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A Trade Union Guide to Human Rights Due Diligence Risk Analysis under the German Supply Chain Act

Introduction

Human rights due diligence refers to the responsibility of companies to establish a process to find, prevent, and address human rights violations, including workers' rights, in their operations and value chains worldwide.

Conducting a risk analysis – sometimes referred to as a risk assessment or identification – is the cornerstone of this process, in which companies must proactively look for what the risks are that people's rights might be violated – not where financial risks may be. Companies can only address problems if they know and acknowledge where these problems might be, and target actions there.

This responsibility is enshrined in international standards with widespread support, including the United Nations Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises and the ILO Declaration on Multinational Enterprises. Now, these standards are increasingly being codified in law.

In Germany, the Supply Chain Due Diligence Act came into force on 1 January 2023. A directive on corporate human rights due diligence is also currently being agreed at EU level. This creates opportunities to ensure companies are held accountable for effectively protecting workers' rights, including through the involvement of trade unions throughout the human rights due diligence process.

This guide aims to help trade union representatives understand what a risk assessment should include. It also aims to identify practical issues that can be raised with companies in dialogue, such as through works councils, EWCs or in the framework of an international social dialogue such as trade union alliances.

Key concepts for risk analysis

The following key concepts taken from international standards and the German Supply Chain Due Diligence Act are used in this guide:

Human rights risk: The German Supply Chain Due Diligence Act defines human rights as being at risk if there is a sufficient likelihood that a violation is imminent. The human rights in scope include but are not limited to: protection against child labour, forced labour, slavery, unequal treatment, withholding of an adequate wage, the right to health and safety at work, freedom of association, and some environmental risks.

Salient human rights risks: Companies must identify and take action on those human rights risks that potentially have the most serious negative consequences for people, not to the business.

Prioritisation of risks: Under international standards, companies are responsible for addressing all of their human rights violations, but it is often not possible for large companies to address all of them at the same time. In these cases, international standards require companies to begin first with the most severe human rights impacts, taking into account scale (how serious is the harm?), scope (how widespread is the harm?) and irreversibility (if the harm occurs, can it be put right?). In addition to these three factors, the German Supply Chain Due Diligence Act adds further criteria for companies to weight and prioritise human rights and environmental harms of: the nature and extent of the business activities; the company's ability to influence the direct party directly responsible; and the nature of the company's causal contribution.

Supply chain and value chain: According to the German Supply Chain Due Diligence Act, the supply chain refers to all products and services of an enterprise, including all steps in Germany and abroad that are necessary to produce a product and provide a service. In this guide, the term "value chain" is used to emphasise that it is not solely about the suppliers of products,

but about the entire range of business relationships, including the service providers that enable the provision of products or services. Unless otherwise stated, the supply chain should also be understood in this sense.

Levels of the supply chain: The German Supply Chain Due Diligence Act covers the actions of a company in its own business area, direct suppliers and indirect suppliers.

1. Own business area refers to any activity of the enterprise to achieve its business objective in Germany and abroad. In affiliated companies, the parent company's own business includes a group company if the parent company exercises a decisive influence over the group company.

2. A direct supplier (also referred to as a Tier 1 supplier) is a business partner with whom there is a direct contract for the supply of goods or services and whose supplies are necessary for the manufacture of the company's product or for the provision and use of the service. This definition explicitly includes not only the manufacture of products but also the provision of services and transportation.

3. An indirect supplier is any enterprise other than a direct supplier, whose supplies are necessary for the production of the enterprise's product or for the provision and use of the service.

For example, in the case of a clothing retailer, its own operations would include its shops worldwide; a direct supplier would include cleaners and security guards in the shops, as well as the garment manufacturers. Indirect suppliers would include, for example, the garment manufacturer's fabric supplier and farms that supply cotton to the fabric supplier.

What requirements must a risk analysis meet?

Section 5 of the German law requires that a company must conduct an appropriate risk analysis to identify the human rights and environmental risks in its own business operations and those of its direct suppliers.¹ The identified human rights and environmental risks must then be weighted and appropriately prioritised based on the criteria above.

The results of the risk analysis must be communicated internally to the relevant decision-makers. The risk analysis must be carried out once a year as well as on an ad hoc basis if the company can expect a significantly changed or significantly expanded risk situation in the supply chain, for example due to the introduction of new products, projects or a new business field. Companies must also conduct a risk analysis of indirect

suppliers on an ad hoc basis if they have information about potential risks or violations. Such information can be obtained through reports, for example, from works councils, trade unions, NGOs or articles in the media.

It is important to note that both the German federal government and international standards provide extensive guidance on how to conduct risk analyses. This requires assessing how the company may create risks through its specific business activities. Relevant factors include, for example, geographical risks in the countries in which the company operates or from which it obtains products or services, potential impacts on people who may be at increased risk due to vulnerabilities or marginalisation, as well as risks due to the type of work carried out by the employees.

International standards, including the UNGPs and the OECD Guidelines, are also clear that stakeholder engagement, which includes involving trade unions, is central to this process. The incorporation of the expertise of trade union and worker representatives in relation to workers' rights and knowledge of company practices is thus required under international standards and essential to ensure effective implementation of companies' human rights due diligence obligations.

Risk analysis on freedom of association and the right to collective bargaining

It is crucial that companies assess risks to freedom of association and the right to collective bargaining in their analysis. These are fundamental rights and ILO core conventions that are also explicitly included in German law. In addition, they are also "enabling rights", because if respected, they can enable respect for other human rights such as gender equality, occupational health and safety, and good working conditions, as workers can advocate for, and enforce them. All companies in all sectors must respect these rights, and they are potentially at risk across many companies and sectors. However, regardless of which company is involved, they are more at risk in some countries than in others. Risks to freedom of association and the right to collective bargaining should therefore be considered salient human rights risks in the sense described above, and all companies should include them in their risk analysis.

¹ The law states: "In cases where a company has engaged in an abusive arrangement of the direct supplier relationship or an evasive transaction in order to circumvent the due diligence

requirements with regard to the direct supplier, an indirect supplier shall be deemed to be a direct supplier."



Key questions for assessing risk analysis

Trade unions should be involved in the risk analysis as it is the basis for effective actions to protect human rights. The following questions are designed to apply to all companies, with a focus on workers' rights in the service sectors represented by UNI. The questions can provide an insight into the company's overall due diligence process and identify gaps where further action should be taken - either because the company's responses indicate major risks, or because the company is unable to provide information on potential risk areas.

Overall risk analysis process and involvement of stakeholders and trade unions:

- 1A. How am I or are we being involved in and informed about this process?
- 1B. How are trade unions involved globally?
- 1C. Does the company have a global framework agreement? If so, does it provide for the involvement of trade unions in the due diligence process?
- 1D. Has the company considered risks to freedom of association and collective bargaining in its analysis?
- 1E. Which workers' representatives on the board are involved in this issue, if any? Who oversees this on the board?
- 1F. Is there a person in the company responsible for monitoring human rights in supply chains? To whom do they report?
- 1G. How are measures developed to address the risks identified?
- 1H. How will this be continuously monitored and adjusted if necessary?

Questions to identify risk factors:

Own business area

Although the law is called the Supply Chain Due Diligence Act, it is not only about the supply chain of manufacturing or production. Under the German law, a company's responsibility begins with its own business operations across the group worldwide.

There can be many risks to its own workers, as we see all too often in the service industries. In these industries there are often large numbers of workers who are not represented by a

trade union or works council, are low-paid and in many countries are disproportionately workers who face discrimination, such as people of colour, women or migrant workers. These risks are particularly high in countries where labour law and the enforcement of rights are generally weaker. Trade unions in the service sector in particular should therefore consider not only where the most likely or serious risks exist, but also where they and their networks can most effectively play a role in contributing to the enforcement of human rights.

The following questions are designed to help trade unionists quickly understand the extent, scope and nature of potential human rights risks within a company's own operations.

1. Geographical risks:

In which countries, ranked 4, 5, 5+ on the ITUC Global Rights Index, does the company operate?

The Global Rights Index of the International Trade Union Confederation (ITUC)

The ITUC's Global Rights Index is an important resource for due diligence in the area of workers' rights. The responsible German ministry for the Supply Chain Due Diligence Act, BAFA or the Federal Office for Economic Affairs and Export Control, has [referred](#) to this as an important resource for risk analysis. The Index distinguishes between the following risk levels for fundamental workers' rights:

- 1 - Sporadic violations of rights
- 2 - Repeated violations of rights
- 3 - Regular violations of rights
- 4 - Systematic violations of rights
- 5 - No guarantee of rights
- 5+ - No guarantee of rights due to the breakdown of the rule of law.

An important first step in identifying risks is to have an overview of which countries a company operates in that are classified as high-risk in the ITUC's Global Rights Index, starting with Level 4, 5 and 5+ countries. In this way, the highest-risk countries can be identified, thereby narrowing the focus for a more in-depth risk analysis.



2. Workforce risk analysis:

After identifying the high-risk countries, it is important to analyse indicators of human rights risks for workers in their operations.

For the company's entire operations worldwide and specifically for each country classified as a high-risk country according to the ITUC Global Rights Index above:

2A. How many workers are there?

2B. What is the percentage of workers covered by collective agreements in each country?

2C. What percentage of workers are employed on fixed-term or temporary contracts?

2D. What is the annual voluntary turnover within the workforce?

2E. What percentage of workers in these countries are disadvantaged or marginalised in a way that may affect their ability or willingness to defend their rights, including the exercise of their right to join a union and to engage in collective bargaining? For example, figures on the proportion of women, migrants or other minorities, informal workers (i.e. those in employment without legal security, employment contracts or access to social security benefits) or young people.

2F. What is the total number and/or rate of recordable work-related injuries and fatalities?

Workers in own business areas who are not employees

There can be many types of workers who are not employees in a company's own operations. Their rights are particularly at risk, but they often fall through the cracks of attention and accountability and so it is worth paying particular attention in the human rights due diligence process.

3A. Has the company mapped, assessed and disclosed its regular business partners (e.g. subsidiaries, franchises, licensees, subcontractors, temporary employment agencies)?

3B. What percentage of all workers are not employed, e.g. those in outsourced operations, those employed through temporary employment agencies or franchises, or self-employed and contract workers who work significantly for the company?

3C. Does the company have a process to ensure that the conditions for these workers are the same as for direct employees?

3D. In which countries, ranked 4, 5 or 5+ in the ITUC Global Rights Index, does the company employ this type of worker? How many such workers are there in each of these countries?

3E. Can the company provide answers to Questions 2A - 2E for these workers, in general and specifically for the high-risk countries mentioned in Question 3D?

Suppliers

Company suppliers are often the source of many serious human rights risks. Companies should first and foremost understand and be transparent about their value chain. If companies do not know where their products or services come from, they cannot possibly ensure that human rights violations are not taking place there. If companies do not share this information publicly or with trade unions, they cannot properly assess the risks along the value chain.

Companies need to look both at their systems for monitoring and managing human rights risks at suppliers, and at how their own purchasing practices and relationships with suppliers may be contributing to human rights risks. The specific risks to look out for among suppliers will vary depending on the industry and specific activities of the company. The following questions are intended to provide an assessment of the company's approach to identifying and addressing risks with its suppliers and to help identify any gaps.

4A. Has the company mapped its own suppliers? Direct suppliers, i.e. Tier 1? Also beyond that? Is this publicly disclosed?

4B. Can the company provide answers to questions 2A - 2E for direct suppliers - in aggregate and for countries ranked 4, 5 and 5+ in the ITUC Global Legal Index?

4C. What is the length of the relationship with direct suppliers, or what is the turnover among suppliers?

4D. Has the company assessed how its purchasing and sourcing practices affect suppliers' ability to meet human rights standards?

4E. What arrangements does the company make to ensure the protection of human rights in: 1. the selection of suppliers; 2. communicating human rights expectations to suppliers; 3. monitoring suppliers' practices? What procedure does the company have in



place in case there is a human rights problem at a supplier? How do they engage with the supplier in dealing with the problem? How does the company use leverage to resolve a problem? For example, what consequences are there in the event of violations of the code of conduct?

4F. Is the company aware of risks or violations at indirect suppliers? Has the company been informed of risks by trade unions or other stakeholders?

The problem with certifications and social audits

Many companies rely primarily on certifications and social audits in the human rights due diligence of their suppliers. Some companies carry out audits themselves, others commission external auditors, and still others demand certifications from suppliers, compliance with which is checked through social audits.

Despite the widespread practice, many studies show that social audits are not fit for purpose for human rights due diligence. At best, they can play a limited role, but they have too many shortcomings to be relied upon. These include incentives to produce whitewashed reports because they are paid for by the company or the supplier itself, and there are cases of audit fraud, including bribery. The Business and Human Rights Resources Centre [summarises](#) the limitations of social audits as follows:

- They only provide a snapshot;
- They rely on checklists rather than being based on and following up on actual risks;
- They are unsuitable for initiating change at suppliers because the company commissioning the audit only focuses on monitoring instead of supporting suppliers in making changes;
- They are often non-transparent and not truly independent, e.g. if social auditors are contracted by the company to be audited or methods and results are not published;
- They are often used by companies to reduce their reputational risk (or legal risk) rather than to reduce risks to people and the environment.

Human Rights Watch recently reiterated the problems of social audits in a [comprehensive analysis](#), as did SOMO in a [report](#) on industry initiatives and audits.

Thus regardless of the number or frequency of audits conducted, companies cannot rely on audits alone to meet their human rights due diligence obligations. Instead, companies should strive for better practices, in particular ones that involve trade unions. If you find that the company relies solely on social audits, this should raise doubts about the company's risk analysis. BAFA does not specifically address in current guidance the use of social audits, but the comprehensive approach in BAFA's [guidance](#) on risk analysis indicates that a risk analysis based solely on audits would not meet expectations.

Trade unions should push companies to adopt more effective approaches to risk analysis. This may include analysis in collaboration with trade unions, participation in agreements such as the [International Accord](#), or [human rights impact assessments](#) that evaluate impacts on rights holders such as workers, residents, consumers and others. As described in the next steps below, it is advisable to coordinate with UNI or another global union federation to determine the best approach for a particular company context.

Next steps

These questions are a starting point to bring to light whether a company has conducted an adequate risk analysis to meet the requirements of the German Supply Chain Act and international standards. The company's answers will identify risk areas where it should adjust its preventive measures or take remedial action. The questions that companies cannot answer will provide information on gaps in the implementation of corporate due diligence. They should inform the next steps for effective risk analysis by the company.

Some companies may refuse to involve trade unions in this process, or only inform them of measures instead of involving them in their development. This would inhibit the effectiveness of the risk analysis and further measures and is contrary to international guidelines such as the UNGP and the OECD Guidelines.

Trade union and worker representatives are not alone in this process. If you are insufficiently informed by the company, if necessary information is withheld from or if you have doubts about the effective fulfilment of the company's due diligence obligations, you can turn to your union to contact UNI Global Union or the other relevant global union federations for other sectors such as the ITF or PSI.

They have extensive experience in human rights due diligence, including persuading companies to change their business practices, bringing companies to the negotiating table and linking a company's workers around the world, for example through trade union alliances. Under Global Agreements, global union federations like UNI can serve as a global counterpart to multinational companies. Cross-border coordination is important to ensure an effective role for trade unions in implementing corporate due diligence.

Further information and materials:

- [The United Nations Guiding Principles on Business and Human Rights \(UNGPs\)](#)
- [The OECD Guidelines for Multinational Companies](#)
- [The OECD Due Diligence Guidance for Responsible Business Conduct](#)
- The German law on corporate due diligence obligations in supply chains - in [German](#) and [English](#)
- [Guidance from BAFA](#)
- UNI Europa: [E-Learning-Module, Toolkit und Checklists](#)
- The expert organisation Shift has produced insightful reports on the following topics:
 - [Conducting human rights due diligence on trade union rights](#)
 - [Signals of seriousness of company due diligence](#)
- ver.di co-determination page on the Supply Chain Due Diligence Act: overview of the Supply Chain Act | ver.di (verdi.de) [Überblick zum Lieferkettengesetz | ver.di \(verdi.de\)](#)
- ver.di fact sheet on the German Supply Chain Due Diligence Act (LkSG): [Overview of the Act - ver.di \(verdi.de\)](#)
- To review a company's past record, you can:
 - contact your union to put you in touch with the relevant global union federation;
 - search the [Business and Human Rights Resource Centre](#) to find reports of human rights violations or risks by industry sector;
 - check how the company performs on key human rights benchmarks - the World Benchmarking Alliance's [Social Transformation Baseline Assessment](#), the [Corporate Human Rights Benchmark](#), or the Modern Slavery [Know the Chain](#) Benchmark; and
 - also review company reports, including annual and sustainability reports.

