

Same, Same but Different

How the CSDDD Differs from the German LkSG

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This briefing is second in a series on the Corporate Sustainability Due Diligence Directive (CSDDD), which addresses the key aspects that (in)directly affect businesses both within and outside the EU, explore its interplay with the existing legislation in Germany and examine interactions with other recently adopted acts of EU legislation (e.g., EUDR and CSRD), which partially establish overlapping obligations.

What's the Scope of the CSDDD?

On 24 April 2024, the European Parliament finally gave the go-ahead for the long-awaited Corporate Sustainability Due Diligence Directive (see our latest briefing [here](#)). Besides its rather dramatic legislative nascence, the Directive and its pending implementation will have notable impacts on the German pedant in force: the German Supply Chain Act (*LkSG*).

What's left in the approved draft of the Directive is a severe reduction of the formerly negotiated agreement: These changes are estimated to cut the number of impacted companies to 30 % of the original scope, meaning that about 0.05 % of the total number of businesses operating in the EU will now be affected. The applicability thresholds were raised to 1,000 employees and a turnover of €450 million (Art. 2(1)(a) CSDDD). The latter threshold also applies to non-EU companies as well as the ultimate parent company of a group that collectively reaches the above-mentioned thresholds. (Although an exemption option upon request may apply if the purpose of the parent company is to solely hold shares in the subsidiaries and a subsidiary in the EU also complies with the obligations of the parent company (Art. 2(3) CSDDD)).

Overall, the CSDDD excludes more companies than the existing German Supply Chain Act as the applicability of the latter currently only depends on the number of employees of a company being above 1,000 without any turnover restriction. If the LkSG is adapted according to the CSDDD's double-criteria, its scope will be greatly reduced.

What Are the Main Differences between LkSG and CSDDD?

In a clear contrast to the reduced scope of application, the Directive mostly goes beyond the protected legal interests and due diligence obligations of the LkSG. For instance, the CSDDD imposes vast due diligence obligations on affected companies in relation to environmental and human rights requirements in their supply chains.

A Matter of the Environment

Compared with the human rights centred scope of the LkSG, the CSDDD expands its definition of environmental protection and the number of legally protected interests. While the LkSG only speaks about “environment-related risks” and names prohibitions deriving from legal instruments such as the Minamata Convention that mostly relate to (hazardous) waste (Sec. 2(3) LkSG), the Directive takes a far more general approach. The CSDDD refers to “any measurable environmental degradation” and lists (non-exhaustively) harmful soil change, water or air pollution, harmful emissions or excessive water consumption, degradation of land, or other impact on natural resources, such as deforestation (Point 15 of Part I of the Annex to the CSDDD) as examples – therefore widening its scope in relation to environmental matters significantly.

On top of the environmental due diligence obligations of the LkSG, further obligations in relation to the protection of biodiversity, endangered species as well as the ozone layer are introduced in the CSDDD. An additional obligation relates to the adoption and implementation of a transition plan for climate change mitigation. It aims to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in accordance with the Paris Climate Agreement (Art. 22 CSDDD).

Damages for Those Who Seek

The CSDDD introduces a basis for civil liability towards private individuals when breaching the duty of care. Besides severe fines, companies might need to be prepared to face claims from those affected by any harm due to the companies’ failure to carry out due diligence (Art. 29 CSDDD). The LkSG does not only not constitute cause for such kind of civil liability, but it even precludes it (Sec. 3(3) LkSG); though it does clarify that the existing civil liability regime as such remains unaffected. In theory, there has always been the possibility to raise claims under the German Civil Code, e.g. as damages due to the breach of a secondary contractual obligation when violating human rights and environmental related due diligence obligations or claims in tort. Nevertheless, the predicted changes of the LkSG, which are necessary to comply with the regime introduced by the CSDDD, are significant. As far as the complaint procedure laid out by the LkSG as well as preventive and remedial measures are concerned, the changes made by the CSDDD are of minor relevance.

Supply Chain Does Not Equal Supply Chain

The CSDDD defines the relevant term “chain of activities” in relation to the company’s upstream business partners widely, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of products and the development of the product or the service (Art. 3(1)(g)(i) CSDDD). In contrast, the company’s downstream business partners’ activities only include storage, transport,

and distribution of the product in the case of direct fulfilment for the obligated company (Art. 3(1)(g)(ii) CSDDD). Based on these definitions, the due diligence obligations of companies mainly focus on the upstream value chain and only partially on the downstream value chain; meaning, that “chain of activities” must be understood in a product or service-oriented manner. The LkSG does not explicitly differentiate between upstream and downstream business but includes “all products and services of an enterprise.” This further entails all steps in Germany and abroad that are “necessary to produce the products and provide the services, starting from the extraction of the raw materials to the delivery to the end customer” (Sec. 2(5) LkSG). The LkSG’s definition of “supply chain” is therefore wider than the underlying definition within the Directive. However, the LkSG’s reference to “direct suppliers” currently restricts its applicability scope in a different manner. As “direct supplier” is to be defined as a partner to a contract for the supply of goods or the provision of services whose supplies are necessary for further production or provision or use of the company’s services, the reference to direct suppliers, e.g. regarding the risk analysis (Sec. 5(1) LkSG) or preventive measures (Sec. 6(4) LkSG), limits the relevant number of tiers of suppliers. By contrast, the CSDDD’s wider definition of “chain of activities” generally establishes due diligence obligations towards tier 2 up to tier N suppliers in the context of upstream activities.

Barred from Public Procurement

The Directive allows the exclusion of economic operator from public procurement procedures for non-compliance reasons. The violation of applicable obligations in the fields of environmental, social, and labour law or grave professional misconduct of the economic operator may lead the contracting authorities and entities to exclude the before-mentioned from participation in a procurement procedure, including a concession award procedure (para. 92 CSDDD). While the LkSG contains a similar section on the exclusion from the award of public contracts (Sec. 22 LkSG), the CSDDD takes a far wider approach and refers to the violations of obligations not only stemming directly from the Directive itself, but also from certain international agreements which were ratified by all Member States (para. 92 CSDDD).

Human and environmental protection

The Directive widens the scope of legally protected interests further in the field of human and environmental rights by referencing a more extensive list of international legal instruments. Consequently, the catalogue of the LkSG might be expanded accordingly and the obligated companies ought to keep even more international legislation in mind.

Part I of the Annex of the CSDDD lists the specific rights and prohibitions in relation to human rights; Part II covers the environmental impacts. Part I and II contain both the protected legal statuses according to Sec. 2(1) LkSG, which are referred to in the LkSG’s annex. Also, the agreements on Basel, Minamata and Stockholm are listed as in Sec. 2(3) LkSG. However, the Directive’s catalogue goes beyond the one provided in the LkSG

and includes, e.g. the prohibition of arbitrary or unlawful interference with a person's privacy (Art. 17 International Covenant on Civil and Political Rights), the prohibition of interference with the freedom of thought, conscience and religion (Art. 18 International Covenant on Civil and Political Rights) or the prohibition to restrict workers' access to adequate housing (Art. 11 International Covenant on Economic, Social and Cultural Rights). Furthermore, the CSDDD adds seven international agreements in relation to environmental prohibitions such as the 1992 Convention on Biological Diversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the Montreal Protocol on substances that deplete the Ozone Layer.

What There Is to Come?

As transposition of the CSDDD into national law is required, the German LkSG will be adapted in accordance with the requirements laid out by the EU Directive. One can assume that the scope of the LkSG will be reduced pursuant to the criteria of the CSDDD. The implementation of the double criteria of the CSDDD – the annual turnover as well as the number of employees – would cut the number of the affected domestic companies in Germany about 70 %. Hence, we would be talking about roughly 1,500 affected companies.

Nevertheless, past European directives were often implemented in an extra-mandatory manner in Germany, so it remains to be seen what this means in detail for the adaptation of the LkSG.

BLOMSTEIN will continue to closely monitor and assess the developments and practical application of the CSDDD as well as its impact on German legislation such as the LkSG. If you have any questions on the topic, [Anna Huttenlauch](#), [Florian Wolf](#) and [Marie-Luise Heuer](#) will be happy to assist you.

Stay tuned: In our next CSDDD briefing – forthcoming around 28 May – we will explore the interaction with the EUDR.
