

Civil Law, Conflict of Laws, and Extraterritoriality in the European Supply Chain Due Diligence Law

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Abstract: This paper gives an overview of the new European Union's Corporate Sustainability Due Diligence Directive (CSDDD), its relation to the German Supply Chain Due Diligence Act (LkSG) from 2021, and the systematic background of both acts. The article contradicts criticism of the extraterritorial effects of the acts, underlining a legislative purpose as part of the national business law regarding fair competition and consumer protection besides the purpose of improving life conditions. The acts are part of an international socially responsible business law. The CSDDD is introducing a new specific civil liability provision. It also brings significant advancements in conflict-of-law principles by introducing mandatory liability norms that apply regardless of jurisdiction. Implementing due diligence obligations in complex international supply chains poses challenges for companies, requiring robust risk management systems and ongoing adjustments. This strict regulation must be balanced with the practical feasibility of Corporate Social Responsibility duties, and a reasonable allocation of responsibilities must take place without risking that the effect of the legislation will stay behind formalistic compliance requirements. The concept of organizational responsibility plays a core role in this balancing process.

Keywords: Civil Liability; CSR; Due Diligence; Supply Chains; Organizational Responsibility; Extraterritoriality

1. Introduction

Advancing economic globalisation has led to supply chains becoming increasingly complex. Companies source raw materials and intermediate products from all over the world to manufacture their end products. However, these global supply chains are often associated with considerable social and environmental risks. Abuses such as child labour, forced labour, poor working conditions, and environmental degradation are commonplace in many production countries. Because of these challenges, an intensive legal discourse has developed at national and European levels on the responsibility of companies for their entire supply chains. Some countries have enacted or plan to enact laws to ensure ethical principles in supply chains. The various national laws differ significantly in terms of their scope of application, but above all, in terms of the design of the legal enforcement instruments.

This article first gives an overview of existing national supply chain legislation, particularly the French '*Loi de Vigilance*' and the German Supply Chain Due Diligence Act of 2021 ('*Lieferkettensorgfaltspflichtengesetz*' LkSG). These acts have significantly influenced the new EU-Corporate Sustainability Directive (CSDDD). The Directive will not supersede the LkSG, but the LkSG will be amended accordingly within two years of its publication in the

Official Journal of the EU to implement the Directive, namely about environmental due diligence obligations, the scope of due diligence obligations and civil liability.

Second, the article analyses civil law liability mechanisms and issues of conflict of laws arising from the LkSG and the CSDDD. The analysis will show how organisational responsibility is anchored in the supply chain due diligence acts. The extraterritorial effects of national supply chain due diligence act on the global south have been particularly controversial. In this context, the importance of supply chain compliance laws is to be demonstrated not only for enforcing protection principles recognised under international law but also for realizing the EU's and Germany's own economic policy objectives in the sense of an *internationalized socially responsible economic law*. The article, therefore, is part of a broader research on a theoretical basis of a socially responsible market economy.¹

In addition to its practical relevance for Indonesian enterprises that are part of international supply chains, the topic is also essential for the general discussion of CSR, as it deals with the relationship between corporate responsibility and legal regulation. It also concerns an important aspect of liability law, namely organisational responsibility. This aspect will become increasingly important as social and economic action contexts become more complex, for example, in digitalisation.

2. National and Supranational Supply Chain Legislation

2.1. National Legislations of Supply Chain Due Diligence

The national supply chain laws aim to strengthen the responsibility of enterprises for the social and environmental conditions in their supply chains. Although the specific requirements and scopes vary, all of these laws have the common goal of promoting human rights and environmental standards and obliging companies to act more responsibly. However, the laws differ in their scope, as in the case of the Dutch '*Wet zorgplicht kinderarbeid*',² which is limited to child labour, and in the legal consequences of violations of the regulated obligations by the addressed companies, as in the case of the Modern Slavery Acts of the United Kingdom³ and Australia,⁴ which only provide for transparency and reporting obligations, but have not introduced any substantive requirements for companies to act. However, in November 2023, a draft "*Commercial*

¹ Stefan Koos, 'Globalisierung, Extraterritorialität und internationalisierte sozial verantwortete Interessenverfolgung im Wettbewerbsrecht', in *Marktkommunikation zwischen geistigem Eigentum und Verbraucherschutz: Festschrift für Karl-Heinz Fezer zum 70. Geburtstag* (Munich: C.H.Beck, 2016), 271–72; Stefan Koos, 'Global Responsibility and International Mutual Consideration in the Business Law - Theory and Reality', in *Proceedings (6th Conference of the Indonesian Association for Legal Philosophy (AFHI) - 'Antinomi Hukum - Pluralisme atakah Integrasi'*, Bandung: Epistema Institute, 2016), 21–28; Karl-Heinz Fezer and Stefan Koos, *Internationales Wirtschaftsrecht*, 6th ed., Staudinger BGB (Munich: Sellier/de Gruyter, 2023) Recital 5-10; see regarding the term of a responsible market economy: Karl-Heinz Fezer, 'Verantwortete Marktwirtschaft', *JuristenZeitung* 45, no. 14 (1990): 657–63.

² 'Wet van 24 octobre 2019 Houdende de Invoering van Een Zorgplicht Ter Voorkoming van de Levering van Goederen En Diensten Die Met Behulp van Kinderarbeid Tot Stand Zijn Gekomen (Wet Zorgplicht Kinderarbeid)' (2019), <https://zoek.officielebekendmakingen.nl/stb-2019-401.html>.

³ 'Modern Slavery Act 2015' (2021), <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

⁴ 'Modern Slavery Act of 2018', Pub. L. No. 153, 2018 (2021), <https://www.legislation.gov.au/Details/C2018A00153>.

Organisations and Public Authorities Duty (Human Rights and Environment) Act" was submitted to the House of Lords of the UK Parliament as a "Private Member's Bill", which would go significantly beyond mere reporting obligations, in particular, because it would extend the responsibility of enterprises, more expansive than the LkSG and CSDDD, to consumers as customers of the obligated companies.⁵

This also applies to the California Transparency in Supply Chains Act (CTSCA)⁶ from 2010.⁷ The act has the purpose of promoting transparency in the supply chains of large companies and combatting human trafficking and forced labour. The CTSCA came into force on 1 January 2012 and is aimed at companies that operate in California and generate annual gross sales of more than USD 100 million. These companies must disclose on their website what measures they are taking to ensure that their supply chains are free from human trafficking and forced labour. Specifically, the CTSCA requires companies to publish information on the verification of risks, the performance of audits, certification by suppliers, internal accountability standards, and training measures. The CTSCA is intended to create consumer sovereignty by establishing transparency with regard to supply chains. Consumers should be enabled to make well-informed business decisions.⁸ This aspect of consumer protection should be noted at this point, as it is of general importance for the legal policy assessment of national supply chain legislation (see 4.). However, the CTSCA does not have adequate enforcement mechanisms either.⁹ Companies are only obliged to disclose their practices. This is likely to limit the pressure on companies to implement effective measures against human trafficking and forced labour in their supply chains.

Supply chain due diligence laws that only impose information disclosure or the duty to publish CSR efforts of companies are considered ineffective.¹⁰ This applies to the CTSCA and the UK Modern Slavery Act.¹¹ The French '*Loi de Vigilance*' (LdV) of 2017¹² goes beyond these legislations. It comes closest to the German LkSG because it refers to the identification of human rights violations and environmental problems in supply chains, albeit in less detail than the LkSG.¹³ The law amended the French *Code de Commerce* and

⁵ Joshua Blach, 'Der Entwurf eines britischen Lieferkettengesetzes – LkSG on steroids?', *Neue Zeitschrift für Gesellschaftsrecht* 27, no. 6 (2024): 240.

⁶ 'California Code', Civil Code - CIV § 1714.43' (n.d.), [https://codes.findlaw.com/ca/civil-code/civ-sect-1714-43/#:~:text=\(a\)\(1\)%20Every%20retail,direct%20supply%20chain%20for%20tangible](https://codes.findlaw.com/ca/civil-code/civ-sect-1714-43/#:~:text=(a)(1)%20Every%20retail,direct%20supply%20chain%20for%20tangible).

⁷ See Rob Bonta, 'The California Transparency in Supply Chains Act', accessed 17 May 2024, <https://oag.ca.gov/SB657>.

⁸ Kamala D. Harris, 'The California Transparency in Supply Chains Act: A Resource Guide', 2015, 3, <https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf>.

⁹ Alexandra Prokopets, 'Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010', *Hastings International & Comparative Law Review* 37, no. 2 (2014): 364.

¹⁰ Maria-Therese Gustafsson, Almut Schilling-Vacafior, and Andrea Lenschow, 'The Politics of Supply Chain Regulations: Towards Foreign Corporate Accountability in the Area of Human Rights and the Environment?', *Regulation & Governance* 17, no. 4 (2023): 10, <https://doi.org/10.1111/rego.12526>.

¹¹ Genevieve LeBaron and Andreas Rühmkorf, 'The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act', *Socio-Economic Review* 17, no. 3 (1 July 2019): 728, <https://doi.org/10.1093/ser/mwx047>.

¹² 'Loi de Vigilance' (2017), <https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>.

¹³ Laura Nasse, 'The French Duty of Vigilance Law in Comparison with the Proposed German Due Diligence Act – Similarities and Differences', *NOVA - Business, Human Rights and the Environment*, 26 May 2021,

introduced an obligation for large companies to draw up a '*plan de vigilance*' and to implement it transparently. A concrete due diligence standard was introduced. The law thus goes further than the Modern Slavery Acts of the United Kingdom and Australia.¹⁴ The act significantly influenced the draft of the CSDDD. However, its effectiveness is limited because - unlike German law - no administrative sanctions are provided, and the act does not establish a competent authority for supporting and controlling the compliance of companies with the law.¹⁵ The possible enforcement under civil law is seen in the literature as rather ineffective.¹⁶ In the first known case of a court ruling on the LdV on 5 December 2023, the Tribunal Judiciaire de Paris¹⁷ found that the '*plan de vigilance*' of the French postal service '*La Poste*' was inadequate. The court ordered La Poste to revise and improve its plan, including a detailed risk map and control mechanisms for subcontractors. However, no penalties or damages were imposed.

An intermediate step between general Corporate Social Responsibility (CSR) and supply chain due diligence law is the Indian Companies Act of 2013, which is the first of its kind to oblige large companies to assume social responsibility in Section 135, including measures to improve working conditions and environmental protection, and requires them to form CSR-committees and draw up CSR-plans.¹⁸ This can also have at least an indirect impact on the organisation of supply chains. However, the regulation is limited to the mandatory introduction of a general CSR policy¹⁹ but not to the monitoring of the supply chain with regard to possible human rights violations.

2.2. The German Supply Chain Due Diligence Act (LkSG) of 2021

The LkSG²⁰ came into force on 1 January 2023 and has obliged companies with at least 3,000 employees since 2023 and companies with at least 1,000 employees since 2024 to comply with comprehensive due diligence obligations. The German legislator aims not to

<https://novabhre.novalaw.unl.pt/the-french-duty-of-vigilance-law-in-comparison-with-the-proposed-german-due-diligence-act-similarities-and-differences/>.

¹⁴ Christophe Clerc, 'The French "Duty of Vigilance" Law: Lessons for an EU Directive on Due Diligence in Multinational Supply Chains', *ETUI Policy Brief - European Economic, Employment and Social Policy*, no. 1 (2021): 3, <https://doi.org/10.2139/ssrn.3765288>.

¹⁵ Gustafsson, Schilling-Vacaflor, and Lenschow, 'The Politics of Supply Chain Regulations: Towards Foreign Corporate Accountability in the Area of Human Rights and the Environment?', 13.

¹⁶ Katharina Koch, 'Die französische Loi de vigilance als Beispiel für ein deutsches bzw. europäisches Lieferkettengesetz?', *Jean Monnet Saar - Europarecht online* (blog), 1 October 2020, https://jean-monnet-saar.eu/?page_id=2818#_edn11; Juliette Camy, 'The French Law on the Duty of Vigilance: The Challenges of the Preventive Approach', *Cambridge Core Blog*, 29 June 2023, <https://www.cambridge.org/core/blog/2023/06/29/the-french-law-on-the-duty-of-vigilance-the-challenges-of-the-preventive-approach/>.

¹⁷ Fédération DES SYNDICATS SOLIDAIRES, UNITAIRES ET DEMOCRATIQUES DES ACTIVITES POSTALES ET DE TELECOMMUNICATIONS (SUD PTT) vs S.A. LA POSTE, No. N° RG 21/15827 N° Portalis 3521-W-B7F-CVY3T (Tribunal Judiciaire de Paris 5 December 2023).

¹⁸ Shuchi Pahuja, 'Corporate Social Responsibility in India - The Impact of Mandated CSR: Evidence From India', in *Current Global Practices of Corporate Social Responsibility: In the Era of Sustainable Development Goals*, Idowu (Ed.), CSR, Sustainability, Ethics & Governance (Cham: Springer, 2021), 695–96, <https://link.springer.com/book/10.1007/978-3-030-68386-3>.

¹⁹ Critical note about that: Vikrant Sopan Yadav, 'Sustainable Development and Corporate Social Responsibility In India: A Critique', *International Journal of Advanced Research* 8, no. 11 (2020): 124, <https://doi.org/10.21474/IJAR01/11983>.

²⁰ English translation available at: https://www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf?__blob=publicationFile&v=3

enforce specific German social standards worldwide but to ensure compliance with internationally recognised human rights and environmental standards. The act is therefore based on the human rights and environmental protection standards resulting from international conventions and implements the UN Guiding Principles on Business and Human Rights from 2011.²¹

The obligations include risk analyses, preventive and remedial measures, and regular reporting.²² The law obliges companies to monitor their entire supply chains and to ensure in an "appropriate" manner (see Sec 3 par 1) that no human rights violations or certain serious environmental offences take place. No performance obligations or guarantee liability are imposed on companies. They are not obliged to improve the human rights or environmental situation in the regions concerned in effect.²³ In German literature this is described as '*Bemühenspflicht*' (duty to endeavour); however, the term is disputed.²⁴

Smaller companies are not themselves directly obliged by law. However, they can be indirectly affected because they are subject to reporting obligations towards their customers or because the LkSG is directly applied to their suppliers.²⁵ Corresponding indirect effects exist for international suppliers: they can be indirectly affected by contractually imposed codes of conduct that are imposed on them by their contractual partners to fulfil their direct obligations under the LkSG. This means that compliance with due diligence obligations is also anchored at lower levels of the supply chain. Contractual obligations of suppliers by a company subject to the act, therefore, strengthen the effectiveness of the law but are probably not sufficient on their own to fulfil the obligations under the act.²⁶

It is essential for companies to implement appropriate measures, particularly suitable risk management systems. These systems must be able to identify and assess human rights and environmental risks along the entire supply chain. In the case of direct suppliers, an individual risk assessment must be carried out, while indirect suppliers only require an

²¹ 'Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework' (United Nations Human Rights - Office of the High Commissioner, 2011); 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (Human Rights Council, 21 March 2011), <https://media.business-humanrights.org/media/documents/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>; Stefan Koos, 'The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies', in *Proceedings of the 2nd Riau Annual Meeting on Law and Social Sciences (RAMLAS 2021)* (Atlantis Press, 2022), 112, <https://doi.org/10.2991/assehr.k.220406.027>.

²² See Stefan Koos, 'The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies'.

²³ Philipp Tschäpe and Dominik Trefzger, 'Die Sorgfaltspflicht des Lieferkettengesetzes – Rechtsnatur, Inhalt und Haftung', *Zeitschrift für deutsches und internationales Bau- und Vergaberecht* 46, no. 5 (2023): 424.

²⁴ Mika Mehran Sharei, 'Lieferkettenrechtliche Sorgfaltspflichten und Bemühenspflichten', *Neue Juristische Wochenschrift* 76, no. 48 (2023): 3467 against the use of the term '*Bemühenspflicht*'.

²⁵ Galina Kolev and Adriana Neligan, 'Effects of a Supply Chain Regulation. Survey-Based Results on the Expected Effects of the German Supply Chains Act', IW-Report (Köln/Berlin: Institut der deutschen Wirtschaft Köln e.V., 2022), 18, <http://dx.doi.org/10.13140/RG.2.2.27022.16961>.

²⁶ Federal Ministry for Economic Cooperation and Development, 'The German Act on Corporate Due Diligence Obligations in Supply Chains: Implications for businesses in partner countries and support from the German government', 2023, 2.

event-driven risk analysis if there are specific indications of risks.²⁷ Compliance with the LkSG is monitored by the Federal Office of Economics and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA). This authority has far-reaching powers to enforce the legal requirements, including imposing fines and excluding companies from public tenders. Another aspect of the LkSG concerns the establishment of complaints mechanisms: companies must ensure that affected individuals or groups can report violations of human rights and environmental standards.

A controversial legal policy issue in connection with the LkSG was the fear that the strict requirements could lead to competitive disadvantages for German enterprises.²⁸ Compliance with the comprehensive due diligence obligations is associated with considerable costs and administrative effort.²⁹ Especially small and medium-sized companies, could find it difficult to provide the necessary resources to implement the required measures.³⁰ The costs of implementing risk management systems, carrying out audits, and preparing reports are considerable and could jeopardise the competitiveness of German companies in an international comparison. It was also criticised that monitoring supply chains is often too time-consuming and complex. The global nature of many supply chains makes it difficult to ensure complete transparency and to identify and minimise all potential risks. Monitoring supply chains is a significant challenge, particularly in countries with weak state structures or high levels of corruption.³¹ Finally, adverse effects on economically weak economic regions and societies that are dependent on international investment and international trade but cannot easily adapt are also suspected.³² This argument is closely linked to the discussion on how national supply chain legislation aligns with international justice (2.4 and 4.).

However, there were also arguments that the LkSG could create competitive advantages for German companies. Companies that adhere to high standards and communicate this transparently could gain the trust and loyalty of consumers. A strong compliance culture can improve brand image and become a favoured choice for customers who value ethical and/or sustainable business practices.³³ Disclosure of supply chain compliance is thus part of consumer communication and strengthens consumer protection as a legislative goal towards the national business surrounding. In addition, the consistent

²⁷ See Stefan Koos, 'The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies', 113.

²⁸ David Weihrauch, Sophia Carodenuto, and Sina Leipold, 'From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act', *Regulation & Governance* 17, no. 4 (2023): 6, <https://doi.org/10.1111/rego.12501>.

²⁹ Stefan Müller and Nadine Otter, 'Implikationen des Lieferkettensorgfaltspflichtengesetzes auf öffentliche Unternehmen – Verpflichtung, Umsetzungsempfehlungen für die Corporate Governance und Berichtsnotwendigkeiten', *Zeitschrift für Gemeinwirtschaft und Gemeinwohl*, 2022, 451.

³⁰ Susanne Kalss, 'Wie sollen die Verhaltenspflichten nach der Lieferkettensorgfalts-Richtlinie (CSDDD) erfüllt werden – ein rechtspolitischer Zuruf!', *Zeitschrift für die gesamte Privatrechtswissenschaft* 10, no. 2 (2024): 198.

³¹ José A. Campos Nave and Clemens Bauer, 'Probleme des Lieferkettengesetzes in der Praxis', *Rödl&Partner* (blog), 19 January 2019, <https://www.roedl.de/themen/lieferkettengesetz-praxis-wettbewerbsverzerrungen-komplexitaet-sozialen-mindeststandards>.

³² Kalss, 'Wie sollen die Verhaltenspflichten nach der Lieferkettensorgfalts-Richtlinie (CSDDD) erfüllt werden – ein rechtspolitischer Zuruf!', 198.

³³ Daniel G. J. Kuchinka et al., 'Consumer Attitudes toward Sustainable Development and Risk to Brand Loyalty', *Sustainability* 10, no. 4 (2018): 12–13, <https://doi.org/10.3390/su10040997>; Prokopets, 'Trafficking in Information: Evaluating the Efficacy of the California Transparency in Supply Chains Act of 2010', 362.

implementation of due diligence obligations might lead to long-term cost savings by identifying and mitigating risks early before they escalate into major problems.³⁴ The legal standardisation of due diligence obligations, in particular, could reduce competitive disadvantages due to bureaucracy by creating clear and generally binding guidelines for business.³⁵ In a survey of German and French companies on the risks and opportunities of the new CSDDD,³⁶ considerable efforts to comply with due diligence obligations and potential competitive advantages through implementing due diligence obligations were mentioned. According to the survey, 78% of the companies surveyed considered the directive's objectives achievable.³⁷

After all, compliance with stricter standards could make German companies pioneers regarding sustainability and social responsibility due to the LkSG already in force and create competitive advantages over other companies that have not yet had to adapt to corresponding legal obligations.³⁸ This could give them access to new markets and business opportunities, particularly in regions where such standards are increasingly required. Companies that adapt early and organise their supply chains transparently could also benefit from regulatory developments in other countries by meeting the requirements for future compliance requirements now. Third-country suppliers could benefit from more substantial and more predictable collaboration within the supply chain and greater employee satisfaction at their production sites, avoiding disruption risks due to labour unrest.³⁹ These benefit arguments, though, still need an empirical foundation.

Linked to a competition law aspect of the regulation of international supply chains (see regarding the national business law purpose 4.) is the beneficial aspect that if supply chain due diligence duties are legal standard for bigger European Companies, the law creates a necessary level playing field by ensuring that responsible companies are not at a competitive disadvantage compared to those not adhering to human rights and environmental standards.⁴⁰

³⁴ Ana Maksimovic, 'SOCIALY RESPONSIBLE CHAINS: INVESTIGATING THE SOCIAL IMPLICATIONS OF SUPPLY CHAIN DUE DILIGENCE IN CORPORATE SUSTAINABILITY', in Proceedings (International Scientific and Professional Conference POLITEHNIKA 2023, Belgrad, 2023), 455.

³⁵ Günther Maihold et al., 'Responsibility in Supply Chains: Germany's Due Diligence Act Is a Good Start', *SWP-Comment* (blog), 21 March 2021, 6, https://www.swp-berlin.org/publications/products/comments/2021C21_Responsibility_Supply_Chains.pdf.

³⁶ Göhkan Yüzgülec, 'Studie zum EU-Lieferkettengesetz: Wo stehen Unternehmen heute?', *Inverto*, 2024, <https://www.inverto.com/de/publikationen/eu-lieferkettengesetz-studie-zeigt-inwieweit-einkauf-und-supply-chain-management-geruestet-sind/>.

³⁷ 'Umfrage Zur EU-Lieferketten-Richtlinie: 78 Prozent Der Unternehmen Halten CSDDD-Ziele Für Erreichbar', *Beschaffung Aktuell* (blog), 19 March 2024, <https://beschaffung-aktuell.industrie.de/news/78-prozent-der-unternehmen-halten-csddd-ziele-fuer-erreichbar/>.

³⁸ Alexander Timmer et al., 'ON TRIAL: THE SUPPLY CHAIN DUE DILIGENCE ACT IN GERMANY AND ITS EFFECTS ON CAR SUPPLIERS', *Berylls* (blog), July 2023, <https://www.berylls.com/on-trial-the-supply-chain-due-diligence-act-in-germany-and-its-effects-on-car-suppliers/>.

³⁹ 'Human Rights Due Diligence', *Ethical Trading Initiative* (blog), accessed 9 June 2024, <https://www.ethicaltrade.org/insights/issues/human-rights-due-diligence#:~:text=It%20delivers%20better%20analysis%20of,solutions%20to%20tackle%20the%20problems;> Maksimovic, 'SOCIALY RESPONSIBLE CHAINS: INVESTIGATING THE SOCIAL IMPLICATIONS OF SUPPLY CHAIN DUE DILIGENCE IN CORPORATE SUSTAINABILITY', 455.

⁴⁰ Weihrach, Carodenuto, and Leipold, 'From Voluntary to Mandatory Corporate Accountability: The Politics of the German Supply Chain Due Diligence Act', 9; Gustafsson, Schilling-Vacaflor, and Lenschow, 'The Politics of Supply Chain Regulations: Towards Foreign Corporate Accountability in the Area of Human Rights and the Environment?', 2.

2.3. The EU Corporate Sustainability Due Diligence Directive (CSDDD)

The legislative process that led to the CSDDD⁴¹ was politically difficult. The final version⁴² is the result of several political compromises. Despite an informal agreement in the trilogue negotiations at the end of 2023, details of the future regulation remained open. At the beginning of 2024, it emerged that the German governing coalition of Social Democrats, Greens, and Liberal Democrats could not agree on a common position on the law. As a result, Germany abstained from the vote. France and Italy did not initially want to support the act but finally agreed in March after compromise concessions, resulting in a majority.

The final draft⁴³ was approved by the EU Parliament on 24 April 2024, and by the EU Council on 24 May 2024, so the directive is in force. The CSDDD will take effect in 2027. Compared to the earlier draft, as a compromise, the scope of the CSDDD has been reduced. The directive now applies to companies with at least 1,000 employees (instead of 500 previously) and a minimum turnover of 450 million euros (instead of 150 million euros previously). Furthermore, the originally planned high-risk sector approach has been removed, meaning that the gradual inclusion based on risk sectors is no longer being pursued. Furthermore, specific additional regulatory requirements for the textile and food industries have been removed, meaning that these sectors are now subject to less stringent requirements than originally envisaged. The directive will be implemented in phases, with company size and turnover as criteria. Accordingly, larger companies will be obliged to fulfil the requirements first, while smaller companies will be included gradually.

As the act is an EU directive and not a regulation, the CSDDD must be transposed into the national laws of the EU member states within two years. For the existing German LkSG and the French LdV, this means that the legal situation will be significantly tightened. The CSDDD should be transposed into German law by adapting and integrating it into the existing LkSG by the end of 2025. European legislation in supply chains is complemented by the Corporate Sustainability Reporting Directive (CSRD)⁴⁴, which came into force on 5 January 2023. The CSRD and the CSDDD are key instruments of the European Union that complement each other. The CSRD is intended to improve the transparency and comparability of companies' sustainability reporting, while the CSDDD ensures the actual implementation of due diligence obligations to comply with human rights and environmental standards along the entire supply chain. The CSRD requires companies to disclose detailed information about their environmental, social, and governance practices, which creates a basis for assessing and monitoring these practices. In contrast,

⁴¹ 'Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937', Pub. L. No. 2022/0051(COD) (2024), <https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf> (older draft version).

⁴² Text of the compromise: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/JURI/DV/2024/03-19/8_ANNEXCOREPERletterCSDD15_03_2024_EN.pdf.

⁴³ The adopted text of the draft is available at https://www.europarl.europa.eu/doceo/document/TA-9-2024-0329_EN.html (accessed 12. June.2024).

⁴⁴ 'DIRECTIVE (EU) 2022/2464 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting', accessed 24 May 2024, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32022L2464>.

the CSDDD requires companies to take preventive and remedial action to ensure compliance with the standards. Companies subject to the CSRD are exempt from the annual reporting obligation set out in the CSDDD on the fulfilment of supply chain due diligence obligations (Art. 11 [1]) (Art. 11 [2]).

In accordance with Art. 2 (1), the CSDDD is aimed at companies that have their registered office within the European Union and at significant companies based outside the EU (Art. 2 [2]) that are active in the EU. This refers to the registered office (statutory seat). Implementation is staggered: From 2027, the Directive will apply to companies with at least 5,000 employees and a turnover of at least 1.5 billion euros. In 2028, companies with at least 3,000 employees and a turnover of 900 million euros, and in 2029, companies with more than 1,000 employees and a turnover of 450 million euros will be included. This represents a significant expansion of the scope of application compared to the French LdV (more than 5,000 employees in France or more than 10,000 employees worldwide). In contrast, the scope of application is not expanded compared to the LkSG regarding company size. The geographical scope of the directive extends to companies within the EU and certain big non-EU companies globally connected to the EU market. As with the LkSG, the regulations will have an indirect impact on small and medium-sized enterprises and also on smaller companies outside the EU, for example, in Indonesia, if they are linked to the larger companies through business relationships and may be forced to comply with the CSDDD requirements through contractual agreements with them.

A key difference between the German Supply Chain Due Diligence Act (LkSG) and the Corporate Sustainability Due Diligence Directive (CSDDD) lies in the scope and reach of the due diligence obligations and the types of companies affected: While the LkSG focuses primarily on due diligence within a company's own business unit and on its direct suppliers, the CSDDD extends due diligence obligations to the *entire value chain*, including indirect suppliers and downstream business partners. The CSDDD refers to this in Art. 3 (1) (g) as the '*chain of activities*'⁴⁵. This implies that, according to the CSDDD, companies must take responsibility for the human rights and environmental practices of their entire supply chain, both upstream and downstream. In contrast, the LkSG in its current version only covers the upstream area. However, *downstream indirect* business partners in the supply chain are not covered by the scope of responsibility (Art. 3 [1] [g] [ii]). The CSDDD also does not extend the responsibility in the supply chain to the level of consumers as customers of the obligated companies.

Another difference between the LkSG and the CSDDD is that the LkSG places less specific emphasis on environmental issues than the CSDDD and focuses more on compliance with human rights. In contrast, the CSDDD has a stronger focus on environmental issues and requires companies to minimise negative environmental impacts. In addition, the CSDDD calls for the creation of climate transition plans aimed at limiting global warming to 1.5 degrees Celsius and achieving climate neutrality targets by 2050 (Art. 15).⁴⁶

⁴⁵ Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 recital 15.

⁴⁶ Nicolas Bueno et al, 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise', *Business and Human Rights Journal*, 2024, 2-3, <https://doi.org/10.1017/bhj.2024.10>.

Based on the due diligence process described in the OECD Due Diligence Guidance for Responsible Business Conduct,⁴⁷ the CSDDD provides for a *six-step approach* to corporate responsibility:

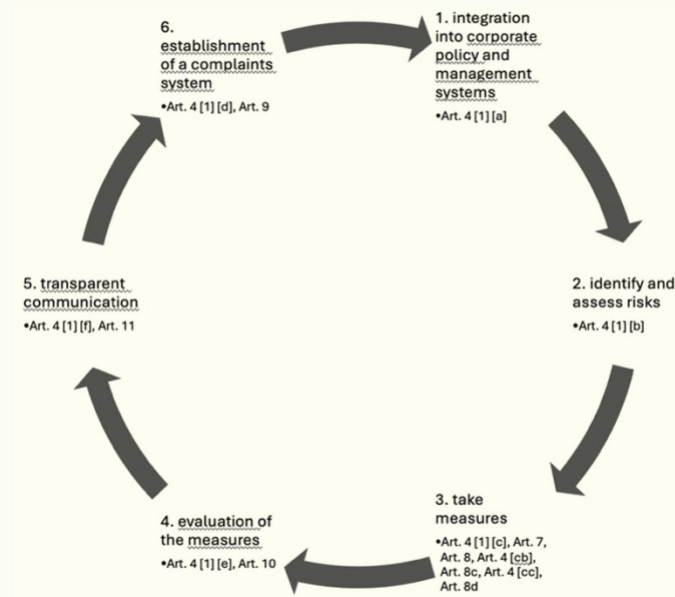


Fig. 1 Due diligence process in the CSDDD

In a first step, companies should integrate due diligence obligations into their corporate policy and management systems (Art. 4 [1] [a]). The second step is to identify and assess risks that have an impact on human rights and the environment (Art. 4 [1] [b]). In the third step, measures must be taken (Art. 4 [1] [c]) to avoid (Art. 7) or minimise (Art. 8) negative impacts. In this context, companies should provide measures for redress if negative impacts occur (Art. 4 [cb] and Art. 8c) and involve stakeholders in the process in an appropriate manner (Art. 4 [cc] and Art. 8d). Fourth, an evaluation of the effectiveness of the implemented measures is required (Art. 4 [1] [e] and Art. 10). Fifth, transparent and open communication about the due diligence processes must be ensured (Art. 4 [1] [f] and Art. 11).

Sixth, the due diligence process of the CSDDD includes the obligation to establish an effective complaints system (notification and complaints procedure, Art. 4 [1] [d] and Art. 9).⁴⁸ The existing EU Whistleblower Directive⁴⁹ is amended and extended by the CSDDD. The scope of application of the Whistleblower Directive is extended to the entire supply chain.⁵⁰ Member States must simplify the reporting of substantiated information by

⁴⁷ OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct', 2018, 20-35, <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>.

⁴⁸ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 recital 42-42a.

⁴⁹ Directive (EU) 2019/1937 of the European Parliament And Of The Council of 23 October 2019 on the Protection of Persons Who Report Breaches of Union Law', L305/17 of 26.11.2019 §, accessed 24 May 2024, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937>.

⁵⁰ Proposal for a Directive Of The European Parliament And Of The Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 recital 65.

creating easily accessible reporting channels.⁵¹ The complaints systems under the CSDDD and the Whistleblower Directive coexist. If a breach of EU or national law is considered to have an adverse effect and an employee of the company is directly affected, he or she can use both the complaints procedure under the CSDDD and the internal reporting procedure under the Whistleblower Directive. However, if one of these conditions is not met, the employee can only use one of the procedures.⁵²

Supervisory enforcement (see 3.1. for civil enforcement) of the CSDDD will be carried out by independent supervisory authorities established by the Member States. These authorities can request information, conduct investigations, and initiate inspections, including unannounced on-site visits.⁵³ Complaints under the mandatory reporting system are reviewed by the supervisory authorities, and, where appropriate, the authorities take the necessary measures to protect the identity of whistleblowers and their personal information.⁵⁴ Fines of up to 5% of annual global turnover can be imposed for breaches of the CSDDD's due diligence obligations. However, the member states can also stipulate higher maximum fines ("*...shall be not less than 5% of the worldwide turnover*"⁵⁵).

Another sanction is the so-called "*name and shame*". This describes a public statement that is made on the nature of the offence and the specific responsibility of the company if the company does not comply within a certain period with a decision previously imposing a fine.⁵⁶ Furthermore, the authorities are authorised to grant remedial measures, order the cessation of infringements, and take provisional measures in case of immediate risk. Non-compliance with the obligations arising from the CSDDD is taken into account in public procurement procedures and can have a negative impact on the awarding of contracts and performance conditions,⁵⁷ up to and including exclusion from public procurement procedures.

2.4. Effectiveness of LkSG and CSDDD concerning improving the human rights situation

Even if the sanctioning effect of the LkSG exceeds that of other national supply chain due diligence laws, there were still doubts about the law's suitability to achieve the intended objectives with sufficient effectiveness. However, it cannot be said that the law would have no tangible impact. In any case, this applies to the perspective of the German

⁵¹ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 Article 19 par 1.

⁵² Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 recital 42a.

⁵³ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 Article 18.

⁵⁴ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 Article 19 par 1a.

⁵⁵ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 Article 20 par 3.

⁵⁶ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 Article 20 par 2a and recital 54.

⁵⁷ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 Article 24 and recital 63.

companies addressed: There are examples⁵⁸ in which companies have already adapted their supply chains as part of their general CSR measures. This may be based on incentive effects for companies linked to a publicly communicable consideration for human rights and environmental concerns. The advertising effect of 'ethical compliance' should not be underestimated, and conformity with clearly standardised statutory duties of care might strengthen trust in companies and reduce the suspicion of "greenwashing".

Conversely, supplier companies could have incentives to fulfil the requirements of companies bound by supply chain law in the interests of more stable business relationships and employee satisfaction.⁵⁹ However, the effectiveness of such incentives depends on the power that a company directly subject to the supply chain law has over the companies concerned in the supply chain.⁶⁰ The 'leverage factor' determines the effectiveness of mandatory rules on supply chain due diligence. This would argue in favour of keeping the relevant regulations flexible and grading due diligence obligations - as in the LkSG - according to how close the company directly addressed by the regulation is to the problematic link in the supply chain and what factual possibilities of influence exist in the specific political and social environment. In this respect, the CSDDD is stricter because it does not contain a graduated standard of obligations. As a result, doubts about the effectiveness of supply chain laws for the human rights-related improvement of living conditions in the specific situation in newly industrialising and developing countries cannot be dismissed out of hand.⁶¹

The Volkswagen case and allegations of the use of forced labour by Uyghurs at a plant in Xinjiang⁶² might demonstrate the need for discussing flexible and staged due diligence obligations. Volkswagen claimed it could not exert sufficient influence in a joint venture with the Chinese company SAIC, which has been running the plant since 2012. The company also claimed that diligence in the case would not align with a universal legal principle that forbids assigning responsibility if someone has no control over the issue.⁶³

⁵⁸ Kolev and Neligan, 'Effects of a Supply Chain Regulation. Survey-Based Results on the Expected Effects of the German Supply Chains Act', 456–57; see regarding the effects on German companies Kolev and Neligan, 'Effects of a Supply Chain Regulation. Survey-Based Results on the Expected Effects of the German Supply Chains Act'.

⁵⁹ Maksimovic, 'SOCIALY RESPONSIBLE CHAINS: INVESTIGATING THE SOCIAL IMPLICATIONS OF SUPPLY CHAIN DUE DILIGENCE IN CORPORATE SUSTAINABILITY', 455–57 with examples.

⁶⁰ See European Union CSRforALL-Project, *Corporate Social Responsibility for ALL Project - Sustainability Reporting Handbook for Employers' Organisations*, 2016, 10–13; Alan Gutterman, 'Responsible Supply Chain Management', 28 June 2023, 6–9, <https://doi.org/10.2139/ssrn.4494227>.

⁶¹ See Lena Rudkowski and Yves-J. Manzanza Lumingo, 'Zur eingeschränkten Effektivität des LkSG am Beispiel der Demokratischen Republik Kongo', *Recht der Arbeit* 76, no. 5 (2023): 291–98 relating to the discrepancy between the focus on employees protection in the LkSG and the dominance of informal employments in the global south.

⁶² 'VW Under Fire for Ongoing Operations in Xinjiang', *Der Spiegel*, 27 May 2022, <https://www.spiegel.de/international/world/the-oppression-of-uyghurs-in-china-vw-under-fire-for-ongoing-operations-in-xinjiang-a-0001da57-a9a9-4384-8bbe-e3628e0e973d>; 'Volkswagen: Address Uyghur Forced Labor: Supply Chain, Xinjiang Plant Risk Links to Labor Abuses', Human Rights Watch (blog), 27 May 2024, <https://www.hrw.org/news/2024/05/27/volkswagen-address-uyghur-forced-labor>.

⁶³ 'VW stellt zwei Verstöße gegen Menschenrechte fest', *Der Spiegel*, 31 May 2024, <https://www.spiegel.de/wirtschaft/unternehmen/volkswagen-vw-stellt-zwei-verstoesse-gegen-menschenrechte-fest-a-5aba612e-c136-4257-bef9-744ba7db1d46>; see also Senate Finance Committee Chairman Ron Wyden, 'Insufficient Diligence: Car Makers Complicit with CCP Forced Labor - A Democratic Staff Investigation', 20 May 2024, 13.

As a consequence of the sometimes difficult or unmanageable efforts for companies in connection with the enforcement of their due diligence obligations towards their direct (and in the case of the CSDDD also indirect⁶⁴) suppliers, a negative effect concerning the legislative objective of the supply chain laws is seen in the literature.

One of the aims of the laws is to improve the human rights and environmental protection situation in problematic regions in accordance with internationally recognised human rights standards. It would be in the interests of this legislative objective for companies that are bound by the laws to remain in these regions and exert a corresponding influence on the conditions of their contractual partners (*'stay and behave'*). However, in the absence of such influence, these companies could opportunistically leave problematic markets or avoid them from the outset (*'cut and run'*).⁶⁵ This has already been described as related to the application of the French LdV on French food producers and their imports of Brazilian soy.⁶⁶ This is seen as a risk of detrimental effects on weak economies and communities that are dependent on international trade and investment.⁶⁷

The CSDDD attempts to minimise these risks by stipulating that termination of the contractual relationship should only be considered as a last resort if no less severe measures have proven sufficient to eliminate or minimise the adverse effects (Art. 8 [6]). Before this, the company must implement an action plan to remedy the adverse effects and, if necessary, attempt to increase its influence by temporarily suspending business relationships (Art. 8 [6] [a]). Only as a further measure can the termination of the contractual relationship be considered in cases of serious actual adverse effects (Art. 8 [6] [b]). It is important to note that before temporarily or permanently terminate the contractual relationship, companies must assess whether the adverse effects of the termination outweigh the adverse effects that are to be minimised. If this is the case, the contract may not be terminated, and the company should inform the supervisory authority of the reasons for its decision (see also 3.2.2 on conflict of contract law).

It has been pointed out in the literature that supply chain due diligence laws are too inflexible when considering the specific economic and social conditions in the Global South that influence the human rights situation. *Lumingu* and *Rudkowski* cite as an example a discrepancy between the concept of labour justice underlying the LkSG, which is based on clear contractual foundations, and the reality of informal employment relationships in the Democratic Republic of Congo.⁶⁸ This amounts to a criticism of a "one-size-fits-all" solution in the global economy and, at the same time, addresses the criticism of authors of the 'Third World Approaches to International Law' (TWAAIL) of the supply

⁶⁴ Critical therefore Kolev and Neligan, 'Effects of a Supply Chain Regulation. Survey-Based Results on the Expected Effects of the German Supply Chains Act', 4.

⁶⁵ Felix Bierbrauer, 'Nachhaltigkeitsziele und das Lieferkettengesetz', *Wirtschaftsdienst* 102, no. 5 (1 May 2022): 345, <https://doi.org/10.1007/s10273-022-3186-4>.

⁶⁶ Mairon G. Bastos Lima and Almut Schilling-Vacaflor, 'Supply Chain Divergence Challenges a "Brussels Effect" from Europe's Human Rights and Environmental Due Diligence Laws', *Global Policy* n/a, no. n/a (n.d.): 10, <https://doi.org/10.1111/1758-5899.13326>.

⁶⁷ Kalss, 'Wie sollen die Verhaltenspflichten nach der Lieferkettensorgfalts-Richtlinie (CSDDD) erfüllt werden – ein rechtspolitischer Zuruf!', 197; Kolev and Neligan, 'Effects of a Supply Chain Regulation. Survey-Based Results on the Expected Effects of the German Supply Chains Act', 4.

⁶⁸ Rudkowski and Manzanza Lumingu, 'On the limited effectiveness of the LkSG using the example of the Democratic Republic of Congo'.

chain laws of industrialised countries, who see this as an expression of what is understood as imperialist paternalism of developing countries.⁶⁹

The concept of organisational responsibility (3.1.) would be systematically flexible enough to take account of cultural particularities within organisational units. It offers a systematic flexibility that enables organisations to take account of specific regional circumstances and particularities. By integrating cultural particularities and social and economic conditions, organisational responsibility could help to develop measures that are more effective and sustainable and better ensure compliance with human rights and fair working conditions. However, it must be admitted that the standardisation aspect described above could fundamentally stand in the way of flexibilisation, as flexibilisation can lead to inconsistencies. However, a region-specific adaptation of due diligence standards is problematic because there is an ambivalence between the goal of improving the internationally determinable human rights situation and the consumer protection aspect of providing information about ethical production conditions on the one hand and a pragmatic aspect of improving regional living conditions on the other. From the perspective of the normative purposes of supply chain due diligence law and ethically, it would hardly be justifiable to tolerate inadequate working conditions or even human rights violations on a region-specific and thus discriminatory basis for pragmatic reasons.⁷⁰

3. Civil Law Issues

3.1. Tort Liability

A central point of criticism in connection with the expected effect of the LkSG was that the law does not provide for an independent civil liability claim for affected parties in addition to the regulated supervisory controls and sanctions in accordance with Section 3 (3) (1) LkSG.⁷¹ In contrast, the French LdV does incorporate civil liability but is seen as not sufficiently effective due to the lack of administrative sanctions (2.1.).⁷² The CSDDD differs from German law in that it expressly provides for an independent civil liability claim that must be incorporated by the Member States into their civil law systems (Art. 22).

The German LkSG and the EU Directive represent legal fixations of CSR obligations.⁷³ This describes the systematic relationship between supply chain due diligence legislation and the new EU Directive on the one hand and CSR on the other hand: In the context of

⁶⁹ Caroline Omari Lichuma, '(Laws) Made in the "First World": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains', *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht* 81, no. 2 (2021): 519; Sara L. Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?', *Osgoode Hall Law Journal* 46, no. 3 (2008): 565–603.

⁷⁰ See Marcel Fratzscher, 'Der faule Kompromiss beim Lieferkettengesetz', *DIW Wochenbericht*, no. 8/2021 (2021): 128, https://doi.org/10.18723/diw_wb:2021-8-4.

⁷¹ Stefan Koos, 'The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies', 113.

⁷² Koch, 'Die französische Loi de vigilance als Beispiel für ein deutsches bzw. europäisches Lieferkettengesetz?'; Camy, 'The French Law on the Duty of Vigilance: The Challenges of the Preventive Approach'.

⁷³ Stefan Koos, 'The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies', 112.

possible tort law claims by those affected by human rights violations within the supply chain, violations of CSR-related due diligence obligations are relevant for the determination of *organisational fault* under tort law. The term organisational fault generally refers to an organisation's liability for damages caused by the actions or omissions of its employees or by systemic errors within the organisation. It encompasses the entire responsibility of an organisation ('organisational duties') for its internal processes, management systems, and compliance with legal regulations. Damage is not only attributed to the person who directly caused the damage but (also) to the organisation or the persons responsible for the organisation in question. The term '*organisational liability*' is based on the idea that an organisation can be held liable as an entity if its structures and processes are inadequate to prevent or correct misconduct. Organisational liability can be defined as the responsibility of organisations to implement appropriate organisational measures to prevent misconduct.⁷⁴

An example from German civil law for organisational duties is a '*vicarious liability*' in Section 831 (1) BGB: If an unlawful act by, e.g., an employee is the cause of an injury to the legal interests of another person, the employer is liable *for his own fault*⁷⁵ if he cannot prove that he properly selected and supervised the employee.⁷⁶ It is therefore presumed that in the event of an unlawful breach of legal interests by a vicarious agent, the employer is at fault in terms of organisation, from which he can exculpate himself. In addition to Section 831 (1) BGB, the legal concept of a *general operational organisational fault* has been developed in German civil law, particularly for *larger business units*,⁷⁷ which corresponds to the above definition: In the context of the general tort law claim under Section 823 (1) BGB, the breach of organisational duties within the company, such as traffic safety duties ("*Verkehrssicherungspflichten*"), can be regarded as breaches of duty of care that constitute fault in the sense of negligence under Section 276 (2) BGB.

The supply chain due diligence obligations standardised in the LkSG can, therefore, be systematically used as a specification of due diligence and organisational obligations to establish liability in the context of general tortious liability⁷⁸⁷⁹ in accordance with Section

⁷⁴ Klaus Heine and Kateryna Grabovets, 'From Individuals to Organizations: The Puzzle of Organizational Liability in Tort Law', *The Dovenschmidt Quarterly* 3, no. 2 (December 2015): 45.

⁷⁵ There is a difference between liability for one's own (organisational) fault according to Section 831 BGB ('Liability for the vicarious agents' - "*Verrichtungsgehilfe*") and the genuine liability for third-party fault of persons whom the obligor involves in the performance process according to Section 278 BGB ('Responsibility of the obligor for third parties' - "*Erfüllungsgehilfe*").

⁷⁶ Section 831 (1): "A person who deploys another person to perform a task is liable to provide compensation for the damage that the other unlawfully inflicts on a third party when carrying out the task. Liability in damages does not apply if the principal exercises the care required in business dealings when selecting the person deployed and, to the extent that they are to procure devices or equipment or to manage the business activity, in such procurement or management, or if the damage would have occurred even if this care had been exercised."

⁷⁷ Christian Katzenmeier, '§ 831', in *Nomos-Kommentar BGB*, 4th ed., vol. 2/3 (Baden-Baden, 2021) recital 8.

⁷⁸ 'Amendment Request No. 2 of the Party "Die Grünen"; BT-Drucks. 19/30505 p. 29, accessed 31 May 2024, <https://dserver.bundestag.de/btd/19/305/1930505.pdf>.

⁷⁹ Different opinion Adam Sagan and Alexander J. Schmidt, 'Das Lieferkettensorgfaltspflichtengesetz: Ein Überblick aus der Perspektive des Arbeitsrechts', *Neue Zeitschrift für Arbeitsrecht-Rechtsprechungsreport* 27, no. 6 (2022): 283 as this would counteract the idea of the LkSG, that no civil law liability should arise from an infringement of the provisions of the act.

823 (1) BGB.⁸⁰ In this respect, according to Section 3 (3) [2] LkSG, the act has no blocking effect with regard to claims arising from general German civil law. According to Section 11 LkSG, non-governmental organisations and domestic unions can assert claims for violations of the paramount legal positions of individuals in court. The *extension of organisational obligations beyond the actual company organisation to the entire supply chain* can be seen as an important development of the legal concept of general organisational fault,⁸¹ because this means that the supply chain itself is seen as an organisational unit and the principles of company organisational fault are transferable to supply chains. Liability under Section 823 (2) BGB in conjunction with Sections 4 et seq. LkSG⁸² is excluded because the LkSG is not a 'protective rule' ("*Schutzgesetz*") within the meaning of Section 823 (2) BGB.⁸³

The legal standardisation of due diligence obligations in supply chains through the LkSG and the CSDDD can also be understood as an *objectification of culpability*.⁸⁴ As companies' control options across the entire supply chain, especially beyond their direct suppliers, are *de facto* limited, it is often only possible to impose standardised requirements on the conduct of companies, their due diligence obligations, and their risk management. Compliance with these requirements can be reviewed and assessed without primarily focussing on the subjective culpability of individuals. This shifts the focus from individual culpability to systematic, organisation-related responsibility, which enables more objective and predictable law enforcement. Certifications integrated into corporate risk management will play a key role here.⁸⁵ A corresponding liability system can also be found in the EU General Data Protection Regulation and the new EU Artificial Intelligence Regulation.

The independent liability claims to be introduced by the CSDDD will not make the legal situation stricter for German companies, which were already bound by the LkSG, on a *material law level*, because it does not go beyond the liability under Section 823 (1) BGB described above. The CSDDD only ensures that the differences in the tort law regulations of the EU member states are equalised.⁸⁶ The relationship between the existing general tort law liability CSDDD depends on whether the respective Member State regulation falls

⁸⁰ Section 823 (1): "A person who, intentionally or negligently, unlawfully injures the life, limb, health, freedom, property or some other right of another person is liable to provide compensation to the other party for the damage arising therefrom."

⁸¹ Sonja Hoffmann and Christian M. Theissen, 'The New Corporate Due Diligence Act: Potential Liability under Civil Law and Administrative Law', *White & Case* (blog), 8 July 2021, <https://www.whitecase.com/insight-alert/new-corporate-due-diligence-act-potential-liability-under-civil-law-and>.

⁸² Section 823 (2): "The same duty is incumbent on a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it is possible to violate it also without fault, then liability to compensation only exists in the case of fault."

⁸³ Sagan and Schmidt, 'Das Lieferkettensorgfaltspflichtengesetz: Ein Überblick aus der Perspektive des Arbeitsrechts', 283.

⁸⁴ See in the context of Section 839 BGB Hans Steege and Christof Muthers, 'Nomos-Kommentar § 839 BGB', 4th ed. (Baden-Baden, 2021) recital 263.

⁸⁵ Lothar Harings, Max Jürgens, and Stefanie Beermann, 'Using Certificates and Standards to Comply with Supply Chain Due Diligence Obligations', *Welternährung*, no. 4/2024 (2024), <https://www.welthungerhilfe.org/global-food-journal/rubrics/business-human-rights/certificates-and-standards-for-due-diligence-compliance>.

⁸⁶ Michael Windfuhr, 'EU-Lieferkettengesetz: Wichtiger Beitrag zum Schutz von Menschenrechten und Umwelt', *Deutsches Institut für Menschenrechte* (blog), 13 February 2024, <https://www.institut-fuer-menschenrechte.de/aktuelles/detail/eu-lieferkettengesetz-wichtiger-beitrag-zum-schutz-von-menschenrechten-und-umwelt>.

short of the EU protection standard or goes beyond it. According to Article 22(4), the civil liability rules of the CSDDD exist independently of other EU or national rules on civil liability in connection with adverse effects on human rights or the environment, which provide for liability in situations not covered by this Directive or which provide for stricter liability than this Directive. However, there is an aggravation due to the deviating *conflict of laws* treatment of the liability element of the CSDDD according to Art. 22 (5) (3.2.1.).

3.2. Conflict of Laws

3.2.1. Tort Law

As described above (3.1.), it is possible to claim damages under tort law already with the LkSG, as the breach of obligations under the LkSG can be taken into account in the context of general tort law claims for damages under Section 823 (1) BGB. Under European International Private Law, however, the tort law of the country where the damage occurs would be applied to breaches of supply chain due diligence obligations. This results from applying the conflict of laws rule of Art. 4 (1) Rome II Regulation.⁸⁷⁸⁸ In the case of the fire in a Pakistani textile factory on September 11, 2012, with over 250 victims,⁸⁹ the question arose regarding the applicable tort law for a possible liability of the German clothing company whose supplier was the Pakistani company because survivors and relatives of deceased victims sued for damages in a German court. Even if the breach of duty of care took place at the seat of the German company (place of action), Pakistani tort law was applicable due to the *place of result connection*.⁹⁰ The LkSG has not changed this from a conflict of law perspective. Generally, in the case of damages of non-EU foreigners abroad, the local tort law applies rather than the German BGB.⁹¹ According to Article 7 of the Rome II Regulation, the only exception is environmental damage. Here, the injured party can choose between the law of the place where the damage occurred and the law of where the event giving rise to the damage occurred.

The CSDDD significantly changes the conflict of law situation: The substantive introduction of an independent civil liability provision is complemented on the conflict of law level by a provision in Article 22(5) CSDDD, stipulating that the member state liability rules created to implement the directive are *mandatory, even if conflict of law rules refer to another law than that of the respective member state*. These liability rules are

⁸⁷ 'Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)', accessed 10 June 2024, <https://eur-lex.europa.eu/eli/reg/2007/864/oj>.

⁸⁸ Art. 4 (1) Rome-II-Regulation: "Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

⁸⁹ 'Korban Kebakaran Pabrik di Pakistan 261 Orang', tempo.co, 12 September 2012, <https://dunia.tempo.co/read/429116/korban-kebakaran-pabrik-di-pakistan-261-orang>.

⁹⁰ Vereinbarkeit ausländischer Verjährungsvorschriften mit deutschem ordre public, NJW 2019 3527 (Oberlandesgericht Hamm 2019 - Higher Regional Court Hamm) Recital 11.

⁹¹ Ludger Giesberts, 'Sorgfaltspflichten für die Lieferkette: Das deutsche Gesetz und der EU-Richtlinienentwurf', Neue Zeitschrift für Verwaltungsrecht 41, no. 20 (2022): 1502; Stefan Koos, 'The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies', 113.

overriding mandatory rules within the meaning of Article 16 of the Rome II Regulation.⁹² The mandatory nature also extends to rules of evidence and limitation periods.⁹³ This addresses a key criticism of the LkSG with the directive.⁹⁴

3.2.2. Contractual Law

According to Art. 8(6)(b) CSDDD, in the case of severe adverse impacts, the termination of the contractual relationship with a supplier may become necessary. From a conflict of laws perspective, in cases of harmful human rights or environmental impacts in third countries, the contract law of those countries may be applicable, or the contract law of the EU Member State where the company has its statutory seat. Pursuant to the relevant EU Rome I-Regulation on the law applicable to contractual obligations⁹⁵, this depends on a choice of law agreement (Art. 3 Rome I) or, in the absence thereof, on the criteria for objective connection (Art. 4 Rome I).

In cases where the governing law of the contract is the law of a third country, termination of the contract can only be considered if the applicable contract law of the third country permits it (Art. 8 [6] [1] CSDDD). For cases where the law of an EU Member State is the governing law of the contract, Member States must, in implementing the CSDDD, ensure that their contract law systems provide for the possibility of temporary or permanent termination of the contract (Art. 8 [6] final sentence). Under current German civil law, applying the provision on the disturbance/cessation of the basis of the transaction under Section 313 BGB would be possible, which under certain circumstances also provides for a right of withdrawal (Section 313 [3] BGB).

In the context of the CSDDD this requires that the determination of severe human rights or environmental impacts within the framework of the due diligence process can be qualified as a subsequent change in the basis of the transaction within the meaning of Section 313 [1] BGB. This must lead to the conclusion that it is unreasonable for the affected company to adhere to the contract. This will likely be affirmed in relevant cases of severe human rights problems, especially since the interests to be protected are those recognized under international law, which both parties must acknowledge as relevant contractual surrounding conditions. However, considerable uncertainties may arise in connection with the company's obligation to determine and qualify those severe adverse impacts, particularly as the burden of proof for the unreasonableness of adhering to the contract lies with the company.

The legal exception from the obligation to terminate the contract in cases where stronger negative impacts on the human rights or environmental situation would result from the termination of the cooperation than the impacts being minimized (Art. 8 [6] [b]) brings

⁹² Stefan Koos, 'The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies', 114; Anne Peters et al, 'Business and Human Rights: Towards a "Smart Mix" of Regulation and Enforcement', *Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht* 83, no. 3 (2023): 447.

⁹³ See Recital 61 of the compromise draft text.

⁹⁴ See 'Amendment Request No. 2 of the Party "Die Grünen"; BT-Drucks. 19/30505 p. 29, accessed 31 May 2024, <https://dserver.bundestag.de/btd/19/305/1930505.pdf>.

⁹⁵ 'Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)', accessed 10 June 2024, <https://eur-lex.europa.eu/eli/reg/2008/593/oj>.

additional uncertainty, as the future impacts of contract termination on the regional conditions will be difficult to predict. The unreasonableness of adhering to the contract would not be established if the company cannot demonstrate that it has conducted a reasonable balancing process. It can therefore be assumed that, in practice, companies will have a wide margin of discretion in this regard and that the unreasonableness will be recognized already if the company can prove that it has carried out a comprehensibly documented balancing process.

Affected companies should ensure that their contracts include clauses allowing for the termination or suspension of the business relationship in accordance with legal requirements. This necessitates adapting existing contracts and considering these requirements when drafting new contracts. The European Commission is to adopt guidelines for voluntary model contract clauses within 30 months after the CSDDD comes into force, in consultation with Member States and stakeholders (Art. 12).

4. Extraterritorial Effect

Beyond criticism of the lack of effectiveness of supply chain laws (2.4.), some authors argue that industrialized countries' supply chain due diligence laws represent a form of 'quasi-imperialistic paternalism' towards developing countries.⁹⁶ The primary reasons for this assessment are the unilateral nature of national norms, in contrast to the multilateral approach of international agreements aimed at improving the human rights situation, and especially the extraterritorial effect of the regulations on the states of the Global South.

From a *substantive perspective*, this argument is not persuasive for several reasons: First, the prospects for the success of international agreements and their effective implementation are doubtful. Creating economic incentives for ethical supply chain management seems more promising.⁹⁷ Second, it must be considered that supply chain due diligence laws also have a *consumer protection aspect*, as they aim to protect consumers in the respective markets from purchasing products where human rights violations occur within the supply chain. They also protect *consumer sovereignty* by ensuring transparency regarding the fulfillment of supply chain due diligence obligations, thereby creating incentives aligned with competitive performance;⁹⁸ they also have a focus on competition law. Thus, these laws also serve national economic policy goals by making them compatible with internationally recognized ethical standards. They are part of an *internationalized, socially responsible pursuit of interests through national economic law*.⁹⁹

⁹⁶ Omari Lichuma, '(Laws) Made in the "First World": A TWAIL Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains', 519; Seck, 'Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?'

⁹⁷ Stefan Koos, 'The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies', 114.

⁹⁸ Margarita Kontogeorgou, 'European Parliament (EP) Draft Proposal: Supply Chain Due Diligence Directive.' (2021).

⁹⁹ See Stefan Koos, 'Globalisierung, Extraterritorialität und internationalisierte sozial verantwortete Interessenverfolgung im Wettbewerbsrecht', in *Marktkommunikation zwischen geistigem Eigentum und Verbraucherschutz: Festschrift für Karl-Heinz Fezer zum 70. Geburtstag* (Munich: C.H.Beck, 2016), 271–73; Stefan

From a systematic perspective, it is correct to say that the LkSG has strong extraterritorial effects. These extraterritorial effects will increase even further with the implementation of the CSDDD, as the rules to be integrated into the national law of the EU member states are to be designed as overriding mandatory national norms that apply regardless of the applicable law (3.2.1.). Beyond the issue of supply chain due diligence obligations, an important problem concerning international law in general is extraterritoriality and its justification in the context of international law. In EU law, various examples of extraterritorial effects can be found, such as in the interpretation of the conflict-of-law effects doctrine in antitrust law,¹⁰⁰ in the application of the market location principle in the EU General Data Protection Regulation (Art. 3 [2] GDPR),¹⁰¹ and, again, in the EU Regulation on Artificial Intelligence.¹⁰²

In digital law, the trend towards extraterritorial effects of EU legal acts follows from the ubiquity of digital action spaces, which diminish territoriality. This leads to a reduction in state sovereignty and, in response, a tendency to use economic or political power to enforce national regulatory interests.¹⁰³ *Gastrein* and *Zwitter* criticised the broad extraterritorial effects of the EU digitalisation law, namely the GDPR, as transforming the regulation into “*a battlefield for legal, economic and political conflicts*”. However, at least the extraterritorial application of the GDPR – different from the extraterritorial enforcement jurisdiction abroad - is legitimate from the perspective of International Public Law,¹⁰⁴ as long as a domestic nexus can be found. In the case of the GDPR the involvement of EU citizens would serve as a sufficient domestic nexus, and in the case of the antitrust law, the domestic nexus can be found in the effects on the domestic market.¹⁰⁵

Koos, ‘Global Responsibility and International Mutual Consideration in the Business Law - Theory and Reality’, in Proceedings (6th Conference of the Indonesian Association for Legal Philosophy (AFHI) - ‘Antinomi Hukum - Pluralisme ataukah Integrasi’, Bandung: Epistema Institute, 2016), 21–28; Stefan Koos, ‘The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies’, 114.

¹⁰⁰ Koos, ‘Global Responsibility and International Mutual Consideration in the Business Law - Theory and Reality’, 21–23; Koos, ‘Globalisierung, Extraterritorialität und internationalisierte sozial verantwortete Interessenverfolgung im Wettbewerbsrecht’, 264–71.

¹⁰¹ ‘Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)’, accessed 10 June 2024, <https://eur-lex.europa.eu/eli/reg/2016/679/oj>.

¹⁰² Tim Hickman and Thomas Harper, ‘The EU AI Act’s Extra- Territorial Scope — Part 2’, Data Protection Ireland 17, no. 3 (9 May 2024), <https://www.whitecase.com/insight-our-thinking/eu-ai-acts-extraterritorial-scope-part-2>. An interesting aspect in connection with the extraterritoriality of the AI Regulation in this context is the provision that developers of general-purpose AI models must comply with the requirements of European copyright law when training such models, even if the training does not take place in the EU (Recital 60j AI Regulation). This *loosens at least indirectly the territorial limitation of copyright law to domestic infringements*: the market presence of the GPAI model on the territory of the EU is the criterion for assuming the applicability of domestic copyright law, even if the actual *infringing acts* in connection with the training of the models take place outside the territory of the EU.

¹⁰³ Stefan Koos, ‘Digital Globalization and Law’, *Lex Scientia Law Review* 6, no. 1 (2022): 33–68, <https://doi.org/10.15294/lesrev.v6i1.55092>.

¹⁰⁴ Indriana Pramesti and Arie Afriansyah, ‘Extraterritoriality of Data Protection: GDPR and Its Possible Enforcement in Indonesia’, in Proceedings of the 3rd International Conference on Law and Governance (ICLAVE 2019) (Atlantis Press, 2020), 87, <https://doi.org/10.2991/aebmr.k.200321.012>.

¹⁰⁵ An interesting aspect in connection with the AI Regulation is the provision that developers of general-purpose AI models must comply with the requirements of European copyright law when training such models, even if the training does not take place in the EU (Recital 60j AI Regulation). This *loosens the territorial limitation of copyright law to domestic infringements*: the market presence of the GPAI model on the territory of the EU is the criterion for

The increased extraterritorial effect of national laws is a phenomenon that can hardly be avoided as a result of advancing economic and, above all, *digital globalisation*. Particularly in digitalisation law, which is characterised by ubiquity, it is also an expression of the efforts of national legislators to compensate for the loss of national territorial sovereignty in the interest of protecting their society and their citizens. It means replacing the legal idea of non-interference with a political principle of power as a kind of "self-defense" to protect the local society.¹⁰⁶

With regard to national laws enforcing due diligence standards in international supply chains, the initial situation is different in that it involves not only *domestic protection interests* (consumer protection, protection of competition, privacy) but also an *outward-facing legislative protection direction* (improvement of human rights related living conditions worldwide). Secondly, unlike in digital law, extraterritoriality here is not a reaction to the impacts of state sovereignty loss. Thus, the extraterritorial effect must be justified with other aspects. The extraterritoriality here is externally legitimized because it is based on the enforcement of internationally recognized protection principles.¹⁰⁷ Ignoring substandard living conditions under CSR principles, on the other hand, cannot represent an internationally protected interest of other states. At most, consideration of social, political, or economic conditions may be made on a case-by-case basis, but this would be based purely on pragmatic and legal-political considerations.

Another aspect, also connected with the question about the political impact of the CSDDD, should be mentioned: In reaction to the CSDDD, third countries might adapt their legislation to the directive's standards. By adapting to extraterritorially applied legal acts in areas in which globalisation plays a significant role, costs resulting from international legal disparities that would affect providers in the respective country can be reduced. A second aspect could be that the extraterritorial enforcement of one's own law by states without the corresponding economic or political weight would be far more difficult, and an adaptation to already globally respected norms would be more likely to fulfil the interests of the application of the law. *Bueno et. al.* transfer the expectation of such an effect to the CSDDD and consider it possible that third countries will orientate their CSR legislation to the CSDDD.¹⁰⁸ In this context stands the '*Brussels effect*' described by *Bradford*.¹⁰⁹ In the supply chain due diligence law, the Brussels effect means the adoption of standards beyond Europe's supply chains. Basically, the 'Brussels effect' depends

assuming the applicability of domestic copyright law, even if the actual infringing acts in connection with the training of the models take place outside the territory of the EU.

¹⁰⁶ Koos, 'Digital Globalization and Law', 41.

¹⁰⁷ Stefan Koos, 'The German Supply Chain Due Diligence Act 2021 and Its Impact on Globally Operating German Companies', 114.

¹⁰⁸ Bueno et al, 'The EU Directive on Corporate Sustainability Due Diligence (CSDDD): The Final Political Compromise', 6.

¹⁰⁹ Anu Bradford, 'The Brussels Effect', *Northwestern University Law Review* 107, no. 1–67 (2012), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1081&context=nulr&httpsredir=1&referer=>; Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press, 2020), <https://doi.org/10.1093/oso/9780190088583.001.0001>; Michal Czerniawski, 'ON DIGITAL SOVEREIGNTY, EXTRATERRITORIALITY AND EU DIGITAL LAWS – GDPR CASE STUDY', *The Digital Constitutionalist* (blog), 2024, <https://digi-con.org/on-digital-sovereignty-extraterritoriality-and-eu-digital-laws-gdpr-case-study/>.

largely on the economic importance of the European market for companies.¹¹⁰ However, the CSDDD is also applicable to companies even if the products are not directly sold to the European market. This may still lead to a remarkable influence on human rights and environmental conditions, even in economic fields with lower economic demand relevance of the EU market.¹¹¹

5. Conclusion

The CSDDD has the potential to generate effects by introducing binding due diligence obligations and stricter reporting requirements. The explicit introduction of an independent civil liability provision by the CSDDD is particularly significant. This follows the trend of stronger implementation of private enforcement, which is already evident in other areas of EU economic legislation. From a conflict of laws perspective, the CSDDD represents a substantial advancement by qualifying its norms as overriding mandatory provisions. This enhances the potential for effective private law enforcement.

A challenge remains in the practical implementation and enforcement of due diligence obligations. Companies must establish and continuously adapt appropriate risk management systems to meet legal requirements. Balancing stringent regulation with practical feasibility is difficult. The precise determination of organisational responsibility plays a crucial role here. Companies must not only take individual measures but also identify and rectify systemic flaws in their management systems and internal processes. There is a certain risk that the actual effectiveness of due diligence obligations will fall short of demonstrating formalized compliance procedures. This is somewhat common to laws aimed at capturing responsibility within complex organisational processes. The role of providers for certification solutions will most likely grow in the future.

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¹¹⁰ Bradford, 'The Brussels Effect', 11–12; Bastos Lima and Schilling-Vacaflor, 'Supply Chain Divergence Challenges a "Brussels Effect" from Europe's Human Rights and Environmental Due Diligence Laws', 3.

¹¹¹ Bastos Lima and Schilling-Vacaflor, 'Supply Chain Divergence Challenges a "Brussels Effect" from Europe's Human Rights and Environmental Due Diligence Laws', 11–12.

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