

# **FAU HUMAN RIGHTS AND BUSINESS CLINIC**

## **THE GERMAN SUPPLY CHAIN ACT (LKSG) AND THE HUMAN RIGHTS IMPACTS OF THE STEEL INDUSTRY**

Environmental Defender Law Center (EDLC) PROJECT



Friedrich-Alexander-Universität  
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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.

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## LIST OF ABBREVIATION

Abbreviation	Definition
3TG	Tin, tungsten, tantalum and gold
AktG	<i>Aktiengesetz</i> , Stock Corporation Act
BAFA	<i>Bundesamt für Wirtschaft und Ausfuhrkontrolle</i> , Federal Office for Economic Affairs and Export Control
BGR	<i>Bundesanstalt für Geowissenschaften und Rohstoffe</i> , Federal Institute for Geosciences and Natural Resources
CDU	<i>Christlich Demokratische Union Deutschlands</i> , Christian-Democratic Union
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRPD	Convention on the Rights of Persons with Disabilities
CSRD	Corporate Sustainability Reporting Directive
CSU	<i>Christlich-Soziale Union in Bayern</i> , Christian-Social Union
DERA	<i>Deutschen Rohstoffagentur</i> , The German Mineral Resources Agency
ECtHR	European Court of Human Rights
EDLC	Environment Defenders Law Center
EU	European Union
FAQ	Frequently Asked Question
FAU	Friedrich-Alexander University Erlangen-Nuremberg
FPIC	Free, Prior, and Informed Consent
HRC	Human Rights Committee
HRDD	Human Rights Due Diligence
HREDS	Human Rights and Environmental Defenders
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICoCA	International Code of Conduct for Private Security Service Providers Association
ILO	International Labor Organization
KPIs	Key Process Indicators
LkSG, the Act	<i>Lieferkettensorgfaltspflichtengesetz</i> , The German Supply Chain Act,
MNE	Multinational Enterprises
NAP	National Action Plan
NCPs	National Contact Point
NFRD	Non-Financial Reporting Directive
NGOs	Non-Governmental Organisations
OECD	Organisation for Economic Cooperation and Development
POPs	Persistent Organic Pollutants
SDGs	Sustainable Development Goals
SPD	<i>Sozialdemokratische Partei Deutschlands</i> , Social Democratic Party of Germany
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN OHCHR	United Nations Office of the United Nations High Commissioner for Human Rights
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNSD	United Nations Statistical Division
VPSHR	The Voluntary Principles on Security and Human Rights
VwVG	<i>Verwaltungsvollstreckungsgesetz</i> , Administrative Enforcement Act
WTO	World Trade Organization
ZPO	<i>Zivilprozessordnung</i> , German Code on Civil Procedure

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## EXECUTIVE SUMMARY

This report presents the main findings of a comprehensive study on the main human rights impacts of the steel industry and the avenues the German Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz* (LkSG) or the Act) offers to address these impacts.

### Main Findings

The steel industry can be responsible for potential negative consequences on various human rights aspects, including labor rights abuses, health and safety hazards, land displacement, environmental pollution, and related concerns.

The steel industry's adherence to international standards and norms, particularly within the realm of international human rights law, is of paramount importance in preventing and remedying these negative impacts. This report sheds light on the alignment or misalignment of the industry's practices with these standards and assesses the effectiveness of existing legal frameworks in dealing with the identified human rights impacts.

There is an urgent need for robust regulations and corporate accountability in addressing the human rights impacts of the steel industry. The findings and recommendations presented in this report aim to contribute to the ongoing endeavors towards establishing a more sustainable and rights-respecting steel industry.

In line with these observations, the report provides comprehensive insights into the interplay between the LkSG, the steel industry, and human rights risks. The most important points can be summarized below:

- The LkSG was adopted in 2021 in response to low levels of compliance with non-binding business and human rights norms.
- The LkSG applies from January 2023 to enterprises with at least 3,000 employees, and from January 2024 to enterprises with at least 1,000 employees.
- Enterprises in the steel industry supply chains are likely to be affected.
- The monitoring and the application of administrative fines are carried out by the German Federal Office for Economic Affairs and Export Control (BAFA).
- No new grounds for civil liability under German Law were established.
- Human rights covered by the LkSG include those from ICCPR, ICESCR and nine ILO Conventions.
- Environmental rights covered by the LkSG include those from the Minamata Convention on Mercury, the Stockholm Convention on Persistent Organic Pollutants

and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

- Past violations are relevant for the identification of existing risks.
- Other instruments, namely those referred expressly by BAFA, might be relevant for the implementation and interpretation of the LkSG.

## Background and Interpretative Guides of the LkSG

The LkSG was adopted after the observed failure of German enterprises to voluntarily uphold principles of the German National Action Plan for Business and Human Rights (NAP) from 2016, which aimed to implement the United Nations Guiding Principles on Business and Human Rights (UNGPs). In 2020, when the compliance with the principles of the UNGPs was assessed, only 13 to 17 percent of enterprises surveyed complied with the NAP requirements.

### Main Features of the LkSG:

Category	LkSG Rules
Obligated enterprises	From 01.01.2023 enterprises with at least 3.000 <i>employees</i> in Germany and from 01.01.2024 enterprises with at least 1.000 <i>employees</i> in Germany.
Norms covered	Explicit list of human rights risks and environment-related risks defined + other behaviors derived from 11 human rights conventions from the Annex of the Act which have to be serious and obviously unlawful.
Supply chain scope	<ol style="list-style-type: none"> <li>1. Enterprises' own operations and their affiliated enterprises - i.e., <i>own business area</i></li> <li>2. The operations of their contractual <i>direct supplier</i></li> <li>3. The operations of their non-contractual <i>indirect supplier</i></li> </ol>
The duties	<ol style="list-style-type: none"> <li>1. Establish a risk management system and appoint a person in charge</li> <li>2. Assess risks, prioritize and lay down preventive measures</li> <li>3. If violations are found, lay down remedial measures</li> <li>4. Establish and maintain a complaint's mechanism for the whole supply chain</li> <li>5. Document and report</li> </ol>

Temporal scope	It is important to note that the LkSG covers <i>risks</i> . Accordingly, enterprises are bound to take preventive measures to address those risks. This means that they are bound to consider preventive measures with respect to human rights violations which happened even before they fell under the scope of the LkSG, as past violations can be strong indicators of risks for new ones.
Nature of Remedial duties	Enterprises are obliged to provide remedy to violations in their <i>own business area</i> , whereas they may be so obliged further up their supply chain in specific circumstances, if they have caused or contributed to the violations that need to be remedied.
Monitoring	The administrative monitoring is carried out by the Federal Office for Economic Affairs and Export Control ( <i>Bundesamt für Wirtschaft und Ausfuhrkontrolle</i> (BAFA)) which can impose sanctions on enterprises for non-compliance. BAFA practices monitoring in accordance with its own risk assessment of affected enterprises or after receiving a complaint, which an affected individual can lodge.
Sanctions	If BAFA finds noncompliance, the affected enterprise can be fined up to 2 percent of annual turnover and excluded from the award of public contracts for a period of up to three years.
Civil Liability (for damages etc.)	The LkSG expressly stipulates that its provisions do not create new grounds for civil liability. Enforcement and sanctions of the LSKG are based on administrative proceedings. Liability for negative human rights impacts in the supply chain can in theory be determined by general principles of German civil law, independent of LkSG.

## Affected Enterprises in the Steel Industry Supply Chain

Steel producers and/or importers are most likely to have to address the adverse impacts of the steel industry on human rights. This is because Germany imports most of its steel from the European Union (EU)<sup>1</sup> while it almost exclusively imports raw materials necessary for the production of steel (iron ore, coal and coke (cooked coal))<sup>2</sup> from outside the EU.

<sup>1</sup> The Observatory of Economic Complexity. (n.d.). *Iron & Steel in Germany*. Retrieved July 31, 2023 from <https://oec.world/en/profile/bilateral-product/iron-steel/reporter/deu?redirect=true>

<sup>2</sup> Institut der deutschen Wirtschaft Köln Consult GmbH. (2022). *Wertschöpfungskette Stahl: Nachhaltigkeit im internationalen Vergleich*. Retrieved July 31, 2023 from [https://www.stahl-online.de/wp-content/uploads/Bericht-WSK-Stahl\\_final-1.pdf](https://www.stahl-online.de/wp-content/uploads/Bericht-WSK-Stahl_final-1.pdf)

## Interpretive Guides for Duties from the LkSG

The official bill for the LkSG<sup>3</sup> as well as the competent authority under it - BAFA<sup>4</sup>- specifically named the following *Soft Law* instruments as standards against which the compliance of the affected enterprises will be assessed:

1. UNGPs (2011)<sup>5</sup>;
2. United Nations Office of the United Nations High Commissioner for Human Rights (UN OHCHR) (2012): *The Corporate Responsibility to Respect Human Rights. An Interpretive Guide*<sup>6</sup>;
3. UN OHCHR (2018): *Corporate Human Rights Due Diligence (HRDD) – Getting started, emerging practices, tools, and resources*<sup>7</sup>;
4. Organization for Economic Cooperation and Development (OECD) *Guidelines for Multinational Enterprises (MNE) (2011), now with the 2023 update*<sup>8</sup>;
5. OECD *Due Diligence Guidance for Responsible Business Conduct*<sup>9</sup>;
6. OECD: *Responsible business conduct for institutional investors: Key considerations for due diligence*<sup>10</sup>

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<sup>3</sup> Das Bundesministerium für Arbeit und Soziales. (n.d.). *Gesetzentwurf der Bundesregierung*. Retrieved July 31, 2023 from [https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2) (page 45)

<sup>4</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1> (reply to question question 5 in section VI)

<sup>5</sup> Office of the United Nations High Commissioner for Human Rights. (2011). *UN Guiding Principles on Business and Human Rights*. Retrieved July 31, 2023 from [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf)

<sup>6</sup> Office of the United Nations High Commissioner for Human Rights. (2012). *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*. Retrieved July 31, 2023 from [https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf)

<sup>7</sup> Office of the United Nations High Commissioner for Human Rights. (2018, July 16). *A/73/163: The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*. OECD iLibrary. Retrieved July 31, 2023 from <https://www.ohchr.org/en/documents/thematic-reports/a73163-report-working-group-issue-human-rights-and-transnational>

<sup>8</sup> OECD. (2023, June 8). *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*. Retrieved July 31, 2023 from [https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct\\_81f92357-en](https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en)

<sup>9</sup> OECD. (2018). *OECD Due Diligence Guidance for Responsible Business Conduct*. Retrieved July 31, 2023 from <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>10</sup> OECD. ((2023, June 8). *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. Organisation for Economic Co-operation and Development*. OECD iLibrary. Retrieved July 31, 2023 from [https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct\\_81f92357-en](https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en)

7. OECD-Guidance for Responsible supply Chains of Minerals from Conflict Affected and High-Risk Areas<sup>11</sup> ;
8. OECD-Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector<sup>12</sup> ;

Although not specifically dealing with the steel industry, the last two OECD instruments mentioned above, will likely be the primary source for the actors in the steel supply chain, seeing that these documents set standards for the extractive industry.

Other relevant interpretative guides could be the: **1)** The Voluntary Principles on Security and Human Rights (VPSHR) and **2)** the International Code of Conduct for Private Security Service Providers Association (ICoCA).

## Other Mandatory Regulations

In addition to the LkSG, the report outlined the key features of some of the other mandatory regulations, which might be applicable to the actors in the steel industry. The regulations examined are:

### 1. Other German or Regulations Directly Applicable in Germany

- a) Article 4 of the EU Brussels I Regulation<sup>13</sup> and Paragraph 17 of the German Code on Civil Procedure (*Zivilprozessordnung* (ZPO))<sup>14</sup>. These two provisions, read jointly, already allow for lawsuits claiming reparations from German entities for their acts or omissions causing damage abroad.

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<sup>11</sup> OECD. (2016). *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*. OECD Publishing, Paris. Retrieved July 31, 2023 from <http://dx.doi.org/10.1787/9789264252479-en>

<sup>12</sup> OECD. (2017, February 2). *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*. Retrieved July 31, 2023 from <https://www.oecd.org/publications/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm>

<sup>13</sup> Official Journal of the European Union. (2012). *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*. Retrieved July 31, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&qid=1690981683324>

<sup>14</sup> Federal Ministry of Justice. (2005, February 25). *Code of Civil Procedure*. Retrieved July 31, 2023 from [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html)

- b) Article 4(1) of the Rome II Regulation<sup>15</sup> establishes a rule that in cases of above-mentioned lawsuits, the applicable law will be the law of the country where the damage was caused.

## 2. EU Level Regulations and Draft Regulations

- a) **The Corporate Sustainability Reporting Directive** mostly requires affected companies to report on various matters, including human rights and the environment.
- b) **The EU Conflict Minerals Regulation** requires all EU importers of tin, tungsten, tantalum and gold (3TG) to check that what they buy is sourced responsibly and does not contribute to conflict or other related illegal activities. This Regulation is further implemented in Germany by the law referred to as: *MinRohSorgG*<sup>16</sup> which gives the Federal Institute for Geosciences and Natural Resources (*Bundesanstalt für Geowissenschaften und Rohstoffe* (BGR)) monitoring powers similar to those of BAFA.
- c) **The Draft EU Directive on Corporate Sustainability Due Diligence**: according to the draft, which is currently under discussion, this Directive will, amongst other provisions envisage that affected enterprises could sustain administrative fines in case of non-compliance and that the victims will have the opportunity to take legal action for damages that could have been avoided with appropriate due diligence measures. However, there is still much to be done before this document enters into force and it is not clear in which form it will do so.

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<sup>15</sup> Official Journal of the European Union. (2007). *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*. Retrieved July 31, 2023 from <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32007R0864>

<sup>16</sup> Bundesministerium der Justiz. (2020, April 29). *Gesetz zur Durchführung der Verordnung (EU) 2017/821 des Europäischen Parlaments und des Rates vom 17. Mai 2017 zur Festlegung von Pflichten zur Erfüllung der Sorgfaltspflichten in der Lieferkette für Unionseinführer von Zinn, Tantal, Wolfram, deren Erzen und Gold aus Konflikt- und Hochrisikogebieten (Mineralische-Rohstoffe-Sorgfaltspflichten-Gesetz - MinRohSorgG)*. Retrieved July 31, 2023 from <https://www.gesetze-im-internet.de/minrohsorgg/BJNR086410020.html>

## **PART 1: SECTIONS CONTENT OVERVIEW**

This report focuses primarily on identifying whether and how the German Supply Chain Act (“the LkSG”) can be used to hold German companies in the steel supply chain accountable for the negative human rights and environmental impacts linked to their steel supply chains.

The LkSG, enacted in Germany in 2021, is a specific legislation designed to regulate and address the responsibility of enterprises established within the country’s borders regarding their supply chains. Its primary objective is to ensure that enterprises take proactive measures to prevent human rights violations and environmental harm throughout their supply chains. The Act places obligations on enterprises, including the need to conduct due diligence, monitor their direct and indirect suppliers, and effectively address any negative impacts on human rights or the environment.

The human rights impacts of the steel industry refer to the consequences or effects that the steel industry has on human rights. As a significant sector with a vital role in global supply chains, the operations of the steel industry can lead to adverse effects on various human rights. These impacts may include labor rights abuses, hazards to the health and safety of workers, displacement of communities and land, environmental pollution, and other related concerns.

### **Sourcing of Steel in Germany**

The report initiates its examination by investigating the sourcing of steel in Germany, including the acquisition of the necessary raw materials for steel manufacturing. It subsequently provides an overview of the relevant supply chains involved in the steel industry, emphasizing their complexities and potential risks.

### **Examining the Relationship between the Steel Industry and Human Rights**

The report delves into the complex and intertwined relationship between the industry and various human rights issues. By engaging with both soft and hard law instruments, the report endeavors to contribute to the ongoing discussion on corporate social responsibility, human rights, and the steel industry’s impact on these crucial issues.

## **General Overview of the Human Rights Impacts of the Steel Industry**

The report broadly analyzes the key affected human rights within various locations that are connected to the steel industry's operations. It outlines the impacts at different stages of the supply chain, starting from mining and raw material extraction sites. This assessment sketches out the potential human rights implications of activities such as mining, including issues related to land rights, displacement of communities, and environmental degradation.

By exploring these specific negative human rights impacts associated with the steel industry across diverse locations, the report provides a general understanding of the multifaceted nature of the industry's effects on rights such as health, work and labor, land and housing, and the environment.

## **Understanding the Background and Scope of the LkSG**

By providing a comprehensive overview of the Act, including its historical background, entry into force, underlying principles, human rights, and environmental norms covered, and temporal scope, the report offers valuable insights into the legal framework governing supply chain due diligence in Germany. This analysis contributes to a better understanding of the legislative landscape and facilitates the evaluation of companies' compliance with their obligations under the Act.

## **Adequacy of the LkSG in Addressing Human Rights Impacts of the Steel Industry**

The report analyses the extent to which the human rights addressed in the LkSG adequately cover the human rights impacts associated with the steel industry. This examination specifically concentrates on key rights that are closely linked to the steel industry's operations and potential negative impacts.

By focusing on these specific rights, the report critically assesses the degree to which the LkSG encompasses and addresses the human rights impacts associated with the steel industry. It aims to provide insights into the adequacy of the Act in protecting the rights of workers, communities, and other stakeholders affected by the steel industry's activities.



## **Obligations of Enterprises under the LkSG**

The report conducts a comprehensive analysis of the obligations imposed on enterprises under the LkSG. It explores these obligations across various dimensions, including general principles, concrete obligations, specific obligations related to the own business area of enterprises, direct and indirect suppliers. The analysis begins by examining the general principles outlined in the LkSG. These principles serve as guiding frameworks for businesses and emphasize the importance of respecting human rights, preventing negative impacts, and promoting responsible supply chain practices. By assessing these principles, the report provides insights into the overarching goals and values of the Act.

Additionally, the report scrutinizes the concrete obligations set forth by the LkSG. These obligations require companies to undertake specific actions and measures to address human rights risks within their supply chains. Such measures may include conducting risk analyses to identify risks, preventive measures to mitigate risks, establishing complaints mechanisms, implementing remedial actions, and promoting transparency and stakeholder engagement. By analyzing these concrete obligations, the report assesses the practical steps that companies must take to fulfill their responsibilities under the Act.

## **Mechanisms and Enforcement of the LkSG**

The report delves into the mechanisms and channels established by the LkSG to address human rights grievances within supply chains. It explores the specific procedures and avenues available for individuals or communities to raise concerns or complaints related to human rights violations. Moreover, the report analyzes the sanctions that can be imposed for non-compliance with the LkSG. Through this examination, the report aims to shed light on the mechanisms available for addressing human rights grievances, the potential consequences for non-compliance, and the role of the responsible institution in monitoring and enforcing the LkSG.

## **Legal Implications and Accountability in the LkSG**

The report examines the legal frameworks and mechanisms that allow for legal action to be taken against companies deemed responsible for human rights violations within their supply chains.

Furthermore, the report examines the potential legal remedies available for affected individuals or communities and analyzes the role of HRDD in mitigating legal risks and liabilities.

## **Beyond the LkSG: an Overview of Relevant Legislations and Guidelines for Promoting Corporate Social Responsibility and Human Rights**

The report presents an overview of various other legislations that are pertinent to the subject matter. These legislations include both mandatory and voluntary frameworks that contribute to the promotion and protection of human rights in the context of business operations. By providing an overview of these additional legislations, the report offers a broader context and highlights the interconnectedness of various initiatives and guidelines in promoting corporate social responsibility and human rights. It underscores the importance of considering a comprehensive framework of legal instruments and standards to address human rights impacts throughout supply chains and business operations.

## PART 2: STEEL IN GERMANY

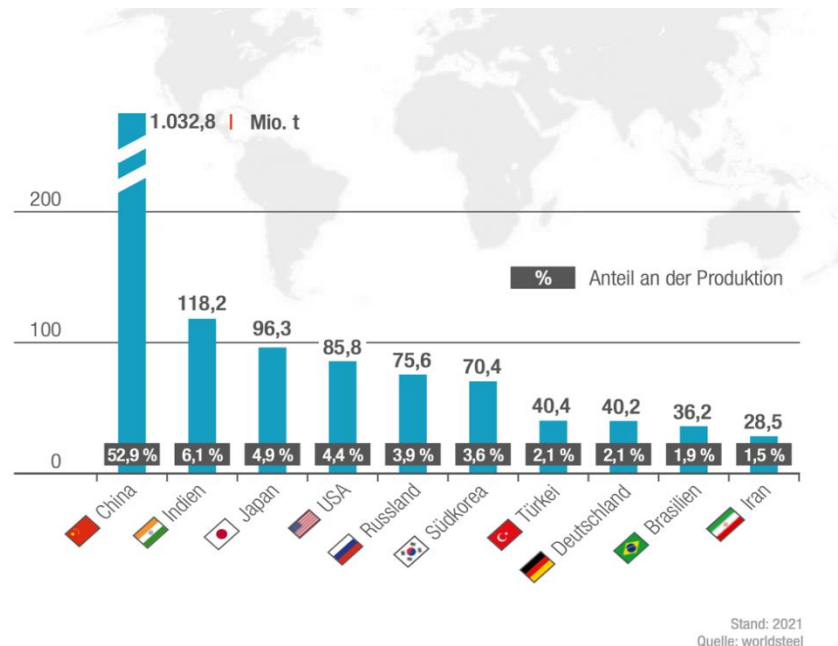
The steel industry holds a significant position within global supply chains, serving as a vital contributor to economic growth and industrial development. In Germany, the steel industry plays a crucial role in various sectors, providing essential raw materials for manufacturing, construction, and infrastructure projects. However, alongside its economic significance, the steel industry also raises concerns regarding its impact on human rights and the environment.

The sourcing, production, and supply chains associated with the steel industry have the potential to affect a range of human rights. These impacts encompass labor rights abuses, health and safety hazards, land displacement, environmental pollution, and other related concerns. As a result, addressing the human rights implications of the steel industry has become a pressing issue, giving rise to the need for implementing robust regulations and corporate accountability measures.

### 2.1. Sourcing of Steel in Germany

Germany is one of the ten largest steel-producing countries in the world, according to a report by the German Steel Association (*Wirtschaftsvereinigung Stahl*).<sup>17</sup>

Figure 1<sup>18</sup>

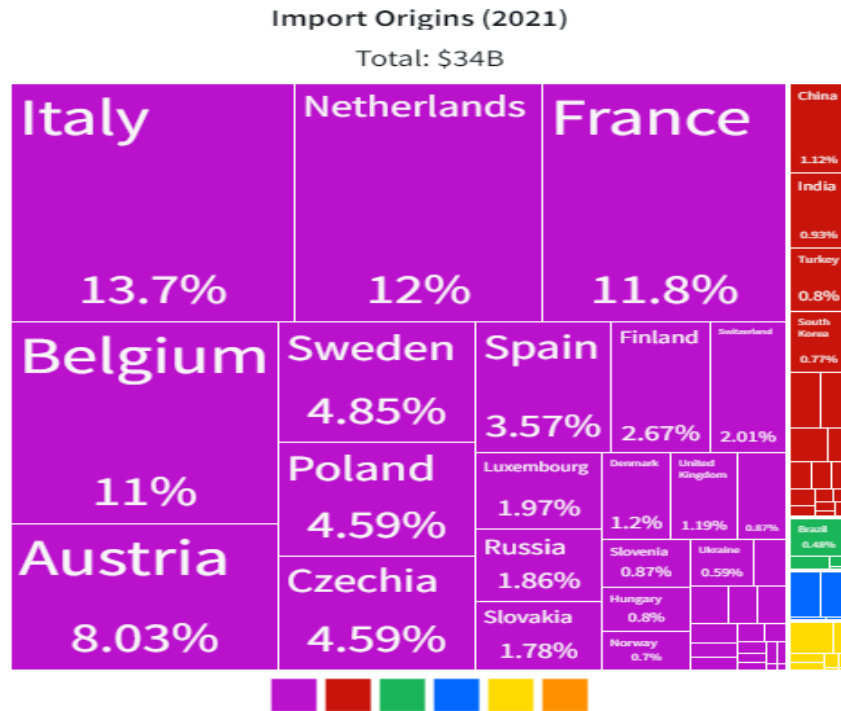


<sup>17</sup> Wirtschaftsvereinigung Stahl. (2022). *Fakten Zur Stahlindustrie in Deutschland*. Retrieved July 31, 2023 from [https://www.stahl-online.de/wp-content/uploads/WV-Stahl\\_Fakten-2022\\_RZ\\_neu\\_Web.pdf](https://www.stahl-online.de/wp-content/uploads/WV-Stahl_Fakten-2022_RZ_neu_Web.pdf) (p. 40)

<sup>18</sup> Ibid

Germany also imports a large amount of steel, ranking third in 2021<sup>19</sup>. However, most of the steel is imported from EU countries, as depicted in this graph from an OEC report<sup>20</sup>:

Figure 2<sup>21</sup>



This would imply that German business sectors buying most of the steel, i.e. **automotive and manufacturing industries** (construction included)<sup>22</sup> satisfy their needs for steel mostly on the EU market.

<sup>19</sup> World Steel Association. (2023, July 19). *Imports of semi-finished and finished steel products. World Total 2021*. Retrieved July 31 2023 from [https://worldsteel.org/steel-topics/statistics/annual-production-steel-data/?ind=T\\_imports\\_sf\\_f\\_total\\_pub/USA/CHN/DEU](https://worldsteel.org/steel-topics/statistics/annual-production-steel-data/?ind=T_imports_sf_f_total_pub/USA/CHN/DEU)

<sup>20</sup> The Observatory of Economic Complexity. (n.d.). *Iron & Steel in Germany*. Retrieved July 31, 2023 from <https://oec.world/en/profile/bilateral-product/iron-steel/reporter/deu?redirect=true>

<sup>21</sup> Ibid

<sup>22</sup> Wirtschaftsvereinigung Stahl. (2022). *Fakten Zur Stahlindustrie in Deutschland*. Retrieved July 31, 2023 from [https://www.stahl-online.de/wp-content/uploads/WV-Stahl\\_Fakten-2022\\_RZ\\_neu\\_Web.pdf](https://www.stahl-online.de/wp-content/uploads/WV-Stahl_Fakten-2022_RZ_neu_Web.pdf) (p.12)

## 2.2. Sourcing of Raw Materials Related to Steel Manufacturing in Germany

On the other hand, Germany is almost exclusively importing raw materials necessary to produce steel (iron ore, coal and coke (cooked coal)).<sup>23</sup>

Figure 3<sup>24</sup>



Quellen: Destatis, 2021a; eigene Berechnungen

As reported by the World Integrated Trade Solutions,<sup>25</sup> Most of the iron ore imported by Germany comes from Brazil.<sup>26</sup>

## 2.3. Overview of the Relevant Supply Chains

This report sought to identify the relevant steel supply chains, which included: 1) a literature review of publicly available studies,<sup>27</sup> 2) an examination of publicly available

<sup>23</sup> Institut der deutschen Wirtschaft Köln Consult GmbH. (2022). *Wertschöpfungskette Stahl: Nachhaltigkeit im internationalen Vergleich*. Retrieved July 31, 2023 from [https://www.stahl-online.de/wp-content/uploads/Bericht-WSK-Stahl\\_final-1.pdf](https://www.stahl-online.de/wp-content/uploads/Bericht-WSK-Stahl_final-1.pdf) (p.12)

<sup>24</sup> Ibid

<sup>25</sup> A software developed by the World Bank in collaboration with the UN Conference on Trade and Development (UNCTAD) and in consultation with organizations such as International Trade Center, UN Statistical Division (UNSD) and the World Trade Organization (WTO) to access and retrieve information on trade and tariffs.

<sup>26</sup> World Integrated Trade Solution. (2019). *Germany iron ores and concentrates; non-agglomerated imports by country 2019*. Retrieved July 31, 2023 from <https://wits.worldbank.org/trade/comtrade/en/country/DEU/year/2019/tradeflow/Imports/partner/ALL/product/260111>

<sup>27</sup> Among other authoritative sources reviewed, these include the following publications available at: 1) Deutsche Rohstoffagentur. (n.d.). *Themenfeld Mineralische Rohstoffe in der BGR* *The-men-feld Mi-ne-ra-li-sche*

corporate documentation of the main German based steel producers outlined in the report on the facts of the steel industry in Germany produced by the German Steel Association (*Wirtschaftsvereinigung Stahl*)<sup>28</sup> and 3) an analysis data available on the website of the Drive Sustainability carmakers sector wide initiative. The first two methods yielded no consistent data, while the third provided a general overview of the automotive industries iron ore supply chain which looks like this:

Figure 4<sup>29</sup>



Human rights impacts can arise at all stages of this supply chain. The following chapter provides an overview of the main human rights risks associated with the steel industry globally.

*Rohstoffe in der BGR*. Retrieved July 31, 2023 from [https://www.deutsche-rohstoffagentur.de/DERA/DE/Themenfeld\\_Mineralische\\_Rohstoffe\\_BGR/miro\\_node.html](https://www.deutsche-rohstoffagentur.de/DERA/DE/Themenfeld_Mineralische_Rohstoffe_BGR/miro_node.html) , 2) Federal Institute for Geosciences and Natural Resources. (n.d.). Retrieved July 31, 2023 from [https://www.bgr.bund.de/EN/Home/homepage\\_node\\_en.html;jsessionid=64C64F10321B1340EDCBC3F77A929AC6.internet981](https://www.bgr.bund.de/EN/Home/homepage_node_en.html;jsessionid=64C64F10321B1340EDCBC3F77A929AC6.internet981) 3) German Federal Ministry of Labour and Social Affairs. (n.d.). Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/DE/Startseite/start.html>, 4) Bundesamtes für Wirtschaft und Ausfuhrkontrolle (BAFA). (n.d.). Retrieved July 31, 2023 from [https://www.bafa.de/DE/Home/home\\_node.html](https://www.bafa.de/DE/Home/home_node.html) and [https://www.bafa.de/EN/Supply\\_Chain\\_Act/supply\\_chain\\_act\\_node.html](https://www.bafa.de/EN/Supply_Chain_Act/supply_chain_act_node.html) , 5) Adelphi Consult GmbH and Ernst & Young GmbH Wirtschaftsprüfungsgesellschaft. (2020). *Die Achtung von Menschenrechten entlang globaler Wertschöpfungsketten Risiken und Chancen für Branchen der deutschen Wirtschaft*. Retrieved July 31, 2023 from [https://www.csr-in-deutschland.de/SharedDocs/Downloads/DE/NAP/achtung-von-menschenrechten-entlang-globaler-wertschoepfungsketten.html?\\_\\_blob=publicationFile](https://www.csr-in-deutschland.de/SharedDocs/Downloads/DE/NAP/achtung-von-menschenrechten-entlang-globaler-wertschoepfungsketten.html?__blob=publicationFile), 6) AK Rohstoffe. (n.d.). Retrieved July 31, 2023 from <https://ak-rohstoffe.de/> , 7) Drive Sustainability. (n.d.). Retrieved July 31, 2023 from <https://www.drivesustainability.org/>, and 8) Business & Human Rights Resource Centre . (n.d.). Retrieved July 31, 2023 from <https://www.business-humanrights.org/en/>

<sup>28</sup>Wirtschaftsvereinigung Stahl. (2022). *Fakten Zur Stahlindustrie in Deutschland*. Retrieved July 31, 2023 from [https://www.stahl-online.de/wp-content/uploads/WV-Stahl\\_Fakten-2022\\_RZ\\_neu\\_Web.pdf](https://www.stahl-online.de/wp-content/uploads/WV-Stahl_Fakten-2022_RZ_neu_Web.pdf) (p.6)

<sup>29</sup> Raw Material Outlook Platform. (n.d.). Retrieved July 31, 2023 from <https://www.rawmaterialoutlook.org/>

## PART 3: OVERVIEW OF HUMAN RIGHTS IMPACTS ASSOCIATED WITH THE STEEL INDUSTRY

The steel industry plays a vital role in global economic development, as steel is an essential material used in various sectors such as construction, automotive, infrastructure, and manufacturing.<sup>30</sup> It encompasses the extraction and processing of raw materials (iron ore, coal, and limestone) and the manufacturing of steel products through processes like smelting, refining, and casting.

The relationship between the steel industry and human rights can be complex and multifaceted. The steel industry can directly impact human rights through its operations and practices. For example, the working conditions within the industry, including issues such as low wages, long hours, and unsafe environments, can directly affect the well-being and rights of workers.<sup>31</sup>

The steel industry has extensive supply chains that span multiple stages. Human rights abuses can occur at various points along this supply chain. For instance, mining operations for iron ore and coal may involve forced labor,<sup>32</sup> child labor, or environmental damage that can harm local communities and their rights.

The expansion of steel production facilities often requires land acquisitions, which can lead to the displacement of local communities, including indigenous groups. This can result in violations of land rights, loss of livelihoods, and cultural heritage.

Moreover, the steel industry's environmental footprint can have indirect impacts on human rights. The industry is a significant contributor to greenhouse gas emissions, air and water pollution, and habitat destruction.<sup>33</sup> These environmental impacts can affect the rights of individuals and communities to a healthy environment, clean air, clean water, and the preservation of biodiversity.<sup>34</sup> Steel plants can emit various pollutants, including particulate matter, sulfur dioxide, nitrogen oxides, and volatile organic compounds, which can have

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<sup>30</sup> Wang, T., Müller, D. B., & Hashimoto, S. (2015). The ferrous find: counting iron and steel stocks in China's economy. *Journal of Industrial Ecology*, 19(5), 877-889.

<sup>31</sup> Jaafar, M. H., Arifin, K., Aiyub, K., Razman, M. R., Ishak, M. I. S., & Samsurijan, M. S. (2018). Occupational safety and health management in the construction industry: a review. *International journal of occupational safety and ergonomics*, 24(4), 493-506.

<sup>32</sup> Halegua, A., & Chin, K. (2021). Forced Labor in the US Construction Industry. In *The Historical Roots of Human Trafficking: Informing Primary Prevention of Commercialized Violence*, pp. 85-99. Cham: Springer International Publishing. [https://doi.org/10.1007/978-3-030-70675-3\\_6](https://doi.org/10.1007/978-3-030-70675-3_6)

<sup>33</sup> Tost, M., Bayer, B., Hitch, M., Lutter, S., Moser, P., & Feiel, S. (2018). Metal mining's environmental pressures: a review and updated estimates on CO2 emissions, water use, and land requirements. *Sustainability*, 10(8), 28-81.

<sup>34</sup> Knox, J. H. (2020). Constructing the human right to a healthy environment. *Annual Review of Law and Social Science*, 16, 79-95.

adverse health effects on nearby communities.<sup>35</sup> Furthermore, accidents or failures in steel production facilities can pose risks to the health and safety of workers and neighboring populations.

The steel industry can also contribute to economic and social development, which is linked to human rights.<sup>36</sup> It creates job opportunities, generates income, and supports local economies. However, the distribution of these benefits and the extent to which they positively impact human rights can vary, and disparities in wealth and social inequality can arise.

Finally, the specific human rights impacts and the actions required to address them may vary depending on the region, country, and individual companies within the steel industry. Some steel companies may prioritize responsible business practices, implement human rights standards, and actively address impacts, while others may struggle to meet these expectations.

### **3.1. Specific Negative Human Rights Impacts Associated with the Steel Industry**

While the steel industry plays a crucial role in economic development and job creation, its operations can give rise to various human rights concerns. The specific negative human rights impacts associated with the steel industry include:

#### ***a) Right to Health***

The steel industry can have detrimental effects on the right to health of individuals living in proximity to steel plants.<sup>37</sup> Emissions of hazardous substances such as particulate matter, heavy metals, and chemicals used in the production process can lead to air and water

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<sup>35</sup> Ashraf, M. A., Sarfraz, M., Naureen, R., & Gharibreza, M. (2015). *Environmental impacts of metallic elements: speciation, bioavailability and remediation*. Singapore: Springer.; Malik, M. K., & Kumar, S. (2021). Sulfur dioxide: Risk assessment, environmental, and health hazard. In *Hazardous Gases* (pp. 375-389). Academic Press.

<sup>36</sup> Birat, J. P. (2015). Steel and humanity's grand challenges. *Matériaux & Techniques*, 103(5), 501.

<sup>37</sup> Qing, X., Yutong, Z., & Shenggao, L. (2015). Assessment of heavy metal pollution and human health risk in urban soils of steel industrial city (Anshan), Liaoning, Northeast China. *Ecotoxicology and environmental safety*, 120, 377-385.



pollution, impacting the health of nearby communities.<sup>38</sup> Exposure to these pollutants may cause respiratory diseases, cancer, and other health issues.<sup>39</sup>

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. It includes the right to access healthcare services, essential medicines, and the underlying determinants of health such as clean water, adequate sanitation, and a healthy environment (para 4°, CESCR).<sup>40</sup>

### ***b) Right to Work and Labor Rights***

While the steel industry can provide employment opportunities, it can also lead to violations of the right to work and labor rights. Unsafe working conditions, insufficient protective measures, and exposure to hazardous materials can compromise the health and safety of workers. This includes issues such as:

- **Right to Fair Wages:** Workers in the steel industry may face low wages that do not provide for an adequate standard of living, violating their right to fair remuneration<sup>41</sup> *which can constitute a violation of Article 7 paragraph 1 point (a), subpoint (i) of ICESCR.*
- **Right to Safe and Healthy Working Conditions:** Steel production involves potentially hazardous processes that can pose risks to the health and safety of workers.<sup>42</sup> Failure to ensure adequate safety measures and protection from occupational hazards can lead to violations of the right to safe and healthy working conditions, *which can constitute a violation of Article 7 paragraph 1 point (b) of ICESCR.*
- **Right to Freedom of Association:** Workers in the steel industry should have the right to form and join trade unions to collectively bargain for their rights and protect their interests. Any restrictions or interference with the right to freedom of association

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<sup>38</sup> Jozi, S. A., & Majd, N. M. (2014). Health, safety, and environmental risk assessment of steel production complex in central Iran using TOPSIS. *Environmental monitoring and assessment*, 186, 6969-6983.; Mousavian, N. A., Mansouri, N., & Nezhadkurki, F. (2017). Estimation of heavy metal exposure in workplace and health risk exposure assessment in steel industries in Iran. *Measurement*, 102, 286-290.

<sup>39</sup> Guan, W. J., Zheng, X. Y., Chung, K. F., & Zhong, N. S. (2016). Impact of air pollution on the burden of chronic respiratory diseases in China: time for urgent action. *The Lancet*, 388(10054), 1939-1951.

<sup>40</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4. Retrieved from <https://www.refworld.org/docid/4538838d0.html>, accessed 4 December 2023.

<sup>41</sup> Beeson, P., Shore-Sheppard, L., & Shaw, K. (2001). Industrial change and wage inequality: Evidence from the steel industry. *ILR Review*, 54(2A), 466-483.

<sup>42</sup> Mojapelo, J., Mafini, C., & Dhurup, M. (2016). Employee perceptions of occupational health and safety standards in the steel industry. *International Journal of social sciences and humanity studies*, 8(2), 106-121.

would be inconsistent with international human rights standards, *which can constitute a violation of Article 8 paragraph 1 point (d) of ICESCR.*

### **c) Right to Land and Housing**

The expansion of steel production facilities often requires land acquisitions, which can impact the right to land and housing:

- **Forced Evictions and Displacement:** Local communities, including indigenous groups, may be forcibly evicted, or displaced from their lands to make way for steel industry activities.<sup>43</sup> Displaced individuals may be deprived of their homes, livelihoods, and community ties, and may face difficulties in accessing suitable alternative housing or compensation.<sup>44</sup> Such actions can violate: **(i) the right to adequate housing from Article 11 of the ICESCR and (ii) the right to free, prior, and informed consent from Article 16 of the International Labor Organization (ILO) Convention no. 169.**
- **Loss of Livelihoods:** Displacement due to steel industry operations can result in the loss of livelihoods and disruption of traditional economic activities, affecting the right to work *from Article 6 of the ICESCR* and the right to an adequate standard of living *from Article 11 of the ICESCR.*

### **d) Right to a Healthy, Clean and Sustainable Environment**

The steel industry's operations can result in environmental degradation. The steel industry's environmental impacts can have implications for the right to a healthy environment, which is closely linked to other human rights:

- **Right to Water:** Steel production often requires substantial amounts of water for cooling, cleaning, and other processes.<sup>45</sup> Improper water management practices can result in the depletion of local water sources or contamination of water bodies, compromising the right to clean and accessible water.<sup>46</sup> This pollution can have adverse health effects on nearby communities, infringing upon their right to a healthy

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<sup>43</sup> Sahoo, S. (2005). Tribal displacement and human rights violations in Orissa. *Social Action: A Quarterly Review of Social Trends*, 55(2), 1-12.

<sup>44</sup> International Federation for Human Rights (FIDH). (2019). *Assessing the fulfillment of recommendations to address human rights violations of the mining and steel industry in Acailândia, Brazil*. Retrieved August 2, 2023 from <https://www.fidh.org/IMG/pdf/bresil734anglaisweb2019.pdf>

<sup>45</sup> Colla, V., Matino, I., Branca, T. A., Fornai, B., Romaniello, L., & Rosito, F. (2017). Efficient use of water resources in the steel industry. *Water*, 9(11), 874.

<sup>46</sup> Cock, J., Lambert, R., & Fitzgerald, S. (2013). Steel, nature and society. *Globalizations*, 10(6), 855-869.

environment. *All of the aforesaid can constitute a violation of Articles 11 and 12 of the ICESCR.*<sup>47</sup>

- **Right to Clean Air:** Steel production processes involve the emission of pollutants into the air.<sup>48</sup> These emissions can include particulate matter, sulfur dioxide, nitrogen oxides, carbon monoxide, and volatile organic compounds. The combustion of fossil fuels, such as coal and coke, in steelmaking contributes to air pollution. The air pollutants released by the steel industry can have significant health impacts on nearby communities.<sup>49</sup> Prolonged exposure to these pollutants can lead to respiratory problems, cardiovascular diseases, and other health issues.<sup>50</sup> Vulnerable groups such as children, the elderly, and individuals with pre-existing health conditions are particularly at risk.<sup>51</sup> The adverse impacts on air quality can disproportionately affect marginalized communities living in the vicinity of steel production facilities.<sup>52</sup> Environmental justice concerns arise when these communities bear a higher burden of exposure to air pollution without adequate access to remedies.<sup>53</sup> *All of the aforesaid can constitute a violation of Article 12 of the ICESCR.*
- **Climate Change:** The steel industry is a significant contributor to greenhouse gas emissions, which contribute to climate change.<sup>54</sup> Climate change impacts, such as extreme weather events and sea-level rise, can disproportionately affect vulnerable communities, impacting their rights to life *under Article 6 of the International Covenant on Civil and Political Rights (ICCPR)*, health *under Article 12 of the ICESCR*, and adequate housing *under Article 11 of the ICESCR.*<sup>55</sup>

<sup>47</sup> See para. 11, para. 15 (and footnote 13) at UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4. Retrieved from <https://www.refworld.org/docid/4538838d0.html>, accessed 4 December 2023.

<sup>48</sup>Gao, C., Gao, W., Song, K., Na, H., Tian, F., & Zhang, S. (2019). Spatial and temporal dynamics of air-pollutant emission inventory of steel industry in China: A bottom-up approach. *Resources, Conservation and Recycling*, 143, 184-200.

<sup>49</sup> Cock, J., Lambert, R., & Fitzgerald, S. (2013). Steel, nature and society. *Globalizations*, 10(6), 855-869.

<sup>50</sup> Lee, B. J., Kim, B., & Lee, K. (2014). Air pollution exposure and cardiovascular disease. *Toxicological research*, 30, 71-75.

<sup>51</sup> Makri, A., & Stilianakis, N. I. (2008). Vulnerability to air pollution health effects. *International journal of hygiene and environmental health*, 211(3-4), 326-336.

<sup>52</sup> Revesz, R. L. (2022). Air Pollution and Environmental Justice. *Ecology LQ*, 49, 187.

<sup>53</sup> Jessel, S., Sawyer, S., & Hernández, D. (2019). Energy, poverty, and health in climate change: a comprehensive review of an emerging literature. *Frontiers in public health*, 7, 357.; Mitchell, G., Norman, P., & Mullin, K. (2015). Who benefits from environmental policy? An environmental justice analysis of air quality change in Britain, 2001–2011. *Environmental Research Letters*, 10(10), 105009.

<sup>54</sup> Zeng, S., Lan, Y., & Huang, J. (2009). Mitigation paths for Chinese iron and steel industry to tackle global climate change. *International Journal of Greenhouse Gas Control*, 3(6), 675-682.

<sup>55</sup> Levy, B. S., & Patz, J. A. (2015). Climate change, human rights, and social justice. *Annals of global health*, 81(3), 310-322.

### e) *Rights of Indigenous and Tribal Peoples*

The steel industry may have adverse impacts on indigenous communities, particularly when extraction activities occur on ancestral lands:

- **Violation of Indigenous Land Rights:** Indigenous communities often have deep connections to their ancestral lands, which may be affected by steel industry operations.<sup>56</sup> Failure to respect their land rights, including the right to Free, Prior, and Informed Consent (FPIC) *from Article 6 of the ILO Convention 169*, can lead to the violation of other rights as recognized under international law including the *right to enjoy their own culture from Article 27 of the ICCPR*.
- **Loss of Cultural Heritage:** The expansion of steel production facilities can result in the destruction or degradation of cultural heritage sites and practices important to indigenous peoples. Destruction of cultural heritage sites and disruption of traditional practices can erode the cultural fabric of indigenous communities *in breach of the Article 27 of the ICCPR*.
- **Violation of FPIC:** Indigenous peoples have the right to participate in decision-making processes that affect their lands, resources, and rights.<sup>57</sup> However, the steel industry may fail to obtain the free, prior, and informed consent of indigenous communities before initiating projects that impact their territories.<sup>58</sup> This violation undermines their self-determination by disregarding their rights to self-governance and control over their lands and resources and runs counter to provisions of *ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Article 27 of the ICCPR*.
- **Lack of Participation and Representation:** Indigenous peoples may face barriers to meaningful participation and representation in decision-making processes related to the steel industry.<sup>59</sup> Limited access to information, language barriers, and power

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<sup>56</sup>Malmgren, J., Avango, D., Persson, C., Nilsson, A. E., & Rodon, T. (2022). Mining towns in transition: Arctic legacies, 229-248.; Thériault, S., Bourgeois, S., & Boirin-Fargues, Z. (2022). Indigenous peoples' agency within and beyond rights in the mining context: The case of the Schefferville region. *The Extractive Industries and Society*, 12, 100979.

<sup>57</sup>Papillon, M., & Rodon, T. (2017). Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada. *Environmental Impact Assessment Review*, 62, 216-224.; Rice, R. (2020). The Politics of Free, Prior and Informed Consent: Indigenous Rights and Resource Governance in Ecuador and Yukon, Canada. *International journal on minority and group rights*, 27(2), 336-356.; Ward, T. (2011). The right to free, prior, and informed consent: indigenous peoples' participation rights within international law. *Nw. UJ Int'l Hum. Rts.*, 10, 54.

<sup>58</sup>Ward, T. (2011). The right to free, prior, and informed consent: indigenous peoples' participation rights within international law. *Nw. UJ Int'l Hum. Rts.*, 10, 54.

<sup>59</sup>Schilling-Vacaflor, A., & Flemmer, R. (2020). Mobilising free, prior and informed consent (FPIC) from below: A typology of indigenous peoples' agency. *International journal on minority and group rights*, 27(2), 291-313.;

imbalances can undermine their ability to express their needs, concerns, and aspirations, thereby hindering their self-determination which can constitute a violation of *provisions of ILO Convention 169, the UNDRIP and Article 27 of the ICCPR*.

- **Socioeconomic Inequality:** The steel industry's operations can exacerbate socioeconomic inequalities between indigenous peoples and other groups.<sup>60</sup> Indigenous communities may face limited access to the benefits and opportunities associated with steel production, such as employment, economic development, and infrastructure improvements *which violates their right not to be discriminated against in exercising their aforesaid rights in line with Article 26 of the ICCPR*.

**f) The Adverse Impact of the Steel Industry on Human Rights and Environmental Defenders (HREDs)**

The steel industry, like many other extractive industries, can have specific negative human rights impacts on HREDs. Here are some specific examples:

- **Criminalization:** HREDs who challenge or protest against steel industry activities may be subjected to criminalization, where their peaceful actions are unjustly labeled as illegal. They may face charges such as trespassing, incitement, or public disorder, which can lead to legal prosecution and potential imprisonment *all running afoul of their rights to: (i) freedom of speech from Article 19 of the ICCPR and (ii) freedom of assembly from Article 21 of the ICCPR*.
- **Abuses and Harassment:** HREDs advocating for human rights and environmental protection in relation to the steel industry may experience various forms of abuses and harassment. This can include intimidation, surveillance, verbal threats, or attacks by private security forces, law enforcement agencies, or individuals with vested interests in the industry *all running afoul of their rights: (i) not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment from Article 7 of the ICCPR; (ii) to personal security from Article 9 of the ICCPR, (iii) private life, reputation and honour from Article 17 of the ICCPR*.
- **Arbitrary Arrest and Detention:** HREDs may be arbitrarily arrested and detained for their activism against the steel industry. They can be held without proper legal procedures, access to legal representation, or fair trial. Such arbitrary arrests aim to silence their voices and discourage their human rights and environmental advocacy

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Thériault, S., Bourgeois, S., & Boirin-Fargues, Z. (2022). Indigenous peoples' agency within and beyond rights in the mining context: The case of the Schefferville region. *The Extractive Industries and Society*, 12, 100979.

<sup>60</sup> Horowitz, L. S., Keeling, A., Lévesque, F., Rodon, T., Schott, S., & Thériault, S. (2018). Indigenous peoples' relationships to large-scale mining in post/colonial contexts: Toward multidisciplinary comparative perspectives. *The Extractive Industries and Society*, 5(3), 404-414.

*and violate their rights: (i) not to be arbitrarily arrested or detained from Article 9 of the ICCPR, (ii) to a fair trial and specific rights outlined in Article 14 of the ICCPR, (iii) not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment from Article 7 of the ICCPR.*

- **Threats:** HREDs involved in challenging the steel industry's practices may face direct threats to their personal safety and well-being. These threats can come from various actors, including powerful individuals or groups with economic or political interests tied to the industry. Threats may be aimed at instilling fear, coercing them to abandon their advocacy, or forcing them into silence *all of which violate their rights: (i) not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment from Article 7 of the ICCPR, (ii) to personal security from Article 9 of the ICCPR, (iii) to private life, reputation and honour from Article 17 of the ICCPR.*
- **Violent Attacks:** In extreme cases, HREDs may become victims of violent attacks, which can lead to severe physical harm or even loss of life. Such attacks are intended to silence opposition to the steel industry and create a climate of fear within communities advocating for human rights and environmental protection, *thus violating their rights: (i) not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment from Article 7 of the ICCPR, (ii) to personal security from Article 9 of the ICCPR, (iii) to life from Article 6 of the ICCPR.*

These negative human rights impacts illustrate the risks and challenges that Human Rights and Environment Defenders face when they confront the steel industry. It is important to recognize and address these issues to protect the rights and safety of those defending human rights and the environment in the face of industrial activities.

Specific human rights impacts associated with the steel industry may vary depending on the location, regulatory framework, and practices of individual companies. Accordingly, assessing these impacts requires considering the particular circumstances and potential risks involved.

### 3.2. Stages of the Steel Supply Chains Where Human Rights Impacts Occur

Human rights impacts within the steel industry can occur in various locations throughout the global supply chain, from mining and production sites to downstream operations and affected communities. Here are some key stages where human rights impacts can occur:

#### a) Mining and Raw Material Extraction Sites

- The extraction of raw materials such as iron ore, coal, and other minerals necessary for steel production can lead to human rights impacts.<sup>61</sup> These impacts may include displacement of local communities, violation of indigenous peoples' rights, and environmental degradation.
- Steel plants and associated infrastructure can have direct and indirect impacts on neighboring communities. These impacts may include air and water pollution, noise pollution, loss of access to resources, disruption of livelihoods, and adverse health effects on local populations.

#### **b) Steel Production Facilities**

- Steel production sites, including steel mills and processing plants, can give rise to human rights impacts.<sup>62</sup> These impacts can include issues related to worker rights, such as unsafe working conditions, low wages, and restrictions on freedom of association.
- The steel industry relies on the extraction of raw materials such as iron ore, coal, and other minerals. Human rights impacts can emerge at this stage, including issues related to land rights, displacement of communities, environmental degradation, and labor rights abuses in mining operations.

#### **c) Supply Chains and Manufacturing Sites**

- Human rights impacts can occur within the supply chains of the steel industry, involving multiple locations where components or materials are sourced, processed, and assembled.<sup>63</sup> These impacts may involve labor rights violations, such as forced labor, child labor, and unsafe working conditions.<sup>64</sup>
- Also, the steel industry relies on the extraction of raw materials such as iron ore, coal, and other minerals. Human rights impacts can emerge at this stage, including issues related to land rights, displacement of communities, environmental degradation, and labor rights abuses in mining operations.

#### **d) Local Communities and Surrounding Areas**

- Communities living near steel production facilities may experience human rights impacts, including adverse effects on their health, livelihoods, and access to clean air, water, and land.<sup>65</sup> These impacts can result from pollution, land acquisition and displacement, and inadequate community engagement.
- The steel industry often involves complex global supply chains, where human rights risks can be present. This includes concerns related to forced labor, child labor, unsafe working

<sup>61</sup> Feichtner, Isabel, Markus Krajewski, and Ricarda Roesch. *Human rights in the extractive industries*. Switzerland: Springer International Publishing, 2019.

<sup>62</sup> Shiva, Vandana, Afsar H. Jafri, and Paul Kingsnorth. "Stronger than steel: Indian people's movement against the Gopalpur steel plant." *The Ecologist* 28, no. 6 (1998): 349-354.

<sup>63</sup> Van den Brink, Susan, René Kleijn, Arnold Tukker, and Jaco Huisman. "Approaches to responsible sourcing in mineral supply chains." *Resources, Conservation and Recycling* 145 (2019): 389-398.

<sup>64</sup> Nordlöf, Hasse, Birgitta Wiitavaara, Ulrika Winblad, Katarina Wijk, and Ragnar Westerling. "Safety culture and reasons for risk-taking at a large steel-manufacturing company: Investigating the worker perspective." *Safety science* 73 (2015): 126-135.

<sup>65</sup> Swennenhuis, Floris, Vincent de Gooyert, and Heleen de Coninck. "Towards a CO2-neutral steel industry: Justice aspects of CO2 capture and storage, biomass-and green hydrogen-based emission reductions." *Energy Research & Social Science* 88 (2022): 102598.

conditions, and labor exploitation within subcontractors, suppliers, and service providers involved in the production and transportation of steel.

**e) Global Markets and Consumers**

- Human rights impacts within the steel industry can extend to the global markets and consumers who purchase steel products.<sup>66</sup> Consumers may unknowingly contribute to human rights abuses if steel products are linked to supply chains involving labor exploitation, environmental degradation, or violations of indigenous rights.

**f) Corporate Policies and Practices**

- Human rights impacts can also emerge due to the policies and practices of steel companies themselves. This includes issues such as inadequate due diligence in assessing and addressing human rights risks, lack of transparency, insufficient community engagement and consultation, and limited access to effective grievance mechanisms for affected individuals and communities.

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<sup>66</sup> Ruggie, John Gerard, and Tamaryn Nelson. "Human rights and the OECD Guidelines for MNE: Normative innovations and implementations challenges." *Brown J. World Aff.* 22 (2015): 99.



## PART 4: THE GERMAN SUPPLY CHAIN ACT (LKSG)

### 4.1. Background of the NAP

The first time the Federal Government of Germany set out the responsibility of German companies along value chains was in 2016 through the National Action Plan for Business and Human Rights (NAP), which aimed to implement the UNGPs.<sup>67</sup> The German NAP was based on a voluntary approach to due diligence<sup>68</sup> and its aim was that at least 50% of all German-based companies with more than 500 employees would have integrated the elements of HRDD described in the NAP into their business processes by 2020.<sup>69</sup> In case no adequate implementation had taken place by 2020, the Federal Government would consider further actions which could result in legal measures.<sup>70</sup>

In 2020, the report commissioned by the German government to verify the implementation of the NAP revealed that only 13 to 17 percent of the companies assessed complied with the NAP requirements.<sup>71</sup> In line with the NAP's stated strategy, the discussion shifted from whether a law was required to what it ought to look like.<sup>72</sup>

### 4.2. Entry Into Force and Main Idea Behind the Law

After over one year of debate, in June 2021, the Federal Parliament passed the *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*, often referred to as *Lieferkettensorgfaltspflichtengesetz* or LkSG. This Act imposed, for the first time,<sup>73</sup> a binding obligation on enterprises with their central administration, main place of business, statutory

<sup>67</sup> CSR in Deutschland. (n.d.). *National Action Plan*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/NAP/nap.html>

<sup>68</sup> Krajewski, M., Tonstad, K. & Wohltmann, F. (2021). Mandatory HRDD in Germany and Norway: Stepping, or Striding, in the Same Direction?. *Business and Human Rights Journal*, 6(3), 550–58. doi:10.1017/bhj.2021.43.

<sup>69</sup> Federal Government of Germany. (2016). *NAP: Implementation of the UN UNGP 2016-2020*. Retrieved July 31, 2023 from <https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf>

<sup>70</sup> Ibid (p. 10)

<sup>71</sup> Federal Foreign Office of Germany. (2020, October 13). *Monitoring the NAP for Business and Human Rights (NAP)*. Retrieved July 31, 2023 from <https://www.auswaertiges-amt.de/en/ausenpolitik/themen/monitoring-nap/2131054>

<sup>72</sup> Krajewski, M., Tonstad, K. & Wohltmann, F. (2021). Mandatory HRDD in Germany and Norway: Stepping, or Striding, in the Same Direction?. *Business and Human Rights Journal*, 6(3), 550–58. doi:10.1017/bhj.2021.43

<sup>73</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1>

seat, administrative headquarters, or branch office in Germany<sup>74</sup> to implement due diligence procedures to identify, prevent, mitigate, and remedy human rights violations and adverse environmental impacts across their global supply chains.

The Act entered into force in January 2023 and its aim is to protect the rights of those individuals who produce goods for the German market.<sup>75</sup> However, it does not necessarily require that the enterprises guarantee that their supply chains are free from violations of human rights or adverse effects on the environment.<sup>76</sup> The duties imposed on the enterprises are analyzed in more detail in Part 6 of this report.

### 4.3. Human Rights Norms Covered in the LkSG

The LkSG does not, in principle, cover all internationally recognized environmental or human rights. Rather, it refers to a closed list of eleven internationally recognized human rights conventions.<sup>77</sup> This means that the treaties or conventions which are not contained in this list do not fall under the scope of the Act. Enterprises falling under the scope of the Act should take into consideration the violations related to the protected legal interests contained in the following documents listed in the Annex of the Act<sup>78</sup>.

Even though the Act does not include many of the human rights law treaties (e.g., Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) or the Convention on the Rights of Persons with Disabilities (CRPD)), one could interpret rights under ICCPR and the ICESCR (which are included in the Annex) in light of those treaties. This is because the said, specialized human rights treaties are not defining new human rights. Rather, they are just specifying how States are obliged to pursue specific measures in order to eliminate discrimination against vulnerable groups in order to enable them to enjoy rights from ICCPR and the ICESCR on an equal footing. Nonetheless, the fact that many of the human rights law conventions have not been included in the list may be considered as a drawback, insofar as they provide clarity on many obligations (e.g., prohibition to dismiss women based

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<sup>74</sup> CSR in Deutschland. (n.d.). *Act on Corporate Due Diligence Obligations in Supply Chains Of July 16 2021*. Retrieved July 31, 2023 from [https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?\\_\\_blob=publicationFile](https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile)

<sup>75</sup> Federal Government. (2021, March 3). *Supply Chain Act (Lieferkettengesetz)*. Retrieved July 31, 2023 from <https://www.bundesregierung.de/breg-en/service/archive/supply-chain-act-1872076>

<sup>76</sup> Bundesamt für Wirtschaft und Ausfuhrkontrolle. (2022). *Angemessenheit: Handreichung zum Prinzip der Angemessenheit nach den Vorgaben des Lieferkettensorgfaltspflichtengesetzes*. Retrieved June 19, 2023 from [https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung\\_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820](https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820) (p.3)

<sup>77</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1>

<sup>78</sup> Ibid

on pregnancy from Article 11 CEDAW, the obligation of reasonable accommodation from Articles 2 and 5 of the CRPD).

- *List of Human rights conventions in from the Annex of the German Supply Chain Due Diligence Act taken from the English translation of the Act*

Document Name	Adopted on	German Ratification
Convention No. 29 of the ILO concerning Forced or Compulsory Labor.	of 28 June 1930	1956
Protocol to Convention No. 29 of the ILO concerning Forced or Compulsory Labor.	of 11 June 2014	2019
Convention No. 87 of the ILO concerning Freedom of Association and Protection of the Right to Organize as amended by the Convention of 26 June 1961.	of 9 July 1948	1963
Convention No. 98 of the ILO concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, as amended by the Convention of 26 June 1961.	of 1 July 1949	1955/1963
Convention No. 100 of the ILO concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.	of 29 June 1951	1956
Convention No. 105 of the ILO concerning the Abolition of Forced Labor.	of 25 June 1957	1959
Convention No. 111 of the ILO concerning Discrimination in Respect of Employment and Occupation.	of 25 June 1958	1961
Convention No. 138 of the ILO concerning the Minimum Age for Admission to Employment.	of 26 June 1973	1976
Convention No. 182 of the ILO concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.	of 17 June 1999	2001
ICCPR	of 19 December 1966	1973
ICESCR	of 19 December 1966	1973

**Section 2 (2)** of the Act then further clarifies what human rights risks the Act targets. It defines eleven rights which are conceived to be typically violated in supply chains.

These prohibitions include child labor, slavery and forced labor, disregard of occupational safety and health obligations, discrimination against employees, denial of an adequate wage, disregard of the right to form trade unions or employee representation bodies, the impairment of access to food and water as well as violence on the part of security forces and the unlawful taking of land and livelihoods.<sup>79</sup>

The above means that actions causing harm to soil, water pollution, air pollution, harmful noise emission or excessive water consumption can constitute human rights risks in certain circumstances. The unlawful evictions or unlawful taking of land, forests and waters which secure the livelihood of a person is also expressly prohibited. Further to that, enterprises are mandated to ensure they do not engage in acts that result in torture and cruel, inhumane, or degrading treatment when engaging in security measures to protect the enterprise's projects.<sup>80</sup>

As opposed to the list of conventions, this list of risks is exemplary and, as such, is open ended in the sense that it admits other risks in addition to those listed. That is made clear by the provision of Section 2 (2) item 12, according to which enterprises should consider any act or omission capable of impairing the protected legal positions in a "*particularly serious manner*" and which are, upon reasonable assessment of the circumstances, obviously unlawful. From that and in light of the wording of items 1 to 11 we can derive two requirements for an action or omission impairing the enjoyment of human rights to fall within the scope of the Act: it needs to be prohibited and the violation of this prohibition needs to be serious.

The Act does not explicitly define what standards are to be used to determine what are human rights-based prohibitions. However, 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 harmony with the corresponding international standards and the clarifications of the ILO and the UN treaty bodies,<sup>81</sup> namely the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR), as those with primary competence to give authoritative interpretations of the conventions listed in the Act.

With regards to the severity of the behavior, although courts will also have to decide this on a case-by-case basis,<sup>82</sup> the German BAFA, which is the body responsible for enforcing

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<sup>79</sup> CSR in Deutschland. (n.d.). *Act on Corporate Due Diligence Obligations in Supply Chains Of July 16 2021*. Retrieved July 31, 2023 from [https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?\\_\\_blob=publicationFile](https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile)

<sup>80</sup> Ibid (Section 2 para 9-11)

<sup>81</sup> Initiative Lieferkettengesetz. (2021). *FAQ on German's Supply Chain Due Diligence Act*. Retrieved July 31, 2023 from [https://lieferkettengesetz.de/wp-content/uploads/2021/11/Initiative-Lieferkettengesetz\\_FAQ-English.pdf](https://lieferkettengesetz.de/wp-content/uploads/2021/11/Initiative-Lieferkettengesetz_FAQ-English.pdf) ( p. 6)

<sup>82</sup> Ibid

the Act, defined some criteria. In one of its guidelines on the application of the Act, BAFA issued the following statement which has been translated from German into English:

*[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.<sup>83</sup>*

This definition of severity is in line with 1) UN UNGP,<sup>84</sup> 2) the UN OHCHR 2012 issued publication: The Corporate Responsibility to Respect Human Rights,<sup>85</sup> and the 3) OECD Guidelines for MNE on Responsible Business Conduct (2023).<sup>86</sup> These documents are important as they were specifically listed as serving as an inspiration to the law on page 45 of the official draft law.<sup>87</sup>

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<sup>83</sup> Bundesamt für Wirtschaft und Ausfuhrkontrolle. (2022). *Angemessenheit: Handreichung zum Prinzip der Angemessenheit nach den Vorgaben des Lieferkettensorgfaltspflichtengesetzes*. Retrieved June 19, 2023 from [https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung\\_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820](https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820) (p.8)

<sup>84</sup> Office of the United Nations High Commissioner for Human Rights. (2011). *UN Guiding Principles on Business and Human Rights*. Retrieved July 31, 2023 from [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf)

<sup>85</sup> Office of the United Nations High Commissioner for Human Rights. (2012). *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*. Retrieved July 31, 2023 from [https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf)

<sup>86</sup> OECD. (2023, June 8). *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct*. Organisation for Economic Co-operation and Development. OECD iLibrary. Retrieved July 31, 2023 from [https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct\\_81f92357-en](https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en)

<sup>87</sup> Das Bundesministerium für Arbeit und Soziales. (n.d.). *Gesetzentwurf der Bundesregierung*. Retrieved July 31, 2023 from [https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2)

#### 4.4. Environmental Norms Covered in the LkSG

Environmental harm is relevant under the Act to the extent that it affects human rights.<sup>88</sup> That notwithstanding, the Act also focuses on strict environmental risks enterprises must prevent and address across their supply chain.

Instead of containing a general clause relating to environmental damage affecting human rights, the Act limited the relevant environmental obligations to three conventions which have been ratified by Germany:

1. **Minamata Convention on Mercury of 10 October 2013**, ratified in Germany since 2017 (“the Minamata Convention”)
2. **Stockholm Convention of 23 May 2001 on Persistent Organic Pollutants** (“the POPs Convention”) (ratified in Germany in 2002 last amended by the decision of 6 May 2005 (ratified in Germany in 2009), and
3. **Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 22 March 1989** (ratified in Germany in 1994), as last amended by the Third Ordinance amending Annexes to the Basel Convention of 22 March 1989 of 6 May 2014 (ratified in Germany in 2014) (“the Basel Convention”)

Some of the prohibitions outlined in these instruments include:

1. the prohibition of the manufacture of mercury-added products,
2. the prohibition on use of mercury or its compounds,
3. the prohibition of treatment of mercury waste contrary to Article 11(3) of the Minamata Convention,
4. the prohibition of production of chemicals contrary to the provisions of the Stockholm Convention, and Basel Convention,
5. the prohibition of handling, collection, storage, and disposal of waste in a way that endangers environmental health.<sup>89</sup>

Although these are extremely relevant in terms of protecting, for example, the right to health and the right to life, they do not address problems such as biodiversity loss and climate

<sup>88</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1>

<sup>89</sup> CSR in Deutschland. (n.d.). *Act on Corporate Due Diligence Obligations in Supply Chains Of July 16 2021*. Retrieved July 31, 2023 from [https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?\\_\\_blob=publicationFile](https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile) (Section 2 para 3)

change<sup>90</sup> which also have serious impacts on those rights and, more particularly, on the rights of indigenous peoples, local communities, women and girls, children and youth, the poor, and persons, groups and peoples in vulnerable situations.<sup>91</sup>

## 4.5. Temporal Scope

The LkSG entered into force on 01.01.2023, meaning that enterprises with at least 3.000 employees are subject to the obligations of the law from 1st of January 2023 onwards. Enterprises with at least 1.000 employees are subject to the law's obligations from 1st of January 2024.

This means companies are required to conduct due diligence in respect of human rights and/or environment-related risks that fall within the material scope of the law from 1st of January 2023 (or 2024 depending on the size of the enterprise). One question that arises is to what extent events and impacts that have occurred prior to the law's enactment can be taken into account. Here a distinction between human rights risks and human rights violations may be of relevance.

### 4.5.1. Temporal Scope for Risks and Preventive Measures

The LkSG primarily sets out due diligence obligations for companies to **address human rights risks** covered under the Act. Human rights impacts that took place before the LkSG's enactment may be considered under other German or EU legislations.

**The knowledge of a human rights violation or impact that occurred previously is logically a strong indication of the existence of a risk of future occurrence unless the risk has already been properly addressed and the situation remedied.** This is a logical conclusion as there is no better indicator of a risk than the fact that a certain risk already materialized in the past. What this means in practice is that in those situations the affected enterprises will have to take this into consideration and assess whether that risk is likely to materialize again.

Such a view is also supported by the BAFA's stance on how the criteria of probability of occurrence should be interpreted: "*the probability of occurrence is measured by how likely*

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<sup>90</sup> European Coalition for Corporate Justice. (2023, January 11). *German supply chain law comes into force*. Retrieved July 31, 2023 from <https://corporatejustice.org/news/german-supply-chain-act-comes-into-force/>

<sup>91</sup> UN Environment Programme. (n.d.). *Human Rights and Biodiversity: Key Messages*. Retrieved July 31, 2023 from <https://wedocs.unep.org/bitstream/handle/20.500.11822/35407/KMBio.pdf>; UN Office of the High Commissioner for Human Rights. (2016, September 30). *The rights of those disproportionately impacted by climate change*. Retrieved July 31, 2023 from <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/EM2016/DisproportionateImpacts.pdf>

*it is that the risk will result in a violation. It is important here whether and how often the risk has already led to a violation in the past.”<sup>92</sup>*

Bearing this in mind, it is clear that if an enterprise was to find occurrences of human rights violations in its supply chains before it became obliged under the LkSG, it would have to assess those and likely employ preventive measures. The question may be different when looking at human rights violations and the obligation to provide remedial action under the Act.

#### **4.5.2. Temporal Scope for Violations and Remedial Measures**

When it comes to the **duties of affected enterprises to remedy human rights violations**, the issue of the temporal scope is more complex.

One question that may be open to debate is the extent to which enterprises may be obliged to provide remedial action to a violation of a human rights-related or an environment-related obligation that occurred prior to the LkSG’s entry into force. As explained in the previous section, the existence of this prior violation could be considered a risk that has to be addressed and remedied through the due diligence process. Alternatively, another possibility may be to look to international and regional human rights law at the distinction between instantaneous and continuing violations of human rights.<sup>93</sup>

**Instantaneous violations of human rights** are violations that are executed at a stroke and are not accompanied with any injurious lasting effects, they include killing, destruction of movable property amongst others.<sup>94</sup> **Continuing violations of human rights** on the other hand include all human rights violations comprising a continuing act or omission.<sup>95</sup>

The concept of continuing violations has been interpreted by various international human rights instruments and institutions to extend the temporal scope of application of specific human rights instruments prior to their entry into force.<sup>96</sup> It is unclear to what extent this line of jurisprudence and reasoning could be a source of inspiration for BAFA and

<sup>92</sup> Bundesamt für Wirtschaft und Ausfuhrkontrolle. (2022). *Angemessenheit: Handreichung zum Prinzip der Angemessenheit nach den Vorgaben des Lieferkettensorgfaltspflichtengesetzes*. Retrieved June 19, 2023 from [https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung\\_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820](https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820) (p.10)

<sup>93</sup> Global Compact Network Germany German Institute for Human Rights. (2016). *Assessing Human Rights Risks and Impacts: Perspectives from corporate practice*. Retrieved August 2, 2023 from [https://www.institut-fuer-menschenrechte.de/fileadmin/user\\_upload/Publikationen/Weitere\\_Publikationen/HRIA\\_Assessing\\_Human\\_Rights\\_Risks\\_and\\_Impacts\\_Perspectives\\_from\\_corporate\\_practice.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Weitere_Publikationen/HRIA_Assessing_Human_Rights_Risks_and_Impacts_Perspectives_from_corporate_practice.pdf) (p. 11)

<sup>94</sup> Loucaides, L. G. (2008). The Concept of "Continuing" Violations of Human Rights. In *The European Convention on Human Rights* (pp. 17-33). Brill Nijhoff.

<sup>95</sup> Altiparmak, K. (2003). The Application of the Concept of Continuing Violation to the Duty to Investigate, Prosecute and Punish under International Human Rights Law. *Prosecute and Punish Under International Human Rights Law*.

<sup>96</sup> *De Becker v. Belgium*, Yearbook 2, pp. 215, 242, 244 and *X.v. the United Kingdom*, 7379/76.-, DR8, P.111.



German courts in determining the LkSG's applicability to violations that occurred prior to its entry into force. In any case, the LkSG exclusively requires enterprises to address risks and violations within their current supply chains. Consequently, affected enterprises may not be obligated to take action regarding ongoing violations from their *former* direct, indirect suppliers, or affiliated enterprises. This exclusion applies specifically if the relevant relationships were terminated before the LkSG obligations took effect.

## **PART 5: LKSG AND THE HUMAN RIGHTS IMPACTS ASSOCIATED WITH THE STEEL INDUSTRY**

The LkSG addresses human rights risks typically associated with the steel industry to a considerable extent. The Act requires companies to prevent, minimize, and eliminate human rights risks arising from the ICCPR, the ICESCR, and nine other ILO Conventions. Specifically, the Act encompasses the following typical risks occurring in the steel industry:

### **5.1. Impairment of Right to Health, Right to Water, and Right to Clean Air**

These rights are covered by Article 12 of the ICESCR in general. Furthermore, the Act explicitly addresses water, air, and soil pollution in Section 2(2)(9). It is noteworthy that, regarding this risk, the Act does not require that the conditions of severity and unlawfulness (see section 2(2)(12) LkSG) be evidenced to the extent that they derive from environmental harms such as excessive use of water, soil change, water and air pollution and harmful noise emission. However, if there is a risk to the right to health resulting from, for example, hindering access to health services, additional criteria may be applicable.

### **5.2. Impairment of Right to Fair Wages**

This right is derived from Article 7(1)(a)(i) of the ICESCR and Section 2(2)(8) of the LkSG. The Act does not impose the evidence of additional criteria of particular seriousness or obvious unlawfulness for behaviors falling under this category.

### **5.3. Impairment of Right to Safe and Healthy Working Conditions**

Derived from Article 7(1)(b) of the ICESCR, this right is also addressed in Section 2(2)(5) of the LkSG. In line with the previous points, the Act does not impose the evidence of additional criteria of particular seriousness or obvious unlawfulness for behaviors falling under this category.

### **5.4. Impairment of Right to Freedom of Association**

This right is guaranteed by Article 8(1)(d) of the ICESCR, Convention No. 87 of the ILO, Convention No. 98 of the ILO, and Section 2(2)(6)(c) of the LkSG. As above, the Act does not

impose the evidence of additional criteria of particular seriousness or obvious unlawfulness for behaviors falling under this category.

## **5.5. Forced Evictions and Displacement**

These risks are addressed in Article 11 of the ICESCR and Section 2(2)(10) of the LkSG. Here again, the Act does not impose the evidence of additional criteria of particular seriousness or obvious unlawfulness for behaviors falling under this category.

## PART 6: OBLIGATIONS OF ENTERPRISES

### 6.1. Which enterprises are obligated to comply with the LkSG?

The LkSG covers enterprises registered in Germany regardless of their legal form, including branches of foreign companies in Germany.<sup>97</sup> The enterprises must have at least 3,000 employees. From January 2024, companies will need to have at least 1,000 employees.<sup>98</sup> Employees included within the scope of the Act include:

- temporary workers in employment for more than six months,
- all employees in a company belonging to the same business unit or not,
- and all employees temporarily dispatched to another country<sup>99</sup>.

When counting the number of employees, the employees of affiliated enterprises will be taken for the calculation of the number of employees of the parent. It is important to note that all affiliations of enterprises matter here. Hence, a connection between a parent and a subsidiary (or between a parent enterprise and an indirect subsidiary - i.e., a subsidiary of the subsidiary) may be through shares or contractual voting rights.<sup>100</sup> However, only employees employed in Germany are considered in the calculation (Section 1 (3) of the Act). If an employee of the German company is only temporarily posted abroad, but their labor contract is still with the German company, that employee will still be included in the calculation.



#### 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

<sup>97</sup> Krajewski, M., Tonstad, K. & Wohltmann, F. (2021). Mandatory HRDD in Germany and Norway: Stepping, or Striding, in the Same Direction?. *Business and Human Rights Journal*, 6(3), 550–58. doi:10.1017/bhj.2021.43.

<sup>98</sup> Ibid

<sup>99</sup> for all three points: CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1>

<sup>100</sup> Authoritative interpretation of these terms is given in Section 1 (3) of the act which refers to section 15 of the AktG [AktG – AktG]. The unofficial English version of this act is available at: Federal Ministry of Justice (2021, August 7). *Stock Corporation Act*. Retrieved July 31, 2023 from [https://www.gesetze-im-internet.de/englisch\\_aktg/](https://www.gesetze-im-internet.de/englisch_aktg/)

## 6.2. The Notion of the Supply Chain

The term supply chain within the LkSG includes products and services of an enterprise including all steps followed by an enterprise in Germany and abroad to manufacture the products and the services rendered.<sup>101</sup> This process begins from the extraction of raw material to the final delivery of the product or service to the end customer/consumer.<sup>102</sup> According to the Act, the supply chain encompasses the following:

- The actions of an enterprise in its own business area
- The actions of direct suppliers
- The actions of indirect suppliers

With regard to the last two, the LkSG defines them as follows:<sup>103</sup>

- a) The Direct Supplier within the meaning of the LkSG is a partner 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 and use of the relevant service (Section 2(7) LkSG).
- b) An Indirect Supplier within the meaning of this Act is 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 and use of the relevant service (Section 2(8) LkSG).

Regarding the scope of the supply chain, and how deep an enterprise must look, BAFA's Frequently Asked Question (FAQs) clarifies the notion of necessary services or supplies. This term must be understood broadly and encompasses, for example, an industrial enterprise's office supplies. However, as BAFA further notes:

*"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. Risk management is about assessing risks, prioritizing them, and addressing them appropriately. **One of the main aspects in setting priorities is the influence an enterprise can exert** (cf. Section 3 (2) Supply Chain Act). Risks that are not a priority can be handled with less urgency."*

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<sup>101</sup> CSR in Deutschland. (n.d.). *Act on Corporate Due Diligence Obligations in Supply Chains Of July 16 2021*. Retrieved July 31, 2023 from [https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?\\_\\_blob=publicationFile](https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile) (Section 2 para 5)

<sup>102</sup> Ibid

<sup>103</sup> Ibid (Section 2 para 5 -8)

Additionally, the term of necessary services or supplies encompasses suppliers responsible for auxiliary services (e. g. commercial cleaning and office catering). Here, when referring to the second example, BAFA specifically stated that the risks at those suppliers can:

*“often be completely disregarded or handled with little effort either because there is no causal contribution (cf. section 4 (2) Supply Chain Act) or because the causal contribution is insignificant (cf. section 5 (2) Supply Chain Act).”<sup>104</sup>*

Regarding where the supply chain ends, BAFA defines the end customer as: “(a) the person for whom the product is intended and who actually uses it or (b) the entity **that processes the product so that, according to generally accepted standards, it becomes a new product.** The determination of the end customer therefore depends on the perspective and/or the **role of the enterprise within the supply chain.** End customers are not necessarily direct contractual partners. To put it in simple terms this means that manufacturers deliver semi-finished products to producers who then turn them into end products.”<sup>105</sup>

In light of the above, it can be assumed that the concept of the end customer will be determined by the nature and the intentions of the participants in the supply chain.

### 6.2.1. *The Abusive Indirect Supplier Setup*

Acknowledging that some enterprises might structure their business relationships in such a way as to avoid much broader due diligence obligations they owe towards their direct suppliers, the LkSG also provides a mechanism to address such abuses.

Namely, Section 5(1), sentence 2 stipulates that: “In cases where an enterprise has structured a direct supplier relationship in an improper manner or has engaged in a transaction in order to circumvent the due diligence obligations with regard to the direct supplier, an indirect supplier is deemed to be a direct supplier.” This provision will be particularly applicable where: “the third party acting between the enterprise and its supplier does not pursue any significant economic activity of its own or does not maintain a permanent presence in the form of business premises, personnel, or equipment. In this case,

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<sup>104</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1> (answer to question no. 5 in section II)

<sup>105</sup> Ibid (answer to question no. 10 in section VI)

this supplier is still considered to be a direct supplier of the enterprise. This also applies to all due diligence obligations.”<sup>106</sup>

### 6.2.2. *The Notion of the Decisive Influence in Own Business Area*

The guidelines issued by BAFA provide some information on the notion of “decisive influence’ and have transcribed below:

#### **Reply to question 8 in the Section IV of BAFA’s FAQs called “Affiliated enterprises”<sup>107</sup>**

“An affiliated enterprise is counted as part of the parent company’s own business area if the parent company exercises a decisive influence over the affiliated enterprise. For there to be a decisive influence, it is required that influence be possible under the respective applicable laws. To determine whether there is decisive influence, all relevant aspects are to be considered in an overall view. All business, staff, organizational and legal ties between the subsidiary and the parent company must be considered and weighted in context. **This may be different from case to case.** Indications (not conclusive) of a decisive influence include:

- a large majority stake in the subsidiary,
- there being a common compliance system for the group,
- taking on the responsibility for the control of key processes in the subsidiary,
- there being a legal framework foreseeing the possibility of exerting influence,
- overlapping staff at the (highest) management level,
- a decisive influence on the subsidiary's supply chain management,
- exerting influence via shareholders' meetings and
- that the business area of the subsidiary corresponds to the business area of the parent company, for example, when the subsidiary manufactures and exploits the same products or provides the same services as the parent company.

These indications must already be in existence. It would not be enough, for example, for a group-wide compliance system to only be planned, but not yet implemented. It is not necessary, however, that the decisive influence has already been exercised with a view to complying with the due diligence obligations pursuant to the Supply Chain Act.”

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<sup>106</sup> Das Bundesministerium für Arbeit und Soziales. (n.d.). *Gesetzentwurf der Bundesregierung*. Retrieved July 31, 2023 from [https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2) (p.49)

<sup>107</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1>

**Chained influence is also relevant and possible**, as evidenced in BAFA’s reply to question 11 in the Section IV of its FAQ’s called “Affiliated enterprises”.<sup>108</sup> There, BAFA stated that an enterprise can exert decisive influence further down its supply chain, i.e. on the subsidiary of its own subsidiary and further down.

It is worth noting that BAFA relies on the Stock Corporation Act<sup>109</sup> (Aktiengesetz – AktG) to define affiliated enterprises.

**“Section 15  
Affiliated enterprises**

*Affiliated enterprises are legally independent enterprises that, in their relationship inter se, are enterprises in which a majority ownership interest is held and enterprises which hold a majority of the ownership interest (section 16), controlled and controlling enterprises (section 17), group member companies (section 18), cross-shareholding enterprises (section 19), or parties to an inter-company agreement (sections 291, 292).”*

However, the extent to which the AktG can be utilized to interpret the procedures and norms of the LkSG remains uncertain.

### **6.3. What is a due diligence process?**

In accordance with Section 3 of the LkSG enterprises have a responsibility to carefully consider and fulfill their human rights and environmental obligations as outlined in that section. This involves conducting thorough assessments of their supply chains to prevent or reduce any potential risks related to human rights or the environment. The LkSG encompasses the following actions:

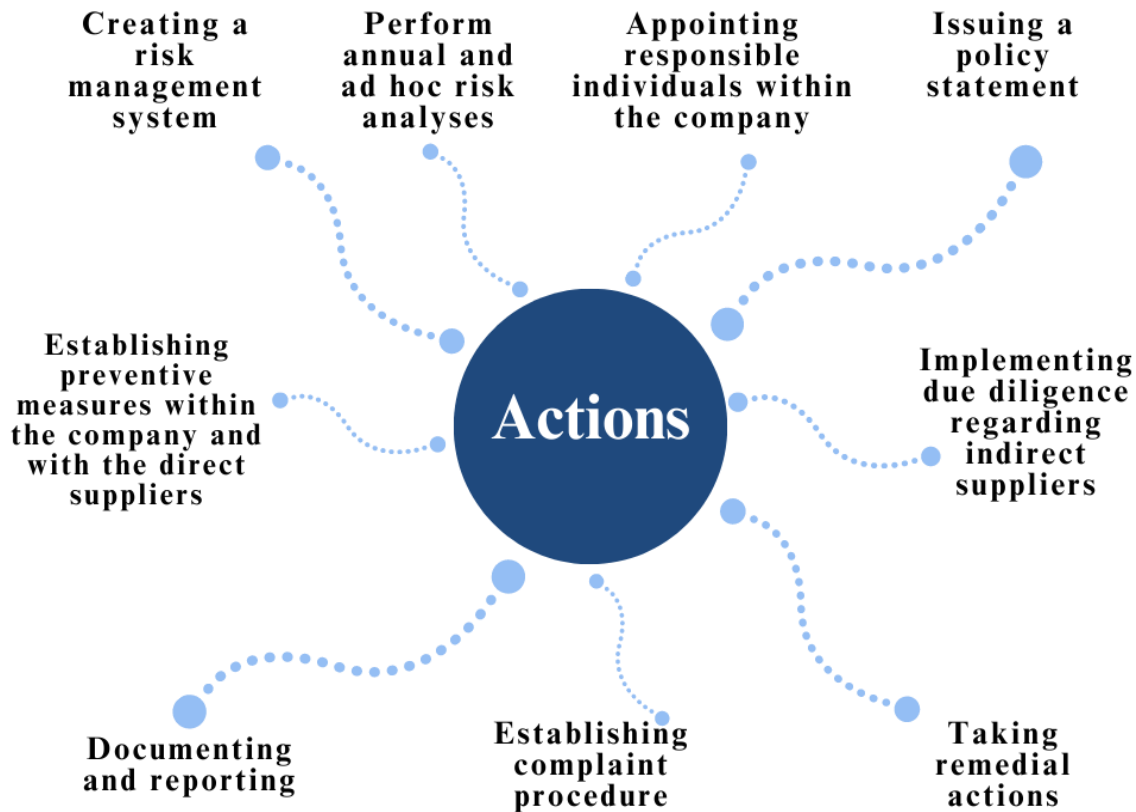
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<sup>108</sup> Ibid

<sup>109</sup> Stock Corporation Act of 6 September 1965 (Federal Law Gazette I, p. 1089), as last amended by Article 7 of the Act of 7 August 2021 (Federal Law Gazette I p. 3311). English version available at: [https://www.gesetze-im-internet.de/englisch\\_aktg/englisch\\_aktg.html](https://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.html).



**Figure 5**



The LkSG establishes a framework for enterprises to fulfill their responsibilities regarding human rights and environmental obligations by conducting comprehensive assessments and implementing preventative measures in their supply chains.

Risk management and preventive measures are central to this due diligence process:

*“(...) organizations should prioritize transparency and gain insights into their supply chain while evaluating potential risks. Specifically, they should identify areas within their own business operations that carry significant risks in terms of human rights and environmental concerns. If there are indications that indirect suppliers may be violating human rights or environmental obligations (based on substantiated knowledge), a thorough risk analysis must be conducted.”<sup>110</sup>*

<sup>110</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1> (BAFA Q&A, no. VI.1. CSR - FAQ)

As defined above, the law distinguishes between direct and indirect suppliers, and enterprises' own business area. It also uses the same distinction to differentiate between three types of due diligence processes (described further below).

## 6.4. General Principles

When defining obligations of the enterprises, the LkSG makes a clear distinction of the obligations owed with regards to the enterprise's own business area, its direct and indirect suppliers. What is common for all of them though are the principles outlined in this subsection.

### 6.4.1 Principles of Appropriateness and Effectiveness

These principles are explained in more depth in one of the BAFA's publications. Their essence is that all of the obligations of enterprises are to be adapted to the specific needs of each enterprise. The two principles are intertwined and are closely related. As BAFA stated, this means that: "Enterprises may only make appropriate selection from effective measures. This ensures that an appropriate measure is always effective and that it can actually reduce or end risks or violations. Through their effectiveness reviews, enterprises gain knowledge on the appropriateness and effectiveness of measures employed and are due to make appropriate adjustments."<sup>111</sup> In other words, whenever an enterprise chooses a measure it must assess whether that particular measure is **able (appropriate)** to reduce or end the risk or violation and if it is going to be the most effective available one in doing so.

**For example**, if the risk or violation is that of inappropriate wages, a training on discrimination is obviously not an appropriate measure. Also, a training on how employees can manage their money better may be appropriate, but it is hardly considered as effective especially when the issue is about wages which can provide a minimal standard of living. In this sense, this training might just have some effects, but only minimal ones. So, in this scenario, the increase of wages would likely be both appropriate and the most effective one to reduce or end the risk or violation of inappropriate wages.

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<sup>111</sup> Bundesamt für Wirtschaft und Ausfuhrkontrolle. (2022). *Angemessenheit: Handreichung zum Prinzip der Angemessenheit nach den Vorgaben des Lieferkettensorgfaltspflichtengesetzes*. Retrieved June 19, 2023 from [https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung\\_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820](https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820) (p.6)

## Criteria for Appropriateness and Prioritizing

The LkSG defines the criteria which must be assessed when deliberating which measures should be implemented, and among them which should be implemented first.<sup>112</sup> These are defined in Section 3 Paragraph (2) of the Act as follows:

The appropriate manner of acting in accordance with the due diligence obligations is determined according to:

- the nature and extent of the enterprise’s business activities,
- the ability of the enterprise to influence the party directly responsible for a risk to human rights or environment-related risk or the violation of a human rights-related or environment- related obligation,
- the severity of the violation that can typically be expected, the reversibility of the violation, and the probability of the occurrence of a violation of a human rights-related or an environment-related obligation as well as
- the nature of the causal contribution of the enterprise to the risk to human rights or environment-related risk or to the violation of a human rights-related or environment-related obligation.

Although it is not clear from the Act itself, BAFA interprets that these criteria to be considered jointly, i.e., they are not in any relation of hierarchy.<sup>113</sup>

BAFA also provides a range of additional questions which can help in assessing the above criteria<sup>114</sup> and which are presented in Table below:

Appropriateness criteria Section 3(2) ‘LkSG’	Guidance criteria
Nature and scope of the business activities of the company	<p><b>Qualitative:</b></p> <ul style="list-style-type: none"> <li>• Degree of complexity of a product or service</li> <li>• Variety of services and business relationships</li> <li>• Country-wide or international scope</li> </ul>

<sup>112</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1> (reply to question 3 in section VI of the BAFA’s FAQ)

<sup>113</sup> Bundesamt für Wirtschaft und Ausfuhrkontrolle. (2022). *Angemessenheit: Handreichung zum Prinzip der Angemessenheit nach den Vorgaben des Lieferkettensorgfaltspflichtengesetzes*. Retrieved June 19, 2023 from [https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung\\_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820](https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/handreichung_angemessenheit.html;jsessionid=26B2ADAFD1B69CFAA33128C04A16323E.intranet262?nn=1469820) (p.16)

<sup>114</sup> Ibid (p.12 and p.18)

	<p><b>Quantitative:</b></p> <ul style="list-style-type: none"> <li>• Company size (number of staff and their roles, revenue, fixed and working capital, production capacity)</li> <li>• Vulnerability (frequency of risks specific to a country, sector, or a category of goods)</li> </ul>
A company's ability to influence the entity directly responsible for a risk or violation	<ul style="list-style-type: none"> <li>• Company size (relative to its competitors (market dominance) and to the entity directly responsible)</li> <li>• Order volume (relative to the revenue of the entity directly responsible)</li> <li>• Proximity to the risk (i.e., where the risk exists and who is responsible: at the company itself, at a direct supplier or at an indirect supplier)?</li> </ul>
The typically expected severity and likelihood of a violation of this nature	<p><b>Severity:</b></p> <ul style="list-style-type: none"> <li>• Degree (i.e., intensity/depth) of harm.</li> <li>• Number of people impacted</li> <li>• No possibility of correcting the adverse impact (irreversibility)</li> <li>• Likelihood: Whether and when a violation occurs (e.g., if there is already evidence of a supplier's poor performance (greater likelihood) or effective preventative measures in place (less likelihood))</li> </ul>
The nature of the company's contribution to the risk or the violation	<ul style="list-style-type: none"> <li>• The company has made a major contribution to the risk or is directly (solely) responsible.</li> <li>• As defined here, contribution to or partial responsibility for implies that the actions of a third party caused the adverse impact. The company "contributes" to the impact if it, by action or even omission, in any way permits, facilitates or incentivizes a specific violation.</li> </ul>

### 6.4.2 Principle of Review

This principle is also backed by the duty of enterprises to periodically review the appropriateness and effectiveness of their due diligence processes. This includes the duties of affected enterprises to **perform annually**:

- a) the risk analysis set out in Section 5 of the Act.
- b) a review analysis of the effectiveness of preventive measures from Section 6 of the Act.
- c) a review analysis of the effectiveness of remedial measures from Section 7 of the Act.
- d) a review analysis of the complaint's mechanism from Section 8 and 9 Paragraph (1) of the Act.

Alongside these periodic reviews, the enterprise is obliged to perform a risk analysis in line with Section 5 of the Act when it expects a significantly changed or significantly expanded risk situation in its supply chain, for example due to the introduction of new products, new projects, or a new business field.

### **6.4.3 Principle of Stakeholder Engagement**

Another general principle of this Act, and HRDD in general, is the obligation to always keep in mind and consider the interests of affected stakeholders. The Act requires this specifically: 1) through Section 4 paragraph (4) of the Act, where it specifically requires the affected enterprises to give due consideration to those views through their risk management systems, 2) through the obligation of always having in place a complaints mechanism (Section 8 and Section 9 (1)).

Although the Act does not specify in which sense this engagement is to be performed, the official draft law provides some guidance when it: 1) specifies that the term *employee* should be interpreted broadly and cover various forms of labor in all three elements of the supply chain<sup>115</sup> and 2) that consultations can be either direct or via NGOs or other means.<sup>116</sup>

## **6.4. Due Diligence Obligations**

When defining obligations of the enterprises, the LkSG makes a clear distinction of the obligations owed with regards to the enterprise's own business area, its direct and indirect suppliers. The same distinction is outlined in the following subsections.

## **6.5. General Overview of Due Diligence Obligations of Enterprises**

In line with the LkSG, the affected enterprises are obliged to:

1. Set up a risk management system and appoint an individual responsible for the system within the enterprise.
2. Execute, on a regular basis, a risk analysis in its own business area and at its direct suppliers.
3. Issue and update policy statements in relation to the enterprise's human rights strategies.

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<sup>115</sup> Das Bundesministerium für Arbeit und Soziales. (n.d.). *Gesetzentwurf der Bundesregierung*. Retrieved July 31, 2023 from [https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2) (p.48)

<sup>116</sup> Ibid

4. Create preventive measures and remedies for human rights violations and violations of environment related obligations.
5. Establish within the enterprise, an effective complaint procedure encompassing all three areas of the supply chain.
6. Ensure proper documentation of the enterprise's compliance to due diligence obligations and publication of the relevant information.<sup>117</sup>
7. Execute ad-hoc risk analyses.

## 6.6. Overarching Obligations

Most of the obligations of affected enterprises apply, at least to some extent, to all elements of the supply chain, except for preventive and remedial measures which are specifically defined for each of the three elements of the supply chain (own business area, direct suppliers, and indirect suppliers). Hence, the following obligations can be deemed overarching ones:

1. Set up a risk management system and appoint an individual responsible for the system within the enterprise.
2. Perform an initial risk analysis.
3. Issue a policy statement on its human rights strategy.
4. Set up a complaint's mechanism.
5. Document and report.

### 6.6.1 *Appropriate Risk Management System*

#### **The Responsible Individual and Embedded Processes:**

The LkSG does not prescribe which qualifications the responsible individual has, although it does prescribe that such an individual can for example bear the title of a human rights officer (Section 4 paragraph 3). It also prescribes that the risk management system must be enshrined in all relevant business processes through appropriate measures (Section 4 paragraph 1) and that the senior management must actively show interest in the work of the appointed person and at least once per year (Section 4 paragraph 3). All of this points to

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<sup>117</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1>

the fact that the said individual ought to be **placed on an appropriate hierarchical level and be responsible directly to the senior management.**<sup>118</sup>

### **6.6.2 Perform a Risk Analysis**

Although the Act only requires the affected enterprises to perform a risk analysis to identify the human rights and environment related risks **in its own business area and at its direct suppliers**, this obligation is considered as an overarching one because it is at the core of the whole risk management system. It is also subjected to the appropriateness and effectiveness criteria. Hence, an enterprise with a complex web of supply chains or which sources high risk materials or from high-risk areas is bound to perform a more complex and in-depth risk analysis than an enterprise which sources mostly locally.

### **6.6.3 Issue a Policy Statement on Human Rights Strategy**

Section 6 (2) states that **the policy statement must be adopted by senior management**, and it must at least:

1. Contain a description of the procedure by which the enterprise fulfills its obligations from Section 3 of the LkSG.
2. Focus on addressing those risks that are relevant for the enterprise instead of dealing with all potential risks and violations not recognized as a priority in its risk analysis.

### **6.6.4 Set up a Complaint Mechanism**

Specifically outlined in Sections 8, 9 and 10 of the LkSG, enterprises are obliged to establish a comprehensive complaint mechanism aimed at addressing human rights and environment-related risks. This mechanism is designed to encompass not only the enterprise's own business area but also its direct and indirect suppliers. It is essential that the procedure adhere to a strict confidentiality standard while simultaneously being made accessible to the public. Hence, enterprises must establish complaints procedures for both internal and external individuals to address concerns. Enterprises have the freedom to design multiple complaints procedures, and they are not obliged to provide the same access to both groups.

**Internal individuals** are target groups, for example, an enterprise' own employees, employees of direct or indirect suppliers or residents living around local sites. The

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<sup>118</sup> Das Bundesministerium für Arbeit und Soziales. (n.d.). *Gesetzentwurf der Bundesregierung*. Retrieved July 31, 2023 from [https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2) (p.47)

information about the complaint mechanism must be easily understandable and clear, and it should be accessible in the languages that are significant to the relevant target groups of the enterprise.

**External Individuals** who are not directly impacted by risks or violations should also be given the opportunity to report information regarding potential risks and violations of obligations. They may also do this on behalf of individuals who are directly affected.

**a) BAFA specified main design requirements for internal complaints mechanisms<sup>119</sup>**

Feature of the grievance mechanism	Requirements
Establishment of publicly available rules of procedure	<ul style="list-style-type: none"> <li>• Easily accessible and published in a readily identifiable location, such as the enterprise's website, the website of the external complaints procedure provider, or on a dedicated website created for this purpose.</li> <li>• Contain scope of application - seeing that there can be various complaints mechanisms, one of them can relate to workers' rights and the other to environmental risks for example.</li> <li>• Complaint's channels used - online form, e-mail, telephone.</li> <li>• Timeframe and steps of the procedure.</li> <li>• Existence of amicable settlement option.</li> <li>• Contact person(s)</li> <li>• How the enterprise ensures effective protection against disadvantage or punishment as a result of a grievance.</li> <li>• Accessible and available in all relevant languages and adopted to all targeted groups (especially women, children, indigenous people).</li> </ul>
Suitability and qualification of internal contact persons	<ul style="list-style-type: none"> <li>• The persons must be able to act impartially - adequate independence safeguards must be established (e.g., if it is overseen by an internal employee, contractual guarantees against their dismissal for carrying out these duties must be applied).</li> <li>• Adequately trained and have sufficient time and resources to understand and assess the factual situation and also follow up on the procedure.</li> <li>• Must be bound to secrecy and protect the identity and personal data of those bringing grievances.</li> </ul>

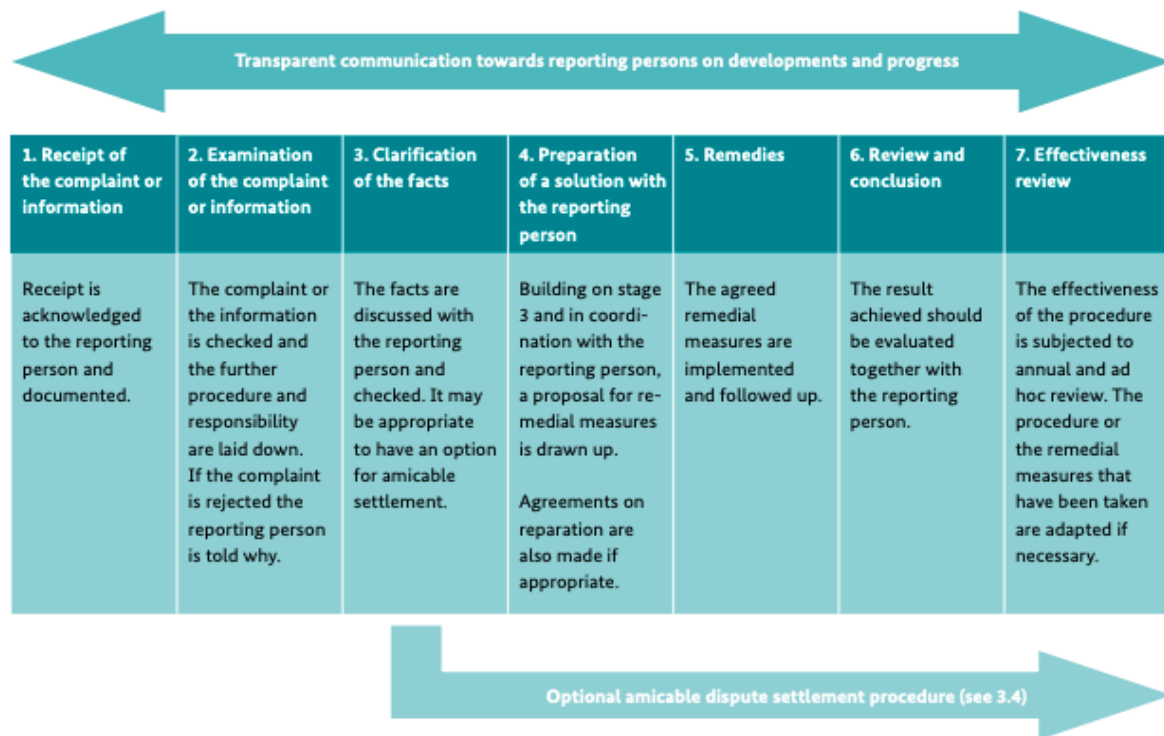
<sup>119</sup> The Federal Office of Economics and Export Control. (n.d.). Organising, Implementing and Evaluating Complaints Procedures. Retrieved August 2, 2023 from [https://www.bafa.de/EN/Supply\\_Chain\\_Act/Complaints\\_Procedure/complaints\\_procedure\\_node.html](https://www.bafa.de/EN/Supply_Chain_Act/Complaints_Procedure/complaints_procedure_node.html); The Federal Office of Economics and Export Control. (n.d.). Guidance on the Complaints Procedure under the German Supply Chain Due Diligence Act. Retrieved August 2, 2023 from [https://www.bafa.de/EN/Supply\\_Chain\\_Act/Complaints\\_Procedure/complaints\\_procedure\\_node.html](https://www.bafa.de/EN/Supply_Chain_Act/Complaints_Procedure/complaints_procedure_node.html)



Process of the complaints procedure and dealing with reporting persons (see also figure 6 below)	<ul style="list-style-type: none"> <li>• Acknowledgement of receipt and continuous contact with the reporting person.</li> <li>• Examination of the complaint.</li> <li>• Clarification of the facts.</li> <li>• Confidentiality of identity and protection against disadvantage or punishment as a result of a complaint.</li> </ul>
Handling of complaints	Several already existing codes of procedures are recommended as good practice <sup>120</sup> (e.g., the Minerals Grievances mechanism platform <sup>121</sup> etc.)
<i>External mechanisms can be used as long as they fulfill the above criteria.</i>	

Figure 6, exemplary measures to design accessibility in the complaint procedure<sup>122</sup>.

**Figure 6**



<sup>120</sup> Ibid

<sup>121</sup> Minerals Grievance Platform. (n.d.). Retrieved August 2, 2023 from <https://mineralsgrievanceplatform.org/>

<sup>122</sup> The Federal Office of Economics and Export Control. (n.d.). Organising, Implementing and Evaluating Complaints Procedures. Retrieved August 2, 2023 from [https://www.bafa.de/EN/Supply\\_Chain\\_Act/Complaints\\_Procedure/complaints\\_procedure\\_node.html](https://www.bafa.de/EN/Supply_Chain_Act/Complaints_Procedure/complaints_procedure_node.html); The Federal Office of Economics and Export Control. (n.d.). Guidance on the Complaints Procedure under the German Supply Chain Due Diligence Act. Retrieved August 2, 2023 from [https://www.bafa.de/EN/Supply\\_Chain\\_Act/Complaints\\_Procedure/complaints\\_procedure\\_node.html](https://www.bafa.de/EN/Supply_Chain_Act/Complaints_Procedure/complaints_procedure_node.html)

## b) Review of the complaint mechanism is also required

As outlined in the general principle of review, the affected enterprises must review the appropriateness and effectiveness of their complaint mechanisms. This is to be done both annually, and on an ad-hoc basis.

## c) BAFA specified main effectiveness criteria for internal complaints mechanisms<sup>123</sup>:

Effectiveness criteria from principle 31 of the UNGP's	Guiding questions for the review <sup>124</sup>
Legitimate	<ul style="list-style-type: none"> <li>● Are there rules of procedure that clearly describe the process for dealing with complaints?</li> <li>● Are there clear responsibilities for the implementation of the procedure designated and is the qualification of the persons responsible for the processing of complaints ensured by appropriate training?</li> </ul>
Accessible	<ul style="list-style-type: none"> <li>● Is information about the process provided in a way that is adapted to the context and target groups?</li> <li>● Does the procedure effectively protect whistleblowers from disadvantage or punishment?</li> </ul>
Calculable	<ul style="list-style-type: none"> <li>● Do the public procedural rules contain information on the foreseeable timeframe for the individual procedural stages, on possible results that can be achieved, and on the monitoring of implementation?</li> </ul>
Balanced	<ul style="list-style-type: none"> <li>● Is the necessary support provided so that the target groups can actually use the procedure?</li> <li>● Do target groups have access to the expertise, guidance, and information they need to participate in the grievance process in a fair, informed, and respectful manner?</li> </ul>
Transparent	<ul style="list-style-type: none"> <li>● Is the person making the reference informed transparently and comprehensively about the course and progress achieved throughout the procedure?</li> <li>● Is information about complaints received through the process and their resolution made publicly available?</li> </ul>
Rights-compatible	<ul style="list-style-type: none"> <li>● Are complaints about serious violations of human rights and</li> </ul>

<sup>123</sup> Ibid

<sup>124</sup> Ibid

	<p>environmental obligations dealt with as a matter of priority and are decision-makers in the company informed accordingly?</p> <ul style="list-style-type: none"> <li>• Are solutions and remedies developed in accordance with internationally recognized human rights standards?</li> </ul>
Source of continuous learning	<ul style="list-style-type: none"> <li>• Is the procedure reviewed annually and on an ad hoc basis in order to determine its effectiveness?</li> <li>• Do findings from the processing of tips flow into the adaptation of the company's own due diligence processes?</li> </ul>
Dialog compatible	<ul style="list-style-type: none"> <li>• Were key target groups consulted in the conception and design of the process and were their specific needs identified?</li> <li>• Are complaints handled using dialogue-based approaches and are those who filed complaints surveyed about their satisfaction with the process and outcomes after the process is completed?</li> </ul>

In summary, the LkSG, as articulated in Sections 8 and 9, imposes the duty on businesses to establish a confidential and publicly accessible complaint mechanism, encompassing both the company itself and its direct and indirect suppliers. This mechanism must be impartial, promote settlement between parties,<sup>125</sup> and be subject to annual testing to ensure its continued effectiveness.

### 6.6.5 Document and Report

All affected enterprises must document all their due diligence obligations and processes (e.g., how they performed the risk analysis, their findings, what drove them to adopt certain preventive or remedial measures, what the outcome of those is, etc.). As outlined in the official draft bill,<sup>126</sup> this obligation is therefore intended to create an informational basis for the public-law enforcement (BAFA's monitoring) of the enterprise's obligations. It can also be used by the enterprise to provide evidence of the fulfillment of its obligations. The documents must be retained for seven years.

The affected enterprises are also obliged to publish an annual report on their websites with a minimum content prescribed under the Section 10 of the LkSG. The deadline is four months after the end of the financial year. The reports must be kept available for 7 years.

<sup>125</sup> CSR in Deutschland. (n.d.). *Act on Corporate Due Diligence Obligations in Supply Chains Of July 16 2021*. Retrieved July 31, 2023 from [https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?\\_\\_blob=publicationFile](https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile) (Section 8, (1))

<sup>126</sup> Das Bundesministerium für Arbeit und Soziales. (n.d.). *Gesetzentwurf der Bundesregierung*. Retrieved July 31, 2023 from [https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2) (p.58)

## 6.7 Specific Obligations of Enterprises with Regard to Own Business Area

The LkSG sets more stringent obligations when it comes to the *own business area* of affected enterprises as it clearly asks for an obligation of result in the remedy duties of enterprises (Section 7(1) of the Act). The next sections look at the distinctions between preventive measures and remedial measures.

### 6.8.1. Preventive Measures

With regards to its own business area, and notwithstanding the adoption of the human rights policy described above, the affected enterprises are obliged to, *in particular*:

Measure	Additional Comment
Implement the human rights strategy in the relevant business processes set out in the policy statement	This obligation can be seen as similar to the obligation to embed a risk management system. This is related to the nature of relations because, in its own business area, the enterprise is required to set up, for example, appropriate recruitment strategies and practices and appropriate incentives and disincentives for non-compliance with its human rights strategies (e.g., disciplinary sanctions against responsible employees).
Develop and implement appropriate procurement strategies and purchasing practices that prevent or minimize identified risks	As described in the official draft law, delivery times, purchase prices or the duration of contractual relationships are specifically referred as elements which must be assessed. <sup>127</sup>
Deliver trainings in the relevant business areas	Most notably in the procurement department, but also the legal department, the compliance department, and the human resources department.
Implement risk-based control measures to verify compliance with the human rights strategy contained in the policy statement in its own business area	E.g., through on-site inspections or third-party audits.

<sup>127</sup> Ibid (p.52)

### 6.8.2. Remedial Measures

The LkSG prescribes that affected enterprises:

- a) must bring the violation to an end if it happened or is happening inside its own business area in Germany;
- b) must usually bring the violation to an end if it happened or is happening inside its own business area abroad. The use of the term *usually* indicates that only in very exceptional circumstances can an enterprise not be obliged to bring a violation to an end in its own business area abroad.

As outlined in the official draft bill<sup>128</sup> “[t]hese obligations are consistent with the criteria of appropriateness and effectiveness (Section 3 Paragraph 2), according to which the following applies: **The closer the enterprise is to the impending or actual infringement and the more it contributes to it, the greater its efforts must be to avoid the infringement end.** In its own area of business, the enterprise is so closely related to the risk that it can be expected to immediately end the imminent or already occurred violation.” (emphasis added).

## 6.9. Specific Obligation of Companies with Regard to Direct Suppliers

When it comes to the remainder of obligations owed with regards to direct suppliers, the main distinction is also between preventive measures and remedial measures.

### 6.9.1. Preventive Measures

With regards to its direct suppliers, and notwithstanding the adoption of the human rights policy described above, the affected enterprises are obliged to, *in particular*:

Measure	Additional Comment
Consider human rights-related and environment-related expectations when selecting a direct supplier	The enterprise should assess potential suppliers in light of the standards and benchmarks it set out in its own human rights policy. <sup>129</sup>
Contractual assurances from a direct supplier that it will comply with the human rights-related and	One of the useful clauses is a contractual obligation of the direct supplier to only purchase certain products from selected (previously checked) suppliers or must prove that

<sup>128</sup> Ibid (p.54)

<sup>129</sup> Ibid (p.53)

environment-related expectations required by the enterprise's senior management and appropriately address them along the supply chain	certain products come from certified regions or smelters (e.g., chain of custody certification). <sup>130</sup>
Implement initial and further training measures for contractual assurances made by the direct supplier	Here emphasis is added on providing refresher training to direct suppliers. Although the enterprise cannot exonerate itself from its duties under LkSG by transferring and imposing all of them on its direct supplier, it seems reasonable that these trainings cover exactly the HRDD process and enable the direct suppliers to perform their own HRDD.
Agree on appropriate contractual control mechanisms and their risk-based implementation to verify compliance with the human rights strategy at the direct supplier	E.g., on site controls by the enterprise itself or through third parties commissioned to carry out audits.

### 6.9.2. Remedial Measures

When it comes to remedial measures with regards to direct suppliers, the LkSG does not impose an obligation of result to the same standard as it does for an enterprises' own business area. Instead, it develops a complex web of obligations, at least when an enterprise establishes that it cannot end the violation in the foreseeable future (Section 7 Paragraph (2)). In that case, the enterprise is obliged to draw up and implement a concept for ending or minimizing the violation without undue delay. This concept must contain a concrete timetable and outline appropriate measures. The Act also provides which measures must be taken into consideration (Section 7 Paragraph (2)):

1. the joint development and implementation of a plan to end or minimize the violation with the enterprise causing the violation.
2. joining forces with other enterprises in sector initiatives and sector standards to increase the ability of influencing the entity that causes or may cause a harm - *reach out to other actors in the sector or industry buying from the same supplier for example. Although the LkSG does not explicitly state this here, this step is aimed at increasing leverage an enterprise has towards its direct supplier.*
3. a temporary suspension of the business relationship while efforts are made to minimize the risk - *the suspension of business is one of the measures an enterprise must take into consideration, but not necessarily employ.*

<sup>130</sup> Ibid

4. the termination of a business relationship, which is **only required if**
  - a) the violation of a protected legal position or an environment-related obligation is assessed as very serious;
  - b) the implementation of the measures developed in the concept does not remedy the situation after the time specified in the concept has elapsed; and
  - c) the enterprise has no other less severe means at its disposal and increasing the ability to exert influence has no prospect of success.

As indicated here, the measure of termination of a business relationship is only required as a measure of last resort and **only if all three conditions above are met**.

Although using different wording, the provisions of the Section 7 paragraph 2 also make it clear that the above noted remedial measures are not the only ones an enterprise should consider. These are only the ones it **must consider**, which does not negate its duty to adopt and implement other, more suitable (more appropriate and/or effective) measures if those exist.

## 6.10. Obligations of Enterprises with Regard to Indirect Suppliers

The one obligation enterprises always have with regards to indirect suppliers is the obligation to set up the complaints procedure pursuant to Section 8. This stems from the fact that enterprises are obliged to set up the complaint mechanism in such a way to enable reporting of risks and violations happening at an indirect supplier (Section 9, paragraph 1). In addition to this, the enterprise is bound to perform a risk analysis with respect to its indirect suppliers when it must expect a significantly changed or significantly expanded risk situation in the supply chain, for example due to the introduction of new products, projects or a new business field (Section 5, paragraph 4).

All other obligations arise once an enterprise has *substantiated knowledge* that violations of human rights or environmental obligations have occurred. The enterprises are then bound to perform most of the obligations relating to direct suppliers, namely to:

- Carry out a risk analysis in accordance with Section 5 (1) to (3).
- Lay down appropriate preventive measures vis-à-vis the responsible party, *such as* the implementation of control measures (on-site inspections), support in the prevention and avoidance of risk or the implementation of sector-specific or cross-sector initiatives to which the enterprise is a party (e.g., health and safety capacity building projects).

- Draw up and implement a prevention, cessation, or minimization concept - the same one envisaged with respect to direct suppliers from Section 7 paragraph 2 of the Act.<sup>131</sup>
- update its policy statement in accordance with Section 6 (2).<sup>132</sup>
- update their existing risk management system if all the previously mentioned actions led it to find that violations did indeed occur or that risks have been identified. This means that the enterprise will be obliged to include this particular indirect supplier and the particular violations or risks identified in their regular, annual risk analysis.

### **6.10.1. The Notion of Substantiated Knowledge**

When it comes to how the substantiated knowledge will be assessed, BAFA already provided some guidelines on this matter by laying down the following principles:<sup>133</sup>

“It is sufficient that indications exist, i.e., have reached the sphere of control of the enterprise so that they can readily be noticed”. These include for example:

- notifications via the complaint’s mechanism,
- handouts by BAFA (Section 20 of the LkSG) and of whose publication the respective human rights officer is expected to take note,
- media reports, reports by NGOs, and notifications on the internet if they are common knowledge because they are known industry-wide or are passed on to the enterprise.

In the case of handouts, case lists and databases of multi-stakeholder or industry initiatives, the more widely the information has been disseminated throughout the industry, the more likely it is that substantiated knowledge within the meaning of Section 9 (3) Supply Chain Act can be assumed.

The degree of possibility of substantiated knowledge is determined by the following guiding principles:

- The violation does not need to be evident, certain, obvious, or even probable. “Possible” events also include events whose likelihood of occurrence is less than 50 percent.

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<sup>131</sup> Ibid (p.57)

<sup>132</sup> Bundesamt für Wirtschaft und Ausfuhrkontrolle. (n.d.). Identifying, weighting and prioritizing risks. Retrieved August 2, 2023 from

[www.bafa.de/SharedDocs/Downloads/EN/Supply\\_Chain\\_Act/guidance\\_risk\\_analysis.pdf;jsessionid=675CD5E440227F91C57B03A6E40C0EAB.internet281?\\_\\_blob=publicationFile&v=2](http://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/guidance_risk_analysis.pdf;jsessionid=675CD5E440227F91C57B03A6E40C0EAB.internet281?__blob=publicationFile&v=2) (p. 6, answer to question 3.2)

<sup>133</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1> (BAFA Q&A, no. VI.14. CSR - FAQ)



- The information available does not need, in and of itself, to indicate that a violation has occurred with a supplier.

It must at least be possible to locate the risk in the enterprise's own supply chain with reasonable efforts using methods recognized in the industry. Reasonableness is measured in accordance with the overall circumstances, and in particular in accordance with the principle of proportionality. The more specific a suspicion has become, the greater the effort that can reasonably be expected in terms of locating the cause. Even the state of the discussion within a sector can have an indicative effect: any knowledge within the sector that has become established, for instance, is part of substantiated knowledge. The following central question must be answered:

*Would an employee entrusted with due diligence obligations and with average experience and understanding, who works in an enterprise where risk management is organized in accordance with the statutory requirements, consider an actual or imminent violation within the supply chain to be possible?*

## PART 7: COMPLIANCE WITH THE LKSG

### 7.1. Authorized Monitoring Body

The Section 19 of the LkSG establishes the competent authority responsible for monitoring and enforcement, BAFA, whose specific responsibilities include:

- **to conduct risk-based inspections** of enterprises to ensure they are fulfilling their due diligence obligations. They have the authority to summon individuals, enter offices, and inspect and examine documents related to compliance with the LkSG. The LkSG does not specify further criteria how BAFA establishes its priorities and how it obtains information based on which it will act at its own initiative. This procedure can also be influenced through delivery of plausible information to BAFA that there has been a violation of obligations under LkSG by anyone claiming to have such information.<sup>134</sup> It is not the same as raising an official complaint, because in this case it is up to BAFA to assess the information received and decide whether it will take further action.
- **to order execution of any of the obligations from the LkSG** when it finds an enterprise non-compliant including the order to take remedial measures.
- to impose sanctions for infringements of the LkSG (see separate subsection 7.3. below)
- **to impose financial penalties in administrative enforcement proceedings.** The maximum amount of the financial penalty that can be imposed is up to 50,000 euros. This penalty is doubled with reference to penalties specified in Section 11(3) of the Administrative Enforcement Act (*Verwaltungsvollstreckungsgesetz-VwVG*).<sup>135</sup> BAFA can repeat a penalty in case of non-compliance in line with Articles 11-14 of the VwVG.

These are not to be confused with the imposed sanction. Namely, financial penalties are a form of instrument BAFA can use to force an Enterprise to fulfill some of the duties under the LkSG. Hence, BAFA can determine incompliance with LkSG, impose a sanction and order the enterprise to remedy the incompliance. If the enterprise fails to remedy the incompliance determined within a certain timeframe imposed by BAFA, then BAFA can impose a financial penalty on that enterprise. It can repeat such penalties so long as the incompliance remains unremedied. This does not affect the

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<sup>134</sup> Das Bundesministerium für Arbeit und Soziales. (n.d.). *Gesetzentwurf der Bundesregierung*. Retrieved July 31, 2023 from [https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2) (p.54)

<sup>135</sup> Bundesamt für Justiz. (1953, April 27). *Verwaltungs-Vollstreckungsgesetz (VwVG)*. Retrieved July 31, 2023 from <https://www.gesetze-im-internet.de/vwvg/BJNR001570953.html>

sanction imposed, which means that in this case the affected enterprise is obliged to both pay the sanction and the penalty and to remedy the incompliance determined.

The Federal Ministry for Economic Affairs and Energy provides legal and technical supervision of BAFA's activities related to the Act, in agreement with the Federal Ministry of Labour and Social Affairs. Additionally, Section 19 emphasizes that the competent authority adopts a risk-based approach in carrying out its tasks, indicating that its actions are prioritized based on potential risks and violations.

The LkSG does not include provisions on imposing sanctions on the monitoring and enforcing body in the event of non-compliance with its obligations. Nonetheless, in case of BAFA's failure to act in accordance with its duties from the LkSG, the procedure in front of the German Administrative Courts in line with the German Code of Administrative Court Procedure<sup>136</sup> applies.

## 7.2. Complaint Mechanism within the Federal Office for Economic Affairs and Export Control (BAFA)

An infringement is deemed to have taken place when a German enterprise's supply chain is involved in a violation of human rights or environmental concerns.



**Complaints to BAFA can be submitted online through this link:**  
**[<https://elan1.bafa.bund.de/beschwerdeverfahren-lksg/>]**

Address: Federal Office for Economic Affairs and Export Control, Directorate-General 7, Supply Chain Act Am Gericht 2, 04552 Borna, Saxony, Germany

Complaints can be filed on various subjects, including Human Rights, Environment, or other relevant matters, where violations may have already taken place or are likely to occur in the future. **If both types of violations are involved, separate complaints must be submitted for each.** Additionally, individuals have the option to submit complaints in four languages: English, German, French, and Spanish. While complaints can be submitted anonymously or without indication of a name, it is important to note that in such cases, BAFA will not be able to provide feedback to the complainant.

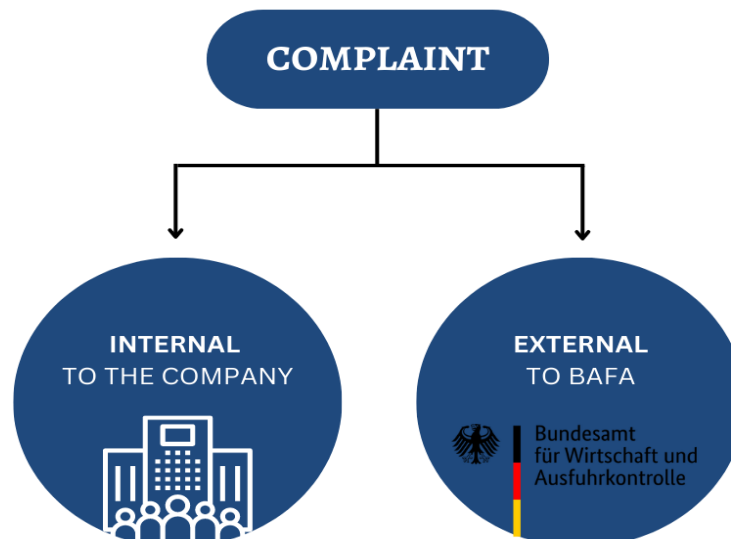
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<sup>136</sup> Federal Ministry of Justice. (2019, Juni 21). *Code of Administrative Court Procedure*. Retrieved July 31, 2023 from [https://www.gesetze-im-internet.de/englisch\\_vwgo/englisch\\_vwgo.html](https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html)

### 7.2.1. Procedure of the Complaint Process

- Receive the complaint.
- BAFA sends an automatic acknowledgement of receipt if the email address is indicated in the submitted complaint form.
- BAFA will contact the complainant for further clarifications or additional comments if needed.
- Conduct an investigation into the complaint and make a decision to accept or reject it.
- Investigate the alleged violation thoroughly.
- Provide feedback to the complainant regarding the investigation's outcome.

Figure 7



### 7.2.2. Requirements for the Content of the Complaint

- A complainant must clearly state the name of the enterprise which, in their view, was involved in the human rights violation at hand. In the case of foreign enterprises, this enterprise must be a supplier (direct or indirect) of a German enterprise or in its own business area (although not specified, it can be implied).
- The complainant must describe the facts of the violation in a comprehensible and comprehensive manner.
- The complainant must be directly affected by the violation or at least by its effects.

### 7.3. Possible Sanctions for Non-Compliance with the LkSG

When enterprises fail to meet their obligations outlined in the LkSG, they can face consequences:

- The severity of the violation determines the fine amount: up to 100,000 Euros for formal violations; up to 500,000 Euros for violations of important duties; and up to 800,000 Euros for violations of especially important duties.<sup>137</sup>
- Managers and human rights officers who neglected their duties may also be fined.<sup>138</sup>
- Corporations and partnerships can face fines of up to 5 million Euros and 8 million Euros, respectively.<sup>139</sup>
- Enterprises with an annual turnover exceeding 400 million euros may in some cases be fined with 2 percent of annual turnover.

Enterprises may be excluded from the award of public contracts<sup>140</sup> for a period up to three years.<sup>141</sup>

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<sup>137</sup> Grabosch, R. (2021). The Supply Chain Due Diligence Act: Germany Sets Standards in Human Rights Protection. *Friedrich-Ebert-Foundation*. Retrieved August 3, 2023 from <https://library.fes.de/pdf-files/iez/18755.pdf>

<sup>138</sup> Ibid

<sup>139</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1> (BAFA Q&A, no. XI.1. CSR - FAQ)

<sup>140</sup> CSR in Deutschland. (n.d.). *Act on Corporate Due Diligence Obligations in Supply Chains Of July 16 2021*. Retrieved July 31, 2023 from [https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?\\_\\_blob=publicationFile](https://www.csr-in-deutschland.de/SharedDocs/Downloads/EN/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile) (Section 24, para 2, section 1, b)

<sup>141</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1> (BAFA Q&A, no. XI.1. CSR - FAQ)

## PART 8: LEGAL IMPLICATIONS AND ACCOUNTABILITY: LITIGATION AND LIABILITY IN THE CONTEXT OF THE LKSG

Section 3 paragraph 3 of LkSG is clear in stating that a violation of the obligations under the LkSG does not give rise to any liability under civil law. This could be owed to the fact that as specified in the BAFA's FAQs<sup>142</sup> German law already permits foreigners to sue a German-based company before German courts for damage German enterprises caused abroad.<sup>143</sup>

The novelty brought by the LkSG is outlined in Section 11 of the LkSG. Section 11 establishes a special capacity for domestic trade unions and NGOs which can be authorized by any affected persons to bring civil proceedings. However, this is only possible after following criteria are all met:

- 1. A person has to be the victim of a violation** of some of the human rights enshrined in Conventions specifically listed in the Annex to the Law. Claims of human rights impacts of juridical persons, i.e. business, organizations, are not possible under the LkSG.
- 2. Not all Conventions listed therein are relevant.** Rather, only conventions listed under No. 1-11 of the Annex to the Act. This means that although the Act covers risks of and violations of environment related obligations enshrined in i) Minamata Convention, ii) POPs Convention and iii) Basel Convention – a person who suffered a violation of an environment-related obligation cannot use this Act in order to sue the responsible enterprise through an authorized trade union or NGO in Section 11.<sup>144</sup>
- 3. The possibility to sue is also limited to those violations of protected human rights which are of *paramount importance*.** What this will probably mean in

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<sup>142</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1>

<sup>143</sup> A German company cannot be sued solely for non-compliance with LkSG. However, avenues for seeking compensation exist under established tort laws (refer to section 9.3 of the report). The crucial factors here are the presence of damage and whether the German company is solely responsible for it or contributed to it by controlling the actions of the supplier, or a combination of both. Due to the complexity and limited practical testing of such strategic litigation, it falls outside the scope of this report.

<sup>144</sup> The environmental obligations outlined by ICESCR are regarded by LkSG as human rights violations defined in either Section 2(2)(9) or Section 2(2)(12) — the latter for violations not explicitly specified in Section 2(2)(9). LkSG specifically defines environment-related obligations for particular violations related to the three conventions detailed in subsection 4.4 (Minamata, etc.). Therefore, if a particular environmental damage cannot be categorized under Section 2(2)(9) or Section 2(2)(12), the German NGO or Union is precluded from filing a lawsuit in accordance with Art. 11 of the LkSG.

practice is that the assessment of the court on whether the human rights violations at hand are serious will be done on a case-by-case basis.

4. The authorized trade union or the NGO must ***maintain a permanent presence of its own***. As the official draft bill clarifies, this means that it must have **legal capacity and have registered headquarters in Germany**. Judging from the official draft bill - which references the German Civil Procedure Code Article 50<sup>145</sup> and certain general principles - all trade unions are presumed to have appropriate and necessary legal capacity, even when they are not incorporated and registered as separate juridical persons. When it comes to NGOs, the ones who are registered as juridical persons have legal capacity, while for those who do not, the court will be authorized and obliged to determine whether or not the NGO before it fulfills criteria set out in court practice: 1) association is joint by its members based on their choice,<sup>146</sup> 2) it is established on a long-term basis, 3) it is established to achieve a common purpose, 4) it is organized according to its statutes, 5) it has its own name and 6) it has particular representation - from the board of directors for example.<sup>147</sup>
5. NGOs or trade unions must have prescribed **their engagement in the realization of human rights or corresponding rights in the national law of a state in their Statutes**. This condition seems clear and hence no additional official guidance has been provided. However, issues may arise in practice if courts take a more formalistic approach and interpret this provision as demanding that Statutes provide detailed provisions on engagement on realization of the specific human rights which were violated. Also, issues may arise in cases where some NGO for example does not have a Statute provision stating that it engages in realization of human rights but rather on the improvement of human standard of living or a similar general notion for example.
6. The condition that the NGOs or Trade Unions **are not engaged commercially with these matters**. Here there is also no clear guidance. Nonetheless, there can be issues of interpretation. It can be presumed that this condition will be met if the trade union or NGO in question do not charge for their services nor enter into *success fee* transactions (i.e. transactions entailing an agreement between a victim and the said NGO/trade union by virtue of which the said NGO/trade union is to be authorized to collect a percentage of compensation granted to a victim in case of its success in the court proceedings) with victims of human rights violations.

<sup>145</sup> Federal Ministry of Justice. (2005, February 25). *Code of Civil Procedure*. Retrieved July 31, 2023 from [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html)

<sup>146</sup> openJur. (2020). *OLG Frankfurt Am Main, Urteil Vom 14.09.2017 - 16 U 1/17*. Retrieved August 2, 2023 from <https://openjur.de/u/2259356.html> (para. 32) **(note-unofficial source)**

<sup>147</sup> openJur. (2020). *OLG Stuttgart, Beschluss vom 22.07.2003 - 4 W 32/03*. Retrieved August 2, 2023 from <https://openjur.de/u/312653.html> (para. 24 for points 2-5) **(note-unofficial source)**

7. The last condition states that NGOs or trade unions **must not engage with these matters only temporarily**. It points to the situation in which an NGO or trade union at hand only works on realization of human rights on an *ad hoc basis* -. e.g., from project to project. Here the same risk of over formalization exists as described in point 5 above.



## PART 9: BEYOND THE LKSG: A REVIEW OF RELEVANT LEGISLATIONS AND GUIDELINES FOR PROMOTING CORPORATE SOCIAL RESPONSIBILITY AND HUMAN RIGHTS

Here we outline some international human rights conventions and other documents that can be cited in relation to the human rights impacts associated with the steel industry, and which can, in general, be regarded as important in the HRDD field. We do this by following the most widely used and known division of legal documents into *Soft Law* and *Hard Law* documents.

### 9.1. International Soft Law Instruments

Soft law refers to non-binding legal instruments or norms that lack enforceability through traditional legal mechanisms such as courts or sanctions. It is characterized by its voluntary nature and serves as a form of guidance, standards, or principles that are generally accepted and followed by states or other actors in international relations.

While soft law instruments do not create legally binding obligations, they can still have significant influence and impact. They can shape state practices, inform domestic legislation, guide policymaking, and serve as a basis for developing future binding agreements. Soft law instruments are also flexible and adaptable, allowing for adjustments and revisions over time to reflect changing circumstances or evolving consensus.

Finally, soft law serves as a mechanism for fostering cooperation, promoting common understandings, and facilitating coordination among states and other stakeholders in the absence of binding legal obligations.

#### ***Soft Law Instruments Likely to Be Used in the Interpretation of LkSG***

Considering that the LkSG is inspired by some of these soft law instruments, it can be assumed that these will be strong interpretive guides for the German authorities and courts. The ones most likely to be of influence are those mentioned on page 45 of the Official draft law<sup>148</sup> which were also specifically mentioned by BAFA in its reply to question 5 in section VI of its FAQs. These are:

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<sup>148</sup> Das Bundesministerium für Arbeit und Soziales. (n.d.). *Gesetzentwurf der Bundesregierung*. Retrieved July 31, 2023 from [https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2)

1. UN UNGP (2011)<sup>149</sup>
2. UN OHCHR (2012): The Corporate Responsibility to Respect Human Rights. An Interpretive Guide<sup>150</sup>
3. UN OHCHR (2018): Corporate HRDD: Getting started, emerging practices, tools and resources<sup>151</sup>
4. OECD Guidelines for MNE (2011), now with the 2023 update<sup>152</sup>
5. OECD Due Diligence Guidance for Responsible Business Conduct<sup>153</sup>
6. OECD-Guidance for Responsible supply Chains of Minerals from Conflict Affected and High-Risk Areas<sup>154</sup>
7. OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector<sup>155</sup>
8. OECD Responsible business conduct for institutional investors: Key considerations for due diligence.<sup>156</sup>

#### a) The UNGPs

What is expected of companies under these principles is quite similar to the obligations of enterprises under LkSG with two notable differences:

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<sup>149</sup> Office of the United Nations High Commissioner for Human Rights. (2011). *UN Guiding Principles on Business and Human Rights*. Retrieved July 31, 2023 from

[https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf)

<sup>150</sup> Office of the United Nations High Commissioner for Human Rights. (2012). *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*. Retrieved July 31, 2023 from

[https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2\\_en.pdf](https://www.ohchr.org/sites/default/files/Documents/publications/hr.puB.12.2_en.pdf)

<sup>151</sup> Office of the United Nations High Commissioner for Human Rights. (2018, July 16). *A/73/163: The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*. Retrieved July 31, 2023 from <https://www.ohchr.org/en/documents/thematic-reports/a73163-report-working-group-issue-human-rights-and-transnational>

<sup>152</sup> OECD. ((2023, June 8). *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. Organisation for Economic Co-operation and Development*. OECD iLibrary. Retrieved July 31, 2023 from

[https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct\\_81f92357-en](https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en)

<sup>153</sup> OECD. (2018). *OECD Due Diligence Guidance for Responsible Business Conduct*. Retrieved July 31, 2023 from <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>154</sup> OECD. (2016). *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*. OECD Publishing, Paris. Retrieved July 31, 2023 from

<http://dx.doi.org/10.1787/9789264252479-en>

<sup>155</sup> OECD. (2017, February 2). *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*. Retrieved July 31, 2023 from <https://www.oecd.org/publications/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm>

<sup>156</sup> OECD. (2017). *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*. Retrieved July 31, 2023 from

<https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

- **Scope:** The UNGPs refer to all *business enterprises*<sup>157</sup> as opposed to the more limited approach of the LkSG.
- **The nature of the expectation:** as opposed to the LkSG, the UNGPs clearly state that they only impose non-legally binding *responsibilities* on business enterprises.<sup>158</sup>

The UNGPs are hence a framework that provides guidance to states and businesses on preventing and addressing human rights abuses linked to business activities. The UNGPs consist of three pillars including:

**Pillar 1: The State Duty to Protect** - this Pillar emphasizes the role of States in protecting human rights within their jurisdictions. It highlights the obligation of governments to enact laws, regulations, and policies that promote respect for human rights by businesses. States are expected to provide an effective legal framework, enforceable remedies, and access to justice for individuals or communities adversely affected by business-related human rights abuses.

**Pillar 2: The Corporate Responsibility to Respect** focuses on the responsibility of businesses to respect human rights. It recognizes that businesses have a responsibility to avoid infringing on the human rights of individuals, and to address any negative human rights impacts with which they are involved. This pillar is based on the principle that businesses should act with due diligence to identify, prevent, and mitigate human rights risks throughout their operations, including their supply chains and business relationships. The appropriate measures under Pillar 2 involve several key components including policy commitments, HRDD, remediation, transparency and reporting, and grievance mechanisms. It is important to note that the appropriate measures under Pillar 2 may vary depending on the cause, contribution, and direct link of the negative human rights impacts.

**Pillar 3: Access to Remedy** focuses on the role of states and businesses in providing access to effective remedy for victims of business-related human rights abuses. It highlights the importance of providing access to justice, remedies, and reparations for individuals or communities affected by such abuses.

The visualizations below illustrate important steps within the UNGPs.

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<sup>157</sup> Office of the United Nations High Commissioner for Human Rights. (2011). *UN Guiding Principles on Business and Human Rights*. Retrieved July 31, 2023 from [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinessshr_en.pdf) (p. 20, inter alia General Principle no 14.)

<sup>158</sup>Ibid (p.19): “The responsibility of business enterprises to respect human rights **is distinct from issues of legal liability and enforcement**, which remain defined largely by national law provisions in relevant jurisdictions. “

**The overall outline of the responsibilities of Business enterprises in the UNGP's follows:**

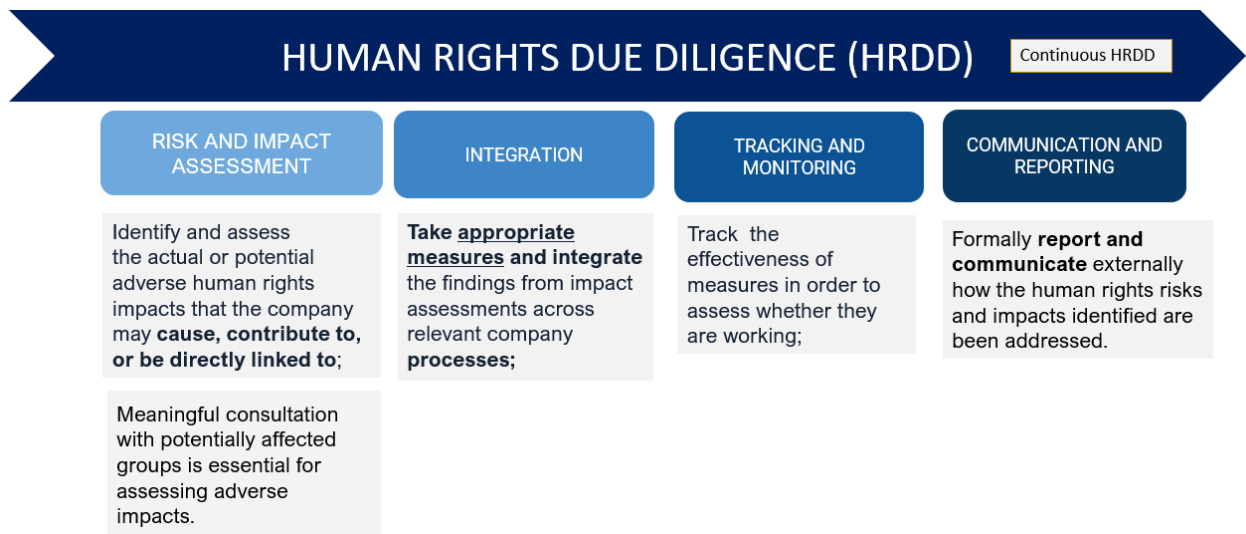
- Business enterprises, regardless of their size, sector, operational context, ownership and structure, should respect human rights. This means that they should **avoid infringing** on the human rights of others and should **address** adverse human rights impacts with which they are involved.

“Know and show“ = embed responsible business conduct into policy and management systems



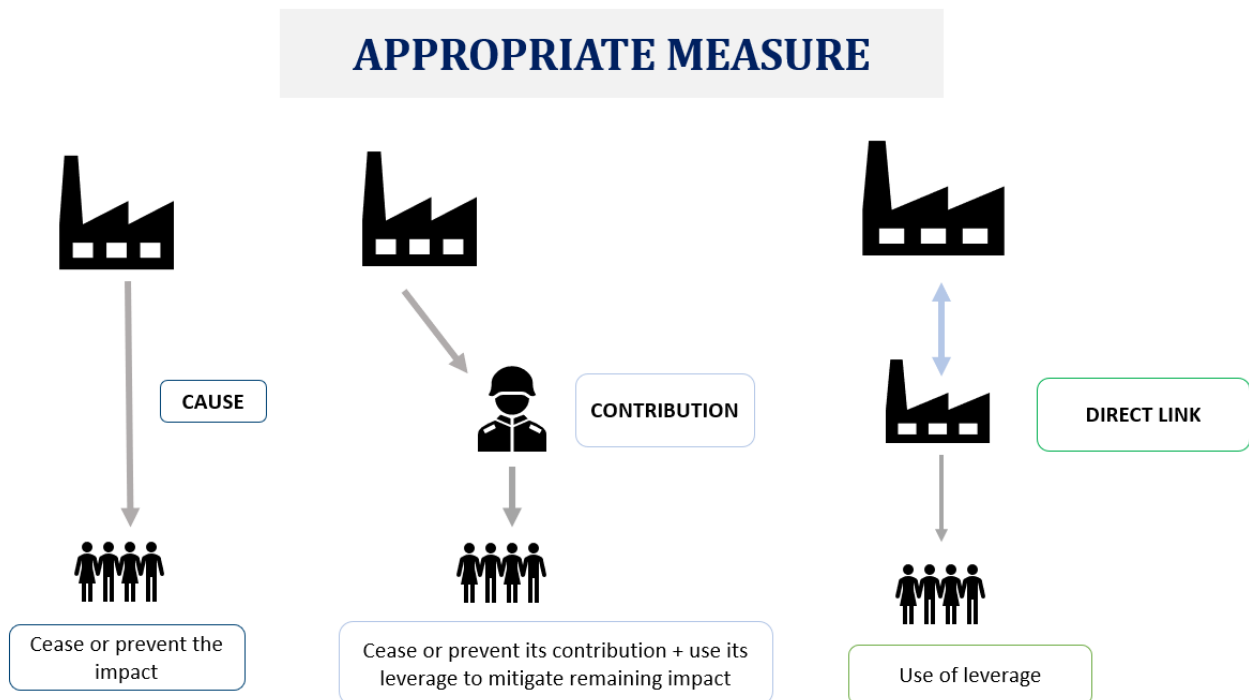
*The Specifics of HRDD in the UNGP:*

**Figure 8**



*The Main Differentiation of Appropriate Measures in UNGP:*

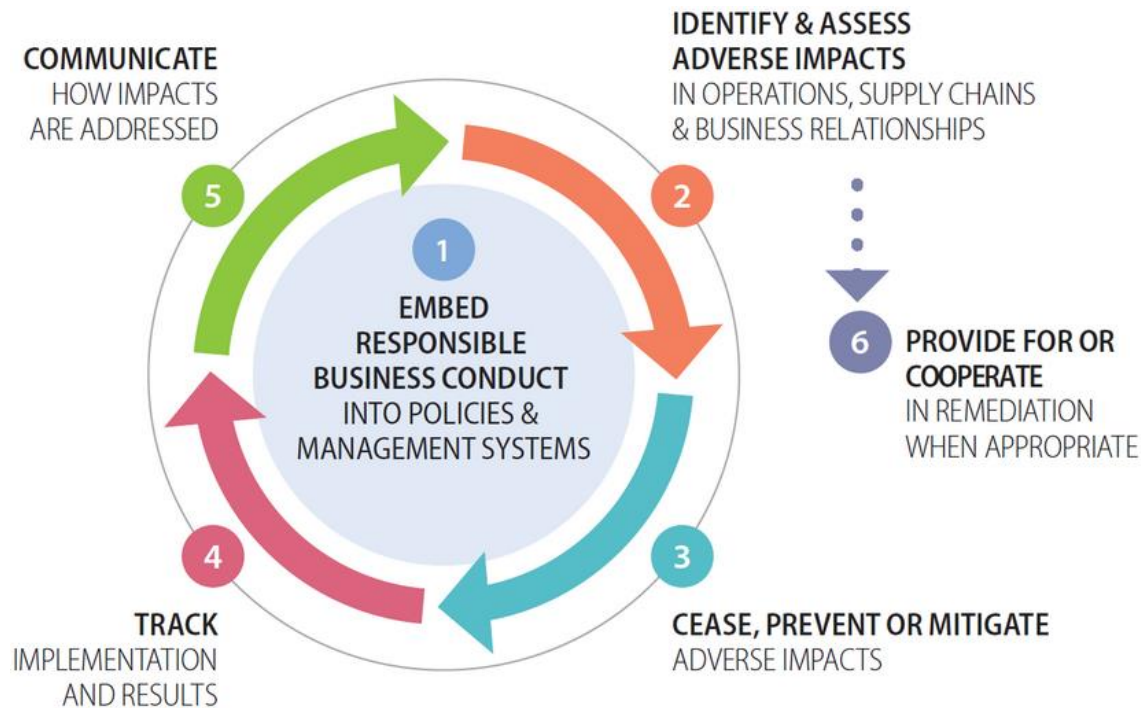
**Figure 9**



**b) OECD Guidelines for Multinational Enterprises**

The OECD Guidelines provide recommendations for responsible business conduct, including in the steel industry. The guidelines cover areas such as human rights, labor rights, and environmental protection, and encourage companies to implement due diligence processes to identify and address adverse impacts.

Figure 10<sup>159</sup>



## General Comment

These Guidelines are narrower in scope than the UNGPs. Nevertheless, they are, at least when it comes to human rights, inspired by the UNGPs but are also relevant because they contain a lot of in-detail guidelines on how enterprises ought to behave in certain situations. They are therefore widely accepted as authoritative, which is confirmed by the explicit mentioning of these documents in the LkSG's official draft bill as one of the sources of inspiration for the Act.<sup>160</sup> Additionally, BAFA confirmed that these guidelines will be used in determining the specific obligations of companies.<sup>161</sup>

<sup>159</sup> OECD. (2018). *OECD Due Diligence Guidance for Responsible Business Conduct*. Retrieved July 31, 2023 from <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

<sup>160</sup> Das Bundesministerium für Arbeit und Soziales. (n.d.). *Gesetzentwurf der Bundesregierung*. Retrieved July 31, 2023 from [https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?\\_\\_blob=publicationFile&v=2](https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?__blob=publicationFile&v=2) (p.45)

<sup>161</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1> (answer to question no. 5 in the section of questions VI)

## Scope and Legal Nature

These guidelines have a limited reach. This is because they have been developed by the OECD, which is a specific International Organization whose members are: 1) 27 European states, 2) some North and Central American States - USA, Canada, Mexico, 3) some South American states - Chile, 4) Some Asian states - Israel, Japan, South Korea and also 5) Australian continent - Australia, New Zealand. In addition to these, the OECD Guidelines apply to 12 additional non-OECD countries which have accepted them (e.g., Argentina, Brazil, Colombia, Egypt, Kazakhstan, Morocco, Peru, Tunisia, Ukraine).

The OECD Guidelines are narrower than the UNGPs, but broader than the LkSG. This is because they refer to all MNE operating in and from territories of adhering states (home and host states) and all entities within MNE. Although binding on states (Decision of OECD Council) in terms of the State's obligation to recommend them to companies, these are **non-binding recommendations to companies (“voluntary and not legally binding”)**.

## Contents of the OECD Guidelines

**The Guidelines contain 11 chapters**, with the first two being of general nature, whereas the nine last substantive chapters cover:

1. disclosure,
2. human rights,
3. employment and industrial relations,
4. environment,
5. bribery,
6. consumers,
7. science and technology,
8. competition
9. taxation

When it comes to the Chapter on Human Rights, the Guidelines require:

Who	What
State	State duty to protect human rights and regulate MNEs based in their jurisdiction

MNE	<p>Corporate responsibility based on Pillar II of UNGP includes the following expectations for MNEs:</p> <ol style="list-style-type: none"> <li>1. respect human rights by avoiding infringing human rights and addressing adverse human rights impacts.</li> <li>2. within the context of their own activities: avoid causing or contributing to adverse human rights impacts and addressing them when they occur.</li> <li>3. seek to prevent or mitigate adverse human rights impacts directly linked to their business operations.</li> <li>4. issue policy commitment to respect human rights.</li> <li>5. carry out HRDD (similar in content to that of UNGP).</li> <li>6. provide for remediation of adverse human rights impacts.</li> </ol>
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### Specific Guidance Building on the General One:

1. Due Diligence Guidance for Responsible Business Conduct
2. Guidance on minerals,
3. Guidance on garment and footwear,
4. Guidance on agriculture,
5. Guidance on child labour,
6. Guidance on extractive industries,
7. Guidance on financial services

### Implementation of OECD Guidelines

One particularity of the OECD guidelines and sector specific guidance is that the OECD has established National Contact Points (NCPs) to review “*specific incidents*”. This means that all OECD Member States and those States that accepted the guidelines, are obligated to establish these mechanisms, maintain them, and empower them with appropriate authority to review “*specific instances*”. In practice these bodies can hear complaints by individuals or NGOs against companies and communicate them to involved MNEs via a procedure based on common standards derived from a specific OECD Decision.

Proceedings at NCPs are **quasi-judicial** dispute settlements involving decisions on jurisdiction, admissibility, and merits. So far there have been more than 500 cases (“soft case law”).<sup>162</sup> Although these procedures may lead to concretization of HRDD standards for businesses in the future, they do remain non-binding and without any enforcement mechanism. In fact, the whole process is aimed at an amicable solution and is based on co-operation and mutual trust of both sides. In general, they may result in:

<sup>162</sup> OECD. (2020, April 17). *UNI Global Union and 4 French Trade Union federations*. Retrieved July 31, 2023 from <https://mneguidelines.oecd.org/database/instances/fr0030.htm>



1. No substantive statement
2. Common statement of parties
3. Statement of NCP

When it comes to Institutional and procedural aspects of NCPs it is worth noting that they differ from country to country. In that sense there are several types of institutional structures, ranging from: 1) those established within one government department, 2) involving more than one governmental department, to those composed of 3) a body of independent experts and 4) those formed on a tripartite basis - including state, enterprises and trade unions.

A more in detail overview of each NCP is available at the website of an NGO dedicated to following the work of NCPs: <https://www.oecdwatch.org/>

### **c) OECD Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas**

When speaking about enterprises along the steel supply chain, specific obligations can be discerned from the OECD sectoral guidance. The one that is most applicable is the **OECD Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas**.<sup>163</sup> This is because this document is expressly referred to in the German Government's official LkSG draft law as the one used for inspiration in drafting the LkSG. Although the said guidance does not contain particular duties of steel rich sectors, it does specify responsibilities of enterprises in the mineral value chain. Seeing that similar relations in all extractive industries can be observed and that there is no specific guidance on steel or iron, it is likely that BAFA will turn to this document when examining the conduct of enterprises in the steel or iron supply chains. What is particularly practical in this guidance are its mineral specific supplements (annexes).

Even though these are not specifically related to steel and iron, it can reasonably be assumed that supply chains of the referred minerals are more less similar to those of steel and iron. Seeing the comprehensiveness of the said guidance, it is therefore most likely that BAFA will use them as benchmarks. Additionally, the OECD sectoral page referring to extractive industries also contains more specific guidance (for example on how to address

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<sup>163</sup> OECD. (2016). *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*. OECD Publishing, Paris. Retrieved July 31, 2023 from <http://dx.doi.org/10.1787/9789264252479-en>

bribery and corruption risks<sup>164</sup>). This means that, enterprises in the steel or iron supply chains would be required to take into consideration, and if necessary, also apply this specific guidance if they encounter such risks in their supply chains.

**Some of the practical actions recommended include:**

1. Where an MNE or any company in their supply chain contracts public or private security forces, to act in accordance with the Voluntary Principles on Security and Human Rights. In particular, that these entities we will support or take steps, to adopt screening policies to ensure that individuals or units of security forces that are known to have been responsible for gross human rights abuses will not be hired.
2. That downstream companies should, inter alia:
  - Identify, to the best of their efforts, and review the due diligence process of the smelters/refiners in their supply chain and assess whether they adhere to due diligence measures put forward in this Guidance.
  - Where necessary, carry out, including through participation in industry-driven programs, joint spot checks at the mineral smelter/refiner's own facilities.
  - Plan and carry out independent third-party audit of the smelter/refiner's due diligence.

**d) OECD-Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector**

This guidance will also likely be relevant for the steel sector actors. This is owed to the fact that it is directly applicable to the extractive sector and that it is also expressly mentioned in the official LkSG draft law. Furthermore, it contains concrete recommendations on how to obtain stakeholder engagement and their views so as to give due consideration to their interest in line with Section 4 paragraph (4) of the LkSG. One illustrative example of an approach of this Guidance is in its ANNEX D: ENGAGING WITH WORKERS AND TRADE UNIONS:

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<sup>164</sup> OECD. (2021, March 23). *How to Address Bribery and Corruption Risks in Mineral Supply Chains*. Retrieved July 31, 2023 from <https://mneguidelines.oecd.org/faq-how-to-address-bribery-and-corruption-risks-in-mineral-supply-chains.pdf>

- *Understanding the context to engage with workers*

Type of information	Description
<b>Regulatory Framework and Relevant Standards</b>	<ul style="list-style-type: none"> <li>• Workers' rights (e.g., freedom from discrimination, freedom of association, the right to collective bargaining, and the right to safe working conditions, referenced in the ILO Tripartite Declaration of Principles concerning MNE and Social Policy and OECD MNE Guidelines, Chapter V).</li> <li>• Laws on working standards and industrial relations (e.g., minimum wage, maximum working hours, safety standards etc. often included in national employment or labor laws, and collective bargaining agreements).</li> <li>• Provisions for preferential local employment (often included in contracts and/or industry agreements, or the national mining or petroleum code).</li> <li>• Grievance procedures, consultation procedures and other factors governing the employment relationship</li> </ul>
<b>History of Industrial Relations</b>	<ul style="list-style-type: none"> <li>• History and context of industrial relations and unions operating in the particular sector (e.g., violence against workers attempting to organize; discrimination against trade union activists; inter-union conflicts, whether unions are genuinely representative of workers' interests, government treatment of unions); context of working conditions in practice (wages and benefits; social protection and social security, occupational health and safety).</li> </ul>
<b>Employee profiles</b>	<ul style="list-style-type: none"> <li>• Number of workers employed by an enterprise and their contractual relationships (e.g., direct employees, subcontractors, and other third-party service providers).</li> </ul>

### 9.1.2 Other Relevant Soft Law Instruments

In addition to the above, the following soft law instruments are also widely recognized as useful interpretative guides in the field of HRDD.

#### a) **The Voluntary Principles on Security and Human Rights (VPSHR) and the International Code of Conduct Association (ICoCA)**

- The VPSHR were developed through a multi-stakeholder initiative involving governments, companies, and NGOs. They provide a framework for addressing the human rights challenges that may arise in the context of security arrangements and the operations of extractive industries. While the VPSHR were initially focused on the

oil, gas, and mining sectors, they can be relevant to the steel industry as well, given the extraction and processing of raw materials involved in steel production.

- The ICoCA is an independent, multi-stakeholder organization that aims to promote responsible and accountable private security services. While the ICoCA and the VPSHR share a common goal of ensuring respect for human rights in the context of security operations, they are separate initiatives with different focuses.
- The ICoCA was established in 2013 as a result of international efforts to address the challenges associated with the use of private security providers, particularly in conflict-affected areas. It provides a framework for the regulation and oversight of private security companies to ensure compliance with human rights, humanitarian law, and international standards. **The ICoCA offers a certification process**, whereby private security companies can demonstrate their adherence to the Code of Conduct and associated standards.
- One of the key differences between these two voluntary regulations is the fact that the VPSHR does not have its own grievance mechanism, while the ICoCA has one (although according to the data on the dedicated website it has received a total of 33 complaints since 2015<sup>165</sup>).
- On the other hand, the VPSHR, as mentioned earlier, is a broader initiative that was developed by governments, companies, and NGOs to address human rights concerns in the extractive industries, including the steel sector. The VPSHR primarily focuses on the relationship between extractive companies and public security forces, aiming to prevent or mitigate adverse human rights impacts resulting from security arrangements.
- While the VPSHR and the ICoCA have different scopes and origins, there are some areas of overlap and potential complementarity between the two initiatives. For example, both emphasize the importance of conducting human rights risk assessments, engaging with security providers, and establishing mechanisms for addressing grievances. Companies operating in the steel industry, particularly those that rely on private security services, may find value in considering the principles and guidelines outlined by both the VPSHR and the ICoCA to strengthen their human rights commitments and practices.
- The VPSHR and the ICoCA are voluntary initiatives, and their implementation by companies is not legally binding.

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<sup>165</sup> International Code of Conduct Association. (n.d.). *Registering a Complaint: ICoCA accepts complaints involving ICoCA Member and Affiliate Companies*. Retrieved July 31, 2023 from <https://icoca.ch/registering-a-complaint/>

## b) UNDRIP

- UNDRIP recognizes the rights of indigenous peoples, including their rights to lands, territories, and resources (Article 26), cultural rights and practices (Articles 11-15), and the right to self-determination (Article 3).

## c) UDHR

- Article 23 of the UDHR recognizes the right to work, fair remuneration, and the right to just and favorable conditions of work.
- Article 25 of the UDHR enshrines the right to an adequate standard of living, including housing.

## 9.2. International Hard Law Instruments

Hard law refers to legally binding and enforceable norms or rules that are backed by the force of law and carry legal consequences for non-compliance. It involves formal agreements, treaties, statutes, regulations, and legally binding decisions made by courts or other judicial bodies.

Unlike soft law, hard law imposes legal obligations on states or other actors and provides mechanisms for enforcement and dispute resolution. Violations of hard law can result in legal consequences, such as penalties, sanctions, or legal remedies, and can be subject to adjudication in courts or international tribunals.

Hard law provides clarity and certainty by establishing legally binding obligations and mechanisms for their enforcement. It sets out specific rights and duties, creates legal frameworks, and provides a basis for legal accountability and recourse in case of non-compliance. Hard law plays a crucial role in international relations, shaping state behavior, resolving disputes, and promoting stability and order within the international legal system.

### 9.2.1. *International Covenant on Civil and Political Rights (ICCPR)*

- Article 17 of the ICCPR protects individuals from arbitrary interference with their privacy, family, home, or correspondence. This can be relevant in the context of forced evictions and displacements associated with the steel industry.
- Article 27 of the ICCPR addresses the rights of individuals belonging to ethnic, religious, or linguistic minorities. The article states that in states where such minorities exist, these individuals should not be denied the right to enjoy their own culture, practice their own religion, or use their own language. The article emphasizes

the importance of preserving and respecting the distinct cultural, religious, and linguistic identities of minority groups, allowing them to participate fully in society while maintaining their unique heritage.

### **9.2.2. *International Covenant on Economic, Social and Cultural Rights (ICESCR)***

- Article 6 of the ICESCR affirms the right to work, fair wages, safe and healthy working conditions, and the right to form and join trade unions.
- Article 11 of the ICESCR recognizes the right to an adequate standard of living, including adequate housing.

### **9.2.3. *ILO Conventions***

- The ILO has adopted various conventions that address labor rights in the context of the steel industry, such as the Occupational Safety and Health Convention (No. 155) and the Minimum Age Convention (No. 138). These conventions set standards for safe working conditions and the protection of workers' rights, including those employed in the steel industry.
- The ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, commonly known as ILO 169, is an international legal instrument that seeks to protect and promote the rights of indigenous and tribal peoples worldwide. The convention places emphasis on the right to self-determination, which includes the right to determine their own political, economic, social, and cultural development. It acknowledges the importance of land and natural resources for the livelihoods and cultural integrity of indigenous and tribal peoples, establishing their right to own, use, and control their traditional lands collectively. Furthermore, ILO 169 promotes the participation and consultation of indigenous and tribal peoples in matters that directly affect them, ensuring their involvement in decision-making processes at all levels.
- One important aspect of ILO 169 is the principle of free, prior and informed consent (FPIC). FPIC is a fundamental right that ensures indigenous peoples have the right to make decisions that affect their lands, resources, and communities. The FPIC within ILO Convention No. 169 holds immense significance for indigenous and tribal peoples as it ensures that these communities have the right to participate in decision-making processes that directly affect their lands, resources, and traditional ways of life. By requiring governments and other stakeholders to obtain the informed consent of indigenous peoples before undertaking any projects or actions that impact them, FPIC upholds their autonomy, self-determination, and fundamental human rights. It serves as a crucial safeguard against potential abuses and violations, fostering respectful and

mutually beneficial relationships between indigenous communities, governments, and industries.

These conventions and documents, among others, provide a foundation for understanding and addressing the human rights impacts associated with the steel industry. They guide the obligations of states and the responsibilities of businesses to protect and respect human rights in the context of steel production and related activities. While these instruments address human rights and the steel industry, the specific implementation and enforcement mechanisms can vary.

### 9.3. Other German Legislation

As specified in the FAQs accompanying the LkSG<sup>166</sup> German law already permits foreigners to sue a German-based company before German courts for damage German companies caused abroad. The grounds for this lie firstly in Article 4 of the EU Brussels I Regulation<sup>167</sup> and secondly, in the Paragraph 17 ZPO<sup>168</sup>.

However, although this is a possibility, a number of obstacles remain. A preliminary review of these is provided with reference to the *Kik* case.<sup>169</sup> Some of the main hurdles identified include:

1. “The ZPO does not provide for pretrial discovery procedures in order to access corporate files before deciding on whether to file a lawsuit.”<sup>170</sup>
2. In the trial phase, the claimants can file petitions asking the court to order the production or disclosure of specific documents on the basis of §421 ZPO, which is the most important provision in this context.”<sup>171</sup>

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<sup>166</sup> CSR in Deutschland. (2023, February 27). *SUPPLY CHAIN ACT - Frequently Asked Questions*. Retrieved July 31, 2023 from <https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html#doc3a956fcc-c35e-4655-a96a-6a39a1a0a2cfbodyText1>

<sup>167</sup> Official Journal of the European Union. (2012). *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*. Retrieved July 31, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&qid=1690981683324>

<sup>168</sup> Federal Ministry of Justice. (2005, February 25). *Code of Civil Procedure*. Retrieved July 31, 2023 from [https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.html](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html)

<sup>169</sup> Wesche, P., & Saage-Maaß, M. (2016). Holding companies liable for human rights abuses related to foreign subsidiaries and suppliers before German civil courts: Lessons from *Jabir and Others v KiK*. *Human Rights Law Review*, 16(2), 370-385.

<sup>170</sup> Ibid

<sup>171</sup> Ibid

3. “In addition, courts have ruled that there is no entitlement to inspect a complete file, but only specific documents, which must be designated and described in their alleged content”<sup>172</sup>
4. “The German law of civil procedure does not provide for the possibility to connect claims in a group action, in the sense that all procedural motions can be done on behalf of the group as such.”<sup>173</sup>
5. Financing litigation - “In the KiK case, for example, court fees alone amount to approximately 3,000 euro, while the deceased or injured Pakistani workers earned between 95 and 170 euro per month”<sup>174</sup> (per case)
6. “This is exacerbated by the fact that claimants who do not reside within a Member State of the European Union or a Signatory State of the Agreement on the European Economic Area must, at the request of the defendants, provide a security deposit covering the costs of the proceedings in advance”<sup>175</sup>
7. “As a consequence, claimants in tort-based litigation concerning corporate human rights abuse generally rely on legal aid. However, such aid does not cover the costs arising during the preparation of the claim, which usually involves expensive evidence collection in third countries, communication with foreign clients and witnesses and high translation costs. More importantly, the approval of legal aid does not affect the claimants’ obligation to reimburse the costs of the defendants if they lose the case, which makes litigation inherently risky, even where such aid is granted.”<sup>176</sup>

## 9.4. EU Level Regulations and Draft Regulations

### 9.4.1. *The Corporate Sustainability Reporting Directive (CSRD)*

As an amendment of the previous Non-Financial Reporting Directive (NFRD),<sup>177</sup> the new Corporate Sustainability Reporting Directive (CSRD)<sup>178</sup> will progressively enter into

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<sup>172</sup> Ibid

<sup>173</sup> Ibid

<sup>174</sup> Ibid

<sup>175</sup> Ibid

<sup>176</sup> Ibid

<sup>177</sup> Official Journal of the European Union. (2014, November 15). *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance*. Retrieved August 2, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095>

<sup>178</sup> Official Journal of the European Union. (2022, December 16). *Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting (Text with EEA relevance)*. Retrieved August 2, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022L2464>



application from 2024 onwards. Much like its predecessor, the aim of this directive is to oblige some of the biggest EU companies to report on certain aspects of their operations. The CSRD covers all (listed or non-listed) companies which meet **two of three** of the following criteria: 1) more than 250 employees and/or 2) more than €40M Turnover and/or 3) more than €20M of Total Assets.

These entities will be obliged to report in more detail on: 1) environmental matters, 2) social matters and treatment of employees, 3) respect for human rights, 4) anti-corruption and bribery, 5) diversity on company boards (in terms of age, gender, educational and professional background).

As stated on the official webpage of the EU,<sup>179</sup> this directive: “helps investors, civil society organizations, consumers and other stakeholders to evaluate the sustainability performance of companies, as part of the European green deal.” At this stage, the development of reporting standards is on-going, with the first draft already available.<sup>180</sup>

The said standards appear to demand a lot of information from obligated companies which may be useful for advocacy and research purposes. For example, on page 197 of the document, called “Annex - Ares(2023)4009405”<sup>181</sup>, the obligated companies will have to provide an explanation of the general approach they take to identify and manage any material actual and potential impacts on value chain workers in relation to: (a) working conditions (for example, secure employment, working time, adequate wage, social dialogue, freedom of association, including the existence of work councils, collective bargaining, work-life balance and health and safety of the workers in its value chains). What is also important to note is that the aforesaid entities will be obliged to implement CSRD starting from the following different timelines:

1. As of January 2024 - Reporting entities already subject to the NFRD report (large listed companies, banks, and insurance companies with more than 500 employees) report in 2025 on the data related to 2024.
2. As of January 2025 - Large reporting entities not currently subject to the NFRD report in 2026 on the data related to 2024.
3. As of January 2026 - Listed SMEs (small and medium enterprises), small and non-complex credit institutions and captive insurance entities report in 2027 on the data related to 2026.

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<sup>179</sup> European Commission. (n.d.). *Corporate Sustainability Reporting*. Retrieved August 2, 2023 from [https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting\\_en](https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en)

<sup>180</sup> European Commission. (n.d.). *Open European Sustainability Reporting Standards*. Retrieved August 2, 2023 from [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13765-European-sustainability-reporting-standards-first-set\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13765-European-sustainability-reporting-standards-first-set_en)

<sup>181</sup>Ibid

### 9.4.2. The EU Conflict Minerals Regulation

Regulation (EU) 2017/821 on the obligations of EU importers of tin, tantalum and tungsten, their ores, and gold from conflict-affected and high-risk areas<sup>182</sup> entered into force on 01.01.2021. The aim of this Regulation is to ensure that: “EU importers of 3TG meet international responsible sourcing standards set by OECD”.<sup>183</sup> The Regulation obliges the importers of the said goods to:

- identify and assess the risks in their mineral supply chain;
- implement a strategy to respond to these risks;
- carry out an independent third-party audit of supply chain due diligence;
- report annually on their policies and practices for responsible sourcing.

In accordance with the Regulation, companies must check that what they buy is sourced responsibly and does not contribute to conflict or other related illegal activities in affected areas.<sup>184</sup> Hence, this Regulation does not expressly bind EU importers to remedy human rights violations they might have caused, although it does ask them to develop and implement strategies to prevent or mitigate the identified risks (Article 5).

In its Article 16, the Regulation left it to Member States to lay down the rules applicable to infringements of the Regulation. Germany did this with the law referred to as *MinRohSorgG*.<sup>185</sup> Among other provisions, the law:

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<sup>182</sup> Official Journal of the European Union. (2017, May 19). *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas*. Retrieved August 2, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0821>

<sup>183</sup> Official Journal of the European Union. (2020, November 19). *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas*. Retrieved August 2, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02017R0821-20201119>

<sup>184</sup> European Union. (n.d.). *Conflict Affected and High-Risk Areas (CAHRAs)*. Retrieved August 2, 2023 from <https://www.cahraslist.net/>

<sup>185</sup> Bundesamt für Justiz. (2020, April 29). *Gesetz zur Durchführung der Verordnung (EU) 2017/821 des Europäischen Parlaments und des Rates vom 17. Mai 2017 zur Festlegung von Pflichten zur Erfüllung der Sorgfaltspflichten in der Lieferkette für Unionseinführer von Zinn, Tantal, Wolfram, deren Erzen und Gold aus Konflikt- und Hochrisikogebieten (Mineralische-Rohstoffe-Sorgfaltspflichten-Gesetz - MinRohSorgG)*. Retrieved August 2, 2023 from <https://www.gesetze-im-internet.de/minrohsorgg/BJNR086410020.html>

- establishes the competent authority for the supervision of the manner of discharge of duties from the Regulation: BGR.<sup>186</sup>
- empowers the BGR with access rights to premises of affected companies in order to establish compliance.
- imposes fines of up to 50.000 EUR in the administrative coercive proceedings of the BGR (which it can repeat in line with Sections 11-14 of the VwVG).

### 9.4.3. The Draft EU Directive on Corporate Sustainability Due Diligence

Another noteworthy instrument in the field is the **Draft EU Directive on corporate sustainability due diligence**. This Directive is however still not final and is under negotiations in the EU institutions, whereby the newest relevant development is that the EU Parliament adopted its views and suggested some amendments to the initial draft on 01.06.2023. A summary of the initial draft of the EU Commission from 2021<sup>187</sup> is presented below:

- *Draft EU Directive on corporate sustainability due diligence scope*<sup>188</sup>

Area	EU Companies:	Non-EU companies:
<b>Scope</b>	<p><b>Group 1:</b> all EU limited liability companies of substantial size and economic power (with more than 500 employees and more than EUR 150 million in net turnover worldwide).</p> <p><b>Group 2:</b> Other limited liability companies operating in <i>defined high impact sectors (such as textiles, agriculture, extraction of minerals)</i>, which do not meet both Group 1 thresholds, but have more than 250 employees and a net turnover of EUR 40 million worldwide. For these companies, rules will start to apply 2 years later than for group 1.</p>	Active in the EU with turnover threshold aligned with Group 1 and 2, generated in the EU.

<sup>186</sup> Die Bundesanstalt für Geowissenschaften und Rohstoffe. (n.d.). *Deutsche Kontrollstelle EU-Sorgfaltspflichten in Rohstofflieferketten*. Retrieved August 2, 2023 from [https://www.bgr.bund.de/DE/Gemeinsames/UeberUns/DEKSOR/DEKSOR\\_node.html](https://www.bgr.bund.de/DE/Gemeinsames/UeberUns/DEKSOR/DEKSOR_node.html)

<sup>187</sup> Official Journal of the European Union. (2022, February 22). *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*. Retrieved August 2, 2023 from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071>.

<sup>188</sup> Europe Commission. (2022, February 22). *Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains*. Retrieved August 2, 2023 from [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_1145](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145)

<p>Obligations:</p>	<ul style="list-style-type: none"> <li>● integrate due diligence into policies;</li> <li>● identify actual or potential adverse human rights and environmental impacts;</li> <li>● prevent or mitigate potential impacts;</li> <li>● bring to an end or minimize actual impacts;</li> <li>● establish and maintain a complaints procedure;</li> <li>● monitor the effectiveness of the due diligence policy and measures;</li> <li>● and publicly communicate on due diligence.</li> </ul>
<p>Liability:</p>	<ul style="list-style-type: none"> <li>● Administrative fines in case of non-compliance</li> <li>● Victims will have the opportunity to take <b>legal action for damages that could have been avoided with appropriate due diligence measures</b></li> </ul>

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