

Unauthorized translation

Design possibilities of a

German "Mantelgesetz" on the sustainable design of global value chains
and amendments of commercial law regulations

(Sustainable Value Chain Act - NaWKG)

including an

Act on the Regulation of Human Rights and Environmental Due Diligence
in Global Value Chains

(Due Diligence Act - SorgfaltspflichtenG)

**Draft of a law on the sustainable design of global value chains and on amendments
of commercial law regulations**

(Sustainable Value Chain Act - NaWKG)

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Draft law to regulate human rights and environmental due diligence in global value chains

(Due Diligence Act - SorgfaltspflichtenG)

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Section 1: General provisions

§ 1 Purpose

¹ The purpose of this Act is to ensure the protection of internationally recognized human rights and the environment in global value chains. ²Protection is provided both in the public interest and in the individual interest of people who are employed in or otherwise directly affected by the impacts of global value chains.

§ 2 Scope of application

(1) ¹ This Act shall apply to all

1. large companies and
2. other companies that operate, themselves or through a controlled company,
 - a) in a high-risk sector or
 - b) in conflict and high-risk areas

with registered office, head office or principle place of business in Germany.

² This Act shall not apply to small enterprises.

(2) The obligations under this Act also extend to business activities conducted abroad.

§ 3 Definitions

For the purposes of this Act, the following definitions shall apply

1. internationally recognised human rights: the human rights laid down in the agreements listed in the Annex to this Act;
2. Value chain: the creation of value throughout the life cycle of a product or service, i.e. all stages, including research and development, production, trade and related conditions, transport, use and maintenance, throughout the life of the product, construction or service, from the procurement of raw materials or production of resources to disposal;
3. Large company: a company that, alone or on a consolidated basis

- together with the companies controlled by it or controlling it, meets the size criteria of a "large corporation" within the meaning of Section 267 (3) HGB;
4. Small company: a company that, on a consolidated basis, together with the enterprises controlled by it or controlling it, satisfies the size criteria of a "small joint-stock company" within the meaning of Section 267 (1) HGB accordingly;
 5. controlled company: a subsidiary over which the parent company directly or indirectly exercises a dominant influence;
as defined in § 290 (2) HGB (German Commercial Code);
 6. High-risk sectors: The following sectors according to the statistical classification of economic activities NACE Rev.²¹:
 - a. SECTION A - AGRICULTURE, FORESTRY AND FISHING;
 - b. SECTION B - MINING AND QUARRYING OF STONE AND EARTH;
 - c. From the section C - MANUFACTURING
INDUSTRY/PRODUCTION OF GOODS:
 - i. Division 10: Manufacture of food products and animal feedingstuffs;
 - ii. Division 13: Manufacture of textiles;
 - iii. Division 14: Manufacture of wearing apparel;
 - iv. Division 15: Manufacture of leather goods and footwear;
 - v. Division 26 : Production of data processing equipment, electronic and optical products;
 - d. SECTION D - ENERGY SUPPLY.
 7. Conflict and high risk areas: Areas of armed conflict or post-conflict fragility, and areas of weak or non-existent governance and security, such as failed states, where widespread and systematic violations of international rights, including human rights violations, occur;
 8. fundamental requirements for environmental protection: requirements,
 - a. that result from the regulations applicable at the place of success for the protection of the environmental media air, water, soil, climate, bio-diversity and the conservation of natural resources,

¹ Regulation (EC) No 1893/2006 of 20 December 2006 establishing the statistical classification of economic activities NACE Revision 2 and amending Council Regulation (EEC) No 3037/90 and certain EC Regulations on specific statistical domains, OJ L 393, 30.12.2006, p. 1-39.

- b. resulting from international agreements that are binding on the Federal Republic of Germany, and
 - c. which result from the international state of the art.
9. Environmental damage: a directly or indirectly occurring, detectable adverse modification of the air, water, soil, climate, bio-diversity and the natural resources or of their functions;
10. Violation: a violation of human rights or a not insignificant violation of fundamental environmental protection requirements or environmental degradation;
11. strategic business decisions: in particular the commencement of a new business activity or the fundamental extension, modification or withdrawal from an existing business activity.

Section 2: Human rights and environmental due diligence

§ 4 Due diligence obligation

- (1) Every company within the meaning of Section 2 (1) shall be obliged to exercise due diligence in accordance with Sections 5 to 11.
- (2) The object of human rights due diligence is the protection of internationally recognised human rights (§ 3 No. 1).
- (3) The subject of environmental due diligence is compliance with fundamental environmental protection requirements (§ 3 No. 8) and prevention of environmental damage (§ 3 No. 9).

§ 5 Risk analysis

- (1) A risk analysis shall be carried out in accordance with paragraphs 2 to 5 in order to comply with the due diligence obligation.
- (2) ¹In completing the risk analysis, the company shall identify, evaluate, and if necessary prioritize in an adequate manner the risks of contributing to violations (§ 3 No 10). ²What an adequate analysis requires shall be determined with regard to the country- and sector-specific risks, the severity and likelihood typically to be expected of possible violations, and how directly the company is contributing to such violations, as well as the size of the company and the actual and economic leverage the company can exert on the actor directly causing them.
- (3) ¹If the company – through the risk analysis or otherwise – becomes aware of indications pointing to a risk that the company is contributing to a violation, the company shall undertake

an adequate in-depth analysis of the risks specifically identified, based on the particular circumstances of the case; the affected persons are generally to be involved in this analysis.

²Para. 2 sentence 2 applies accordingly.

(4) ¹ A company may also be considered to be contributing to a violation if

1. third parties, in particular companies in the value chain and government agencies, or
2. products or services of the company

contribute unlawfully to a violation as a result of the company's business activities.

(5) ¹The risk analysis shall be updated adequately on a continuous basis, to the extent there are grounds for doing so. ²Para. 2 sentence 2 applies accordingly. ³In addition, the risk analysis shall be repeated annually and comprehensively, regardless of any specific grounds for doing so. ⁴Moreover, the risk analysis shall be conducted before every strategic business decision. ⁵In this case, the risk analysis shall cover those risks associated with the planned decision.

§ 6 Preventive measures

(1) If the company identifies a risk of contributing to violations (§ 3 No. 10), it shall incorporate adequate preventive measures in its business policy, integrate them into its business processes and evaluate and monitor their effectiveness.

(2) ¹In particular, the company shall as a rule take adequate measures to avoid violations in connection with contract initiations, contract negotiations, and the conclusion of contracts relating to strategic business decisions. ²Adequate prevention measures usually also include defining a human rights and environmental business and value chain policy and communicating this to employees, business partners and the public.

(3) § Section 5 para. 2 sentence 2 and § 5 para. 4 shall apply accordingly.

§ 7 Remedial measures

¹ If the company determines that a violation (§ 3 para. 10) to which it is contributing has already occurred or is imminent, it shall immediately take adequate measures to prevent or mitigate such violation. ² § 5 para. 2 sentence 2 and § 5 para. 4 shall apply accordingly.

§ 8 Compliance officer

(1) The executive board/management must appoint a company officer who monitors compliance with the due diligence obligation (compliance officer).

(2) ¹ The Compliance Officer shall be appointed in writing. ² His tasks shall be specified precisely. ³ Its appointment and dismissal shall be notified immediately to the competent authority. ⁴ The executive board/management must appoint a Compliance Officer who has the necessary expertise and reliability to perform his tasks.

(3) ¹ The Compliance Officer is directly subordinate to the Executive Board and reports directly to it. ² He must have direct access to the responsible member of the Executive Board. ³ The management must support him in the performance of his tasks and in particular provide him with the resources (support staff, rooms, equipment, appliances and other means) necessary for the performance of his duties, grant him authorisations and enable him to participate in training courses. ⁴ In particular, he shall have unhindered access to all information, data, records and systems that may be of significance in the fulfilment of his tasks.

(4) The expert opinion of the Compliance Officer must be obtained in good time before strategic business decisions are made (§ 3 No. 11).

(5) ¹ The Compliance Officer shall not be disadvantaged because of the fulfilment of his duties. ² The employment of the Compliance Officer may not be terminated unless facts exist that entitle the company to terminate the employment relationship for good cause without observing a period of notice. ³ The fulfilment of the duties as Compliance Officer does not constitute such a fact. ⁴ The special protection against dismissal shall also apply for a period of one year following the revocation of the Compliance Officer.

§ 9 Complaints mechanism

(1) ¹ The company shall establish an effective internal complaints mechanism or participate in an effective non-governmental complaints mechanism of a multi-stakeholder initiative. ² The Compliance Officer (§ 8) is responsible for setting up and operating the internal complaints mechanism or for participating in the external complaints mechanism.

(2) ¹ The complaints mechanism shall have written rules of procedure that, in particular, contain reasonable time limits for the procedural steps and decisions. ² As a rule, at least one employee representative shall be involved in the proceedings.

(3) ¹ The complaint mechanism is open to any person who claims that he or she, another person or the environment is negatively affected, directly or indirectly, by the company's business activities, in particular in the company's value chain. ² If complaints from certain language areas are to be expected due to a corresponding country-specific risk (§ 5 (2) sentence 2), any language barriers should be taken into account as far as possible in the design of the complaints mechanism; as a rule, at least English should also be provided as the language of the proceedings for this purpose. ³ The Rules of Procedure shall be accessible to the public and shall be published on the Company's website, if existent. ⁴ If certain groups are exposed to particular risks of injury, they should be actively informed about the complaints mechanism and the Rules of Procedure.

(4) Where the affected person alleges serious violations, it shall be ensured that he has the necessary assistance and access to the necessary information.

(5) ¹ The complaints mechanism shall be set up and operated in such a way as to preserve the confidentiality of the identity of the complainant and to deny unauthorised staff access to the procedural documents. ² It must be ensured that complainants are neither punished nor otherwise disadvantaged because of the complaint.

(6) To the extent that under applicable law the limitation of claims by recourse to appeal proceedings is not already suspended by operation of law, the company must declare an effective waiver of limitation for the duration of the proceedings until their conclusion.

(7) ¹ Complaints are systematically evaluated and included in the risk analysis. ² The effectiveness of the complaints mechanism and the complainants' satisfaction with the outcome are regularly evaluated. ³ The Rules of Procedure shall be adapted if the result of the evaluation gives cause to do so.

§ 10 Protection of whistleblowers

(1) ¹ The enterprise shall establish an appropriate system for receiving and documenting evidence of failure to exercise due diligence and of actual or threatened violations in accordance with paragraphs 2 to 6. ² The Compliance Officer (§ 8) is responsible for setting up and operating the system.

(2) ¹ The reporting channel must be open to its own employees as well as employees and stakeholders in the value chain and other third parties. ² If, based on a corresponding country-specific risk (§ 5 para. 2 sentence 2), hints from a certain language area are to be expected, any language barriers should be taken into account to the extent possible when designing the reporting channel; as a rule, at least one English-language reporting channel is required for this purpose.

(3) ¹ Hints are to be followed up immediately. ² If the information proves to be correct,

appropriate and adequate follow-up measures must be taken without delay.³ If the report is not made anonymously, feedback must be given to the whistleblower within three months on any follow-up action taken.

(4)¹ The reporting channel must be set up and operated in such a way that the confidentiality of the whistleblower's identity is preserved and unauthorised employees are denied access to these channels.² A whistleblower employed by the enterprise must not be discriminated against because of the complaint.³ Follow-up measures for complaints coming from third parties must, as far as possible, ensure that the whistleblower is not discriminated against.

(5) A whistleblower employed by the company must also not be discriminated against if he informed the competent authorities instead of the internal reporting channel and could reasonably assume from his point of view that the information was correct.

(6)¹ Hints are systematically evaluated and included in the risk analysis.² The effectiveness of the reporting system is evaluated regularly.³ The reporting system shall be adapted if the results of the evaluation give cause to do so.

§ 11 Documentation and reporting obligations

(1)¹ Compliance with the obligations under §§ 4 to 10 shall be truthfully documented - also for the purpose of preserving evidence in the interest of those affected by human rights violations.² The documentation must be kept for at least 5 years.

(2)¹ The compliance with the obligations pursuant to §§ 4 to 10 shall be publicly reported.² If the company is obliged to submit a non-financial statement pursuant to Section 289 (3) HGB, the report pursuant to sentence 1 may be submitted within this scope.³ If the company has an internet presence, the report shall be published there.

Section 3: Enforcement and sanctions

§ 12 Administrative orders, rights to access and other competences

(1) The competent authority may, on a case-by-case basis, issue the necessary orders for the implementation of this Act and the statutory regulations adopted in accordance with the Act.

(2)¹ The competent authorities and the persons appointed by them are authorised to access business offices and premises during business hours to the extent necessary for the fulfilment of their supervisory tasks; the fundamental right of the inviolability of the residence (Article 13 of the German Basic Law) shall be restricted to this extent.² The competent authorities and the persons appointed by them may request the information and documents necessary for the fulfilment of their tasks, in particular the publication of the documentation in accordance with §

11 paragraph 1. ³ The obligated companies shall tolerate measures in accordance with sentences 1 and 2 and shall support the competent authorities. ⁴ The obliged companies and their employees shall be obliged to provide the competent authority on request with the information necessary for the fulfilment of its tasks. ⁵ The parties responsible for providing information may refuse to provide information on questions if the reply would expose them or one of the members of staff referred to in section 383(1)(1) to (3) of the Code of Civil Procedure to the risk of criminal prosecution or proceedings under the Administrative Offences Act. ⁶ They shall be informed of their right to refuse to provide information.

§ 13 Administrative fines

(1) Anyone who

1. does not carry out a risk analysis contrary to § 5 (2),
2. does not carry out an in-depth, case-by-case risk analysis contrary to § 5 (3) sentence 1,
3. contrary to § 5 (5) sentence 3, does not comprehensively repeat the risk analysis at regular intervals,
4. contrary to § 5 (5) sentence 4, does not carry out the risk analysis prior to a strategic corporate decision,
5. does not appoint a Compliance Officer contrary to § 8 paragraph 1,
6. does not set up a complaints mechanism contrary to Paragraph 9(1),
7. does not set up a whistleblower reporting channel contrary to § 10 paragraph 1,
8. does not document contrary to § 11 paragraph 1, the compliance with the obligations under § 5 to 10 or does not keep the documentation for at least five years,
9. does not publicly report on compliance with §§ 4 to 10 contrary to § 11 (2),
10. contrary to section 12 subsection (2) second sentence of subsection (2) does not or cannot submit the documentation pursuant to section 11 para 1 at the request of the competent authority,

shall be committing an administrative offence.

(2) Anyone, who

1. deliberately does not take preventive measures contrary to § 6, although he has determined a risk,
2. deliberately fails to take remedial action contrary to § 7, although he has

found a violation.

shall be committing an administrative offence.

(3) ¹ Offences pursuant to paragraph 1 may be punished by a fine of up to one million euros.

² Offences pursuant to paragraph 2 may be punished by a fine of up to five million euros.

§ 14 Penal provisions

(1) A custodial sentence of up to one year or a fine shall be imposed on any Compliance Officer (Section 8 (1)) who, contrary to Section 11 (1), deliberately makes false statements in the documentation of due diligence compliance.

(2) ¹ Who in the case of paragraph 1

1. causes serious damage to the health of another person or damage to the health of a large number of people, or

2. puts another person in danger of death,

shall be punishable by imprisonment for not less than one year. ² Anyone who, as a Compliance Officer or Executive Director in the case of § 13 paragraph 2, causes an injury specified in sentence 1 shall be equally punished.

(3) ¹ Any person who, in the case referred to in paragraph 1, causes the death of another person shall be punished with a custodial sentence of not less than two years. ² A Compliance Officer or Managing Director, who, in the case of § 13 paragraph 2, causes a consequence specified in sentence 1 will be equally punished.

§ 15 Civil liability, overriding mandatory rule

. Regarding non-contractual liability claims, the obligations deriving from §§ 5 to 11 define the applicable duty of care on a mandatory basis and irrespective of the law otherwise applicable to the non-contractual liability under private international law.

§ 16 Exclusion from the award of public contracts

(1) ¹ Candidates who have been fined at least two thousand five hundred euro for an infringement under Paragraph 13 shall be excluded from the participation in a competition for a supply, construction or service contract offered by the contracting authorities referred to in §§ 99 and 100 of the Act against Restraints of Competition (GWB) for a reasonable period of time until their reliability has been re-established. ² The same shall apply prior to the commencement of proceedings for a fine if, in the individual case, given the evidence, there is no reasonable doubt as to serious misconduct within the meaning of sentence 1.

(2) The authorities responsible for prosecuting or punishing administrative offences pursuant to § 13 may, upon request, provide the necessary information to contracting authorities pursuant to Section 99 of the Act against Restraints of Competition and to bodies who maintain prequalification directories approved by contracting authorities or directories of contractors and suppliers.

(3) ¹ Public contracting authorities pursuant to paragraph 2 shall, in the fulfilment of their tasks, request information from the Central Register of Trade and Industry on final decisions on fines for an administrative offence pursuant to § 13 or shall require applicants to declare that the conditions for exclusion pursuant to paragraph 1 are not met. ² In the event of a declaration by the applicant, contracting authorities may at any time request additional information from the Central Register of Trade and Industry in accordance with section 150a of the Industrial Code (GewO) in accordance with paragraph 2. In the case of contracts worth EUR 30 000 or more, the contracting authority referred to in paragraph 2 shall, before awarding the contract, request information from the Central Register of Trade and Industry in accordance with Section 150a of the Industrial Code (GewO) for the candidate to whom the contract is to be awarded.

(4) Before a decision is taken to exclude a candidate from the competition, he or she must be heard.

Section 4: Final provisions

§ 17 Authorization to issue statutory regulations

¹ The (Federal) Ministry [*competence still to be clarified*] shall be authorised, by statutory order without the consent of the Bundesrat, to regulate the details of the duties and obligations laid down in the second part and, for this purpose, in particular to issue provisions with regard to

1. cross-sectoral and sector-specific minimum requirements for compliance with the due diligence obligation (§§ 4 to 7), including the obligation to extend the risk analysis to certain tiers of the value chain,
2. Minimum requirements for the person of the Compliance Officer (§ 8), in particular his expertise and reliability,
3. Minimum requirements for the complaints mechanism (§ 9),
4. Minimum requirements for whistleblower protection (§ 10),
5. Minimum requirements for the type and scope of documentation (§ 11 paragraph 1),
6. Minimum requirements for the type and scope of public reporting (Article

11(2)).

² When it defines minimum requirements, the Federal Ministry shall not fall short of international standards.

§ 18 Responsibilities

(1) The implementation of this law is the responsibility of the federal states (Bundesländer) authorities responsible for trade and industry supervision (Gewerbeaufsicht), unless the federal states stipulate otherwise.

(2) ¹ The authorities responsible under paragraph 1 shall be assisted by the Federal Institute for Occupational Safety and Health. ² The Federal Institute for Occupational Safety and Health identifies and assesses injury risks in global value chains specific to countries, sectors and value-added levels within the scope of its general research mandate. ³ It shall assist the federal states authorities responsible under paragraph 1 in the development and implementation of a risk-based monitoring concept. ⁴ It shall support and advise, upon their request, the federal states authorities which are responsible in accordance with paragraph 1 also with regard to individual cases as a form of administrative assistance; the provisions of §§ 4 et seq. of VwVfG and applicable corresponding provisions of federal states law shall remain unaffected.

(3) The Federal Government Commissioner for Human Rights Policy and Humanitarian Aid shall report to the German Bundestag at least every two years on compliance with and implementation of this Act.

Annex - catalogue of internationally recognised human rights conventions within the meaning of § 3 No. 1

Human rights within the meaning of this Act are the internationally recognized human rights resulting from the following agreements in the version published by the respective consent law:

1. the International Covenant on Civil and Political Rights of 19 December 1966 (Federal Law Gazette 1973 II p. 1533) and the Second Optional Protocol to the International Covenant on Civil and Political Rights abolishing the death penalty (Federal Law Gazette 1992 II, 390);
2. the International Covenant on Economic, Social and Cultural Rights of 19 December 1966 (BGBl. 1973 II p. 1569);
3. Convention No 87 of the International Labour Organisation on Freedom of Association and the Protection of the Right to Organise of 9 July 1948 (Federal Law Gazette 1956 II p. 2072), as last amended by Article 1 of the Amending

- Convention of 26 June 1961 (Federal Law Gazette 1963 II p. 1135);
4. Convention No. 98 of the International Labour Organization on the Application of the Principles of the Right to Organize and to Bargain Collectively of 1 July 1949 (BGBl. 1955 II p. 1122);
 5. Convention No. 29 of the International Labour Organisation on Forced or Compulsory Labour of 28 June 1930 (Federal Law Gazette 1956 II p. 640);
 6. Convention No. 105 of the International Labour Organization on the Abolition of Forced Labour of 25 June 1957 (Federal Law Gazette 1959 II p. 441);
 7. Convention No. 100 of the International Labour Organization on Equal Pay for Equal Work for Men and Women of 29 June 1951 (BGBl. 1956 II p. 23);
 8. Convention No. 111 of the International Labour Organisation on Discrimination in Employment and Occupation of 25 June 1958 (BGBl. 1961 II p. 97);
 9. Convention No. 138 of the International Labour Organization on the Minimum Age for Admission to Employment of 26 June 1973 (BGBl. 1976 II p. 201);
 10. Convention No. 182 of the International Labour Organization on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 17 June 1999 (BGBl. 2001 II p. 1290);
 11. the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 (BGBl. 1969 II p. 961);
 12. the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 (BGBl. 1985 II p. 647);
 13. the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (BGBl. 1990 II p. 246);
 14. the Convention on the Rights of the Child of 20 November 1989 (Federal Law Gazette 1992 II, p. 121), the Optional Protocol of 25 May 2000 to the Convention of 20 November 1989 on the Rights of the Child regarding the involvement of children in armed conflicts (Federal Law Gazette 2004 II, p. 1354) and the Optional Protocol of 25 May 2000 to the Convention on the Rights of the Child regarding the Sale of Children, Child prostitution and Child pornography (BGBl. 2008 II p. 1222);
 15. the Convention on the Rights of Persons with Disabilities of 13 December 2006 (BGBl. 2008 II p. 1419);
 16. the International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006 (BGBl. 2009 II p. 932).

Article 2

Amendment to the HGB

In Section 289 c (3) of the Handelsgesetzbuch (German Commercial Code), in the corrected version published in Part III of the Bundesgesetzblatt (Federal Law Gazette), Section 4100-1, as last amended by [...] (BGBl. I p. [...]), the following point 4a shall be inserted after point 4:

"4a. the observance of human rights and environmental due diligence in accordance with the second part of the Due Diligence Act".

Article 3

Amendment to the Act against Restraints of Competition (GWB)

In Section 124(2) of the Act against Restraints of Competition in the version promulgated on 26 June 2013 (BGBl. I p. 1750, 3245), as last amended by [...] (BGBl. I p. [...]), the words "Section 15 of the Due Diligence Act" shall be inserted after the words "Section 21 of the Act to Combat Illegal Employment".

Article 4

Amendment to the Trade Regulation Act

(1) A comma and the words 'according to § 14 of the due diligence act' shall be inserted after the words 'des Arbeitnehmerüberlassungsgesetz' in § 149 (2) sentence 1 number 4 of the trade regulation act in the version published on 22 February 1999 (BGBl. I p. 202), as last amended by [...] (BGBl. I p. [...]).

(2) In Section 150a(1)(1)(b), the words 'Section 14 of the Due Diligence Act' shall be inserted after the words 'des Mindestlohngesetzes'.

(3) A comma and the words "§ 14 of the Due Diligence Act" shall be inserted after the words "§ 23 (1) and (2) of the Employee Secondment Act" in § 150 a (1) sentence 1 number 4.

Article 5

Amendments to the WRegG

In Section 2(1) No. 2 of the Competition Register Act of 18 July 2017 (BGBl. I p. 2739), as

last amended by [...] (BGBl. I p. [...]), the following letter f is inserted:

"f) in accordance with §§ 13 and 14 of the Due Diligence Act of ... (BGBl. ...)".

Article 6

Entry into force

(1) The first, second and fourth part of the Due Diligence Act (Article 1) and Article 2 of this Act shall enter into force on the day following their promulgation.

(2) The third part of the Due Diligence Act (Article 1) and Articles 3 to 5 of this Act shall enter into force on [...].