

Due Diligence in Supply Chains Act (LkSG)

Questionnaire on reporting published by BAFA

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On 11.10.2022, the Federal Office of Economic Affairs and Export Control ("BAFA") published the long-awaited question catalogue¹ on the reporting obligations of companies under § 10 para. 2 of the LkSG.

The report on the fulfilment of due diligence obligations according to §10 para. 2 LkSG is a central element of the law. With it, the companies - as the BAFA puts it - hand in their first business card.

At what time must the report be submitted?

Companies must prepare an annual report on the fulfilment of due diligence obligations in the previous business year

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and make it publicly available free of charge on the company's website no later than four months after the end of the business year for a period of seven years. The report must be submitted to BAFA in German and electronically via an access point to be provided no later than four months after the end of the business year.

In the case of affiliated companies, do all companies have to submit a separate report?

In the case of affiliated companies, where both the ultimate parent company and subsidiaries meet the thresholds of the LkSG, independent reports must be submitted in each case

1

https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/merkblatt_fragenkatalog.html?nn=18157744

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- according to BAFA - whereby plausible references are to be permissible.

This solution, which has been criticised in the literature and is impracticable from the company's point of view, is regrettable and means an additional bureaucratic effort in larger groups, which does not promise any gain from the authority's point of view.

What is the content of the reporting obligation?

The legislator requires a comprehensible presentation,

- whether and, if so, which human legal and environmental risks or violations of a human legal or environmental duty the company has identified,
- what the company has done to fulfil its due diligence obligations; this includes, for example, the policy statement as well as the measures taken by the company in response to complaints,
- how the company evaluates the impact and effectiveness of the measures; and
- what conclusions it draws from the assessment for future action.

The comprehensive questionnaire that BAFA has now published goes into all the details of the LkSG. It is a quasi "translation aid" of the requirements of the law in question form. The basic chapters of the question catalogue concern:

A - Strategy and anchoring

[A1] Monitoring of risk management and management responsibility

[A2] Policy Statement on the Human Rights Strategy

[A3] Anchoring the human rights strategy within one's own organisation

B - Risk analysis and prevention measures

[B1] Implementation, procedure and results of the risk analysis

[B2] Prevention measures in own business area

[B3] Prevention measures at direct suppliers

[B4] Prevention measures at indirect suppliers

[B5] Communication of the results

[B6] Amendments and Occasional Effectiveness Review

C - Findings of violations and remedial actions

[C1] Findings of violations and remedial action in own business area

[C2] Findings of violations and remedial action at direct suppliers

[C3] Findings of violations and remedial actions at indirect suppliers

D - Complaints procedure

[D1] Establishment of or participation in a complaints procedure

[D2] Requirements for the complaints procedure

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[D3] Effectiveness of the appeal procedure

E - Risk management assessment and conclusions

BAFA as a partner for companies

BAFA emphasises that it sees itself as a partner of companies that want to fulfil the requirements of the LkSG. Consideration is given to "entrepreneurial realities", especially in the first reporting year. In many places, there is the possibility of introducing processes that have been started but not yet completed, complex company-specific structures or contents via free text fields.. These comments indicate that BAFA is willing to tolerate certain deficits in the implementation of the LkSG, especially in the first reporting year.

On the other hand, BAFA emphasises that it will carry out risk-based inspections, with an important criterion being how "plausible" a company's submitted report is. Companies would therefore do well to fill out the questionnaire precisely and carefully.

Do companies or organs have the right to refuse to give evidence?

BAFA also points out that no company is required to make statements, the answers to which would expose "you" (i.e. its employees or organs) to the risk of criminal prosecution or proceedings under the Administrative Offences Act (Ordnungswidrigkeitengesetz). By means of a "checkbox query", the company could confirm whether it would make use of the right to refuse to

make a statement when answering binding questions.

How are trade and business secrets protected?

According to the BAFA questionnaire, companies are generally not obliged to disclose trade and business secrets. In principle, this is to be welcomed in order to avoid competitive disadvantages, for example in the disclosure of direct or indirect suppliers. However, Section 10 para. 4 of the LkSG contains a somewhat softer wording, according to which trade and business secrets are only to be "duly taken into account". It remains to be seen how the field of tension will develop here.

Regulatory audit and fines

The LkSG contains a whole arsenal of measures in the event of late, incomplete or even false information. BAFA examines the content of the companies' reports (§§ 10 paras. 2 and 3 and 13 LkSG). If the requirements are not met, BAFA can demand improvements within a reasonable period of time (§13 para. 2 LkSG).

The retention of documentation for at least 7 years, the correct preparation, timely publication and submission of the report pursuant to § 10 para. 2 LkSG to the BAFA or the contravention of an enforceable order to rectify a report are punishable as administrative offences with fines in the event of violations.

Glossary

The glossary included at the end of the questionnaire is helpful, as it explains the

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terms used, partly autonomously, partly with reference to FAQs.

Conclusion

The BAFA has provided a first draft or guidance for the questionnaire to be filled out. The 35-page questionnaire covers all details and nuances of the LkSG and causes a considerable reporting effort. Those who had hoped that the reporting obligation would not be taken seriously or at would be shaped in a rather moderately form find themselves disappointed. Companies are strongly advised to deal intensively with the questionnaire and to carefully provide plausible answers.
