Federal Office
for Economic Affairs
and Export Control

Agency for Business &
Economic Development

Helpdesk
Business & Human Rights

Guidance

Collaboration in the supply chain between obliged enterprises and their suppliers

Contents

Summary

I) Indroduction

The Act on Corporate Due Diligence Obligations in Supply Chains obliges enterprises of a certain size (since 2023 with at least 3,000 employees in Germany, from 2024 with at least 1,000 employees in Germany) to respect certain human rights and environmental due diligence obligations (= obliged enterprises). Furthermore, the Act has effects on enterprises outside the scope which are in direct or indirect supplier relationship, because the Supply Chain Due Diligence Act requires obliged enterprises to collaborate with their suppliers in order to fulfil their due diligence obligations even if these suppliers do not have their own obligation according to the Supply Chain Due Diligence Act. **In this context, obliged enterprises sometimes make (too) far-reaching demands towards their suppliers.**

This paper shows possibilities and boundaries the Act sets to such demands. Moreover, it contains recommendations for constructive collaboration. The Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA) additionally published a catalogue with the most important questions and answers for small and medium-sized enterprises (SMEs) and - together with the Helpdesk on Business & Human Rights - the Executive Summary of this Guidance as separate documents.[1]

II) General remarks

Obliged enterprises in many cases depend on collaborating with their suppliers in order to fulfil their own due diligence obligations. This is provided for by the Act and starts with the implementation of the risk management system. Furthermore, obliged enterprises need assistance from their suppliers in relation to the risk analysis, preventive and remedial measures, and the complaints procedure. Although suppliers are not obliged to collaborate in relation to due diligence, such a collaboration in practice is necessary and reasonable for both parties.

Collaboration however does not mean an extension of the scope of the Act. If for example, an obliged enterprise requires their suppliers to comply with all obligations of the Supply Chain Due Diligence Act and solely relies on this, this may lead to an assessment of this enterprise by BAFA in relation to compliance with the Act. **The transfer of obligations under the Act to suppliers is not permitted.** Demands for written assurances by suppliers that they fulfil all relevant human rights and environmental regulations and measures would be too far-reaching as well.

Enterprises who fall under the scope of the Act are themselves responsible to comply with their due diligence obligations. Even where the Act requires obliged enterprises to collaborate with non-obliged enterprises, the Act only defines requirements regarding the actions of obliged enterprises. The **principles of the appropriateness and effectiveness** prescribe acting in a risk-based approach and **at the same time limit the transfer of due diligence obligations to suppliers.**

[1] See „Collaboration in the supply chain between obliged enterprises and their suppliers. The most important questions and Answers for SMEs“: https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/faq_zusammenarbeit_lieferketten.pdf and „Executive Summary to the Guidance“: https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/executive_summary_zusammenarbeit_lieferketten.html?nn=1469788

III) Regarding the due diligence obligations in detail

Among other things, this means the following:

- Enterprises outside the scope of the Act **are not obliged to comply with the due diligence obligations.** Accordingly, BAFA will not implement enforcement measures or sanctions against them. BAFA will also not carry out risk-based controls of non-obliged enterprises.
- **Non-obliged enterprises are not required to report and account towards BAFA.** They do not have to publish a report in relation to fulfilling their due diligence obligations or submit a report to BAFA. Moreover, they are not obligated to participate directly in creating such reports of obliged enterprises.
- **Obliged enterprises cannot replace their risk analysis with a general reference to contractual assurances or corresponding guaranties from their suppliers that their supply chains are without risks.** Obliged enterprises must conduct their own risk analysis to ensure that they fulfil their responsibilities under the Supply Chain Due Diligence Act. Enterprises do not fulfil their obligation to conduct a risk analysis by demanding generalised and far-reaching self-declarations regardless of the specific situation or risk of the supplier. Such practice may lead to appropriate measures by BAFA.
- **Obliged enterprises must consider the results of their risk analysis when requesting information from their suppliers.** In the context of a proper risk analysis, they should investigate risks at suppliers with no or low risks with less intense measures than at high-risk suppliers. Consequently, both generalised requests for information and the undifferentiated implementation of preventive measures towards suppliers are inappropriate.
- Obliged enterprises cannot generally pass on the implementation of preventive measures to their suppliers. They do not fulfil this due diligence obligation by merely referring to **written assurances from the supplier or by providing generalised declarations of clearance**. Instead, preventive measures including contractual assurances must consider the results of their own risk analysis and be designed in an appropriate and effective way.
- **It is the responsibility of obliged enterprises to ensure the implementation of trainings and further education.** First and foremost, they shall support suppliers with recognising and addressing human rights and environmental risks at an early stage. Additionally, they should enable suppliers to comply with and implement contractual obligations effectively.
- The Act requires obliged enterprises to **contractually implement appropriate control mechanisms and to carry out controls at their suppliers.** Self-declarations of suppliers can be a helpful auxiliary tool for an ongoing monitoring.

  Regular written self-declarations that suppliers comply with the agreed-upon human rights and environmental requirements alone, however, do not suffice as control measures. If an obliged enterprise requests such declarations in a generalised and comprehensive way of all suppliers, this can be inappropriate and thus violate the Act.
- **Obliged enterprises do not fulfil their obligation to implement a complaints procedure by reference to the complaints procedure of a supplier.** Obliged enterprises have to design the complaints procedure in a way that enables people to notify them of risks and violations of human rights and environmental obligations caused by economic activities of a supplier. Alternatively, enterprises may join a suitable external complaints procedure. The Act, however, does not allow enterprises to only refer to complaints procedures set up by suppliers.

- Obliged enterprises should take into account the capacities of their suppliers when assessing the effectiveness of a measure. The capacities depend in particular on the suppliers' resources, size, sector, position in the supply chain, and the specific local conditions. M**easures taken by an obligated enterprise that are obviously too demanding for a supplier usually are ineffective and therefore inappropriate.**

IV) Recommendations for the collaboration in the supply chain

Fulfilling due diligence obligations is a continuous learning process for all participants and the collaboration in the supply chain must be understood as a dynamic process based on dialogue. Obliged enterprises must be aware of their role and ability to influence. Ideally, they collaborate with their suppliers fairly and on an equal footing over a longer period of time. Suitable sector initiatives can generally support this. The following measures and approaches for an appropriate collaboration should be considered:

Risk analysis

Transparency and knowledge of human rights and environmental risks in their own supply chains is key to fulfilling due diligence obligations. Obliged enterprises should therefore proceed in a risk-based approach and assess which information from their suppliers they actually need for conducting an appropriate risk analysis.

For obliged enterprises this means especially:

- When requesting information from suppliers, obliged enterprises should justify for each individual case why and for what this information is needed;
- Obliged enterprises must ensure the protection of the requested data, e. g. with non-disclosure agreements;
- Obliged enterprises should make available their resources, information and tools for risk analysis to their non-obliged suppliers.

Suppliers should especially:

- In case requests for data are not justified, suppliers should ask for a justification and only forward data after receiving such justification;
- Suppliers should be vigilant regarding the protection of transmitted data by the obliged enterprise.

Generally:

- Obliged enterprises and their suppliers should establish a common understanding of the risks identified by the obliged enterprise and use this as a basis for further, aligned action.

Preventive measures

Before making demands to suppliers, obliged enterprises should carefully assess their demands, the legal basis for their demands, the effectiveness of their demands in the context of a risk-based approach, and whether they can actually be implemented according to the laws with respect to general terms and conditions. In this context, it is noteworthy that the Act does not set forth any independent bases for liability between contracting parties in supply chains. Obliged enterprises should acenterprise contractual assurances with control measures, training, and further education in their own responsibility.

For obliged enterprises this means especially:

- When demanding assurances from suppliers, obliged enterprises should refer to their own risk analysis and the identified and prioritised risks, and submit their policy statement;
- Obliged enterprises must specifically show suppliers how they can fulfil the assurance and whether and how the obliged enterprise supports them with their own resources;
- They should not generally terminate business relationships because of a supplier's reluctant willingness to cooperate or support with the implementation of preventive measures;
- If the implementation of preventive measures fails because of a lack of cooperation of a supplier, obliged enterprises should be able to present this fact in a plausible way to BAFA.

Suppliers should especially:

- If necessary, suppliers should seek individual legal advice if obliged enterprises demand commitments from suppliers in contractual supplements or contractual assurances due to the Act;
- They should assess whether the cooperation in relation to the implementation of a preventive measure between them and the obliged enterprise is reasonable.

Remedial measures

Costs for remedial measures in case of violations of a protected legal position should be shared appropriately between obliged enterprises and their suppliers. Obliged enterprises are responsible to prepare a proposal on how these costs should be shared according to the criteria of appropriateness and effectiveness. In case of an examination by BAFA, they should be able to explain the reasons for the specific allocation of costs in a plausible way.

For obliged enterprises this means especially:

- They should assess which financial, technical, and human resources are available to all enterprises who participate in the remedial measure respectively;
- They should consider the ability to influence the party directly responsible for the violation of all participating enterprises respectively;
- They should make a comparative assessment of the degree of contribution to the violation of all participating enterprises.

Suppliers should especially:

- Assess which resources are available to them for the necessary remedial measure;
- Determine to what extent they (may) have contributed to the violation.

Complaints procedure

Obliged enterprises should be aware that their interests in access to information in relation to the functioning and availability of their complaints procedure may conflict with legitimate interests of suppliers to limit direct contact between upstream suppliers and the obliged enterprise.

For obliged enterprises this means especially:

- Obliged enterprises are responsible to implement an effective complaints procedure or participate in an appropriate external complaints procedure;
- They are responsible to offer solutions to their suppliers concerned in this situation, such as the participation in an external complaints procedure (e. g. multi-stakeholder initiatives) or a joint involvement of regional or industry stakeholders (e. g. trade unions);
- They must design the complaints procedure in a way that allows for the protection of the confidentiality of the identity of reporting persons and effective protection from disadvantage and punishment due to a complaint.

Suppliers should especially:

- When information is requested they should assess which data their contractual partners actually need and whether legitimate interests conflict with disclosure (cf. recommendations in relation to risk analysis);
- They should observe principles of data minimisation, in doing so they can make use of non-disclosure agreements.

Guidance on the collaboration in the supply chain

I) Corporate due diligence obligations and the Supply Chain Due Diligence Act

The Supply Chain Due Diligence Act's foundation was laid with the Federal Government's National Action Plan on Business and Human Rights (NAP) in 2016. The NAP serves to implement the 2011 UN Guiding Principles on Business and Human Rights (UNGP). They lay out enterprises' responsibilities to respect human rights in an international and globally harmonised framework. They address all enterprises worldwide, across sectors, and independent of their size. States are called upon to promote enterprises' respect for human rights by a smart mix of legal obligations and voluntary measures.

In the NAP, the Federal government has expressed its expectation towards all enterprises in Germany to introduce corporate due diligence processes in a manner appropriate to their size, sector, and position in the supply and value chain in order to fulfil their responsibility to respect human rights in global supply and value chains.[2] The implementation of a robust risk management system shall be based on five key elements: policy statement, risk analysis, measures, reporting, and grievance mechanism. Another important point of orientation of the Act are the OECD Guidelines for Multinational Enterprises, which recommend enterprises of all sizes to respect human rights in their operations.

The Act applies since January 1st 2023 to enterprises with central administration, principal place of business, administrative headquarters, statutory seat in Germany or domestic branch office pursuant to section 13d of the Commercial Code (Handelsgesetzbuch – HGB) and at least 3,000 employees in Germany. From January 1st 2024 the Act also applies to enterprises with at least 1,000 employees in Germany.[3]

Enterprises within the scope of the Act are obliged to comply with the human rights and environmental due diligence obligations in an appropriate and effective way.[4] The supply chain in the meaning of the Act includes all steps in Germany and abroad that are necessary to produce the products and provide the services, starting from the extraction of the raw materials to the delivery to the end customer, and includes the actions of an enterprise in its own business area, direct suppliers and indirect suppliers.[5] Within the obligations of means provided for by the Act, enterprises must not guarantee that their supply chains are free from risks and violations of human rights or from negative impacts on the environment. Instead, they must prove that they have implemented the due diligence obligations described in sections 4 to 10 of the Act. As long as enterprises comply with their due diligence obligations in an effective and

[2] The Federal Government is currently revising and updating the National Action Plan and including the Act into the overall strategy on business and human rights.

[3] In order to determine the number of employees, see section 1 of the Act, the government's explanatory memorandum to the Act: BT-Drs. 19/28649, p. 33 et seq., and chapter III of the FAQ on BAFA's website. Enterprises must assess continuously and independantly whether the fall within the scope of the Act and are liable to provide information in this regard to BAFA (section 17 § 2 no. 1 of the Act).

[4] The due diligence obligations are defined in section 3 § 1 of the Act. Section 3 § 2 of the Act sets forth the decisive criteria on appropriateness, section 4 § 2 of the Act sets forth the decisive criteria on effectiveness of measures. BAFA's Guidance on Appropriateness and Effectiveness provides further explanation and advice on the practical implementation: https://www.bafa.de/EN/Supply_Chain_Act/Appropriateness_and_Effectiveness/appropriateness_and_effectiveness_node.html

[5] Section 2 § 7 and 8 as well as section 5 § 1 of the Act.

appropriate manner, a violation of a protected human rights and environmental legal position does not generally constitute a violation of the due diligence obligations.

The Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA) is responsible for controlling and enforcing the act. In addition to the assessment of the annual reports and the complaints by affected persons in relation to violations of the due diligence obligations, BAFA conducts risk-based controls of obliged enterprises. In case of non-compliance with legal requirements, BAFA can order enterprises to implement suitable and necessary measures and impose financial penalties and administrative fines. In case of fines for serious violations that have been established by final and binding decision, the exclusion from public procurement is possible as well.[6]

II) Effects of the Act on non-obliged enterprises

The Act also has effects on enterprises, which do not fall in its scope, but are suppliers or subsidiaries of an obliged enterprise. This is due to the fact that obliged enterprises must comply with the human rights and environmental due diligence obligations also in relation to non-obliged enterprises in their supply chains if they are

- subsidiaries which are part of the own (attributed) business area[7] or
- direct or (under certain requirements) indirect suppliers.

In many cases, obliged enterprises need to rely on collaborating with non-obliged enterprises – subsidiaries or suppliers in Germany or abroad – in order to fulfil their due diligence obligations. This starts with the implementation of the risk management system where the interests of employees and those who may otherwise be affected by the economic activities in the supply chains must be considered appropriately.[8] Additionally, obliged enterprises will need support or collaboration in relation to the following due diligence obligations (see also presentation of the legal requirements in the following sub-chapters):

- Risk analysis[9]
- Preventive measures
- Remedial measures
- Complaints procedure[10]

Although enterprises outside of the scope of the Act are not obliged to collaborate in relation to human rights and environmental due diligence, today already many obliged enterprises approach their suppliers with demands and requests for information. Refusing to cooperate might have negative impacts on the business relationship with the obliged enterprise and could even lead to negative consequences for the contractual relationship – including termination.[11]

[6] Section 15 as well as sections 22-24 of the Act.
[7] Subsidiaries in Germany and abroad are part of the parent companies own business area if the parent company exercises a decisive influence on the group company (section 2 § 6 sentence 3 of the Act).
[8] Section 4 § 4 of the Act.
[9] BAFA's Guidance on the Risk Analysis offers explanations and advice on the practical implementation: https://www.bafa.de/EN/Supply_Chain_Act/Risk_Analysis/risk_analysis_node.html
[10] BAFA's Guidance on the Complaints Procedure offers information on the practical implementation: https://www.bafa.de/EN/Supply_Chain_Act/Complaints_Procedure/complaints_procedure_node.html
[11] The threat of terminating the collaboration in a contractual clause could already be void under general terms and conditions law.

1. Risk analysis

In order to conduct their own risk analysis, obliged enterprises will need internal and external information from their suppliers and subsidiaries within their own business area. This applies to suppliers and subsidiaries that are part of the enterprise's own business area both in- and outside of the scope of the Act. Therefore, obliged enterprises turn towards their suppliers with extensive self-assessment questionnaires, demand registration in tools for managing suppliers, or require on-site-visits or audits. In some cases, these demands (e.g. requiring suppliers to pass on all relevant information upon request) are far-reaching.

Obliged enterprises must conduct an ad hoc risk analysis in case of so-called 'substantiated knowledge'[12] or in case of significant changes to the business activity or risk situation[13] in relation to indirect suppliers – thus the suppliers of their suppliers. Therefore, they typically need information from their direct suppliers in relation to not only the suppliers' operations but also their suppliers.

Info box 1: What does 'substantiated knowledge' mean in the context of the Act?

If an enterprise has actual indications that suggest a violation of a human rights-related or an environment-related obligation at indirect suppliers to be possible, they have to conduct an ad hoc risk analysis immediately. Such actual indications are not mere opinions or rumours, but contain at least a verifiable factual core. This includes own insights, reports on the poor human rights situation in the region of production, the fact that a supplier belongs to a sector with particular human rights or environmental risks or indications from the authorities.

It is sufficient that the indications are present, i.e. that they have entered the sphere of control of the obliged enterprise, so that they can be readily taken note of. This is for example the case with:

- Information through the complaints procedure,
- BAFA's guidances and reports from the Federal Government, that the enterprise is expected to take note of, e.g. through their human rights officer,
- Media reports, reports from non-governmental organisations (NGOs) and reports on the internet if they are obvious because they are known throughout the industry or have been submitted to the enterprise.[14]

In the case of guidances, case lists and databases of multi-stakeholder or industry initiatives, substantiated knowledge within the meaning of section 9 (3) is more likely to be assumed if the information is disseminated widely throughout the industry.

Non-obligated enterprises can anticipate that obligated enterprises will have to expend a certain amount of effort for their risk analysis and find out which raw materials, products and services are particularly

[12] Section 9 § 3 of the Act, further explanation on ‚substantiated knowledge' are provided, among others, by BMAS in their FAQ: https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html
[13] Section 5 § 4 of the Act.
[14] Further information on the degree of possibility of the substantiated knowledge can be found in chapter VI of the FAQ of BAFA's website (in German).

exposed to risks. Thus, in addition to production, the procurement and processing of raw materials and semi-finished products, their transportation, and the disposal of raw materials as well as products from the production process will also play a central role for the analysis. With regard to the identification of some risks and violations, a technical understanding of the production process is also required.

2. Preventive measures

When obliged enterprises will try to implement preventive measures vis-à-vis their direct suppliers, they try to do that by taking corresponding measures or introducing regulations especially within the framework of existing contractual relationships with supplementary contractual clauses or Code of Conducts. The Act provides the following preventive measures as presumptive examples:

- Consideration of human rights and environment-related expectations when selecting a supplier,
- Contractual assurances from a supplier that they will comply with the human rights-related and environment-related expectations required by the enterprise's senior management and appropriately address them along the supply chain,
- The implementation of initial and further training measures to implement the contractual assurances made by the supplier,
- Agreeing on appropriate contractual control mechanisms and their risk-based implementation to verify the supplier's compliance with the human rights strategy.[15]

Additionally, obliged enterprises must develop and implement procurement strategies and purchasing practices to prevent or minimise identified risks at suppliers. This includes for example lead times, purchasing prices or the duration of the contractual relationship.[16]

With regard to indirect suppliers, in case of substantiated knowledge of a human rights or environmental violation, the Act generally prescribes the following preventive measures vis-à-vis the responsible party:

- The implementation of control mechanisms,
- Support in the prevention or avoidance of a risk,
- The implementation of sector-specific or cross-sector initiatives to which the enterprise is a party.[17]

Many obliged enterprises ask their suppliers to sign their Code of Conduct (or Supplier Code of Conduct). The CoCs (or supplements to contractual agreements) usually govern both compliance with human rights and environmental expectations and collaboration in order to fulfil the obliged enterprise's due diligence obligations (providing information for the risk analysis, consent to audits and on-site-visits, collaboration on preventive and remedial measures, support in measures to make the complaints procedure accessible). Furthermore, they often contain control mechanisms and consequences for non-compliances.[18]

3. Remedial measures

With regard to remedial measures, it can also be expected that obliged enterprises will seek cooperation from their suppliers. Obliged enterprises have far-reaching obligations to remedy within their own

[15] Section 6 § 4 of the Act.
[16] See section 6 § 3 Nr. 2 of the Act as well as the Governments explanatory memorandum in BT-Drs. 19/28649, p. 47.
[17] Section 9 § 3 no. 2 of the Act.
[18] See chapter III. of the Guidance for more detailed elaborations on the appropriateness of this approach.

business area: In Germany, they must end violations through suitable remedial measures. Abroad as well as at subsidiaries which are (attributed) part of the own business area,[19] violations must be terminated generally.

If an obliged enterprise identifies the violation of a human rights or an environmental obligation that has already occurred or is imminent at a direct supplier, they must implement appropriate remedial measures immediately in order to prevent, end or minimise the extent of the violation.[20] Many violations cannot be terminated by a singular measure alone but require several coordinated measures. If a violation at a direct supplier cannot be terminated in the near future, the Act requires a concept for the ending or minimising, meaning obliged enterprises and suppliers need to design and implement a remedial action plan together.[21]

Obliged enterprises also have to design and implement a remedial action plan to ad hoc prevent, end or minimise, if they have substantiated knowledge of a violation of a human rights or environmental obligation at an indirect supplier.[22]

Obliged enterprises depend on their direct and indirect suppliers' assistance in order to implement remedial measures because they cannot implement them without their suppliers' consent. In order to implement measures at an indirect supplier they will generally need their direct supplier's direct contact with this indirect supplier. Similarly, non-obligated enterprises may rely on the support of obligated enterprises.

4. Complaints procedure

All obliged enterprises must implement a complaints procedure that enables internal and external persons to inform the enterprise on human rights and environmental risks or violations in their own business area and supply chains. Complaints procedures serve as early warning systems that identity and ideally, address risks and violations before people and the environment are harmed.

In order to implement appropriate and effective complaints procedures obliged enterprises will need to rely on exchange and cooperation in the supply chain. They must implement either their own appropriate complaints procedure or establish or join an external procedure. The procedure must be accessible for potential parties involved including employees in the supply chain.[23] For this purpose, obliged enterprises must provide clear and comprehensible information in relation to accessibility and responsibility as well as the stages of the procedure. The complaints procedure must also protect the confidentiality of identity of the potential parties and provide effective protection from disadvantage or punishment due to a complaint.[24]

Obliged enterprises usually lack information on local potential parties to design a target group oriented conception of the complaints procedure. This information is possibly needed already when the obliged enterprise designs the complaints procedure since they can only design a complaints procedure that is

[19] See footnote 7.
[20] Section 7 § 1 of the Act.
[21] Section 7 § 2 of the Act.
[22] Section 9 § 3 no. 3 of the Act.
[23] This term includes both persons who are (potentially) directly affected by the violation of an obligation and other persons who are not directly affected (e.g. relatives, neighbours).
[24] Section 8 § 4 of the Act.

accessible to the target group with knowledge of these groups and their specific circumstances. [25] Obliged enterprises might further ask their suppliers to assist them with making their complaints procedure accessible by receiving and forwarding complaints to them.

III) Boundaries on the use of suppliers by obliged enterprises

The legal obligations of the Act only apply to enterprises within the scope. Even where the Act requires obliged and non-obliged enterprises to collaborate in order to fulfil due diligence obligations, the Act only sets forth requirements in relation to obligations of obliged enterprises. Specifically, the nature of the due diligence obligations does not allow for a generalised transfer of these obligations. BAFA will consider this principle in the context of its controlling and enforcing tasks.

1. The principles of appropriateness and effectiveness

The obligations of the Act consistently refer to the **principles of appropriateness and effectiveness,** which are closely linked. Obliged enterprises must respect due diligence obligations in their supply chains in a way that is appropriate (to them) in order to prevent or minimise human rights and environmental risks and prevent, end[26] or minimise the extent of human rights and environmental violations.[27] An appropriate selection of measures is only permitted among effective measures. The principles of appropriateness and effectiveness enable obliged enterprises to take **risk-based approaches** and at the same time limit the transfer of obligations of the Act to suppliers.

Info box 2: The criteria of appropriateness of the Act

Appropriateness is determined by the following criteria:

- The nature and extent of the obliged enterprise's activities,
- The obliged enterprise's ability to influence the party directly responsible for a human rights or environmental risk or a violation of a human rights or environment-related obligation,
- The typically expected severity of a violations, its reversibility, and likeliness of a violation of a human rights and environment-related obligation, and
- The nature of the obliged enterprise's causal contribution to the human rights or environmental risk or a violation of a human rights or environment-related obligation. [28]

The criteria of appropriateness do not stand in a specific hierarchy to one another but must be considered equally. It would therefore be shortened, for example, to assess a risk only on the basis of its ability to influence, and to conclude that the risk does not have to be pursued from the outset, if there is little or no influence. Appropriateness also means that the requirements on extent and range of the analysis and activities differ from case to case. This generally also means that the appropriateness of acting in a way that complies with the due diligence requirements will have to be assessed differently for the various

[25] See BAFA-Guidance on the Complaints Procedure, p. 11.
[26] Sections 3 § 1 and 4 § 2 of the Act.
[27] Sections 7 § 1 sentence 1 and section 9 § 3 no. 3 of the Act.
[28] Section 3 § 2 of the Act.

enterprises in the supply chain. Mere assurances that standards are met by the suppliers in the entire supply chain typically do not constitute an effective and appropriate contribution to the risk management of an obliged enterprise.

Measures are effective[29] that enable obliged enterprises to identify and minimise human rights and environmental risks and prevent, end or minimise the extent of human rights and environmental violations if the obliged enterprise has caused or contributed to the risks or violation within the supply chain. [30] This means enterprises must analyse the specific situation in detail and take a risk-based approach.[31]

Obliged enterprises must consider their supplier's **capacity** in order to assess the effectiveness of measures. Obliged enterprises' measures that are obviously too demanding (e.g. because they lack necessary financial resources) for a supplier are usually ineffective and inappropriate. Supplier's capacities depend in particular on the suppliers' resources, size, sector and position in the supply chain, as well as the specific local conditions.[32]

2. Boundaries for transferring obligations from the Act to supplier

In practice, some obligated enterprises try to obtain written assurances from their suppliers that they comply with all relevant human rights and environmental standards and due diligence processes in the supply chain. In some cases, they even want blanket assurances that the supplier complies with the Act.

[29] Section 4 § 2 of the Act.

[30] Effective risk management requires the due consideration of the interests of employees which includes trade unions and persons such as neighbours who could be otherweise affected by the economic activities of an enterprise. See section 4 § 4 of the Act as well as the Government's explanatory memorandum in: BT-Drs. 19/28649, p. 44.

[31] For further information see BAFA's Guidance ‚Risk Analysis'.

[32] See also negative example 2 for illustration.

Negative example 1

Excerpt from a(n) (inapropriate) Supplier Code of Conduct
between obliged enterprise A and non-obliged supplier B

The parties conclude the following agreement against the background of enterprise A's obligations under the Germany Supply Chain Due Diligence Act. The supplier is only directly obliged to comply with the Act if the Act applies according to its provisions.

§ 1 Obligations
The supplier commits to respecting human rights and sustainable environmental protection. It undertakes to comply with the following prohibitions:

- *the prohibition of the employment of persons in forced labour,*
- *the prohibition of all forms of slavery and practices similar to slavery,*
- *the prohibition of disregarding the occupational safety and health obligations applicable under the law of the place of employment,*
- *the prohibition of causing any harmful soil change, water pollution, air pollution, harmful noise emission or excessive water consumption,*
- *(...)*

§ 2 Measures
(1) The supplier undertakes to implement measures to prevent and minimise risks to the fulfilment of the obligations according to § 1 in its supply chains.

(2) The supplier must assess within the framework of a risk anaylsis whether specific risks to § 1 exist. The identified risks must be weighed and prioritised appropriately. The supplier commits to informing enterprise A on any increase of risk in context of this agreement without request.

(3) When new risks are identified, the supplier is obliged to implement concrete preventive measures to prevent or minimise these risks.

(4) The supplier is obliged to implement remedial measures immediately when identifying violations of human rights or environmental obligations.

(5) The supplier is obliged to implement a complaints procedure that enables third parties to report violations of afore-mentioned regulations.

(6) Enterprise A reserves the right to suggest or mandate specific measures if they relate to obligations under § 1.
(...)

Such a blanket agreement does not comply with the requirements of the Act and might entail controls of the obliged enterprise by BAFA.

Obliged enterprises are responsible themselves to fulfil due diligence obligations in their own business area and in relation to direct and indirect[33] suppliers. The Act's obligations cannot be transferred to suppliers.

In detail, this means the following:

- Contrary to obliged enterprises, enterprises outside of the scope are **not obliged to implement the processes to fulfil due diligence obligations as described above.** Accordingly, BAFA will not implement enforcement measures or sanctions against them.
- **BAFA will not conduct risk-based controls of non-obliged enterprises.** According to the Act, the assessment of substantiated complaints of affected persons only applies to obliged enterprises.
- Non-obliged enterprises are **not required to report and account towards BAFA.** They do not have to publish a report in relation to fulfilling their due diligence obligations or submit a report to BAFA. Moreover, they are not obligated to participate directly in creating such reports of obliged enterprises. Obligations to provide information and surrender documents generally do not apply to them.[34]
- **Obliged enterprises cannot replace an appropriate risk analysis with a general reference to contractual assurances or corresponding guaranties from their suppliers stating that their supply chains are without risks.** Obliged enterprises must conduct their own risk analysis to ensure that they fulfil their responsibilities under the Act. Among others, independently collected and verified findings on risks along the supply chain are relevant. Enterprises can take recourse to different methods for the risk analysis. Requesting extensive and blanket self-disclosures without reference to the concrete situation or the specific risk of a supplier, however, does not comply with the risk-based approach and causes considerable efforts for suppliers. Such a practice may result in corresponding measures for obligated enterprises by BAFA.
- Furthermore, it is important to note that the use of tools and the evaluation of data are only part of the process of the risk analysis. Obliged enterprises can also use methods like audits or industry standards and guidelines in order to gain a comprehensive understanding of the risks in their supply chains. Additionally, when establishing risk management, the interests of workers and those otherwise potentially affected by the economic activity in the supply chain must be considered appropriately.[35]If obligated enterprises are - justifiably or unjustifiably - denied the disclosure of required information by their suppliers in the context of the risk analysis or if this disclosure is made difficult, it is the responsibility of the obligated enterprise to point out this circumstance within the scope of reporting.. Obliged enterprises should be able to document specifically on which basis they attempted to collect relevant information, the reasons why the information acquisition failed and which alternative measures they used to receive information from the area concerned. In the context of the reporting examination, BAFA will take plausible explanations into account in an appropriate manner and examine whether and to what extent the enterprise has fulfilled its obligation of means.

[33] Acc. to section 9 § 3 of the Act in case of substantiated knowledge, see info box 1.

[34] Pursuant to section 17 of the Act, obliged enterprises are subject to duties of disclosure and surrender, within the scope of which they must provide information and surrender documents at BAFA's request, which BAFA requires to carry out its statutory duties. The obligation also extends to information on subsidiaries, direct and indirect suppliers and the surrender of documents of these enterprises, insofar as the enterprise or person obliged to provide information or surrender has the information at its disposal or is in a position to obtain the requested information due to existing contractual relationships. With regard to information and evidence to determine whether an enterprise falls within the scope of the Act, however, all enterprises are obliged to provide information to BAFA (section 17 § 2 no 1).

[35] Section 4 § 4 of the Act.

Info box 3: Use of tools for the risk analysis

It is suitable to conduct the risk analysis in several steps. Enterprises should use different internal and external sources in order to gain an appropriate overview.[36]

First, it is useful to collect sector-, country- and product-specific information to conduct an abstract risk analysis. This step consists for example of a desktop-research (e.g. by using indices, NGO-reports, UN-reports, reports from agencies, etc.). **Different tools and software-solutions are available to enterprises in order to analyse risks and create more transparency in their supply chains. It is important to note, however, that the use of such tools alone does not fulfil the enterprises' own due diligence obligation.**

Next, enterprises should assess to what extent an abstract risk actually exists at a supplier (concrete risk analysis). For this step, enterprises can include internal and external knowledge from different departments and verify assumptions with experiential values, audits/certifications, insights from multi-stakeholder- and sector-initiatives or dialogue with (potentially) affected persons and their legitimate representatives. In this context, enterprises can resort to suppliers' self-assessments, questionnaires or on-site-visits.

- **Obliged enterprises cannot generally pass on the implementation of preventive measures to their suppliers**. Preventive measures must meet the threshold of appropriateness and effectiveness also in relation to suppliers. They do not fulfil this due diligence obligation by merely referring to **written assurances from the supplier**. Generalised declarations of clearance do not fulfil this obligation either. Such practice may lead to appropriate measures by BAFA against the obliged enterprises. Instead, preventive measures including contractual assurances must consider the results of their own risk analysis and be designed in an appropriate and effective way. Obliged enterprises should in particular explain identified risks and their prioritisation towards their suppliers in a precise way.[37] The extent of efforts enterprises have to undertake in the context of their obligation of means when implementing measures at direct suppliers is determined by the identified risks as well.
- Should the implementation of preventive measures fail because the supplier does not provide for assurances, the obliged enterprise's efforts to fulfil their due diligence obligations is not met if such assurances could not be expected to begin with (e.g. because of extensive exemptions from liability to the disadvantage of the supplier or disproportionately high costs not covered by purchase prices). In relation to terms of contractual clauses that include indirect suppliers in preventive measures, it is noteworthy that contracts at the expense of third parties are generally invalid.
- **It is generally the responsibility of obliged enterprises to ensure the implementation of trainings and further education.** First and foremost, they shall support suppliers with recognising and addressing human rights and environmental risks at an early stage. Additionally, they should enable suppliers to comply with and implement contractual obligations effectively. It should be stipulated in the contract who organises the trainings and further education and who bears the costs.[38] Obliged enterprises can control e.g. in samples whether agreed-upon trainings and further education actually take place and whether they reach the relevant target group. Trainings and further education should explicitly cover the content of the Act and the international frameworks it is based on. Enterprises

[36] See the Annex of chapter V. of this Guidance as well as the BAFA-Guidance on risk analysis.
[37] For further explanations, see chapter IV.2. of this Guidance.
[38] See also section IV.3.a) in this Guidance on appropriate cost-sharing for remedial measures.

may commission external service providers with those trainings and further education. In this context, it is noteworthy as well that the trainings and further education cover content on the protected legal positions of the Act in the specific context of the suppliers and their business relationship to the obliged enterprise.[39]

- The Act requires obliged **enterprises to contractually agree on appropriate control mechanisms and to carry out controls** at their suppliers (e.g. audits). Self-declarations of suppliers can be a helpful auxiliary tool for an ongoing monitoring. **Regular written self-declarations that suppliers comply with the agreed-upon human rights and environmental requirements alone, however, do not generally suffice as control measures.** If an obliged enterprise requests such declarations in a generalised and comprehensive way of all suppliers, this can be inappropriate and thus does not fulfil the legal due diligence obligations.
- Audits can be used to identify actual risks and violations at suppliers. Moreover, they can be used as control measures to assess whether preventive or remedial measures lead to the desired result. However, they are only an indicator for meeting the expectations and only if the audit in question meets certain conditions, including being independent and transparent.40

[39] The following list provides an overview on relevant information and training (in German): https://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/Umsetzungshilfen/Information-Beratung-Schulung-Vernetzung/Netzwerkbildung-und-Schulungen/netzwerkbildung-und-schulungen.html

[40] Audits and certifications always provide only a snapshot of the current situation. Additionally, certain (structural) risks might not be detected through an audit. Time constraints, courtesy towards the client (often the audited enterprise), insufficiently qualified staff or even corruption can influence the results and might lead to the situation that the actual conditions on site are not reflected in a correct way. Further information, including on the role of audits in the due diligence process can be found in the information package, 8. Runder Tisch: Wirtschaft & Menschenrechte - Austausch zwischen NGOs und Unternehmen‘ of the on Business & Human Rights (in German): https://wirtschaft-entwicklung.de/fileadmin/user_upload/5_Wirtschaft_und_Menschenrechte/Aktuelle_Downloads/8._Runder_Tisch_Rolle_von_Audits.pdf

Info box 4: The role of standards in the fulfilment of legal due diligence obligations

Obliged enterprises increasingly rely on standards in order to fulfil their due diligence obligations. They can assist with a systematic inventory, risk assessment, agreement on measures, and control of due diligence obligations in relation to direct and indirect suppliers. Consumers also increasingly base their purchasing decisions on standards that promise goods and services produced in accordance with human rights.[41]

The Act does not privilege certain standards. Additionally, the Act does not specify which evidence must be provided or agreed upon by a supplier in a specific case. Standards can be an important auxiliary tool to assist obliged enterprises with complying with their due diligence obligations along their supply chains. **They do not, however, generally exempt enterprises from their due diligence obligations.**

To the extent that standards take into account the legal due diligence requirements, they can serve as indicators for the fulfilment of due diligence obligations in the context of the regulatory examination process. However, enterprises should be aware of the limitations of standards and first consider whether and to what extent the selected standards are effective and suitable for their purposes.

Furthermore, standards follow different approaches and do not always require a robust management system. A standard's quality and credibility strongly depends inter alia on which stakeholders (e.g. civil society actors) were included in its development and how the criteria are being verified in practice. In countries with weak governance, for example, increased vulnerability to corruption may result in bribery attempts to influence the outcome of standards compliance reviews.

- **Obliged enterprises do not fulfil their obligation to implement a complaints procedure by reference to the complaints procedure of a supplier.** Non-obliged enterprises do not have to implement their own complaints procedure according to the Act. Obliged enterprises sometimes try to fulfil their obligation to make their complaints procedure accessible solely by obliging their suppliers to implement a complaints procedure of their own and make it accessible to potentially reporting persons in the context of their sub-suppliers. This, however, does not fulfil obliged enterprises obligation to implement an appropriate complaints procedure and make it accessible. Instead, they have to design a complaints procedure of their own in a way that enables persons to notify them of risks and violations of human rights and environmental obligations caused by economic activities of a supplier. Specifically, obliged enterprises must provide clear and comprehensible information in relation to the procedure and available complaints channels. Furthermore, the complaints procedure must protect the confidentiality of identity of the potential parties and provide effective protection from disadvantage or punishment because of a complaint.
- Obliged enterprises can use an internal procedure, participate in an equivalent external procedure, or combine internal and external complaints procedures. Since determining the target group of the complaints procedure and measures to make the complaints procedure accessible in the deeper supply chain poses particular challenges for obliged enterprises, they can assess whether an external

[41] The Helpdesk on Business & Human Rights provides further information on the role of standards in line with the UN Guiding Principles in their ‚Standards Compass': https://kompass.wirtschaft-entwicklung.de/en/standards-compass/what-can-standards-achieve

complaints procedure may be a better solution. An external complaints procedure is also particularly useful if other obliged enterprises procure goods or services from the same supplier.

In the development of contractual clauses or provisions for a supplier code of conduct, obliged enterprises have to consider the results of their risk analysis. When doing so, they should carefully examine which of the human rights and environmental obligations listed in the Act are relevant for the respective supplier, and if necessary only address these individual risks and violations and communicate this to the suppliers accordingly.

IV) Recommendations for collaborating in the supply chain

Collaboration in the supply chain has to be understood as a dynamic process based on dialogue. Ideally, obliged enterprises collaborate with their suppliers fairly and on an equal footing over a longer period. Obliged enterprises must be aware of their role and influence and, for example, focus on appropriate contractual terms and conditions in purchasing processes, e.g. in pricing and lead times.[42]

Obliged enterprises can be expected to implement a combination of incentivising and controlling measures. Possible approaches for measures are the implementation of occupational safety and health trainings, structural or technical changes that are necessary under occupational safety and health laws, the introduction of sustainable wastewater management, audits/reviews, higher purchasing prices, support with supplier trainings or the certification of a production site. Suppliers can prepare themselves for the obliged customer's increasing demands by implementing processes to minimise human rights and environmental risks.

Non-obliged suppliers, on the other hand, might ask themselves which measures they can take to gain a better understanding of the risks and how they can start to address them.

On this basis, obliged enterprises and non-obliged suppliers could also examine how they can jointly deal with the requirements. The obliged enterprise benefits from addressing risks and violations in that case and non-obliged enterprises - whether in Germany or abroad - receive support in implementing risk-based preventive and remedial measures, which often are complex and cost-intensive. Obliged enterprises must also consider the interests of employees and those otherwise affected by the economic activities in the supply chain (e.g. residents of surrounding communities).

Due diligence obligations are a learning process for all participants. In order to create synergies and share learning experiences, obliged enterprises should especially exchange information with others on identified risks within the framework of multi-stakeholder initiatives. The purpose should be to seek joint solutions for strengthening human rights and environmental responsibility along the supply and value chains, for example for a sector, a product group, a product or a region.

1. Approaches for risk analysis

Obliged enterprises should assess which information they actually need from their suppliers in order to conduct an appropriate risk analysis. This assessment is also worthwhile on the part of the suppliers. In many cases, obliged enterprises extensively ask for information from their suppliers. Not all of this information is always necessary for an appropriate risk analysis. Against the background of the criteria of appropriateness, asking a German supplier about, for example, child labour, the worst forms of child

[42] For Information related to competition law consequences see chapter IV.3.b) of this Guidance.

labour or forced labour - depending on the branch - may be unfounded.[43] At first glance, it may seem easier for obliged enterprises to extensively request information from all suppliers without reference to the respective individual case by self-assessment-questionnaires. When obliged enterprises, however, demand all information from all direct suppliers, they risk receiving too much information, which does not help creating a better understanding of the risk exposure in their supply chains. The results often cannot be used for the risk analysis and create considerable efforts and costs for non-obliged suppliers. Since risk analysis serves to fulfil legal due diligence obligations of obliged enterprises, they should balance the efforts and costs and, in addition to the risk exposure, always consider their supplier's capacity and needs.

Negative example 2

An obliged enterprise contacts all involved suppliers with the same questionnaire and asks all suppliers to sign the same standardised assurance. In the event of a non-response, the enterprise threatens with negative consequences for the business relationship. Among the suppliers contacted are without differentiation an IT-service-provider situated in Germany, a German law firm who consults a subsidiary within the obliged enterprise's own business area and a craft business.

This approach does not meet the requirements of the Act and may affect BAFA's control activities.

In order to avoid excessive demands to non-obliged suppliers in the context of the risk analysis, obliged enterprises should first determine the risk profile of direct and (if necessary) indirect suppliers in an abstract risk analysis. These findings should be the basis for further measures. For example, it may already be inappropriate to include low-risk suppliers in the same detail as high-risk ones. This also applies to the inclusion of direct suppliers of subsidiaries who are part of the obligated enterprise's own business area.

Many suppliers receive a high number of differing questionnaires, which in essence request the same information but differ in details and design. Filling in these questionnaires causes considerable efforts. Here it may be reasonable to develop common questionnaire formats, for example within the framework of sector initiatives. Obliged enterprises could also check to what extent already completed questionnaires or assessment forms, scorecards, etc. from software or system solution providers or other sources fulfil their need for information. Interoperability of programmes can save resources on the part of suppliers by not having to fill in a multitude of differing questionnaires and provide verification documents. Obliged enterprises should ensure that the programmes and solutions they use are as interoperable as possible with other providers, for example by allowing the software to integrate data from another programme via an interface.

Sector-specific and cross-sectoral associations might substantially contribute to the risk analysis, e.g. by developing services for higher-level analyses in relation to specific products, services or regions that are particularly relevant to their members. Members can use these to support their own risk analysis.

[43] In some sectors, isolated cases of forced labour in Germany were reported in the past. A general statement that the supplier is based in Germany (or the EU) and is therefore not associated with any human rights or environmental risks would therefore be short-sighted.[44] See also info box 4 regarding the role of standards and certifications.

Example 1

Assistance with the risk analysis by a trade association

The trade association A represents the economic, legal, and political interests of around 800 German enterprises. The members mostly are small and medium enterprises but include several enterprises with more than 1,000 employees who fall within the scope of the Act in 2024 and accordingly have to fulfil due diligence obligations. The association A would like to support their members with implementing the Act by answering questions in relation to the Act, providing recommendations for the sector, and assistance for the risk analysis and other due diligence obligations.

To this end, A first conducts a (voluntary) survey to products, materials, components, and countries of origin among the members. With this information, other sources, and industry experts, A conducts an annual study on sector- and country-specific risks. The study includes surveys among potentially affected persons in the most important sourcing countries of A's members. A working group then discusses und documents the results and insights in an industry-specific risk evaluation.

The risk evaluation can be accessed by all members via an easily accessible format provided by the association („tool"). Members can use the risk evaluation as basis for their concrete risk analysis. Additionally, they can enter data on suppliers in order to obtain an initial sector- and country-specific assessment for their own abstract risk analysis and advice on how to deal with suppliers.

The association points out to their member enterprises that this is only an auxiliary tool and does not replace the obligation to conduct a risk analysis. Both the small and medium-sized members and the obliged members use the industry association's tool for the initial risk assessment. The working group regularly checks the effectiveness of the tool and adapts it if necessary.

Obliged enterprises might also raise questions in relation to sub-suppliers. Transparency and knowledge of the supply chain generally are key to fulfilling due diligence obligations. Suppliers, however, often fear that this information may be used to bypass them from the supply chain. While producing enterprises often specialise in a particular step of the value chain and are less reluctant to disclose the origin of their raw materials or semi-finished products, the requirement for supply chain transparency poses a significant business risk for traders and importers. Suppliers should enter into dialogue with the obliged enterprise in order to develop a common understanding of what information is actually required.

Information on business relationships and supply chains is generally protected as a trade secret. It is also possible that obliged enterprises request information that suppliers are not allowed to pass on because they have in turn committed themselves to non-disclosure vis-à-vis their supplier or because of overriding applicable law.

Info box 5: Information necessary (among others) for the risk analysis

- Information on identified risks and violations,
- In case risks and violations:
  - Information on country or region, level of the value chain,
  - Economic activity in relation to the risk or violation,
  - Number of affected persons, size of the environmental areas affected,
  - Any preventive or remedial measures already taken, if applicable.
- Information on whether the supplier conducts a risk analysis themselves and the method,
- Information on raw materials, semi-finished product, and services used to create the product or service: From which countries are they? How are the raw materials obtained and the semi-finished products and products manufactured? (for all stages of the supply chain),
- Audit and certification documents relating to the supplier's premises, if available (non-disclosure agreements might be necessary).[44]

In the context of the risk analysis, obliged enterprises may ask their suppliers for permission to visit their premises or conduct an audit. Sometimes obliged enterprises in this context try to gain extensive control rights over suppliers through contractual agreements, for example in the form of codes of conducts. This leads to difficulties in practice. Suppliers often are not willing or able to provide such control rights to obliged enterprises. Excessive control and auditing rights may be invalid under contract law.[45] Suppliers should therefore carefully examine such agreements from a legal point of view, especially with regard to unreasonable disadvantages or excessive claims.

Even though suppliers do not have to collaborate with their business partners according to the Act, it can strain the business relationship when they completely refuse to cooperate with information requests since obliged enterprises depend generally on information from their suppliers in order to fulfil their due diligence obligations. Non-obliged enterprises are free to meet these demands or not and should act cautiously and in a data-minimising way when dealing with such requests.

Suppliers should ask for what purpose their customers need the requested information exactly in order to make an informed decision whether and to what extent they can give insight into their own supply and value chains. They should also black out sensitive information and contractually ensure the use of the information only for specific purposes as well as confidentiality through non-disclosure agreements (NDAs). It is also possible that long-term contractual relationships can calm suppliers' concerns about being bypassed in the supply chain with the help of information obtained in the risk analysis.

The goal is a dialogue on equal footing to deal with this tension. In doing so, obliged enterprises should consider the interests at stake in the respective context. Possible approaches could be that non-obliged suppliers only disclose certain data (e.g. forwarding audit results without naming the sub-supplier or using intermediary platforms) or that the obliged enterprise provides them with tools and (financial) resources with which they can better analyse and address risks in the upstream chain themselves.

[44] See also info box 4 regarding the role of standards and certifications.
[45] See section 307 § 1 sentence 1, § 2 of the German Civil Code.

Info box 6: How to proceed with sensitive information

- Assessing which information is needed,
- Blackening of certain information,
  - which is not needed for the purposes of the request,
  - when there is a legal interest to protect the information (trade secrets),
  - when NDAs with sub-suppliers prohibit disclosure,
  - when overriding applicable law prohibits disclosure,
- Protection of sensitive information via non-disclosure-agreements:
  - Information cannot be shared,
  - Information can only be used for certain purposes,
  - Communication only to certain actors.

2. Approaches for preventive measures

When obliged enterprises ask their suppliers to sign contractual agreements, they should carefully assess what is required, whether suppliers are able to perform and whether the agreement is balanced. Suppliers should generally be careful when contractually assuring circumstances over which they have no knowledge or control. While suppliers typically are familiar with the situation in their own business area, they might have only little knowledge regarding sub-suppliers or the deeper supply chain.

Assuring that certain standards are being met might lead to contractual claims. Enterprises should be particularly careful if they are to be liable for certain circumstances. The Act does not establish independent liability standards between contractual parties along supply chains. However, it is possible that suppliers are liable for faulty or unfulfilled assurances. Therefore, the parties should carefully assess which measures and, in particular, achievements they should commit to in the context of contractual amendments justified by the Act. Suppliers should seek individual legal advice if necessary. Furthermore, enterprises can be liable for misleading advertisement with a standard that is ultimately not met regardless of a supplier relationship. They might even be liable vis-à-vis end customers (as long as there is a contractual relationship). A careful examination is therefore always advisable when specific standards and their requirements are addressed.

Obliged enterprises should accompany contractual assurances with control mechanisms, trainings and further education while keeping an eye on costs for control measures such as audits to avoid conflicts of objectives. Suppliers might not be able to cover costs created by meeting standards and implementing due diligence processes when prices remain unchanged. Obliged enterprises should pay particular attention to costs effects for suppliers in the deeper supply chain who might have a weaker negotiating position. Suppliers might struggle with covering costs for operational safety and health, environmental protection, and adequate living wages. Obliged enterprises should therefore always considers their procurement strategies and purchasing practices.

Example 2

Supplier trainings on the Code of Conduct

An obliged enterprise is trading with tropical fruits and has many suppliers in countries of the Global South, some in high-risk countries. Unskilled or low-skilled labour is often used in the harvesting of fruits, many businesses use seasonal and migrant workers. During the risk analysis, the enterprise notices high risks for protected legal positions, in particular regarding forced labour, child labour, operational safety and health, adequate living wages, freedom of association and the right to collective bargaining, and violations through the use of security forces.

As a first step, the enterprise wants to send their Code of Conduct to their high-risk business partners. The goal is to both overall regulate the collaboration to fulfil due diligence obligations and to set minimum requirements to comply with rights in workplaces and to set targets to work towards. The enterprise knows that assurances of the absence of risks or violations are unrealistic in relation to risks already identified. It also assumes that not all suppliers will understand the Code of Conduct and its background. The enterprise furthermore fears that suppliers may conceal problems for fear of disadvantages, which in turn would hinder the fulfilment of due diligence obligations. They worry that some suppliers might refuse to sign the Code of Conduct and to collaborate because they are legally not obliged to.

In order to prevent these problems, the enterprise not only made sure that the Code of Conducts describes due diligence processes as a shared task within the meaning of a shared responsibility and to provide for termination rights only as a last resort in the case of very serious violations and only if the supplier refuses to cooperate or improvements do not occur even after repeated attempts. The enterprise furthermore wants to enable their suppliers to fulfil the obligations resulting from in the Code of Conduct that first requires a common understanding of due diligence processes and the collaboration in the meaning of the Code of Conduct.

To this end, the enterprise not only sends their Code of Conduct to their suppliers but also provides training on own expenses. The training covers the Supply Chain Due Diligence Act and the resulting need of the enterprise to collaborate with their suppliers. Additionally, the training explains the content of the Code of Conducts, the enterprise's expectation and how they can collaborate to fulfil due diligence obligations as a shared responsibility.

Info box 7: Questions to assess procurement and purchasing practices

- Are costs for respecting human rights and the environment considered (e.g. as part and parcel in price negotiations)?
- Are potential cost increases, for example due to rising minimum wages, rising costs of living or inflation taken into account (e.g. with a price escalation clause)?
- How are costs for adequate living wages included?
- Are costs for measures such as audits or training covered, which are conducted in the interests of an obliged company?
- Are financial incentives provided for suppliers linked to continuous improvements in the respect of human rights and environmental obligations (e.g. through guarantees for further orders, longer contract terms or higher purchase volumes)?
- Are the terms of the contract designed in such a way that they do not impose a disproportionate burden on the supplier (e.g. through unfair payment terms, payments that are not specifically related to the sale of the supplier's products, or terms for changing and cancelling orders)?
- Are lead times and product specifications designed in a way that suppliers can meet them without violations of rights (esp. working time)? (In order to avoid rights violation, contracts can for instance allow suppliers to refuse performance or sub-contract connected with a right to object for human rights reasons.)
- What incentives do contract terms provide (short contract terms often do not allow suppliers to invest in operational safety and health or environmental protection)?
- What incentives are provided by termination rights? Are negative impacts on human rights and the environment identified and addressed that may result in the case of termination?

Obliged enterprises can collaborate with their suppliers and other actors to implement preventive measures at an indirect supplier. If suppliers do not want to share information that allows recourse to the identity of sub-suppliers, obliged enterprises can instead support their suppliers with the implementation of preventive measures. Obliged enterprises might want to implement preventive measures at an indirect supplier themselves, for example by the sub-supplier agreeing to comply with the code of conduct. Implementing preventive measures at an indirect supplier in most cases in only possible when this indirect supplier is known to the obliged enterprise and they can contact them. Suppliers in these cases should expect their customers to request such information.

Obliged enterprises furthermore should ensure that they announce preventive measures towards their suppliers with an adequate lead time so they can adapt to the new situation. Generally, it does not suffice to only refer to the legal requirements of the Act.

Info box 8: Questions for collaborating on preventive measures

- Is a supplier asked to warrant circumstances about which they have or can have no knowledge?
- Are contractual assurances balanced in the meaning of a shared responsibility?
- Are costs for control measures (e.g. audits) to be shared appropriately?
- Shall obliged enterprise and suppliers collaborate on preventive measures at an indirect supplier in a reasonable way?
    - Does the supplier have to bear the responsibility alone or is the cost burden balanced?
    - Requirements for the disclosure of information identifying upstream suppliers:
        - Non-disclosure agreements including intended use and contractual penalty, if necessary,
        - Assurance of continued cooperation if violations are reported and serious efforts and approaches to improvement are shown to avoid secrecy regarding existing violations.

If suppliers already implement preventive measures at their suppliers, obliged enterprises should assess whether these measures fully minimise the risk. If this is not the case, they should further analyse whether the criteria of appropriateness require them to additionally implement own measures.

Info box 9: Enabling before withdrawal

The Act only obliges enterprises to terminate business relationships under certain prerequisites and as a last resort. The Act does not intend the withdrawal of enterprises from difficult contexts. Terminating business relationships do not necessarily reduce risks or terminate violations. Instead, this can constitute an additional risk and lead to further deterioration of living and working conditions.

The termination of a business relationship is only required if:

1. The obliged enterprise assesses the violation of a protected legal position as very serious,
2. The implementation of the measures developed – with the supplier – in the concept do not provide remedy after the time specified in the concept,
3. The enterprise does not have any other milder means, and
4. Increasing the ability to exert influence has no prospect of success.[46]

It should be noted that the mere fact that a State has not ratified one of the conventions listed in the Annex to the Act or has not implemented them in national law does not automatically lead to an obligation to terminate a business relation.

3. Approaches for remedial measures

If an obliged enterprise wants to plan or implement remedial measures at a supplier, they at least need their consent. Implementing those measures potentially requires accessing the supplier's premises to

[46] Section 7 § 3 of the Act.

create changes, which only is possible with the supplier's consent. In most cases, suppliers will not be able to achieve remedy by only instructing their suppliers to cease certain actions. Instead, remedy can often only be achieved by combining several complex measures. In many cases, an obliged enterprise also needs information to develop measures, be it as singular measure or a plan of measures. Which information is needed specifically differs depending on the identified violation and necessary remedial measures. Dealing with operational safety and health or environmental protection might require detailed technical information.

It is possible that remedy includes compensating affected persons for example because their health is impaired and they had expenses for medical treatment or lost income. In these cases, remedy is only possible if the obliged enterprise contacts the affected persons or their legitimate representatives. This in turn requires information that obliged enterprises generally only receive from their suppliers.

For planning and executing remedial measures at an indirect supplier, an obliged enterprise generally turns towards their direct suppliers who are in contact with them. While in the context of the risk analysis obliged enterprises should carefully assess which information they really need for the risk analysis and should be cautious with information relating to the identity of sub-suppliers, it might finally be necessary for remedial measures to learn about the identity of indirect supplier.

This is the case because the implementation of remedial measures at an indirect supplier requires knowledge of their identity and possibilities to communicate. Suppliers can expect that their buyers will turn towards them with questions of this sort. In this context, it is possible that obliged enterprises support their direct suppliers in implementing remedial measures if they are unwilling to disclose information in relation to sub-suppliers. This support can range up to fully covering the costs – depending on appropriate cost-sharing according to the criteria of appropriateness. Obliged enterprises should not use the lack of cooperation or support from suppliers in implementing remedial measures as a blanket reason to terminate a business relationship.[47]

Regarding the actual implementation of measures, several actors can be considered:

- It is possible that obliged enterprises implement the measure themselves at the direct or indirect suppliers where remedial measures shall be taken.
- The obliged enterprise, however, can also implement the measure together with other actors or further intermediary suppliers. In particular, this can be considered if they also fall in the scope of the Act. Implementing measures together with other buyers or intermediary suppliers of an indirect supplier is also possible if they are not obliged by the Act. In this context it is important to note that they might be under no legal obligation to provide remedy and the obliged enterprise must negotiate their participation in the remedial measure. These non-obliged buyers or intermediary suppliers might be interested in participating in the remedial measure for other reasons, for example because they are obliged by other laws to remedy or due diligence or for reputational reasons.
- Another option is that suppliers, where remedy shall take place, implement the measure themselves and get support by the obliged enterprise.

In all these constellations, enterprises need to ensure that costs for remedial measure are **shared appropriately**.

[47] Info box 6 provides for further information on the principle ‚enabling before withdrawal'.

Example 3

Implementation of remedial measures at an indirect supplier

A fashion company has its collection manufactured by a supplier in India, among others.

In addition to fabrication, the production of viscose fibres from cellulose, the spinning of the fibres and their dyeing take place in their production facilities. As part of the risk analysis, the fashion company takes a risk-based approach and has an audit carried out at this supplier. The audit shows that various chemicals used in viscose production, including highly toxic carbon disulphide, are not properly treated from the effluents into the nearby river. Due to the strong manifestation of the criteria of appropriateness (in particular, there are severe health risks for the residents of several communities located along the river), the fashion company decides to implement their own remedial measures with a high expenditure of resources.

In addition to remedying, the environmental damage that has already occurred and compensating residents who have already become ill, remedial measures include adapting the viscose plant so that the supplier no longer disposes of the chemicals via the wastewater. To this end, some of the chemicals used shall be retained and recycled.

The fashion company can only plan and implement these measures together with their supplier. Already for the planning the measure, the fashion company needs precise information about the viscose plant. It is not possible to make changes to the plant without the supplier's consent. In addition, the fashion company is faced with the question of how to divide the costs for adapting the plant, removing the environmental damage, and compensating residents who have fallen ill between itself and the supplier. The latter in any case is obliged under Indian law to treat wastewater and it is forbidden to discharge hazardous chemicals into water bodies.

When implementing remedial measures at direct and indirect suppliers, obliged companies sometimes attempt to contractually oblige their suppliers to implement remedial measures in their own business area or at their upstream suppliers. On the one hand, the principle that contracts to the detriment of third parties are invalid, applies here as well. On the other hand, merely transferring obligations does not meet the requirements of effectiveness and appropriateness for the enterprise obliged by the Act. This is because, especially in the context of remedial measures, effective and proportionate cost sharing in line with the criteria of effectiveness and appropriateness is central.

Example 4

Remedial measures at a supplier in Germany

A large German food retailer sources goods during asparagus- and strawberry-season from farms in the region. From media reports, the enterprise learns that one of its direct suppliers is said to have violated the legal minimum wage and occupational safety and health regulations among the seasonal workers it employs. In the past, the supplier had informed the obliged enterprise in a self-assessment questionnaire and later contractually committed to work towards meeting certain human rights and environmental standards. Among these requirements are paying the legal minimum wage and meeting legal requirements for occupational safety and health. The legally effective contractual agreement also provides for the possibility of unannounced on-site visits to monitor compliance by the obliged enterprise. The agreement, however, also includes obligations for the obliged enterprise to by means of responsible purchasing practices to avoid negative impacts and support the suppliers in meeting standards. The obliged enterprise only has a right to terminate the contractual relation in case of severe violation that cannot be remediated and in case of repeated refusal to collaborate by the supplier.

Due to the high standard of protection at the place of production and the long-standing business relationship without complaints, the obliged enterprise has not yet made use of their right to visit the site but solely relied on the supplier's assurances.

Because of the media report, the obliged enterprise visits and inspects the site. To not defeat the purpose of the visit, the obliged enterprise does not announce it prior. The inspection of the sites, consultation with employees in a trustful environment, and the assessment of salary statements confirms that the supplier violated occupational safety and health regulations such as providing face-masks and disinfectant as well as sufficient ventilation in the accommodation and paid their employees below minimum wage among other because of undue deduction of non-monetary remuneration values.

When discussing the reasons with the supplier, it becomes apparent that the constant purchase prices did not allow the supplier to finance the last minimum wage increase and the protective measures required by the SARS-CoV-2 pandemic.

To remedy the situation, the obliged enterprise then agrees with the supplier on cost-covering purchase prices and a time and action plan to improve labour and health protection. To prevent such problems in the future, a supplementary agreement is concluded in which the food retailer undertakes to adjust the purchase prices in the event of rising minimum wages and high inflation, among other things (so-called price escalation clause). Furthermore, the obliged enterprise establishes direct contact with a counselling centre in contact with the seasonal workers in order to be informed about human rights and environmental violations at an early stage in addition to its complaints procedure.

a) Appropriate cost-sharing

Obliged enterprises are required to develop suggestions in accordance with the principles of appropriateness and effectiveness on cost sharing between them and their suppliers where remedial

measures shall be taken or between them and other intermediary suppliers where remedial measures shall be taken. It should be noted that obliged enterprises have a duty of means regarding their direct and – in case of substantiated knowledge - indirect suppliers. Accordingly, obliged enterprises do not generally owe the success of the remedial measure. However, the success of the measure must not be ruled out from the outset - this would be the case, e.g., if the costs of the measure in question were unilaterally imposed on other market participants, thus obviously preventing its effective implementation. Such cost sharing does not comply with the requirement of effectiveness stipulated in the Act.

With the Supply Chain Due Diligence Act, the legislator has made the fundamental decision that enterprises obliged by the Act must proactively identify risks and violations in their supply chains and address them with measures. However, many protected human rights and environmental legal positions of the Act are linked to the adherence of relevant nationally applicable law. In other cases, there are national pieces of legislation with the same or a similar protective aim.

For example, if a supplier violates occupational safety and health obligations applicable under the law of the place of employment and this leads to the risk of accidents at work or work-related health hazards, there is both: a violation of national law by the supplier and a violation of a protected legal position under the Act by the obligated enterprise. Both enterprises, based on diverging legal grounds and independently from each other, are then obliged to take measures. With reference to the criteria of effectiveness and appropriateness, it may be sufficient for the obliged enterprise to bear only a part of the costs incurred by the remedial measure and another share of the costs borne by the supplier. Constellations, in which the supplier infringing a protected legal position is itself obliged by the Act or that a supplier has several obliged customers, are possible too.

When sharing costs for remedial measures, enterprises should consider to what extent the criteria of appropriateness are met in relation to the different enterprises involved (obliged enterprises and obliged and non-obliged suppliers). It should also be noted here that the appropriateness criteria are not in any particular hierarchy and should be considered equally. They are likely to differ from enterprise to enterprise involved in the remedy.

The criterion **nature and extent of the business activities** consists of risk- and resource-related criteria. In the context of appropriate cost sharing, it depends on the extent to which the enterprises involved in the remedy are able to remedy the situation with regard to their resources. In particular, the financial, technical, and human resources available to the different enterprises must be taken into account. Enterprises with more capacity are expected to do more. Especially regarding suppliers in countries of the Global South, obliged enterprises should consider carefully the extent to which suppliers are economically able to participate in remedial measures. The risk-related criteria of this criterion is usually irrelevant when addressing the issue of appropriate cost sharing. These criteria are fundamentally important for the question of how much is to be paid in total for remedial measures as well as other due diligence obligations.[48]

Enterprises with a stronger **ability to influence** are usually expected to do more to achieve remedy. The ability to influence is also decisive for the type of measure that can be taken. In determining the ability to influence, the degree of market dominance plays a special role. Of particular relevance is the ratio of the obliged enterprise's order volume to the total turnover of this supplier. Hence, in the context of determining appropriate cost sharing, the respective order volumes of the enterprises involved with this supplier have to be compared.

[48] Further information on the criterion nature and extent of the business activity can be found in BAFA's Guidance on appropriateness, p. 9.

The violation-related criteria of **severity and probability of occurrence**, together with the other criteria of appropriateness, govern the level of appropriate action for remedies as well as other due diligence obligations. However, they are not relevant for the determination of appropriate cost sharing since they are equally met for all participating enterprises in relation to the same violation.[49]

The **nature of the causal contribution** is about determining how much responsibility the enterprises involved have in relation to each other. Enterprises that bear greater responsibility for the violation must contribute more than enterprises with less responsibility. The nature of causal contribution is particularly pronounced when a violation is caused directly by a single enterprise. However, enterprises can also cause or contribute to a violation jointly with others. For example, a contribution may lay therein that buyers pay a purchase price for goods that prevents suppliers from paying an adequate living wage or to comply with environmental and labour protection regulations.

Moreover, changes on short notice in lead times and conditions often contribute to risks and violations, for instance when changes result in overtime at suppliers exceeding the statutory maximum working hours. In the case of violations at suppliers, in most cases a contributory cause by the supplier themselves exists. Here, it must be determined to what degree it is appropriate for them to contribute to the costs. However, since the criteria must be considered equally, special attention must be paid here to the criterion of the nature and extent of the business activities. This is because a supplier may not have the resources necessary for the remedy.

Info box 10: Application of the criteria of appropriateness on cost sharing

1. Nature and extent of the business activities
Which resources are available for remedial measures to each of the participating enterprises?

2. Ability to influence
To what extent is each participating enterprise able to influence the party directly responsible for the violation?
What is the ratio of each of the participating enterprises' order volume to the overall turnover of the party directly responsible compared to one another?

3. Severity and probability of occurrence typically to be expected
- no differences between the participating enterprises since these criteria are pronounced to the same extent in relation to the same violation. -

4. Nature of the causal contribution
To what extent have the participating enterprises contributed to the violation?
Did one enterprise cause the violation alone or mostly alone?
To what extent did the conduct of other participating enterprises contribute to the violation?

[49] More on the criteria severity and probability of occurrence can be found in the Guidance on appropriateness, p. 10.

Example 5

Cost-sharing

A chocolate manufacturer has identified child labour in cocoa harvest at one of their suppliers in Western Africa through their risk analysis. Due to the strong manifestation of the criteria of appropriateness, they decide to take remedial measures.

Combatting child labour requires complex measures because child labour can only be eliminated by eliminating the reasons for child labour. The manufacturer considers, i.a., to increase the income of adult workers and small farmers as well as establishing child-care opportunities for their children. The chocolate manufacturer is one of several enterprises that buys cocoa from this supplier and is wondering whether they can motivate the other buyers to participate in the measure.

They further wonder whether they have to implement remedial measures in a scale that reaches all affected persons if other buyers are not participating in the measures. Additionally, the chocolate manufacturer would like to know to what extent the supplier can be expected to contribute towards the costs or rather whether the appropriate costs the manufacturer has to cover might be reduced by an amount that can be expected from the supplier. The chocolate manufacturer already pays a purchase price that is above the average market price, because the supplier is certified in accordance with a sustainability standard according to which child labour should not occur there.

To answer these questions, the chocolate manufacturer assesses whether the purchase price and the certification contribute to preventing child labour. Like many other enterprises, the chocolate manufacturer purchases the raw cocoa via commodity exchanges. In the next step, they analyse their pricing policy and establish that the purchase price – although above market price – is not sufficient to pay decent wages. The chocolate manufacturer therefore determines the extent to which they would have to increase the purchase price on the basis of the local cost of living and acts accordingly. Additionally, they plan to make contact with other buyers to regarding further, potentially joint measures.

b) Collaboration in conformity with German antitrust and competition law

Should a human rights or environmental violation at a supplier be designed in a way that the obliged enterprise cannot terminate it within foreseeable time, it is legally obliged to design and implement a concept for terminating and minimising the violation.[50]

They shall further assess allying with other enterprises in the context of sector-initiatives and –standards to increase their ability to influence the party directly responsible. This does not mean permanent structural mergers in the meaning of merger control law but topic-specific cooperation on specific aspects.

[50] Section 7 § 2 of the Act.

The absolute limits of such cooperation under antitrust law are found in calls for boycott or when the participating enterprises are no longer free to make their own decisions. Such cooperation must also not violate antitrust law.[51] The exchange of information on competition-relevant parameters with the aim of eliminating uncertainty about the future market behaviour of competitors is a typical means of prohibited coordination in violation of antitrust law.[52] Vertical price fixing - unless it can be exempted from the ban on antitrust violations in exceptional cases - is also prohibited. In the event of such violations, the enterprises involved face fines of up to ten percent of their annual turnover.

When collaborating in the supply chain, it is up to the enterprises themselves to carefully review and assess the risk for exchanging sensitive information (such as exchanges on specific procurement sources or purchase prices) and to avoid potential antitrust violations. They are required to ensure compliance with competition law requirements within the framework of the so-called self-assessment in an independent legal examination and with the help of generally available guidelines and regulations.

Enterprises should observe the 'guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (horizontal guidelines) especially regarding the exchange with competitors in this context. They contain valuable information about the competitive assessment of the exchange of information. Although information exchange is a common tool of many competitive markets and can lead to different types of efficiency gains. However, in situations where the exchange of market information can provide companies with insight into the market strategies of their competitors, there also is a risk of restrictive effects on competition. Additionally, the horizontal guidelines contain further requirements in relation to different types of cooperation, e.g., in relation to standardisation and sustainability aspects. Corresponding requests for information should also be carefully reviewed against this background.

Against this background, the exchange within the framework of industry initiatives should in principle pursue the goal of a (joint) implementation of due diligence obligations according to the Act, the concrete exchange of information should also be suitable for this purpose and should be limited to the extent indispensable for this purpose..

Agreements or an exchange of information on planned new product launches, components or processes as well as prices can constitute administrative offences punishable by fines, among other things, and are therefore to be avoided. If the exchange of certain sensitive information is indispensable for the cooperation, the enterprises involved should appoint a neutral third party who will only pass on the data to them in aggregated form.

Enterprises can also turn to the competent cartel authority with a request for informal examination in case of a sufficiently concrete cooperation project or an intended exchange of information on contents (also) relevant in competition law, if there are still uncertainties under antitrust law despite legal advice.[53]

4. Approaches for the complaints procedure

In order to implement the complaints procedure, different actors need to collaborate when the obliged enterprise needs information from their suppliers to define the target audience of the procedure and design it in a way that is accessible for them. Furthermore, obliged enterprises need support from their suppliers if it wants to convey information to the target group about the accessibility of the procedure and

[51] Section 1 of the Competition Act, Article 101 § 1 TFEU.
[52] German Federal Court, order of 13 July, 2020KRB 99/19, guiding principle a (in German).
[53] An example of an industry association with content close to the objective of the Act is the Federal Cartel Office's case report on the ‚Working Group of the German Retail Trade - Sustainability Initiative to Promote Living Wages in the Banana Sector (Living Wages)' of 8 March 2022, online available at (in German): https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2022/B2-90-21.pdf

its process. In this context, there are particular challenges in relation to the deeper supply chain. Again, suppliers can expect to be approached by their customers with questions and requests for assistance. The parties involved may also regulate this in a supplier code of conduct or supplementary contractual agreements.

Similar to the risk analysis, when approached with requests for information, suppliers should carefully examine what information their contractual partners really need and whether legitimate interests conflict with their disclosure. Here, they should regularly observe principles of data economy; in doing so, they can also make use of confidentiality agreements, which usually also cover purposes of use of information.

In the course of **publicising and making the complaints procedure accessible** to potential stakeholders along the supply chain, obligated enterprises rely on involving their suppliers. It should be noted that the interest in the disclosure of information on the functioning and accessibility of the complaints procedure may be opposed by major interests of the suppliers to avoid direct contact between upstream suppliers and obligated companies. In this case, obliged enterprises should offer solutions such as the joint participation in an external complaints procedure (e.g., multi-stakeholder-initiatives) or jointly including other actors active in the region or industry (e.g., trade unions). Since employees and residents of communities in the proximity of suppliers can usually only use the complaints procedure of an obliged enterprise if they know that this enterprise is among the supplier's buyers, obliged enterprises should demand from their suppliers to make this information transparent to this group of persons.

Similarly, suppliers can expect that their obliged buyers expect **protective measures** for reporting persons, because obliged enterprises must design their procedure in a way that it protects the confidentiality in identity of potential users and effectively protect against disadvantage and punishment for using the procedure.[54] Since disadvantages or punishment for using the complaints procedure may regularly come from a supplier or from actors in their environment, such as supervisors, security forces, service providers or other buyers, suppliers may expect the obliged enterprise to require them to protect employees and residents of communities in the proximity of suppliers .

If the supplier receives complaints on behalf of the buyer to forward them, the protection of the confidentiality of the identity of the reporting person plays a special role. In this case, suppliers must expect that the obliged buyer will demand special protective measures.

Support measures might lead to **costs** for the supplier. Unlike the costs for remedial measures, which may require and justify the participation of several enterprises, including the supplier where the action takes place, the costs here concern a due diligence obligation that is the sole responsibility of the obliged enterprise. Accordingly, the obliged enterprise must bear the costs. These include costs for providing for information and protective measures. This is to be assessed differently in case of an external complaints procedure (together with other enterprises or within the framework of an industry or cross-industry initiative). In this case, participating enterprises must determine the costs and share them appropriately. Suppliers might also participate in an external complaints procedure together with an obliged enterprise. Again, as described above in the approaches to remedial action, the criteria of appropriateness provide further assistance.

[54] Section 8 § 4 sentence 2 of the Act.

V) Tips for suppliers to implement due diligence processes

The due diligence requirements specified in the Act are only mandatory for enterprises within the scope of application. There are no legal requirements for suppliers outside the scope to introduce their own due diligence obligations. Enterprises of all sizes and sectors, however, can have a positive impact on the respect for human rights and the environment, regardless of obligations of the Supply Chain Due Diligence Act. This is in line with the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and the Federal Government's expectation set out in the NAP. The Federal Government has established the Helpdesk on Business & Human Rights to support enterprises.

A robust environmental and social management system also provides advantages for enterprises: It enables them to identify and address risks and violations early on. Such a management system might also lead to competitive advantages especially in relation to the initiation of business relationships and development with obliged enterprises, but also attracting investors. Understanding requirements of due diligence risk management systems might facilitate negotiations with customers for non-obliged enterprises.

It is also reasonable for non-obligated suppliers to understand the requirements of the Act and to consider how they can develop appropriate strategies for dealing with requests from obligated enterprises. A robust risk management system allows them to collaborate with obliged enterprises on equal footing.

In practice, non-obligated suppliers are sometimes not able to establish such a risk management system with their own resources. In these cases, it can be helpful if obligated enterprises support their suppliers. Especially for non-obligated suppliers in particularly high-risk countries or sectors, it can be helpful to promote cooperation in order to establish their own structures while addressing the responsibility of obligated enterprises to improve the situation on site.

Non-obliged suppliers which are unable to implement such a management system should assess whether they can implement at least some elements of such a system. They can often prepare themselves for demands from obliged enterprises with partial steps. For example, it may be useful to conduct a risk analysis for at least parts of the supply chain in order to be prepared for requests from an obligated buyer or to implement preventive measures in case of identified risks.

Non-obliged suppliers can primarily focus on high-risk parts of the supply chain and intensify their efforts there. Both the own analysis of negative impacts on human rights and the environment and external influences (e.g., demands from obliged buyers) can be set as priorities. On this basis, both enterprises can implement preventive and remedial measures at a supplier together (e.g., audits, supplier trainings, etc.) and share costs according to the criteria of appropriateness. If non-obliged suppliers are unable to disclose sub-suppliers they can pass on financial resources for the implementation of measures in the upstream supply chain. The obliged enterprise in this case, however, needs valid information on the proper use of the funding for its intended purpose. It would be conceivable, for example, to provide audit reports or salary statements in which sensitive information is blackened.

Determining responsibilities and processes as well as the use of financial resource can sometimes vary considerably in the implementation of own due diligence obligations. While in a large enterprise, the topic of due diligence may be located in a specially created position of the human rights officer and a cross-departmental committee (e.g., a human rights committee) accompanies the technical implementation in the core processes of the enterprise, a non-obliged enterprise can limit itself to leaner structures, for example by combining the responsibility for quality, sustainability and purchasing in one person. However, it can also be important for smaller enterprises to define a minimum set of processes so that the

systems are verifiable and function independently of persons (e.g., if the person responsible leaves the company).

In this context, enterprises can take recourse to the UN Guiding Principles on Business and Human Rights, the NAP and relevant OECD guidelines for guidance.

Appendix: Overview with references for existing support services

Information on the Supply Chain Due Diligence Act:

- Questions and answers about the Supply Chain Due Diligence Act (FAQs) (in German): https://www.bafa.de/DE/Lieferketten/FAQ/haeufig_gestellte_fragen_node.html
- Further BAFA Guidances on the Supply Chain Due Diligence Act:
  - Guidance on risk analysis "Identifying, weighing and prioritizing risks": https://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/guidance_risk_analysis.pdf?__blob=publicationFile&v=2
  - Guidance on complaints procedures „Organising, implementing and evaluating complaints procedures": https://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/guidance_complaints_procedure.pdf?__blob=publicationFile&v=6
  - Guidance on the principle of appropriateness according to the requirements of the Supply Chain Due Diligence Act: https://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/guidance_appropriateness.pdf?__blob=publicationFile&v=6
- Information sheet on the questionnaire (in German): https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/lksg_berichtspflicht_fragebogen.html?nn=1469768
- Supply Chain Due Diligence Act – legislative text: https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=4
- Draft bill of the Federal Government (including explanatory memorandum), Deutscher Bundestag Drucksache 19/28649 (in German): https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/gesetzesentwurf.pdf

Support and advisory services for the implementation:

- German Helpdesk on Business & Human Rights: Main contact for the implementation of the Supply Chain Due Diligence Act, free and confidential advice to companies and business associations on the practical implementation of due diligence processes, funding and financing instruments, customized training; free e-learning, awareness-raising events, and a variety of free online tools: www.helpdeskwimr.com
- UN Global Compact Network Germany: Publications (e.g. „What does effective human rights due diligence look like for SMEs? 5 insights from practice": UNGCD_Insights_Series_human_rights_due_diligence_SME.pdf (globalcompact.de)), seminars, and webinars: https://www.globalcompact.de/en
- Initiative for Global Solidarity: https://www.giz.de/en/downloads/giz2023-en-igs-factsheet.pdf
- Business Scouts for Development: Advice on the sustainable engagement of companies in developing countries, on funding, financing, and cooperation offers and on connecting companies with potential business partners (in German): https://www.bmz.de/de/themen/privatwirtschaft/kammern-und-verbaende/business-scouts-for-development-70214

Tools und Resources:

- Business & Human Rights Navigator: www.bhr-navigator.unglobalcompact.org/
- SME Compass „Due Diligence Compass": www.kompass.wirtschaft-entwicklung.de/en/due-diligence-compass/develop-a-strategy

- SME Compass „Standards Compass“: www.kompass.wirtschaft-entwicklung.de/en/standards-compass/what-can-standards-achieve
- CSR Risk Check: identify industry-, product-, and country-specific risks: www.mvorisicochecker.nl/en/start-check
- Business and Human Rights Resource Centre (BHRRC): Ability to filter reports by country, sector, and topic: www.business-humanrights.org

Assistance in identifying high-risk countries:

- International Labour Organisation (ILO)
  - SDG indicator 8.8.2 (workers‘ rights): https://www.ilo.org/shinyapps/bulkexplorer33/?lang=en&id=SDG_0882_NOC_RT_A
  - SDG indicator 8.7.1 (child labour): https://ilostat.ilo.org/topics/child-labour/#
  - SDG indicator 8.8.1 (occupational injuries): https://ilostat.ilo.org/topics/safety-and-health-at-work/
  - Data on wages worldwide: https://ilostat.ilo.org/topics/wages/
- Transparency International, Corruption Perception Index: https://www.transparency.org/en/cpi/
- Yale Center for Environmental Law & Policy, Environmental Performance Index: www.epi.yale.edu
- ITUC CSI IGB, ITUC Global Rights Index: https://www.globalrightsindex.org/
- Walk Free, Global Slavery Index: www.globalslaveryindex.org
- United Nations Development Programme, Human Development Index: https://hdr.undp.org/data-center/human-development-index#/indicies/HDI
- World Bank, World Wide Governance Indicators: https://info.worldbank.org/governance/wgi/Home/Documents
  - Voice and Accountability
  - Political Stability and Absence of Violence/Terrorism
  - Government Effectiveness
  - Regulatory Quality
  - Rule of Law
  - Control of Corruption
- The Heritage Foundation, Index of Economic Freedom: https://www.heritage.org/index/
- Freedom House, Freedom in the World Score: https://freedomhouse.org/countries/freedom-world/scores
- World Economic Forum, Global Gender Gap Report: https://www.weforum.org/reports/global-gender-gap-report-2022/
- Bertelsmann Stiftung, Transformation Index (in German): https://bti-project.org/de/

Industry initiatives:

- Sector Dialogue Automotive Industry: https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Implementation-support/Sector-dialogues/Automotive-Industry/automotive-Industry.html
- Chemie³ - Sustainability Initiative of German Chemical Industry (in German): https://www.chemiehoch3.de/
- Sector Dialogue of the German Energy Industry (in German): https://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/Umsetzungshilfen/Branchendialoge/Energiewirtschaft/energiewirtschaft.html
- German Initiative on Sustainable Cocoa: https://www.kakaoforum.de/en/
- Forum for Sustainable Palm Oil: https://www.forumpalmoel.org/en/welcome
- Partnership for Sustainable Textiles: https://www.textilbuendnis.com/en/

Cross-industry initiatives:

- Trade: Ethical Trading Initiative Alleged Code Violation Procedure: https://www.ethicaltrade.org/sites/default/files/shared_resources/Alleged%20code%20violation%20investigation%20procedure.pdf
- Workers' rights: Fair Labor Association Third Party Complaints Process: https://www.fairlabor.org/accountability/fair-labor-investigations/tpc/
- Trade: Amfori Speak for Change Programme: https://amfori-.foleon.com/speak-for-change/scgm/
- Palm Oil: Roundtable on Sustainable Palm Oil Complaints and Appeals Procedures: https://rspo.org/who-we-are/complaints/
- Minerals: Responsible Minerals Initiative Grievance Mechanism: https://www.responsiblemineralsinitiative.org/rmap/grievance-mechanism/

International reference documents:

- ILO Fundamental Rights and Principles at Work: https://www.ilo.org/declaration/lang--en/index.htm
- UN Guiding Principles on Business and Human Rights (2011): https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
- UN OHCHR: The Corporate Responsibility to Respect Human Rights. An Interpretive Guide (on the UNGP): https://www.ohchr.org/sites/default/files/Documents/Issues/Business/RtRInterpretativeGuide.pdf
- UN OHCHR: Frequently Asked Questions (FAQ) about the Guiding Principles on Business and Human Rights (2014): https://www.ohchr.org/sites/default/files/Documents/Publications/FAQ_PrinciplesBussinessHR.pdf
- OECD: OECD-Guidelines for Multinational Enterprises on Responsible Business Conduct (2023): https://read.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en
- OECD: OECD-Guidelines for Multinational Enterprises (2011): https://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en
- IFC Performance Standards on Environmental and Social Sustainability (2011): https://www.ifc.org/en/insights-reports/2012/publications-handbook-pps
- Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration) (2022): https://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm

OECD Guidances:

- OECD Due Diligence Guidance for Responsible Business Conduct (2018): http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf
- OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2019): https://www.oecd.org/daf/inv/mne/OECD-Due-Diligence-Guidance-Minerals-Edition3.pdf
- OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016): https://www.oecd.org/publications/oecd-fao-guidance-for-responsible-agricultural-supply-chains-9789264251052-en.htm

- OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2017): https://www.oecd.org/publications/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector-9789264252462-en.htm
- OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (2020): https://www.oecd.org/publications/oecd-due-diligence-guidance-for-responsible-supply-chains-in-the-garment-and-footwear-sector-9789264290587-en.htm
- Responsible Business Conduct for Institutional Investors (2018): https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf
- Due Diligence for Responsible Corporate Lending and Securities Underwriting (2020): https://mneguidelines.oecd.org/due-diligence-for-responsible-corporate-lending-and-securities-underwriting.pdf

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