

LABOUR AND SOCIAL JUSTICE

COMPANIES AND HUMAN RIGHTS

A Global Comparison of Legal
Due Diligence Obligations

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This study illustrates many countries have unilaterally developed varying theories in support of their efforts to regulate corporate due diligence in human rights. Most of those theories have been limited to thematic or regional approaches.



Many of the laws have extraterritorial effects. These laws apply to foreign companies doing business in their country, own a branch or subsidiary in their country or are listed on their country's domestic stock exchange.



Civil society and labor unions exert influence on the development of regulatory requirements. Whenever legislation was passed without considering the interests of these parties, doubts have arisen and many questions remain.

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Contents

INTRODUCTION	3
SUMMARY	4
I COUNTRY COMPARISON	6
II COUNTRY REPORTS	12
1. USA: Dodd-Frank Act and Conflict Minerals	12
2. California Transparency in Supply Chains Act	18
3. EU: European Timber Regulation.....	22
4. UK Modern Slavery Act 2015	24
5. France: Loi De Vigilance (Corporate Duty of Vigilance Law).....	30
6. EU CSR Reporting Directive.....	38
7. Australia: Modern Slavery Act 2018	41
8. Netherlands: Wet Zorgplicht Kinderarbeid (Child Labor Regulation)	43
9. Switzerland: Konzernverantwortungsinitiative (Responsibility Initiative For Corporate Groups).....	47
10. Austria: Entwurf eines Sozialverantwortungsgesetzes für die Textilbranche (Draft Bill For A Social Responsibility Law For The Textile Industry)	52
11. EU Conflict Minerals Regulation.....	55
Abbreviations	58

INTRODUCTION

The German government passed the National Action Plan on Business and Human Rights (NAP) on December 21, 2016. The NAP addresses the government's expectations for all companies to implement human rights due diligence in their business operations by the year 2020. The purpose of the plan is to work towards sustainable supply chains and for Germany to live up to its global human rights responsibility. The German government established a timeline and monitoring activity to determine whether 50 percent of companies with over 500 employees have established and implemented human rights due diligence processes by the year 2020. If this target is missed, the Federal government will consider further action, which may include legislative measures. In 2020, an encompassing report will assess overall NAP implementation by all stakeholders, including the government. Therefore, 2020 holds significant importance not only for Germany, but also for the whole of the European Union (EU). Germany will hold the EU Council Presidency in the second half of 2020 and will add the subject of sustainable supply chains to the political agenda.

The question how to make supply chains more sustainable, both socially and ecologically, has been discussed more publicly in the past few years. This discussion has centered on avoiding corporate human rights violations and if they do happen, how to provide affected individuals with a mechanism to effectuate their rights. The OECD has published various corporate guidelines for specific industries trying to give concrete answers to the question of how to develop practical steps out of the technical term due diligence (ex. OECD General Due Diligence Guidance 2018). For example, the initiative ACT (Action, Collaboration, Transformation) was founded with the goal of implementing collective bargaining in the textile industry in order to enforce living wages in producing countries. There are many other examples for similar actions that focus on sustainable supply chains.

The question whether voluntary or mandatory regulations are effective tools to prevent human rights violations in global production networks has been the subject of contentious debates. Human rights regulation of the economy is nothing fundamentally new. Already in 2002, a regulatory certification system for blood diamonds was established in Europe, taking into account the Kimberley Treaty. When the United Nations passed the UN Guidelines for Economy and Human Rights in 2011, the trend towards passing laws to define and enforce due diligence noticeably gained momentum. Legislatures are not afraid to pursue extraterritorial application of their laws. These laws do not concern only foreign fact situations. They also concern domestic and foreign companies. The author also includes his observations about the efficacy of regulations. A survey of regulatory efficacy will be the subject of a future comparative study which will explore this issue in greater depth.

This study serves as an introduction to (inter)national regulatory approaches which focus on sustainable supply chains. There is a range of different regulatory approaches. One approach may consist of exploring various forms of human rights violations (prohibition of child labor, prohibition of modern slavery, etc.), another approach may attempt to address particular activities in a particular region (see Dodd-Frank Act, USA) to prevent human rights violations at least in a defined location. The author, Robert Grabosch of Schweizer Legal, introduces eleven government approaches and provides a helpful summary in the first part of his study, outlining trends and tips relating to the current development.

The study shall to be continued over the next few years so that it also takes into account current developments and other regulatory measures.

Frederike Boll

SUMMARY

This survey concludes that countries have followed individual paths when regulating human rights due diligence obligations. Countries often have limited themselves to special themes or particular regions of application. Even though due diligence obligations are essentially identical, countries have framed and defined due diligence obligations in different ways. Considering this patchwork law practitioners face the challenge to understand and comply with requirements of foreign legal systems. A transnational legal harmonization, especially of the core elements of due diligence, would bring relief to all participants. Framers are advised to pay attention to a wise combination of voluntary initiatives and mandatory requirements, both at national and transnational levels.

Highlights of important findings are:

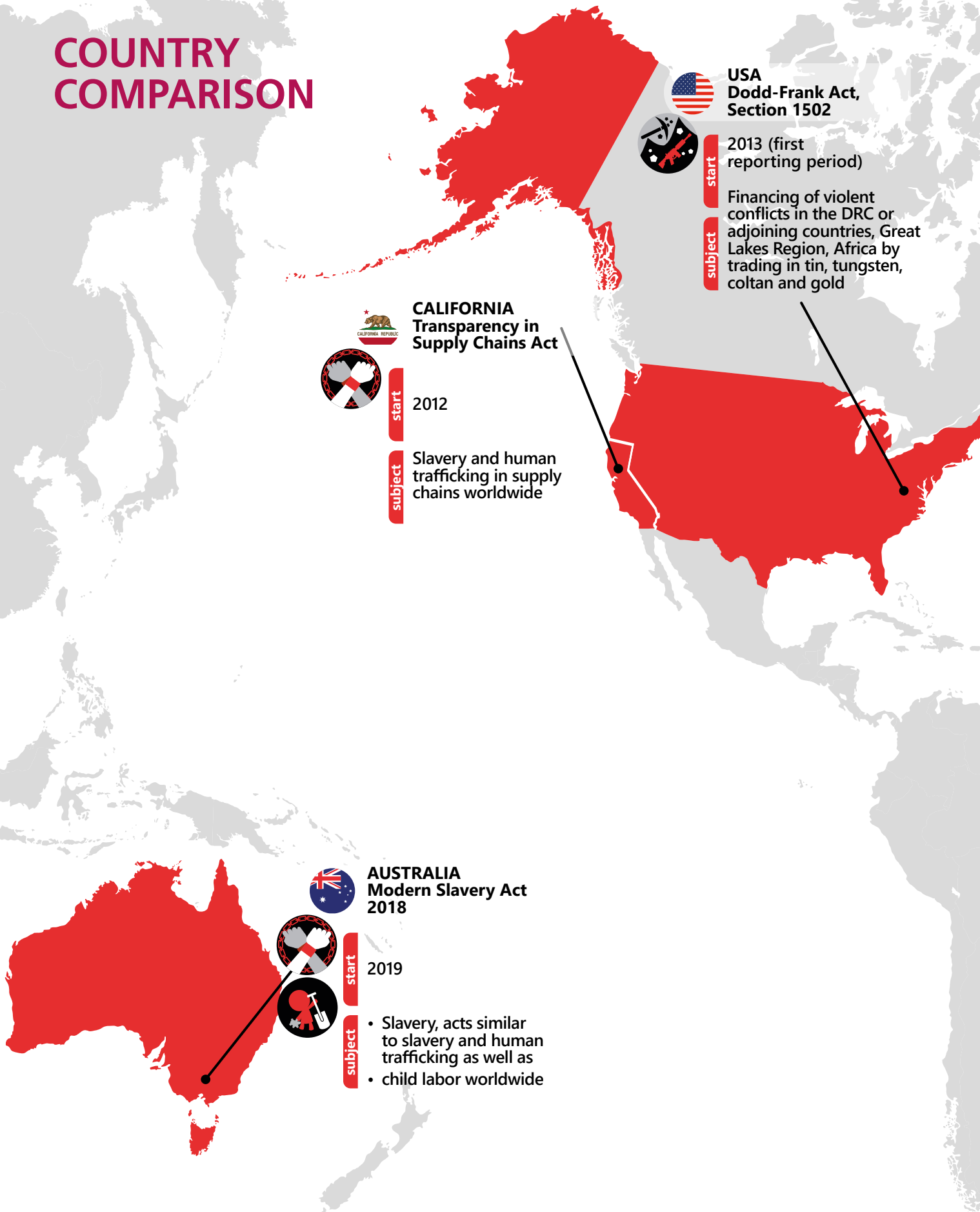
- Many of these laws provide for extraterritorial application. They apply to foreign companies who do business in the country, maintain a branch office, own a subsidiary or are listed on a domestic stock exchange. Typically, due diligence requirements extend beyond national borders. Legislative developments in the area of human rights continue to demand extraterritorial application of human rights laws just as laws to prevent corruption and money laundering have demanded extraterritorial application.¹
- The specifications for due diligence requirements in the different laws are similar in content. They are also similar to the requirements contained in the UN Guidelines for Economy and Human Rights which were unanimously passed by the Human Rights Council of the United Nations in 2011. The UN guidelines offer a good starting point for legislatures in many countries. They should serve to fill gaps without imposing anything new on companies.
- The regulatory approach employed by legislatures varies:²
 - › Mandatory due diligence obligations combined with enforcement/liability provisions seem to be most effective.
 - › The EU government approach consisting of authorization decisions and monetary penalties is also effective. In cases of purely environmental damage, fines issued by public authorities are indispensable.
 - › Merely imposing reporting duties to protect consumers, investors and shareholders has proved a weak measure.
 - › Greater effectiveness of CSR rules has resulted from combining CSR duties with corresponding CSR rules in procurement law.
- Civil societies and labor unions play a decisive role in many regulatory systems. Whenever legislation was passed without consideration for the interests of these parties, doubts have arisen and open questions remained whether these laws are even feasible (UK Modern Slavery Act, MSA). Specifications of legal terms are sometimes left to multi stakeholder initiatives and their industry-specific interests. Companies and interest groups have the opportunity to participate in the development of legal certainty (*Wet Zorgplicht Kinderarbeid*). Sometimes legislatures demand that corporations collaborate with unions and other interest groups when developing specific due diligence plans. Preliminary legal suggestions serve to encourage the parties to find specific solutions which satisfy diverse perspectives (*Loi de Vigilance*). Sometimes legislatures burden non-governmental organizations (NGOs) with the duty not only to collect, but also to evaluate, compare and publicize sustainability reports from companies (UK MSA, Corporate Social Responsibility (CSR) EU Guideline). Regarding issues that are particularly complex, statutory regulations can only be one component of a multi-faceted approach that should also involve initiatives from the business community, government, unions and non-governmental organizations. For instance the *EU Conflict Minerals Regulation* taps into the great potential that rests in civil society. Legislators should generally consider a potential interplay between regulation and voluntary initiatives.

¹ USA: Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 et seq; U.K: Bribery Act 2010, Sec. 23.

² See de Schutter (2012): Human Rights Due Diligence: The Role of States, also references due diligence in public procurement law and foreign trade promotion, issues which were not examined here.

- The interest of human beings who need to be protected should be at the center of all solutions. Ascertaining actual events in foreign countries and international litigation are difficult and expensive. If victims who carry the burden of proof cannot access corporate documents, they are not protected.
- The question whether a multi-level legal approach (for ex. on a national and transnational EU level) is hindering the development of laws at the higher level has been posed. The experience of Australia indicates that this is not the case. Development of the MSA 2018 in New South Wales furthered the development of the Modern Slavery Act 2018 for the Commonwealth of Australia.
- Typically, legislatures face certain trade-offs. A law is supposed to define all expectations clearly, be operational and provide legal certainty. Overly bureaucratic drafting of rules is wasteful. The law must be carefully worded to address various fact situations and to allow for future development. Ambiguous clauses which can be interpreted one way or another are to be avoided. The recommendations for German and European legislatures, in light of the laws reviewed, are as follows:
 - › The scope of application, purpose and enforcement must be clearly defined.
 - › The use of general legal terms, such as »reasonable measures« (*Loi de Vigilance*) is prudent because it allows law practitioners to reflect on the meaning and purpose of the law and then to develop suitable solutions. It is generally known that parties more willingly accept solutions that they have a stake in.
 - › Statutory texts that contain presumptive examples (*Regelbeispiele*) provide clear ideas of what companies are expected to do while also maintaining flexibility: under normal circumstances it is sufficient to follow presumptive examples whereas in atypical cases companies must apply other measures.
 - › The law may provide specifications by referencing existing guidelines or demanding that the legislature collaborate with interest groups when drafting a due diligence plan, regularly reviewing the plan and further reworking the plan.
 - › Specifications should not only relate to the operational level, but also refer to corporate culture, the tone from the top and the organizational structure (personal and task assignment).
- Laws need to be reassessed regularly. A purpose/strategy section which defines the intended short-term outcomes and long-term effects of the legislation is helpful. It must be clear whether a legislature desired an impact (ex.: to reduce the severity or frequency of human rights violations), an improvement of actual due diligence or an improvement of a particular output (ex.: to receive better reports). Legislators have often failed when they left the framing of these issues to private organizations, avoiding discussion and research.

COUNTRY COMPARISON



USA
Dodd-Frank Act,
Section 1502



2013 (first
reporting period)

start

subject

Financing of violent
conflicts in the DRC or
adjoining countries, Great
Lakes Region, Africa by
trading in tin, tungsten,
coltan and gold



CALIFORNIA
Transparency in
Supply Chains Act



start

2012

subject

Slavery and human
trafficking in supply
chains worldwide



AUSTRALIA
Modern Slavery Act
2018



start

2019

subject

- Slavery, acts similar
to slavery and human
trafficking as well as
- child labor worldwide

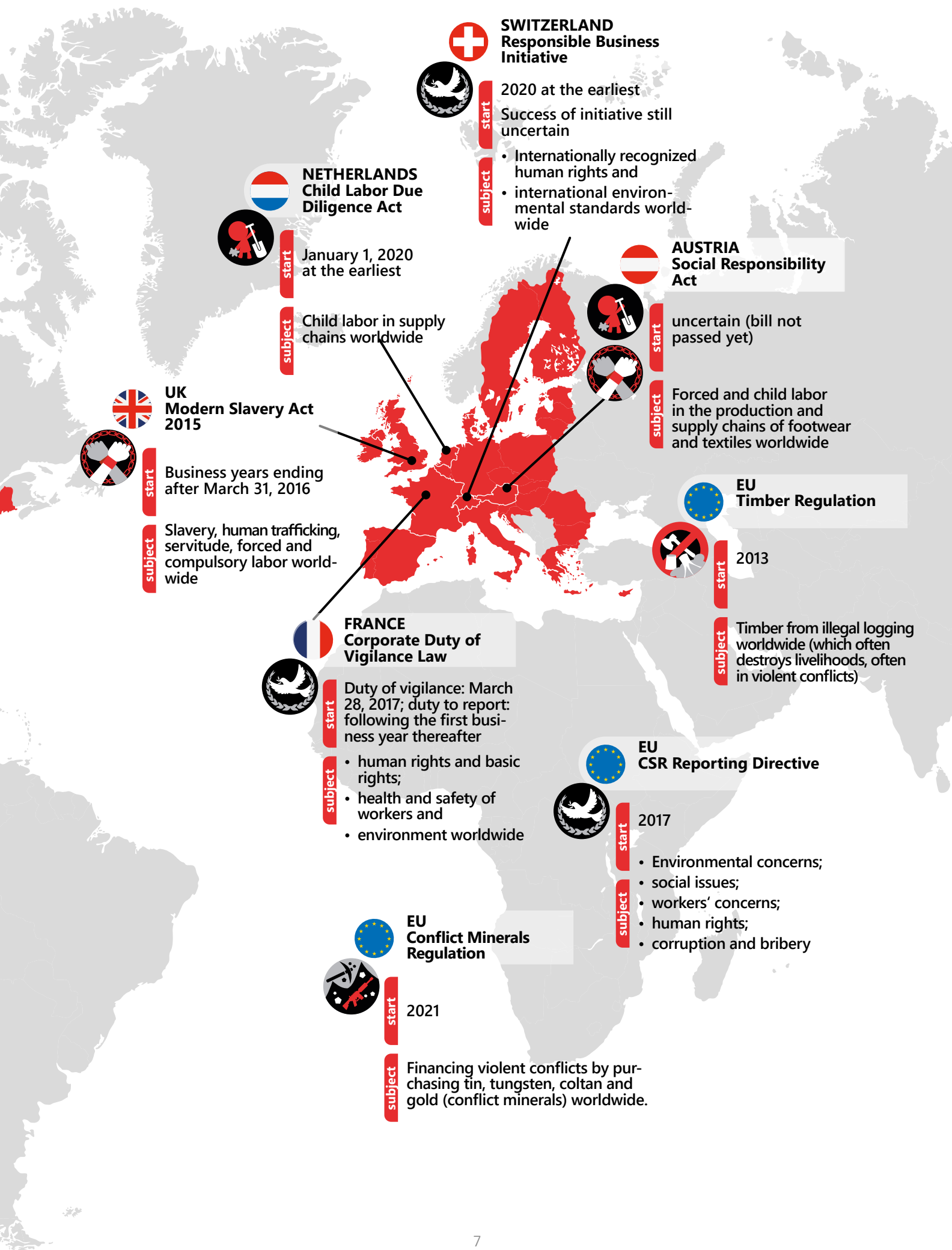


Table 1
Country Comparison

	USA 	CALIFORNIA 	EU 	UK 	FRANCE 
	Dodd-Frank Act and Conflict Minerals	Transparency in Supply Chains Act	Timber Regulation	Modern Slavery Act 2015	Loi de Vigilance: Monitoring/Reporting
Effective since	2010	January 1, 2012	March 3, 2013	Accounting year which ends after March 31, 2016	For Monitoring duty: March 28, 2017 For Reporting duty: At the end of the first accounting year
Theme	Financing of violent conflict in DRC, Great Lakes region, Africa, through mining of tin, tungsten, tantalum and gold (conflict minerals)	Slavery and human trafficking in supply chains worldwide	Avoidance of illegal timber harvesting worldwide. Preservation of living conditions, avoidance of violent conflicts.	Slavery, servitude, forced labor, human trafficking worldwide	Human rights and basic rights, health, safety, the environment worldwide
Scope of Application	All companies listed on a US stock exchange must investigate whether tin, tungsten, tantalum or gold are used in the supply chain. If so, they are subject to additional duties (see below)	Companies with annual gross receipts in excess of \$ 100 million, if their main business is retail or manufacturing and they do business in California, i.e. either have substantial earnings or own assets in California. Residency is irrelevant.	Companies who import timber or timber products into the EU, and other down-stream merchants. Size of company and presence in the EU are irrelevant.	Domestic and foreign companies doing business in the U.K. who have total annual gross receipts of over £36 million.	French stock corporation (SA) with over 5,000 employees, including controlled subsidiaries, in France, or over 10,000 employees worldwide. Possibly applies to other corporate structures.
Duties	Careful investigation and reporting: Do the minerals stem from recycled materials or at least not from the DRC or neighboring countries? If so, reporting is only required as to the investigation into origin and the resulting findings. If suspicions exist as to the origin, a more stringent investigation is necessary and the report must disclose whether the minerals were acquired from violent groups. The SEC is authorized to determine that certain due diligence measures are deficient. Reports which are based on insufficient measures will be rated as deficient.	Publication on company website. The following 5 aspects must be addressed: 1. Verification of supply chain 2. Supplier audits 3. Certifications 4. Whether and how employees and contract partners are held liable if they do not observe company guidelines 5. Training of employees No mandatory minimum requirements as to due diligence	Whoever places timber on the market must observe due diligence: 1. Information about the timber, suppliers and proof of legality must be available 2. Risk assessment process 3. Measures to reduce risk Due diligence may be outsourced to 3 rd party monitoring entities, if these are recognized by the EU Commission. Merchants must be able to name all market participants and dealers and immediate customers in the total supply chain. Information must be kept for 5 years.	Companies must provide the public with annual reports about their measures. The Act names 6 aspects to be referenced: (a) organizational structure, business and supply chains (b) company guidelines (c) due diligence procedure (d) scope of business, supply chains and risks and measures (e) efficacy of measures (f) training of employees No mandatory minimum requirement as to due diligence	Monitoring plan for risks related to company activity and controlled subsidiaries, also contractors and suppliers in long-term business relationships. 1. Risk registry, incl. identification, analysis and prioritization of risks 2. Assessment of subsidiaries, contractors and suppliers 3. Prevention 4. Warning/Whistle-blower provisions 5. Controlling and Monitoring Develop monitoring plan together with interest groups, possibly via multi-stakeholder initiatives. Implement monitoring plan effectively and publish in annual reports.

EU 	AUSTRALIA 	NETHERLANDS 	SWITZERLAND 	AUSTRIA 	EU 
CSR Reporting Duties	Modern Slavery Act 2018	Wet Zorgplicht Kinderarbeid (Child Labor)	Swiss Corporate Initiative	Social Responsibility Law	Conflict Minerals Regulation
2017	January 1, 2019 Reporting duty probably will be effective on July 1, 2019	Pending, earliest date is 2020 Decree is pending	Pending, earliest date is 2020 Success of initiative is questionable	Pending, was planned for Jan. 1, 2019, not passed yet	1.1.2021
Environment, social concerns, workers' concerns, corruption and bribery worldwide	Slavery, slavery-like action, human trafficking (Ref. to Australian criminal law), child labor under ILO-182 worldwide	Consumer protection, information about due diligence against child labor (ILO 138 AND 182) worldwide	Internationally recognized human rights and international environmental standards worldwide	Forced labor and child labor in production/ supply chains for shoes and textiles worldwide	Financing violent conflicts through tin, tungsten, tantalum and gold (conflict minerals) worldwide
Capital market oriented companies with over 500 employees and balance sheet total over €20 million or over €40 million sales revenue Out of est. 11,200 large German companies about 536 companies are affected.	Companies and organizations with over 100 million Australian Dollar in sales and headquarters or branch in Australia. Probably also applies to other companies doing business in Australia (especially if active in financial markets) and the Australian government.	All domestic and foreign companies who sell goods or services to Dutch consumers. Exempt are transportation companies. Also, exceptions possibly for certain categories of companies (likely depending on size)	Companies headquartered or having main branch office in Switzerland, SMEs with low risks may be exempt. Additional limitations are possible, see counter proposal of National Council	All mid-size and large companies (under Austrian law) with its seat, main administration, main branch or branch office in Austria, if they import or sell shoes or textiles	Any company worldwide who declares for import into the EU, or causes another company to declare for import, a certain amount of conflict minerals (between 100 kg and several tons per year)
Yearly reports a) Company business model b) Concepts, incl. due diligence processes («comply or explain») c) Concept results d) Essential risks related to company business activity which are expected to have negative consequences, and measures to reduce risk e) Performance indicators	Report about modern forms of slavery a) Company name b) Company structure, business processes and supply chains c) Risk of modern slavery in business processes, supply chains and controlled entities d) Risk assessment and risk management, due diligence and restitution e) Evaluation of efficacy of measures f) Consultation process within the company g) Other information deemed relevant	Companies must publicly report within six months from effective date that they apply suitable due diligence against child labor. Further details are not required. Requirements for suitable due diligence: Examination if there is a reasonable suspicion of child labor; poss. development of action plan for total supply chain (ILO-IOE Child Labor Guidance tool), reference to government initiated industry-specific MSI	Due diligence duty, risk identification, prevention and remedies, public reporting Affects economically controlled companies and total supply chain National Council counter proposal contains provisions relating to appropriateness, prioritization, limitations as to potential influence and reference to international due diligence frame work	Due diligence duty: importers must perform risk assessment, potentially take counter-measures and keep documentation for 5 years. Suitability of risk assessment depends on: – Country- and sector specific risks; – Weight and probability of potential violations; – Complexity of production and supply chain; – Size of import company; – Type and directness of measure; – Opportunity for influence; – If indications of violations, then deeper analysis; – Merchants must only name the importer	Due diligence duties under OECD Due Diligence Guidance Mineral Sourcing. – develop, publish management system, supply chain policy and insert in contract. Assure compliance by assigning compliance officer. Complaint mechanism and early warning system and traceability system; – Risk management: explore risk, assess and minimize risk; – Audits; – Disclosure of audits to agencies and annual; reports about strategy and processes

	USA 	CALIFORNIA 	EU 	UK 	FRANCE 
	Section 1502 Dodd-Frank Act	Transparency in Supply Chains Act	Timber Regulation	Modern Slavery Act 2015	Loi de Vigilance: Monitoring / Reporting
Enforcement	SEC: monetary penalties Shareholders' litigation for damages, if incorrect information is published Maryland and California: exclusion from public procurement bids Public: Damage to reputation, lower company stock values	California Attorney General (AG) receives from tax office annual list of companies subject to reporting duty AG may file a court action for injunctive relief to obtain corrected report, enforceable with monetary penalty Damage to Reputation Potential liability under consumer protection laws	EU member states must equip their agencies with effective sanction measures: in Germany sanctions consist of fines, prison sentences or monetary penalties. Governmental controls, guided by risk probabilities, may collect samples on location. Companies must cooperate.	Secretary of State may apply to High Court for an order forcing company to issue a declaration. Order is enforced via fines (unlimited amount). Damage to Reputation Liability of German management personnel (§93 AktG, §43 GmbHG) for damages, if violation of reporting duty	Civil liability for damages Each organization and person with a legitimate interest may apply to the courts for an order to have monitoring duties enforced. Courts may order fines, including recurrent fines for future violations. Damage to Reputation
Additional Sovereign Measures	US Secretary of State: strategy, recommendations for Congress and for companies; also cartographical images related to conflict minerals issues on website US Government (GAO): annual report about violent conflicts and efficacy of reporting duties US Department of Commerce: Annual recommendations for reliability of audits and other due diligence measures, publication of list of processors of conflict minerals worldwide	California Attorney General: Guidelines California has already included prevention of slavery and human trafficking as themes in criminal statutes and other laws pertaining to victims	EU Commission, dated Feb. 12, 2016: Guidelines for recognition of monitoring organizations and revocation of monitoring organizations.	UK Secretary of State: Guidelines Extensive, additional provisions addressing criminal acts, judicial preventative measures, Anti-Slavery Commissioner, victim protection, especially assistance with court expenses and cost of legal representation	Council of State: may demand via decree that additional due diligence requirements are to be fulfilled (currently not planned) The Council of Economy (Conseil Général de l'Économie) composes, commissioned by the Minister of Economy and the Minister of Finance, a list of all companies which are covered by the law.
Assessment of the Law	GAO: annual reports about violent conflicts and efficacy of reporting duty		EU member states and EU Commission assess the implementation of the regulation every two years. The EU-Commission was tasked to perform an especially rigorous assessment in 2015 and every six years thereafter.	Independent assessment of implementation, recommendations for improvement of the law and supplemental measures on behalf of the Home Secretary (Report in May 2019)	French Minister for Economy and Finance authorized the Council of Economy to perform an assessment of the first monitoring plans and reports via random sampling. The report is due in 2019. Assessment by the French Parliament in 2020

EU 	AUSTRALIA 	NETHERLANDS 	SWITZERLAND 	AUSTRIA 	EU 
CSR Reporting Duties	Modern Slavery Act 2018	Wet Zorgplicht Kinderarbeid (Child Labor)	Swiss Corporate Initiative	Social Responsibility Law	Conflict Minerals Regulation
Supervisory Board must examine the report. Mostly they retain external examiners. National government departments may impose fine, not over €10 million or less than 5 % of annual sales Reputation	Reputation, public report registries, Home Secretary may publish reporting violations separately	Regulatory authority: publishes declarations in a registry (reputation); Follows up on tips about potential due diligence violations; Imposes fines of up to €820,000 or 10 % of annual sales; prison sentence for repeated violations	Liability for subsidiaries and economically controlled companies. Release from liability/no liability, if proof of due diligence by company The National Council counter proposal provides for limitation of liability. Reputation	Consumer protection organizations may demand: Submission of due diligence documents; File court action to desist sales of products; File court action for disgorgement of company profits	Government agencies examine documents and audit reports and conduct controls after the fact, on location. Effective implementation must be assured by all member states via sanctions. Agencies have to collaborate and share information.
EU Commission guidelines for reporting (2017)	Home Secretary published company guidelines in the summer of 2019. Home Secretary formed a department for business relationships which supports companies dealing with modern slavery. Home Secretary issues annual report about implementation of MSA. Legislature of New South Wales passed their own MSA which also includes small companies; Anti-Slavery Commissioner of New South Wales; Fines up to 1,1 million AUD	Dutch government initiated 13 industry-specific round tables. Government funds to financially support company measures against child labor.	Purpose clause of proposed Constitutional Amendment contains demand that the government take measures to strengthen respect for human rights and the environment by companies.	Government creates a »fund for social responsibility of companies« to collect disgorgement profits from companies.	Handbook of EU Commission to determine risk and high-risk areas, includes list to be prepared by experts. List of responsible refineries and smelters worldwide Initiatives which assist companies with due diligence compliance may be recognized by EU Commission, following an application by companies or interested persons. Respective application criteria were specified via regulation in 2019.
EU Commission had to present to Parliament and Council a report about implementation and efficacy of the guideline in member states prior to December 6, 2018.	Review of reporting requirements and efficacy after 3 years. Possible supplementation of law with provisions for criminal action and fines.	Minister for trade and development will report to Parliament within 5 years of the law's effective date about efficacy and effects of the law in practice.			EU Commission will examine 2 years after effective date of regulation how effective the regulation is and whether it needs to be improved, especially in regards to raw materials and whether due diligence for downstream companies also should be mandatory.

II

COUNTRY REPORTS

1. USA: DODD-FRANK ACT AND CONFLICT MINERALS

U.S. Congress enacted the *Dodd-Frank Wall Street Reform and Consumer Protection Act* in 2010.³ In response to the financial crisis of 2008, Congress members Chris Dodd and Barney Frank had introduced a comprehensive bill to restore financial markets. Dodd-Frank's transparency duties were meant to stabilize the markets.⁴ The legislature added certain *Security Exchange Commission* (SEC) rules in Dodd-Frank Section 1502 requiring the SEC to hold companies responsible for disclosures about the origin of conflict minerals. Dodd-Frank became effective in 2010. In 2012, after a public consultation campaign, the SEC published in a *Final Rule*, specifications of the due diligence reporting duty.⁵ The first due diligence reports for calendar year 2013 were due to be filed not later than May 2014.⁶

The purpose of the reporting duty is to lower the use of conflict minerals which stem from violent groups in the *Democratic Republic of Congo* (DRC) and adjoining countries in the Great Lakes region, Africa.⁷ Dodd-Frank minerals are tin, tungsten, tantalum and gold.⁸ They are especially valuable raw materials in the central region of Africa. When these minerals are mined in the DRC, it is likely that the revenue from the sale of the minerals is used to finance violent conflicts and to increase humanitarian suffering in the East of the country.

Congress delegated additional tasks to prevent trade with conflict minerals to other government entities. The *U.S. State Department* prepared strategy recommendations for Congress and companies and maintains cartographic updates on conflict minerals at their website. The *General Accountability Office* (GAO) issues annual reports about the development of violent conflicts and the efficacy of report-

ing. The *U.S. Department of Commerce* issues annual recommendations concerning the reliability of audits and other due diligence duties, together with a list of all known processors of conflict minerals world-wide.

Section 1502 is considered to represent part of a broader development from purely voluntary transnational corporate governance to a national supply chain legislation.⁹ The reporting and due diligence duties have increased awareness of the problems related to conflict minerals and have caused companies to address solutions jointly and transparently in regional initiatives.¹⁰ Still, it became noticeable that some companies did not substantially report their due diligence measures and were more likely to withdraw from conflict regions instead of seeking to contract with conflict-free local partners.¹¹ Dodd-Frank has caused various U.S. government entities to develop strategies and competencies. Numerous initiatives address conflict minerals. The governments of twelve states in the Great Lakes region have founded an organization to establish peace in the region and to strengthen governance structures in their region (*International Conference on the Great Lakes Region*, ICGLR). A regional initiative offers companies practical support against illegal exploitation of national resources and for sustainable mining (*Regional Initiative against the illegal Exploitation of Natural Resources*, RINR). The OECD published guidelines for mining in conflict regions.¹² Still, there have been repeated complaints that necessary additional regulatory and political initiatives have not been implemented and that the actual conflicts in the Great Lakes region have not been conquered.¹³

³ Eickenjäger 2017: p. 24.

⁴ Preamble of Dodd-Frank Wall Street Reform and Consumer Protection Acts (U.S. Act. H.R. 4173).

⁵ SEC Final Rule, p. 2, effective since November 13, 2012; contains SEC summary of stakeholder consultation.

⁶ Id.

⁷ Sec. 1502(e)(4)(A) Dodd-Frank Act; Sarfaty 2015: p. 422. Additional raw materials may be added as conflict materials by the Secretary of State under Sec. 1502(e)(4)(B).

⁸ English: *tin, tungsten, tantal and gold*, often abbreviated as »3TG«.

⁹ Sarfaty 2015: p. 420, lists as additional examples the Foreign Corrupt Practices Act, the Lacey Act and the California Transparency in Supply Chains Act.

¹⁰ Global Witness: 2017; Giller/Tost refer to blockchain-technology as a promising solution, Giller/Tost 2019: p. 240.

¹¹ Giller/Tost speaks of a »de-facto trade embargo«, Giller/Tost 2019: p. 238; Lowe 2014: 1; Sarfaty 2015: p. 440, criticizes the law.

¹² Küblböck/Pinter 2016. The *Regional Initiative against the Illegal Exploitation of Natural Resources* has been active since 2006. The Secretary of the International Conference on the Great Lakes Region started work in 2007 in Burundi. The OECD published »Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas« in 2016, third edition.

¹³ 70 Scientists in an open letter of September 9, 2014: <https://suluhu.org/2014/09/09/conflict-minerals-an-open-letter/>; s. also EurAc, a network of 38 organizations in the Great Lakes Region, EurAc: 2017; Sarfaty 2015: p. 423 and p. 440 w. addtl. references.

The SEC estimated in 2012 that the costs of adjustment caused by new corporate business requirements would amount to three to four billion U.S. Dollar.¹⁴ Management consultants issued a position statement in 2017 and found that this estimate was vastly exaggerated. They further noted that companies saved money because of new initiatives and improved risk and compliance management.¹⁵

SCOPE OF APPLICATION

All companies world-wide who are listed on an U.S. stock exchange must comply with SEC reporting duties, including the 343 German companies¹⁶ who are listed in the U.S. These reporting duties now include the new Section 13 (p) (2) of the *Security Exchange Act* (SEA) addressing conflict minerals.¹⁷ All companies who use »conflict minerals which are necessary for the functionality or production of the products« must report the origin of the conflict minerals. This excludes minerals which are merely ancillary to the production process.¹⁸ The company size does not matter.

Products which are not produced by the company, but by business partners, are included.¹⁹ Every company listed on a U.S. stock exchange, including German companies, must investigate whether they use tin, tungsten, tantalum or gold in their production. It is expected that companies demand respective information from their suppliers to be able to comply with their reporting obligation. That means that suppliers are indirectly encouraged to observe the same due diligence in the mining of conflict minerals.²⁰

Companies are subject to additional special reporting requirements when the minerals do not stem from recycling, but from new mining and if the mining location most likely lies in a conflict region. When a company determines that conflict minerals do not matter in their supply chain they do not have to file reports.

The SEC originally expected to receive 6,000 conflict minerals reports in 2014 and 2015. Actually only 1,300 reports were filed.²¹

DUTIES

Companies subject to reporting duties must report the origin of conflict minerals used in production and must dis-

close which due diligence measures were taken when determining the place of origin. The law imposes concrete requirements in terms of what kind of due diligence measures are expected. The SEC and the *U.S. Department of Commerce* fill out these requirements by issuing regulations and issuing guidelines on their websites.

Dodd-Frank minerals are tin, tungsten, tantalum and gold: The *U.S. Secretary of State*²² has the authority to add additional minerals which serve to finance DRC conflicts to the current list.²³

When examining their supply chains, companies must follow these three steps:²⁴

1. They must determine whether the minerals are »necessary for the functionality or production of the products«. ²⁵ If not, no reporting is necessary (see above). The quantity of minerals is irrelevant.
2. They must determine the reasonable country of origin (RCO). The RCO inquiry (RCOI) has to be accomplished in a good faith manner and must provide for the ability to recognize conflict minerals from the region versus minerals from recycled materials. The SEC intentionally did not explicitly define which specific measures a company must use when determining the origin, stating that the particular circumstances needed to be considered in this context.²⁶ When it can be assumed that the minerals stem from recycled materials or are not from the conflict region, companies only need to report the products, the origin of the conflict minerals and their RCOI procedure on a reporting form.
3. If there are reasons to believe that conflict minerals do not stem from recycling, but are from the conflict region, companies must intensify the investigation. They must examine whether violent groups are financed by the earnings from conflict minerals.²⁷ Companies must choose a due diligence framework which is accepted either nationally or internationally when dealing with conflict minerals. Companies must file a conflict minerals report outlining the due diligence procedure, countries of origin, mines and smelting plants. This report is to be attached to the reporting form (see # 2 above). If a company is unable to determine that a product is free of conflict minerals from the conflict region, it must list the product on the form.²⁸

¹⁴ SEC Final Rule, August 22, 2012, p.246.

¹⁵ ELM Sustainability Partners LLC 2017.

¹⁶ Sec. 13(p) Securities Exchange Act.

¹⁷ Data bank at www.sec.gov/cgi-bin/browse-edgar, visited on April 20, 2019.

¹⁸ SEC Final Rule 2012: p. 20.

¹⁹ Products are not included, if a company simply purchases a product and affixes its trade mark to the product, without having any influence on the production process.

²⁰ Sarfaty 2015: p. 439.

²¹ Küblböck/Pinter 2017: p.10.

²² The function of the *Secretary of State*, currently Mike Pompeo, corresponds with the function of a Minister for Foreign Affairs in Europe.

²³ Sec. 1502(e)(4) Dodd-Frank Act.

²⁴ SEC Final Rule, August 22, 2012: Step one p.40 et seq., Step two p.140 et seq., Step three p.166 et seq.

²⁵ The SEC states that a mineral is not necessary for production if it no longer exists in the final product, SEC 2012: p. 22.

²⁶ SEC Final Rule, August 22, 2012: p. 24.

²⁷ Sarfaty 2015: p. 422.

²⁸ SEC Final Rule, see above, p. 29.

By referring to national and international conflict mineral frameworks for thorough due diligence, the SEC seeks to contribute to a qualitatively better due diligence, assure the comparability of reports, facilitate auditors' reviews and reduce costs to companies.²⁹ The SEC has the authority to declare due diligence as insufficient and to evaluate those conflict minerals reports as deficient.³⁰

Companies must publish on their websites all SEC forms and reports which they file with the SEC.³¹

Initially the SEC required in the *Final Rule* of 2012 that companies had to affirmatively report in step 3 that mining products were not used to finance violent groups («DRC conflict free») or that the products were not determined to be DRC conflict free. The SEC also initially required companies to contract with an auditing entity in order to obtain approval of their due diligence procedure and a verification that the due diligence report truthfully reflects the actual due diligence measures applied.³² Any independent company was qualified to serve as auditor, if they committed to adhering to the quality standards of the *U.S. Government Accountability Office* (GAO) for audit reports.³³ In the first 2 to 4 years of the transition period the SEC was willing to tolerate that companies evaluated products as «DRC conflict undeterminable».³⁴

A federal court of appeals ruled on April 14, 2014, prompted by the complaint of a trade organization, that the requirement to classify products was unconstitutional,³⁵ that the First Amendment of the Constitution («free speech») preempted provisions which would force companies to classify their own products as required by the conflict minerals regulation. The SEC no longer requires explicit classification and audits.³⁶ On April 7, 2017 the SEC announced that they would no longer impose sanctions if a company does not implement measures under step 3.³⁷

ENFORCEMENT PROVISIONS

If a company does not fulfill its reporting duties, the SEC is authorized to impose the same sanctions they impose for

violations of financial reporting duties.³⁸ Additionally, shareholders can sue companies for damages, especially if shares have lost value when it is disclosed that reports contained incorrect information.³⁹ Insufficient reporting may impair the reputation of companies. California and Maryland have combined their public procurement law with reporting duties under Dodd-Frank. Companies are excluded from bidding for public contracts as long as they do not comply with reporting duties.⁴⁰

²⁹ SEC Final Rule, see above, p. 27.

³⁰ Sec. 13(p)(1)(C) Securities Exchange Act, inserted via Sec. 1502(b) Dodd-Frank Act.

³¹ Dodd-Frank Act (2010) Sec. 1502(E); Sarfaty 2015: p. 438.

³² Sec. 13(p)(1)(A)(i) Securities Exchange Act.

³³ SEC Final Rule, August 22, 2012: p. 28, referring to Government Auditing Standards («the Yellow Book») of the US Government Accountability Office; Sarfaty 2015: p. 439.

³⁴ The general transition period was 4 years and 2 years for small companies; SEC 2012: p. 29.

³⁵ National Association of Manufacturers, et al. v. SEC, et al., No. 13-5252 (D.C. Cir. April 14, 2014); see Sarfaty 2015: p. 441; Woody 2012: p. 1334 w. addtl. references.

³⁶ SEC Statement on Effect of recent Court of Appeals Decision, April 29, 2014.

³⁷ SEC Updated Statement, April 7, 2017.

³⁸ Woody 2012: p. 1338 with additional references.

³⁹ Sec. 18 Securities Exchange Act; see 15 U.S.C § 78m(p)(1)(A)(i) and (ii), also Rule 10b-5; see discussion at Woody 2012: p.1337 et seq.

⁴⁰ S.B. 861, 2011-12 Reg. Sess. (Cal. 2011); H.B. 425 (Md. 2012); cited by Sarfaty 2015: p. 439.

Text: Section 1502 Dodd-Frank Act

(www.congress.gov/bill/111th-congress/house-bill/4173/text)

(a) SENSE OF CONGRESS ON EXPLOITATION AND TRADE OF CONFLICT MINERALS ORIGINATING IN THE DEMOCRATIC REPUBLIC OF THE CONGO.—It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual and gender based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b).

(b) DISCLOSURE RELATING TO CONFLICT MINERALS ORIGINATING IN THE DEMOCRATIC REPUBLIC OF THE CONGO.—Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following new subsection:

(p) DISCLOSURES RELATING TO CONFLICT MINERALS ORIGINATING IN THE DEMOCRATIC REPUBLIC OF THE CONGO.—

(1) REGULATIONS.—

(A) IN GENERAL.—Not later than 270 days after the date of the enactment of this subsection, the Commission shall promulgate regulations requiring any person described in paragraph (2) to disclose annually, beginning with the person's first full fiscal year that begins after the date of promulgation of such regulations, whether conflict minerals that are necessary as described in paragraph (2) (B), in the year for which such reporting is required, did originate in the Democratic Republic of the Congo or an adjoining country and, in cases in which such conflict minerals did originate in any such country, submit to the Commission a report that includes, with respect to the period covered by the report—

(i) a description of the measures taken by the person to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report submitted through the Commission that is conducted in accordance with standards established by the Comptroller General of the United States, in accordance with rules promulgated by the Commission, in consultation with the Secretary of State; and

(ii) a description of the products manufactured or contracted to be manufactured that are not DRC conflict free ('DRC conflict free' is defined to mean the products that do not contain minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country), the entity that conducted the independent private sector audit in accordance with clause (i), the facilities used to process the conflict minerals, the country of origin of the conflict minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.

(B) CERTIFICATION.—The person submitting a report under subparagraph (A) shall certify the audit described in clause (i) of such subparagraph that is included in such report. Such a certified audit shall constitute a critical component of due diligence in establishing the source and chain of custody of such minerals.

(C) UNRELIABLE DETERMINATION.—If a report required to be submitted by a person under subparagraph (A) relies on a determination of an independent private sector audit, as described under subparagraph (A)(i), or other due diligence processes previously determined by the Commission to be unreliable, the report shall not satisfy the requirements of the regulations promulgated under subparagraph (A)(i).

(D) DRC CONFLICT FREE.—For purposes of this paragraph, a product may be labeled as 'DRC conflict free' if the product does not contain conflict minerals that directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.

(E) INFORMATION AVAILABLE TO THE PUBLIC.—Each person described under paragraph (2) shall make available to the public on the Internet website of such person the information disclosed by such person under subparagraph (A).

(2) PERSON DESCRIBED.—A person is described in this paragraph if—

(A) the person is required to file reports with the Commission pursuant to paragraph (1)(A); and

(B) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

(3) REVISIONS AND WAIVERS.—The Commission shall revise or temporarily waive the requirements described in paragraph (1) if the President transmits to the Commission a determination that—

(A) such revision or waiver is in the national security interest of the United States and the President includes the reasons therefor; and

(B) establishes a date, not later than 2 years after the initial publication of such exemption, on which such exemption shall expire.

(4) TERMINATION OF DISCLOSURE REQUIREMENTS.—The requirements of paragraph (1) shall terminate on the date on which the President determines and certifies to the appropriate congressional committees, but in no case earlier than the date that is one day after the end of the 5-year period beginning on the date of the enactment of this subsection, that no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.

(5) DEFINITIONS.—For purposes of this subsection, the terms 'adjoining country', 'appropriate congressional committees', 'armed group', and 'conflict mineral' have the meaning given those terms under section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

(c) STRATEGY AND MAP TO ADDRESS LINKAGES BETWEEN CONFLICT MINERALS AND ARMED GROUPS.—

(1) STRATEGY.—

(A) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of State, in consultation with the Administrator of the United States Agency for International Development, shall submit to the appropriate congressional committees a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products.

(B) CONTENTS.—The strategy required by subparagraph (A) shall include the following—

(i) A plan to promote peace and security in the Democratic Republic of the Congo by supporting efforts of the Government of the Democratic Republic of the Congo, including the Ministry of Mines and other relevant agencies, adjoining countries, and the international community, in particular the United Nations Group of Experts on the Democratic Republic of Congo, to—

(I) monitor and stop commercial activities involving the natural resources of the Democratic Republic of the Congo that contribute to the activities of armed groups and human rights violations in the Democratic Republic of the Congo; and

(II) develop stronger governance and economic institutions that can facilitate and improve transparency in the cross-border trade involving the natural resources of the Democratic Republic of the Congo to reduce exploitation by armed groups and promote local and regional development.

(ii) A plan to provide guidance to commercial entities seeking to exercise due diligence on and formalize the origin and chain of custody of conflict minerals used in their products and on their suppliers to ensure that conflict minerals used in the products of such suppliers do not directly or indirectly finance armed conflict or result in labor or human rights violations.

Text: Section 1502 Dodd-Frank Act
(continuation)

(iii) A description of punitive measures that could be taken against individuals or entities whose commercial activities are supporting armed groups and human rights violations in the Democratic Republic of the Congo.

(2) MAP.—

(A) IN GENERAL.—Not later than 180 days after the date of the enactment of this Act, the Secretary of State shall, in accordance with the recommendation of the United Nations Group of Experts on the Democratic Republic of the Congo in their December 2008 report—

(i) produce a map of mineral-rich zones, trade routes, and areas under the control of armed groups in the Democratic Republic of the Congo and adjoining countries based on data from multiple sources, including—

(I) the United Nations Group of Experts on the Democratic Republic of the Congo;

(II) the Government of the Democratic Republic of the Congo, the governments of adjoining countries, and the governments of other Member States of the United Nations; and

(III) local and international nongovernmental organizations;

(ii) make such map available to the public; and

(iii) provide to the appropriate congressional committees an explanatory note describing the sources of information from which such map is based and the identification, where possible, of the armed groups or other forces in control of the mines depicted.

(B) DESIGNATION.—The map required under subparagraph (A) shall be known as the “Conflict Minerals Map”, and mines located in areas under the control of armed groups in the Democratic Republic of the Congo and adjoining countries, as depicted on such Conflict Minerals Map, shall be known as “Conflict Zone Mines”.

(C) UPDATES.—The Secretary of State shall update the map required under subparagraph (A) not less frequently than once every 180 days until the date on which the disclosure requirements under paragraph (1) of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b), terminate in accordance with the provisions of paragraph (4) of such section 13(p).

(D) PUBLICATION IN FEDERAL REGISTER.—The Secretary of State shall add minerals to the list of minerals in the definition of conflict minerals under section 1502, as appropriate. The Secretary shall publish in the Federal Register notice of intent to declare a mineral as a conflict mineral included in such definition not later than one year before such declaration.

(d) REPORTS.—

(1) BASELINE REPORT.—Not later than 1 year after the date of the enactment of this Act and annually thereafter until the termination of the disclosure requirements under section 13(p) of the Securities Exchange Act of 1934, the Comptroller General of the United States shall submit to appropriate congressional committees a report that includes an assessment of the rate of sexual- and gender-based violence in war-torn areas of the Democratic Republic of the Congo and adjoining countries.

(2) REGULAR REPORT ON EFFECTIVENESS.—Not later than 2 years after the date of the enactment of this Act and annually thereafter, the Comptroller General of the United States shall submit to the appropriate congressional committees a report that includes the following:

(A) An assessment of the effectiveness of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b), in promoting peace and security in the Democratic Republic of the Congo and adjoining countries.

(B) A description of issues encountered by the Securities and Exchange Commission in carrying out the provisions of such section 13(p).

(C)(i) A general review of persons described in clause (ii) and whether information is publicly available about—

(I) the use of conflict minerals by such persons; and

(II) whether such conflict minerals originate from the Democratic Republic of the Congo or an adjoining country.

(ii) A person is described in this clause if—

(I) the person is not required to file reports with the Securities and Exchange Commission pursuant to section 13(p)(1)(A) of the Securities Exchange Act of 1934, as added by subsection (b); and

(II) conflict minerals are necessary to the functionality or production of a product manufactured by such person.

(3) REPORT ON PRIVATE SECTOR AUDITING.—Not later than 30 months after the date of the enactment of this Act, and annually thereafter, the Secretary of Commerce shall submit to the appropriate congressional committees a report that includes the following:

(A) An assessment of the accuracy of the independent private sector audits and other due diligence processes described under section 13(p) of the Securities Exchange Act of 1934.

(B) Recommendations for the processes used to carry out such audits, including ways to—

(i) improve the accuracy of such audits; and

(ii) establish standards of best practices.

(C) A listing of all known conflict mineral processing facilities worldwide.

(e) DEFINITIONS.—For purposes of this section:

(1) ADJOINING COUNTRY.—The term “adjoining country”, with respect to the Democratic Republic of the Congo, means a country that shares an internationally recognized border with the Democratic Republic of the Congo.

(2) APPROPRIATE CONGRESSIONAL COMMITTEES.—The term “appropriate congressional committees” means—

(A) the Committee on Appropriations, the Committee on Foreign Affairs, the Committee on Ways and Means, and the Committee on Financial Services of the House of Representatives; and

(B) the Committee on Appropriations, the Committee on Foreign Relations, the Committee on Finance, and the Committee on Banking, Housing, and Urban Affairs of the Senate.

(3) ARMED GROUP.—The term “armed group” means an armed group that is identified as perpetrators of serious human rights abuses in the annual Country Reports on Human Rights Practices under sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (22 U.S.C. 2151n(d) and 2304(b)) relating to the Democratic Republic of the Congo or an adjoining country.

(4) CONFLICT MINERAL.—The term “conflict mineral” means:

(A) columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or

(B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.

(5) UNDER THE CONTROL OF ARMED GROUPS.—The term “under the control of armed groups” means areas within the Democratic Republic of the Congo or adjoining countries in which armed groups—

(A) physically control mines or force labor of civilians to mine, transport, or sell conflict minerals;

(B) tax, extort, or control any part of trade routes for conflict minerals, including the entire trade route from a Conflict Zone Mine to the point of export from the Democratic Republic of the Congo or an adjoining country; or

(C) tax, extort, or control trading facilities, in whole or in part, including the point of export from the Democratic Republic of the Congo or an adjoining country.

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2. CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT (ANTI-SLAVERY MEASURES)

The California Transparency in Supply Chains Act of 2010 compels companies since the beginning of 2012 to disclose measures aimed at preventing slavery and human trafficking in their supply chains.⁴¹ The legislators defined the purpose of the law in the first section. They acknowledge that criminal statutes and the protection of potential victims have improved but that slavery and human trafficking are still happening in each country and is difficult to detect. They state that markets lack the proper incentives to address products tainted by slavery and human trafficking. Without publicly available disclosures consumers are unable to distinguish whether or not companies make efforts to supply products free from the threat of slavery and human trafficking in their supply chains. That is why California wanted to ensure that large manufacturers and retailers disclose their measures against slavery and human trafficking. To accomplish this purpose California inserted a reporting duty (Section 1714.43) into the tort section of the California Civil Code.

SCOPE OF APPLICATION

The reporting duty applies to any companies doing business in California who have annual worldwide gross receipts in excess of \$100 million, if their main business is retail or manufacturing. »Doing business« is defined as: actively pursuing a business with the goal of making a profit, and having a branch office or owning considerable assets in California, or generating considerable revenue or tax obligations in California.⁴² It is not necessary that a person resides in California. It is irrelevant where in the world the main office or subsidiaries are located. The reporting duty even applies to German companies who sell products in California via internet transactions, if they are generating more than \$500,000 in revenue. Since April 24, 2019 foreign companies must register with the *California Department of Tax and Fee Administration* (CDTFA) and pay sales and use taxes, if they generate over \$500,000. The registration assures that foreign companies are known to the tax authority.⁴³

The *California Franchise Tax Board* (tax authority) has estimated that 3.2 % of all retailers and manufacturers in California, i.e. about 3,500 companies, are directly required to report.⁴⁴

⁴¹ Sec. 1714.43 (e) Civil Code.

⁴² Sec. 1714.43 (a) Civil Code and Sec. 23101 California Revenue and Taxation Code: It suffices if a company (alternatively) has its headquarters or administrative office in California, generates revenue over \$500,000 or 25 % of their sales in California, owns assets in California valued over \$50,000 or maintains 25 % of their assets in California or pays more than \$50,000 or 25 % of their taxes in California.

⁴³ Sec. 6203 California Revenue and Taxation Code. See also Newsletter L-632 and L-684 of the California Department of Tax and Fee Administration (CDTFA) at www.cdtfa.ca.gov/formspubs/l632.pdf and www.cdtfa.ca.gov/formspubs/l684.pdf.

⁴⁴ Franchise Tax Board: 2010, 97 and Cal. State Assembly Committee on Judiciary, Analysis of SB 657 (28.6.2010), p. 9 et seq.

DUTIES

Companies must prominently publish on their website how they deal with the risk of slavery and human trafficking in their supply chains.

The terms slavery and human trafficking are not defined. The question has arisen whether also modern forms of slavery are included.⁴⁵

In this context Section (c) poses five (5) questions that call for comprehensive answers. The *Attorney General* (AG) of the *California Department of Justice* has jurisdiction over the enforcement of the law and has published guidelines for companies. Companies have the following duty to report:

- (1) Whether and to which extent they verify supply chains in order to evaluate and address risks of slavery and human trafficking.

The AG has expressed the expectation that companies explicitly disclose whether they have their measurers evaluated by external third parties.⁴⁶ They must disclose whether they use recruiters and whether the recruiters perform an evaluation and prioritization of potential risks.⁴⁷ Recruiting is considered to be especially relevant, since usually there is an increased risk of human rights violations in supply chains, if recruiters are involved.⁴⁸

- (2) Whether and to which extent they audit suppliers in order to evaluate the suppliers' adherence to their own company guidelines for human trafficking and slavery in supply chains. If the audit was not independent and not unannounced, companies have to disclose this fact.

The AG states that companies are free to report how they organize audits, i. e. which method they use to select auditors and how often external supply chain audits are performed.⁴⁹

- (3) Whether and to which extent they compel their direct suppliers to certify that the production materials comply with laws against slavery and human trafficking of those countries in which they are doing business.

The AG encourages companies to ask direct suppliers for proof that they observe protective employment laws and other related laws of the countries in which the suppliers are doing business.⁵⁰

⁴⁵ Determann: 2012, p. 117, suggesting that modern slavery can be considered when there is pressure due to unemployment or poverty to take a job for low wages.

⁴⁶ Sec. 1714.43 (c) 1 Civil Code.

⁴⁷ California Department of Justice Resource Guide, 2015: pp. 11, 12.

⁴⁸ California Department of Justice Resource Guide, 2015: p. 12.

⁴⁹ California Department of Justice 2015: pp. 11, 12.

⁵⁰ California Department of Justice 2015: p. 17.

- (4) Whether and to which extent they implement internal guide lines and procedures designed to hold employees and contract partners accountable, if they do not comply with company guidelines related to slavery and human trafficking.

Companies may disclose whether they have established accountability standards and procedures for employees or contract partners that address non-compliance of the company standards related to slavery and human trafficking.⁵¹

- (5) Whether and to which extent companies offer training programs related to slavery and human trafficking to employees and management who are responsible for supply chain management, with special consideration for risk reduction in the supply chain.

The AG recommends to identify those levels of management who deal with issues of slavery and human trafficking and to list training sessions, including the title of the event.⁵² Companies may also consider to report duration and frequency of training sessions.⁵³

The report must address all five subjects. A short answer such as »We are not involved with measures under the »California Transparency in Supply Chains Act« is not sufficient. The AG expects definitive answers.⁵⁴ Consumers should be able to make a fully informed decision whether to purchase a particular product or whether to accept employment by a particular company.⁵⁵

There are no minimum requirements for due diligence against slavery and human trafficking. Even if a company reports in all five categories that it does not apply any measures, they have complied with reporting requirements.

The report must be prominently displayed on the company website, i. e. it should be easy to find the report when visiting the website.⁵⁶ Companies who do not have a website must respond to all inquiries and mail reports via postal service to the person who requested information.⁵⁷

ENFORCEMENT PROVISIONS

The California AG receives from the California tax office a list of all companies who are subject to the reporting duty.⁵⁸

The AG can file a court action for injunctive relief against a company, if a deficient report was filed, and demand a correct report.⁵⁹ The AG has called on consumers to report violations online.⁶⁰ The AG has sent an informative newsletter to companies.⁶¹ Additional measures have not been reported.⁶²

The legislators have clarified that while the California AG has jurisdiction over the enforcement of public reporting in connection with the Act against slavery and human trafficking, other remedies are available for violations of any other state or federal law.⁶³ If companies exaggerate their efforts of prevention, they can be sued by consumers and competitors under unfair competition laws.⁶⁴ In the fall of 2015 six class actions were filed in California courts against food retailers, alleging that the true conditions in supply chains contradicted the information contained in the company reports.⁶⁵ Until now plaintiffs have not been successful with complaints of this kind. Courts have held that consumers understand that the content of reports is merely an expression of a company effort, and not a (false) assurance of certain production conditions.⁶⁶ So far consumer groups have been unable to convince courts to find that companies must disclose on their packaging that products were derived from a supply chain tainted by slavery, human trafficking and other human rights violations.⁶⁷ Apparently court decisions in similar cases have already motivated companies to describe their due diligence in CSR reports measures realistically, avoiding exaggeration.⁶⁸

It is not advisable to publicly disclose that few or no efforts were made. This is dangerous in two respects: 1. Companies could allege breach of contract, if their contract partner had obligated himself/herself to adhere to a high duty of diligence. 2. Companies could potentially document their own negligence and become liable for damages, if slavery or human trafficking occurred in the supply chain.⁶⁹

Doubts about the efficacy of the *California Transparency in Supply Chains Act* have arisen due to a lack of enforceability.⁷⁰

⁵¹ California Department of Justice 2015: pp. 30, 31.

⁵² California Department of Justice 2015: p. 21.

⁵³ Id.

⁵⁴ California Department of Justice 2015: p. 22.

⁵⁵ Determann 2012: p. 119.

⁵⁶ Sec. 1714.43 (b) Civil Code. *The Attorney General* advises to place the link to the required information on the website's homepage, California Department of Justice 2015: p. 5.

⁵⁷ Sec. 1714.43 (b) Civil Code.

⁵⁸ Sec. 19547.5 Cal. Revenue and Taxation Code, inserted via Sec. 4 of the California Transparency in Supply Chains Act.

⁵⁹ Sec. 1714.43 (d) Civil Code.

⁶⁰ Press release of April 13, 2015; <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/consumer-alert.pdf>.

⁶¹ Newsletter of April 1, 2015; <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/letter.pdf>.

⁶² Greer believes that the reason for this lack of measures is that *injunctive relief* is only granted in obvious, unique cases, Greer 2017: p. 41 et seq.

⁶³ Sec. 1714.43 (d) Civil Code.

⁶⁴ Cusumano/Ryerson 2013; Determann 2012: p. 119.

⁶⁵ Hagey/Cross 2015.

⁶⁶ Tulumello/Ising/Meltzer 2017.

⁶⁷ Tulumello/Ising/Meltzer 2017.

⁶⁸ Tulumello/Ising/Meltzer 2017.

⁶⁹ Determann 2012: p. 119.

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Text: California Transparency in Supply Chains Act of 2010**§ 1. Title****§ 2. The Legislature finds and declares the following:**

- (a) Slavery and human trafficking are crimes under state, federal, and international law.
- (b) Slavery and human trafficking exist in every country, including the United States, and the State of California.
- (c) As a result of the criminal natures of slavery and human trafficking, these crimes are often hidden from view and are difficult to uncover and track.
- (d) In recent years, significant legislative efforts have been made to capture and punish the perpetrators of these crimes.
- (e) Significant legislative efforts have also been made to ensure that victims are provided with necessary protections and rights.
- (f) Legislative efforts to address the market for goods and products tainted by slavery and trafficking have been lacking, the market being a key impetus for these crimes.
- (g) In September 2009, the United States Department of Labor released a report required by the Trafficking Victims Protection Reauthorization Acts of 2005 and 2008 which named 122 goods from 58 countries that are believed to be produced by forced labor or child labor in violation of international standards.
- (h) Consumers and businesses are inadvertently promoting and sanctioning these crimes through the purchase of goods and products that have been tainted in the supply chain.
- (i) Absent publicly available disclosures, consumers are at a disadvantage in being able to distinguish companies on the merits of their efforts to supply products free from the taint of slavery and trafficking. Consumers are at a disadvantage in being able to force the eradication of slavery and trafficking by way of their purchasing decisions.
- (j) It is the policy of this state to ensure large retailers and manufacturers provide consumers with information regarding their efforts to eradicate slavery and human trafficking from their supply chains, to educate consumers on how to purchase goods produced by companies that responsibly manage their supply chains, and, thereby, to improve the lives of victims of slavery and human trafficking.

§ 3. Inserted in the Civil Code as § 1714.43

- (a) (1) Every retail seller and manufacturer doing business in this state and having annual worldwide gross receipts that exceed one hundred million dollars (\$100,000,000) shall disclose, as set forth in subdivision (c), its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.
- (2) For the purposes of this section, the following definitions shall apply:
 - (A) »Doing business in this state« shall have the same meaning as set forth in Section 23101 of the Revenue and Taxation Code.
 - (B) »Gross receipts« shall have the same meaning as set forth in Section 25120 of the Revenue and Taxation Code.
 - (C) »Manufacturer« means a business entity with manufacturing as its principal business activity code, as reported on the entity's tax return filed under Part 10.2 (commencing with Section 18401) of Division 2 of the Revenue and Taxation Code.
 - (D) »Retail seller« means a business entity with retail trade as its principal business activity code on the entity's tax return filed under Part 10.2 (commencing with Section 18401) of Division 2 of the Revenue and Taxation Code.

- (b) The disclosure described in subdivision (a) shall be posted on the retail seller's or manufacturer's internet website with a conspicuous and easily understood link to the required information placed on the business' homepage. In the event the retail seller or manufacturer does not have an internet website, consumers shall be provided the written disclosure within 30 days of receiving a written request for the disclosure from a consumer.
- (c) The disclosure described in subdivision (a) shall, at a minimum, disclose to what extent, if any, that the retail seller or manufacturer does each of the following:
 - (1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.
 - (2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.
 - (3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.
 - (4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.
 - (5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.
- (d) The exclusive remedy for a violation of this section shall be an action brought by the Attorney General for injunctive relief. Nothing in this section shall limit remedies available for a violation of any other state or federal law.
- (e) The provisions of this section shall take effect on January 1, 2012.

§ 4. Inserted as § 19547.5

- (a) (1) Notwithstanding any provision of law, the Franchise Tax Board shall make available to the Attorney General a list of retail sellers and manufacturers required to disclose efforts to eradicate slavery and human trafficking pursuant to Section 1714.43 of the Civil Code. The list shall be based on tax returns filed for taxable years beginning on or after January 1, 2011.
- (2) Each list required by this section shall be submitted annually to the Attorney General by November 30, 2012, and each November 30 thereafter. The list shall be derived from original tax returns received by the Franchise Tax Board on or before December 31, 2011, and each December 31 thereafter.
- (b) Each annual list required by this section shall include the following information for each retail seller or manufacturer:
 - (1) Entity name.
 - (2) California identification number.

3. EU: EUROPEAN TIMBER REGULATION

EU Regulation 995/2010 of October 20, 2010 (Regulation) regulates the duties of market participants who place timber and timber products on the market. The Regulation addresses company due diligence to prevent illegal timber harvesting, the duties of monitoring organizations and national agencies.⁷¹

Forests provide many ecological, commercial and social benefits. They present a basis of existence to local inhabitants who are dependent on forests. As the worldwide demand for timber and timber products grows, the forest industry has proven to be weak in terms of institutional and regulatory oversight.⁷² Consequentially, many population groups have lost their basis of existence due to illegal timber logging and violent conflicts.

The Regulation applies to companies who bring timber or timber products on the EU market or trade with timber on the EU market. The import ban for illegal timber allows regulatory and criminal action against companies for the first time.⁷³ It also outlines due diligence duties and traceability.

The Regulation appears to be compatible with world trade rules.⁷⁴ Political and climate organizations welcomed it, even though in practice the operators that are subject to the Regulation have contended with difficulties due to unclear data.⁷⁵

Due diligence duties have been effective since March 3, 2013 (Art. 21).

SCOPE OF APPLICATION

The Regulation applies to companies who place timber or timber products on the EU market for the first time (market participants under Art. 2 (c)) and to companies who purchase the timber after it has been imported or to companies who sell the timber (Art. 2 (d)). Placing on the market can be done through import into the EU or after the timber has been harvested within the EU territory.

The size of the company, how much business they generate with timber, and whether they have their headquarters, a subsidiary or branch office or personnel present in the EU, is irrelevant. The Regulation also applies to companies outside of the EU. Customs agencies generally are told that the company who receives the timber in the EU is the importer.⁷⁶

DUTIES

The Regulation prohibits placing illegally harvested timber or timber products on the market (Art. 4 (1)). Whether timber was logged without infringement on regulations is to be determined according to the local laws. This is about local fees, environmental and forest related rules, land use rights, property rights and trade and customs regulations (Art. 2 (h)). Taking only local laws of a logging location into consideration has been determined insufficient.⁷⁷ Timber for which an export permit under the CITES-Treaty⁷⁸ or under one of the voluntary EU timber trade partnership agreements⁷⁹ has been obtained is already considered legal timber (Art. 3).

Due diligence duties vary for market participants, depending on whether they place the timber on the market for the first time or whether they are traders. Timber products undergo various processing procedures before and after they are placed on the domestic market. Unnecessary bureaucracy is to be prevented (recital 15).

Art. 6 addresses the due diligence procedure for market participants:

- Making information available: Description of product type and the name of the tree species, country (sometimes also the region and logging concession), amount of shipment, name and address of supplier and proof of lawfulness/legality
- Risk assessment and evaluation: Consideration of certifications and complex supply chains as well as knowledge related to the frequency of illegal logging of certain free species in the particular country
- Measures to reduce risk, if the risk assessment results in a finding of a more than negligible risk: Deployment of appropriate and reasonable measures; market participants may demand further information and documents or monitoring by third parties

The EU Commission is authorized by Art. 6 (3) of the Regulation to regulate additional details. The EU issued an implementation regulation in 2010⁸⁰ and published guidelines in 2016.⁸¹

Market participants may comply with due diligence obligations by tasking monitoring organizations with the due dili-

⁷¹ eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:32010R0995.

⁷² Jakel 2015: p. 28 w. addtl. references.

⁷³ Sieveking 2014: p. 548.

⁷⁴ Jakel makes this conclusion following a rough evaluation, Jakel 2015: p. 31.

⁷⁵ Jakel 2015: p. 31.

⁷⁶ EU Commission 2016: No. 1.

⁷⁷ Sieveking 2014: p. 546.

⁷⁸ The Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES).

⁷⁹ Forest Law Enforcement, Governance and Trade Voluntary Partnership Agreements – FLEGT-VPA.

⁸⁰ Implementation Regulation (EU) No. 995/2010 regulates details of due diligence and frequency and type of controls by monitoring organizations. It contains Information about requirements for scientific names of tree species, regions and concessions for logging.

⁸¹ EU Commission 2016.

gence process (Art. 4 (3) and 8). The monitoring organization has to be recognized by the EU Commission. The process for recognition and revocation of recognition of monitoring organizations is regulated in an additional regulation (EU Regulation 363/2012). This regulation contains requirements for technical know-how, capacity of the organization, conflicts of interest and subsequent changes related to these circumstances.

Traders have to be able to name all market participants in the supply chain, from whom they received and to whom they delivered products (traceability). This is different from the requirements for market participants. They have to keep this information for five (5) years (Art. 5).

ENFORCEMENT PROVISIONS

All member states are required to name at least one agency who is responsible for the administration of the Regulation (Art. 7). If timber is or was imported into Germany from abroad, the Ministry of Agriculture and Food has jurisdiction. The Ministry is supported by the German customs authority when monitoring imports.⁸² If timber has been logged in Germany the respective state authority has jurisdiction. Mostly the local agency responsible for forestry has jurisdiction.^{83, 84}

All agencies are expected to collaborate with each other, with agencies in third countries and the EU Commission (Art. 12).

The relevant agencies are required to conduct an assessment of market participants according to a risk-based plan that must be regularly monitored. Agencies must examine the procedures and documents and take samples on location. Market participants must assist agencies as much as is necessary. Agencies may mandate remedial measures, confiscation of timber (products) and disallow marketing of the product (Art. 10). Regret has been voiced that the Regulation does not require market actors to report former trade partners to the agencies when those partners had been suspected of illegal practices.⁸⁵

The EU Commission monitors the reliability of monitoring organizations via *EU Regulation 995/2010*.

Member states specify sanctions provisions for violations of the Regulations. Sanctions are required to be effective and reasonable and should have a deterrent effect. In straightforward cases in Germany, the relevant agency prohibits timber being placed on the market and threatens to impose

a monetary penalty for non-compliance.⁸⁶ The German timber protection law of 2011 (*Holzhandels-Sicherungs-Gesetz*) already specified fines, prison sentences and monetary penalties as sanctions.

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⁸² §1 (2) Sentence 1 and § 3 HolzStG.

⁸³ §1 (2) Sentence 2 HolzStG.

⁸⁴ Art. 3 of the Administrative Rule for the Timber Protection Law and Elimination of Administrative Rules Regarding Forest Reproductive Materials of November 25, 2013.

⁸⁵ Sieveling 2014: p. 546.

⁸⁶ Landgericht (Superior Court) Frankfurt (Oder) of Feb. 14, 2019, VG 5K 1620/17.

4. UK MODERN SLAVERY ACT 2015

The *UK Modern Slavery Act 2015* (MSA) obliges companies to report their measures fighting slavery and human trafficking.⁸⁷ The law implements new criminal offences related to slavery, servitude and forced and compulsory labor.⁸⁸ Additionally, the law contains protective provisions for persons affected by slavery and human trafficking and provides for an independent Anti-Slavery Commissioner and other measures.⁸⁹ The Anti-Slavery Commissioner's duty consists of working towards the prevention, exposure and criminal prosecution of slavery and human trafficking and to identify victims of these acts. The Commissioner is tasked with developing a strategic plan and to reconcile the plan with the Home Secretary. He/she is supported by law enforcement agencies (§§ 40–44). Companies are obligated in Section 6 (§ 54) to publish an annual report (*slavery and human trafficking statement*). Companies must report measures which they have taken to fight slavery and human trafficking in their supply chain or company units. The reports are to be published promptly, not later than six months after the end of the fiscal year, for fiscal years ending after March 31, 2016.⁹⁰

British Parliament intended the MSA to create a level playing field for large companies and provided for extraterritorial application of duties to foreign companies. At the same time the Government has expressed hope that companies develop joint strategies and measures against modern forms of slavery and human trafficking, in competition with each other, but also jointly, and *»to do more, not just because they are legally obliged to, but also because they recognize it is the right thing to do,«* thus envisioning a race to the top.⁹¹

Some authors have explained certain weaknesses in the MSA, especially the lack of requirements related to complex business relationships and supply chains, by pointing to the lack of consultation with interest groups prior to passing the MSA, calling it a top-down legislation.⁹²

In consideration of the fact that the UK Government counts modern forms of slavery and human trafficking among the worst crimes, legal scholars have assessed the MSA as rather weak.⁹³ Evaluations of the first declarations paint a sobering picture. In 2018 most companies only submitted statements of intention, especially statements about the efficacy of measures taken were weak.⁹⁴ The legislature

left companies not really a choice, considering liability risks for making unfair advertising claims and violating trade and business secrets, all in light of not being forced to provide more information because of the lack of specific reporting duties.

It is remarkable that the Government, in respect to an effective implementation of the law, put their trust in civil organizations to critically examine company reports, to denounce them publicly and not in any way to facilitate their efforts. The Government leaves it up to companies to compose statements in regards to structure, content, format and potential references to other documents. There is no list of companies who are subject to reporting and there is no public registry for reports, thus making it difficult for the public to access the reports.⁹⁵

However, the MSA has encouraged development of similar, but more effective laws in other countries (see Australia report in this study). In the meantime, the British Government has established an Evaluation Commission developing improvement recommendations for the British MSA based on the information about these new laws in other countries.⁹⁶

SCOPE OF APPLICATION

British legislature already had passed the UK Bribery Act to fight bribery in 2010, providing for extraterritorial application in an unusually wide-reaching manner.⁹⁷ The MSA also provides for extraterritorial application to numerous foreign persons.

The newly created criminal offences for human trafficking also apply to persons without British citizenship and without a residence in the UK. Whoever conducts human trafficking destined for delivery in the UK or whoever is aiding and abetting such an act will be held criminally liable, no matter where they reside or live (§ 2(7)(b)).

The reporting duty outlined in § 54 applies to companies who do business or part of a business in the UK and who have worldwide turnover of £ 36,000,000 or more, whether the revenue is derived by the parent company or its subsidiaries.⁹⁸ The British Government estimates that 9,000 companies are affected by the reporting duty.⁹⁹

Numerous German companies are affected by the law, since the UK is the third-largest export partner of Germa-

⁸⁷ See www.legislation.gov.uk/uk-pga/2015/30/contents/enacted.

⁸⁸ Sec. 1–12 UK Modern Slavery Act 2015, Chapter 30, Part 1.

⁸⁹ Preamble of MSA; § 40–44: The Independent Anti-slavery Commissioner; § 45–53: Protection of Victims.

⁹⁰ § 61(1) MSA in conjunction with no. 3 of the Commencement and Transitional Provision Regulation for Modern Slavery Act 2015, Secretary of State.

⁹¹ UK Home Secretary: 2017, 1.4.

⁹² Broad/Turnbull 2018: p. 12.

⁹³ Mantouvalou 2018: p. 1045.

⁹⁴ BHRRC 2019.

⁹⁵ Independent Review of the Modern Slavery Act 2015.

⁹⁶ Field/Miller/Butler-Sloss 2019: p. 44, no. 2.6.3, commenting on reporting duty in public procurement.

⁹⁷ Deister/Geier 2011.

⁹⁸ § 54 (2)(a) (12) MSA and nos. 2 und 3 of the Modern Slavery Act 2015, Transparency in Supply Chains Regulation 2015, Secretary of State.

⁹⁹ UK Government 2017: Impact Assessment Modern Slavery Act, Transparency in Supply Chains, p. 2.

ny.¹⁰⁰ About 2,500 German companies maintain a branch office in the UK where they employ more than 37,000 employees.¹⁰¹ A company may be active in a country in various ways. It is open to question whether one-time or occasional deliveries of goods and services or the purchase of company shares are already sufficient to trigger application of the law. The MSA addresses business activity by referring to »carries on business, or part of a business, in any part of the UK«. German companies were »alarmed« by this vague language. They prefer to understand the law to mean that a »single delivery would not be sufficient«.¹⁰²

§ 54 (9) MSA states that the Secretary of State is authorized to publish MSA best practice guidelines. Even the second edition of the guidelines does not clearly define the scope of application. But the sole purchase of a British subsidiary does not fall under »carrying on business«. The Home Secretary reserved all other questions to be answered by using »common sense«.¹⁰³

Large foreign companies with minor business relationships in the UK should expect that reporting duties apply to them.¹⁰⁴

The British Government estimates that a total of 9,000 companies are directly affected by the reporting duties and that consequentially they will incur a total cost of £ 12,500,000 over the next ten years.¹⁰⁵ It is presumed that on average each company would incur costs of £ 1,389 per year. There was no disclosure as to which expenses were considered in this calculation.

DUTIES

The law prohibits in § 1 slavery, servitude and forced or compulsory labor, terms that are used in the *EU Human Rights Convention* (EMRK).¹⁰⁶ Whether there is prohibited conduct is a case-by-case decision and depends on the circumstances. Consent of the victim is, by itself, not dispositive.¹⁰⁷ § 2 defines human trafficking as arranging or faci-

tating the travel of another person with a view of the victim being exploited. § 3 lists six contexts in which exploitation may occur: slavery, servitude, forced or compulsory labor, sexual exploitation, removal of organs, violence, threats or deception as well as minority (under the age of legal consent) or particular vulnerability. For an intentional commission of these crimes courts may impose a life sentence (§ 5), order victim restitution and confiscate vehicles and vessels which were used for human trafficking (§ 8 and 11). Criminal liability also attaches to a person who in the course of his/her employment with a company instigates another person to commit the offence or to aid and abet its commission.

Reporting duties are regulated in § 54. Companies have to publish on their website for each of their fiscal years actual measures taken to assure that modern forms of slavery and human trafficking are prevented in all supply chains and business units.¹⁰⁸ The reports have to be easy to find, i.e. easily accessible. The MSA does not oblige companies to take such measures, but explicitly allows companies to report that no measures were taken.

§ 54 (5) contains six optional aspects which may be addressed by a declaration:

- (a) The organization's structure, its business and supply chains
- (b) Company policies for slavery and human trafficking
- (c) Its due diligence processes related to slavery and human trafficking in the company and supply chains
- (d) The business units and supply chains which carry a risk of slavery or human trafficking and the steps it has taken to assess and manage that risk
- (e) The effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains; measured against such performance indicators as it considers appropriate
- (f) Training about slavery and human trafficking the company offered to its staff

Reporting duties as to slavery and human trafficking apply worldwide; they do not end at the border or at any particular level of the supply chain (§ 54 (12)). The above-referenced six aspects are only suggestions of the legislature (»may include«).¹⁰⁹ Since the law does not provide for mandatory minimum reporting requirements, companies are advised to refrain from disclosing potential business or company secrets.¹¹⁰

¹⁰⁰ Including goods and services.

¹⁰¹ Mayer 2016: pp. 115 and 116.

¹⁰² Comment by Oliver Baumbach, deputy managing director, Chamber of Industry & Commerce, Legal/Tax Dep., Nürnberg, cited by Meves 2016: p. 49.

¹⁰³ UK Home Secretary: 2017, 3.6–3.8. The guidelines do not specify when a franchise cooperation qualifies as »carrying on business« under the MSA. See also no. 3.9. It is recommended to interpret this term in accordance with the language of the UK Bribery Act of 2010: Doris/Zimmer 2016: p. 183.

¹⁰⁴ This results from Sec. 54 (2) und (12).

¹⁰⁵ UK Government, Impact Assessment Modern Slavery Act, Transparency in Supply Chains, 2017, p. 2.

¹⁰⁶ §1(1)(b)(2) refers to Art.4 EMRK, which does not clearly define these terms; EGMR court decisions may be applied for further definition. See also ILO Forced Labor Convention of 1930. Forced labor is labor that is performed under threat of punishment or other precarious evil against the free will of the victim. Treating a person as property is paramount in issues of slavery and servitude.

¹⁰⁷ §1 (3) and (5) MSA.

¹⁰⁸ Sec. 54 (1) and (7) MSA. If a company does not have a website, they have to mail reports to all persons who request it, Sec. 54 (8).

¹⁰⁹ Government guidelines recommend that companies attempt to address all six aspects.

¹¹⁰ Doris/Zimmer 2016: p. 182.

The statement must be approved by executive company organs (Board of Directors, CEO) and must be signed by one of its members (§ 54 (6)).

The MSA does not contain any additional requirements to define the reporting duty. § 54 (9) contains an authorization for the Secretary of State to issue a best-practice guideline. The practical guidelines address restitution, due diligence and refer to the UN Guiding Principles on Business and Human Rights by the UN Human Rights Council which were unanimously approved in 2011. The guidelines also address guidelines from the OECD and other organizations and present practical examples.¹¹¹ Child labor is defined by the ILO Convention Number 138 (Minimum Age Convention) and Number 182 (Convention about Worst Forms of Child Labor). The British government has rated worst forms of child labor as »most likely« one of the modern criminal forms of slavery under the MSA.¹¹²

Even after the practical guidelines were published in 2017 legal practitioners have complained that the terms »supply chains« and »business activity« are ill-defined.¹¹³ The practical guide addressed specific inquiries as to the meaning of those terms by issuing only one sentence: The term supply chain has its »customary meaning«.¹¹⁴ An independent Commission tasked with assessing the MSA advised Parliament in 2019 that companies must examine the whole supply chain.¹¹⁵

Companies who have already taken measures against modern slavery are able to issue statements »quickly and simply« according to the Home Secretary assessment: Companies will need to build on what they are doing year on year. Their first statements may show how they are starting to act on the issue and their planned actions to investigate or collaborate with others to effect change.¹¹⁶

ENFORCEMENT PROVISIONS

If a company does not publish the statement, the Secretary of State may bring civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988. Unlimited Fines may be imposed against non-compliant companies. The government will consider court action if a company has not issued any statement or the statement does not address any measures taken. The government does not examine whether the statement is accurate regarding its content or whether it is written in a clearly understandable manner. Instead it relies on consumers and civic organizations to find the statements, as-

sess and compare them, and publicly denounce weak statements.¹¹⁷

There is no liability for companies who become known for slavery in their supply chain. The government has stated that violation of reporting duties does not imply such liability.¹¹⁸

However, a statement that no measures against slavery and human trafficking were taken is permitted, but should be the exception in light of expected reputation damages.¹¹⁹ A statement that is weak or does not show any measures may increase the risk of liability for companies. For companies finding slavery occurring in their sphere of influence, a lack of human rights due diligence measures has been suggested.

Additionally, managing company organs who have to examine and sign statements are liable under German law for damages that are incurred to the company because of careless examinations of statements. (§ 93 (2) AktG, §43 (3) GmbHG). It is conceivable that a competitor successfully sues a company for unfair competition based on reporting errors.

The government had hoped that competing companies would engage in a »race to the top« and develop further effective measures against slavery and human trafficking.¹²⁰ The Commission tasked with an assessment of the MSA did not comment on this expectation in their interim report, but concludes that when the MSA was introduced in 2015, it was innovative, and further states that the current provisions are not sufficient and it is time for the government to take tougher action.¹²¹

¹¹¹ UK Home Secretary 2017: pp. 15 and 32.

¹¹² UK Home Secretary 2017: p. 18.

¹¹³ Hudson/Elgie 2017.

¹¹⁴ Hudson/Elgie 2017.

¹¹⁵ Field/Miller/Butler-Sloss 2019: p. 41, no. 2.2.5.

¹¹⁶ UK Home Secretary 2017: 1.5

¹¹⁷ UK Home Secretary: 2017, 2.6 to 2.8.

¹¹⁸ UK Home Secretary 2017: 2.3.

¹¹⁹ Mayer 2016: p. 116.

¹²⁰ UK Home Secretary: 2017, 2.5.

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Text: Modern Slavery Act 2015**Part 1**

(Slavery, servitude, forced labor, human trafficking, rules of criminal procedure)

Part 2

(Preliminary court orders)

Part 3

(Enforcement on High Seas)

Part 4

(Anti-Slavery Commissioner)

Part 5

(Protection of victims, assistance with court costs and support for under-age victims)

Part 6

TRANSPARENCY IN SUPPLY CHAINS ETC

54 Transparency in supply chains etc

- (1) A commercial organisation within subsection (2) must prepare a slavery and human trafficking statement for each financial year of the organisation.
- (2) A commercial organisation is within this subsection if it—
 - (a) supplies goods or services, and
 - (b) has a total turnover of not less than an amount prescribed by regulations made by the Secretary of State.
- (3) For the purposes of subsection (2)(b), an organisation's total turnover is to be determined in accordance with regulations made by the Secretary of State.
- (4) A slavery and human trafficking statement for a financial year is—
 - (a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—
 - (i) in any of its supply chains, and
 - (ii) in any part of its own business, or
 - (b) a statement that the organisation has taken no such steps.
- (5) An organisation's slavery and human trafficking statement may include information about—
 - (a) the organisation's structure, its business and its supply chains;
 - (b) its policies in relation to slavery and human trafficking;
 - (c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;
 - (d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;
 - (e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;
 - (f) the training about slavery and human trafficking available to its staff.
- (6) A slavery and human trafficking statement—
 - (a) if the organisation is a body corporate other than a limited liability partnership, must be approved by the board of directors (or equivalent management body) and signed by a director (or equivalent);
 - (b) if the organisation is a limited liability partnership, must be approved by the members and signed by a designated member;
 - (c) if the organisation is a limited partnership registered under the Limited Partnerships Act 1907, must be signed by a general partner;
 - (d) if the organisation is any other kind of partnership, must be signed by a partner.
- (7) If the organisation has a website, it must—
 - (a) publish the slavery and human trafficking statement on that website, and
 - (b) include a link to the slavery and human trafficking statement in a prominent place on that website's homepage.
- (8) If the organisation does not have a website, it must provide a copy of the slavery and human trafficking statement to anyone who makes a written request for one, and must do so before the end of the period of 30 days beginning with the day on which the request is received.
- (9) The Secretary of State—
 - (a) may issue guidance about the duties imposed on commercial organisations by this section;
 - (b) must publish any such guidance in a way the Secretary of State considers appropriate.
- (10) The guidance may in particular include further provision about the kind of information which may be included in a slavery and human trafficking statement.
- (11) The duties imposed on commercial organisations by this section are enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction or, in Scotland, for specific performance of a statutory duty under section 45 of the Court of Session Act 1988.
- (12) For the purposes of this section—
 - »commercial organisation« means—
 - (a) a body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, or
 - (b) a partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,
 - and for this purpose »business« includes a trade or profession;
 - »partnership« means—
 - (a) a partnership within the Partnership Act 1890,

Text: Modern Slavery Act 2015

(continuation)

- (b) a limited partnership registered under the Limited Partnerships Act 1907, or
 - (c) a firm, or an entity of a similar character, formed under the law of a country outside the United Kingdom;
- »slavery and human trafficking« means—
- (a) conduct which constitutes an offence under any of the following—
 - (i) section 1, 2 or 4 of this Act,
 - (ii) section 1, 2 or 4 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (c. 2 (N.I.)) (equivalent offences in Northern Ireland),
 - (iii) section 22 of the Criminal Justice (Scotland) Act 2003 (asp 7) (traffic in prostitution etc.),
 - (iv) section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking for exploitation),
 - (v) section 47 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) (slavery, servitude and forced or compulsory labour), or
 - (b) conduct which would constitute an offence in a part of the United Kingdom under any of those provisions if the conduct took place in that part of the United Kingdom.

Part 7

(Regulation for the implementation of the Act)

5. FRANCE: LOI DE VIGILANCE (CORPORATE DUTY OF VIGILANCE LAW): MONITORING AND REPORTING DUTIES

Two years after the collapse of the factory building Rana Plaza in Bangladesh France introduced a bill in the *National Assembly* to establish a corporate vigilance duty for parent companies and contract-awarding companies.¹²² The legislators reasoned that eleven of the fifty largest European companies (including Switzerland) were French and that therefore France had a special responsibility.¹²³

This new law established a new provision in the *Code de Commerce* to provide for reporting duties subject to liability and sanctions. Large companies in all industry sectors are required to monitor controlled companies and certain business partners in an appropriate manner in order to avoid risks of human rights and environmental violations.

The bill incorporated the essence of the *UN Guiding Principles on Business and Human Rights*, corporate due diligence, and expanded the application of due diligence to environmental and corruption risks. Due diligence is to be enforced with monetary penalties, civil tort damages, expedited court orders and reporting duties. Corruption prevention measures were dropped from the bill during legislative discussions,¹²⁴ but requirements for measures of due diligence and the development of due diligence plans were added.¹²⁵ After numerous controversial discussions in the National Assembly and Senate, 120 representatives demanded a declaration to find the bill unconstitutional. The Constitutional Council (*Conseil Constitutionnel*) affirmed constitutionality, excepting the section on monetary penalties due to a lack of clear preconditions.

On March 28, 2017, the *Loi de Vigilance (Loi)* was published in the Journal of Laws and the corporate due diligence duty has been in effect since then. The reporting duty applies to the first fiscal year after the enactment of the law (Art. 4).

The *Loi* exceeds other corporate due diligence laws in terms of subject matter and enforcement. The French legislature continues its progressive trend of recent years.¹²⁶

It is difficult to assess how effective the law is.¹²⁷ Once the Economic Council (*Conseil Général de l'Économie*) publishes its list of companies that are subject to the law in 2019, civ-

il society will learn which companies are covered by the law. The French organization Sherpa, founded in 2001, advocates protection of persons who have suffered injuries as a result of corporate global business activities. Sherpa has followed the legislative process of the *Loi* from the beginning and now advocates the effective implementation of the *Loi*. By the beginning of 2019, Sherpa had only ascertained 80 monitoring plans and company reports and reported that they had gained little insightful data.¹²⁸ Most reports did not reveal which risks companies had identified and failed to indicate how companies dealt with these risks.¹²⁹ The requirements for reporting do not go quite so far as to invalidate company non-disclosure agreements. It is not expected that many complaints will be filed, since victims do not have access to much internal company data, and are unable to carry their burden of proof.

The law cedes many, including fundamental, questions to law practitioners for clarification.¹³⁰ The French legislators intended to prevent thoughtless »tick-boxing« by company employees and wanted to encourage them to reflect on the concrete requirements. They pursued a definitive strategy when using general terms like »human rights and basic freedoms«, »appropriate measures« and »severe violations« which need to be filled with specific meaning.

SCOPE OF APPLICATION

The new provision in the *Code de Commerce* applies to all companies and all industries with 5,000 or more employees in the parent company and French subsidiaries and sub-subsidiaries. The law also applies to companies with 10,000 or more employees worldwide, including subsidiaries and sub-subsidiaries. The number of employees at the end of two consecutive fiscal years is dispositive.

It does seem to matter which corporate structure the company has chosen, whether it is a stock company, capital company or a partnership. The new Art. 1 L. 225-102-4 (1) *Code de Commerce* seemingly addresses all companies with a large number of employees. However, there remains some doubt about the assumption, since the new provision was inserted as part of reporting duties for stock companies. The French economy is, in global comparison, a country of large companies, especially stock companies. Originally the law, thematically comprehensive and with strong enforcement mechanisms, was intended to apply only to large companies who are responsible for the majority of exports, typically stock companies. Thus, the new law was inserted in the commercial code section on reporting duties of French stock companies (L. 25-102). Some authors have concluded that the term »every company« (*toute société*) only applies to every »*Société Anonyme*«.¹³¹ However, it seems arbitrary to limit the

¹²² Loi n°2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre; www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte.

¹²³ Assemblée Nationale, No. 2578 of February 11, 2015, p. 10, s. Fn. 124.

¹²⁴ Corruption prevention is regulated in the *Loi Sapin 2* of Dec. 9, 2016.

¹²⁵ For legislative process see: www.senat.fr/dossier-legislatif/ppl14-376.html.

¹²⁶ See Fleischer/Danninger 2017: pp. 2849 et seq. for environmental and social reporting duties, corporate liability for the environment and compliance.

¹²⁷ Cautiously optimistic: Brabant/Savourey 2017 [2].

¹²⁸ Sherpa 2019: p. 27, n. 28.

¹²⁹ Sherpa 2019: p. 10.

¹³⁰ See details at: Nasse 2019, pp. 788–800.

¹³¹ So Mansel 2018: p. 444.

scope of application via the company structure. Whether only stock companies were to be obligated has been discussed in the legislature without reaching a final consensus.¹³² The French government commented on the decision of the Constitutional Court from March 23, 2017, stating explicitly that the new provision applies to the French simplified stock company (SAS) and the French partnership by shares (SCA).¹³³ The discussion about the scope of application has not been finalized.¹³⁴ It is expected that the courts will clarify the scope of application.¹³⁵

Considering the literal meaning of »every company«, the question arises whether the law applies to foreign parent companies without a seat in France.¹³⁶ It is thinkable that a German stock company would be required to monitor their French subsidiaries according to the *Loi*. The majority view has been to deny extraterritoriality of the *Loi*.¹³⁷ However, this issue was not seriously discussed during the legislative process and may need to be clarified by the courts. It is clear that French companies have to apply due diligence duties to their foreign subsidiaries.

It is assumed that only 136 large French stock companies fall under the new law due to the high threshold of 5,000 to 10,000 employees. Estimates run from 100 to 250 companies.¹³⁸ The Economy and Finance Minister tasked the Economic Council (*Conseil Général de l'Économie*) with compiling a list of companies subject to the law.¹³⁹

Since corporate due diligence extends to controlled companies and established business relationships it is likely that a lot more French and foreign companies will be obliged by large companies to observe due diligence.

SUBJECT OF THE MONITORING PLAN

The law defines due diligence as a duty to draft and implement a monitoring plan (*plan de vigilance*) for all controlled companies and established business relationships (Art. L.225-102-4 (1) *Code de Commerce*).

This provision addresses various topics: »human rights and basic freedoms, health and safety of persons and the environment«. The subject of corruption was dropped after Senate debates.

The law does not closely define these public protected rights. The legislators and the government decided against a catalogue of international or national standards, since they are in constant development.¹⁴⁰ They decided that it was sufficient if the law only named the kinds of risks that companies had to address in the monitoring plan. The listing of general protected rights without further specification is similar to the wording used by the *UN Guiding Principles for Business and Human Rights*. This approach puts emphasis on the circumstances of a specific business activity and then concludes which human rights beyond the *UN Human Rights Conventions* and beyond *ILO Core Labor Standards* are required to be observed. Some monitoring plans will have to address public international law on human rights and the rights of special groups (such as children, women, ethnic minorities, indigenous populations and migrant workers).¹⁴¹ The law does not address which environmental provisions have to be observed and whether »human rights« means human rights under treaties which France has ratified or whether local foreign law is authoritative.¹⁴²

Companies are advised to take a holistic approach when drafting the monitoring plan. The environment, health and safety are to be taken together as a group, indivisible and intricately connected to human rights.¹⁴³ It is assumed that it is more effective to combine these subject matters than to separate them.¹⁴⁴

Thus, the relationship of these protected rights and their definitions remain blurry. It has been proposed to consult the French environmental code (Art. L. 162-1 *Code de l'Environnement*) when dealing with due diligence directed at the environment.¹⁴⁵ It is not clear whether French standards are supposed to extend worldwide. Courts may have to provide clarification.

¹³² Sherpa 2019: p. 28, n.30.

¹³³ Gouvernement 2017: 1. A. The government points to references in the *Code de Commerce*.

¹³⁴ Brabant/Savourey opine that the *Societas Europaea* (SE) is affected, but doubt application to the SAS, Brabant/Savourey 2017 [1]: p. 3 et seq.

¹³⁵ Sherpa 2019: p. 28.

¹³⁶ Different from the 1st alternative of Art. L.225-102-4 (1) *Code de Commerce*, the 2nd alternative does not require a seat in France, or at the most requires only one of the company seats to be in France.

¹³⁷ Brabant/Savourey 2017 [1]: p. 2 refers to the decision of the French Constitutional Court of March 23, 2017. Also see Bourgeois/Nataf 2017: p. 42; Action Aid 2019: p. 7.

¹³⁸ Sherpa 2019: p. 27, n. 27; Bourgeois/Nataf 2017: p. 43. Fleischer/Danninger 2017: p. 1850 (150 companies); Bougois/Nataf 2017: p. 44 (200 companies). It is estimated that companies subject to the law are responsible for 2/3 of the French international trade.

¹³⁹ Letter of the Minister to the deputy chairman of the Economic Council of May 6, 2019, is in the hands of the author. The Economic Council report is supposed to be available 2019.

¹⁴⁰ Brabant/Michon/Savourey 2017: p. 6 with further references.

¹⁴¹ Official Commentary for UN-Guiding Principle 12 and UN OHCHR 2012: 11, answer to question p. 4; Brabant/Michon/Savourey 2017: p. 6.

¹⁴² The law refers to human rights and basic freedoms under the European Human Rights Conventions according to Fleischer/Danninger 2017: p. 2850 with further references.

¹⁴³ Sherpa 2019: p. 37.

¹⁴⁴ Sherpa 2019: p. 37.

¹⁴⁵ Art.L.162-1 *Code de l'environnement*: »Sont prévenu ou réparés selon les modalités définies par le présent titre: 1° Les dommages causés à l'environnement par les activités professionnelles dont la liste est fixée par le décret prévu à l'article L. 165-2, y compris en l'absence de faute ou de négligence de l'exploitant; 2° Les dommages causés aux espèces et habitats visés au 3° du I de l'article L. 161-1 par une autre activité professionnelle que celles mentionnées au 1° du présent article, en cas de faute ou de négligence de l'exploitant. Le lien de causalité entre l'activité et le dommage est établi par l'autorité visée au 2° de l'article L. 165-2 qui peut demander à l'exploitant les évaluations et informations nécessaires.

EXTENT OF RISK IDENTIFICATION: RELATIONSHIPS IN COMPANIES AND WITH SUBSIDIARIES AND SUPPLIERS

The monitoring plan must contain appropriate measures to identify risk. The risks to be identified are from the following three areas of activity:

- Activities of the company
- Activities of controlled subsidiaries and sub-subsidiaries¹⁴⁶
- Activities of subsidiaries and suppliers in established business relationships, if these activities are connected to the business relationship of the company who has to observe due diligence

Which business partners are to be included in the risk assessment depends on with whom the »established business relationship« (*relation commerciale établie*) exists. This technical legal term was taken from a different section of the French Civil Code.¹⁴⁷ Any company that wants to suddenly end an »established business relationship«, without providing the business partner with a suitable phase-out period, may be liable for damages, even if the business relationship was not documented in writing.¹⁴⁸ French courts have issued many rulings on »established business relationships«, asserting that the specific circumstances are relevant, emphasizing the intention to protect trust between business partners, if a business relationship is suddenly terminated. Deciding factors generally were: a certain stability, continuity and regularity of the relationship.¹⁴⁹ Some law practitioners consider the term »relation établie« and its reliance on trust also relevant under the *Loi*.¹⁵⁰

However, the term »established business relationship« does have a special function in the *Loi*. The focus of the *Loi* is on the rights of third parties and the protection of the environment. To limit the due diligence duty of the *Loi* to business relationships where the parties have trusted each other over a long time-period does not seem to be particularly expedient.¹⁵¹ French law practitioners, civil organizations and labor unions advocate a modified understanding of the word »established«. They promote that the duration of the relationship is less important than the significance of contract performance.¹⁵² Business relationships where the company who was awarded a contract receives instructions or is economically dependent seem to be just as relevant.¹⁵³

Business relationships that are temporary or project-based are considered to be sufficiently established when the contract-awarding company has reserved the right to actively contribute to the partner's planning, development, manufacturing or delivery decisions. Even business relationships where the contractor partner derives the majority of their revenue from the contract-awarding company, should be considered established. This view is supported by the fact that the contractor partner retains significant influence or that it is at least possible to work towards greater influence. Whether the term »relation établie« will be modified remains to be resolved by civil courts.

An established business relationship under the *Loi* may also exist with companies further down the supply chain and not only with immediate business partners.¹⁵⁴ The originators of the *Loi* desired a clarification that the due diligence duty would apply to the total supply chain. They were not successful. A clarification of the extent of due diligence will have to be provided by civil courts.

The French government and the French constitutional court have expressed their understanding that the *Loi* requires companies to demand due diligence from immediate business partners and indirectly and directly controlled companies.¹⁵⁵ This interpretation conforms to the stipulations of the *UN Guiding Principles for Business and Human Rights*.¹⁵⁶ Since due diligence specifications of the *Loi* are limited to the upstream of the supply chain and do not address the use of products and services by end-users downstream, the *Loi* falls short of the *UN Guiding Principles*.¹⁵⁷

CONTENT OF MONITORING PLAN

The monitoring plan must include appropriate prevention measures against severe infringements on the protected rights. The law lists five aspects:

1. A geographic systematization of risks (risk registry) to identify, analyze and prioritize risks
2. Procedures to regularly assess conditions present at subsidiaries, sub-contractors and suppliers with an established business relationship, in relation to the risk registry
3. Appropriate measures to reduce risk or prevent severe violations
4. A warning and whistleblower mechanism for existing and materializing risks which is to be jointly specified together with company unions

¹⁴⁶ Control can be derived by law or by contract. See Brabant/Michon/Savourey 2017: p. 2.

¹⁴⁷ Cossart/Chaplier/de Lomenie 2017: p. 320.

¹⁴⁸ Art. 442-6-I-5° Code de Commerce (*rupture brutale*).

¹⁴⁹ Hübner/Pika 2018: p. 38 with further references.

¹⁵⁰ Bourgois/Nataf 2017: p. 44.

¹⁵¹ Brabant/Michon/Savourey 2017: p. 4.

¹⁵² Hannoun 2017: p. 810, cited in Brabant/Michon/Savourey 2017: p. 4.

¹⁵³ The organization Sherpa considers »instructing companies« and »economic dependence« relevant characteristics, Sherpa 2019: p. 33.

¹⁵⁴ Cossart/Chaplier/de Lomenie 2017: p. 320.

¹⁵⁵ Gouvernement 2017: 1. B; Conseil Constitutionnel 2017: No. 21.

¹⁵⁶ Compare UN-Guiding Principles 13 and 19; same at Brabant/Michon/Savourey 2017: pp. 4 and 5.

¹⁵⁷ Brabant/Michon/Savourey 2017: p. 5.

5. A mechanism to monitor implemented measures and to assess their efficacy

Different from traditional financial risk management systems, is a risk under the *Loi* not only relevant when the course of or the financial success of the business is jeopardized. Relevant are potential effects on sustainability concerns.¹⁵⁸

The law authorizes the State Council (*Conseil d'État*) to impose by decree any additional measures that should be included in the monitoring plan and to specify requirements for plan development. Such a decree has not been developed yet.

When performing risk assessment of subsidiaries and suppliers, companies are required to exchange information about business partners. This is set out as an important measure but has been used by too few companies so far.¹⁵⁹ Competitive disadvantages and non-disclosure agreements prevent many companies from sharing risk-relevant information.¹⁶⁰

PROCEDURE FOR THE DEVELOPMENT OF MONITORING PLANS

The plan should be developed in cooperation with interest groups relevant to the company, if necessary in industry-specific or regional multilateral initiatives (Art. L. 225-102-4 (1) 4th paragraph). This aspect concerns groups who are potentially affected by the business activity, both within the company and supply chain and third parties outside of the company. This is about the workforce and workers employed in the supply chain and neighbors and communities in the surrounding area of manufacturing facilities who may be affected by company waste or soil erosion. Companies are advised to use their own definition of these interest groups, to name and describe them and to explain how they design the consulting process with these interest groups.¹⁶¹

The requirement has special importance, since cooperation with stake holders, such as unions and population groups affected by large projects, has had a positive impact on the design and quality of due diligence plans. The *UN Guiding Principles* have purported that collaboration with interest groups is important for the development and implementation of due diligence plans.¹⁶² The vagueness of the *Loi de Vigilance* regarding the content development of due diligence can thus be overcome.

Some views in the literature have held that procedures to assess the efficacy of measures (No. 5) demand the employment of external auditors and quality inspectors.¹⁶³

ENFORCEMENT THROUGH PUBLICITY

The *Loi de Vigilance* encourages careful implementation of the law through a combination of publicity and society's interest in reputation.

Art. L. 225-102 *Code de Commerce* has required since 2001 that French stock companies address in their reports how they deal with social and environmental consequences of their activities (environmental and social governance). The amended law *Grenelle II* of 2010 expanded this duty and added a duty of independent auditing.

The *Loi de Vigilance* added environmental governance to the requirements for a monitoring plan (Art. L. 225-102-4 and 5). The due diligence plan and the report about its effective implementation must be contained in the environmental report and must be presented at the annual shareholder meeting (Art. L. 225-102-4 paragraph 1, sentence 6).

The monitoring plan and the implementation report must be published separately (Art. L. 225-102-4 paragraph 1, sentence 6). Civil organizations have examined the first available monitoring plans and have pointed out that improvement is possible. So far, assessments have concluded that companies have neither fulfilled the expectations expressed in the *UN Guiding Principles for Business and Human Rights* nor the *Loi de Vigilance*. The majority of published plans were judged incomplete and vague, not indicating whether or how certain themes were prioritized.¹⁶⁴ The *Economic Council* is authorized by the *Economic and Finance Minister* to conduct in 2019 a comprehensive assessment of all monitoring plans and reports that have been published. Parliament is expected to conduct an assessment of the efficacy of the *Loi* in 2020. Hopefully clearer requirements will lead to a better quality of plans and reports.

When a court issues a judgment for damages it may also order the publication of its decision or an excerpt of its decision and may order the execution of its judgment.¹⁶⁵

JUDICIAL ORDERS FOR FULFILLMENT OF DUTIES

If a company does not fulfill their duties (set out above) within three months of being requested to do so, the appropriate court may, upon the request of any person who has a justified interest, order the fulfillment of duties (Art. L. 225-102-4 paragraph 2, sentence 1). Initially, the court

¹⁵⁸ Brabant/Michon/Savourey 2017: 10; compare UN Working Group 2018: Nos. 15, 19 and 90.

¹⁵⁹ Sherpa 2019: p. 34 et seq.; see for example initiatives »Know the Chain«; <http://knowthechain.org/benchmarks/> and »Transparency Pledge«; <http://cleanclothes.org/transparency>.

¹⁶⁰ Sherpa 2019: p. 34 et seq.

¹⁶¹ Presentation of French attorney Elsa Savourey in Paris in September 2018; the protocol is available from the author.

¹⁶² UN-Guiding Principle, 18 (b).

¹⁶³ Fleischer/Danninger 2017: p. 2850 with further references.

¹⁶⁴ Shift Project, 2019: p. 8; Action Aid 2019.

¹⁶⁵ Art. L. 225-102-5 (4) and (5).

may threaten to impose a fine (*astreinte*), and then order payment of a fine. The fine will be recurrent if the violation continues. In urgent cases the court president may issue a preliminary ruling (Art. 2, sentence 2).

Not only aggrieved parties, but also any person or organization who has a justified interest in the procedure is entitled to apply to the court. Thus, NGOs or unions are entitled to file an application with the courts.¹⁶⁶

In June 2019 six French and Ugandan NGOs formally requested the company »Total« to fulfill their duties. Total is required to improve its monitoring plan related to oil drilling in the vicinity of a Ugandan nature reserve. If Total does not comply within the three-month period, these organizations will ask a court to issue a respective order.¹⁶⁷

CIVIL LIABILITY

The main enforcement mechanism of the *Loi* lies in the risk that companies be held liable for damages. The legislators have successfully closed this loop hole that had existed in French tort law.¹⁶⁸

The basis for civil liability can be found immediately following the monitoring section of the *Loi* (Art. L. 225-102-5 *Commercial Code*). Whoever does not develop and implement a monitoring plan, is liable for damages under general French tort law, if the damage could have been prevented otherwise. A company does not have to pay all damages, only the ones which were caused by the action of the company, its controlled companies or business partners in a type of no-fault guarantee or risk liability scheme. Only those damages are payable which could have been prevented by fulfillment of the due diligence duties. This is not an obligation based on reaching a particular result, but an obligation based on making an effort.¹⁶⁹

Aggrieved parties must prove that the parent company could have avoided the damages if they had applied the required due diligence. The draft version of the *Loi* originally provided for a reversal of the burden of proof: If damages arose out of the action of a subsidiary or established business relationship, then it would have been inferred that the application of due diligence would have prevented this particular damage.¹⁷⁰ The proponents of this version were not successful.¹⁷¹ Whoever files a court action for damages must prove a violation of the monitoring duty and causation between the violation and the damage.¹⁷²

The parent company is expected to use their influence in the corporate group to minimize risks which are directly attributable to controlled subsidiaries and sub-subsidiaries, no matter in which business unit these risks are present. The parent company may instruct the management of the controlled company to provide information towards risk identification and to develop and implement measures required by the *Loi de Vigilance*. When the controlled company complies and controls the execution of the parent company's instruction in an appropriate manner, they will have satisfied their monitoring duty. If the subsidiary still causes damage, the parent company is not liable. The same rule applies to the monitoring of established business relationships. Since the company is only liable for their own fault, this does not represent an unlawful liability for the action of a third party or a breach of the corporate veil.¹⁷³

It has not been clear whether French civil courts will apply the new liability scheme in cross-border matters. European provisions in the *Rome-II-Regulation* provide for civil courts to apply in cross-border matters the law of the forum where the damage occurred, i.e. foreign law.¹⁷⁴ Civil courts must qualify the *Loi de Vigilance* as a »for public-order especially important law« in order to be able to apply it. A respective clarification was proposed, but defeated.¹⁷⁵ State obligations under International law, legislative materials and accompanying public discussions should offer sufficient criteria for a conclusion that the *Loi* is a »for public-order especially important law« and applies in cross-border matters.

French attorneys do not expect a wave of complaints to be filed. Proof of non-performance of the (rather vague) due diligence requirements and proof of causation constitute tremendous challenges for plaintiffs. Still, the combination of the risk of having to pay damages and the possibility of a court ordered fine should motivate companies sufficiently to comply with the law's requirements.¹⁷⁶

NO MONETARY PENALTIES

Originally the law provided for a monetary penalty of up to €10 million for a violation of the duty to develop and implement a monitoring plan. The penalty was supposed to be even higher if actual damages were caused.

However, the French Constitutional Council, in response to the application of several members of Parliament invalidated these provisions only a short while after the law was passed. The court held that due diligence duties focus on vague legal terms such as »human rights and basic freedoms« and »appropriate monitoring measures«, and even apply to »es-

¹⁶⁶ Brabant/Savourey 2017 p. 2; Nordhues 2019: p. 317.

¹⁶⁷ www.totalautribunal.org.

¹⁶⁸ For a comparison of the *Loi de Vigilance* with prior French provisions: See Nasse 2019, pp. 777–801.

¹⁶⁹ Cossart/Chaplier/de Lomenie 2017: p. 321.

¹⁷⁰ Proposition de loi N° 1519.

¹⁷¹ Cossart/Chaplier/de Lomenie 2017: p. 317.

¹⁷² Sherpa 2019: p. 10.

¹⁷³ A different view at Nordhues 2019: p. 296 et seq.

¹⁷⁴ An exception can be found in Art. 7 Rom II-Regulation: The law of the forum which gave rise to the loss applies to environmental damages. France might be considered the forum where the loss was caused.

¹⁷⁵ For example see Carpentier et al. 2015.

¹⁷⁶ For a description & evaluation of sanctions in the *Loi*: Brabant/Savourey 2017, p. 2.

established business relationships», including those of subsidiaries with third parties. The court further held that the language of the law was not clear in regards to monetary penalties. They opined that the law was not clear on whether judges could order several penalties of each up to €10 million for separate violations or whether a maximum of €10 million meant that this was the maximum penalty for all violations of a company. The court summarized that the *Loi* was unduly burdened by vagueness and therefore precluded the imposition of sanctions of a punitive character.¹⁷⁷

Otherwise, the Constitutional Council affirmed the constitutionality of the law, finding that the law was specific enough to impose civil liability for damages.¹⁷⁸

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¹⁷⁷ Conseil Constitutionnel 2017: Nos. 9, 10, 12 and 13.

¹⁷⁸ Conseil Constitutionnel 2017: Nos. 15 to 23.

Text: Law n° 2017-399 of March 27th, 2017 relating to the duty of vigilance of parent and contract-awarding companies
(Unofficial translation by Robert Grabosch, Schweizer Legal)

Article 1

Après l'article L. 225-102-3 du code de commerce, il est inséré un article L. 225-102-4 ainsi rédigé:

»**Art. L. 225-102-4. – I.** – Toute société qui emploie, à la clôture de deux exercices consécutifs, au moins cinq mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français, ou au moins dix mille salariés en son sein et dans ses filiales directes ou indirectes dont le siège social est fixé sur le territoire français ou à l'étranger, établit et met en œuvre de manière effective un plan de vigilance.

Les filiales ou sociétés contrôlées qui dépassent les seuils mentionnés au premier alinéa sont réputées satisfaire aux obligations prévues au présent article dès lors que la société qui les contrôle, au sens de l'article L. 233-3, établit et met en œuvre un plan de vigilance relatif à l'activité de la société et de l'ensemble des filiales ou sociétés qu'elle contrôle.

Le plan comporte les mesures de vigilance raisonnable propres à identifier les risques et à prévenir les atteintes graves envers les droits humains et les libertés fondamentales, la santé et la sécurité des personnes ainsi que l'environnement, résultant des activités de la société et de celles des sociétés qu'elle contrôle au sens du II de l'article L. 233-16, directement ou indirectement, ainsi que des activités des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, lorsque ces activités sont rattachées à cette relation.

Le plan a vocation à être élaboré en association avec les parties prenantes de la société, le cas échéant dans le cadre d'initiatives pluripartites au sein de filières ou à l'échelle territoriale. Il comprend les mesures suivantes:

- (1) Une cartographie des risques destinée à leur identification, leur analyse et leur hiérarchisation;
- (2) Des procédures d'évaluation régulière de la situation des filiales, des sous-traitants ou fournisseurs avec lesquels est entretenue une relation commerciale établie, au regard de la cartographie des risques;
- (3) Des actions adaptées d'atténuation des risques ou de prévention des atteintes graves;
- (4) Un mécanisme d'alerte et de recueil des signalements relatifs à l'existence ou à la réalisation des risques, établi en concertation avec les organisations syndicales représentatives dans ladite société;
- (5) Un dispositif de suivi des mesures mises en œuvre et d'évaluation de leur efficacité.

Le plan de vigilance et le compte rendu de sa mise en œuvre effective sont rendus publics et inclus dans le rapport mentionné à l'article L. 225-102.

Un décret en Conseil d'État peut compléter les mesures de vigilance prévues aux 1° à 5° du présent article. Il peut préciser les modalités d'élaboration et de mise en œuvre du plan de vigilance, le cas échéant dans le cadre d'initiatives pluripartites au sein de filières ou à l'échelle territoriale.

II. – Lorsqu'une société mise en demeure de respecter les obligations prévues au I n'y satisfait pas dans un délai de trois mois à compter de la mise en demeure, la juridiction compétente peut, à la demande de toute personne justifiant d'un intérêt à agir, lui enjoindre, le cas échéant sous astreinte, de les respecter.

Le président du tribunal, statuant en référé, peut être saisi aux mêmes fins.

Article 1

After Article L. 225-102-3 of the Commercial Code, the following article L. 225-102-4 shall be inserted:

»**Art. L. 225-102-4. – I.** – Any company that employs, by the end of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within the French territory or abroad, shall establish and effectively implement a vigilance plan.

Subsidiaries or controlled companies that exceed the thresholds referred to in the first paragraph shall be deemed to satisfy the obligations laid down in this article, if the company that controls them, within the meaning of Article L. 233-3 of the French Commercial Code, establishes and implements a vigilance plan covering the activities of the company and of all the subsidiaries or companies it controls.

The plan shall include reasonable and appropriate vigilance measures to identify risks and to prevent serious harms to human rights and fundamental freedoms, to the health and safety of individuals and to the environment, resulting from the activities of the company and of those companies it controls within the meaning of II of Article L. 233-16, directly or indirectly, as well as the activities of subcontractors or suppliers with whom an established commercial relationship is maintained, when these activities are linked to that relationship.

The plan is meant to be drawn up in conjunction with the stakeholders of the company, where appropriate as part of multi-stakeholder initiatives within sectors or at territorial level. It includes the following measures:

- (1) A mapping of risks meant for their identification, analysis and prioritization;
- (2) Regular evaluation procedures regarding the situation of subsidiaries, subcontractors or suppliers with whom an established commercial relationship is maintained, in line with the risks mapping;
- (3) Adapted actions to mitigate risks or prevent serious harms;
- (4) An alert and complaint mechanism relating to the existence or realization of risks, drawn up in consultation with the representative trade union organizations within the company;
- (5) A scheme for monitoring the implementation of measures and evaluating their effectiveness.

The vigilance plan and the report concerning its effective implementation must be published and included in the report mentioned in Article L. 225-102.

A decree issued by the Council of State may expand on the vigilance measures provided for in points 1 to 5 of this article. It may detail the methods for drawing up and implementing the vigilance plan, where appropriate in the context of multi-stakeholder initiatives within sectors or at territorial level.

II. – When a company receives a formal notice to comply with the duties laid down in para. I it does not satisfy its requirements within three months of the formal notice, the competent court may, at the request of any person with standing, order the company, including under a periodic penalty payment, to respect them.

The president of the court, ruling under summary proceedings, may be seized to the same purpose.

Text: Law n° 2017-399 of March 27th, 2017 relating to the duty of vigilance of parent and contract-awarding companies
(continuation)

Article 2

Après le même article L. 225-102-3, il est inséré un article L. 225-102-5 ainsi rédigé :

«**Art. 225-102-5.** – Dans les conditions prévues aux articles 1240 et 1241 du code civil, le manquement aux obligations définies à l'article L. 225-102-4 du présent code engage la responsabilité de son auteur et l'oblige à réparer le préjudice que l'exécution de ces obligations aurait permis d'éviter.

L'action en responsabilité est introduite devant la juridiction compétente par toute personne justifiant d'un intérêt à agir à cette fin.

La juridiction peut ordonner la publication, la diffusion ou l'affichage de sa décision ou d'un extrait de celle-ci, selon les modalités qu'elle précise. Les frais sont supportés par la personne condamnée.

La juridiction peut ordonner l'exécution de sa décision sous astreinte.»

Article 3

[Dispositions déclarées non conformes à la Constitution par la décision du Conseil constitutionnel n° 2017-750 DC du 23 mars 2017.]

Article 4

Les articles L. 225-102-4 et L. 225-102-5 du code de commerce s'appliquent à compter du rapport mentionné à l'article L. 225-102 du même code portant sur le premier exercice ouvert après la publication de la présente loi.

Par dérogation au premier alinéa du présent article, pour l'exercice au cours duquel la présente loi a été publiée, le I de l'article L. 225-102-4 dudit code s'applique, à l'exception du compte rendu prévu à son avant-dernier alinéa.

La présente loi sera exécutée comme loi de l'État.

Article 2

After the same article L. 225-102-3, it is inserted an article L. 225-102-5 and reads as follows:

»**Art. 225-102-5.** – Following the conditions laid down in articles 1240 and 1241 of the Civil Code, a breach of the duties defined in Article L. 225-102-4 of this Code, establishes the liability of the offender and requires him to compensate any damage that the performance of those duties would have prevented.

The claim for tort is brought before the competent court by any person proving standing.

The court may order the publication, dissemination or display of its decision or an extract thereof, according to the terms it specifies. The costs are borne by the convicted person.

The court may order the execution of its decision under a periodic penalty payment.«

Article 3

[Provisions declared not in conformity with the Constitution by the Constitutional Court decision No. 2017-750 DC of 23 March 2017.]

Article 4

Articles L. 225-102-4 and L. 225-102-5 of the Commercial Code apply from the report mentioned in Article L. 225-102 of the same code, relating to the first financial year opened after the publication of this Act.

By way of derogation from the first paragraph of this article, for the financial year during which this Act was published, paragraph I of Article L. 225-102-4 of the said code applies, with the exception of the report in its penultimate paragraph.

This law shall be executed as state law.

6. EU CSR REPORTING DIRECTIVE

European legislators issued the *CSR Reporting Directive*, 2014/95/EU, (Directive) on October 22, 2014, aimed at transparency in reporting of non-financial and diversity data by certain large companies and groups.

The European Commission was motivated by the realization that investors, owners, creditors and customers have a need to evaluate the non-financial performance of large companies but often lack the necessary information to do so.

The Directive 2014/95/EU amended the EU Accounting Directive (2013/34/EU) by establishing requirements for the new reporting duties. The new duties must be implemented by all Member States.

In Germany, these new reporting duties were inserted into §§ 289b et seq. of the Commercial Code (Handelsgesetzbuch, HGB) and have been effective since April 19, 2017. The German implementation can be judged as reticent in that the scope of application is narrow. German companies need only report sustainability risks that are very probable or grievous and economically relevant, and there is no provision for comparing reports between companies. Overall there is doubt whether the CSR reporting duties in Germany will result in the corporate behavior modification intended by EU legislators.¹⁷⁹

SCOPE OF APPLICATION

The German legislature implemented the EU Directive by providing a bare minimum scope of application. Under § 289b HGB only those companies with more than 500 employees and total assets of over €20 million or annual sales revenue of over €40 million are required to report. The scope of application is further reduced by applying only to companies whose shares are traded on a German stock exchange (capital market oriented companies). That means that large companies like *Edeka* and *Rewe* are excluded from reporting duties, since they are privately owned.

Out of about 11,200 large companies in Germany, 3,500 to 4,000 companies would have fallen under the CSR Guideline. According to a study of the *Hans-Böckler-Stiftung* (a foundation), by limiting application to capital market oriented companies, only 536 companies are subject to the Directive with over half doing business as a credit institution or insurance company.¹⁸⁰

DUTIES

Companies are required to disclose relevant, useful information that is necessary to understand their development, performance, position and impact of their activity. Under Direc-

tive 2014/95/EU, large companies are required to publish reports on the policies they implement in relation to the following matters:

- environmental protection
- social responsibility
- treatment of employees
- respect for human rights
- anti-corruption and bribery

Companies must disclose, relative to the above five matters, the following information:

- A brief description of the undertaking's business model;
- Company policies related to non-financial matters, including due diligence processes implemented; if it does not have a policy where it is required, it must explain why;
- The outcome of these policies;
- The principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks;
- Non-financial key performance indicators relevant to the particular business.

The reporting duty related to risks under (d) may apply to the whole supply chain, however, the reporting duty is further reduced for German companies in the following two areas:

First, only »principal risks« matter. The EU Commission defines principal risks to mean risks which are necessary for gaining understanding of their impacts on sustainability or on the financial condition of a company.¹⁸¹ German legislature defines »principal risks« to mean risks which diminish sustainability concerns AND are necessary for an understanding of the company's financial condition.¹⁸² Thus, German companies may neglect risks in distant, multi-redundant, easily exchangeable supply chains. Grave sustainability damages may occur or be imminent that may only cause a rerouting of production processes, without customers ever hearing about it. German auditors are of the opinion that the implementation of the EU Directive in German law did not lead to any new reporting contents, since CSR risks had been already reportable if they were relevant to the financial condition of the company.¹⁸³ Actually 63% of German com-

¹⁷⁹ Humbert 2019.

¹⁸⁰ Kluge/Sick 2016: p. 5.

¹⁸¹ EU Commission 2019: p. 4; critical view at Baumüller 2019.

¹⁸² Official justification of the Upper House (*Bundesrat*), Ds.547/16 of September 23, 2018, p. 52: CSR risks also »quite often« constitute economic risks. There was no discussion as to why other CSR risks should not be reported.

¹⁸³ Schmidt/Strenger 2019: p. 485.

panies subject to the reporting duty still do not provide any CSR risk data.¹⁸⁴ The German legislature did not recognize that investors and consumers were more interested in obtaining greater clarity about sustainability aspects than the company's financial condition.¹⁸⁵

Second, the German legislature provided for a »double« limitation of the reporting duty when implementing the Directive in the German Commercial Code. Art. 19a (1) (d) of the Directive demands reporting of »likely adverse impacts« while § 289c (3) No. 4 HGB only demands reporting of »likely grave adverse impacts«. The German government justified their wording by referring to EU recitals (a preliminary explanation of the reasons for the Directive) of »very likely grave negative impacts«, stating that a restrictive wording was covered by the Directive in a broad sense. The general rule for the application and implementation of EU law is that recitals may only be considered if the wording leaves a margin for interpretation. The German government consciously did not refer to this principle of legal interpretation.¹⁸⁶

Overall, sustainability reports remain mostly vague and patchy.

Non-financial information must be provided in the status report. References to the financial section of the report are required. The EU Commission published non-binding guidelines about the method of reporting.¹⁸⁷

Reporting duties do not include mandatory due diligence. Companies are free to report that they do not observe any policies. It is possible that reporting of sustainability themes may at least gain the attention of company management.

ENFORCEMENT PROVISIONS

Non-financial information as part of the status report must be presented to the supervisory company organ for assessment.¹⁸⁸ § 171 AktG requires that the supervisory organ examine the reports. Generally corporate supervisory organs employ external third parties, i.e. auditors, to accomplish this task.¹⁸⁹

If companies do not comply with the reporting duty or make false declarations, the German Ministry for Justice and Consumer Protection may order a fine of up to €10 million or 5 % of annual revenue.

If declarations are false or unreasonably positive, competitors and consumer organizations may request in court the issuance of a »cease and desist« order against the company under unfair competition laws. The prohibition of misleading statements under §§ 5 and 5a of the law against unfair competition (*»Gesetz gegen unlauteren Wettbewerb«*) applies to sustainability reports as well.¹⁹⁰

The efficacy of the Directive and national implementation is dependent on companies' interest in preserving a good reputation. Reputation is affected when market participants are easily able to use and compare published information. The implementation of the Directive in Germany does not contain any requirements as to which of the internationally recognized reporting frame works companies should use. There is no guidance on how to structure a report or how and which key performance indicators are to be applied in a quantitative assessment and presentation. This impedes utility and comparability of information for consumers. Even auditors speak of a »confusing variety related to the new CSR reporting«.¹⁹¹

Art. 3 of the *CSR Reporting Directive* imposed on the EU Commission the task to report on the national implementation of the Directive prior to December 6, 2018 and to assess and submit suggestions for improvement. No report has been published yet.

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¹⁸⁴ IÖW 2019: pp. 16 & 28.

¹⁸⁵ Discussion of the terms »risk« & »principal risk« at Grabosch 2015: p. 15 et seq. See also Rauch/Weigt 2018: p. 122 for a discussion of trade-offs.

¹⁸⁶ The Upper House complained that the German draft incorrectly restricted the wording of the Directive, exceeding interpretation limits; the government refused all changes that were suggested. See also Bertram/Brinkmann/Kessler/Müller 2018: § 289c HGB, margin no. 5.

¹⁸⁷ COM 2017/C 215/01.

¹⁸⁸ § 170 AktG; See also Haller/Gruber 2018; Financial Experts Association e.V. 2017.

¹⁸⁹ Velte/Scheid 2018: p. 1681.

¹⁹⁰ Von Walter 2014.

¹⁹¹ Kolb/Niechcial 2017.

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7. AUSTRALIA: MODERN SLAVERY ACT 2018

In the fall of 2018 the Australian legislature passed the *Modern Slavery Act 2018* («MSA») to provide for reporting duties related to modern slavery. The Act requires companies to take measures to overcome risks of modern slavery in their business and supply chains.¹⁹² The reporting duties are comparable to the duties imposed by California and the U.K. The first year of reporting was expected to start on July 1, 2019.¹⁹³

When compared to the *U.K. Modern Slavery Act 2015*, the Australian Modern Slavery Act is an improvement. The Australian provisions not only require reports from private companies, but also from the *Commonwealth* for public procurement deliveries. Similar laws in the U.K. and France are often not definitive in terms of which companies must report.

Civil society hopes that the annual report by the Minister of Home Affairs about implementation of the MSA will show which companies refuse to abide by it.¹⁹⁴

SCOPE OF APPLICATION

The Australian reporting duty applies to certain companies, NGOs, universities and the Australian government (*Commonwealth*).¹⁹⁵

The MSA applies to business entities who have a consolidated revenue of at least AU\$ 100 million (about €66 million), are an Australian entity or carry on business in Australia at any time in the reporting period.¹⁹⁶ A foreign corporate entity carries on business in Australia if they carry on business within the meaning of the Corporations Act 2001, including have a branch office in Australia.¹⁹⁷ Fiscal entities will be aware of those entities in the context of taxation. The government plans for the MSA to apply to foreign corporate entities carrying on business in Australia if they must register with the Australian Securities and Investments Commission (ASIC) because of size or industry.¹⁹⁸ That means that foreign companies with an Australian branch office or business activity without a branch office are subject to reporting. The Australian Minister for Home Affairs expects that about 3,000 companies are required to report.¹⁹⁹

Smaller Australian companies or companies doing business in Australia may voluntarily file reports with the new public report registry.²⁰⁰

DUTIES

The focus of the Act is on reports about risks of modern slavery. Modern slavery includes:²⁰¹

- Slavery, slave-like actions and human trafficking, extensively defined in §§ 270 to 271 of the Australia criminal code (33 pages), without regard for the location of the action, both inside the country or abroad.
- Human trafficking under Art. 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime of 2000
- The worst forms of child labor under Art. 3 of the *Worst Forms of Child Labor ILO Convention (No. 182)*

Every report must contain the following information:²⁰²

- (a) The name of the company
- (b) A description of the company's structure, business processes and supply chains
- (c) A description of all modern slavery risks in the business processes and supply chains of the reporting company and all companies that they own or control
- (d) A description of risk assessment and risk management measures of the reporting company and its owned and controlled companies, including due diligence and restitution measures
- (e) A description how the company evaluates the efficacy of these measures
- (f) The consultation processes within the group
- (g) All other information which the company deems relevant.

The report must be approved by management (Executive Board), signed by one of its members and filed within six months of the end of the fiscal year with the Minister of Home Affairs (§ 13 (2) MSA). Groups may file a joint report for all group entities (§ 14 (1) MSA).

The MSA tasks the Minister of Home Affairs with publishing a public report registry which is accessible without cost. The Minister is authorized to disclose to the public those reports which do not comply with the requirements (§§ 18 to 19 MSA).

¹⁹² § 3 MSA.

¹⁹³ § 2 MSA. The first reports are expected to be filed in early 2021, Sinclair 2019: p. 87.

¹⁹⁴ Sinclair 2019: p. 87.

¹⁹⁵ §§ 5 (1)(2) and 6 MSA.

¹⁹⁶ § 5(1) MSA.

¹⁹⁷ § 5 (2) MSA, § 21 (1) Corporations Act 2001.

¹⁹⁸ Department of Home Affairs 2019: 17. The government guideline refers to the duty to register with the Australian Securities & Investments Commission.

¹⁹⁹ Fact Sheet of the Department of Home Affairs 2018.

²⁰⁰ § 6 MSA.

²⁰¹ § 4 MSA; see Christ/Burritt 2018: p. 104 et seq.

²⁰² § 16 MSA.

ENFORCEMENT PROVISIONS

After reports are received, they are available to the public in an online registry, without cost. The Minister of Home Affairs is authorized to publish the names of reporting companies and the nature of their violations, if they violate the reporting duty (§ 16 A (4)). The Minister of Home Affairs must publish an annual report about the implementation of the MSA (§ 23 A MSA). The MSA relies on civil organizations for a critical review of the reports. It is left to them to evaluate and compare reports, to examine their meaningfulness and accuracy and to publicly denounce them. It is expected that companies are motivated to report in meaningful and accurate ways.

The MSA does not provide for fines or monetary penalties.²⁰³ The legislature intends to review whether fines or other sanctions should be added after three years.²⁰⁴

The legislature did not assign an anti-slavery commissioner with wide competencies. The Ministry of Home Affairs formed a department for business relationships to support companies in their dealings with modern forms of slavery.

If the Minister of Home Affairs is of the opinion that a report is insufficient under the MSA provisions, he/she may demand from the company, in writing, to provide additional explanations or improvements within 28 days (minimum period) from request (§ 16 A MSA). The Ministry will advise the Company that they will publish the reporting violation and the name of the company. A company has the right to request a review of the Minister's decision to the Administrative Appeals Tribunal (§ 16 A (4)(6) MSA).²⁰⁵

Additionally, the Ministry of Home Affairs will publish an annual report about compliance with the MSA and will identify best-practice examples (§ 23 MSA). The MSA provides for a »three-year-review« of efficacy and implementation of its provisions (§ 24 MSA).

The Ministry of Home Affairs is authorized to issue regulations which are necessary to carry out or giving effect to the Act. Civil and criminal sanctions are explicitly excluded from these regulations (§ 25 MSA).

MODERN SLAVERY ACT 2018 OF NEW SOUTH WALES

New South Wales was not deterred from passing their own Modern Slavery Act (MSA, NSW) on June 27, 2018 which served the Commonwealth as an ambitious model.²⁰⁶ The Act applies to companies who conduct business, have a

consolidated revenue of at least AU\$ 50 million (about € 31 million) and employ workers in New South Wales. The supply chain requirements (§ 24 MSA New South Wales) correspond with federal requirements. The state MSA provides for the appointment of an anti-slavery commissioner for New South Wales and authorizes him/her to impose fines of up to AU\$1.1 million if a company files a false or misleading report or no report at all. Companies that have more than AU\$100 million annual revenue and are subject to the federal MSA, are excluded from fines.²⁰⁷

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²⁰³ Sinclair 2019: p. 86.

²⁰⁴ Sinclair 2019: p. 87.

²⁰⁵ § 16A (6).

²⁰⁶ Modern Slavery Act 2018, published at www.legislation.nsw.gov.au. A short summary in Marshall/Jones 2018: p. 29 et seq.

²⁰⁷ Sinclair 2019: p. 87.

8. NETHERLANDS: WET ZORGPLICHT KINDERARBEID (CHILD LABOR REGULATION)*

The Dutch Senate voted on May 14, 2019 for a law addressing due diligence duties to prevent child labor. In February 2017, this law had already been passed by the *Tweede Kamer*, the lower house (House of Representatives) of the Dutch Parliament.²⁰⁸ The »Wet Zorgplicht Kinderarbeid« (abbreviated: »Wet«) has not taken effect yet, pending a royal decree expected to be issued sometime after January 1, 2020. Companies must abide by the law within six months of the law taking effect.

The Dutch legislature considers the right of consumers to be protected from misleading information a fundamental right and believes that the vast majority of consumers would not purchase goods or services derived from child labor. Thus, the legislature decided to provide Dutch consumers with the necessary market information to determine whether companies exert reasonable efforts to prevent child labor in the supply chain of goods and services.

The Dutch government has offered financial assistance with measures against child labor to those companies who participate in one of the sector-specific human rights roundtables.²⁰⁹

SCOPE OF APPLICATION

The law applies to all companies who deliver goods or services to Dutch consumers, no matter whether the final consumer is a company or an individual consumer (Art. 4 (1)). Foreign companies who sell goods or services to Dutch consumers at least twice a year (Art. 4 (1) S. 2) are explicitly included in the law, even if they do not have an office in the Netherlands. The only foreign companies that are excluded are those who only transport or transship goods (for example through the harbor of Rotterdam), Art. 4 (2) S. 2.

The law indirectly effects additional companies in the global supply chain, since companies who are subject to the law must develop and implement measures to reduce risks of child labor in the whole supply chain. The draft bill provides for »regulatory exemptions for some categories of companies« (Art. 6). The government announced that they would be guided by »proportionality« when defining the requirements for exempt companies.

DUTIES

Companies must submit a onetime declaration that they observe appropriate due diligence under Art. 5 to prevent child labor. The government agency which will be authorized to receive these declarations has not been assigned yet. The declaration must be submitted within six months of the law's effective date.

To define the term »child labor« the law refers to ILO Conventions: The *Minimum Age Convention (No. 138)* of 1973 regulates the minimum age for labor by young persons and children in consideration of the circumstances of the employment conditions, with special provisions for labor that is harmful to the health or development of young persons. The *Worst Forms of Child Labor Convention (No. 182)* of 1999 regulates worst forms of child labor and its prevention. The Dutch Parliament opined that adopting the ILO definitions made the implementation of the law easier.

There are few countries who have not ratified the ILO Conventions. The literal meaning of the draft and its purpose proscribe that due diligence measures are especially relevant for the supply chain in those countries which have not ratified ILO Conventions.

Companies must fulfill their duties by taking the following three steps:

1. A due diligence assessment must be performed to determine whether there is a reasonable suspicion (»*redelijk vermoeden*«) that child labor is used in the supply chain. The term »*redelijk vermoeden*« is commonly used in Dutch criminal and civil law. Companies must consider information from sources which are »*reasonably identifiable and available*« and must abide by the requirements of the future regulation. It is expected that the regulation will adopt the recommendations of the *ILO-IOE Child Labor Guidance Tools* (Art. 5 (2) and (3)). Also, the »MVO-Risk-Checker« developed by the Dutch government may be a tool included. Parliament hearing notes reveal that a reasonable suspicion is justified if the particular country is known for child labor in the production of comparable goods and services. If there is no reasonable suspicion, then companies must advance straight to step three.
2. If there is a reasonable suspicion, the company must develop and implement an »action plan«, following the recommendations of the *ILO-IOE Child Labor Guidance Tools*. Further requirements for the action plan are expected to be included in the future regulation and in industry-specific »joint action plans« which are developed by NGOs and trade associations. The *Minister of Foreign Trade* may authorize these plans, thus acknowledging that the measures in the plan fulfill legal requirements. This is particularly true for the »*Covenants*« which are currently developed by industry-specific round-tables of the Dutch government.

* The author thanks attorney Wouter Timmermans, Stellicher Advocaten, Arnheim, for his contribution.

²⁰⁸ *Wet Zorgplicht Kinderarbeid*, enacted on February 7, 2017, Kamerstukken 34506, nos. 1–3.

²⁰⁹ *Fonds Bestrijding Kinderarbeid*, established by the government on June 12, 2018.

3. A company submits a »declaration about the application of appropriate due diligence«. This declaration must only be filed once and does not need to be renewed. The declaration can consist of a boiler-plate statement »that appropriate due diligence to prevent child labor« was performed. The Wet authorizes the government to add requirements for the declaration, however, the government commented on July 17, 2017 that they »did not see the need for supplementary requirements«. Companies must report their statements to the supervisory authority and all declarations will be published by the supervisory authority in a registry. It is anticipated that the consumer protection agency »Autoriteit Consument & Markt« will serve as supervisory authority, but maybe a new agency will be established.

ENFORCEMENT PROVISIONS

Every person and every company whose interest is affected may file a complaint with the supervisory authority, pointing to a specific violation against the law (Art. 3). It is not sufficient to voice a general suspicion based on hearsay or low prices, which do not constitute »concrete evidence« under the law. The government clarified that concrete evidence is required.²¹⁰

If the company does not remedy the violation within six months, the supervisory authority may impose a fine of €820,000, or may order a fine of up to 10 % of annual company revenue in special cases. Managers/CEOs should expect criminal consequences if they are charged with recurrent violations within five years. A prison sentence of up to six months (Art. 6 (1)) may be imposed. The legislature decided on substantial sanctions because they deemed it important to prevent child labor.²¹¹

It is presumed that injured children are prevented from suing for damages against a company who violates the duties of the Wet. The Dutch legal system focuses on the primary purpose of a law and, in this context, that is consumer protection.

The legislature's objective is that consumers of goods and services review the public registry and consider the information when making purchasing decisions.

OUTLOOK

The declaration to the supervisory authority and its publication seem to be the foremost concerns of the law. However, there are no specific requirements as to its content and the declaration must only be submitted on one occasion. The due diligence duties outlined in the law should be

considered just as important.²¹² They apply no matter whether a (truthful) declaration was submitted or not and can be enforced by persons with a legitimate interest in the matter.

The due diligence duty is extraterritorial in two aspects: 1. It relates to child labor which takes place in supply chains outside of the Netherlands. 2. It applies to foreign companies who do not have an office in the Netherlands, but sell to Dutch companies or consumers.

It is questionable whether the supervisory authority will be able to uncover violations. The authority would need the necessary expertise and capacities as well as the authority to demand information and production of documents from the respondents to be truly effective. The Wet is mute on these aspects.²¹³

The frequent references to Conventions and Tools of international organizations and industry-specific guidelines, authorized by ministers, appear to provide expedient assistance. Critical voices have pointed to »vague requirements for due diligence«.²¹⁴ Still, 22 Dutch companies, including Heineken and Nestlé Holland publicly supported the draft and asked the Senate in an open letter to pass the law.²¹⁵

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²¹⁰ Kamerstukken I 2016–2017, 34506, G:4–5.

²¹¹ Kamerstukken II 2016–2017, 34506, 6:16 (MvT).

²¹² Opinion of ICAR, FLEX 2019.

²¹³ Critical: Vytopil 2017.

²¹⁴ Vytopil 2017.

²¹⁵ Tony's Chocolonely et al., 2017.

Wet Zorgplicht Kinderarbeid

(Unofficial translation of Dutch Child Labor Act, courtesy of Ropes & Gray, New York)

Amended Legislative Proposal

February 7, 2017

We, Willem-Alexander, by the grace of God, King of the Netherlands, Prince of Orange-Nassau, etc. etc. etc. Greetings to all who shall see or hear this read! We have taken into consideration the desirability of enshrining in law that companies that sell goods and services on the Dutch market should do everything within their power to prevent their products and services from being produced using child labor, so that consumers can buy them with peace of mind; Thus, it is that We, having heard the recommendations of the Advisory Division of the Council of State, and in consultation with the States General, hereby approve and understand the following:

Article 1 Definitions

For the purposes of this Act and the provisions based thereon, the following terms shall have the following meanings

- a. child labor: child labor as referred to in Article 2;
- b. end-user: the natural person or legal entity using or consuming the good or purchasing the service;
- c. company: a company within the meaning of Article 5 of the Trade Register Act 2007 or any entity engaged in an economic activity, regardless of its legal form and the way in which it is financed;
- d. superintendent: the superintendent to be appointed by order in council;
- e. binding instruction: a standalone order imposed for an offence;
- f. standalone order: the order, issued as a sole order, to perform certain acts, as referred to in Article 5:2, second paragraph, of the General Administrative Law Act, in order to promote compliance with statutory regulations;
- g. Our Minister: Our Minister for Foreign Trade and Development Cooperation.

Article 2

(1) Child labor is understood to mean:

- a. in any case, any form of work, whether or not under an employment contract, performed by persons who have not yet reached the age of 18 and which is included among the worst forms of child labor referred to in Article 3 of the Worst Forms of Child Labor Convention, 1999;
- b. if the work takes place in the territory of a State Party to the Minimum Age Convention, 1973, 'child labor' shall further mean any form of work prohibited by the law of that State in implementation of that Convention;
- c. if the work takes place in the territory of a State which is not a party to the Minimum Age Convention, 1973, child labor shall further be understood to mean:
 - i. any form of work, whether or not under an employment contract, performed by persons who are subject to compulsory schooling or who have not yet reached the age of 15, and
 - ii. any form of work, whether or not under an employment contract, performed by persons who have not yet reached the age of 18, insofar as such work, by virtue of the nature of the work or the conditions under which it is performed, may endanger the health, safety or morality of young persons.

(2) By way of derogation from paragraph 1(c), child labor shall not include light work as defined in Article 7(1) of the Minimum Age Convention, 1973, carried out for a maximum of 14 hours a week by persons who have reached the age of 13.

Article 3 Supervision

- (1) The superintendent shall be charged with the supervision of compliance with the provisions of or pursuant to this Act.
- (2) Any natural person or legal entity whose interests are affected by the actions or omissions of a company relating to compliance with the provisions of or pursuant to this Act may submit a complaint about this to the superintendent.
- (3) Only a concrete indication of non-compliance with the provisions of or pursuant to this Act by an identifiable party constitutes grounds for submitting a complaint.
- (4) A complaint can only be dealt with by the superintendent after it has been dealt with by the company, or six months after the submission of the complaint to the company without it having been addressed.

Article 4 Declaration

- (1) Any company registered in the Netherlands that sells or supplies goods or services to Dutch end users declares that it exercises due diligence as referred to in Article 5 in order to prevent such goods or services from being produced using child labor. The first sentence applies mutatis mutandis to companies not registered in the Netherlands that sell or supply goods or services to Dutch end users.
- (2) The company shall immediately send the statement, as referred to in the first paragraph, to the superintendent after it has been registered in the trade register. Companies that are already registered with the trade register shall send the declaration to the superintendent within six months of the entry into force of this Act. Any company that is not registered in the European part of the Netherlands and that is not registered in the trade register shall send the declaration to the superintendent within six months after the company supplies goods or services to end users in the Netherlands for the second time in a given year.
- (3) Exceptions may be granted by or pursuant to an order in council before the date on which the declaration is delivered and further rules may be laid down on the content and form of the statement.
- (4) The supply of goods, as referred to in the first paragraph, does not mean the mere transport of goods. The superintendent shall publish the declarations in a public register on its website.
- (5) The superintendent shall publish the declarations in a public register on its website.

Article 5 Due diligence

- (1) A company which, with due observance of the provisions of paragraph 3, investigates whether there is a reasonable suspicion that the goods or services to be supplied have been produced using child labor and which, in the event of a reasonable suspicion, adopts and implements a plan of action, is exercising due diligence. A company which receives goods or services from companies which have issued a declaration as referred to in Article 4 is also exercising due diligence with respect to those goods and services. A company which receives only goods or services from companies which have issued a declaration as referred to in Article 4 is also exercising due diligence and shall not be required to issue a declaration as referred to in Article 4.
- (2) The investigation referred to in the first paragraph shall be oriented toward sources that are reasonably known and accessible to the company.
- (3) With due observance of the ILO-IOE Child Labor Guidance Tool for Business, further requirements shall be set by or pursuant to an order in council for the investigation and the plan of action referred to in the first paragraph.

Wet Zorgplicht Kinderarbeid

(continuation)

- (4) Our Minister may approve a joint plan of action that is aimed at ensuring that affiliated companies exercise due diligence to prevent goods or services from being produced using child labor, and that is developed by or among one or more social organizations, employees' organizations or employers' organizations. A company that acts in accordance with a joint action plan approved by Our Minister is exercising due care.

Article 6 Exemption

By or pursuant to an order in council, categories of companies are exempted from the provisions of this Act. The recommendation for an order in council to be adopted pursuant to the previous sentence shall not be made until four weeks after the draft has been submitted to both Houses of the States-General.

Article 7 Administrative fine

- (1) The superintendent may impose an administrative fine for violation of Article 4, second paragraph, up to a maximum of the amount of the second category fine of Article 23, fourth paragraph, of the Dutch Criminal Code.
- (2) The superintendent may impose an administrative fine of up to the amount of the fine of the sixth category of Article 23, fourth paragraph, of the Dutch Criminal Code in respect of the following:
 - a. failure to comply with the obligation to carry out investigations or to draw up a plan of action, as referred to in Article 5, first paragraph, or
 - b. failure to comply with the requirements for the examination or plan of action referred to in Article 5, third paragraph.
- (3) Article 23, seventh paragraph of the Dutch Criminal Code shall apply mutatis mutandis to paragraphs 1 and 2 of this Article.
- (4) The superintendent shall not impose an administrative fine for violation of the provisions of or pursuant to Articles 4 and 5 until after they have issued a binding instruction. The superintendent may set the offender a time limit within which the instruction must be complied with.

Article 8 Suspension of the fine

The effect of a decision imposing an administrative fine shall be suspended until such time as the period for submitting a notice of ob-

jection or appeal has expired or, if an objection has been lodged or an appeal has been lodged, a decision has been taken on the objection or appeal, as the case may be.

Article 9 Criminalization

In Article 1, under 2°, of the Economic Offences Act, the following shall be inserted in the alphabetical list: the Child Labor Due Diligence Act, article 4, second paragraph, and Article 5, first and third paragraphs, if, in the five years preceding the violation, an administrative fine was imposed on the basis of Article 7, first or second paragraph, of that Act for the same violation by the company, committed by order of or under the de facto leadership of the same manager.

Article 10 Evaluation

Within five years of the entry into force of this Act, Our Minister shall send the States-General a report on the effectiveness and practical effects of this Act.

Article 11 Transitional provision

This Act shall be inapplicable to the supply of goods or services, the obligation for which was entered into prior to the date of issue of the Bulletin of Acts and Decrees in which it is published, until the date on which the obligation expires pursuant to a stipulation agreed prior to the date of issue of the Bulletin of Acts and Decrees in which this Act is published, but no later than until five years after the date of entry into force of this Act.

Article 12 Entry into force

- (1) This Act shall enter into force on a date to be determined by Royal Decree, but not earlier than January 1, 2020.
- (2) This Act shall expire at a time to be determined by Royal Decree, which shall not be before the time of dispatch of the report referred to in Article 10.

Article 13 Short title

This law shall be cited as: Child Labor Due Diligence Act. Order and command that it be published in the Bulletin of Acts, Orders and Decrees and that all ministries, authorities, colleges and civil servants concerned shall uphold its accurate execution.

Given, the Minister for Foreign Trade and Development Cooperation.

9. SWITZERLAND: KONZERN- VERANTWORTUNGSINITIATIVE (RESPONSIBILITY INITIATIVE FOR CORPORATE GROUPS)

A Swiss ballot measure »*For responsible companies – to protect people and the environment*« seeks to insert a new Art. 101a in the Swiss Constitution. The new article will institute a legal duty for large Swiss companies to apply due diligence to their actions and to monitor due diligence of subsidiaries and supply chains. Holding companies are expected to recognize and avoid risks, to provide restitution if appropriate, and to report due diligence measures. Only when companies prove that they have observed appropriate due diligence, are they not liable for any damages that occurred.

The ballot measure is known as the »*Corporate Group Responsibility Initiative*« and is supported by human rights and environmental NGOs, labor unions and shareholder associations. This ballot measure was prompted by the decision of the Swiss government (»*Bundesrat*«, Swiss federal council) to not enact mandatory regulations that implement the UN Guiding Principles for Business and Human Rights.²¹⁶

LEGISLATIVE PROCESS: BALLOT MEASURE AND COUNTER-PROPOSAL

On October 10, 2016, the ballot measure draft (*BV-Entwurf*) to amend the federal Constitution was submitted to the *Federal Chancellery* with 120,418 valid signatures, thus obliging the Chancellery to present the constitutional amendment for a vote by Swiss citizens. The vote is expected to take place in 2020. Prior to the vote, the Federal Chancellery and Parliament (consisting of *National Council* and *Council of States*, the upper chamber) have the opportunity to develop their own counter-proposal, either constitutional or regulatory. The Swiss government recommended that Parliament reject the ballot measure without developing a counter-proposal.²¹⁷ On June 14, 2018, the National Council passed a counter-proposal with 121 to 73 votes. The counter-proposal contains several new provisions for the *Swiss Code of Obligations*, *Civil Code* and *International Private Law*.²¹⁸ The purpose of the counter-proposal is meant to implement the ballot measure, while not implementing all of its provisions. The Council of States would require a vote for implementation of the counter-proposal in order to enact the amendment, however, they found the counter-proposal went too far. In March 2019, after additional changes to the counter-proposal by their own legal committee, the Council of States voted down the proposal by a 22 to 20 vote. In June 2019, the National Council reaffirmed their own counter-proposal with a 109 to 69 vote.

Both chambers are attempting to come to an agreement on the counter-proposal. If they are able to agree, the committee who presented the ballot measure will most likely withdraw their measure. If the counter-proposal remains in limbo, the people of Switzerland will probably vote in 2020 on the corporate group responsibility initiative as a constitutional amendment. According to a study of the Swiss Technical College of Zurich (*Eidgenössische Technische Hochschule*) the majority of the Swiss population supports strict regulation in this area.²¹⁹

SCOPE OF APPLICATION

The new constitutional Art. 101a (draft bill) applies to all companies who have either their statutory seat, main administration or main branch in Switzerland. This requirement models the rules around the jurisdiction of Swiss civil courts.²²⁰ The statutory seat of companies can be ascertained by a review of public trade registries. The »main administration« refers to the location where company management makes decisions and manages the company or corporate group. A »main branch« is the location where actual company business takes place and this business activity is obvious to others.²²¹ A company may have several »main branches«, such as for different product lines. Due diligence duties apply to German and other foreign companies who qualify under one of the three points of reference.²²² The drafters of the bill wanted to ensure that companies do not try to avoid their due diligence duties by moving their statutory seat abroad.²²³ The legal structure of the company (stock company or limited liability company) does not matter.

Art. 101a (2) (b) tasks the legislature with applying special consideration to small and midsize companies who demonstrate low risks of modern slavery. It is the intention to exclude small and midsize companies unless they operate in a high-risk industry. General guidance provisions mention mining and processing of raw materials and trade with raw materials as high-risk industries. The government is tasked with regular industry assessments to determine which industry must be classified as high-risk industry.²²⁴ It is estimated that about 1,500 Swiss companies are to be included, with only few small to midsize companies.²²⁵

²¹⁶ Konzernverantwortungsinitiative: Fact Sheet I, 2.

²¹⁷ Schweizerischer Bundesrat 2017.

²¹⁸ Komitee »Ja zur Unternehmensverantwortung mit Gegenvorschlag« 2018: 4.

²¹⁹ 2/3 of the respondents advocated for the government to strengthen monitoring and regulating of corporate activities abroad, ETH Zürich 2019.

²²⁰ Art.60 *Übereinkommen über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen (Lugano-Übereinkommen)*, October 30, 2007. This »Convention on civil jurisdiction and judgments« complies with EU jurisdiction under Brüssel (Brussels) I-VO of the EU.

²²¹ »The location of the main administration is often not easily discernable«; see Handschin 2017: pp. 999 and 1001.

²²² Schweizerischer Bundesrat 2017: p. 6355.

²²³ Handschin 2017: p. 999.

²²⁴ Konzernverantwortungsinitiative: Fact Sheet V, 2.

²²⁵ <https://konzern-initiative.ch/initiative-erklaert/> (visited on July 23, 2019).

In its counter-proposal the National Council limits the scope of application to companies who have their seat in Switzerland and either have a balance sheet of over CHF 40 million, consolidated revenues over CHF 80 million or 500 full-time employees (annual average) during two consecutive fiscal years. Small and midsize companies are only covered by the legislation if they demonstrate an especially high risk. Large companies who demonstrate especially low risks are also to be excluded. The initiative calls on the government to issue regulations to that effect.²²⁶ The National Council's counter-proposal would limit the scope of application to under 1,000 companies.²²⁷

DUTIES

The initiative intends to oblige companies, including companies abroad, to respect internationally recognized human rights and environmental standards. Initiative guidance provides insight: Addressed are UN Conventions related to social and cultural rights and ILO core labor standards. Environmental standards are derived from the Montreal Protocol of Substances that Deplete the Ozone Layer, emission standards of the World Health Organization (WHO), sustainability standards of the International Finance Corporation (IFC) and standards of the International Organization for Standardization (ISO).²²⁸ The legislature is tasked with defining which standards are to be included.²²⁹ The National Council's counter-proposal advocates to only include legal provisions which are covered by international law and that have been ratified by Switzerland.²³⁰

Companies must respect the new provisions when active abroad. They are obliged to perform an »appropriate due diligence assessment« related to human rights for all business relationships and for all controlled subsidiaries (Art. 101a (2) (a) and (b) of draft bill). Due diligence must be applied to the total supply chain and to factually or economically controlled subsidiaries, in accordance with UN and OECD standards.

The initiators of the constitutional amendment provide for three significant steps to be performed by companies in their due diligence assessment (Art. 101a (2) (b):

- Actual or potential effects on internationally recognized human rights and environmental rights
- Suitable measures to prevent human rights violations and violations of international environmental standards and to end existing violations
- To be accountable for measures taken

²²⁶ Komitee »Ja zur Unternehmensverantwortung mit Gegenvorschlag« 2018: 1, 2.

²²⁷ Kommission für Rechtsfragen des Schweizer Nationalrats 2018.

²²⁸ Konzerninitiative, Erläuterungen: §§ 3.2.3.1 & 3.2.3.3.

²²⁹ Grosz 2017: p. 978 et seq.

²³⁰ Komitee »Ja zur Unternehmensverantwortung mit Gegenvorschlag« 2018: 2.

Companies are expected to adhere to the UN Guiding Principles for Business and Human Rights and OECD Guidelines for Multinational Entities.²³¹

The National Council's counter-proposal lists »monitoring of the measure's efficacy« as an additional duty. The counter-proposal expressly limits the duty to take measures in the total supply chain to »influence and control« of the company. Measures must be appropriate. Companies may prioritize risks.²³² Actions of third parties are only relevant if they are directly connected with the company's business activity, products or services.²³³

ENFORCEMENT PROVISIONS

The initiative seeks to ensure that due diligence is effective and provides for civil liability and damages. The new due diligence requirements step up company liability for a company's fault. Whoever increases production requirements without adjusting delivery times, is liable for all damages that occur in the total supply chain under Swiss obligations law (Art. 41 OR).²³⁴ Art. 101a (2) (c) expands established Swiss law on a principal's liability for an agent's act: Companies will be liable for damages which were caused by an economically controlled company abroad. The practical effect is to impose liability on subsidiaries. Switzerland is particularly known for a large number of global corporate headquarters.²³⁵

The rules on the allocation of the burden of proof to favor injured parties is an important principle of legal protection. Civil courts are expected to assume that due diligence was not appropriately observed, if damages were caused by a controlled company. Only if the company proves that due diligence measures were appropriately taken or that damages would have occurred even if appropriate due diligence measures were taken, can they be released from liability (*Sorgfalts- oder Entlastungsbeweis*/Due Diligence or Exoneration Proof).²³⁶ The National Council's counter-proposal makes the argument for considering the »influence« of a company and advocates for exoneration, if the parent company claims not to have any influence over the actions of their subsidiary.²³⁷

The counter-proposal places limits on a subsidiary's liability for damages to body, life or property if the parent company's control was not only economic but also legal, and the

²³¹ Konzernverantwortungsinitiative: Jur. Erläuterungen zum Entwurf der Volksinitiative: p. 32.

²³² Art. 716a (2) Obligationsrecht; see indirect counter-proposal; Kommission für Rechtsfragen des Schweizer Nationalrats 2018: p. 8.

²³³ Kommission für Rechtsfragen des Schweizer Nationalrats 2018: p. 7.

²³⁴ Geisser 2017: p. 951 et seq.

²³⁵ Konzernverantwortungsinitiative, Fact Sheet V:2, »typically, subsidiaries«.

²³⁶ Art. 101a (c) Konzernverantwortungsinitiative.

²³⁷ Art. 55 (1) Schweizer Obligationenrecht, see indirect counter-proposal of National Council.

subsidiary was actually controlled (*Leitungsprinzip/Management Principle*).

The ballot measures do not clarify whether natural persons (board members and managers) may be held liable. The counter-proposal explicitly excludes liability of natural persons.²³⁸

The ballot measure provides that, in Swiss civil courts, Swiss due diligence and liability regulations have priority over foreign law, even if the courts would be otherwise required to apply foreign law in a particular case.²³⁹ The counter-proposal offers a nuanced version: Damages and causation should (under Swiss International Private Law) be determined according to foreign law; wrongfulness and fault should be determined according to Swiss law, unless the application of foreign law is deemed more appropriate in consideration of the location where damages arose. The term »control« follows current Swiss law. These nuanced provisions were meant to eliminate objections of »*Rechtsimperialismus*« (legal imperialism).

Accountability is expected to serve as an enforcement mechanism. Companies must publish regular reports that target groups can easily access, understand and compare.²⁴⁰

Kommission für Rechtsfragen des Schweizer Nationalrats (2018): Indirekter Gegenentwurf der Kommission für Rechtsfragen des Nationalrats, www.parlament.ch/centers/documents/de/dok-gegenentwurf-mm-rk-n-2018-05-04.pdf.

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²³⁸ Art. 759a Ca. Schweizer Obligationenrecht, see indirect counter-proposal of National Council.

²³⁹ Art. 101a (d) Konzernverantwortungsinitiative.

²⁴⁰ National Council 2017: p. 6363.

Text: Swiss Coalition for Corporate Justice (SCCJ), Factsheet V, 1 and 2
(English Version of Ballot Measure: »Konzernverantwortungsinitiative«)

The Federal Constitution will be amended as follows:

Art. 101a Responsibility of business

- (1) The Confederation shall take measures to strengthen respect for human rights and the environment through business.
- (2) The law shall regulate the obligations of companies that have their registered office, central administration, or principal place of business in Switzerland according to the following principles:
 - a. Companies must respect internationally recognized human rights and international environmental standards, also abroad; they must ensure that human rights and environmental standards are also respected by companies under their control. Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship.
 - b. Companies are required to carry out appropriate due diligence. This means in particular that they must: identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human

rights and international environmental standards, cease existing violations, and account for the actions taken. These duties apply to controlled companies as well as to all business relationships. The scope of the due diligence to be carried out depends on the risks to the environment and human rights. In the process of regulating mandatory due diligence, the legislator is to take into account the needs of small and medium-sized companies that have limited risks of this kind.

- c. Companies are also liable for damage caused by companies under their control where they have, in the course of business, committed violations of internationally recognized human rights or international environmental standards. They are not liable under this provision however if they can prove that they took all due care per paragraph b to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.
- d. The provisions based on the principles of paragraphs a–c apply irrespective of the law applicable under private international law.*

* For the draft bill, including reasons, and protocol of the first debate: www.parlament.gv.at/PAKT/VHG/XXVI/NRSITZ/NRSITZ_00039 > Sitzungsverlauf

Text: Unofficial translation of the counter-proposal by the Swiss Parliament to the citizen initiative »Responsible Business Initiative«

(bill published by the Legal Affairs Committee of the National Council on May 4th 2018 in French and German, explanatory report published by the Committee on May 18th 2018 in French and German, bill adopted without changes by the National Council on June 14th 2018 (official French text p. 204–213, official German text p. 207–216), pending in the Council of States)

Proposal by the Legal Affairs Committee of the Swiss National Council Responsible Business Initiative: indirect counter-proposal

Art. 716a CO [Code of Obligations] Non-transferable duties

[...]

5. overall supervision of the persons entrusted with managing the company, in particular with regard to compliance with the law, articles of association, operational regulations and directives as well as the provisions for the protection of human rights and the environment also abroad;
10. For companies, which are required to adopt measures relating to the compliance with the provisions for the protection of human rights and the environment: the compilation of the report in accordance with Art. 961e CO.

Art. 716a^{bis} CO (new) 2a. Compliance with the provisions for the protection of human rights and the environment also abroad

- 1 The board of directors takes measures to ensure that the company complies with the provisions for the protection of human rights and the environment relevant to its areas of activity, including abroad. It identifies potential and actual impacts of the business activities on human rights and the environment and assesses these risks. Taking into account the company's ability to exert influence, it takes effective measures to minimize the identified risks concerning human rights and the environment as well as to ensure effective remedy for violations. It monitors the effectiveness of the measures adopted and reports on them. Impacts of business activities of controlled companies or due to business relationships with a third party are also subject to this due diligence.
- 2 For this due diligence process the board of directors is primarily concerned with the most severe adverse impacts on human rights and the environment. It respects the principle of appropriateness.
- 3 This Article applies to companies which, alone or together with one or more domestic or foreign companies controlled by them, exceed two of the following values in two consecutive financial years:

- a. balance sheet total of 40 million Swiss francs;
- b. sales of 80 million Swiss francs;
- c. 500 full-time positions on an annual average.

- 4 This Article furthermore applies to companies whose activities entail a particularly high risk of violating the provisions for the protection of human rights and the environment, also abroad. It is not applicable to companies with such a risk that is particularly small. The Federal Council issues implementing provisions in this regard.
- 5 Where the law refers to the provisions for the protection of human rights and the environment also abroad, this refers to the corresponding international provisions, which are binding for Switzerland.
- 6 Where the law refers to the provisions for the protection of human rights and the environment also abroad, this refers to the corresponding international provisions, which are binding for Switzerland.

Art. 810 II. CO Duties of managing directors

[...]

- 4 Supervising of the persons who are delegated management responsibilities, in particular with regard to compliance with the law, articles of association, regulations and directives as well as the provisions for the protection of human rights and the environment also abroad;

Art. 810a CO (new) IIa Compliance with the provisions concerning the protection of human rights and the environment also abroad

Article 716a^{bis} shall apply by analogy.

Art. 901 CO 5 Compliance with the provisions for the protection of human rights and the environment also abroad

Article 716a^{bis} shall apply by analogy.

Proposal by the Legal Affairs Committee of the Swiss National Council Responsible Business Initiative: indirect counter-proposal
(continuation)

Art. 69a^{bis} CC [Swiss Civil Code] (new) 3. Compliance with the provisions concerning the protection of human rights and the environment also abroad

1. Article 716a^{bis} Code of Obligation shall apply by analogy.

Third Section a Report on compliance with the provisions for the protection of human rights and the environment also abroad

961e CO (new)

- 1 For companies that are obliged by law to comply with the provisions for the protection of human rights and the environment also abroad, a report shall account for the fulfilment of the individual obligations in accordance with Article 716a^{bis}.
- 2 This report shall be made publicly available.

Art. 55 CO C. Liability of employers

^{1bis (new)} In accordance with these principles, companies that are also obliged by law to comply with the provisions for the protection of human rights and the environment abroad are also liable for the damage caused to life and limb or property abroad by companies actually controlled by them in the performance of their official or business activities by violating the provisions for the protection of human rights and the environment. In particular, companies shall not be liable if they can prove that they have taken the measures required by law to protect human rights and the environment in order to prevent such damage or that they have not been able to influence the conduct of the controlled company in connection with the alleged infringements.

^{1ter (new)} A company does not control another company simply because the latter is economically dependent on that company.

Art. 759a CO Ca Limitation of Liability

The members of the Board of Directors and all natural persons involved in the management of the company shall not be liable to persons who have suffered injury to life and limb or property abroad through a company controlled by the company due to a violation of the provisions for the protection of human rights and the environment abroad.

Art. 918a CO Ca Limitation of Liability

Any liability of natural persons involved in the administration or management of the association towards persons who have suffered damage to life and limb or property abroad due to a violation of the provisions for the protection of human rights and the environment abroad of a company controlled by the association is excluded.

Art. 69a^{bis} CC (new) 3. Compliance with the provisions concerning the protection of human rights and the environment also abroad

- 2 Any liability of the members of the board towards persons who suffered damage to life and limb or property abroad by another association controlled by the association or another controlled company due to a violation of the provisions for the protection of human rights and the environment abroad is excluded.

Art. 139a PILA [Federal Act on Private International Law] g. Violation of the provisions concerning the protection of human rights and the environment also abroad

- 1 In the case of claims against companies which under Swiss law are obliged to comply with the provisions for the protection of human rights and the environment also abroad, due to damage to life and limb or property abroad as a consequence of a violation of the aforementioned provisions, the unlawfulness and culpability of conduct shall be assessed in accordance with these provisions. However, they shall be subject to the law applicable under Article 133, if in accordance with the purpose of the provisions of that law and the consequences thereof, this leads to a decision that is appropriate in the Swiss legal opinion, or if the unlawfulness and culpability of the conduct exist only under that law.
- 2 Whether a company domiciled in Switzerland, which actually controls a company domiciled abroad, is considered liable for claims of the type mentioned and whether it can release itself from liability is determined by Swiss law.
- 3 Article 132 is reserved.

10. AUSTRIA: ENTWURF EINES SOZIAL-VERANTWORTUNGSGESETZES FÜR DIE TEXTILBRANCHE (DRAFT BILL FOR A SOCIAL RESPONSIBILITY LAW FOR THE TEXTILE INDUSTRY)

On September 26, 2018, the Austrian National Council (*Nationalrat*, lower house of Parliament) debated the proposed Social Responsibility Law (abbreviated: SZVG) for the first time.²⁴¹ The Austrian Social Democratic Party of Austria (SPÖ) intends to prevent the sale of textiles which were found to be produced with forced labor and child labor in the production and supply chain.

The first deliberation session of the National Council showed some representatives doubted Austria's jurisdiction asserting that jurisdiction lay with the European Union (EU), but that otherwise the representatives supported the draft bill. The draft bill is now in a committee for further debate.

SCOPE OF APPLICATION

The law would apply to midsize and large companies who have their main administration, main or regular branch in Austria (§ 2) and import shoes and textiles into Austria or trade with shoes and textiles.

The financial thresholds are those contained in the Austrian accounting law and include foreign companies.²⁴²

DUTIES

The duties aim to avoid violations of the »prohibition of forced labor and child labor« in the entire production and supply chain (§ 1). The draft bill does not address which particular violations are meant or whether foreign or Austrian or international law would apply. The purpose clause of the draft bill simply states that the goal is to prevent child labor and forced labor, two significant ILO core labor standards.

Importers must perform a risk assessment, possibly take follow-up action, and fulfill documentation duties (§§ 4 and 5).

Risk assessment includes appropriate risk identification and assessment of the entire production and supply chain. Whether the assessment is deemed appropriate or not is depending on:

- country and industry specific risks;
- whether certain typical violations are expected and how serious and probably they are;

- the complexity of the production and supply chain; the draft bill does not address whether risk assessment of complex supply chains has to be performed in a more thorough, less thorough or different manner;
- the company size of the importer;
- the type and immediacy of the importer's contribution to the supply chain; and
- actual and economic capabilities to influence the entity who directly caused the violation.

If an importer has indications that child labor or forced labor is taking place, he/she must perform a deeper analysis of the particular circumstances and must include the persons affected. Risk assessment must be performed as it arises out of particular occasions, and must be renewed at least once a year.

Follow-up measures, »suitable and appropriate measures towards prevention«, must be taken, if a risk cannot be excluded.

Importers must store documentation of risk assessments and follow-up measures for five years and must produce upon demand the documentation to organizations who have the legal capacity to file an action in court (§ 5).

Dealers, different from importers, are exempt from performing comprehensive risk assessments and storing documentation. They only need to name the company who delivered the products to them. Dealers must provide this information to organizations who have the legal capacity to file an action in court (§ 6).

ENFORCEABILITY MECHANISM

Due diligence duties are supposed to be enforced by consumer protection organizations (§§ 7 and 8). They are authorized:

- to demand due diligence documentation from companies;
- to file for injunctive relief to prevent the distribution of products;
- to file legal action for the disgorgement of company profits generated by the products.

Disgorged company profits shall be paid into a »*Fonds für soziale Verantwortung von Unternehmen*« (Fund for Social Responsibility of Companies) (§ 10).

This Austrian enforcement mechanism is unusual in international comparison. It can be explained by the jurisdiction of the *Sozialministerium* (Ministry of Labor, Social Affairs, Health and Consumer Protection) who drafted the bill prior to the National Council elections in 2017. The Ministry of Social Affairs is responsible for consumer protection matters.

²⁴¹ For the draft bill, including reasons, and protocol of the first debate: www.parlament.gv.at/PAKT/VHG/XXVI/NRSITZ/NRSITZ_00039 > Sitzungsverlauf.

²⁴² Criteria: €5 million balance sheet total, €10 million in revenue, 50 employees.

Unofficial translation of the Austrian draft bill for a Law to observe Corporate Social Responsibility (Sozialverantwortungsgesetz – SZVG)
(by Anna Engelhard-Barfield, Attorney, Lake Ridge, USA)

**Chapter 1:
General Provisions**

Purpose

§ 1. The purpose of this federal law is to prevent the placing on the market and distribution of products under § 3 No. 1, if forced labor and child labor occurred in the production and supply chains.

Scope of Application

§ 2. (1) This federal law regulates due diligence duties of companies (§ 1 KSchG) who import a product defined under § 3 No. 1 for the first time onto the Austrian market (importer, § 3 No. 3) and the responsibility of dealers (§ 3 No. 4) who offer this product for sale in Austria, as related to observing the prohibition of forced labor and child labor in the production and supply chain.

(2) This law applies to all importers and dealers with a statutory seat, main administration, main branch or regular branch in Austria, if they singly or in combination, exceed at least two of the characteristics of company sizes described in § 221 (1) UGB.

Definitions

§ 3. For the purposes of this law the following terms are defined:

1. Product: Garments, including shoes and textiles.
2. Placing on the market: Every initial delivery of products under No. 1 onto the Austrian market for distribution and trade.
3. Importer: Any company who imports a product under No. 1 into Austria to place that product on the Austrian Market. An importer is also the first company in the production and supply chain if they have their statutory seat, main administration, main branch or any branch in Austria. The delivery of the product constitutes placing a product on the market under No. 2.
4. Dealer: Whoever is not an importer, but sells or buys a product on the Austrian market which was already on the market.

**Chapter 2:
Duties of Importers**

Due Diligence Duty

§ 4. (1) An importer of products under § 3 No. 1, must comply with the due diligence described in (2).

(2) Due diligence includes the following elements:

- a) *Risk assessment.* The importer must perform a risk assessment and identify and assess in an appropriate manner whether and which risks of forced labor and child labor exist in the production and supply chain. Whether a risk assessment is deemed appropriate depends on whether consideration was given to country and region-specific risks, whether certain typical violations are expected and how serious and probable they are, the complexity of the production and supply chain, the company size of the importer, the type and immediacy of the importer's contribution to the supply chain and actual and economic capabilities to influence the entity who directly caused the violation. If an importer has indications that child labor or forced labor is taking place, they must perform a deeper analysis of the particular circumstance and must include the persons affected; sentence 2 applies accordingly. A new risk assessment must be performed or the prior one must be updated, if there is reason to do so; sentence 2 applies accordingly. Risk assessment must be performed at least once a year, if no particular occasion demands such.

- b) *Follow-up measures.* If a risk cannot be excluded following risk assessment under § 4 (2)(a), suitable and appropriate measures towards prevention must be taken. Excepted are cases where the risk assessment under § 4 (2)(a) resulted in a finding that there are no risks or negligible risks. Suitable and appropriate measures must be taken promptly in order to avoid realization of the risks ascertained. Paragraph (a), sentence 2 applies accordingly.

Documentation Duty

§ 5. (1) Compliance with duties under § 4 (2) must be documented and the documentation is required to be stored for a minimum of five years.

(2) The documentation must be produced upon demand to organizations who have the legal right to file an action in courts under § 29 (1) KSchG.

(3) If an importer is required to disclose under § 243b or § 267a UGB, a separate non-financial report must be included and must contain information about measures taken in observance of the duties under § 4 (2).

**Chapter 3:
Duties of Dealers**

§ 6. A dealer in products under § 3 No. 1 must provide the name of the importer or the supplier who delivered the product (dealer or importer) to the organizations authorized under § 29 (1) KSchG within four weeks of demand.

**Chapter 4:
Collective Actions by Organizations**

Injunctive Relief

§ 7. (1) If an importer violates § 4 (2), § 5 (1) or (3) they can be sued for injunctive relief by organizations authorized under § 29 (1) KSchG. If an importer who violates the duties described in sentence 1 also places a product on the market or distributes a product where the prohibition of forced labor and child labor was violated in the supply chain, they can be sued for an injunction to stop them from placing those products on the market or distributing those products. If a company contends that they did not act as an importer, the burden of proof is on the company. §§ 24 and §§ 25 (3) to (7) UWG 1984 apply analogously.

(2) If a dealer who violates § 6 also places on the market a product where the prohibition of forced labor and child labor was violated in the supply chain, he can be sued for an injunction to stop distribution by the organizations authorized under § 29 (1) KSchG. §§ 24 and §§ 25 (3) to (7) UWG 1984 apply analogously.

(3) The risk of violation ceases to exist when the company issues a cease and desist declaration within a reasonable time period after receipt of a written warning by an organization authorized under § 29 (1) KSchG and when the declaration is supported by a contingency penalty under § 1336 ABGB.

Disgorgement of Profits Claim

§ 8. (1) The company who places a product on the market or distributes a product where the prohibition of forced labor and child labor was violated in the supply chain, can be sued by organizations authorized under § 29 (1) KSchG for the disgorgement of company profits, payable to the Fund for Social Responsibility of Companies, in an amount to be determined under (2). The amount in controversy under §§ 54 et seq. JN cannot be more than €31,000. § 25 (3) to (7) UWG apply analogously.

Unofficial translation of the Austrian draft bill for a Law to observe Corporate Social Responsibility (Sozialverantwortungsgesetz, SZVG)
(continuation)

- (2) The amount of profits to be paid is determined by the difference between the purchase price and the sales price of the sold product. Companies must disclose to the organizations authorized under § 29 (1) data pertaining to the calculation of profits.
- (3) A claim for disgorgement of profits lapses if the company proves that they complied with due diligence duties under § 4 (2) and disclosure duties under § 6, or that they were not at fault or only slightly culpable.
- (4) If a company claims that they did not act as importer, the burden of proof is on them.
- (5) A judge may reduce or cancel the liability if the company did not intentionally violate their duties and if the obligation to pay disgorgement profits would constitute an unfair hardship. The company has the burden of proof and must present respective assertions and prove the veracity of these assertions.
- (6) The statute of limitations is five years from the date the product was placed on the market or distributed.
- § 9. (1) Jurisdiction for civil action under § 7 and § 8 lies with the commercial courts. § 51 (2) No. 10 and § 83c JN apply analogously.
- (2) § 7 (2) sentence 1 and § 8 (2) JN do not apply.
- § 10. (1) In order to give special recognition and to promote engagement in the area of Corporate Social Responsibility, as well as improving legal enforcement under this law, a fund will be established. The name of the fund is »Fonds für soziale Verantwortung von Unternehmen« (Fund for the Social Responsibility of Companies). The fund may make contributions to natural persons and legal entities who further the development or execution of innovative measures, especially activities or initiatives related to Corporate Social Responsibility in Austria.
- (2) Eligible recipients for contributions are:
1. Austrian citizens or persons who have their permanent residence in the federal territory, or
 2. Domestic legal entities.
- (3) The fund is located at the Federal Ministry for Labor and Social Affairs, explicitly serves the public good and is a legal entity in its own right.

**Chapter 5:
Final Provisions**

Administration

- § 11. The Federal Ministry for Labor and Social Affairs is authorized to administer this federal law.

Effective Date

- § 12. This federal law takes effect on January 1, 2019.

11. EU CONFLICT MINERALS REGULATION

The materials tin, tantalum, tungsten, ore, and gold are indispensable for the production of many functional objects and tangible assets. The transition to a new economy with less carbon dioxide and renewable energies depends on these raw materials.²⁴³ The *European Union* (EU) recognized the connection between these minerals and the recurrent, severe impairment of human rights. Areas rich in raw materials often experience violent conflicts, but have weak government institutions resulting in pervasive incidents of child labor, sexual violence, forced relocation and destruction of cultural sites. Armed groups finance their activities with illegal mining. The *EU Parliament* has requested four (4) times that the EU Commission draft a conflict minerals regulation comparable to the *U.S. Dodd-Frank Act*.²⁴⁴

The EU enacted *Regulation 2017/821* on May 17, 2017 to specify due diligence duties for EU importers in the supply chain from conflict and high-risk areas (regulation/VO).²⁴⁵ In order to prevent armed groups from trading with conflict minerals, the EU wants to establish a so-called »*Unionssystem*« (union system) which provides transparency and safety in the supply chain originating from companies, smelters and refineries (Art. 1 (1) VO).

The due diligence duties established for companies by the regulation are considered an important contribution towards the prevention of violent conflicts.²⁴⁶ Due diligence includes measures which are essential and generally recognized in the area of compliance. In Germany, there is no regulation that lays out CSR compliance for companies as specific and detailed as this EU regulation.

Companies are supported by the government in the implementation of appropriate due diligence. The *EU Commission* will publish a manual to assist companies with the identification of conflict and high-risk areas and will employ experts to generate a list of the pertinent areas. The EU Commission will maintain a list of responsible refineries and smelters world-wide. They will authorize methods and criteria for the assessment and recognition of systems to facilitate due diligence compliance, subject to an application by companies or other interested parties. The EU Commission issued in 2019 a »delegated regulation« (*Delegierte VO 2019/429*) to supplement VO 2017/821 and to specify criteria for the assessment and recognition of due diligence systems.²⁴⁷ The EU and its member states also took foreign and development policy steps to fight corrup-

tion at the local level, reinforce borders and educate local population groups and their representatives in efforts to encourage reporting of abuse.

The due diligence duties will apply to companies as of January 1, 2021. The regulation has been in effect since 2017 (Art. 20 VO).

SCOPE OF APPLICATION

The regulation applies to companies world-wide, if they either directly or indirectly import via a Unionseinführer (union importer) under Art. 2 VO, the minerals tin, tantalum or tungsten into the EU. The size of the company is irrelevant.

The regulation's appendix specifies quantity thresholds. Due diligence duties apply to those union importers who import a minimum quantity per year. Current thresholds are 100 kg for gold and 250,000 kg (including all ores and concentrates) for tungsten. The EU Commission may adjust the thresholds in order to effectuate that at least 95 % of the imported metals and minerals are covered by due diligence duties (Art. 1 (3) – (5) VO).

Many companies who deal with or deliver conflict minerals without crossing a EU border will be indirectly affected. Companies who are obliged to perform due diligence will request from these companies disclosure and participation towards fulfilling their own due diligence duties. The regulation will directly apply to 600 to 1,000 union importers. The regulation will indirectly apply to about 500 smelters and refineries who have their company seat either in or outside of the EU.²⁴⁸

The scope of the regulation's application has been criticized because it does not include certain, similar raw materials, such as lithium, cobalt and jade which are connected to violent conflicts.²⁴⁹ Union importers are generally »upstream companies« who mine raw materials in the mines, then refine and process the minerals in smelters, refineries and metal processing facilities. »Downstream companies« who import metals and generally only operate in the EU are exempt from a portion of the due diligence duties. They are expected to voluntarily comply. It seems that the regulatory content can be easily circumvented. The EU Commission will review the regulation within two years from its effective date (Art. 17 (2) VO) to determine whether additional minerals will be included, whether thresholds will be lowered and whether the processing industry within the EU will be included in the scope of application.²⁵⁰

²⁴³ Church/Crawford 2018.

²⁴⁴ Resolutions of October 7, 2010, March 8, 2011, July 5, 2011 and February 26, 2014.

²⁴⁵ See recitals 1, 3 and 7.

²⁴⁶ See Heße/Klimke 2017: p. 446.

²⁴⁷ Delegierte Verordnung (EU) 2019/429, EU Commission of January 11, 2019, regarding methods and criteria for the assessment and recognition of due diligence systems in supply chains for tin, tantalum, tungsten and gold.

²⁴⁸ See explanatory notes of the EU Commission.

²⁴⁹ Teicke/Rust 2017: p. 450. The import of diamonds has been subject to a certification process for a long time, VO (EG) No. 2368/2002.

²⁵⁰ Supportive: Teicke/Rust 2017: p. 450.

DUTIES

The regulation governs due diligence duties of union importers in the entire supply chain. The due diligence duties correspond with the »Due Diligence Guidance Mineral Sourcing« of the OECD. Companies must apply measures to identify and address actual and potential risks in conflict and high-risk areas worldwide in order to prevent or mitigate harmful effects occurring in the supply chain. Companies are expected to use an EU manual when determining whether any region worldwide is a »conflict or high-risk area«. A supplemental list from experts is intended to provide companies with additional assistance.

Many due diligence duties are defined and due diligence compliance must be documented (Art. 3 (1), 4 (c) VO):

- A solid management system (Art. 4 VO). The company supply chain policy must correspond with the OECD model²⁵¹ and it must be published and incorporated into company agreements. Due diligence compliance must be monitored by a specially commissioned compliance officer.²⁵² The management system must include complaint mechanisms to be used as an early warning system to identify risks. It must include systems that allow custody and supply chain tracking. The regulation imposes different requirements for management systems of different minerals and metals.
- A risk management system (Art. 5 VO). Supply chain risks in conflict and high-risk areas must be identified and assessed. A strategy for dealing with identified risks must be developed and implemented. The regulation defines conflict and high-risk areas as »areas where armed conflict takes place or where the situation is fragile as a consequence of conflict. This includes areas where governance and safety are weak or non-existent, such as failed states and states where wide-spread, systemic violations of international law (including human rights) take place.«²⁵³ The regulation imposes specific requirements for risk mitigation strategies.
- Audit (Art. 6 VO). Independent third parties are tasked with monitoring the activities, processes and systems of union importers to determine which processes comply with the requirements. OECD guiding principles must be observed.
- Disclosure (Art. 7 VO). Union importers must report the audit results to competent national agencies and must share with direct customers (down-stream) relevant information, unless barred by trade secrets or competition concerns. They must publicly (online) re-

port strategies and processes on an annual basis. If recycled conflict minerals are concerned, the union importer must only disclose how they applied due diligence when making the assumption that the conflict mineral is recycled.

Whoever imports only metals and not upstream minerals may conduct a toned-down risk management by merely assessing third party reports about smelters and refineries in the supply chain (Art. 5 (4) – (5) VO). Auditing of the company's own activities, management systems and processes is not required if there is »substantial proof« that smelters and refineries comply with regulation requirements. The Commission will maintain a list of smelters and refineries who are rated as conforming with the requirements (Art. 9 VO).

Companies may refer and cooperate with commercial or civil initiatives in order to fulfill their due diligence duties. The delegated regulation of the EU, mentioned above, specifies methods and criteria for the assessment and recognition of due diligence systems which may be recognized by the EU Commission upon application.²⁵⁴ But simply because suppliers have adopted such a system does not mean with legal certainty that they have fulfilled their due diligence duty.²⁵⁵ The EU Commission only assesses concepts and strategies of due diligence systems submitted to them by application and it does not assess how reliably suppliers observe the system.²⁵⁶

ENFORCEMENT PROVISIONS

Member state agencies will examine documents and audit reports (Art. 3 VO) and perform post hoc on-site inspections (Art. 11 VO) at union importers' facilities. Each EU member state must ensure effective implementation of the regulation by providing for sanctions such as monetary penalties (Art. 16 VO).²⁵⁷ The regulation tasks the competent agencies in member states to cooperate and to share information (Art. 13 VO). The German *Bundesministerium für Wirtschaft und Energie* (German Federal Ministry for Economic Affairs and Energy, recently renamed) published on June 6, 2019 its draft bill to implement the regulation in Germany.

Since companies are required to publicly report, their reputation may be at risk if they fail to comply or poorly comply, with due diligence requirements related to conflict minerals.

As far as (partial) voluntary compliance for »downstream companies« is concerned, the legislator relies on peer pressure. The EU Commission will review within two years from the regulation's effective date whether this provision is suf-

²⁵¹ OECD 2016: Annex II.

²⁵² Teicke/Rust 2017: p. 41.

²⁵³ Art.2 (f) VO. The EU Commission will publish a manual to support legal practitioners.

²⁵⁴ Delegierte Verordnung (EU) 2019/429 of January 11, 2019.

²⁵⁵ Id. recital No. 5.

²⁵⁶ Critical at Germanwatch 2019, compare Sydow/Reichwein 2018.

²⁵⁷ The German law does not yet provide for sanctions.

ficient or whether downstream companies should be subject to mandatory compliance.

Currently it is difficult to say whether the conflict minerals regulation will have positive effects or whether it will have the effect of a de facto trade embargo.²⁵⁸ As it was noted for the Dodd-Frank Act, the situation around conflict minerals is exceptionally complicated, especially in the Great Lakes region of Africa, and cannot be controlled merely by legislation. Numerous regional, national and inter-state initiatives have formed in order to improve governance structures. For example, the German *Gesellschaft für Internationale Zusammenarbeit* (GIZ) (German Corporation for International Cooperation GmbH) and the *Bundesanstalt für Geowissenschaften und Rohstoffe* (BGR) (Federal Institute for Geosciences and Natural Resources) have joined with the International Conference on the Great Lakes Region (ICGLR) and developed a regional certification mechanism and a data bank to monitor the flow of minerals. Mastering the problems related to conflict minerals will substantially depend on the integration and support from similar initiatives. It is possible that the planned review of the regulation will show that scope of application and quantify thresholds need to be adjusted.

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²⁵⁸ Teicke / Rust 2017: p. 449.

ABBREVIATIONS

AG	Attorney General
ASIC	Australian Securities and Investments Commission
CITES	Convention of International Trade in Endangered Species of Wild Fauna and Flora
CDTFA	California Department of Tax and Fee Administration
CFTB	California Franchise Tax Board
CSR	Corporate Social Responsibility
DRC	Democratic Republic of Congo
EGMR	European Court of Human Rights
EMRK	European Convention on Human Rights
EU	European Union
HolzSiG	Holzhandels-Sicherungs-Gesetz (German Timber Regulation)
i. d.	Refers to a preceding citation in a footnote
ICGLR	International Conference of the Great Lakes Region
IFC	International Finance Corporation
ILO	International Labor Organization
IOE	International Organization of Employers
ISO	International Organization for Standardization
MSA	Modern Slavery Act (UK and AU)
MSI	Multi-Stakeholder-Initiative
NAP	National Action Plan on Business and Human Rights
NGO	Non-Governmental Organization
NSW	New South Wales (Australia)
OECD	Organization for Economic Cooperation and Development
RCOI	Reasonable Country of Origin Inquiry
RINR	Regional Initiative against the Illegal Exploitation of Natural Resources
SAS	Simplified Stock Company (France)
SCA	Partnership by Shares (France)
SEC	U.S. Securities and Exchange Commission
SZVG	Austrian Draft Bill for a Social Responsibility Law
UN	United Nations
VO	Regulation (Germany or EU)
WHO	World Health Organization

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COMPANIES AND HUMAN RIGHTS

A Global Comparison of Legal Due Diligence Obligations



This survey reveals national governments and international organizations have focused on slavery, child labor, financing of violent conflicts or the destruction of the environment in crafting due diligence related legislation. Recent integrations of social issues, employee protections and environmental protection have levied further responsibilities on companies. Some laws provide for the extraterritorial application to foreign companies who may not have an office or subsidiary but the company is doing business in the country and/or is listed on a domestic stock exchange. In doing so, governing bodies preserve a level playing field by protecting domestic companies from unfair foreign competition.



Often laws call for either optional or mandatory measures that include consulting various interest groups, supplier management, audits, employee training, whistleblower provisions and the use of guidance handbooks. The laws are carried out in various ways. Some governments appeal to a company's desire to maintain a positive reputation and only require transparency through disclosure reporting. Others impose government sanctions and monetary penalties which appear to be the more effective approach. Effective legal protection is more likely when respective laws and regulations afford the right to file an action for restitution in court.



Legal due diligence and its elements are suitable for standardization across its thematic areas through legislative action at the international level. Regulation on a national or regional level does not preclude regulation at a higher level but may serve to strengthen the existing regulation in its application. In light of the obvious trend towards the extension of laws, companies have little choice but to institute *Corporate Social Responsibility* (CSR) as an enduring topic for members of corporate and supervisory boards, including strengthening sustainability departments and assuring close collaboration with legal, compliance and purchasing departments.

Further information on the topic can be found here:
[https://www.fes.de/themenportal-die-welt-gerecht-gestalten/
weltwirtschaft-und-unternehmensverantwortung/](https://www.fes.de/themenportal-die-welt-gerecht-gestalten/weltwirtschaft-und-unternehmensverantwortung/)