

Due Diligence Law

If you don't want to listen, find out the hard way – For fair regulations of global supply chains

Still in 2013, suppliers of German textile manufacturers burned down in Bangladesh without any consequences. Almost six years later, in February 2019, the Federal Minister for Economic Development and Cooperation announced a draft law which aims to regulate due diligence of human rights and ecologic standards. Remarkable is not only the title and the content of the law but also the fact that it was initiated by the conservative CSU (Christian Social Union)-led Ministry for Economic Development and Cooperation. It seems as if the confidence in the voluntary commitment of economic actors is dwindling and a legally binding regulation perused.

The ministry states that the draft law was a first proposal on how human rights due diligence could be made binding for companies if by 2020 less than half of the companies over 500 employees will fulfil their responsibilities voluntarily. Sending a strong signal, the draft law overlaps widely with unions' and NGOs' demands for legally binding solutions.

Content of the draft law

The current draft would apply to companies with more than 250 employees, revenues of more than 40 Million Euros and assets of 20 Million Euros. Independent of size, the law would covers all companies operating in high-risk sectors or conflict states.

Companies are required to comply with all relevant human rights. For instance, the draft law includes references to the UN International Covenant on Civil and Political Rights regulating inter alia the right to strike, the right for decent work as well as occupational health and safety regulations. Furthermore, the draft law refers to the ILO Core Labor Standards, which includes the freedom of association, the right to collective bargaining, equal pay and equal treatment and a minimum age for employment. With regard to ecological requirements, the law draft stays rather vague.

To comply with due diligence, companies would be obliged to establish the following risk management procedures:

- A risk analysis to identify and evaluate potential risks of human rights violation. Where appropriate, risks have to be subject to a more thorough analysis. The analysis would have to be repeated annually and in case of special risks updated continuously;
- Preventive measures, which would make new business activities and investments already subject to a risk evaluation;
- Remedial measures, which have to be taken immediately in case of expected or already occurring violations.

The draft law would also help define responsibilities within the company by making the identification of a compliance representative within the company's management obligatory. This would move the current corporate policy on Corporate Social Responsibility towards becoming obligatory.

The draft law would require companies to establish a complaint mechanism accessible for everybody affected. The management can either establish a complaint mechanism within their own structures or join a non-governmental mechanism such as a multi-stakeholder initiative, which includes such a complaint mechanism. The protection of whistleblowers has to be ensured as well.

In case of non-compliance or violation, the draft foresees very clearly defined sanctions. For instance, insufficient evidence of risk analyses or lack of a complaint mechanism can lead to fines of up to 1 Million Euros.

If risks were identified but not addressed with preventive measures, fines could surge up to 5 Million Euros. Severe violations of the law causing injuries or death could result in imprisonment of the compliance representative or the responsible company manager. Additionally, violations could lead to the exclusion from public procurement.

Labour inspectorates at state level (*Länder*) and the Federal Agency for Occupational Health and Safety would be responsible for the enforcement of the law. The human rights representative of the German government would report on the practical implementation of the law on an annual base.

Clear regulation procedures instead of voluntary commitment

The draft is very comprehensive. Interestingly, the proposal does not mention any CSR statement as self-commitment to comply with human rights as relevant. In the past, this represented the flagship of voluntary commitment to compliance with human rights. Now, the law foresees clear binding regulations of procedures.

With respect to risk management and the obligation of developing and providing a complaint mechanism, the law follows the requirements of the UN Principles on Business and Human Rights. The law provides not only clear guidelines on the management's responsibility and its recruitment of a compliance representative, but also sanctions in case of severe violation.

The draft law exceeds what would have been thought possible in the process of the National Action Plan (NAP).

With a company's size threshold of 250 employees and the clear structure, the draft might also exceed the French Due Diligence Law passed in 2017 and could serve as a proposal for a European initiative with regard to the German Presidency of the European Council.

From paper to reality: A long way to go

The draft law is an important step but its implementation might be a weak point. Labor inspectorates, which are supposed to oversee compliance, are understaffed and already struggle to fulfill all their duties of monitoring compliance.

Employers' associations already oppose the introduction of the law. It took them by surprise that the government did not first follow through with the rather slow process of the NAP's implementation. Most likely, this would have carried the process of compliance with human rights in global supply chains into the next legislation period, giving them time to water it down to a voluntary commitment on their terms.

The DGB supports the draft law, which we demanded already during the development process of the NAP. Besides, the draft is a clear message that there is little confidence in voluntary commitment of economic actors. Therefore, the draft law should be used prominently and circulated widely to push for the compliance with human rights in global supply chains.