



Analysis of the Impacts of the German Act on Corporate Due Diligence Obligations in Supply Chains on the Sexual Exploitation of Children in the Travel and Tourism Industry




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The risk of the sexual exploitation of children in the travel and tourism industry is well known. Up until now, Germany-based enterprises have barely been obligated to take action against these human rights violations due to widely branching supply chains. This analysis aims to highlight the extent to which the German Act on Corporate Due Diligence Obligations in Supply Chains (Lieferkettensorgfaltspflichtengesetz – LkSG) now demands such obligations.

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BACKGROUND:

This analysis was commissioned by ECPAT International as part of the project “Developing travel & tourism with child protection in focus for a sustainable post-COVID-19 pandemic recovery”. The project is being implemented with the support of the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH on behalf of the German Federal Ministry for Economic Cooperation and Development (BMZ).

CONTENT OF THE LKSG

On 16 July 2021, the German Bundestag passed the LkSG.¹ The obligations imposed by the LkSG are to be met by enterprises with at least 3,000 employees as of 1 January 2023, and by enterprises with at least 1,000 employees as of 1 January 2024, respectively. The Act only applies to enterprises based in Germany. To count as such, it is sufficient for an enterprise to have a branch office located in Germany. The due diligence obligations imposed on enterprises by the LkSG are as follows:

- The establishment of a risk management system to comply with due diligence obligations (Section 4 (1) LkSG) and the designation of a person or persons within the enterprise responsible for monitoring risk management (Section 4 (3) LkSG)
- The conduct of regular risk analyses (Section 5 LkSG)
- The issuance of a policy statement on the enterprise's human rights strategy (Section 6 (2) LkSG)
- The implementation of preventive measures (Section 6 (1, 3, 4) LkSG)
- Taking remedial actions in case of a violation of a human rights-related or environmental obligation (Section 7 (1, 2, 3) LkSG) as well as establishing a complaints procedure (Section 8 LkSG)
- The realisation of due diligence obligations in case of actually known risks concerning indirect suppliers (Section 9) and the documentation thereof (Section 10 (1) LkSG)
- Reporting (Section 10 (2) LkSG) on the compliance with due diligence obligations

The exact risks to be prevented are specified in reference to several international treaties (Section 2 LkSG). **Consequently, it is irrelevant if the risks occur on domestic or foreign territory. All risks occurring within the enterprise's sphere of influence are to be minimised.** However, the due diligence obligations do not entail the obligation to succeed, but rather the obligation to make an effort. This means that enterprises

seeking to fulfil the obligations, only need to attempt to minimise risks for people and the environment. Whether the human rights violation can actually be averted or not is not the enterprise's responsibility. Furthermore, the actual extent of the obligations depends on the enterprise's size and ability to influence as well as on the severity and probability of the risks to be minimised. Compliance with the due diligence obligations is supervised by the German Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle – BAFA), which can impose considerable fines in case of violations (Section 24 LkSG).

THE IMPACTS OF THE LKSG ON THE SEXUAL EXPLOITATION OF CHILDREN IN THE TRAVEL AND TOURISM INDUSTRY

In Section 2 (2, 4), the LkSG explicitly identifies the sexual exploitation of children as a human rights risk, which is to be prevented by complying with the mentioned due diligence obligations.

2.1 Scope of application and addressees

As soon as enterprises in the travel and tourism industry reach the required number of employees, they are required to comply with the due diligence obligations. In actual practice, however, most enterprises will not exceed the threshold of 3,000, or rather 1,000 employees², as suppliers are not included in this number. The due diligence obligations for enterprises do not only concern delivered goods, but, according to Section 2 (5) LkSG, also apply to all other services and steps taken to provide that service, domestically and abroad.

2.2 Supply chain

The enterprise's actual obligations depend on the proximity of the respective operation to the enterprise's **own business area**. All operations within the enterprise's own business area must comply with the highest requirements. According to Section 2 (6) LkSG, the business area includes every activity of the enterprise

1 Bill with explanation in German, refer to: https://www.bmas.de/SharedDocs/Downloads/DE/Gesetze/Regierungsentwuerfe/reg-sorgfaltspflichtengesetz.pdf?sessionId=65DA8760ED7D2C53A020E57782B52CA4.delivery2-replication?__blob=publicationFile&v=2 [accessed 29 March 2022]; for the English version, refer to: https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3 [accessed 29 March 2022].

2 To our knowledge this is the case for: Alltours, TUI, DER Touristik, FTI Group.

to achieve its business objective. The business area of tourism companies based in Germany will often amount to contact between hired intermediaries and clients. A house, a hotel or a site run by the enterprise at the destination itself also pertains to its business area. All preventive and remedial obligations apply to the enterprise's own business area in the full extent (Section 5 (1), Section 6 (3), Section 7 (1) LkSG). The remedial actions taken in the enterprise's own business area must generally lead to a termination of the human rights violation (Section 7 (1) LkSG).

Apart from the enterprise's own operations, direct and indirect suppliers are affected as well. **Direct suppliers** are defined as all partners to a contract whose supply of goods or provision of services is necessary for the production of the Germany-based enterprise's product or the provision of its service (Section 2 (7) LkSG). Extensive preventive measures must also be implemented for direct suppliers. Starting with the choice of the direct supplier, these measures also cover covenants and the implementation of training courses and control mechanisms (Section 6 (4) LkSG). Furthermore, if a violation is observed, remedial measures pursuant to Section 7 (1) LkSG are to be carried out immediately. Should there be no way of finding a remedy in the foreseeable future, a concept with countermeasures must still be compiled (Section 7 (2) LkSG). Especially severe cases might call for the termination of business relations (Section 7 (3) LkSG).

Indirect suppliers are defined as suppliers whose supply of goods or provision of services is equally necessary for the provision of one's own services, but who are not directly bound to the enterprise by contract (Section 2 (8) LkSG). In general, the indirect supplier is a contractual partner to a direct supplier. The obligations of the Germany-based enterprise concerning the indirect supplier arise with the substantiated knowledge of a human rights-related violation (Section 9 (3) LkSG). In this case, actual indications suggesting the possibility of such a violation are required. It is important that the enterprise itself is aware of these indications, albeit no obligations to procure information or actively supervise the indirect suppliers have been stipulated. However, the enterprise must not consciously ignore information brought to its knowledge. For example, substantiated

indications given by NGOs might trigger pursuant obligations.³ In such an instance the obligations as per Section 9 (3) LkSG entail conducting a risk analysis, implementing appropriate preventive measures and creating a concept with countermeasures.

2.3 Actual obligations

The tourism industry faces particular challenges concerning possible risks as most of the supply chains are not geared to the production of goods, but rather to the provision of services.

Determining whether individual services provided by third parties are "necessary" to the touristic enterprise's provision of the travel service within the context of Section 2 (7, 8) LkSG will likely cause difficulties in actual practice.⁴ In addition, there is no "classical" supply chain at hand, in which a product runs through a supply chain and then makes its way to a client. Rather, the client – or in this case the tourist – is brought to the product and can even themselves pose a risk, especially concerning the sexual exploitation of children. However, the LkSG does not address the individual tourist but the enterprise with regard to its supply chains. Actions performed independently on-site by individual tourists outside of the services provided by the Germany-based enterprise or its suppliers are therefore not covered by the LkSG.

According to the discussed obligations, the enterprises must attempt to ensure that no sexual exploitation occurs within their area of influence. Respectively, the enterprise must take immediate action should there be actual indications concerning an indirect supplier. It is noteworthy that many risks of sexual exploitation of minors in the tourism industry do not lie within the enterprise's own business area or within the contractual relations of the Germany-based enterprise. In fact, human rights violations and environmental breaches are more likely to occur in connection with indirect suppliers. They may even have no direct link to the supply chain at all, in which case the LkSG will have only little grounds for obligating enterprises to implement active countermeasures.

3 Gehling/Ott/Lüneborg, Das neue Lieferkettensorgfaltspflichtengesetz – Umsetzung in der Unternehmenspraxis, CCZ 2021, 230 (237).

4 If, for instance, one thinks about the production of a watch, every incorporated gearwheel is absolutely essential. In case of a travel service, however, this distinction is not always obvious. An additionally booked transfer from the airport to the hotel can effortlessly be seen as necessary. A day trip offered by a third party, an advertisement for which is displayed in the hotel, however, is not an obvious supplier service, since the actual journey can also be taken without the day trip. In this case, the third party can still be a supplier, if, for instance, the hotel makes particular use of the offers for the purpose of marketing itself or if it receives a commission. At any rate, an independent restaurant located next to the hotel that is often and eagerly frequented by hotel guests would not be considered a supplier.

Nevertheless, the due diligence obligations established by the LkSG for the enterprise's own business area and concerning direct and indirect suppliers do offer various possible measures that the tourism industry can make use of. The implementation of training courses and risk-based control measures (Section 6 (3) LkSG) as well as the covenant of indirect suppliers to respect the human rights strategy of the enterprise (Section 6 (4, No. 2) LkSG) are of particular significance. Examples of how to actually apply the due diligence obligations can be found by looking at the work of enterprises and associations who took measures prior to the LkSG coming into force. The touristic enterprise Studiosus, for instance, has established ILO core labour standards and children's rights in its contracts with all of its service partners, e.g. hotels and bus companies, supervises its business and service partners in online audits on a regular basis and informs and sensitises tour guides and travellers. Studiosus has also arranged annual country seminars to analyse risks and has set up a notification office.⁵

As the largest association of the German tourism industry, the German Travel Association (Deutscher Reiseverband – DRV) also provides information on the sexual exploitation of children in tourism and has taken measures in cooperation with its members.⁶

Actual recommendations on how to act, published by the Roundtable of Human Rights in Tourism e.V. may also offer an approach on how to realise due diligence obligations. Important recommendations are that enterprises contractually mandate their contract partners to comply with a zero-tolerance policy concerning the sexual exploitation of minors, to cooperate with other stakeholders, to train employees, to inform travellers (e.g. about the Don't-Look-Away campaign), to report on all of these measures and to support those affected with the help of NGOs.⁷ As a multi-stakeholder initiative, the Code (short for the code of conduct to protect children from sexual

exploitation in the travel and tourism industry) offers support on how to implement these measures in order to protect children from sexual exploitation in travel and tourism. For example, companies can get an overview of potential risks within the tourism supply chain using The Code's analysis tool⁸. Enterprises voluntarily commit themselves to put the six criteria of the Code into practice to thus protect children.⁹

3. Culpability and liability

The LkSG explicitly states that it does not intend to give reason for new liabilities (Section 3 (3) LkSG). At the same time, it refers to an independent civil liability, thereby enabling derivative action by labour unions and NGOs (Section 11 LkSG). This means that people who have been affected by a human rights violation included in the LkSG can make use of liability provisions that exist independently of the LkSG to take legal action against enterprises. In this case they can, for instance, let themselves be represented by an NGO. Obtaining civil liability according to the general provisions in practice, however, can prove to be difficult. Enterprises whose headquarters and general place of jurisdiction are located in Germany can generally be sued in a German court (Sections 12, 17 (1) of the German Code of Civil Procedure (Zivilprozessordnung – ZPO)).¹⁰ But, pursuant to Art. 4 ROME II Regulation, the law of the country in which the incident that caused harm took place is applicable. The practice of foreign law in German courts leads to complicated and lengthy legal proceedings. Apart from that, it would also be hard to justify the enterprise's liability pursuant to German tort law.¹¹ This is especially the case for parts of the supply chain that are not part of the enterprise. In order for the demands of the victims to be met, the foreign law would have to stipulate an even further-reaching liability. In addition, it is often difficult to prove the human rights violation

5 An actual example published by the German Federal Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales): <https://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/Umsetzungshilfen/Praxisbeispiele/Studiosus/studiosus.html> [accessed 29 March 2022].

6 Refer to: <https://www.driv.de/themen/nachhaltigkeit/kinderschutz.html> [accessed 29 March 2022].

7 Human Rights Impact Assessment Thailand and Myanmar EN, pp. 31, 39, <https://www.humanrights-in-tourism.net/implementation-guidelines> [accessed 29 March 2022].

8 Refer to: <https://thecode.org/assess-your-child-protection-risk/> [accessed 06 May 2022].

9 For more information, refer to: <https://thecode.org/about/> [accessed 29 March 2022].

10 Code of Civil Procedure (Zivilprozessordnung – ZPO): <https://www.gesetze-im-internet.de/zpo/> [accessed 29 March 2022].

11 Claiming liability pursuant to Section 823 (1) or (2) of the German Civil Code (Bürgerliches Gesetzbuch – BGB) will regularly fail because of the allocation, while enterprises are able to exculpate their liability, according to Section 831 (1) BGB.

by enterprises. A revised LkSG with a separate liability provision, as it has been demanded by several NGOs, could help remedy the situation.¹²

EU

The newly published draft by the European Commission, providing guidelines for sustainability due diligence obligations of enterprises (coll. EU supply chain act)¹³, does stipulate a distinct civil liability but, notably, does not lessen the difficulty in proving that a violation against the due diligence obligations was the cause of the resulting damage (Art. 22 of the draft). According to the existing draft, the proof would have to be provided by the plaintiff.

A second, significant difference of the draft compared to the German LkSG are the affected enterprises. The draft lists all enterprises with more than 500 employees and a worldwide net revenue of more than € 150,000,000 over the course of the last business year. The choice of addressees is not only determined by the static number of employees but is also geared to economic sectors that are especially high-risk in terms of human rights and environmental violations (Art. 2 of the draft). The requirements to be met by the due diligence obligations are tied to the size and position of the enterprise in the value chain. Compared to the German LkSG, this includes a wider range of addressees.

Furthermore, the stipulated due diligence obligations would not only affect the enterprise's own business areas but also include partners in the supply chain with established business relationships, i.e. business relationships that are lasting in terms of their duration or intensity (Art. 3 (f) of the draft). This applies to both direct and indirect business partners. The draft also takes note of the partner's "upstream" and "downstream"

activities (Art. 3 (g) of the draft) which could prove to be especially significant for the extensive risk analysis of the often widely dispersed business relationships within the tourism industry.

In its entirety, the implementation of the draft would affect more enterprises of the travel and tourism industry and widen the scope of the due diligence obligations.

CONCLUSION

In the present legislation, the LkSG has little to no impact on the sexual exploitation of minors in the travel and tourism industry. This is in part due to the stated threshold of 3,000 or respectively 1,000 employees of the addressed enterprises. Moreover, the problem lies within the distinctive nature of the tourism industry. Determining whether an involved party is a supplier or not poses more difficulties than it does in regular supply chains. In the case of a journey, it is harder to estimate whose service is essential to the service provided by the German-based enterprise compared to the manufacturing process of a product. Furthermore, a risk of sexual exploitation of children comes from the offenders that misuse travel and tourism infrastructure and services, even though companies may facilitate or provide venues for sexual exploitation.

Within the scope of an enterprise's liability, the possibility to take derivative action (Section 11 LkSG) does constitute a new aspect. However, in order to improve the options for those affected to assert their claims for compensation, an applicable liability provision is needed. This would also force enterprises to provide proof, rather than place this burden on those affected.

12 Refer to the statement of the initiative "Lieferkettengesetz" ("Supply Chain Act"): https://lieferkettengesetz.de/wp-content/uploads/2021/03/Initiative-Lieferkettengesetz_Stellungnahme-zum-Gesetzentwurf.pdf [accessed 29 March 2022].

13 Full text of the draft: https://ec.europa.eu/info/sites/default/files/1_1_183885_prop_dir_susta_en.pdf [accessed 29 March 2022]

