A Comparative Analysis between the Corporate Sustainability Due Diligence Directive and the French and German Legislation

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This blog post offers an initial comparative glimpse of the most important changes that the Corporate Sustainability Due Diligence Directive (CSDDD) will bring for the respective mandatory human rights and environmental (HREDD) legislation in Germany and France. While both the French Duty of Vigilance Law (Loi de vigilance, LdV) and the German Supply Chain Act (Lieferkettensorgfaltspflichtengesetz, LkSG) already require effective HREDD, the CSDDD goes a long way in strengthening the requirements and bringing them more in line with international standards. We focus on important clarifications and changes vis-à-vis the requirements set up by LdV and LkSG, especially concerning the reach of HREDD, the adequacy criteria which need to be followed when implementing measure and the role of stakeholders. We also focus on the requirements set up for contracting, purchasing and remediation.

Alignment with international standards and reach of due diligence

The CSDDD sets forth a comprehensive framework that mandates companies to exercise due diligence for human rights and environmental impacts.

The EU legislator clearly intends to align the CSDDD with the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines) as several recitals of the directive refer to them as guidance (20, 37, 51, 59) or more generally (5, 6, 14, 62). Companies that fall within the scope of the directive are therefore called upon to interpret and implement the CSDDD in light of the objectives of the UNGPs and the OECD Guidelines.

However, at least two important instances in which the CSDDD – like LkSG and LdV – explicitly departs from these authoritative international standards: first, the scope only covers larger corporations. Second, the due diligence obligations mainly apply to the companies' own activities and their upstream suppliers and largely exclude the downstream side. While distribution, transport and storage of the product are covered, the central phases of use and disposal of products are excluded (Art. 3(1)(g)). (Article 3(1)(g)). Nonetheless, the reach of due diligence is wider than both the LdV and the LkSG. The LdV provides that the vigilance measures should cover the company's own activities, but also those of its directly or indirectly controlled subsidiaries, as well as those of its subcontractors or suppliers with whom the company has 'established business relationships' – defined as stable, regular commercial relationships with a certain volume of business and an expectation of duration – within its supply chain. The LkSG is narrower insofar as it only covers tier 2-n suppliers in case of substantiated concern (Sec. 9 (3) and 5 (4)). The CSDDD's wider approach will enable businesses to focus their HREDD better: instead of widescale superficial tier 1-supplier based compliance, they will be able to focus on meaningful HREDD in the tiers of their supply chain where the severest impacts occur.

Adequate due diligence

Both the LdV (Art. L. 225-102-4 of the French Commercial Code – "FCC") and the LkSG (Sec. 4 (2)) require effective human rights and environmental due diligence (LdV: "vigilance"). In addition, the LkSG additionally sets forth criteria for appropriate action.

The CSDDD goes further than the two national legal frameworks and provides for an elaborate system of criteria to determine appropriateness in relation to the different due diligence obligations.

According to the CSDDD, appropriateness does not only include an effectiveness criterion ('effectively addressing adverse impacts') but also include a proportionality element as measures should be commensurate to the severity and likelihood of the adverse impact as well as the measures 'reasonably available to the company' (Art. 3 (1)(o)). Similarly, the LkSG determines appropriateness according to the nature and extent of a company's activities, severity and likelihood of impacts, as well as the company's ability to influence the entity directly responsible, and its contribution to the impact (Sec. 3(2)). The LdV, on the other hand, does not refer to appropriateness but uses the term 'reasonable' in relation to the vigilance measures that must be adopted to identify risks and prevent severe harm to human rights and fundamental freedoms, health and safety and the environment (Art. L. 225-102-4.-I. FCC). However, it does not define nor give precise criteria to define the term "reasonable" and remains silent in relation to the criteria to be used for prioritizing risks.

Under the CSDDD, the ability of the company to influence the business partner that caused or jointly caused the impact and the company's implication in the adverse impacts are only relevant to determine the appropriateness of the measures taken in relation to the measures to prevent or mitigate the potential adverse impacts, as well as in relation to the measures to bring actual adverse impacts to an end (Articles 10(1), 11(1)). Therefore, influence cannot be used to deprioritize action altogether, but only to decide on what actions to take. Measures to neutralise the adverse impact or minimize its extent must be proportionate to severity and the company's implication (Article 11(3)(a)).

Cause, contribution and linkage are covered by CSDDD

When interpreting the due diligence obligations under Art. 7, Recital 45 provides essential guidance: companies should take appropriate measures to prevent or mitigate the adverse impacts that they caused or to which they contributed (CSDDD: "cause jointly") or are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts (CSDDD: "caused only by (...) business partner"). It specifies that contribution includes the company's acts or omissions, including where the company substantially facilitates or incentivises a business partner to cause an adverse impact, that is, excluding minor or trivial contributions. Companies can be liable for the adverse impacts that they caused or to which they contributed. This means that where companies contribute to adverse impacts – for example, by engaging in irresponsible purchasing practices, design, distribution (Recital 46) – which is caused by a business partner in their value chain, they will be required to participate in the remediation. In line with international standards (UNGPs 22), companies are not expected to provide remediation when they did not cause nor contribute to an adverse impact but are simply 'directly linked' to it (Article 12). Nonetheless, they are expected to take measures when they are merely 'directly linked' to an adverse impact, and notably use their influence to prevent or mitigate the adverse impact caused by their business partners, or to increase their influence to do so (Art. 10(1)(a) and Art. 11(1)(a) and Recital 45.

The LdV does not make any references to the cause, contribute, directly linked involvement framework, though it could be argued that it is indirectly included in the references made in the preliminary work of the LdV which refers to the UNGPs. As for the LkSG, while the notion of causation and contribution are interpreted similarly as they are in the CSDDD (see BAFA, p. 12), there is not a lot of clarity as to whether companies are expected to take any measures in relation to adverse impacts that they are only linked to.

Meaningful stakeholder engagement

Importantly, the CSDDD sets a new standard on "meaningful stakeholder engagement" that the LdV and LkSG laws will need to adjust to, as they currently lack the extensive and explicit mandates for effective stakeholder consultations present in the CSDDD (Arti-

cle 13). The LdV encourages stakeholder consultation for the development of the vigilance plan and requires collaboration with relevant trade unions for the setting up of an alert mechanism. The LkSG references the need to consider the interests of potentially affected persons in risk management (Section 4(4)). However, both lack detailed provisions for effective engagement which in turn raises concerns around the risk of treating stakeholder engagement as a tick-boxing exercise. The CSDDD addresses these shortcomings by defining stakeholders and integrating stakeholder engagement throughout the entire due diligence process. Moreover, while the CSDDD does not explicitly define "meaningful", it provides safeguards to ensure that stakeholder consultations are substantial and secure, addressing obstacles to participation and protecting of affected stakeholders from retaliation, including vulnerable groups (Recital 65).

Responsible contracting and purchasing

The role of purchasing practices and contracting is not explicitly addressed in the LdV. In turn, both the CSDDD and the LkSG require companies to preventively use contractual assurances on human rights and environmental requirements vis-a-vis their suppliers (Art. 10 No. 2 (b)). As recital 46 of the CSDDD and guidance by BAFA & Helpdesk (p. 2 and 11) point out, contracts should not be used to simply pass on HREDD responsibilities to suppliers but reflect a shared responsibility of buyers and suppliers. This is in line with the requirements of both the German and the French law on effectiveness (see here and here). Indeed, where contracts only impose responsibilities onto the suppliers, asking them to guarantee that their operations and supply chains are free of adverse impacts, with sanctions/termination in case of breach, they disincentivize suppliers to talk honestly about issues – for example in questionnaires or supplier talks – and risk creating perverse incentives to conceal issues. The legal fiction of a 'risk-free supply chain' that is created by such risk-shifting contracts rarely reflect the social and economic reality in which supply chains almost always contain risks for human rights. For example, the gender pay gap (compare CSDDD Annex Part. I, No. 16 a)) is still wide open in many countries, including European ones, forced labour risks have been identified in logistics, as well as in the agriculture or the construction sector in Europe and beyond, union avoidance is a common practice in the US and elsewhere and reports of child labour in the US and around the world are frequent, etc.

At the same time, as both the CSDDD and the LkSG recognize (Art. 10 (2) (d)) /Sec. 6 (3) No. 2), it is often not in the power of the supplier alone to address human rights issues: purchasing practices such as the price, the delivery times, the incentives set by the buyer via selection criteria, all influence the capacity of the supplier to respect human rights (see examples here and here) and can actually contribute to the adverse impacts. In order to address these issues, the LkSG & CSDDD & Guidance by BAFA & Helpdesk (p. 24 f.) call for a shared responsibility approach and responsible purchasing practices. The European Commission will develop model contract clauses based on these requirements to guide companies (Art. 18). The EMC working group, formed by BHR practitioners and academics from several European countries, is developing a publicly available proposal for this. Guidance on how to design HREDD-aligned contracts have been developed by the Responsible Contracting Project's open access toolkit and guidance on how to implement responsible purchasing practices is offered, for example by the CFRPP. Companies will need to analyze the risks associated with their purchasing practices to identify where changing them is "necessary" (Art. 10 (2) (d)). To do so, they can first map abstract risks associated with their spend categories, for example, by using the data on product risk here to focus on those with the highest risks. They can then assess concrete risks in their high risk spend categories by using the assessment tool provided by the CFRPP (here). Based on these assessments, pricing, incentives and other factors can be changed risk-based.

The CSDDD also foresees a role for (responsible) contracts and the need to adapt purchasing practices in relation to bringing actual impacts to and end and remediation (Art. 11).

Responsible contracts and purchasing areis especially relevant when working with small and medium-sized (SME) suppliers. While according to the LkSG the criteria of appropriateness and effectiveness are understood to prohibit risk-shifting and protect SMEs, the CSDDD explicitly provides that contractual assurances from SMEs must be fair, responsible and non-discriminatory (Art. 10 (5) and 11 (6)).

Remediation

Under Art. 12, as part of their internal – primary – HREDD obligations companies are required to remediate and compensate victims of human rights violations that appropriate HREDD would have avoided. This accompanies secondary civil liability under Art. 29 and ensures that victims have a pathway to remediation even without going to court. This goes further than both LdV and LkSG: While Art. 2 LdV foresees civil liability for harms that HREDD would have avoided, it does not require remediation as a part of the human rights or environmental due diligence obligations of companies. Under the LkSG, companies have an obligation to provide compensation as part of their due diligence process (Sec. 7) and as part of civil liability (Sec. 3 (3) and Sec. 11). However, both are unclear. Recital 46 clarifies that to avoid jointly causing (=contributing to) impacts, purchasing, design and distribution practices have to be changed "as necessary". Irresponsible purchasing can therefore lead to an obligation to repair victims. It is important to note that remediation is only owned proportionate to the company's implication in the adverse impact (Recital 58). An impact correctly deprioritized (under Art. 9) does not trigger an obligation to compensate (under Art. 12), because Art. 11 (3) (h) clarifies that Art. 12 is part of the remediation obligation which can be deprioritised – Art. 10 (1) only requires impacts which were or should have been identified under Art. 8 and prioritized under Art. 9 to be addressed. This also means that companies should take their obligation to conduct risk analysis seriously. For example, not analyzing their own irresponsible purchasing practices at all is not in line with deprioritizing acc. to Art. 9. Without a complete and thorough risk analysis, successful compensations claims are therefore likely.

Conclusion

The CSDDD will reshape the national legal frameworks in France and Germany, bringing them into closer alignment with the UNGPs and the OECD Guidelines. Important clarifications are made when it comes to the reach of HREDD, the role of stakeholders, contracting, purchasing, and remediation. While these will be familiar to many businesses in both countries that already now take human rights seriously, other businesses that chose minimal, compliance-orientated approaches will have to adapt and improve their practices. This might require some adjustments at first, but it will certainly help business realise the full potential of their HREDD.

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