Laws will push human rights due diligence

On 3 March, the German Federal Cabinet passed a draft law outlining the obligations of companies to conduct human rights due diligence through their supply chain. Known as the "Due Diligence Act" or the "Supply Chain Act', the proposed law is expected to become law in 2022.

Initially, the Act would apply to companies with more than 3,000 employees and require human rights due diligence across international supply chains. In the draft legislation, the due diligence obligations are described as "best efforts obligations", but companies should be able to demonstrate that they have implemented the due diligence obligations in a way that is "appropriate and practicable" based on the industry and company profile. Guidelines for penalties will be forthcoming.

Due diligence should ensure the absence of child labor in the supply chain.

Describing due diligence obligations as "reasonable efforts" may cause some anxiety among export compliance professionals tasked with understanding the breadth and depth of due diligence required – and how much time and money such efforts are likely to take. In Germany, the draft legislation has attracted criticism from industry and business organizations as being too difficult to implement. However, all indications are that this type of law or regulation will become more common with countries looking to uphold the United Nation's Guiding Principles and the Organization for Economic Co-operation and Development's Guidance for Responsible Business Conduct in a more substantial way. In addition, Environmental, Social, Governance ("ESG") concerns are a hot button for investors for looking at qualitative investment risks in the companies they invest in.

Patrick Spaeth, a Partner, and Felix Werner, an Associate at law firm Morrison & Foerster LLP in Berlin, agree that the draft Due Diligence Act "has definitely become a global trend. It is further driven by overall ESG discussions taking place amongst companies, investors and regulatory bodies."

Spaeth and Werner point to various initiatives globally for advancement to laws in the near future. In addition to the German proposal, France, the Netherlands, Switzerland and the UK have implemented human rights related legislation already; in Finland, Denmark and Austria, there are proposals at parliamentary level or in government coalition agreements to introduce human rights due diligence requirements; in the US, while still early days, the Securities and Exchange Commission has recently created the Climate and ESG Task Force to, amongst other things, develop initiatives to proactively identify ESG-related misconduct, with the Acting Chair of the SEC highlighting human rights as one of the fundamental issues to markets and investors.

"It is largely within the companies' discretion how to organize compliance with such requirements," says Werner. "Depending on each company's unique organizational set-up and history, it may be practical to task compliance teams with addressing these risks and implementing due diligence requirements as part of a company's existing compliance management system."

Compliance departments are not strangers to vetting third parties, assessing third-party risk, and drafting the needed policies and guidelines. For compliance teams, however, the question will be whether adding a few lines about human rights due diligence requirements is enough to fulfill the intent and the letter of the law, or if new policies, procedures, frameworks and training will be introduced with a view to achieving the requirements of the new laws and the company's ESG commitments.

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