

Newsletter, 3 January 2023

## Supply Chain Act and Antitrust Law

The new Supply Chain Act requires companies to conduct appropriate human rights and environmental due diligence in their supply chains. Nonetheless, antitrust laws remain applicable

**As of 1 January 2023, the Supply Chain Act<sup>1</sup> ("LkSG"), which was passed by the legislator in the summer of 2021, requires certain companies to comply with due diligence obligations regarding their global supply chains. In fulfilling their obligations in the context of selecting and monitoring suppliers, companies must still comply with antitrust rules in both vertical and horizontal relationships.**

The LkSG's objective is to ensure compliance with human rights and environmental standards along the global supply chain. Under the Act, companies must fulfill certain due diligence obligations with regard to their own business operations as well as to direct and, in exceptional cases, indirect suppliers. These include, for example, establishing a risk management system, conducting regular risk analyses, taking preventive measures and, if necessary, remedial action. Many of these measures raise antitrust concerns.

The due diligence obligations of the LkSG apply as of 1 January 2023 for companies that

- have their central administration, principal place of business, administrative headquarters or statutory seat or a branch office in Germany and
- normally employ at least 3,000 employees in Germany (as of 1 January, 2024: 1,000 employees).

### **Antitrust limits in vertical relationships (company – supplier)**

#### *Supplier selection and information exchange*

Pursuant to Section 6 (4) No. 1 LkSG, as a mandatory preventive measure a company must take human rights and environmental due

diligence into account when selecting its direct suppliers. To this end, the company might request competitively significant information from its suppliers, e.g. as part of an annual supplier audit. This may include sensitive information on production costs or other cost structures, such as the supplier's employment costs, which can be used to check whether the supplier complies with labor protection regulations and pays appropriate wages.

According to general antitrust guidelines on vertical information exchange, one has to differentiate between "need to know" information and such that is merely "nice to have": Information that is necessary for the performance of the contract or the fulfillment of legal obligations, such as the LkSG, belongs to the former category. An exchange of such information is generally permitted from an antitrust perspective, provided the companies are not competitors. Antitrust concerns arise when the supplier unrequested provides unrelated additional information or if information sources are used in an institutionalized manner.

#### *Exclusive purchasing obligations*

The fulfillment of the due diligence obligations prescribed by the LkSG can intensify the business relationship between company and supplier. Companies may be even more interested in retaining reliable suppliers in the long term. Exclusive purchasing obligations on part of the buyer, however, are only permitted under antitrust law if the market shares of the parties are below 30% on the relevant purchasing and sales market, the exclusive purchasing obligation does not cover more than 80% of the buyer's total requirements and can be terminated within five years.

<sup>1</sup> Act on Corporate Due Diligence in Supply Chains of 16.7.2021, available [here](#) in English.

### Resale price maintenance

Customers likely perceive compliance with human rights and environmental standards as an indication of increased quality. The supplier could therefore try to demand a fixed sales price from its buyer for a product that complies with the requirements of the LkSG, which reflects the increased product quality or higher costs caused by compliance with the due diligence obligations. Price fixing that goes beyond non-binding recommended resale prices or maximum prices as well as agreements as to whether and how any changes in costs are passed on along the supply chain are prohibited under antitrust law.<sup>2</sup>

### Antitrust limits in horizontal relationships (between competitors)

#### Industry initiatives and standards

In order to increase the possibilities of exerting influence on suppliers who do not meet the standards required by the LkSG, the law explicitly addresses cooperations between companies within the framework of industry initiatives and industry-wide standardization agreements (Section 7 (2) No. 2 LkSG). From an antitrust perspective, such cooperations must comply with the rules for standardization agreements based on the EU Horizontal Guidelines. For example, there must be no obligation to participate in the standard, the procedure must be transparent and the standard accessible on non-discriminatory terms. The information exchange must be limited to what is necessary and there must be no coordination of prices and sales volumes.

#### Purchasing cooperations

The implementation of the due diligence obligations prescribed by the LkSG may incentivize purchasing cooperations. Here, the participating companies can define common criteria for supplier selection and monitoring as well as sanctioning mechanisms. As a rule of thumb, if the members have a joint market share of less than 15% on the relevant purchasing and sales markets, a purchasing cooperation is considered unproblematic under antitrust law. The members are not allowed to reach agreements on their sales prices and quantities, exchange strategic information, or divide up customers or markets.<sup>3</sup>

<sup>2</sup> FCO [case summary](#) about the sustainability initiative "Living Wages" of 25.11.2021.

### Exchange of information about suppliers

Antitrust law also limits the information exchange between competitors with regard to supplier selection. For example, sensitive information on cost structures that suppliers have communicated to companies pursuant to Section 6 (4) No. 1 LkSG must not be exchanged with competitors. According to the draft of the new Horizontal Guidelines of the EU Commission<sup>4</sup>, however, an information database on suppliers and distributors that have a sustainable supply chain does generally not raise any competition concerns as long as there is no obligation to enter into a business relationship with the suppliers listed in the database.

### Comment

Measures required under the LkSG may raise antitrust concerns. In order to meet the standards prescribed by the Act and to implement the due diligence obligations, particularly cooperations between companies will likely become more relevant in practice in the future. Companies continue to be bound by antitrust rules on, *inter alia*, information exchange and industry standards. Industry initiatives have to be assessed thoroughly and a consultation with the Federal Cartel Office might be recommended.



Franziska Lange-Schlüter, LL.M.



Isabel Oest, LL.M.

#### COMMEO Attorneys at Law PartGmbH

Lawyers and notary  
Speicherstraße 55 | D-60327 Frankfurt am Main  
[www.commeo-law.com](http://www.commeo-law.com)

COMMEO is an independent law firm specialized in competition law. We are an established team of experienced lawyers advising clients on all aspects of German and European competition law.

*This publication has been prepared for information purposes only. It does not claim to be complete and does not constitute legal advice. Any liability in connection with the use of the information and its accuracy is excluded.*

<sup>3</sup> FCO [press release](#) about the purchasing cooperation of Warsteiner and Karlsberg of 14.12.2022.

<sup>4</sup> [Draft Horizontal Guidelines](#) of 1.3.2022, para. 553.