

The Implementation of Supply Chains Responsibilities by Public Authorities in Germany

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Abstract

The contribution provides a rough introduction and evaluation of the implementation of supply chain responsibilities in Germany by administrative authorities using the example of the implementation of the EU Timber Regulation with a view to the introductory measures of the 3TG Regulation and the German Supply Chain Due Diligence Act (Lieferkettengesetz).

Keywords: Supply Chains Responsibilities, Due Diligence, EU Timber Regulation, EUTR, Holzhandelssicherungsgesetz, HolzSiG, 3TG Regulation, Conflict Minerals, Mineralische-Rohstoffe-Sorgfaltspflichten-Gesetz (MinRohSorgG), Lieferket-

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tensorgfaltspflichtengesetz (LkSG), Supply Chain Due Diligence Act (SCDDA), Administrative Enforcement, Penalties

A. Introduction

The legal obligation of economic operators to monitor suppliers and production conditions along their supply chain is a comparatively new instrument in the EU and in Germany. The aim is to protect human rights, the environment and social standards beyond the borders of territorial sovereignty. Private economic operators are obliged to control the standards specifically set by the regulatory framework upstream along their supply chain. Typically, the obligation to control conditions in the supply chain is flanked by the obligation to introduce an internal due diligence system that ensures effective implementation of the economic operator's obligation through internal measures. Where applicable, these obligations are not necessarily coupled with import bans and market prohibitions.¹

In the course of the introduction and implementation of the national supply chain due diligence law, Germany perceived above all the obligations to monitor the supply chain and the legal obligation to introduce an internal due diligence system as new or novel. In fact, the traditional commodity-related import and market bans differ substantially from the obligations to organise the supply chain or to introduce a due diligence system: Import and market bans have an indirect and only factual effect on the business organisation of the market participants and along the supply chain. It is up to the market participant how to avoid that the imported goods fall victim to a ban. The situation is different with regulatory approaches that impose independent and therefore independently enforceable obligations on market participants for their business organisation and for the design and control of their supply chain. This article understands supply chain responsibilities as limited to this state intervention in the organisation of operations and in the design of contractual relationships with suppliers. Import and market bans, which do not differ significantly from other sovereign measures, are excluded. Even though this is an important part of the administrative implementation of supply chain responsibilities, this contribution does not deal with the modalities of monitoring organisations, whose task is to monitor obligatory due diligence systems of market participants.

In Germany, the novelty of supply chain responsibilities only seems to have received broader attention, especially in the public discussion, in the context of the creation of the German Supply Chain Due Diligence Act (SCDDA)² and the entry

¹ Regarding the different regulatory approaches in EU legislation, compare the contribution by *Hoffmeister* in this issue.

² German Lieferkettentensorgfaltspflichtengesetz (LkSG) of 16 July 2021 (BGBl. I, 2959), available at: https://www.bgbler.de/xaver/bgbl/start.xav?start=/%5B@attr_id=%27bgbl121s2959.pdf%27%5D%27%5D#_bgbl__%2F%2F%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D_1640091981261 (22/3/2022). English convenience translation available at: <https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html> (22/3/2022).

into force of significant parts of it on 1 January 2023. This has somewhat overshadowed the fact that the supply chain responsibilities of the EU Conflict Minerals Regulation (3TG Regulation)³ came into force on 21 January 2021 and thus currently raise questions which under the German SCDDA will only become relevant in the future from 21 January 2021. The more, it seems to have been completely overlooked that a large number of market participants dealing with timber and timber products have already been subject to comparable supply chain responsibilities for nine years. The supply chain responsibilities of the EU Timber Regulation (EUTR)⁴ came into force on 3 March 2014. The EU Timber Regulation covers the placing on the (EU) market of a large part of timber products (including e.g. paper products)⁵ regardless of the size of the company and regardless of the sector of the operator. To the surprise of many of the companies concerned, the obligations are not limited to the timber trade in the narrow sense of the word, but also cover a wide range of goods made of wood (e.g. furniture or decorative articles) or containing wood (e.g. wallpaper). For this reason, the scope of application of the EU Timber Regulation is very broad. Due to the broad scope of the EU Timber Regulation, there is almost ten years of experience in the German administrative enforcement of supply chain responsibilities. For this reason, this article will take a look at the experience gained in advising on the administrative implementation of the EU Timber Regulation as an example for the implementation of supply chain responsibilities.

These experiences, especially in legal advice, may allow conclusions to be drawn about the implementation of the 3TG Regulation, which has already begun, and the future implementation of the SCDDA in Germany.

Since supply chain responsibilities with their special public-private mechanism of action are a kind of “success model” for the enforcement of standards beyond territorial sovereignty borders, further regulations of this kind can also be expected in other areas.⁶ In this respect, too, the practical experience with the not entirely simple administrative implementation of the EU Timber Regulation in Germany offers

3 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130 of 19/5/2017, p. 1; implemented by the German Mineralische-Rohstoffe-Sorgfaltspflichten-Gesetz (MinRohSorgG) of 29 April 2020 (BGBl. I, 864), available at: <http://www.gesetze-im-internet.de/minrohsorgg/MinRohSorgG.pdf> (22/3/2022).

4 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L 295 of 12/11/2010, p. 23, amended by (EU) of the European Parliament and of the Council of 5 June 2019, OJ L 170 of 25/6/2019, p. 115, in force since 2 December 2010.

5 See Art. 2 lit. a and Annex EUTR.

6 The European Commission presented on 23 February 2022 a first draft of a Supply Chain Directive: Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, available at: https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en (22/3/2022); see also the discussion on mandatory supply chain due diligence in the Proposal for a gelation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive

suggestions for the regulation of the administrative implementation of future supply chain responsibilities.

B. EU-Timber Regulation (EUTR) – Supply Chains Responsibilities – Enforcement by public authorities in Germany

For the implementation by the market participants as well as by the national enforcement authorities, the fact that the obligations regarding the supply chain responsibilities of the EU Timber Regulation apply directly is significant. However, the obligation to implement the regulation only became fully effective on 3 March 2013,⁷ i.e. 27 months after the regulation came into force. This gave market participants, as well as the administrative authorities, a considerable transitional period to adjust to the new regulations.

The requirements of the EU Timber Regulation itself for administrative enforcement are limited and thus respect the specific features of administrative law in the Member States. In addition to the requirements of the Regulation only a few implementation regulations have been issued at EU level, but these do not contain any significant provisions for administrative enforcement. These implementation regulations are in particular concerning the recognition of monitoring organisations in the sense of the EU Timber Regulation,⁸ more detailed requirements for the due diligence system and the control of the monitoring organisations⁹ as well as the reporting obligations of the Member States under the EUTR.¹⁰

The enforcement of the supply chain responsibilities is the responsibility of the Member States. In Germany, the EU Timber Regulation was implemented through the Timber Trade Protection Act (Holzhandelssicherungsgesetz – HolzSiG).¹¹ Fur-

2006/66/EC and amending Regulation (EU) No 2019/1020 of 10 December 2020, COM(2020) 798 final.

7 Art. 21 EUTR.

8 Commission Delegated Regulation (EU) No 363/2012 of 23 February 2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organizations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of the operators who place timber and timber products on the market, OJ L 115 of 27/4/2012, p. 12.

9 Commission Implementing Regulations (EU) No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organizations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, OJ L 177 of 7/7/2012, p. 16.

10 Regulation (EU) 2019/1010 of the European Parliament and of the Council of 5 June 2019 on the alignment of reporting obligations in the field of legislation related to the environment, and amending Regulation (EC) No 166/2006 and (EU) No 995/2010 of the European Parliament and of the Council, Directives 2002/49/EC, 2004/35/EC, 2007/2/EC and 2010/63/EU of the European Parliament and of the Council, Council Regulation (EC) No 338/97 and (EC) No 2173/2005, and Council Directive 86/278/EEC, OJ L 170 of 25/6/2019, p. 115.

11 German Holzhandelssicherungsgesetz (HolzSiG) of 29 April 2011, available at: <https://www.gesetze-im-internet.de/holzsig/HolzSiG.pdf> (22/3/2022).

thermore, a national administrative regulation for the implementation of the HolzSiG is in force,¹² which binds the BLE and regulates details of administrative enforcement.

Insofar as this does not provide for special provisions for the administrative procedure, the general instruments governing the administrative procedure and the fine procedure shall apply. These are, in particular, the Federal Administrative Procedure Act (Verwaltungsverfahrensgesetz – VwVfG),¹³ the Federal Administrative Enforcement Act (Verwaltungsvollstreckungsgesetz – VwVG),¹⁴ since the competent authority is a federal authority, and the Procedure of the Administrative Courts Code (Verwaltungsprozessordnung – VwGO)¹⁵ and the Administrative Offences Act (Ordnungswidrigkeitengesetz – OWiG).¹⁶

I. Competent authorities and cooperation with German customs authorities

The Member States designate the competent authorities (Art. 7 EU TR). In Germany, the main competent authority for administrative enforcement is the Federal Office for Agriculture and Food (BLE) according to Sec. 1 par. 2 HolzSiG. Although the administrative enforcement of federal laws also lies with the Länder, the federal legislator has taken the opportunity to concentrate the administrative enforcement of the EU Timber Regulation for timber and timber products from third countries with a federal authority. Only monitoring of operators who place timber harvested in Germany on the market for the first time, i.e. forest owners and purchasers of unharvested timber (“standing stock”), remain within the responsibility of the Länder.¹⁷

12 German Allgemeine Verwaltungsvorschrift zum Holzhandels-Sicherungs-Gesetz und zur Aufhebung von Verwaltungsvorschriften im Bereich des Rechts über forstliches Vermehrungsgut HolzSiGVwV of 25 November 2013, available at: https://www.ble.de/SharedDocs/Downloads/DE/Wald-Holz/Holzhandelssicherungsgesetz-Verwaltungsvorschrift.pdf?__blob=publicationFile&v=1 (22/3/2022). Market participants can only recur to an administrative regulation to a limited extent. An administrative regulation is internal administrative law, which the individual can at best invoke by recurring to a violation of the principle of equality.

13 German Verwaltungsverfahrensgesetz (VwVfG), revised of 23 January 2003, available at: <https://www.gesetze-im-internet.de/vwvfg/VwVfG.pdf> (22/3/2022)..

14 German Verwaltungs-Vollstreckungsgesetz (VwVG) of 27 April 1953, available at: <https://www.gesetze-im-internet.de/vwvg/VwVG.pdf> (22/3/2022).

15 German Verwaltungsgerichtsordnung (VwGO), revised 19/3/2991.

16 German Gesetz über Ordnungswidrigkeiten (OWiG), revised of 19 February 1987, available at: https://www.gesetze-im-internet.de/owig_1968/OWiG.pdf (22/3/2022), English convenience translation at: https://www.gesetze-im-internet.de/englisch_owig/englisch_owig.pdf (22/3/2022).

17 See Sec. 1 par. 1 last sentence HolzSiG and Sec. 2 par. 1 HolzSiGVwV, in respect of the due diligence system specifically Sec. 5 HolzSIGVwV. The Federal States have passed respective legislation, e.g. Saarland Verordnung über die Zuständigkeit nach dem Holzhandels-Sicherungs-Gesetz (ZV-HolzSiG) of 16 June 2015 (Amtsblatt I 2015, 395), available at: <https://recht.saarland.de/bssl/document/jlr-HolzSiGZustVSLpP1> (22/3/2022).

The cooperation with the German customs authorities provided for in Sec. 3 HolzSiG serves primarily to enforce the market ban according to Art. 4 par. 1 EU-TR. In practice, however, the activities of the customs authorities also constitute an essential part of the enforcement of obligations with regard to supply chain responsibilities: If infringements of the market ban are detected by the customs authorities before the goods are released for free circulation, i.e. before they are placed on the market, these regularly trigger further investigations by BLE, also with regard to the obligations to create a corresponding due diligence system. Information obtained by the customs authorities in the course of import controls is shared with the BLE (Sec. 3 par. 1 HolzSiG).

II. Checks

According to Article 10 EU-TR Member States shall carry out checks to verify if the operators complied with their obligations in respect of the supply chains responsibilities, in particular to exercise due diligence when placing a product on the market and to “use a framework of procedures and measures, hereinafter referred to as a ‘due diligence system’ as set out in Article 6” (Art. 4 par. 2 EU-TR) and to maintain and regularly evaluate such system (Art. 4 par. 4 EU-TR). Such checks shall be conducted either on a risk-based approach in accordance with a periodically reviewed plan (Art. 10 par. 2 EU-TR) or in the case of specific indication of incompliance. The checks and their outcome shall be recorded (Art. 11 EU-TR).

In addition to the already directly applicable Art. 10 and 11 EU-TR, the German HolzSiG does not provide for any additional specific provisions for the implementation of risk-based or occasion-related inspections of operators. The HolzSiG, however, stipulates more comprehensively and not limited to checks the obligation to provide information upon request of the authority, to tolerate certain investigation measures also on site in the business premises (Sec. 6 par. 1 through par. 4 HolzSiG). This obligation, which also covers the checks of the authority as provided for in the EU Timber Regulation, is backed by the general clause in Sec. 2 par. 1 first sentence. It authorises the competent authorities to take all necessary orders and measures, *inter alia*, to detect violations of the EU Timber Regulation and its implementing provisions. This unproblematically also includes investigations at the operators, be it occasion-related and risk-related.

The investigative powers of the BLE are supplemented by the obligation of operators to notify it of the import of timber and timber products from third countries before placing them on the market. This obligation is subject to a fine, but can of course only take effect if the operators are aware that they are subject to the EU Timber Regulation.

In fact, the BLE has been carrying out regular risk-based checks across all sectors of the markets for timber and timber products for years, which in the meantime has also reached sectors and companies that, at least subjectively, thought they were far removed from the timber sector and the scope of application of the EU-TR. This is evidenced not least by the number provided in the annual reports that the Member

States must make available to the Commission and the public on the implementation of the EU Timber Regulation pursuant to Art. 20 par. 1 EU TR and the annual evaluations of the Commission pursuant to Art. 20 par. 2 EU TR.¹⁸

The risk-based check of compliance with the supply chain responsibilities by BLE typically starts with an on-site inspection. The background is that the EU Timber Regulation, unlike the 3 TG Regulation¹⁹ or SCDDA,²⁰ does not require operators to document their due diligence system to the BLE or to the public. This excludes risk-based desktop audits of the due diligence system.

III. Enforcement by obligatory orders and their execution

The national public authority shall be entitled to issue obligatory orders (“notices of remedial actions”) to mitigate any incompliance (Art. 10 par. 5 EU TR). The competent authority shall also have the option to take interim measures, including but not limited to seizures or prohibition of marketing timber and timber products (Art. 10 par. 5). Accordingly, Sec. 2 (1) of the Timber Trade Safety Act contains a general clause that authorises the BLE to issue all necessary orders and measures not only to detect violations, but also to eliminate detected violations or to prevent future violations. A large number of specific individual measures are then named by way of example in five paragraphs. They are all product-related. If violations of the obligations concerning supply chain responsibilities, e.g. the absence or defectiveness of a due diligence system, have not manifested themselves in the defectiveness of the documentation of the lawful handling of the goods, the measures do not apply. In this case, the only recourse is to the general power in Sec. 2 par. 1 first sentence HolzSiG to order the mitigation of the default. Such order is usually linked to a reasonable deadline. An appeal by the operator against such a binding order under German administrative procedure and procedural law would suspend its enforceability (Art. 80 par. 1 first sentence VwGO). Nevertheless, Sec. 80 par. 2 no 4 VwGO allows the authority to order the immediate enforceability of the binding order. The prerequisite for this is that there is a specific special public interest in immediate enforceability. The order is discretionary and must comply with the general requirements of the rule of law, in particular the principle of proportionality. The order must also be justified in writing (Sec. 39 VwVfG).

The EU Timber Regulation does not contain any specific provisions for the compulsory enforcement of binding orders. Unlike for penalties (Art. 19 EU TR), there is not even an obligation for Member States to ensure that orders are “effective”.

18 See *European Commission*, EU TR: Union-Wide Overview for the Year 2020, available at: https://ec.europa.eu/environment/forests/pdf/EUTR%20Overview%202020_alternative.pdf (22/3/2022) and *European Commission*, Key Obligations and Practical Aspects of the Application of the EU TR – 2020, available at: <https://ec.europa.eu/environment/forests/pdf/EUTR%20MS%20Key%20obligations%20and%20practical%20aspects%20of%20implementation%20and%20enforcement%202020.pdf> (22/3/2022).

19 Art. 7 par. 1 and par. 3 3TG Regulation.

20 Sec. 10 and Sec. 12 SCDDA.

The recourse to the principle of *effet utile* fills this gap only very unspecifically. This seems to indicate that the means of choice for the compulsory enforcement of obligations under the EU Timber Regulation are “dissuasive” penalties. This is surprising, since the sustainable establishment of the legal situation should have priority, especially as far as the obligations concerning the supply chains responsibilities are concerned. The experience with the implementation of the EU Timber Regulation in Germany proves that the binding orders to mitigate violations of the due diligence system under the sword of Damocles of an effective administrative compulsory execution are probably more sustainable and effective than “dissuasive” financial penalties: The execution of a binding order to enforce a breach of the obligations concerning supply chain responsibilities is subject to the VwVG. The implementation of the due diligence system in particular sourcing the timber back upstream of the supply chain are actions that can only be carried out by the operator itself, neither by a third party nor by the authority. Therefore, they can only be executed by threatening and imposing enforcement payments (*Zwangsgeld*, § 11 VwVG) in an amount of up to EUR 25,000. If the operator does not comply with the enforceable order within the set period, he forfeits the enforcement payment. The enforcement payment may be repeatedly imposed, up to the permissible limit of EUR 25,000 each time, until the order is complied with. Since the assessment of the amount of the enforcement payment is again subject to the authority’s discretion and bound to the principles of the rule of law and in particular the principle of proportionality, the limit of EUR 25,000 cannot be exhausted in the first instance. This allows the amount and thus the pressure to be increased in the case of continued violations. It proves to be particularly effective that the setting of the enforcement payment can be combined with the threat to order substitute imprisonment (*Ersatzzwangshaft*, § 16 VwVG) of two days to two weeks against the obligated person in the event that the enforcement payment cannot be collected. Understandably, this threat has a considerable psychological effect, especially on legal laypersons even though it can easily be avoided by settlement of the set enforcement payment.

Such enforcement payments are coercive means in the enforcement of a binding order within the meaning of Art. 10 par 5 EU TR and therefore not penalty payments within the meaning of Art. 19 EU TR.

IV. Cooperation of Member States, authorities and Commission

The competent authorities of the various Member States shall cooperate with each other, with authorities of third countries and with the European Commission and exchange information in particular on cases of serious incompliance and on the types of penalties imposed (Art. 12 EU TR). Practical experience shows that the exchange and cooperation between Member States and their competent authorities are essential. Still, the enforcement pressure in the implementation of the EU Timber

Regulation is very different in the various Member States.²¹ This suggests that the enforcement pressure in one Member State can also be avoided by transferring the placement on the market to another Member State with, according to experience, a lower level of control and less effective enforcement.

V. Obligation on Member States and Commission to assist operators

The Member States are “without prejudice to the operators’ obligation to exercise due diligence” obliged to provide assistance and guidance to the operators, taking into account in particular the needs of small and medium sized enterprises (Art. 13 par. 1 EUSTR). Such assistance shall not impair the independence of the competent authority to enforce the regulation (Art. 13 par. 4 EUSTR).

The Commission has fulfilled its obligation from Art. 13 (1) EUSTR to assist the Member States in supporting the operators by issuing Guidance Documents.²² These are of great practical importance for the application of the EU Timber Regulation, be it by the market operators or by the administrative authorities, even if these documents are not legally binding.

However, the EU Timber Regulation sees the Member States as primarily responsible for supporting the operators in implementing the obligations regarding supply chain responsibilities. The European Commission, on the other hand, only has a supporting role (Art. 13 par. 1 EUSTR). Measured against this, it is noticeable that the information and support offered by the German authorities, in particular the BLE²³ as well as the Thünen Institute²⁴ is rather limited in comparison to the assistance provided by the European Commission. In addition, experience with administrative enforcement shows that the BLE often finds itself prevented from providing more intensive advice to market participants, particularly with regard to the due diligence system and its design, due to its obligation to neutrally in the enforcement

21 Even if the differences in the sizes of the economies were taken into account, the numbers set out in *European Commission*, EUSTR: Union-Wide Overview for the Year 2020, p. 2 available at: https://ec.europa.eu/environment/forests/pdf/EUTR%20Overview%202020_alternative.pdf (22/3/2022) indicate a different intensity of administrative actions in the various Member States.

22 In particular the basic Commission Notice Guidance Document for the EU Timber Regulation of 12.2.2016, C(2016) 755 final, backed by a number of additional guidance documents, like on Consideration of Prevalence of Armed Conflict and Sanctions in Due Diligence Systems, all available at the European Commission’s comprehensive information and assistance site: https://ec.europa.eu/environment/forests/timber_regulation.htm (22/3/2022).

23 The BLE timber trade starting internet page: https://www.ble.de/DE/Themen/Wald-Holz/Handel-Holz/handel-holz_node.html (22/3/2022).

24 The Johann Heinrich von Thünen Institute – Federal Research Institute for Rural Areas, Forestry and Fisheries forms part of the Federal Ministry of Food and Agriculture developing scientific basics to assist decision making of German federal institutions (e.g. wood analysis commissioned by the BLE in the course of the enforcement of the EU Timber Regulation). See the starting page of its specialist Forrest Institute: <https://www.thuenen.de/en/wf/> (22/3/2022).

of the obligations of the EU Timber Regulation (see Art. 13 par. 3 EUSTR). This makes effective implementation considerably more difficult, as market participants are to a certain extent dependent on trial-and-error. This is all the more true as the EU Timber Regulation does not prescribe detailed and practical standards that have already been tried and tested in other regulatory environments. Unlike the 3TG Regulation, it does not refer to the recognised standards, such as Annex II of the OECD Due Diligence Guidance²⁵ (Art. 4 lit. b 3TG Regulation).

VI. Sanctions by penalties

Apart from the enforcement of the operator's obligations in respect of the supply chains responsibilities by binding administrative orders and their execution, the members states shall according to Sec. 19 EUSTR impose "effective, proportionate and dissuasive penalties" on the operators for infringements of the regulation's obligations. Penalties may include financial fines related to the environmental damage, tax losses or "economic detriment" and making sure that the incompliant operator was deprived of the economic benefits derived from serious infringements. Penalties may also include seizure of timber and timber products or the immediate suspension of the authorization to trade.

The EU Timber Regulation does not prescribe to the Member States which penalties are to be introduced in detail, but limits itself to the fact that they must be effective, proportionate and dissuasive.

With regard to the specific obligations concerning supply chain responsibilities, the HolzSiG in Germany created the possibility of imposing fines and confiscating objects to which the administrative offence relates. An administrative fine of up to EUR 50,000 can be imposed for

- breach of the obligation to have and maintain an appropriate due diligence system (Sec. 7 par. 5, par. 2 no 2 HolzSiG, Art. 4 par 3 EUSTR),
- failure to properly provide information and evidence on the due diligence system (Sec. 7 par. 5, par. 3 no 3 and no 3, Art. 6 par. 1 lit a and lit b EUSTR) or
- failure to return affected timber or timber products at his own expense to the place of origin if the violation of the law concerning the due diligence system has manifested itself in an illegal placing on the market (Sec. 7 par 5, par 4 no 1, Sec. 2 par 3 no 1 HolzSiG Art. 4 par 2 and Art. 6 EUSTR).

An administrative fine of up to EUR 20,000 can be imposed for the breach of the obligation

²⁵ See OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas Second Edition, available at: <https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf> (22/3/2022).

- to provide information to the authority upon request (Sec. 7 par 5, par 4 no 2, Sec. 6 par 1 HolzSiG)
- to notify the import of timber or timber products to the BLE (Sec. 7 par 5, par 4 no 4, Sec. 6 par 5 first and second sentence, fourth sentence HolzSiG)

However, the failure to comply with a binding order bases on the general power in Sec. 6 par 1 first sentence is no administrative offence.

Whether and to what extent administrative penalties are imposed, is at the discretion of the authority. In exercising this discretion, it is again bound by the principles of the rule of law, in particular the principle of proportionality. All factual and personal circumstances of the offence are to be taken into account, i.e. the gravity of the offence and the damage as well as the personal guilt in the sense of Art. 19 par 1 lit a EUSTR. In fact, however, administrative offences are regularly prosecuted. This may also have its reason in the fact that the member states and thus also the authorities are under the EU Timber Regulation obliged to make penalties effective. This has a discretionary effect. Fines can only be imposed once for an administrative offence. For first-time offenders, they are regularly rather moderate and far from exhausting the range of penalties. If an operator repeatedly commits an offence, the fines for each offence increase. The option to impose administrative fines is supplemented by the additional possibility of skimming off the economic benefits (e.g. not only the profit but the turn-over) obtained through the unlawful act (sec. 30 par. 3, sec. 17 par. 4 OWiG) and thus of the economic benefits in the sense of Art. 19 par. 1 lit. a EUSTR. In practice, however, the author is not aware of any cases in which this option has been used. This may be due to the fact that it is difficult to prove for the BLE the necessary connection between violations of the non-goods-related obligations concerning supply chain responsibilities (e.g. the obligations for a due diligence system) and certain benefits that could be skimmed off.

Accountable for the administrative fines are the persons responsible for the violation of the law, i.e. regularly the management. Furthermore, the fine can also be imposed on the company as such (Sec. 30 par 1 OWiG). This personal accountability puts a lot of personal pressure on the responsible persons. It is intensified by the fact that activity-related fines of more than EUR 200 are entered in the central business register (Gewerbezentralregister) (Sec. 149 par. 2 no 3 Commercial Code – Gewerbeordnung – GewO).²⁶ The central business register is always called up if, for example, the person's commercial reliability has to be proven, for example before registration as a managing director. This also exerts a strong compliance pressure on the responsible persons that goes beyond the mere sanction effect – provided that they are aware of their obligations under the EU Timber Regulation.

Last but not least it shall be pointed out that above-mentioned enforcement payments (*Zwangsgeld*) in the context of administrative execution of binding orders under Art. 10 par 5 EUSTR are not penalties in this sense. Penalties according to Art. 19 EUSTR sanction the breach of obligations retrospectively. Enforcement pay-

26 German Gewerbeordnung (GewO) revised 22/2/1999, available at: <https://www.gesetze-im-internet.de/gewo/GewO.pdf> (22/3/2022).

ments in the course of the enforcement of binding orders, on the other hand, serve to mitigate a default and to ensure future compliance with the obligations.

C. Implementation of EU 3TG Regulation and German Supply Chains Due Diligence Act by public authorities in Germany

I. EU 3TG Regulation

The 3TG Regulation has already been fully effective since 1 January 2021 and has been implemented in Germany in 2020 through the MinRohSorgG. Nevertheless, an administrative practice for the enforcement of the obligations with regard to supply chains responsibilities, in particular the creation of a due diligence system, cannot yet be ascertained yet, as the decisive ex-post checks according to Art. 11 3TG Regulation are reportedly only in preparation for 2022. Part of the implementation of supply chain responsibilities is not only the enforcement of legal obligations. An essential condition for effective implementation is again the creation of sufficient awareness among market participants and their preparation for the obligations to become effective. In this respect, a first assessment of at least the preparation measures for the implementation of the 3TG Regulation in 2022 appears sensible.

The Member State Competent Authority – MSCA – (Art. 10 3TG Regulation) is the German Inspection Agency for EU Due Diligence in Natural Resources Supply Chains (Deutsche Kontrollstelle für EU-Sorgfaltspflichten in Rohstofflieferketten – DEKSOR)²⁷ which forms part of the Federal Institute for Geosciences and Natural Resources (Bundesanstalt für Geowissenschaften und Rohstoffe – BGR) (Sec. 2 MinRohSorgG).

Similar to the entry into force of the EU Timber Regulation, there was also a transitional period; in this case three and a half years since the entry into force of the 3TG Regulation on 8 June 2017 until the obligations regarding the four conflict minerals (tin, tantalum, tungsten and gold) became effective at 1 January 2021. In contrast to the introduction of the EU Timber Regulation, DEKSOR and the Commission have used this transitional period more stringently to fulfil their obligation under Article 13 of the 3TG Regulation to provide technical assistance and guidance to market participants. The European Commission used this time in particular to offer small and medium-sized enterprises guidance on the introduction of the due diligence system.²⁸ Since the entry into force of the MinRohSorgG, DEKSOR has also been proactively and stringently pursuing the preparation of the potentially covered German market participants (150 to 200 operators annually) even before the obligations take effect. According to own information by DEKSOR, from May 2021 onwards, trial inspections were carried out at four operators, which were ar-

27 Starting page of DEKSOR at: https://www.bgr.bund.de/DE/Gemeinsames/UeberUns/DEKSOR/DEKSOR_node.html (22/3/2022).

28 See the Online-Tool “Due Diligence Ready”, available since 2019 at: https://ec.europa.eu/growth/sectors/raw-materials/due-diligence-ready_de (22/3/2022).

ranged by the trade associations. In July / August 2021, quick desk-top inspections were carried out at approximately 170 German operators on the basis of data from the customs authorities and publicly available information (in particular such available online). The affected companies were contacted directly, which was under 3 TG Regulation more feasible with a total number of 150 to 200 per year than under the EU Timber Regulation with its considerably larger and less definable target group. However, DEKSOR's support and advice to covered companies suffers from the same dilemma as BLE's support to operators under EU Timber Regulation: DEKSOR is also the enforcement authority. Its support must therefore also not jeopardise its independence in enforcing the obligations and must not compromise its task as a supervisory authority (Art. 13 par. 3TG Regulation). The function as supervisory authority has priority over the advisory task. This limits the effectiveness of its advice and preparation.

II. German Supply Chains Due Diligence Act (SCDDA)

The SCDDA is at an even earlier stage of implementation compared to the 3TG Regulation. The law came into force on 23 June 2021, but for the first group of German enterprises and branches (more than 3.000 employees) the obligations will only become effective on 1 January 2023, and for the second group (more than 1000 employees) only one year later (Sec. 1 par 1 SCDDA). Necessarily, there is also a lack of administrative practice in this respect, except for the preparatory measures by administrative and governmental bodies for the preparation of the applicability of the obligations. Here, too, a substantial transition period of 17 months, i.e. a good year and a half, is available for the preparation of the implementation.

The competent authority for control and enforcement of the obligations under the SCDDA is the Federal Office for Economic Affairs and Export Control (Bundesanstalt für Wirtschaft und Exportkontrolle – BAFA).²⁹ But not BAFA but the Federal Ministry of Labour and Social Affairs (Bundesministerium für Arbeit und Soziales), on the basis of its own competence and not primarily based on the SCDDA, has started a broad-based introduction initiative within the framework of the “National Action Plan for Business and Human Rights” (Nationaler Plan für Wirtschaft und Menschenrechte – NAP) with intensive involvement of business associations and the economic participants.³⁰ As part of this initiative, the Ministry's own measures to support businesses as well as measures by third parties were transparently interconnected at an early stage.³¹ For example, the ministry conducted industry dialogues, made 12 best-practice examples of well-known companies avail-

29 Sec. 19 par. 1 SCDDA.

30 See the starting page: <https://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/wirtschaft-menschenrechte.html> (22/3/2022).

31 See for the broad scope of guidance for enterprises: <https://www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/Gesetz-ueber-die-unternehmerischen-Sorgfaltspflichten-in-Lieferketten/Umsetzung-durch-Unternehmen/umsetzung-durch-unternehmen-art.htm> (22/3/2022).

able and provided comprehensive information. In contrast, BAFA's own service, which is explicitly obliged to support economic operators according to Sec. 20 SCDDA, is rather plain; it essentially refers to the initiative of the Federal Ministry.³² By separating the function of offer of guidance (ministry) from the supervisory function (BAFA), the quality of support to economic operators can obviously be significantly increased without corrupting the independence of the supervisory function. This could also serve as a model for the introduction of supply chain responsibilities in other areas.

D. Conclusion

In the legal advice provided to operators, it is noticeable that even almost ten years after the obligations under the HolzSiG came into effect, many small and medium-sized enterprises are still not aware that the regulations apply to them. Even companies that in general spend a great deal of time and effort on identifying and fulfilling their legal obligations have only become aware of the fact that they fall within the scope of the EU Timber Regulation through the inspections.³³ This observation is not limited to small and medium-sized enterprises. Even though the Federal Government as well as the various cross-sectoral trade associations have informed about the coming into effect of the obligations under the EU Timber Regulation and even though information was of course also available in the press, awareness of the majority of market participants has apparently not been achieved. The guarantee of a transitional period of several years as such combined with only unspecific information is not suitable on its own to adequately and efficiently prepare the implementation of complex obligations like those concerning due diligence systems and supply chains responsibilities. An inadequate introduction with too little consultation of the economic operators makes the introduction of supply chain responsibilities ineffective and requires more enforcement efforts for the public authorities on the long run. It seems essential to provide sufficient guidance in the transition phase in a stringent and targeted manner. The same applies to the need of support in the course of the administrative enforcement of the obligations.

As the example of the introduction of the SCDDA shows, it can be helpful to separate the offer of the necessary government support from the execution of the su-

32 See the BAFA starting page for the SCDDA: https://www.bafa.de/DE/Lieferketten/lieferketten_node.html (22/3/2022).

33 This observation is confirmed by the results of a representative survey of market participants conducted by the Thünen Institute of International Forestry and Forest Economics in 2018: "Only one-third of operators comply with the EU TR, mainly driven by a lack of information. However, legally compliant operators cover the majority of the imported timber to Germany. To increase the level of implementation, access to information for small enterprises outside the timber-related sector would have to be guaranteed."; *M. Köthke*, Implementation of the European Timber Regulation (EU TR) by German importers, Project Brief, available at: https://literatur.thuenen.de/digbib_extern/dn061751.pdf (22/3/2022); for more information and details see: <https://www.thuenen.de/de/wf/projekte-liste/die-eu-holzhandelsverordnung-und-ihre-folgen/> (22/3/2022).

pervisory function. Whether the introduction of the SCDAa generates at the end of the day more awareness and ultimately more compliance than the less intensive introduction of the EU Timber Regulation remains to be seen. Nevertheless, the example proves that more intensive support by government agencies in the separation of supervisory functions is feasible.

Furthermore, practical experience with the implementation of the EU Timber Regulation proves that differences between the member states lead to market participants switching supply chains and business to less strict member states in the sense of enforcement shopping. This could also be counteracted if the Member States were more active in fulfilling their obligation to cooperate and exchange information (cf. Art. 12 EU Timber Regulation, Art. 13 3TG Regulation).

Finally, it also proves to be problematic in enforcement if the regulations, e.g. for due diligence systems, do not refer to harmonised standards, such as those of the OECD. This not only increases uncertainty for the legal practitioner because experience is not transferable. The existence of different standards also increases the necessary implementation effort considerably, since the market participants subject to various supply chains responsibility regimes can even within the EU not easily transfer basic structures of the due diligence system from one area to the other. This applies all the more to companies that are active in third countries and may have to comply with additional not harmonised standards even within the same field, e.g. the different concept of conflict mineral in the United States of America under the Dodd-Frank-Act.

