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### The German LkSG and the New Corporate Sustainability Due Diligence Directive (CSDDD) - an Evaluation of Existing Regulations in Light of European Changes

**Contents:** **1.** Introduction. **2.** Provisions of the current LkSG. **2.1.** Definition of the supply chain. **2.2.** Human Rights and Environmental Conditions Protected by the LkSG. **2.2.1.** Environmental Conditions. **2.2.2.** Risks Regarding Human Rights. **2.2.2.1.** Child Labour (No. 1 and 2). **2.2.2.2.** Forced Labour and Slavery (No. 3 and 4) **2.2.2.3.** Industrial Safety (No. 5). **2.2.2.4.** Freedom of Association (No. 6). **2.2.2.5.** Equality (No. 7). **2.2.2.6.** Appropriate Wage (No. 8). **2.2.2.7.** Security forces with excessive use of force (No. 11). **2.2.2.8.** Catch-all offence (No. 12). **2.3.** Due Diligence Obligations. **2.3.1.** Risk Management System. **2.3.2.** Risk Analysis. **2.3.3.** Preventive Measures. **2.3.3.1.** Policy Commitment. **2.3.3.2.** Preventive measures in the own business area. **2.3.3.3.** Preventive Measures Regarding Direct Suppliers. **2.3.4.** Remedial Measures. **2.3.5.** Complaints Procedure. **2.4.** Enforcement. **3.** Points Contradicting CSDDD – Necessary Adjustments to the LkSG. **3.1.** Scope. **3.2.** Chain of Activities. **3.3.** Protected Legal Positions. **3.3.1.** Human Rights. **3.3.2.** Environmental Conditions. **3.4.** Due Diligence Obligations. **3.5.** Engagement with Stakeholders. **3.6.** Enforcement. **3.7.** Possible Changes Resulting from the Omnibus Package. **4.** Prospects and Conclusion.

## 1. Introduction

After the tragic collapse of the Rana Plaza textile factory in Bangladesh in 2013 that caused the death of more than 1100 people the whole world discussed about Western responsibility to this and similar incidents<sup>1</sup>. Globalisation and responsibility in supply chains came into public focus<sup>2</sup>.

<sup>1</sup> For further information on the Rana Plaza factory collapse see: <https://www.amnesty.de/informieren/aktuell/bangladesch-zehn-jahre-rana-plaza-unglueck-textilindustrie-arbeitsbedingungen> (last accessed November 30, 2024).

<sup>2</sup> See also Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung:

Ten years later, in January 2023 the German law about due diligence in supply chains, the *Lieferkettensorgfaltspflichtengesetz*, *LkSG*, became effective. Beforehand, many discussions about the need and importance of a law regarding supply chain due diligence occurred<sup>3</sup>. The German approach was originally built on the voluntary implementation of measurements to protect human rights along supply chains according to a “National Action Plan” which implements Nr. 17 of the UN Guiding Principles on Business and Human Rights into German Law<sup>4</sup>. This approach failed since only 13–17 % of the affected companies, in contrast to the 50% the National Action Plan aimed at, actually implemented adequate measurements meeting the requirements of due diligence<sup>5</sup>. After a monitoring by the Ministry of Federal Affairs (*Auswärtiges Amt*) that revealed this alarmingly low adaption rate, the discussion about the introduction of mandatory rules regarding supply chain due diligence arose again. Finally, in 2021 German legislature passed the *LkSG*.

With the new European Corporate Sustainability Due Diligence Directive (CSDDD)<sup>6</sup> entering into force, the *LkSG* needs to get partly changed to meet the requirements of the European provisions. Which effects has CSDDD on the *LkSG*? What are the significant changes for companies, stakeholders and those affected of human rights violations? Is the implementation of the CSDDD the right step towards fairer supply chains? The following article is dedicated to these questions.

## 2. Provisions of the Current *LkSG*

The *LkSG* in its current form (November 2024) applies to all companies, regardless of their legal form, based in Germany that employ more than 1000 employees, § 1 *LkSG*.

<https://www.bmz.de/de/aktuelles/aktuelle-meldungen/10-jahre-rana-plaza-152970> (last accessed November 30, 2024).

<sup>3</sup> For the legislative procedure see: <https://www.bundestag.de/dokumente/textarchiv/-2021/kw23-de-lieferkettengesetz-845608> (last accessed November 30, 2024).

<sup>4</sup> See AUSWÄRTIGES AMT, *National Action Plan Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020*.

<sup>5</sup> AUSWÄRTIGES AMT, *Monitoring of the status of implementation of the human rights due diligence obligations of enterprises set out in the National Action Plan for Business and Human Rights 2016-2020*, p. 4.

<sup>6</sup> Dir. EU 2024/1760 of 13 June 2024.

### 2.1. Definition of the Supply Chain

The foundation for the law is the *Lieferkette* - the “supply chain”. The definition of *Lieferkette* can be found in § 2 Section 5 *LkSG*. This regulation roughly translates to:

“The supply chain within the meaning of this Act refers to all products and services of a company. It comprises all steps in Germany and abroad that are necessary to manufacture the products and provide the services, from the extraction of the raw materials to the delivery to the end customer and includes

1. the actions of a company in its own business area,
2. the actions of a direct supplier and
3. the actions of an indirect supplier.”

Even though the wording of the definition is suited mainly for companies in the production sector, the *LkSG* actually applies to every company within the above-given scope, including service industries<sup>7</sup>.

It is not easy to determine which step in a complex supply chain is covered by the *LkSG*. For example: since the supply chain covers everything until the delivery to the end customer, one may think that the producer of a small part of a big and complex product, like a car, is responsible for the whole supply chain until the consumer buys the car, but this apparently is not the intention of the law<sup>8</sup>. The understanding of the supply chain is way more limited than the wording of § 2 Section 5 *LkSG* may imply at first sight. The supply chain of the manufacturer of the small part would in this example end when the small part arrives at the car manufacturer, since that is the end customer of the producer of the small part manufacturer<sup>9</sup>. The car

<sup>7</sup> ZIMMER, *Das Lieferkettensorgfaltspflichtengesetz, Handlungsoptionen für Mitbestimmungsak-toren und Gewerkschaften*, Bund-Verlag, 2023, p. 17.

<sup>8</sup> BMWK (Bundesministerium für Wirtschaft und Klimaschutz), BMAS (Bundesministerium für Arbeit und Soziales), BAFA (Bundesministerium für Wirtschaft und Ausfuhrkontrolle), *Fragen und Antworten zum Lieferkettengesetz*, 6.8 and 6.10, [https://www.bafa.de/DE/Lieferketten/FAQ/haeufig\\_gestellte\\_fragen\\_node.html](https://www.bafa.de/DE/Lieferketten/FAQ/haeufig_gestellte_fragen_node.html) (last accessed December 1, 2024).

<sup>9</sup> MITTWOCH, BREMENKAMP, *Comment on § 2 LkSG*, in KALTENBORN, KRAJEWSKI, RÜHL, SAAGE-MAASS (eds.), *Lieferkettensorgfaltspflichtenrecht*, C. H. Beck, 2023, marginal no. 812; KOLB, *Comment on § 2*, in MANKOWSKI, KALB (eds.), *LkSG*, C. H. Beck, 2023, marginal No. 217; SCHALL, *(Berechtigte) Lücken in der Lieferkettensorgfaltspflicht des LkSG?*, in NZG, 2022, p. 789.

manufacturer on the other hand would be responsible for the whole supply chain regarding the car<sup>10</sup>.

## 2.2. *Human Rights and Environmental Conditions Protected by the LkSG*

Companies under the scope of the LkSG are obliged to avoid environmental risks and risks regarding human rights. The prospective companies need to monitor their supply chains in respect to these risks and take measures to prevent violations (for details see Sections 2.3.1, 2.3.2 and 2.3.3). Situations causing or aggravating the violation of the protected matters listed below require certain actions of the obliged companies according to § 7 LkSG (for details see Section 2.3.4).

§ 2 Section 1 LkSG states that international conventions listed in the appendix of the law also define protected legal positions by the LkSG. Since these agreements are only binding between states, section 2 and 3 order the direct horizontal effect of the international conventions through the introduction of prohibitions<sup>11</sup>.

### 2.2.1. *Environmental Conditions*

§ 2 Section 2 No. 9 and No. 10 LkSG define the environmental conditions protected by the LkSG connected with human rights. No. 9 prohibits negative repercussions of the environment caused by the economic activity of a company. This includes soil changes, water and air pollution, harmful noise emissions, and excessive water consumption. § 2 Section 2 No. 9 a)-d) LkSG clarifies that these environmental conditions are only protected by the LkSG when humans are affected negatively by violations, e. g. when “the natural basis for the preservation and production of food [is] significantly impaired” (§ 2 No. 9 a) LkSG). Therefore, negative repercussions of the environment without the affection of humans are only a matter of the LkSG in its current form, when they are listed in the prohibitions of § 2 Section 3 LkSG.

<sup>10</sup> MITTWOCH, BREMENKAMP, *cit.*; KOLB, *cit.*; SCHALL, *cit.*

<sup>11</sup> LEYENS, *Comment on § 2 LkSG*, in HOPT, *Handelsgesetzbuch*, C. H. Beck, 2024, marginal no. 2; in detail WIATER, *Unternehmerische Menschenrechtsbindung nach Maßgabe des Lieferkettengesetzes*, in JZ, 2022, p. 863 ff.

The environmental regulations in § 2 Section 3 *LkSG* mainly regulate the use and handling of quicksilver, dangerous chemicals hazardous waste. A violation of the prohibitions listed in § 2 Section 3 *LkSG* is a violation of the *LkSG* regardless of a violation of protected human rights.

### 2.2.2. *Risks Regarding Human Rights*

Apart from the above-mentioned environmental risks with an aspect to human rights in § 2 Section 2 No. 9 and 10 *LkSG*, the law prohibits the violation of the following human rights:

#### 2.2.2.1. Child Labour (No. 1 and 2)

§ 2 Section 2 No. 1 and 2 *LkSG* both have child labour as their subject matter. In No. 1 a minimum age for taking up employment is required, which is linked to the end of compulsory schooling in the respective state but cannot be lower than 15 years. Exceptions apply according to Art. 2 Section 4 and Art. 4-8 of ILO Convention No. 138. These include, for example, taking up light activities in line with compulsory schooling by the age of 13 years<sup>12</sup>.

No. 2 prohibits the worst forms of child labour according to ILO Convention No. 182, which includes for example forced labour, slavery, prostitution and drug trafficking<sup>13</sup>. Labour which can be dangerous for “life, health or morality of adolescents” is also prohibited under the age of 18, according to § 2 Section 2 No. 2 d) *LkSG*.

#### 2.2.2.2. Forced Labour and Slavery (No. 3 and 4)

§ 2 Section 2 No. 3 and 4 *LkSG* prohibit any form of forced labour and slavery. The definition of forced labour is oriented on Art. 2 ILO Convention No. 29<sup>14</sup> and translates to: “any labour or service which is required of a person under threat of punishment and for which he or she has not volunteered”. It does not matter if labour is forced by public or private actors

<sup>12</sup> See ILO Convention No. 138, art. 7 section 1.

<sup>13</sup> See ILO Convention No. 182, art. 3.

<sup>14</sup> The explanatory memorandum refers to Art. 8 ICCPR, ILO Convention No. 29 and ILO Convention No. 105: BT-Drs. 19/28649, p. 35.

or if the specific form of forced labour may even be legal in the respective state<sup>15</sup>. Voluntary labour can also turn into forced labour if workers are not able to finish working in a self-determined way, e.g. by the creation of physical obstacles or psychological pressure<sup>16</sup>.

#### 2.2.2.3. Industrial Safety (No. 5)

Violations of regulations regarding industrial safety in the supply chain, in particular obviously inadequate safety standards of the workplace, the lack of protection against hazardous materials, the lack of measurements to avoid exhaustion and unsatisfactory safety instructions of the workers, are prohibited by § 2 Section 2 No. 5 *LkSG*. The safety standards of the respective state the labour is done in apply, not German standards.

#### 2.2.2.4. Freedom of Association (No. 6)

Companies bound by the *LkSG* have to make sure that individual and collective freedom of association and the right to strike and collective bargaining according to ILO Convention No. 87 and 98, Art. 22 ICCPR and Art. 8 ICESCR<sup>17</sup> are guaranteed along their supply chains in and outside of Germany. The national laws are decisive only regarding the freedom of action of unions<sup>18</sup>. Therefore, by the wording of § 2 Section 2 No. 6 *LkSG*, the right to form and join an association is not determined by the respective national law<sup>19</sup>.

This becomes problematic, when trade unions are forbidden by the national laws of a state in the supply chain<sup>20</sup>. On the one hand one could assume that the collaboration with such states in a supply chain is automatically a violation of the *LkSG*. On the other hand, § 3 *LkSG* clarifies that the obligations of the bound companies are based on “appropriateness” (see Section

<sup>15</sup> ILO, *Global Estimates of Forced Labour*, 2012, p. 19; ZIMMER, *cit.*, p. 21.

<sup>16</sup> ZIMMER, *cit.*, p. 21.

<sup>17</sup> These are not mentioned in the wording of § 2 Section 2 No. 6 *LkSG*, but in the explanatory memorandum: BT-Drs. 19/28649, p. 37.

<sup>18</sup> SCHÖNFELDER, § 4 *Menschenrechtliche und umweltbezogene Risiken*, in GRABOSCH, *Das neue Lieferkettensorgfaltspflichtengesetz*, Nomos, 2021, p. 90; critical ZIMMER, *cit.*, p. 23.

<sup>19</sup> SCHÖNFELDER, *cit.*, p. 91.

<sup>20</sup> *Ibid.*

2.3) Part of that is the own causal contribution of the company to the violation (see Section 2.3). Therefore, one could also assume that business activities in countries where trade unions are forbidden are unproblematic since the company has no causal contribution to this situation<sup>21</sup>. The explanatory memorandum to § 2 Section 2 No. 6 *LkSG* limits both interpretations as it states: “If the domestic context makes it impossible to fulfil this responsibility in full, companies can be expected to respect the principles of internationally recognised human rights to the extent possible in the circumstances”<sup>22</sup>.

Protected by the law according to the judgement practice of the ILO supervisory body are trade union plurality and the right to access the company<sup>23</sup>. It is disputable if works councils and comparable bodies are also protected by § 2 Section 2 No. 6 *LkSG*<sup>24</sup>. It is partly argued that this is not the case since the regulation aims at trade unions by its wording<sup>25</sup>. The explanatory memorandum however mentions “trade unions and other employee representatives”<sup>26</sup> which can lead to the assumption that representatives elected by the employees, such as works councils are also protected by § 2 Section 2 No. 6 *LkSG*<sup>27</sup>.

#### 2.2.2.5. Equality (No. 7)

§ 2 Section 2 No. 7 *LkSG* prohibits unequal treatment in employment. The regulation defines national and ethnic origin, social origin, health status, disability, sexual orientation, age, gender, political opinion, religion and world

<sup>21</sup> SAGAN, SCHMIDT, ALEXANDER, *Das Lieferkettensorgfaltspflichtengesetz, Ein Überblick aus der Perspektive des Arbeitsrechts*, in *NZA-RR*, 2022, p. 285; EHMANN, *Der Regierungsentwurf für das Lieferkettengesetz: Erläuterung und erste Hinweise zur Anwendung*, in *ZVertriebsR*, 2021, p. 144.

<sup>22</sup> BT-Drs. 19/28649, p. 1.

<sup>23</sup> ZIMMER, *cit.*, p. 24; 67th Report of the CFA, case No. 303 (Ghana), marginal no. 264; 95th Report, case No. 448 (Uganda), marginal no. 124; 127th Report, case No. 878 (Nigeria), marginal no. 109; 197th Report, case No. 905 (UdSSR), marginal no. 633; 265th Report, case No. 1431 (Indonesia), marginal no. 127; 270th Report, case No. 1500 (China), marginal no. 324; 338th Report, case No. 2348 (Iraq), marginal no. 995.

<sup>24</sup> Endorsened: ZIMMER, *cit.*, p. 24; EHMANN, *cit.*, p. 144; NIETSCH, WIEDMANN, *Der Regierungsentwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in der Lieferkette*, in *CCZ*, 2021, p. 105; Rejecting: SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 285.

<sup>25</sup> ZIMMER, *cit.*, p. 24.

<sup>26</sup> BT-Drs. 19/28649, p. 37.

<sup>27</sup> ZIMMER, *cit.*, p. 24; EHMANN, *cit.*, p. 144; NIETSCH, WIEDMANN, *cit.*, p. 105.

view as forbidden grounds for discrimination. The standard example in this regulation is unequal pay for equal work<sup>28</sup>. It is questionable whether the latter only applies to unequal pay because of gender, since in the explanatory memorandum the German legislator only cites international laws concerning inequality regarding gender<sup>29</sup>. Since this would mean a big loophole in the protection of the employees, and this view would also contradict international adjudication practice, it is to be assumed, that unequal pay is forbidden no matter which of the grounds for discrimination is the reason<sup>30</sup>. The regulation allows exceptions because of employment requirements.

#### 2.2.2.6. Appropriate Wage (No. 8)

Receiving an appropriate wage is a human right in itself, but it also prevents other human rights violations<sup>31</sup>. Forced labour or child labour lose their attractiveness when independent, adult workers get paid enough to support their families<sup>32</sup>. The appropriate wage according to § 2 Section 2 No. 8 *LkSG* is at least the minimum wage of the respective state. If this is considered too low, the appropriate wage has to be higher than minimum wage<sup>33</sup>. The appropriate wage is based on the local cost of living of the employees and their families and the local social security benefits<sup>34</sup>. To determine the correct values, the internationally accepted “Anker method” is suggested to be used<sup>35</sup>. Relevant risk factors are the withholding of relevant wage components, for example to cover the costs of work clothing and materials<sup>36</sup>.

<sup>28</sup> SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 286; SCHÖNFELDER, *cit.*, p. 92.

<sup>29</sup> SCHÖNFELDER, *cit.*, p. 92; BT-Drs. 19/28649, p. 37 ff.

<sup>30</sup> SCHÖNFELDER, *cit.*, p. 93; HARINGS, JÜRGENS, *Die Auswirkungen des Lieferkettensorgfaltspflichtengesetzes auf die Transportwirtschaft*, in *RdTW*, 2021, p. 298.

<sup>31</sup> SCHÖNFELDER, *cit.*, p. 93 ff.; LEBARON, *Wages: An Overlooked Dimension of Business and Human Rights in Global Supply Chains*, in *BHRJ*, 2021, p. 17.

<sup>32</sup> SCHÖNFELDER, *cit.*, p. 94; LEBARON, *cit.*, p. 14 ff.; ILO, *Child Labour Business Guidance Tool*, p. 11.

<sup>33</sup> SCHÖNFELDER *cit.*, p. 94; SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 286.

<sup>34</sup> BT-Drs. 19/28649, S. 38.

<sup>35</sup> SCHÖNFELDER, *cit.*, p. 94; other suggestions: ZIMMER, *cit.*, p. 26 ff.; SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 286.

<sup>36</sup> SCHÖNFELDER, *cit.*, p. 95; LEBARON, *cit.*, p. 11 ff.

### 2.2.2.7. Security forces with excessive use of force (No. 11)

To protect employees from violence in connection with a violation of their right to life, health, and freedom of association and to further prevent torture, § 2 Section 2 No. 11 *LkSG* places special demands on the use of private and public security forces<sup>37</sup>. This regulation is aimed at the typical situation in countries of the global south, especially in zones of conflict with paramilitary forces<sup>38</sup>.

### 2.2.2.8. Catch-all Offence (No. 12)

§ 2 Section 2 No. 12 *LkSG* builds the basis for further protection from human rights violations according to the conventions and pacts listed in the appendix, such as the right to maternity leave, freedom of speech or right to education<sup>39</sup>. According to the clause, the entrepreneurial behaviour has to be “directly suitable” to cause an impairment of these rights. Therefore, the probability and temporal connection for the occurrence of the impairment must be very high<sup>40</sup>. Also, the unlawfulness of the behaviour has to be “obvious, when weighing up all the relevant circumstances”.

Thus the “catch-all offence” is indeed very limited to some rare and severe cases that would otherwise create a great lack of protection of human rights. Some voices in German jurisprudence have been risen, in favour of the regulation being too vague<sup>41</sup>. However, since the respective agreements applicable in Germany are referenced by the law<sup>42</sup>, there is indeed a static canon of legal interests to be protected, which is why the sufficient determinability of the standard is possible by interpretation<sup>43</sup>.

<sup>37</sup> SCHÖNFELDER, *cit.*, p. 102.

<sup>38</sup> BT-Drs. 19/28649, p. 38 ff.; SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 287; SCHÖNFELDER, *cit.*, p. 102.

<sup>39</sup> SCHÖNFELDER, *cit.*, p. 103 ff.

<sup>40</sup> SCHÖNFELDER, *cit.*, p. 104.

<sup>41</sup> SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 287; SPINDLER, *Verantwortlichkeit und Haftung in Lieferantennetzen - das Lieferkettensorgfaltspflichtengesetz aus nationaler und europäischer Perspektive*, in *ZHR*, 2022 p. 78; KEILMANN, SCHMIDT, FALKO, *Der Entwurf des Sorgfaltspflichtengesetzes, Warum es richtig ist auf eine zivilrechtliche Haftung zu verzichten*, in *WM*, 2021, p. 720; WAGNER, RUTLOFF, *Das Lieferkettensorgfaltspflichtengesetz - eine erste Einordnung*, in *NJW*, 2021, p. 2146 ff.

<sup>42</sup> SCHÖNFELDER, *cit.*, p. 106.

<sup>43</sup> ZIMMER, *cit.*, p. 28; KRAUSE, *Das Lieferkettensorgfaltspflichtengesetz als Baustein eines transnationalen Arbeitsrechts Teil II*, in *RArbeit*, 2022, p. 335; SCHÖNFELDER, *cit.*, p. 106.

### 2.3. *Due Diligence Obligations*

The *LkSG* imposes various obligations on companies to monitor their supply chains for possible above-mentioned violations and limit or eliminate them. It is important to note that the duties are “obligations of means” and therefore fulfilled by attempt – the attempts do not have to be successful<sup>44</sup>. Also, the obligations are limited due to appropriateness<sup>45</sup>. Which measurements are appropriate is based on the following criteria according to § 3 *LkSG*:

- type of the company’s business activities;
- the company’s ability to influence the protected risks;
- the typically expected severity, the likelihood and reversibility of a violation;
- the type of the company’s causal contribution to the violation.

Additionally, the accountability of the bound company varies along the supply chain. The *LkSG* differentiates between “activities of the own business area” (§ 2 Section 4 No. 1), “direct suppliers” (§ 2 Section 4 No. 2) and “indirect suppliers” (§ 2 Section 4 No. 3).

#### 2.3.1. *Risk Management System*

The centrepiece of the companies’ duties obligatory by the *LkSG* surely is the establishment of a risk management system. These are generally nothing new for big companies<sup>46</sup>. The big difference between the already existing risk management systems and the one the *LkSG* obligates are the risks the system is monitoring: traditional compliance risk management systems are used to prevent corruption, money laundering and cartel<sup>47</sup>. The risk management system of the *LkSG* in contrast is used to protect human rights and the environment<sup>48</sup>.

<sup>44</sup> BT-Drs. 19/28649, p. 2, 41; SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 282; SPINDLER, *cit.*, p. 80; WAGNER, *Haftung für Menschenrechtsverletzungen in der Lieferkette*, in ZIP, 2021, p. 1099.

<sup>45</sup> ZIMMER, *cit.*, p. 29; SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 282; GRABOSCH, § 5 *Die Sorgfaltspflichten*, in GRABOSCH, *Das neue Lieferketten-sorgfaltspflichtengesetz*, *cit.*, p. 143.

<sup>46</sup> GRABOSCH, § 5 *Die Sorgfaltspflichten*, *cit.*, p. 125 ff.

<sup>47</sup> ZIMMER, *cit.*, p. 36.

<sup>48</sup> ZIMMER, *cit.*, p. 36; GEHLING, OTT, LÜNEBORG, *Das neue Lieferketten-sorgfaltspflichtengesetz - Umsetzung in der Unternehmenspraxis*, in CCZ, 2021, p. 234.

Since the risk management system has to be appropriate, the financial and other resources used to maintain this system are limited to this appropriateness, e. g. by company size<sup>49</sup>. On the other hand, this principle also means that the risk management system has to be effective<sup>50</sup>. A system is effective when it leads to the identification of risks and prevents, stops or limits violations caused or contributed to by the company, § 4 Section 2 *LkSG*<sup>51</sup>. According to § 4 Section 3 *LkSG*, the companies have to name a designated person for monitoring the risk management system, like a “human rights officer”.

For the establishment and implementation of the risk management system, the companies have to consider the interests of workers and other people affected in a protected legal position by the economic activity of the company, § 4 Section 4 *LkSG*. The German legislator did not, however, state how the companies need to consider the interests of these groups<sup>52</sup>.

### 2.3.2. Risk Analysis

Part of the risk management system is the risk analysis to identify possible risks along the supply chain. With the identification of a risk, the company has to prioritise these risks according to the factors in § 3 Section 2 *LkSG*, mentioned above (see section 2.3).

To identify risks of possible violations, the German legislator suggests doing “risk mapping” in regard to business fields, locations, products, or countries of origin<sup>53</sup>. How exactly the risk analysis is to be implemented is under the assessment of the company<sup>54</sup>.

The risk analysis must be carried out at least once a year for the own business area and for direct suppliers, § 5 Section 4 *LkSG*. If there is a specific reason, such as an expansion of business activities, it also needs to be carried out on an ad hoc basis. This “*ad hoc* analysis” also applies to indirect suppliers. If the supply chain is organised in an abusive way, the company also has to carry out the

<sup>49</sup> ZIMMER, *cit.*, p. 31.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*; SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 287.

<sup>53</sup> ZIMMER, *cit.*, p. 35; STEINHAUS, GUTTZEIT, *Management unternehmensstrategischer Risiken: Früherkennung von Indikatoren für Beschäftigungsrisiken*, in *Mitbestimmungspraxis*, 2021, p. 34.

<sup>54</sup> BT-Drs. 19/28649, 45.

yearly risk analysis regarding indirect suppliers according to § 5 Section 1 *LkSG*. The outcome of the analysis has to be communicated to the companies' decision-makers, who have to take the results as a basis for their decisions<sup>55</sup>.

### 2.3.3. Preventive Measures

When the risk analysis results in the identification of risks, the company has to take appropriate measures to prevent the risks from materialising according to § 6 *LkSG*.

§ 6 Section 1 *LkSG* stipulates that the preventive measures must be taken *unverzüglich*. Following the system of the German Civil Code (BGB) this means "without culpable hesitation" (see § 121 Section 1 *BGB*). In contrast to *sofort*, meaning without any hesitation, a short appropriate delay is unproblematic<sup>56</sup>.

Subsequently, an overview of the different preventive measures shall be given.

#### 2.3.3.1. Policy Commitment

If at least one risk is identified, company management has to make a policy commitment about the human rights strategy of the company<sup>57</sup>. It expresses the company's commitment and dedication to respect human rights<sup>58</sup>. It includes the company's risk management concept, the prioritised risks according to the risk analysis and the expectations the company has of its employees, contract partners and indirect suppliers, § 6 Section 2 *LkSG*. The policy commitment has to be presented to the works council, the *Wirtschaftsausschuss* ("economic committee", which is a particular part of the works council) and publicly to the direct suppliers<sup>59</sup>. Since the commitment has to address the specific risks and measurements, it is a tool that forces continuous transparency<sup>60</sup>.

<sup>55</sup> ZIMMER, *cit.*, p. 39; SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 287; NIETSCH, WIEDMANN, *cit.*, p. 107.

<sup>56</sup> GRABOSCH, § 5 *Die Sorgfaltspflichten*, *cit.*, p. 147.

<sup>57</sup> GRABOSCH, § 5 *Die Sorgfaltspflichten*, *cit.*, p. 148.

<sup>58</sup> BT-Drs. 19/26639, p. 46.

<sup>59</sup> BT-Drs. 19/26639, p. 46.

<sup>60</sup> GRABOSCH, § 5 *Die Sorgfaltspflichten*, *cit.*, p. 149.

### 2.3.3.2. Preventive measures in the own business area

§ 6 Section 3 *LkSG* stipulates that companies have to enable appropriate preventive measures in their own business area. Four measures are given by the regulation as standard examples<sup>61</sup>:

- “1. the implementation of the human rights strategy set out in the policy commitment in the relevant business processes,
- 2. the development and implementation of appropriate procurement strategies and purchasing practices that prevent or minimise identified risks,
- 3. training in the relevant business areas,
- 4. the implementation of risk-based control measures to verify compliance with the human rights strategy contained in the policy commitment in its own business area.”

Since these four points are standard examples, companies regularly have to follow them, but exceptions are possible<sup>62</sup>. This means also that the company’s duties are not automatically fulfilled when all these measures have been taken<sup>63</sup>. Depending on the particular case there may be other measures a company has to take to fulfil their duties.

### 2.3.3.3. Preventive Measures Regarding Direct Suppliers

According to § 6 Section 4 *LkSG*, companies have to implement preventive measures vis à vis their direct suppliers. The regulation lists four measures as standard examples<sup>64</sup>:

- “1. consideration of human rights and environmental expectations when selecting a direct supplier,
- 2. the contractual assurance of a direct supplier that it fulfils the human rights and environmental expectations demanded by the company’s management and addresses them appropriately along the supply chain,
- 3. the implementation of training and education to enforce the contractual assurances of the direct supplier in accordance with number 2,
- 4. the agreement of appropriate contractual control mechanisms and

<sup>61</sup> BT-Drs. 19/26639, p. 46.

<sup>62</sup> GRABOSCH, § 5 *Die Sorgfaltspflichten*, cit., p. 121.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

their risk-based implementation in order to verify the direct supplier's compliance with the human rights strategy."

#### 2.3.4. Remedial Measures

If a violation of protected rights occurs or is imminent, the bound company has to take remedial measures to prevent or stop the violation or minimise its extent according to § 7 *LkSG*. The measures have to be appropriate (see section 2.3) and need to be taken *unverzüglich* (see section 2.3.3).

In its own business area, the bound company has to stop the human rights violation successfully. The principle of "obligations of means" of the *LkSG* does not apply in this situation<sup>65</sup>. This is in line with the principle of appropriateness since the companies have enough influence in their own business area to be required to stop any violation<sup>66</sup>. Exceptions from this rule can be made for violations occurring abroad and particular corporate structures that limit the influence of the company<sup>67</sup>.

Violations caused by direct suppliers often cannot be stopped by the bound company. In these cases, the measures are structured in a step model, oriented on the different criteria of appropriateness. As a first step, a concept for the minimisation of human rights' violations has to be made, including a timetable for the implementation of the here defined measures. According to § 7 Section 2 No. 3 *LkSG* a temporary suspension of the business relations can be necessary.

If the violation of the protected rights is especially grave, if the attempts of the minimisation concept don't work or if it is obvious that a minimisation concept is doomed to fail and if there is no effective milder remedy the cancellation of the business relationship serves as the ultima ratio, according to § 7 Section 3 *LkSG*<sup>68</sup>.

With reference to § 5 Section 1 *LkSG*, the same measures have to be taken in the case of violations caused by indirect suppliers if the supply chain is structured in an abusive way (see section 2.3.2).

<sup>65</sup> GRABOSCH, § 5 *Die Sorgfaltspflichten*, cit., p. 157 ff.

<sup>66</sup> ZIMMER, cit., p. 43; GRABOSCH, § 5 *Die Sorgfaltspflichten*, cit., p. 157 ff.; BT-Drs. 19/28649, p. 48.

<sup>67</sup> The wording in § 7 Section 1 Sentence 4 *LkSG* differs from "has to stop the violation" to "has to usually stop the violation": GRABOSCH, § 5 *Die Sorgfaltspflichten*, cit., p. 158.

<sup>68</sup> ZIMMER, cit., p. 43; GRABOSCH, § 5 *Die Sorgfaltspflichten*, cit., p. 158 ff.

### 2.3.5. Complaints procedure

The companies have to establish an appropriate complaints procedure according to § 8 *LkSG*. People who are impaired in their human rights by the activities of the company or their suppliers have to be given the opportunity to file their complaints to the company. The system has to allow the file of complaints via NGOs or other trusted people or organisations; personal involvement cannot be a requirement to file a complaint<sup>69</sup>. The complainants have to be protected from disadvantages or punishments in connection with their complaints and their identities must remain confidential according to § 8 Section 4 *LkSG*.

### 2.4. Enforcement

The *Bundesamt für Wirtschaft- und Ausfuhrkontrolle (BAFA)* – the Federal Office of Economics and Export Control – is responsible for the enforcement of the *LkSG*. The *BAFA* may penalise violations by imposing fines. The amount of the fines varies, according to different factors including the particular offence and its severity from up to a hundred thousand euros to up to 2% of the company's annual turnover, cf. § 24 *LkSG*.

Civil liability is not provided for by the *LkSG*, § 3 Section 3 *LkSG*. Therefore, the enforcement of the law works exclusively by public enforcement<sup>70</sup>. People affected from violations can on the one hand use the designated complaint procedure (described above) and on the other hand try to enforce their possible civil claims via tortious liability. The latter are measured, however, based on international private law, since the *LkSG* itself does not provide a civil law basis for claims<sup>71</sup>. This is however the crux of the matter: a violation of the protected rights will regularly not result in a tortious claim according to international private law, since the law of the place of origin applies<sup>72</sup>. Therefore, affected parties outside of Germany are regularly not able to assert any claims for damages<sup>73</sup>.

<sup>69</sup> ZIMMER, *cit.*, p. 46; SAGAN, *Das Beschwerdeverfahren nach § 8 LkSG*, in ZIP, 2022, p. 1424.

<sup>70</sup> SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 282.

<sup>71</sup> RÜHL, KNAUER, *Zivilrechtlicher Menschenrechtsschutz? Das deutsche Lieferketten-gesetz und die Hoffnung auf den europäischen Gesetzgeber*, in JZ, 2022, p. 109.

<sup>72</sup> RÜHL, KNAUER, *cit.*, p. 109; MANSEL, *Internationales Privatrecht de lege lata wie de lege ferenda und Menschenrechtsverantwortlichkeit deutscher Unternehmen*, in ZGR, 2018, p. 454 ff.

<sup>73</sup> RÜHL, KNAUER, *cit.*, p. 111; WAGNER, *Das Lieferkettengesetz: Viele Pflichten, keine Haftung*,

Contradictory to this regulation is §11 *LkSG*, which does not really fit into the public enforcement system the *LkSG* imposes<sup>74</sup>. This provision allows people affected by a violation of a paramount legal position to authorise a trade union or an NGO to take legal action to assert its rights in court. First of all, the law does not make clear which protected rights are of a “paramount legal position”<sup>75</sup>. Since the *LkSG* protects fundamental human rights, every right in § 2 Section 2 *LkSG* seems of utmost importance<sup>76</sup>. More astonishing is, however, that there is absolutely no possibility to take legal action in court, as was explained above. Therefore, this procedural standing imposed by § 11 *LkSG* comes to nothing<sup>77</sup>.

### 3. *Points Contradicting CSDDD – Necessary Adjustments to the LkSG*

With CSDDD entering into force, Germany has to adjust the *LkSG*. The following section will give an overview of the important points currently contradicting the current version of the directive and prospects for future changes. After that, these findings will be re-examined in light of the omnibus package.

#### 3.1. *Scope*

CSDDD is known to have a step-by-step model regarding its scope according to Art. 37 Section 1 CSDDD. In its final stage, it binds companies with at least 1000 employees, like the *LkSG*, but with the further condition that a net annual turnover of at least 450 million euros is reached. Also, in contrast to § 1 *LkSG*, employees are calculated on a full-time equivalent basis, according to Art. 2 Section 4 CSDDD. Therefore, the scope of CSDDD is limited compared to the one of the *LkSG*.

in TÖLLE (eds.), *Selbstbestimmung: Freiheit und Grenzen, Festschrift für Reinhard Singer zum 70. Geburtstag*, Berliner Wissenschafts-Verlag, 2021, p. 710 ff.

<sup>74</sup> SAGAN, SCHMIDT, ALEXANDER, *cit.*, p. 290.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*; RÜHL, KNAUER, *cit.*, p. 110.

### 3.2. *Chain of Activities*

As explained in Section 2.1, the *LkSG* covers the “supply chain” of the bound companies. In contrast, the basis of CSDDD is the “chain of activities”, Art. 3 Section 1 g). It contains nearly every activity of downstream and upstream business partners related to the product or service the company provides. The activity of the downstream business partner does not need to be directly related to the product, indirect activities that support the production or service, like cleaning works, are also part of the chain of activities<sup>78</sup>. Concerning upstream business partners, activities for the company or in the name of the company are included. Much alike § 2 *LkSG* the end customer is not part of the chain of activities.

### 3.3. *Protected Legal Positions*

CSDDD follows a similar systematic as the *LkSG* regarding the integration of international agreements for the definition of protected legal positions. The standards however far exceed those of the *LkSG*<sup>79</sup>.

#### 3.3.1. *Human Rights*

CSDDD refers in its annex predominantly to the same international agreements as the *LkSG* but it integrates more human rights that are to be protected, like personality rights or freedom of conscience and religion according to Art. 17 and Art. 18 UN social pact<sup>80</sup>. Also, CSDDD solely refers to international agreements, whereas in some parts the *LkSG* refers to conditions of the respective area, for example in § 2 Section 2 No. 5 *LkSG* (see section 2.2.2.3) where the industrial safety conditions of the state the labour is done in are significant.

<sup>78</sup> GRABOSCH, *Die EU-Lieferkettenrichtlinie, Weltweiter Schutz für Mensch und Umwelt*, Friedrich-Ebert-Stiftung, 2024, p. 6 ff.; different opinion: HÜBNER, LIEBERKNECHT, *Mehr Pflichten für weniger Unternehmen? - Kerninhalte der EU-Lieferketten-RL und ihre Umsetzung im deutschen Recht*, in *NJW*, 2024, p. 1843.

<sup>79</sup> For an overview see HAGEL, WIEDMANN, *Wie muss das LkSG aufgrund der CS3D angepasst werden?*, in *CCZ*, 2024, p. 191.

<sup>80</sup> SCHMIDT, *Die EU-Lieferketten-Richtlinie (CSDDD) - Meilenstein oder bürokratische Hydra?*, in *NZG*, 2024, p. 861; SCHÄFER, SCHÜTZE, *Die CSDDD - eine erste Vorstellung der Richtlinie und ihrer Folgen für die deutsche Wirtschaft*, in *BB*, 2024, p. 1095.

Therefore, German legislature needs to include every legal position CSDDD refers to into the *LkSG* and has to adapt the regulations that are based on national regulations and conditions.

### 3.3.2. *Environmental Conditions*

The environmental conditions protected by CSDDD greatly exceed those of the *LkSG*. While *LkSG* mainly protects resources as far as humans are concerned and regulates the use of quicksilver and hazardous substances, CSDDD protects biodiversity, animals and plants of the sea, the sea itself, the ozone layer, natural heritage and wetlands on top of the conditions already protected by the *LkSG*<sup>81</sup>. Also, companies have to establish a plan regarding climate protection and to meet the 1.5-degree target of the Paris climate agreement according to Art. 22 Section 1 CSDDD.

Consequently, the provisions of the *LkSG* concerning environmental conditions need to be widely expanded to meet the criteria of CSDDD.

### 3.4. *Due Diligence Obligations*

Basically, CSDDD imposes the same obligations on companies as the *LkSG*: implementation of a risk management system, risk analysis, preventive and remedial measures and the implementation of a complaints procedure. Referring to risk analysis, risk management system and preventive measures, the obligations differ to an extent in some smaller details<sup>82</sup>. The biggest differences can be found in the risk analysis (Art. 8 and 9 CSDDD), since it is not limited to the own business area and direct suppliers, but indirect suppliers in the chain of activities need to be included<sup>83</sup>.

Regarding the remedial measures, one can find one of the biggest differences between CSDDD and *LkSG*. First, violations of the protected rights basically have to be stopped, regardless if the violation was caused in the own business area or by a supplier<sup>84</sup>. The measures that need to be taken however still need to be appropriate<sup>85</sup>. The final remedy when these attempts fail is,

<sup>81</sup> HAGEL, WIEDMANN, *cit.*, p. 191.

<sup>82</sup> See HAGEL, WIEDMANN, *cit.*, p. 192 ff.

<sup>83</sup> HÜBNER, LIEBERKNECHT, *cit.*, p. 1844 ff.

<sup>84</sup> GRABOSCH, *Die EU-Lieferkettenrichtlinie*, *cit.*, p. 8.

<sup>85</sup> For a differentiation between the definitions of “appropriateness” see GRABOSCH, *Die EU-Lieferkettenrichtlinie*, *cit.*, p. 8.

comparable to § 7 Section 3 *LkSG*, the cancellation of the business relations. Completely new in comparison to the *LkSG* is the obligation of “remediation of actual adverse impacts” stipulated by Art. 12 CSDDD<sup>86</sup>. If a company has caused or jointly caused an actual adverse impact, it needs to provide remediation. According to Art. 3 Section 1 t) CSDDD remediation is the restoration to a situation equivalent to or as close as possible to the situation without the impact. This includes financial and non-financial compensation.

### 3.5. *Engagement with stakeholders*

According to Art. 13 CSDDD, companies shall effectively engage with stakeholders regarding the whole process of fulfilling their obligations. § 4 Section 4 *LkSG* in contrast stipulates that the bound companies have to consider the interests of trade unions, works councils and other stakeholders, but the regulation does not impose to actually engage with them and consult them. Therefore, Art. 13 CSDDD far exceeds the comparable regulation in § 4 *LkSG*.

### 3.6. *Enforcement*

The biggest difference between the *LkSG* and CSDDD can be found when law enforcement is considered. CSDDD does not rely solely on public enforcement but also introduces a tort law claim in Art. 29 Section 1. Hereby every person who suffered damages caused by failed compliance to Art. 10 and 11 CSDDD can claim compensation for their damages in court. Excluded from this are the obligations for climate protection of Art. 22 CSDDD. The national legislators must determine the details of the calculation of damages, causality, burden of proof and place of jurisdiction following their national law<sup>87</sup>. Art. 29 CSDDD further specifies the provisions for the limitation period of the claim. It states that the limitation period must not unreasonably hinder the bringing of claims for damages and must be at least 5 years. This is considerably longer than the regular German limitation period of 3 years<sup>88</sup>.

<sup>86</sup> In § 24 *LkSG* “remediation of actual adverse impacts” is only a part of the calculation of fines: HAGEL, WIEDMANN, *cit.*, p. 197.

<sup>87</sup> HÜBNER, LIEBERKNECHT, *cit.*, p. 1845.

<sup>88</sup> § 195 German Civil Code (*BGB*).

Art. 29 Section c) CSDDD alike § 11 *LkSG* allows trade unions and NGOs to file lawsuits for people who suffered from damages. Contrary to § 11 *LkSG* the organisations are not meant to enforce the rights in their own capacity<sup>89</sup>. Therefore Art. 29 does not describe a litigation standing as in § 11 *LkSG*<sup>90</sup>.

Apart from the differences regarding civil enforcement, CSDDD also emphasises public enforcement, as part of a “smart mix”<sup>91</sup>. The possible fines the authorities can impose however are notably higher. The maximum amount has to be at least 5 % of annual turnover, Art. 27 Section 4 CSDDD, in contrast to the maximum of 2 % of annual turnover according to § 24 *LkSG*.

### 3.7. Possible Changes Resulting from the Omnibus Package

In February 2025, the European Commission had proposed an “omnibus package” with the aim of reducing bureaucracy for companies<sup>92</sup>. The consolidation of reporting commitments across multiple acts is a rational approach, given the overlap in responsibilities stemming from CSDDD, CSRD, and the taxonomy directive.

Moreover, should the omnibus package successfully negotiate the legislative process, it will result in a significant weakening of the duties stipulated by CSDDD for companies: the monitoring of the chain of activities will only comprise the direct suppliers<sup>93</sup>. Consequently, companies will no longer be obligated to put an action plan that aligns with the 1.5°C goal into effect<sup>94</sup>. Human rights violations will not be required to cease immediately, an enhanced prevention plan may also be sufficient<sup>95</sup>. The tort law claim and the obligation to remediate of adverse impacts are to be completely withdrawn<sup>96</sup>.

<sup>89</sup> This addition was deleted during the legislative process; SCHMIDT, *cit.*, p. 868 ff.

<sup>90</sup> SCHMIDT, *cit.*, p. 868 ff.

<sup>91</sup> HÜBNER, LIEBERKNECHT, *cit.*, p. 1844.

<sup>92</sup> Omnibus I, COM (2025) 80; COM (2025) 81; COM (2025) 87; Omnibus II, COM (2025) 84, 26 February 2025.

<sup>93</sup> Art. 4 par. 4 Omnibus I, COM (2025) 81, p. 38 ff.

<sup>94</sup> Art. 4 par. 10 Omnibus I, COM (2025) 81, p. 41.

<sup>95</sup> Art. 4 par. 6 Omnibus I, COM (2025) 81, p. 40.

<sup>96</sup> Art. 4 par. 12 Omnibus I, COM (2025) 81, p. 41 ff.

Therefore, the forthcoming of the omnibus package would mean, that the German legislator would actually only need to implement some minor changes to the existing LkSG. The package would therefore negate any improvement on current rules.

#### 4. *Prospects and Conclusion*

As the above analysis showed, the German legislator needs to adjust the LkSG in big parts to meet the criteria of the directive in its current form. In the event of the European Commission achieving success with the proposal of the omnibus package, the majority of the aforementioned adjustments would not be required.

Following the German elections in February 2025, the Christ Democratic Union Party (CDU) and the Social Democratic Party (SPD) entered into negotiations to establish a coalition treaty, which was officially ratified in April 2025<sup>97</sup>. According to the stipulations set out in the coalition treaty, the future government of the Federal Republic of Germany has declared its intention to effect significant reductions in the size of the bureaucracy burdening commercial enterprises<sup>98</sup>. The LkSG is to be abolished in its entirety<sup>99</sup>. The duties regarding reporting commitments are to be fully suspended<sup>100</sup>. Subsequent to this, sanctions will be imposed for only the most egregious violations of human rights<sup>101</sup>. The future German government has announced its intention to implement the regulations of the CSDDD to the minimum extent legally feasible through the introduction of a new law<sup>102</sup>. This procedure is both unnecessary and ineffective for two main reasons. Firstly, it would be more logical to simply amend the current LkSG. Secondly, and more pertinently, the few clauses of the LkSG that exceed the regulations of the CSDDD (e.g. sections 1 and 11 LkSG) would also have to be eliminated.

<sup>97</sup> *Verantwortung für Deutschland, Koalitionsvertrag zwischen CDU, CSU und SPD*, (Coalition Treaty) [https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag2025\\_bf.pdf](https://www.spd.de/fileadmin/Dokumente/Koalitionsvertrag2025_bf.pdf) (last access: 30 April 2025).

<sup>98</sup> Coalition Treaty, p. 56.

<sup>99</sup> Coalition Treaty, p. 60.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

It is not inconceivable that this could be considered to be in violation of the law.

According to Art. 1 Section 2 CSDDD, the directive is not to be employed as a basis for the diminution of the prevailing national standards of protection for human, employment and social rights, the environment and climate. The “sacrifice” of better regulations as a compromise for the implementation of CSDDD is assumed to be a violation of that clause. The dissolution of the LkSG, as outlined in the coalition treaty, may also be regarded as a contravention of Art. 1 Section 2 CSDDD<sup>103</sup>.

In light of these considerations, it is currently challenging to anticipate the future of the LkSG. However, the current political situation in Europe and Germany gives only little hope that human rights monitoring and protection will greatly improve in the future.

<sup>103</sup> HAGEL, WIEDMANN, *cit.*, p. 187.

### **Abstract**

Since 2023 the German *LkSG* about due diligence in supply chains is effective. With the new European Directive adjustments to the existing law will be necessary. The article analyses the existing German regulations and evaluates them in light of CSDDD. The European Directive almost exclusively exceeds the regulations of the *LkSG* regarding the protection of human rights and the environment in supply chains. Especially the introduction of civil liability in case of violations against protected legal positions is a big improvement compared to the current provisions of German law. How exactly the adjustments to the existing law will be made is a matter of speculation in light of the upcoming elections in Germany.

### **Keywords**

Due diligence, Supply chain, CSDDD, Human rights, National implementation.

