

# Confronting systemic human rights violations

## Human rights due diligence and state-imposed forced labor under the German Supply Chain Act

### POLICY PAPER

The existence of state-imposed forced labor as a systemic human rights violation within global value chains requires an urgent corporate response. Although the issue of state-imposed forced labor and its presence within global production networks is not a recent phenomenon, it has gained international prominence in recent years. Documentation of the use of state-imposed forced labor in the production of cotton in Uzbekistan<sup>1</sup> and Turkmenistan,<sup>2</sup> and across multiple industries in the Uyghur Region of China,<sup>3</sup> has put pressure on companies operating in or sourcing from these regions to act.

With the introduction of human rights due diligence laws in Europe, companies now have a legal obligation to respect human rights in their supply chains. Most recently, the German Supply Chains Act (*Lieferkettensorgfaltspflichtengesetz*, LkSG) entered into force in January 2023. It requires that the largest German companies take appropriate measures to identify, prevent and remediate human-rights related risks in their supply chain.<sup>4</sup> This includes the actual or potential violation of the prohibition of forced labor.<sup>5</sup> The severity of state-imposed forced labor as a human rights violation that may reach the threshold of an international crime merits specific attention. In particular, what should be considered to be an appropriate due diligence response to the risk of forced labor when carried out as a systematic government policy, and how this affects the measures to be taken by corporations exposed to these risks?

This policy paper proposes key considerations for the implementation of the due diligence obligation under the LkSG in relation to state-imposed forced labor. Using the example of forced labor in the Uyghur Region of China, which has been connected to the supply chains of numerous German companies, it emphasizes that human rights due diligence carried out by companies operating in or sourcing from this region must take into account the specific political, legal and cultural context in which these human rights violations are occurring. Considering the context in which state-imposed forced labor is carried out, there are no due diligence measures through which companies can effectively identify or prevent these risks from occurring. As

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- 1 Between 2011 and 2022, international brands and retailers, united by the Cotton Campaign, led a boycott of cotton products from Uzbekistan as a result of the use of a state-imposed forced labour program in the harvesting of cotton.
  - 2 <https://www.cottoncampaign.org/turkmenistan>
  - 3 See for example Congressional-Executive Commission on China, *Global Supply Chains, Forced Labour and the Xinjiang Uyghur Autonomous Region* (March 2020)
  - 4 Section 3(1) LkSG
  - 5 Section 2(2) No.3 LkSG

a consequence, in this situation the only feasible due diligence response should be disengagement of business relationships with companies operating in the Uyghur Region. Failure to take appropriate action to address these risks exposes businesses to potential enforcement action under the LkSG, as well as potential criminal liability for aiding and abetting crimes against humanity.

#### Key recommendations

- Companies should map their value chains, from the extraction of raw materials to the end-product, to identify actual or potential exposure to state-imposed forced labor.
- Companies operating in industries, or sourcing from countries, where there are high risks of state-imposed forced labor should prioritize addressing these risks as part of the implementation of the due diligence obligation under the LkSG.
- In situations of state-imposed forced labor where the operating context prevents the implementation of effective due diligence measures to minimize or prevent severe human rights risks, companies should withdraw from business relationships or contracts with suppliers linked to these risks, in accordance with Section 7(3) LkSG.
- The government agency with responsibility for enforcing the LkSG (Federal Office of Economic and Export Control—BAFA) should prioritize monitoring of compliance with the due diligence obligation by German headquartered companies operating in industries, or sourcing from countries, where there are known risks of state-imposed forced labor.
- When monitoring company compliance, the BAFA should take into account the challenging human rights context in which state-imposed forced labor occurs and the heightened risk of business involvement in human rights harms, and interpret the due diligence obligation accordingly.

## STATE-IMPOSED FORCED LABOR AS A HUMAN RIGHTS RISK UNDER THE LKSG

State-imposed forced labor is labor exacted by a State (or agents acting on its behalf) against its population. It is implemented as a means of political coercion or education, or as a punishment for expressing political views; as a method of mobilizing labor for the purpose of economic development; as a means of labor discipline; or as a means of racial, social, national or religious discrimination.<sup>6</sup> The

prohibition of state-imposed forced labor is enshrined in international human rights law under ILO Conventions Nos. 29<sup>7</sup> and 105.<sup>8</sup> Nevertheless, it is estimated that in 2021 4 million people were forced to work by state authorities.<sup>9</sup>

State-imposed forced labor is among the most egregious forms of human rights violation, as it involves states not only failing in their duty to safeguard human rights, but actively using their power to perpetrate abuse against their population. It may occur alongside other violations, such as arbitrary detention, discrimination and surveillance.

For the purposes of the LkSG, state-imposed forced labor falls within the scope of human rights risks that are included in Section 2(2) LkSG, the realization of which companies should avoid, minimize or end by exercising human rights due diligence.<sup>10</sup> The prohibition of forced labor forms part of this list, defined as “all work or service that is required of a person under threat of punishment and for which he or she has not made himself or herself available voluntarily”.<sup>11</sup> Excluded from its scope is forced prison labor, compulsory military service, or “any work or service which forms part of normal civil obligations”.<sup>12</sup>

Where state-imposed forced labor is occurring within supply chains—for example in the Uyghur Region of China and in Turkmenistan where repressive governments are using systems of coerced labor on a massive scale to produce goods exported to global markets—businesses within the scope of the LkSG<sup>13</sup> must therefore take steps to prevent the realization of these risks through human rights due diligence.

<sup>6</sup> ILO, Walk Free and IOM, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (September 2022) p.14

<sup>7</sup> ILO Forced Labor Convention 1930 (No.29)

<sup>8</sup> Article 1 Abolition of Forced Labor Convention, 1957 (No.105)

<sup>9</sup> ILO, Walk Free and IOM (2022) p.4

<sup>10</sup> Section 2(2) No.3 LkSG

<sup>11</sup> This definition replicates the definition of forced labour in Article 2(1) ILO Convention No.29 “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”

<sup>12</sup> ILO Forced Labor Convention Article 2(2)

<sup>13</sup> As of 1 January 2023, the personal scope of the LkSG is companies that have their central administration, their principal place of business, their administrative headquarters or their statutory seat in Germany and more than 3000 employees in Germany (Section 1(1) LkSG). The threshold is lowered to 1000 employees from 1 January 2024.

## CASE EXAMPLE: FORCED LABOR AS PART OF INDUSTRIAL DEVELOPMENT IN THE UYGHUR REGION OF CHINA

Since 2017 the government of the People's Republic of China (PRC) has implemented a policy of forced labor of Uyghurs and members of other ethnic groups in the Xinjiang Autonomous Uyghur Region (hereinafter Uyghur Region). It is estimated that up to 1.8 million people have been detained in internment camps, and compelled to work.<sup>14</sup> In addition, as many as 3.2 million people have been forced to work as part of “surplus labor” programs that involves their coerced transfer to work in farms and factories across the Uyghur Region as well as in other regions of China. The severity of the human rights violations being carried out in the Uyghur Region has been recognized by the UN High Commissioner for Human Rights as potentially amounting to crimes against humanity.<sup>15</sup>

The Uyghur Region is a major agricultural base in China, and is heavily involved in the country's mining, industrial production and manufacturing sectors. As a consequence, global supply chains have been shown to be significantly exposed to forced labor practices in the Uyghur Region. The PRC government encourages and incentivizes all companies that are located in the Uyghur Region to participate in labor transfer programs. Therefore, it is highly likely that any company providing or receiving goods directly or indirectly from suppliers based there, faces state-imposed forced labor risks in their supply chain.

In June 2023 the European Center for Constitutional and Human Rights (ECCHR), with the support of the World Uyghur Congress, submitted complaints to the Federal Office of Economic and Export Control (BAFA), alleging that German automotive companies Volkswagen, Mercedes-Benz and BMW had failed to comply with their human rights due diligence obligation under the LkSG in relation to Uyghur forced labor.<sup>16</sup> Despite robust factual evidence documenting a high risk of Uyghur forced labor in these companies' supply chains, based on the publicly available information on their due diligence processes, these companies failed to take appropriate due diligence measures to effectively identify and mitigate these risks.

### Risks of state-imposed forced labor in specific countries

- Uyghur Region of China: Textile/apparel, agriculture, renewable energy (polysilicon), PVC, automotive parts, electronics<sup>17</sup>
- Turkmenistan: cotton, textiles<sup>18</sup>
- China (with North Korean forced labor): PPE<sup>19</sup>

## STATE-IMPOSED FORCED LABOR: DUE DILIGENCE REQUIREMENTS UNDER THE LKSG

The LkSG clearly defines the specific elements of human rights due diligence that companies must observe with the aim of preventing or minimizing human rights risks in their supply chains. The law provides some flexibility with regards to the implementation of the obligation, referring to the notion of ‘appropriate’ measures to be adopted to prevent the actual or imminent human rights risks identified and remediate violations. However, the risk of state-imposed forced labor, known to occur in the production of goods and services in challenging political and/or repressive contexts, merits particular consideration. Specifically, what due diligence measures are appropriate, given the severity, probability and irremediable nature of state-imposed forced labor as a human rights violation?

### The scope of the due diligence obligation: addressing state-imposed forced labor risks in the indirect supply chain

The supply chain within the meaning of the LkSG includes all steps in Germany and abroad that are necessary for the manufacture of products or the provision of services by a company: from the extraction of raw materials to the delivery to the end customer.<sup>20</sup> However, in relation to the implementation of the due diligence obligation, the law makes a distinction between whether the human rights risk or violation is occurring within the business' own operations, its direct suppliers or its indirect suppliers.

<sup>14</sup> A.Zenz, “Wash Brains, Cleanse Hearts”: Evidence from Chinese Government Documents about the Nature and Extent of Xinjiang's Extrajudicial Internment Campaign (*Journal of Political Risk*, Volk 7, No. 11, November 2019)

<sup>15</sup> United Nations Office of the High Commissioner for Human Rights, *OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China* (31 August 2022) para 148

<sup>16</sup> [www.ecchr.eu/en/case/german-economic-engine-roads-thanks-to-forced-labor-complaint-filed-against-vw-bmw-and-mercedes-benz/](https://www.ecchr.eu/en/case/german-economic-engine-roads-thanks-to-forced-labor-complaint-filed-against-vw-bmw-and-mercedes-benz/)

<sup>17</sup> See Helena Kennedy Centre for International Justice, *Products made with forced labor in the Uyghur Region* (Issue Brief 3 May 2023)

<sup>18</sup> Radio Free Europe, “Involuntary Volunteers: Turkmenistan Mobilizes State Workers to Pick Cotton”, 27 August 2023

<sup>19</sup> P.Pattison, “UK sourced PPE from factories secretly using North Korean slave labour”, *The Guardian*, 20 November 2020

<sup>20</sup> Section 2(5) LkSG

This is an important consideration with regards to where corporations may be exposed to risks of state-imposed forced labor in their supply chain. In general, European companies are unlikely to have direct contractual relationship with suppliers that are using state-imposed forced labor. For example, cotton produced with forced labor in Turkmenistan often enters the supply chain via suppliers in third countries that produce garments which are then sold on to international brands and retailers.<sup>21</sup>

Investigations published by academics, media and NGOs have clearly established specific risks of Uyghur forced labor in the garment,<sup>22</sup> solar,<sup>23</sup> agricultural<sup>24</sup> and automotive<sup>25</sup> industries. In recent years, the impact of growing legal, reputational and political pressure to respond to the human rights situation in the Uyghur Region has led many corporations to end direct business relationships with suppliers based there. However, there remain significant risks of Uyghur forced labor further “upstream” in the supply chain connected to indirect suppliers; for example in mining and processing of raw materials or the production of cotton.<sup>26</sup> The existence of these risks has been well-publicized, and many companies have been directly put on notice on their exposure to state-imposed forced labor via engagement by civil society, investors,<sup>27</sup> the UN Human Rights Council<sup>28</sup> and national parliaments.<sup>29</sup>

According to the LkSG, whereas companies are required to conduct regular risk analysis for direct suppliers, and take action “without undue delay” to address human rights risks where risks or rights violations are identified,<sup>30</sup> the due diligence obligation with respect to indirect suppliers is only triggered when companies receive concrete information about potential risks.<sup>31</sup> This is on an ad-hoc basis, if there has been a significant change in the risk situation in the supply chain (for example the introduction of new products or a new business area), or if the company receives “substantiated knowledge” of human rights risks in its upstream supply chain.<sup>32</sup>

According to Section 9(3) LkSG substantiated knowledge is defined as “actual indications” that suggest that a violation at an indirect supplier “may be possible”.<sup>33</sup> This includes media and NGO reports if they are common knowledge because they are known industry-wide, or are passed on to the enterprise.<sup>34</sup> The information available does not need to indicate that a violation has occurred at a specific supplier; it is sufficient that there is a reasonable risk that it exists within the company’s supply chain. This comparatively low threshold for relevant knowledge on the side of businesses, and the extent of publicly available information documenting where and in what industries state-imposed forced labor is taking place, means that these risks at indirect suppliers

would fall within the scope of the due diligence obligation and should be integrated into the risk analysis under Section 5 LkSG.

For Uyghur forced labor in particular, continued reporting on its prevalence in global supply chains in recent years across multiple industries should have already prompted companies to carry out an urgent mapping of their indirect supply chain to assess these risks. If identified, the business has an obligation to implement appropriate preventive measures in relation to the indirect supplier,<sup>35</sup> and draw up and implement a prevention, cessation or minimization concept.<sup>36</sup>

#### Appropriate due diligence for state-imposed forced labor: a context-specific approach

The principle of “appropriateness” is central to the implementation of the due diligence obligation under the LkSG. Section 3(2) LkSG outlines four criteria for appropriateness: the nature and extent of the company’s business activities; the company’s ability to influence the party directly responsible for the risk or the violation; the severity of the violation that can typically be expected, the reversibility of the violation and the probability of its occurrence; and the nature of the causal contribution of the company to the risk or the violation. These criteria should be taken into account in both the analysis of human rights risks in the

<sup>21</sup> www.sourcingnetwork.org/turkmentsignatories

<sup>22</sup> A. Stevenson, S. Maheshwari “Escalation of Secrecy’: Global Brands Seek Clarity on Xinjiang”, *The New York Times*, 29 May 2022

<sup>23</sup> S. Wang, J. Lloyd, *Sins of a Solar Empire* (November 2022), *The Breakthrough Institute*

<sup>24</sup> “Canada’s grocery chains stocked with tomato products connected to Chinese forced labour”, *CBC*, 18 November 2021

<sup>25</sup> L. Murphy, N. Elima and D. Tobin, *Driving Force: Automotive Supply Chains and Forced Labor in the Uyghur Region*, (December 2022), *Sheffield Hallam University Helena Kennedy Centre for International Justice*

<sup>26</sup> E. Paton, A. Ramzy “Coalition brings pressure to end forced Uighur Labor”, *The New York Times*, 2 July 2021

<sup>27</sup> V. Waldersee, R. Kerber “Investors press companies on human rights in Xinjiang”, *Reuters*, 30 March 2021

<sup>28</sup> OHCHR, “China: UN experts deeply concerned by alleged detention, forced labour of Uyghurs”, Press Release 29 March 2021

<sup>29</sup> See for example A. Kashgarian, “US Senate probes alleged Chinese forced labour in auto supply chain”, *VOA*, 6 April 2023

<sup>30</sup> Section 6(1) LkSG

<sup>31</sup> Section 9(3) LkSG

<sup>32</sup> Section 9(3) LkSG

<sup>33</sup> Kaltborn/Krajewski/Rühl/Saage-Maaß LkSG §9 Rn 31 (37)

<sup>34</sup> BMAS, Supply Chain Act FAQ, QVI, 14

<sup>35</sup> Section 9(3) No.2

<sup>36</sup> Section 9(3) No.3

supply chain and in the subsequent weighting and prioritization of risks to be addressed. This reflects the position of the United Nations Guiding Principles (UNGPs) and OECD Guidelines for Multinational Enterprises on Responsible Business Conduct which state that companies should “carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.”<sup>37</sup>

Whereas all four criteria listed in the LkSG should be taken into account, when considering the risk of state-imposed forced labor those relating to severity, reversibility and probability are particularly pertinent. According to guidance issued by the BAFA, forced labor can always be assumed to be severe.<sup>38</sup> For state-imposed forced labor in particular, the scale of the violation in terms of the number of individuals affected (which may target entire ethnic groups, as in the Uyghur Region) demonstrates a significantly high level of severity. In the Uyghur Region, state-imposed forced labor is an integral element of a government-imposed system of oppression against the Uyghur population that encompasses mass surveillance, controls on movement, arbitrary arrest and enforced disappearance, cultural and religious erasure and family separation.<sup>39</sup> Taken together, these factors demonstrate the irreversible nature of the violation. Furthermore, it is widely accepted that the use of this practice is so widespread that virtually any workplace in the region should be considered as at high-risk of receiving coerced laborers.<sup>40</sup>

In practice, this means that companies operating in industries where there are known risks of state-imposed forced labor in their supply chain should prioritize their assessment as part of the risk analysis process under Section 5(2) LkSG, and without undue delay take the necessary preventive and remedial measures in accordance with Section 6(1) and 7(1) LkSG.

#### Preventing state-imposed forced labor: a due diligence response

When selecting and designing due diligence measures, the determination of what is appropriate must take into account the local legal, political and cultural circumstances of where the human rights risk is occurring. According to the UNGPs, companies operating in “high risk” contexts, such as conflict settings or where ethnic minorities experience severe discrimination, should adapt their human rights due diligence processes to be “finely tuned and sensitive to the higher level of risk.”<sup>41</sup> Due diligence should be conducted to ensure that a business is not involved in government violations of human rights or other gross human rights abuses through their business relationships.<sup>42</sup> This is crucial when identifying and

addressing risks of state-imposed forced labor as a serious violation of international human rights law.

The determination of the appropriate due diligence response to state-imposed forced labor should therefore be interpreted in light of the repressive political and social contexts it is known to take place. First, in relation to the measures used to identify the risk of state-imposed forced labor in the supply chain—either for direct suppliers (Section 5(1) LkSG) or for indirect suppliers where there is substantiated knowledge of state-imposed forced labor risks (Section 9(3) LkSG)—and where those risks are identified, to prevent or minimize violations (Section 6 LkSG).

In the vast majority of cases, companies use social audits to assess suppliers as part of their due diligence response, to identify actual or potential rights violations and to assess compliance with the company’s human-rights standards. Audits are also envisaged as a preventive measure within the framework of the LkSG, as a form of “contractual control mechanism” (Section 6(4) No.4 LkSG).<sup>43</sup>

Crucially, however, the use of social audits as part of human rights due diligence is premised on the ability of the auditor to carry out an independent investigation of workplaces, and speak freely to workers. In the Uyghur Region, the systematic adoption of mechanisms of surveillance, coercion and control by the PRC government against Uyghurs and other ethnic minority groups means that it is essentially impossible for companies, either directly or via third party auditors, to monitor working conditions in factories.<sup>44</sup> This fact has been acknowledged by many of the largest auditing companies that now refuse to carry out supply chain inspections for international companies

<sup>37</sup> OECD, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (2023) Chapter IV, 5

<sup>38</sup> BAFA, *Handreichung zum Prinzip der Angemessenheit nach den Vorgaben des Lieferkettensorgfaltspflichtengesetzes* (December 2022) p.10

<sup>39</sup> Human Rights Watch, “*Break their lineage, break their roots*”: Chinese government crimes against humanity targeting Uyghurs and other Turkic Muslims (April 2021) p.2

<sup>40</sup> A. Zenz, “Xinjiang’s New Slavery”, *Foreign Policy* (11 December 2019)

<sup>41</sup> OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), United Nations, p.80

<sup>42</sup> OHCHR, *Business and Human Rights in Challenging Contexts: Considerations for Remaining and Exiting* (August 2023) p.7

<sup>43</sup> Beschlussempfehlung und Bericht des Ausschusses für Arbeit und Soziales (11. Ausschuss) vom 09.06.2021, BT-Drucksache 19/30505, p.48

with suppliers in the Uyghur Region.<sup>45</sup> In addition, it is important to note that the risk of Uyghur forced labor is not limited to suppliers located in the region; the transfer of coerced workers to other regions of China has been well-documented in the electronics<sup>46</sup> and more recently the seafood industry,<sup>47</sup> which poses similar challenges.

At a minimum, the LkSG obliges companies to explain if and how their potentially problematic suppliers have been approached and which efforts they undertook to address the problem of state-imposed forced labor. Regarding Uyghur forced labor, given that it is now widely accepted that there is no effective measure available to companies with supply chain connections to the region that would enable them to adequately identify, verify, minimize or prevent its occurrence, continuing to rely on audits or certifications should be determined to be insufficient and evidence of non-compliance with the due diligence obligation.

#### The obligation to take remedial action

The LkSG specifically envisages the possibility of terminating business relationships, where rights violations are determined to be “very serious”, the implementation of preventive measures has not remedied the situation; and the company has no other less severe means at its disposal and increasing the ability to exert influence has no prospect of success (Section 7(3) LkSG). The language used in the law clearly indicates that this was intended by the legislator to be a measure that should only be used in exceptional circumstances, as a way to avoid businesses cutting and running where human rights risks are identified. However, state-imposed forced labor should be considered as a situation that meets this particularly high threshold.<sup>48</sup>

To take the example of Uyghur forced labor, based on the criteria laid out in Section 7(3) LkSG: the rights violations occurring have been determined by the UN as likely to meet the threshold of crimes against humanity (severity); the use of contractual assurances and compliance mechanisms such as audits have been established as ineffective in identifying and preventing the occurrence of forced labor (no prospect of remedy); and the violation is being carried out through government policy, thereby limiting any potential to exert influence (no prospect of success).

Recognizing the severity of state-imposed forced labor as a human rights violation is crucial: as noted by the UN Working Group on Business and Human Rights, the more severe the harms involved, the more justifiable it would be for a business to consider terminating business relationships.<sup>49</sup> This is particularly important if there is the risk of complicity in international crimes.<sup>50</sup> On the question of leverage, given that coerced labor transfers of Uyghurs are an

integral and expanding part of the PRC government’s political and economic agenda it is hard to identify a scenario in which a company would be able to use its leverage with a Chinese business partner to remediate a situation of forced labor.

This interpretation also reflects the position of the European Parliament in relation to the Corporate Sustainability Due Diligence Directive: that in situations of state-imposed forced labor, where the adverse impact is organized by political authorities, mitigation is not possible therefore businesses should terminate these business relationships.<sup>51</sup>

Furthermore, civil society stakeholders, human rights due diligence experts and international organizations have consistently stated that the only valid corporate response to address state-imposed forced labor in the Uyghur Region is disengagement of supply chains. This is the demand of the Coalition to End Forced Labour in the Uyghur Region,<sup>52</sup> endorsed by over 400 organizations. It is also the central position of the Cotton Campaign in relation to state-imposed forced labor in the Turkmenistan cotton industry. Moreover, disengagement also reflects the emerging practice within industries that have a particularly high exposure to these risks. For example, some companies in the garment industry have publicly stated that they have cut ties with their suppliers based in the Uyghur Region, although it is unclear to what extent they have taken steps to completely remove Uyghur cotton from their extended supply chain.<sup>53</sup>

<sup>44</sup> See for example [www.fairlabor.org/forced-labor-risk-in-xinjiang-china/](http://www.fairlabor.org/forced-labor-risk-in-xinjiang-china/)

<sup>45</sup> S. Baker, “Auditors hired by Western firms to make sure their products aren’t being made from forced labor in China now say they won’t carry out the checks”, *Business Insider* (23 September 2023)

<sup>46</sup> See for example Z. Basu, “Senators launch probe into U.S. electronics firm’s use of Uyghur labor”, *Axios* (20 October 2021)

<sup>47</sup> I. Urbina, “The Uyghurs forced to process the world’s fish”, *New Yorker* (9 October 2023)

<sup>48</sup> BMAS, Supply Chain Act FAQ Q. XI 1. “The deficits of states in the field of human rights or violations of human rights by states can, however, give rise to relevant human rights risks or exacerbate them in the context of corporate due diligence. Enterprises can thus in particular be expected to take the lack of ratification or implementation into account in their risk analysis and to review the consequences of that for the risk situation as a whole.”

<sup>49</sup> OHCHR (August 2023) p.12

<sup>50</sup> OHCHR (2012) p.80

<sup>51</sup> Amendment 44, Recital 32 [https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html)

<sup>52</sup> [www.enduyghurforcedlabour.org/call-to-action/](http://www.enduyghurforcedlabour.org/call-to-action/)

<sup>53</sup> See for example “M&S signs call to action over Uyghur forced labour”, *BBC* (6 January 2021)

## CASE STUDY: UNDERSTANDING THE SHIFT IN APPROACH TOWARDS UZBEK COTTON

For 15 years civil society, acting under the banner of the Cotton Campaign, called for a boycott of Uzbek cotton in response to state-imposed forced labor of over 1 million children and adults by the Government in the annual cotton harvest.<sup>54</sup> The Uzbek Cotton Pledge was launched, with over 330 brands and retailers publicly committing not to use Uzbek cotton in their products.<sup>55</sup> In 2017, after a decade of international pressure, and prompted by a change of regime, the Government of Uzbekistan embarked on a program of reform to end systematic state-imposed forced labor. In 2022, the Cotton Campaign ended its call for a boycott as a result of independent research findings confirming that there was no government-imposed forced labor in the harvest.<sup>56</sup> However, the campaign emphasizes that the situation is not resolved: individual cases of coercion and forced labor remain, as well as other labor rights violations. Apparel brands starting to source from Uzbekistan following the removal of the boycott should conduct human rights due diligence to ensure labor rights are respected at all stages of production.

## ENFORCEMENT ACTION

Compliance with the due diligence obligation under the LkSG is monitored and enforced by an administrative authority, the BAFA. The BAFA has extensive powers, including the ability to initiate investigations ex officio on the basis of its own information, or evidence that it has been provided by external stakeholders such as civil society organizations.<sup>57</sup> Whereas the BAFA has discretion as to whether and when to take action when operating ex officio, when it is provided with information of severe human rights violations occurring within the supply chains of companies that fall within scope of the LkSG, this scope of discretion may be limited. For instance, in situations of grave human rights abuses (such as crimes against humanity), its discretion may be narrowed to such an extent that it is required to take action even in the absence of a complaint by an affected individual.<sup>58</sup>

Significant political and media attention on the issue of state-imposed forced labor in the Uyghur Region, and its supply chain links to German companies, should influence the likelihood that the BAFA will take enforcement action. Moreover, the practical obstacles for impacted individuals in the Uyghur Region to make individual claims under the LkSG, or access internal complaints procedures to report

violations of human rights, should be taken into consideration when assessing what issues to prioritize. Equally, the assessment by the BAFA of corporate compliance with the LkSG, and any decision to proceed with enforcement action, should be undertaken independently of any geopolitical and economic considerations in relation to trade.

Although companies' reports on the implementation of their obligations under the LkSG are not required to be published until 2024, ECCHR's analysis of the publicly available information provided by German automotive companies on their human rights due diligence processes indicates that they are not taking appropriate measures to address the high risks of Uyghur forced labor in their supply chains. Companies operating in other industries that are known to be exposed to these risks should be aware of the possibility of future monitoring and/or enforcement action.

By knowingly engaging in business relations with suppliers involved in state-imposed forced labor, companies may also be exposed to criminal liability. When implemented as part of a systematic attack on certain populations, a state-imposed forced labor program such as that occurring in the Uyghur Region may constitute a crime against humanity. In 2021, ECCHR filed criminal complaints in Germany and the Netherlands, and supported a complaint in France, alleging complicity in crimes against humanity against apparel companies linked to production facilities in the Uyghur Region.<sup>59</sup> Whether a company has engaged in robust human rights due diligence processes, and severed business relationships where the implementation of measures to address human rights violations is impossible, may be taken into account when considering the mental element of complicity under international criminal law.

<sup>54</sup> [www.cottoncampaign.org/uzbekistan/#CC15yearsUZ](http://www.cottoncampaign.org/uzbekistan/#CC15yearsUZ)

<sup>55</sup> [www.cottoncampaign.org/uzbek-cotton-pledge](http://www.cottoncampaign.org/uzbek-cotton-pledge)

<sup>56</sup> [www.cottoncampaign.org/news/cotton-campaign-ends-its-call-for-a-global-boycott-of-cotton-from-uzbekistan](http://www.cottoncampaign.org/news/cotton-campaign-ends-its-call-for-a-global-boycott-of-cotton-from-uzbekistan)

<sup>57</sup> The BAFA can also take enforcement action on the basis of complaints filed by affected individuals, according to Section 14(1) No.2 LkSG. Where there is a substantiated claim, the BAFA must examine the complaint.

<sup>58</sup> Kaltenborn/Krajewski/Rühl/Saage-Maaß LkSG §14 Rn.27

<sup>59</sup> [www.ecchr.eu/en/case/china-zwangsarbeit-uyghuren/](http://www.ecchr.eu/en/case/china-zwangsarbeit-uyghuren/)

## RECOMMENDATIONS

Addressing the risks of state-imposed forced labor in global supply chains should be a high priority for both companies and governments. The LkSG provides an important legal mechanism through which this can be pursued, where those risks are linked to the operations and supply chains of German businesses. In parallel, developments at the EU level on the Corporate Sustainability Due Diligence Directive and the adoption of a regulation that would ban the import of products made with forced labor demonstrate the growing momentum towards coordinated political and legal action on this issue.

### Companies operating in or sourcing from regions with a risk of state-imposed forced labor

- As part of risk management, adopt specific measures to address risks of state-imposed forced labor in the supply chain. This should include a commitment to disengage business relationships where human rights due diligence cannot be carried out, and refrain from initiating any further business relationship where there are known risks of state-imposed forced labor.
- Carry out an in-depth supply chain mapping and analysis to determine exposure to risks of state-imposed forced labor. Where these specific risks are identified, prioritize these as part of the risk management approach in accordance with Section 3(2) LkSG.
- When developing preventive measures, take into account the specific context of surveillance and cultural and political repression in which state-imposed forced labor occurs. The use of audits and other contractual control measures are neither effective nor appropriate preventive measures in these circumstances.
- Considering the severity of state-imposed forced labor as a violation of human rights and the absence of any prospect to prevent or remediate this risk, disengage from business relationships or contracts with suppliers linked these violations, in accordance with Section 7(3) LkSG.
- Publicly communicate about steps taken in the exercise of the due diligence obligation in relation to identified risks of state-imposed forced labor, including disengagement.
- Collaborate with civil society organizations and trade unions in implementing due diligence measures to respond to state-imposed forced labor risks. This includes the Coalition to End Forced Labour in the Uyghur Region and the Cotton Campaign in relation to cotton from Turkmenistan.

### To the BAFA

- In the exercise of its ex-officio discretionary power under Section 14(1) No. 1 LkSG, prioritize monitoring of compliance with the due diligence obligation by German companies operating in industries, or sourcing from countries, where there are known risks of state-imposed forced labor.
- Require that companies operating in these industries, or sourcing from these countries, provide sufficient detail as part of their reporting obligation under Section 10(2) LkSG on the measures adopted to prevent and minimize the risk of state-imposed forced labor.
- When assessing compliance with the LkSG in relation to identified risks of state-imposed forced labor, adopt an interpretation of the due diligence obligation that takes into account the repressive political context in which these serious human rights violations take place. In particular, the inability of audits to adequately verify, minimize or prevent the realization of state-imposed forced labor and the absence of any prospect of companies' using their leverage to remedy the human rights situation.
- In situations of non-compliance, require that companies take action to fulfil their due diligence obligations in accordance with sections 3 to 10(1) LkSG. The specific actions should take into account the recommendations for appropriate human rights due diligence developed by civil society.
- Where companies continue to fail to comply with their due diligence obligation, consider the issuance of financial penalties or administrative fines.

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