

Luther.

Memo: The German Supply Chain Act and its implications on business operations in Thailand

October 2023



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A. Introduction



On 11 June 2021, the “Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chain” (Lieferkettensorgfaltspflichtengesetz – LkSG) – hereafter “SCA” – was enacted, for the first time establishing the duty of care of enterprises to avoid human rights violations in one’s own supply chain (human rights due diligence) and vis-à-vis direct suppliers. The new law will come into effect on 1 January 2023 and initially apply to enterprises that normally have at least 3,000 employees. From 2024, this threshold will be reduced to 1,000 employees.

As the new law contains several due diligence obligations and hefty penalties for non-compliance with its requirements, we strongly recommend to already make yourself familiar with the SCA and assess whether it will apply to your business operations in South-East Asia: This is, for example, the case if you have a business presence registered in Thailand or source goods or services from Thai suppliers for the German market.

This publication summarises key aspects of the SCA and highlights its most important requirements. If you would like to receive further information from us, please let us know. In the meantime, we hope that you will find this publication useful.

B. General overview of compliance requirements

Please find below an overview of the most important requirements under the SCA:



Establish a risk management system and regularly perform risk analyses in own business area and vis-à-vis direct suppliers



If **RISKS** are identified, without undue delay:
Adopt a policy statement on human rights protection in supply chains



If **RISKS** are identified, without undue delay:
Implement preventive measures for own business activities and/or vis-à-vis direct suppliers



If **VIOLATION** occurred or is imminent, without undue delay:
Take remedial action and/or mitigate risks

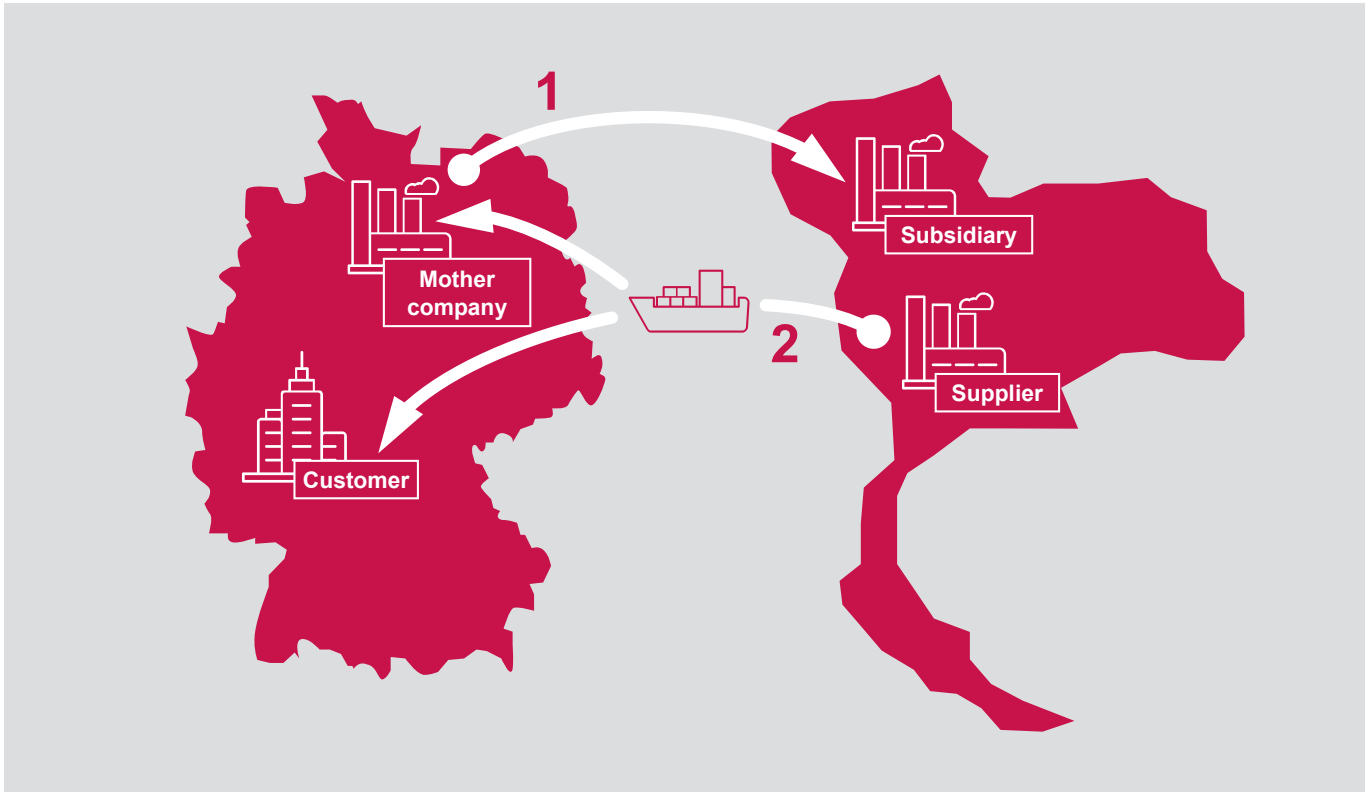


Implement a internal complaint system or participate in a corresponding external complaints procedure



Document the fulfilment of all due diligence obligations and submission of an annual report with the relevant authority

C. Implications on businesses in Thailand



1.

German enterprise with own subsidiaries and/or affiliated businesses in Thailand

2.

Direct supplier in Thailand who sells goods or provides services to enterprises in Germany

D. Scope of application

1. Affected enterprises

From 1 January 2023, the SCA will apply to enterprises regardless of their legal form that have their central administration, principal place of business, administrative headquarters or statutory seat in Germany and normally have at least 3,000 employees in Germany. Please mind that employees posted overseas are also included in this calculation.

Further, the SCA will apply to enterprises regardless of their legal form that have a domestic branch pursuant to the German Commercial Code (Handelsgesetzbuch – HGB) and that normally have at least 3,000 employees in Germany.

From 1 January 2024, the this threshold will be reduced to 1,000 employees.

2. The Supply Chain

Under the SCA, the term “supply chain” refers to all products and services of an enterprise. It includes all steps in Germany and abroad that are necessary to manufacture products and provide services, starting from the extraction of raw materials to the delivery to the end customer.

It includes:

- the actions of an enterprise in its own business area;
- the actions of direct suppliers; and
- the actions of indirect suppliers.

2.1 Own business area

The own business area covers every activity of the enterprise to achieve its business objectives. This includes any activity for the creation and exploitation of products and services, regardless whether it is carried-out in Germany or abroad. In affiliated enterprises, the parent company’s own business are includes a group company if the parent company exercises a decisive influence on the group company.

2.2 Direct suppliers

A direct supplier is a partner to a contract for the supply of goods or the provision of services whose supplies/services are necessary for the enterprise to manufacture its products or provide its services.

2.3 Indirect suppliers

An indirect supplier is any enterprise which is not a direct supplier and whose supplies are necessary for the production of the enterprise’s products or for the provision and use of the relevant services.

3. Protected legal positions

The SCA shall improve the international human rights situation through responsible structuring of the supply chains of German enterprises. It contains several prohibitions based on international agreements (e.g., employment of children under the legal minimum age, forced labour, disregarding occupational safety and health laws, violating the freedom of association, unjustified discrimination in employment).

A human rights risk is defined as a situation in which, based on actual circumstances, there is a reasonable likelihood of a violation of one of the listed prohibitions, for example child labour/forced labor/slavery, disregarding occupational health and safety obligations under local law or unequal treatment of staff because of sex, age, gender or religion.

Further, it shall protect the environment and prohibits violating obligations under the Minamata Convention on Mercury, the Stockholm Convention on Persistent Organic Pollutants and the Basel Convention on the Control of Hazardous Wastes.

E. Due diligence obligations

Enterprises must comply with several human rights and environment-related due diligence obligations in their supply chains with the aim of preventing or minimising any risks to human rights or environment-related risks or of ending the violation of human rights-related or environment-related obligations.

These due diligence obligations include:

- establishing a risk management system and regularly performing risk analyses;
- adopting a policy statement on human rights protection in supply chains;
- implementing preventive measures for its business activities and vis-à-vis direct suppliers;
- taking remedial action and/or mitigating risks;
- implementing a complaint system; and
- documenting and reporting.

The SCA requires enterprises to comply with these due diligence obligations in an “appropriate manner”, which is for example determined by the nature and extent of the enterprise’s business activities, the ability of the enterprise to influence the party directly responsible for a human rights risk or environment-related risks or the violation of a human rights-related or environment-related obligation, and the severity of potential damages.

The law sets a flexible framework within which the specific standard of duties of care depend on the individual enterprise and risk situation. It adopts a duty of best effort, but not a duty to succeed. Business are thus not required to absolutely prevent any human rights violations, but are required to prove that they have done everything in their power to identify human rights-related risks within the specific overall situation and tried to prevent or to remedy such violations.

While the Supply Chain Act primarily addresses an enterprise’s responsibility for its own business and direct suppliers, indirect suppliers may be subject to due diligence obligations if the enterprise is, or becomes aware of potential violations within the wider supply chain.



1. Risk management and risk analysis

As a first step, enterprises must develop and implement an appropriate and effective risk management system to identify/detect/prevent potential negative impacts on human rights within its business operations. This includes, for instance, to determine who is responsible for the risk management, for example by appointing a human rights officer.

Enterprises must carry-out a risk analysis in their own business operations and in their direct suppliers once a year and also on a case-by-case basis in the event of a significant increase in risks.

Identified risks must be prioritised appropriately, taking into account, for example, the severity and expected damage of the violation. The results of this risk analysis form the basis for the preventive and remedial measures. Enterprises can decide how to carry-out their risk analysis. Government documents name inspections on site, discussions with employees and, especially in the case of environmental risks, local residents as examples.

With respect to indirect suppliers, enterprises are required to conduct a risk analysis only if it obtains substantial knowledge of possible violations.



2. Policy statement

If an enterprise identifies any risks, it must immediately take appropriate preventive measures. It must adopt a so-called “policy statement” on its human rights strategy, which must comprise of a description of the procedures to ensure compliance with human rights and environmental due diligence obligations throughout the supply chain, the main risks identified during the analysis and a code of conduct for employees and suppliers, outlining expectations for the protection of human rights and the environment.

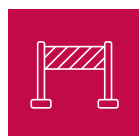


3. Preventive measures

Further, it must set-up appropriate preventive measures in their own business area (including companies belonging to the group). These include implementing the human rights strategy in the business

processes set out in the policy statement, implementing appropriate purchasing processes, training of staff and monitoring whether the human rights strategy is integrated and properly adhered to.

The enterprise must also set-up appropriate preventive measures for direct suppliers. The principles of the policy statement shall serve as a guideline and be taken into account when selecting direct suppliers, suppliers shall provide a contractual guarantee that they will comply with the human rights and environmental requirements and address them in an appropriate way to their (indirect) suppliers and implement control mechanisms as well as trainings for suppliers.



4. Remedial action and/or mitigating risks

If an enterprise determines that the violation of a protected legal position has occurred or is imminent, it must take appropriate remedial measures “to prevent this injury, to end it or to minimise the extent of the injury”.

If the violation occurs in an enterprise’s own business area, the remedial measure must end it.

If the violation occurs in a direct supplier’s business area and cannot be ended in the foreseeable future, a concept for minimizing the extent of the injury must be drawn up and implemented immediately.

For example, the following measures must be taken into account: joint development and implementation of a plan to remedy the grievance with the supplier, cooperation with other enterprises to apply pressure and increase the possibility of influencing the polluter and temporary suspension of the business relationship.

The concept should include considerations as to when to terminate the business relationship. This shall, however, only be necessary if a violation is very serious, remedy has failed, and the enterprise does not have any milder options.

If an enterprise obtains substantiated knowledge of a possible violation of human rights or environmental obligations by an indirect supplier, it must carry-out a risk analysis and take appropriate and preventive measures. This can mean that also indirect suppliers must be controlled, trained and supported.



5. Complaint system

An enterprise must set-up a system that allows those affected and third parties to point out violations. This must include the possibility to point out injuries caused by indirect suppliers.

If a complaint is received, the receipt must be confirmed and the facts be discussed with the whistle blower. An enterprise must lay down rules of procedure. The person responsible for the complaint process must be impartial, independent, free from instructions and bound to secrecy. This indicates that an enterprise cannot actually use an own employee.

Further, an enterprise must publish appropriate and easy to understand information on the complaint system (e.g., on its website). It must guarantee confidentiality and protect the whistle blower from discrimination or punishment based on the complaint.



6. Documenting and reporting

An enterprise must document the fulfilment of its due diligence obligations (continuously and immediately/on an ad-hoc-basis). Such documentation is not public, but can be reviewed by the relevant authorities as part of an examination.

Further, an enterprise must draw-up an annual compliance report, showing which risks have been identified, what measures were taken, how it evaluated the effectiveness of its measures and conclusions drawn for the future.

The annual report must be published on the enterprise’s website and submitted to the relevant authorities for review.

The information provided in the annual report should be comprehensible and pass plausibility checks. At the same time, however, operational and business secrets are not disclosed. This may lead to difficult decisions, e.g., regarding the disclosure of information that makes direct or indirect suppliers identifiable.

F. Monitoring and enforcement

1. Authority

The German Federal Office for Economic Affairs and Export Control (“**BAFA**”) is in charge to assess compliance with the Supply Chain Act. BAFA checks reports submitted by an enterprise to see whether they comply with the statutory requirements.

If these requirements are not met, BAFA can demand that reports to be revised. BAFA can become active ex officio or at the request of a person who reported a violation (or an imminent risk thereof).

BAFA can instruct an enterprise to draw-up and submit a plan to remedy the grievances or name specific actions to comply with its statutory obligations.

2. Sanctions

In case of a violation, the Supply Chain Act provides for the possibility to implement fines against a natural person of up to EUR 800,000.

For a large enterprise with an average annual turnover of over EUR 4 million, fines can be up to 2% of the annual sales amount. According to the wording of the law, “the worldwide turnover of all juristic persons is taken into account”. This could mean group sales all around the world.

In the event of fines exceeding EUR 175,000, there is a risk of exclusion from public tenders in Germany for up to three years.

3. Liability

The SCA clearly states that “A violation of the obligations under this law does not constitute grounds for civil liability.” However, a civil liability established independently of this law stays untouched. For example, section 823 of the German Civil Code (Bürgerliches Gesetzbuch – BGB) may apply.

The SCA provides for a special capacity to sue (“besondere Prozessstandschaft”). In case of violation of an “extremely important legal position from the Supply Chain Act, German trade unions and non-governmental organisations can sue and act as litigants.

G. Our Services

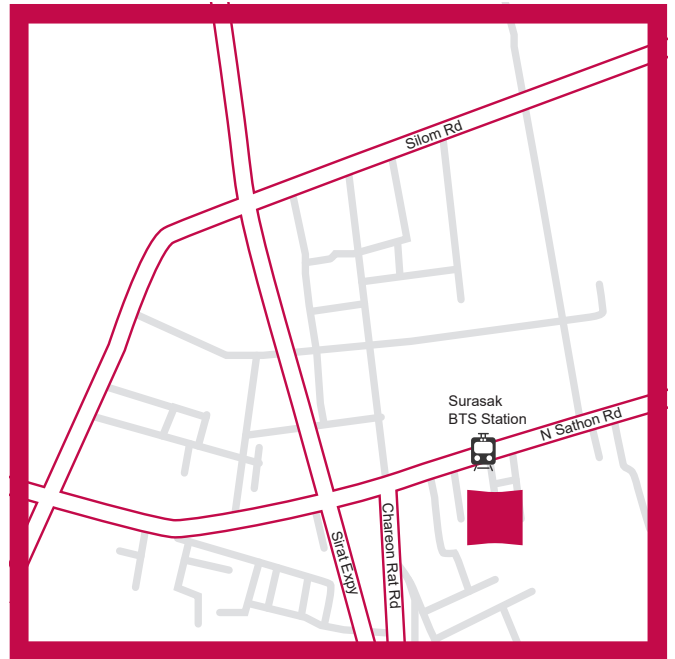
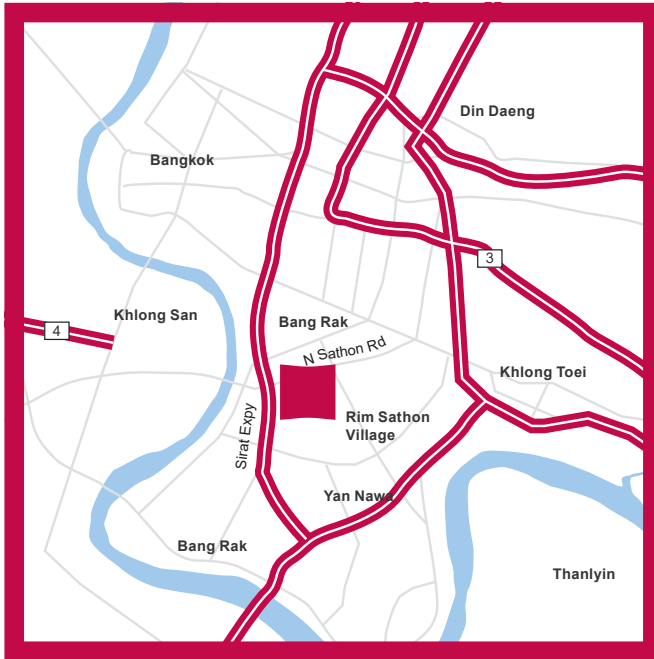
We have extensive experience in helping clients understand their global supply chain risks and assisting them to develop clear and concise policies. This includes identifying the implications of proposed business transactions and helping them make informed business decisions.

We can assist in conducting risk analyses and setting up risk management systems in various complex business environments to support our clients in properly identifying, understanding and assessing the implications of proposed business transactions and make informed business decisions

Our multidisciplinary and cross-functional teams can draw up organisational conclusions – ideally tailored to the specific business and in an audit-proof manner.

Should you have any questions or require further information, please do not hesitate to contact us.

Our office in Bangkok



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Luther in Asia

Expertise

Our office works closely together with the other Luther offices in Asia and Europe. We take a holistic approach, dealing with Asia-wide compliance issues, assisting with the creation of international holding structures and ensuring tax-efficient repatriation of profits.

We provide the complete range of legal and tax advice to clients doing business in and from Asia. To offer a seamless service, we have teams in Europe as well as in Asia, led by partners with many years of experience on both continents. That way, we can immediately answer questions concerning investment decisions and provide our clients with an accurate assessment of the particularities of their projects, no matter where they are located.

Our lawyers unite substantial practical knowledge in important legal areas and cover the entire spectrum of law in Asia and beyond. We support foreign investors in the assessment of location and investment criteria, the structuring of investment projects, acquisitions and joint ventures. Finding and implementing solutions for sensitive areas like technology transfer and know-how protection also form part of our work. Alongside our clients we negotiate with future partners and local authorities and ensure the enforcement of their rights, in and out of court as well as in arbitration proceedings.

The services of our lawyers are complemented by our accountants, HR professionals and tax consultants offering all the services one would necessarily associate with a “one-stop shop” concept, from outsourced administration to accounting, payroll and tax compliance. Additionally, we provide corporate secretarial services, especially in Asian “common law” countries.

Collectively, our lawyers, tax consultants and professionals combine the competence and experience necessary to comprehensively assist comprehensively on all business matters in Asia. Our tax experts advise on individual and corporate tax compliance as well as on withholding tax issues, on Double Taxation Agreements and on complex international tax structures. Our accountants and professionals carry out the time-consuming administrative tasks of accounting and payroll functions a business must undertake, allowing our clients to concentrate on growing their business.

Singapore

Singapore is a leading international trade and financial hub. As such, it serves as Asian headquarters for many international companies operating within the Asia-Pacific region.

With a staff strength of more than 90, Luther is by far the largest continental European law firm in Singapore. More than 26 lawyers from Singapore, Germany, France and other jurisdictions cover the full range of corporate and commercial legal work as well as the structuring of investments within South and South East Asia.

Our team is supported by excellent local Singaporean lawyers, notary publics, tax advisors, accountants, corporate secretaries and other professionals.

Shanghai

Shanghai is the main hub for doing business in China, and with a team of more than 20 international lawyers, Luther is the largest German-speaking law firm in the city. Our China team consists of German and Chinese legal experts most of whom have over a decade of experience in developing and entering the Chinese market.

Luther Shanghai is fully authorised to offer legal services including litigation and provides advice on all questions of Chinese law. Our legal team is supported by Chinese tax advisors, accountants, corporate secretaries and other professionals.

Region

Our two principal Asian offices in Singapore and Shanghai are complemented by offices and teams in Yangon (Myanmar), Bangkok (Thailand), Delhi-Gurugram (India), Ho Chi Minh City (Vietnam), Kuala Lumpur (Malaysia) and Jakarta (Indonesia).

This network of Luther offices is further strengthened by the long-established business relationships that we have successfully developed both locally and with our regional partners in Australia, Hong Kong, Japan, New Zealand, the Philippines and South Korea.

Hits the Mark. Luther.

Luther Rechtsanwaltsgesellschaft mbH is one of the leading corporate law firms in Germany. With some 420 lawyers and tax advisors, we can advise you in all fields of German and international corporate law. In addition to having offices in every economic centre throughout Germany, we are also present in 11 locations abroad: in Brussels, London and Luxembourg in Europe, and in Bangkok, Delhi-Gurugram, Ho Chi Minh City, Jakarta, Kuala Lumpur, Shanghai, Singapore and Yangon in Asia.

Our advisory services are tailored to our clients' corporate goals. We take a creative, dedicated approach to achieving the best possible economic outcome for each of our clients. The name "Luther" stands for expertise and commitment. With a passion for our profession, we dedicate all our efforts to solving your issues, always providing the best possible solution for our clients. Not too much and not too little – we always hit the mark.

We know how crucial it is to use resources efficiently and to plan ahead. We always have an eye on the economic impact of our advice. This is true in the case of strategic consulting as well as in legal disputes. We have complex projects on our agenda every day. At Luther, experienced and highly specialised advisors cooperate closely in order to offer our clients the best possible service. Thanks to our fast and efficient communication, permanent availability and flexibility, we are there for you whenever you need us.

Luther has been named "Law Firm of the Year: Germany 2021" and also "European Law Firm of the Year 2021" by The Lawyer, one of the most well-known legal magazines worldwide.



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unyer has an exclusive approach and only accepts one member firm from each market. unyer members offer its clients full services across all jurisdictions with a compelling industry focus. The organisation has an annual turnover of more than EUR 650 million and includes over 2,550 lawyers and advisors in more than 14 countries in Europe and Asia. In September 2021, Pirola Pennuto Zei & Associati joined the international organisation. In the spring of 2023, the Austrian law firm KWR joined the group.
www.unyer.com



Our Locations

Our and our local partners' offices in important European and Asian markets



The shown locations are either Luther legal or corporate services offices and/or offices of our local cooperation partners.

Luther.

**Bangkok, Berlin, Brussels, Cologne, Delhi-Gurugram, Dusseldorf, Essen,
Frankfurt a.M., Hamburg, Hanover, Ho Chi Minh City, Jakarta, Kuala Lumpur,
Leipzig, London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart, Yangon**

You can find further information at:

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