

THE FSS IN THE CONTEXT OF GERMANY'S NEW SUPPLY CHAIN ACT

Germany's new Act on Corporate Due Diligence Obligations in Supply Chains [*Lieferkettensorgfaltspflichtengesetz – LkSG*] places a number of obligations on businesses to respect human rights and protect the environment. More specifically, the Act defines a bundle of due diligence obligations businesses are required to implement within their own sphere of business and in relation to their direct and indirect suppliers. Voluntary human rights and environmental standards may be helpful in implementing the due diligence obligations under the Act, in particular in taking preventive measures in respect of controls and audits (as is also stated in the Explanatory Memorandum to the Draft Bill, cf. Bundestag printed matter 19/28649, p. 48).

In light of this, we will provide a brief overview today of the Food Security Standard (FSS) and the role it can play in the implementation of the *LkSG*:

STANDARDS AND THE LKSG

Within the *LkSG*, we need to distinguish between the legal positions protected by the *LkSG* (Sec. 2 Para. 1 to 3 *LkSG*) and the due diligence obligations to be fulfilled within a company (Secs. 3 *et seq.* *LkSG*). Depending on how a standard is structured, it can serve to guarantee compliance with protected legal positions and/or as a way of implementing due diligence obligations within a certified company.

Standards and certificates are therefore a practical and meaningful way for companies and their business partners to make sure human rights are respected and environmental and due diligence obligations are complied with.

THE HUMAN RIGHT TO FOOD IN LIGHT OF THE LKSG

Sec. 2 Para. 1 *LkSG* defines the protected legal positions as human rights and environmental obligations that are covered by the international treaties referred to under nos. 1 to 11 of the Annex to the draft bill. Sec. 2 Para. 2 and Para. 3 *LkSG* includes a catalogue of “risks” that the due diligence obligations aim to prevent from materialising. However, legal positions that are not mentioned in said catalogue, such as the right to food (Art. 11(1) ICESCR¹, or as part of the right to life of Art. 6(1) ICCPR²) are also to be taken into account in the context of the due diligence obligations. Sec. 2 Para. 2 No. 12 *LkSG* also qualifies legal positions that are not expressly mentioned in the Act as “risks” if their violation is particularly grave and their unlawfulness is manifest upon an informed consideration of all relevant circumstances. Such other legal positions not expressly mentioned are thus included in the scope of the due diligence obligations as “risks”.

Similar to violations of the prohibition of child labour, impairments of the right to food will, as a rule, be regarded as serious violations because they put the health and life of those concerned directly at risk. Apart from that, impairments of the right to food are usually irreversible because they directly affect people's health. Companies who use agricultural raw materials from risk regions in their products will, as a rule, have to take the right to food under Art. 11(1) ICESCR into account in implementing the *LkSG* to make sure that the cultivation and sourcing of agricultural raw materials in their supply chain does not affect food security in the respective source countries in a particularly grave way.

¹ International Covenant on Economic, Social and Cultural Rights.

² International Covenant on Civil and Political Rights.

Moreover, the human right to food is a transversal right:

The human right to food can, as a matter of principle, not be ensured unless the protection of other human rights and compliance with environmental obligations are ensured.

The fulfilment of the human right to food as a rule requires the fulfilment of a number of other human rights that are specifically referred to as “risks” under Sec. 2 Para. 2 *LkSG*.

THE FSS IN THE LIGHT OF THE *LKSG*

If they are correctly identified and applied, the requirements of the FSS and the audit criteria provide a high degree of certainty that an audited or certified company indeed complies with the protected legal positions expressly referred to in the *LkSG* and protects the right to food.

The entire FSS certification process, comprising the NaFSA, the QAT and FOSSEM up to FSS certification, is capable of covering the main due diligence obligations under of the *LkSG*:

The abstract risk analysis can be undertaken by means of the NaFSA (Sec. 5 *LkSG*). Specific risks can be analysed using the QAT (Sec. 5 *LkSG*). Once risks and suppliers associated with certain risks have been identified, the implementation of FOSSEM can serve as a preventive or (if risks have materialised) remedial action (Sec. 6 and Sec. 7 *LkSG*). The actual certification process is an extension of the preventive measures derived from FOSSEM principles. In particular, there is an on-site audit conducted as part of the certification process (Sec. 6 Para. 4 No. 4 *LkSG*). The certification obtained is also a preventive measure within the meaning of Sec. 6 Para. 4 *LkSG*. Regular monitoring can be undertaken using the QAT, which then operates as a review of effectiveness of the preventive measures taken as referred to under Sec. 6 Para. 5 *LkSG*. At the same time, an FSS certificate can be taken into account as a risk-reducing factor in the specific risk analysis (Sec. 5 *LkSG*, see above).

RELEVANCE OF THE FSS FOR BUSINESSES

Firstly, the due diligence obligations apply only to companies that fall directly within the scope of the Act as defined under Sec. 1 Para. 1 *LkSG*. However, Sec. 6 Para. 4 No. 2 *LkSG* requires companies who are subject to the obligations of the *LkSG* to pass on their obligations in relation to human rights and protection of the environment to their suppliers by way of contractual agreements. This applies in particular to the promise to comply with the protected legal positions.

The aim of FSS certification is precisely that: To ensure that certified companies respect human rights in accordance with international human rights standards. Companies which are subject to the obligations of the *LkSG* may require their (direct or indirect) suppliers to obtain FSS certification and assist with the implementation in order to keep risks on the part of suppliers to a minimum and/or put an end to any violations. This is how companies subject to the obligations of the *LkSG* can comply with their main due diligence obligations under the *LkSG*:

In the context of a specific risk analysis, successful FSS certification can be regarded as a risk-reducing factor for a certified supplier given the scope of the examination it requires to be undertaken in relation to the protected legal positions. Thanks to the large scope of the FSS certification and the examination programme to obtain the same, which includes an on-site visit, the risk of a violation on the part of a certified supplier can be largely ruled out. In other words, suppliers with a high abstract risk of human rights violations can be regarded as less risky, or even as human rights compliant, on the basis of FSS certification.

FSS certification itself constitutes an effective preventive measure within the meaning of Sec. 6 Para. 4 *LkSG*.

The audit, which includes an on-site visit, ensures an independent review of the actual risk exposure of a supplier taking into account the position of all the various stakeholders. If a violation is identified, FSS certification is a way to put an end to the violation, i.e. from the perspective of a company that is subject to the obligations of the *LkSG*, FSS certification can also serve as a remedial action within the meaning of Sec. 7 *LkSG*.

CONTACT



Dr Lothar Harings
Lawyer, Partner

GvW Graf von Westphalen
Poststr. 9 – Alte Post
20354 Hamburg

l.harings@gvw.com
T +49 40 359 22-278



Max Jürgens
Lawyer, Associate

GvW Graf von Westphalen
Poststr. 9 – Alte Post
20354 Hamburg

m.juergens@gvw.com
T +49 40 359 22-115

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