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(NOT) AN HONORABLE MERCHANT AT LACHIN AIRPORT?

REPORT ON

**THE DEUTSCHE FLUGSICHERUNG
GMBH, AZERBAIJAN AIRLINES,
AND THE GERMAN PUBLIC
GOVERNANCE CODE**

JULY 2024

**GERMAN-ARMENIAN LAWYERS'
ASSOCIATION**



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PROMOTION OF LEGAL AWARENESS AND THE PEACEFUL RESOLUTION OF THE CONFLICT OVER NAGORNO-KARABAKH (REPUBLIC OF ARTSAKH)

The German-Armenian Lawyers' Association e.V., according to its statute, has among its goals the promotion of legal awareness and the peaceful resolution of the conflict over Nagorno-Karabakh (Republic of Artsakh) and the presence of legal issues with Armenian relevance on national and international levels. The German-Armenian Lawyers' Association e.V. is deeply concerned about the armed conflict over Nagorno-Karabakh.

EXECUTIVE SUMMARY

(Not) an honorable Merchant at the Airport in Lachin?

After the expulsion of over 100,000 Armenians from Nagorno-Karabakh in the fall of 2023 by Azerbaijan, cooperation partners were quickly sought to help connect the infrastructure to the rest of the country. Azerbaijan Airlines found their partner for the modernization of the airport in Lachin in DFS Aviation Service GmbH, a 100% subsidiary of **DFS Deutsche Flugsicherung GmbH**. The sole shareholder of DFS is the **Federal Ministry for Digital and Transport of Germany**. Thus, the application of the German Public Corporate Governance Code applies to this private sector enterprise.

This is a set of rules with guidelines for good corporate governance. It states that companies with federal participation must not only act in accordance with the law but also ethically and in accordance with the principles of the "honorable" merchant; thus, they must be aware of their overall social responsibility. The forced expulsion of Armenians from Nagorno-Karabakh was addressed in the European Parliament resolution of October 4, 2023 (2023/2879(RSP))

and classified as **ethnic cleansing**, which corresponds to crimes against humanity under section 7 of the German Code of Crimes against International Law. Even though the German Supply Chain Due Diligence Act (LkSG) is not applicable here, the principles of the "honorable merchant" do not apply to this business relationship. For cooperation with business partners who commit or tolerate obvious violations of international law, it cannot be assumed that societal due diligence is exercised through one's own economic actions. Furthermore, such actions cannot and should not be considered honorable.

DFS should have carefully examined or terminated the cooperation of its subsidiary with Azerbaijan Airlines last year. The same applies to the Federal Ministry for Digital and Transport. Further information can be found in this report.

(NOT) AN HONORABLE MERCHANT AT LACHIN AIRPORT?

THE DEUTSCHE FLUGSICHERUNG GMBH, AZERBAIJAN AIRLINES, AND THE GERMAN PUBLIC GOVERNANCE CODE

Since there have been repeated ethical and legal transgressions by privately operating companies in recent decades, efforts began as early as the 1990s to create normative foundations for better and, above all, more transparent corporate governance through stricter laws. These measures are intended to protect private investors as well as society as a whole from harm.[1]

The German Supply Chain Due Diligence Act (LkSG; 2023), a relatively new law with a similar purpose, holds companies accountable for knowing and monitoring their suppliers and ensuring their compliance with standards.



It is no secret that companies have repeatedly found ways to circumvent these laws in the past by operating close to the edge of legality.

To provide companies with a kind of guide to "good" corporate governance in addition to these principles, the "Government Commission on the German Corporate Governance Code" (DCGK) was established in 2001. Its mandate was to design a so-called "Code of Best Practice" for German companies.

[1] Specifically noteworthy and emphasized are the following laws: the Act on Further Reform of Stock and Accounting Law, Transparency and Disclosure (TransPuG; 2002), the Act on Corporate Integrity and Modernization of Contestability Law (UMAG; 2005), the Act on Modernization of GmbH Law and Combatting Abuses (MoMiG; 2008), the Act on Modernization of Accounting Law (BilMoG; 2009), and the Act on Implementation of the Shareholders' Rights Directive (ARUG; 2009). These laws were intended to lay important initial foundations for transparent, ethical, and integral business practices.

In February 2002, the German Corporate Governance Code was published for the first time in its initial version.[2] This included rules for corporate management and their supervisory bodies to promote transparency in the interest of shareholders, as well as guidelines for rules and values to ensure good and responsible corporate governance. However, this set of rules is not binding for companies. The DCGK introduced a new category of norms in German law, commonly referred to as "soft law." These are not enforceable laws that have received parliamentary approval.[3]

Instead, the DCGK provides recommendations that should be implemented for good corporate governance in accordance with best practices. According to section 161 of the German Stock Corporation Act (AktG), publicly listed companies are required to issue a so-called "Declaration of Conformity," stating whether and to what extent the recommendations of the DCGK have been accepted and implemented, or explaining why they have acted contrary to these recommendations or have not implemented them.[4]

The counterpart to the DCGK for the private sector is the Public Corporate Governance Code (PCGK)[5] of the federal government, which regulates the principles of good corporate and active participation management for federal companies in private legal form.[6] The professional responsibility for the respective federal investments in private enterprises lies with the respective federal ministries.

The Federal Ministry of Finance oversees the Public Corporate Governance Code (PCGK). According to the Federal Budget Code, the federal government is only permitted to choose a private law organizational form for task fulfillment if the specific intended purpose cannot be achieved better or more economically in another way. Therefore, when the federal government is a formal shareholder in a privately held company, it, like any private law organizational form, has an interest in good corporate governance. The PCGK directly applies to companies in which the federal government holds a majority stake but which are not publicly traded. This notably includes limited liability companies (GmbH), such as Bundesdruckerei GmbH, Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH, and DFS Deutsche Flugsicherung GmbH.[7]

Deutsche Flugsicherung GmbH and Azerbaijan Airlines: A Cooperation in Focus

DFS Deutsche Flugsicherung GmbH, based in Langen, is 100 percent owned by the Federal Ministry for Digital and Transport. The recent cooperation of its 100 percent subsidiary, DFS Aviation Services GmbH, with the Azerbaijani state-owned company[8] Azerbaijan Airlines to modernize Lachin Airport shows that it only fulfills its obligations under the PCGK with moderate entrepreneurial diligence.[9]

[2] See Government Commission German Corporate Governance Code 2024; available at: <https://www.dcgk.de/en/code/archive.html> (accessed on July 7, 2024; unless otherwise stated, all hyperlinks were last accessed on July 7, 2024 for verification of their current status).

[3] See *ibid.* available at: <https://www.dcgk.de/en/commission.html>.

[4] See *ibid.* available at: <https://www.dcgk.de/en/compliance-statements.html>.

[5] Available in the updated version of 2023 including annexes at: https://www.bundesfinanzministerium.de/Content/EN/Downloads/Broschueren_Bestellservice/principles-of-corporate-governance.pdf?__blob=publicationFile&v=5.

[6] See Federal Ministry of Finance 2024; available at: https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Federal_Assets/Privatisation_and_participation_policy/Participation_policy/principles-of-good-corporate-and-active-participation-governance.html.

[7] See *ibid.*

[8] See Center for Aviation; 2024; available at: <https://centreforaviation.com/data/profiles/airlines/azerbairlines-azal-i2>.

[9] See DFS Aviation Service 2024; available at: <https://dfs-as.aero/azerbairlines-and-the-modernization-of-lachin-airport/>.

Deportation of Armenians

In September 2023, the entire Armenian population—over 100,000 people—was expelled from Nagorno-Karabakh.[10] As part of Azerbaijan's so-called "anti-terror" operation in Nagorno-Karabakh, which had already suffered from blockade and famine for nine months, Azerbaijan not only attacked the population of Nagorno-Karabakh in September 2023 in violation of the International Court of Justice's order to lift the blockade. Active measures were taken to expel the population from Nagorno-Karabakh.[11]

According to the trilateral declaration of November 10, 2020, the areas where the Lachin Airport was to be built were to come under Azerbaijan's control. As part of this handover, about 10,000 Armenian residents from around 109 areas in the Lachin region were forcibly displaced. The European Parliament resolution of October 4, 2023 (2023/2879(RSP)), classified the forced expulsion of Armenians from Nagorno-Karabakh as ethnic cleansing, which equates to the crimes against humanity under section 7 of the German Code of Crimes against International Law.

However, Azerbaijan is taking no steps to improve the situation or to provide the ordered compensation. Instead, Armenian cultural assets in Nagorno-Karabakh are being destroyed, along with residential areas of Armenians.[12] Although the International Court of Justice has already ordered that Armenian houses and cultural assets must not be destroyed, this is being done deliberately by Azerbaijan to prevent the return of Armenians. [13]

Ethical concerns and legal foundations

However, not only international law prohibits such actions. The German Supply Chain Due Diligence Act (LkSG) now obliges companies to take measures to sanction business partners for violations and potentially prohibit collaborations. For instance, the prohibition of unlawful forced evictions under the LkSG, see section 2 (2) No. 10, constitutes a protected legal position. According to this provision, it is impermissible to unlawfully dispossess areas that secure at least one person's livelihood. The UN Committee on Economic, Social and Cultural Rights defines forced eviction as "the permanent or temporary removal against the will of individuals, families, and/or communities from their homes and/or land, without the provision of, and access to, appropriate legal or other protection." [14]

The crucial precondition for a forced eviction is that the affected person does not have ownership rights. Due to the expulsion of Armenians from the region and their prevention from returning, they do not have ownership rights in the Lachin region. The residents of these mentioned residential areas have also not received compensation from Azerbaijan.[15]

In cases of expropriation, it is essential for companies to verify whether the affected individuals were consulted and had access to legal remedies and adequate compensation. [16]

[10] See, among others, Othmann, Ronya 2023: After the expulsion from Nagorno-Karabakh. Available at: <https://www.faz.net/aktuell/feuilleton/debatten/vertreibung-der-armenier-aus-bergkarabach-und-die-un-beobachter-19223926.html>.

[11] See Order of the International Court of Justice of November 17, 2023, § 74; available at: <https://www.icj-cij.org/sites/default/files/case-related/180/180-20231117-ord-01-00-en.pdf> and Order of the International Court of Justice of February 22, 2023, § 67; available at: <https://www.icj-cij.org/sites/default/files/case-related/180/180-20230222-ord-01-00-en.pdf>.

[12] See Chapple, Amos 2024: Church, Entire Village 'Erased' In Azerbaijan's Recaptured Nagorno-Karabakh. Available at: <https://www.rferl.org/a/azerbaijan-armenia-nagorno-karabakh-heritage-destruction-karintak-dasalti/32918998.html>.

[13] See footnote 10.

[14] See *ibid.* § 34; available at: <https://www.un.org/depts/german/menschenrechte/a-hrc-43-43.pdf>.

[15] See *Sargsyan v. Azerbaijan App. No. 40167/06* § 95 (ECtHR 16 June 2015).

[16] See Government Statement, Bundestag Printed Paper 19/28649, Explanation of § 2 II No. 10.

Given the current symmetry of the business relationship, where DFS Aviation Services GmbH primarily sells know-how and software to Azerbaijan Airlines, which does not qualify as part of the supply chain and thus the Supply Chain Due Diligence Act (LkSG) does not apply, DFS Deutsche Flugsicherung GmbH should nevertheless be acutely aware of its existing obligations under the Public Corporate Governance Code (PCGK) regarding the economic activities of its 100% subsidiary. Even though there may not be a formal legal violation in this cooperation, the preamble of the PCGK defines that companies with federal participation are obligated "[...] not only to act in accordance with the law, but also with ethically sound, responsible behavior (the 'honorable merchant' principle)."[17]

Although the term "honorable merchant" is not legally defined and evolves over time, there is a broad understanding of its potential interpretation. This concept dates back to the 12th century, particularly in Italian and North German trading cities, emphasizing that merchants bear not only economic responsibility for their companies but also a societal responsibility towards all stakeholders. A similar definition can be found today in the concept of Corporate Social Responsibility (CSR).[18]

Furthermore, this cooperation contradicts the specially established human rights body of DFS Deutsche Flugsicherung, which is described in the Corporate Governance Report 2023 as "[...] the responsible authority for human rights issues and the adoption of its own policy statement on respecting human rights by the management [...]."[19]

This policy statement, effective from January 1, 2023, expresses the management's commitment to the Universal Declaration of Human Rights of the United Nations (UN) and reserves the right "[...] to prevent or mitigate human or environmental rights violations to the extent possible [...]" upon their disclosure to the company.[20]

Call for Review and Reconsideration

In light of the points outlined, DFS should terminate the cooperation of its subsidiary with Azerbaijan Airlines with immediate effect. Failure to do so would undermine both the Public Corporate Governance Code (PCGK) and the company's own defined values of "Professionalism," "Trust," "Change," "Passion," and "Collaboration." [21] Additionally, it would render the efforts of its own human rights body purely symbolic, as articulated in the Corporate Governance Report.

[17] See PCGK 2023, p. 7.

[18] See German Chamber of Industry and Commerce 2024; available at: <https://www.dihk.de/de/themen-und-positionen/recht-in-der-wirtschaft/ehrbarer-kaufmann-2728>.

[19] See *ibid.*, p. 7; available at: <https://www.dfs.de/homepage/de/medien/publikationen/eg-bericht-2023-dfs.pdf?cid=iws>.

[20] See *ibid.*, p. 2ff.; available at: <https://www.dfs.de/homepage/de/unternehmen/unternehmen-dfs/menschenrechte/unterzeichnet-grundsatzerklaerung-menschenrechte-dfs-2023.pdf?cid=hvt>.

[21] See Footnote 19.



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