

Edeke and Rewe in violation of the German Supply Chain Law

Q&A on the legal background

What is the case about?

Health hazards from the use of pesticides (including Mancozeb, which is banned in the EU because of its significant health risks), violations of the right to freedom of association (anti-unionism, wrongful termination because of trade union activities, blacklisting of trade union members), discrimination (esp. gender pay gap and severely exploitative informal employment of migrant workers), and the withholding of proper wages – for years, Oxfam, together with the Ecuadorian trade union of agricultural workers and farmers in the banana sector ASTAC and the Costa Rican trade union of plantation workers SITRAP, has documented human rights violations on plantations in Ecuador and Costa Rica that supply the large German supermarket chains Aldi, Edeka, Lidl and Rewe with bananas and pineapples.

In summer 2023, Oxfam, together with ASTAC and SITRAP informed the four large supermarkets Aldi, Edeka, Lidl and Rewe of the documented human rights violations. The German Supply Chain Due Diligence Act (LkSG), which entered into force on 1 January 2023, obligates companies to prevent, eliminate or at least minimize human rights violations in their supply chains through corporate due diligence. The supermarket chains were thus requested to investigate the information they received about labor and human rights violations within the operations of their suppliers and to work towards eliminating the documented abuses with the appropriate participation and on an equal footing with those affected and their trade union representatives.

Aldi and Lidl have acknowledged the allegations and are now negotiating suitable remedial and preventative measures with their suppliers and the trade unions. Although Edeka and Rewe have responded to the complaints, they have not taken

any concrete steps to better protect workers and prevent further human rights violations. Instead, they continue to hide behind audits and certifications – for example, from the WWF or the Rainforest Alliance – despite numerous reports and statements from those affected that these audits have not yet managed to expose the abuses and contribute to actual improvements on the ground.

On 2 November 2023, the trade union ASTAC, together with ECCHR, Oxfam and Misereor, thus filed a complaint against Edeka and Rewe with the Federal Office of Economics and Export Control (BAFA), which is responsible for implementing and monitoring the LkSG. With this complaint, ECCHR seeks to support its partners in using the legal potentials of the LkSG to ensure that the supermarket chains fulfill their responsibilities to the workers in their supply chains and take effective measures to prevent the violation of labor and human rights.

What is the political context of the complaint?

In recent years, a neoliberal economic policy that relies on foreign direct investment has been predominant in Ecuador. With the aim of attracting investment and exporting products cheaply, labor protection measures have been dismantled and wages have been kept low. Violations of existing workers' rights are widespread and include the failure to comply with laws pertaining to minimum wage, overtime and mandatory leave, as well as gender discrimination in the workplace and violations of occupational health and safety. Trade unions, in particular, have been subject to massive repressive measures: union members and leaders experience repeated incidents of harassment, while the Ministry of Labor often delays or even rejects the founding and registration of unions. In October 2023, three trade unionists from ASTAC received death threats. ASTAC founder Jorge Acosta, who himself has received death threats in the past, suspects that banana producers are behind this. Together with Oxfam, Misereor and the Friedrich Ebert Stiftung (FES), ECCHR sent a letter to the Ecuadorian president and other international bodies, calling on them to ensure the safety of trade unionists.

The Ecuadorian government has been reluctant thus far to enforce existing laws and hold companies accountable for their violations of workers' rights, including the right to freedom of association. President-elect Daniel Noboa, who was elected on 15 October 2023, is himself an entrepreneur in the banana industry and appears ready to continue pursuing the neoliberal economic course. In Costa Rica, the situation with regard to human- and labor rights is similar. Here, the extreme exploitation generated through the informal employment of migrant workers, especially from Nicaragua, is particularly alarming.

Importing companies and countries in the Global North profit from these conditions in the producing countries. This is also the case with the large German supermarket chains, which not only benefit from the low wages and lax enforcement of occupational health and safety standards in Ecuador, but also actively contribute to the exploitation of workers on the plantations, particularly through the pressure they exert on prices. Certifications and voluntary commitments have proven to be inadequate and unreliable in attempts to change such circumstances. One quarter of all bananas in German supermarkets are from Ecuador, which makes the country the largest supplier of bananas for the German market. The fact that human rights violations occur in the supply chains of all four major supermarket chains illustrates the structural dimension of the problem.

For years, ECCHR, together with numerous civil society actors, has thus campaigned at the national and international level for strong, binding regulations, which would obligate transnationally active companies to respect human rights and the environment in their supply chains, hold companies liable for violations, and enable those affected to effectively assert their rights. With the LkSG, such a legal framework is now in place in Germany for the first time. Despite persistent legal gaps, it is now crucial to apply the law in a way that reflects the demands and interests of workers and other affected parties, so as to contribute to real improvements in working and living conditions along the supply chains of transnationally active companies.

What is the legal basis of the complaint?

The complaint was submitted on the basis of the LkSG, which obliges companies with headquarters or a branch office and at least 3,000 (from 2024 onward, 1,000) employees in Germany to fulfill human rights and environmental due diligence obligations. The aim of this legislation is to prevent, stop or at least minimize human rights violations and environmental harm in the supply chains of such companies.

According to the law, the BAFA is the competent authority for auditing companies' compliance with human rights and environmental due diligence obligations. According to 14 para. 1 no. 2 LkSG, those affected by human rights violations can request that the BAFA initiate investigations and ensure compliance with the LkSG. Together with individual workers who are directly affected by the human rights violations committed by one of Rewe's banana suppliers, ASTAC is now exercising this right. ASTAC also represents the interests of workers who wish to remain anonymous due to justified concerns about repression and, in particular, the loss of their jobs, as well as those who do not wish to appear anonymously as complainants. In such cases, those affected can be represented in

the proceedings by civil society organizations (Section 14 of the Administrative Procedure Act, VwVfG).

If the applicants make a substantiated claim that their own rights protected under the LkSG have been violated as a result of a breach of due diligence by a company, the BAFA must take action. It must take the appropriate and necessary steps and measures to identify, eliminate and prevent violations of human rights or environmental due diligence obligations. For these purposes, the BAFA has extensive powers at its disposal: for example, it can summon people, inspect company premises, examine documents and order the company concerned to take specific actions to fulfill its obligations (Sections 15 ff. LkSG). If a company fails to comply with BAFA's orders within a reasonable time frame, BAFA can impose fines of up to €50,000 and penalize intentional or negligent breaches of duty with fines of up to €8 million or 2 percent of the company's average annual revenue.

The human rights violations documented in the supply chains of Rewe and Edeka – in particular, health hazards resulting from non-compliance with local occupational health and safety obligations (section 2(2) no. 5 LkSG), violations of freedom of association (section 2(2) no. 6 LkSG), gender-specific wage inequality (§ 2 para. 2 no. 7 LkSG) and the withholding of appropriate wages (§ 2 para. 2 no. 8 LkSG) – are explicitly mentioned in the LkSG as typical human rights risks. Companies are obliged to identify and minimize such risks in their supply chains through appropriate and effective due diligence measures and to prevent, stop, or at least minimize the extent of, human rights violations (Sections 3 to 10 LkSG). The law stipulates specific measures that companies must take in order to fulfill their due diligence obligations. These include regular risk analyses (Section 5), preventive measures (Section 6), and appropriate and effective remedial measures that address the results of the risk analyses and other indications of human rights or environmental risks (Section 7). Furthermore, companies are required to establish an internal complaints procedure (§ 8).

In principle, the law applies to the entire supply chain, i.e. from the extraction of raw materials to the end customer. However, the standard of due diligence is differentiated according to whether the infringement or the risk of an infringement occurs within the business operations of a company or within those of its direct or indirect suppliers. Indirect suppliers with which a company has no contractual relationships of its own do not have to be included in the company's human rights risk analysis, unless the company anticipates a significantly altered or amplified risk situation in its supply chain (Section 5 (4) LkSG) or if there are actual indications ("substantiated knowledge") of human rights violations and environmental harms (Section 9 (3) LkSG). In the event of such indications, the company is obliged to immediately implement appropriate preventive measures

vis-à-vis its indirect suppliers and to develop and implement a strategy to prevent, stop or minimize such violations and to adapt its overall risk management policy accordingly. In contrast, human rights violations and environmental damage in the company's own business operations in Germany and abroad must always be successfully prevented or stopped. Violations within the operations of direct suppliers that the company cannot stop within a reasonable period of time must be counteracted by creating and implementing a strategy for stopping and minimizing them.

The specific violations of fundamental workers' rights on banana plantations in Ecuador brought forward in the complaint against Rewe and Edeka have been addressed both publicly and directly with the supermarket chains for years. Thus, at the time when the LkSG entered into force in January 2023, the companies were already aware of factual indications of serious human rights risks within the operations of their banana suppliers from Ecuador. Therefore, they should have taken appropriate and effective due diligence measures to prevent, stop or at least minimize human rights violations at their Ecuadorian suppliers immediately after the LkSG came into force (but, at the latest, after formal complaints were submitted via their internal complaints mechanism that was to be set up in accordance with Section 8 LkSG at the beginning of August 2023).

One of the main legal arguments in the complaint is that the measures that Edeka and Rewe have taken so far do not meet the requirements of the LkSG: neither the interests of workers and their legitimate stakeholders have been adequately taken into account (Section 4 (4) LkSG), nor are the due diligence measures effective (Section 4 (2) LkSG) and appropriate (Section 3 (2) LkSG). Supermarket chains continue to rely solely on audits and certifications, which have been criticized for years: numerous workers report substantial manipulation of results, for example, by putting workers under pressure or presenting falsified documents. There are thus considerable doubts as to whether the measures taken to date are suitable for exposing abuses and contributing to actual improvements on the ground. In our opinion, supermarkets must involve trade unions and other key stakeholder groups in particular in the development and implementation of measures on an equal footing, in order to effectively and appropriately carry out factory inspections and other remedial and preventative measures.

In addition, the review and, if necessary, adaptation of the procurement strategies and purchasing practices of supermarkets is particularly important for the prevention of future human rights violations. This is because "the determination of delivery times, purchase prices or the duration of contractual relationships can have a significant influence on whether a human rights risk at a supplier is avoided or potentially exacerbated" (see government explanatory memorandum to the

LkSG). The BAFA should therefore urge Edeka and Rewe to adjust their banana purchasing policies and to pay their suppliers prices for bananas that at least cover production costs, as well as enable the payment of appropriate wages and compliance with local labor (protection) law regulations.

What do we want to achieve with the complaint?

Together with Oxfam and Misereor, we are supporting the Ecuadorian trade union ASTAC and the workers involved in the complaint. With the help of the LkSG, they are trying to persuade Edeka and Rewe to finally take effective measures to end the labor and human rights violations within the operations of their banana suppliers in Ecuador and to prevent future violations. In particular, those affected are demanding compliance with local occupational health and safety regulations: no aerial spraying of pesticides while workers are present on the plantations, compliance with re-entry periods after aerial spraying, suitable protective clothing, equal and non-discriminatory payment of appropriate and living wages for the hours actually worked, and the guarantee of unrestricted trade union activity for workers and trade unions.

In order to satisfy these legitimate expectations of the complainants under the LkSG, we are convinced that the law and the BAFA's complaints procedure must be interpreted and implemented in such a way that the concerns and perspectives of those affected are given a central role. In accordance with the UN Guiding Principles for Business and Human Rights (UNGPR), this requires transparency and the participation of those affected in all procedures and measures affecting them.

Furthermore, in our view, it is crucial that corporate due diligence is not reduced to simple and superficial review-and-report obligations (tick-the-box approach), whose effects are dubious at best. One of the key questions that must be answered when implementing the law is: what are appropriate preventive and remedial measures in different constellations and contexts? We argue that it is not sufficient to rely solely on audits and certifications by private third parties – especially not (as in the case of Rainforest Alliance) when there are justified doubts as to their validity and reliability, due to inadequate standards or methodology, or due to concrete evidence of manipulation. In this regard, we expect BAFA to develop ambitious standards, in line with the purpose of the law, that are suitable for actually improving working and living conditions in the supply chains of transnationally active companies.

What role do certification companies such as the Rainforest Alliance play in global supply chains and human rights due diligence?

Many pineapples and bananas sold in German supermarkets bear seals and certificates, for example from the Rainforest Alliance, which are intended to attest to their sustainable cultivation under fair working conditions. Such certificates therefore have a significant influence on purchasing behavior, but NGOs such as Oxfam have long criticized their often-dubious validity and credibility. This is because, until now, certification companies themselves have often lacked adequate interest in actually checking suppliers effectively and refusing them certification if ecological and social standards are not met. This is because they are commissioned by the companies or the suppliers themselves and, therefore, do not act with sufficient independence. The standards set by certification companies are generally very low, and they are often monitored insufficiently. Visits to company premises are often announced and arranged in advance. In some cases, workers are put under pressure by their employers or are presented with false documents, or with work environments and equipment that do not exist in everyday working life or that are in a completely different condition. In the case of the Rainforest Alliance, one of the largest certifiers of supposedly sustainable bananas, partners from Ecuador and Costa Rica have repeatedly criticized the company for placing too little value on the statements of workers on the plantations. A lack of transparency and involvement of workers and trade unions also means that the certificates often conceal abuses and labor rights violations.

Rewe and Edeka have so far outsourced the risk analyses that are primarily their responsibility to certifiers, despite the well-documented and long-criticized unreliability of their audits and certificates. The reports of the workers interviewed by ASTAC and Oxfam have once again confirmed this fact. Ultimately, the question of how to deal with certificates and audits is a central problem in the implementation of the LkSG and will be a yardstick for its effectiveness. At best, they can contribute to corporate due diligence measures, but they can never replace them. At the same time, certification companies themselves must also carry out their own work with human rights due diligence. Negligent or false certificates must not be allowed to be used to conceal abuses such as labor rights violations or the suppression of trade unions.

Why is the case relevant?

Working conditions in the pineapple and banana industry have been notoriously bad for years. German companies not only benefit from the low wages and lax enforcement of occupational health and safety standards in Ecuador, but also

contribute to the exploitation of workers themselves, particularly through their pressure on prices. With the LkSG, those affected now finally have a legal framework to assert their rights and exert pressure on supermarkets. Given the fact that the food industry in particular often has long-standing supplier relationships, it seems possible to have a real impact on local production conditions. This gives the companies a real opportunity to contribute to improvements. The complaint against Edeka and Rewe with the BAFA could also send a signal to other companies in the sector.

There is hope that the LkSG will fulfill its goal of upholding human rights in global supply chains and lead to an improvement in working conditions on banana plantations in Ecuador. The complaint filed against Rewe and Edeka is also one of the first proceedings under the LkSG. This provides an opportunity to clarify a number of unresolved legal issues that are relevant beyond these specific cases and, therefore, help set the course for the effective application of the LkSG.

What role does ECCHR play in this case?

The complainants are anonymous workers from one of Rewe's banana suppliers and from the Ecuadorian trade union of agricultural workers and farmers in the banana sector, ASTAC. ASTAC is itself affected by the massive restrictions on trade union freedoms within the operations of Edeka and Rewe suppliers and also represents the interests of all workers who do not want to be involved as complainants (including anonymously) out of justified fear of repression and loss of their jobs.

Oxfam is representing those affected and complainants as an authorized representative in the administrative proceedings before the BAFA. ECCHR advises and supports Oxfam and ASTAC in terms of content and logistics in the filing of complaints, implementation and communication about the procedures.

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