

Due Diligence: French Law As a Model for Germany and the EU?

The year 2021 has seen an increase in legislative initiatives regulating human rights and the environmental due diligence of companies' supply chains, particularly in Europe. While Germany's Due Diligence Act (*Sorgfaltspflichtengesetz*), also known as the Supply Chain Act (*Lieferkettengesetz*), which was adopted in June 2021, will take effect in 2023, and the European Union's Due Diligence Regulation is expected to be adopted later this year, several regulations on due diligence are already in place in other countries. In particular, the French Due Diligence Act, also known as Duty of Care Law (*Loi sur le devoir de vigilance*), is considered exemplary. A study commissioned by iPoint-systems examined its contents.



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As part of the European Green Deal and the coronavirus rescue package, the European Union also intends to enact regulation requiring companies to conduct human rights and environmental due diligence in their supply chains from 2021 onward. European Commissioner for Justice Didier Reynders provided information about the plan in a webinar in April 2020. With this, the EU is joining existing efforts that have already become law in France, for example, with the *Loi sur le devoir de vigilance*, or in the Netherlands with the *Wet Zorgplicht Kinderarbeid*, report Dr. Chris N. Bayer and Juan Ignacio Ibañez in the iPoint blog.

Germany recently passed its own Due Diligence Act (*Sorgfaltspflichtengesetz*),

also known as the Supply Chain Act (*Lieferkettengesetz*). This was urgently needed because only about one-fifth of German companies even check compliance with human rights in their supply chains; the NGO Initiative Lieferkettengesetz reports on the occasion of the monitoring of the German government within the framework of the National Action Plan for Business and Human Rights (*Nationaler Aktionsplan Wirtschaft und Menschenrechte*). In contrast, the chair of the German Council of Economic Experts, Lars Feld, warned in the German newspaper *Frankfurter Allgemeine Zeitung* that the law, which is also supported by the federal ministers Hubertus Heil (SPD) and Gerd Mueller (CSU), threatens to impose massive burdens on the economy.

Yet, massive burdens have not materialized in the frontrunner legislation – the French Due Diligence Act – seen by many as a model for possible EU-wide regulation. In France, companies with more than 5,000 employees in size must draw up, implement, and evaluate plans on how they will protect the health and safety of employees in their supplier companies and also ensure environmental protection on site. They must also identify the direct and indirect risks of harmful effects from their supplier relationships and take precautions to prevent them. Annual reports must also be submitted on this.

The Berlin-based non-profit research agency Development International e.V. has analyzed how the French law works

in practice. Commissioned by the software house iPoint-systems, the study evaluated the due diligence reports of 134 French companies on the basis of 42 quantitative performance indicators and a further 14 qualitative characteristics in terms of their compliance with the legal requirements, their compliance with the UN Guiding Principles on Business and Human Rights (UNGP), as well as the quality of the disclosures. The overall result showed that most companies still had significant potential for improvement, particularly in the areas of transparency (a value of 36 percent compliance with the indicators was determined here) and compliance with the UNGP (24 percent). With an overall compliance rate of 66 percent, the law had been observed to trigger reform processes in French companies.

One aim of due diligence is to focus attention on ultimate outcomes of corporate governance. Moreover, companies may learn good practice from each other. In a specialist article for iPoint-systems, the authors of the study point out that there are several obstacles on the way to achieving these goals. In their non-financial reporting, many companies tended to report on supply chain risks and how to prevent them, rather than current harmful impacts caused by suppliers. This very deficiency was also revealed in a 2019 comparative study of non-finan-

cial reporting in Germany, Austria, and Sweden, also conducted by Development International and sponsored by iPoint. Country-specific differences emerged: According to Bayer and Ibañez, Swedish companies are particularly open about their own impact on human rights as well as environmental and health impacts in the supply chain.

As suitable means against the inconsistent compliance with human rights and environmental due diligence, the authors recommend a stricter legislation along the lines of the French model. Companies would also be motivated to fulfill their due diligence obligations carefully, among other reasons, because relevant stakeholders could even hold the companies liable if they can prove violations or also false or insufficient protective measures. The discussion in the EU is leading toward such a model, which would then apply to companies of all sizes and sectors, possibly with exceptions for small and medium-sized businesses.

The Reutlingen-based software company iPoint regularly funds studies and projects on due diligence and non-financial reporting. By doing so – and with its software solutions for product compliance, sustainability, risk management, and due diligence processes based on a circular economy approach, as well as

for traceability of the entire product life cycle and supply chain transparency – iPoint contributes to Goal 12 (Responsible consumption and production). Most importantly, the solutions contribute to making the environmental and social footprints of companies and products visible. Furthermore, iPoint's software solutions also promote the achievement of Goal 8 (Decent work and economic growth) and Goal 9 (Industry, innovation and infrastructure). ■

THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The UNGP were approved unanimously by the UN Human Rights Council in 2011. The principles, which are not legally binding, have nevertheless found expression in a variety of other initiatives and frameworks. The UNGP are governed by three pillars: protection of human rights, respect for human rights, and access to remedy. The protection of human rights primarily addresses the governments, while the second pillar is mainly aimed at companies. This reflects the issue of due diligence. The third pillar assumes a shared responsibility between governments and companies. Governments should take legal and institutional measures to help victims of human rights violations to demand that their rights be respected. Companies are also expected to create opportunities for complaints and, if applicable, to make compensation for human rights violations that have been committed.

