Examples of these measures are
  - Implementation of the human rights strategy outlined in the policy statement.
  - Procurement and purchasing practices that prevent or minimize risks.
  - Contractual assurances and control mechanisms.
  - Training measures.



## COMPLAINTS PROCEDURE

Can be internal, including at the group-wide level, or external as long as it fulfils the following requirements:

- The persons responsible for the procedure must offer a guarantee of impartiality.
- Information on accessibility, responsibility and implementation of the complaints procedure must be accessible, clear and comprehensible.
- Confidentiality of identity and effective protection against disadvantage or punishment as a result of a complaint must be ensured.
- The effectiveness of the complaints procedure must be reviewed at least once a year or every time a change or expansion of the risk is expected - e.g. introduction of a new product or project.



## REMEDIAL ACTION

- If the enterprise discovers that a violation of a human rights-related or an environment-related obligation has already occurred or is imminent it must take immediate appropriate remedial action to prevent, end or minimise the extent of this violation.
- A violation in the enterprises' own business area must be ended.
- The closer the enterprise is to the violation, the greater must be the effort to end it.
- Standards of what measures are appropriate and effective may take into account the measures taken by other enterprises in the same field.
- Termination of a business relationship is a last resort.



## DOCUMENT AND REPORT

- Ongoing documentation.
- Annual report on the fulfilment of the due diligence obligations in the previous financial year.
  - state whether the enterprise has identified any human rights and environment-related risks or violations of a human rights-related or environment-related obligation and identify them.
  - what the enterprise has done to fulfil its due diligence obligations.
  - assessment of the impact and effectiveness of the measures taken.
  - conclusions it draws from the assessment for future measures.

# MONITORING



Federal Office  
for Economic Affairs  
and Export Control



## MONITOR COMPLIANCE WITH THE ACT

It may summon people, order enterprises to submit corrective plans or to take specific actions; inspect the enterprises' premises, offices, commercial buildings, documents and records.



## SANCTION VIOLATIONS OF THE ACT

It may apply administrative fines of up to eight million euros or up to two percent of the enterprises' annual turnover as well as exclude enterprises from the award of public contracts within a period of up to three years depending on the fine






## WHO IS THE COMPETENT AUTHORITY?

The Federal Office for Economic Affairs and Export Control (BAFA) is responsible for the official monitoring and enforcement of the Act. It can take action:


- At its own initiative (ex officio)
- Upon request, if the person making the request makes a substantiated claim that a violation has occurred or is imminent


# REPORTING A COMPLAINT\*

 Bundesamt für Wirtschaft und Ausfuhrkontrolle

Language  English 


## Report a complaint

 Here you have the possibility to file a complaint.

 The complaint can also be submitted anonymously. However, in this case we cannot give you any feedback on your complaint.

### Information on yourself

Name of the organisation


Salutation  Surname First name

E-Mail

#### Address

Street House number

Postal Code Location

Country 

### Information on the company you wish to file a complaint about:


Name of the company

Legal form

#### Address


Street House number

Postal Code Location

Country 

### File a complaint

Please select whether the violation has already occurred or is imminent.

 If you wish to report an imminent violation and a violation that has already occurred, please file two complaints separately, one complaint for the imminent violation and one for the violation that has already occurred.

Imminent  Already occurred

# CIVIL PROCEEDINGS



- Under the Act, **persons affected by serious violations** are able to authorise domestic Trade Unions and NGOs to bring civil proceedings in their own capacity.
- The NGO or Trade Union must
  - be headquartered in Germany.
  - be permanently engaged with the realization of human rights or corresponding rights in the national law of a state.
  - not be engaged with these matters commercially.



A violation of the Supply Chain Act's obligations **does not** give rise to any new grounds of liability under German civil law.



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