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Prof. Dr. Jessica Schmidt, LL.M.

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Abstract

Prof. Dr. Jessica Schmidt, LL.M.*

The EU Supply Chain Directive (CSDDD) – landmark or bureaucratic hydra?**

The EU Supply Chain Directive (Corporate Sustainability Due Diligence Directive – CSDDD) creates general requirements for due diligence obligations of companies in the supply chain as well as for transition plans to mitigate the consequences of climate change. This article provides an overview of the essential contents and the significance of the CSDDD for European and especially German companies.

I. The way to the CSDDD

The creation of the CSDDD can be described as a "drama in five acts": 1

Act 1: Preparatory work 2

In two consultations in 2020/21, the Commission for the first time raised the question of whether general EU requirements for supply chain due diligence and sustainable corporate governance should be created.[1] Almost at the same time, two studies were published.[2] Both the format of the consultation on sustainable corporate governance, which dealt in particular with directors' duties, and the EY study on this topic in particular, rightly met with fierce criticism in expert circles.[3] A little later, the European Parliament (EP) called on the Commission in two resolutions to present proposals for directives on due diligence obligations in the supply chain and sustainable corporate governance.[4]

Act 2: Commission draft at the third attempt 3

* Prof. Dr. Jessica Schmidt, LL.M. holds the chair of civil law, German, European and international company and capital markets law at the University of Bayreuth. She is a member of the Informal Expert Group on Company Law and Corporate Governance (ICLEG). The article reflects only her own opinion. Contact: jessica.schmidt@uni-bayreuth.de.

** This paper is a slightly updated and amended version of a German paper entitled „Die EU-Lieferketten-RL (CSDDD) – Meilenstein oder bürokratische Hydra?" published in the journal „Neue Zeitschrift für Gesellschaftsrecht" (NZG 2024, 859) which is published by Verlag C.H. Beck oHG. It has been reprinted with their kind permission.

[1] Consultation on the renewed sustainable finance strategy (https://finance.ec.europa.eu/regulation-and-supervision/consultations/2020-sustainable-finance-strategy_en); Consultation on sustainable corporate governance (https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en). See on this J. Schmidt BB 2020, 1794 (1798 f.); J. Schmidt BB 2021, 1923 (1929).

[2] Smit et al., Study on due diligence requirements through the supply chain, 2020, DOI 10.2838/39830; EY, Study on directors' duties and sustainable corporate governance, 2020 (https://op.europa.eu/s/zF7q).

[3] See on this J. Schmidt BB 2021, 1923 (1929) m.w.N.

[4] EP resolution of 17 December 2020 on sustainable corporate governance, P9_TA(2020)0372; EP resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, P9_TA(2021)0073.

The Commission complied with this, but initially received a "red card" from the Regulatory Scrutiny Board twice before finally receiving the "green light" in February 2022 at the third attempt to present its (substantially revised) proposal[5].[6]

4 *Act 3: Positioning of the EP and Council and trilogue*

The entire legislative process was marked by considerable controversy, great media attention and constant lobbying activity from all political camps. The Council[7] already positioned itself at the end of 2022, the EP[8] in the summer of 2023.[9] In the trilogue on 14 December 2023, a political agreement was euphorically announced after difficult negotiations until the early hours of the morning.[10] However, in fact, some neuralgic points were still open at that time.

5 *Act 4: Showdown in Coreper*

At the beginning of 2024, the legislative process became a real thriller. After the German economy went up in arms and one of the parties of the German ruling coalition, the FDP, blocked the project, Germany had to abstain in the Council's Committee of Permanent Representatives (Coreper). Other Member States now also had concerns. Under great media attention, the vote in Coreper was postponed several times and there were rumours of extensive "horse-trading"; only after the text had been significantly revised, the necessary majority was finally achieved on 15 March 2024.[11]

6 *Act 5: Adoption*

The CSDDD was then officially adopted by the EP on 24 April 2024[12] and by the Council on 24 May 2024[13] and published in the Official Journal on 5 July 2024[14]. It will thus enter into force on 25 July 2024 and will then have to be implemented gradually by 2029 (→ II.3).

II. Scope

1. Priority of sector-specific special rules

7 As a general horizontal framework for due diligence obligations in the activity chain, the CSDDD is expressly subsidiary to sector-specific special regulations, in particular the EU

[5] COM(2022) 71.
[6] See on this *J. Schmidt* BB 2022, 1860, 1861.
[7] ST 15024/1/22 REV 1.
[8] P9_TA(2023)0209.
[9] For more details, see *J. Schmidt* BB 2023, 1859, 1860 ff.
[10] Council Press Release 1026/23; JURI press release Ref.: 20231205IPR15689. Text: ST 5893/1/24 REV 1.
[11] Adopted version: ST 7327/1/24 REV 1.
[12] P9_TA(2024)0329.
[13] PE-CONS 9/24.
[14] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760, 5.7.2024.

Conflict Minerals Regulation[15], the EUDR[16] and the EU Battery Regulation[17] (cf. Art. 1(3) CSDDD).[18]

2. Relevant criteria

In the context of the efforts to achieve a majority in Coreper, the scope of the CSDDD has been significantly reduced compared to the Commission's draft. However, the relevant criteria continue to be the legal form of the company as well as certain thresholds. 8

a) Legal form

Firstly, the CSDDD applies to legal persons constituted as one of the legal forms listed in Annex I of the EU Accounting Directive[19], i.e. the national types of limited liability companies listed there (Art. 3(1)(a)(i) CSDDD). Secondly, according to the wording of Art. 3(1)(a)(i) CSDDD, the CSDDD also applies to legal persons constituted as one of the legal forms listed in Annex II of the EU Accounting Directive. Taken literally, this would mean all national types of (commercial) partnerships listed in Annex II of the Accounting Directive would be covered by the CSDDD (at least if they are legal persons pursuant to the relevant national law). However, the Commission proposal[20] and the Council's general approach[21] had specified unequivocally that – in line with the scope of the EU Accounting Directive (cf. Art. 1(1)(b) EU Accounting Directive) – legal persons constituted as one of the legal forms listed in Annex II EU Accounting Directive are only within the scope of the CSDDD if they are composed entirely of undertakings organised as limited liability companies listed in Annex I EU Accounting Directive. The EP mandate for the trilogue negotiations[22] then essentially provided for the same wording that can now be found in Art. 3(1)(a)(i)-(ii) CSDDD; this was then included in the trilogue compromise[23] and ultimately in the final version of the CSDDD. Yet there are good arguments that the co-legislators only intended to simplify the language and not even considered that – upon a literal reading – "pure" partnerships (and not just "limited liability companies & Co") would be included in the scope of the CSDDD. From the very beginning, the intention was to align the scope of the CSDDD with that of the EU Accounting Directive. This intended alignment was even reinforced in the course of the legislative process – especially through the 9

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[15] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ 2017 L 130/1.

[16] Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ 2023 L 150/206 (EU Deforestation Regulation – EUDR).

[17] Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC, OJ 2023, L 191/1.

[18] Cf recital 17 CSDDD.

[19] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ 2013, L 182/19; last amended by Directive (EU) 2024/1306, OJ L, 2024/1306, 8.5.2024.

[20] COM(2022) 71, Art. 3(a)(iii).

[21] ST 15024/1/22 REV 1, Art. 3(a)(iii).

[22] ST 15012/23 ADD 1, Art. 3 lit. a Ziff. i-ii.

[23] ST 5892/24, Art. 3(1)(a)(i)-(ii).

modifications in Art. 22 CSDDD (→ para. 102 ff.) – and manifests itself in the various references to the EU Accounting Directive both in the recitals[24] and in the text[25] of the CSDDD itself. Hence, Article 3(1)(a)(i) CSDDD should be interpreted as meaning that the CSDDD covers all legal entities that are also covered by the EU Accounting Directive.[26] The legal forms of (commercial) partnerships listed in Annex II EU Accounting Directive are therefore only covered if all of the direct or indirect members of the undertaking having otherwise unlimited liability in fact have limited liability, i.e. only if they are a "limited liability company &. Co."[27]

In Germany, for example, the CSDDD thus covers not only AG, SE, KGaA and GmbH, but also all oHG and KG, in which all direct or indirect members actually have only limited liability.

10 In addition, the scope of the CSDDD encompasses companies from third countries with a comparable legal form (Art. 3(1)(a)(ii) CSDDD). The rationale is to create a level playing field where, on principle, all companies operating in the EU are covered, even if they are organised under the law of a third country.[28] Such an extraterritorial scope is certainly a controversial issue, especially against the background of the political sensitivity of the topic.[29]

11 Furthermore, the CSDDD applies to regulated financial undertakings (including credit institutions, investment firms, insurance companies, AIFMs, UCITS management companies) – regardless of their legal form (Art. 3(1)(a)(iii) CSDDD). However, AIFs and UCITS are expressly excluded (Art. 2(8) CSDDD).

b) Thresholds

12 According to the Commission's draft, the threshold for EU companies was > 500 employees and a net worldwide turnover of > EUR 150 million.[30] Now, according to Art. 2(1)(a) CSDDD, only EU companies with > 1,000 employees[31] and a net worldwide turnover > EUR 450 million are covered. The special regime for high-risk sectors provided for in the Commission's draft[32] (which would the trilogue compromise would even have extended[33]) has been deleted. However, to prevent circumvention[34], the CSDDD now also covers the ultimate parent companies of groups that have reached the thresholds (Art. 2(1)(b) CSDDD) and certain cases of franchise agreements (Art. 2(1)(c) CSDDD).

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[24] Recitals 30, 62, 63, 73, 95 CSDDD.
[25] Art. 3(1)(a)(i)-(ii), (e), (i), (m)(i), (r); Art. 16; Art. 22(2); Art. 36(2)(b) CSDDD.
[26] See also *Sinnig/Zetzsche,* The EU's Corporate Sustainability Due Diligence Directive: From disclosure to prevention of adverse sustainability impacts in supply chains, 2024, https://ssrn.com/abstract=4865488, p. 9.
[27] See also *Sinnig/Zetzsche,* The EU's Corporate Sustainability Due Diligence Directive: From disclosure to prevention of adverse sustainability impacts in supply chains, 2024, https://ssrn.com/abstract=4865488, p. 9.
[28] *Hübner/Habrich/Weller* NZG 2022, 644, 646; *J. Schmidt* BB 2022, 1859, 1860.
[29] *J. Schmidt* BB 2022, 1859, 1860; näher *Enriques/Gatti* OBLB of 21 April 2022; *Jung* GPR 2022, 109, 119; *Pietrancosta* ECGI Law WP 639/2022, para. 28.
[30] COM(2022) 71, Art. 2 CSDDD Commission draft.
[31] The calculation of the number of employees is specified in Art. 2(4) CSDDD.
[32] According to Art. 2(1)(b) CSDDD Commission draft, EU companies from certain high-risk sectors (textiles, agriculture, minerals) would have been covered if they had > 250 employees and a worldwide net turnover > EUR 40 million, provided that at least 50 % was generated in one of these high-risk sectors.
[33] According to Art. 2(1)(bb)(iiia) CSDDD trilogue draft (ST 5893/1/24 REV-1), the construction sector would also have been considered to be a high-risk sector.
[34] Cf. ST 15012/23, p. 3.

For third-country companies, the threshold is now a net turnover > EUR 450 million in the EU (Art. 2(2)(a) CSDDD). To prevent circumvention, the CSDDD also covers the ultimate parent companies of groups that reach this threshold (Art. 2(2)(b) CSDDD) and certain cases of franchise agreements (Art. 2(2)(c) CSDDD).

The conditions must have been met in the last two consecutive financial years (Art. 2(5) CSDDD). 14

	Article	Thresholds
EU companies	Art. 2(1)(a)	> 1000 employees and net worldwide turnover > EUR 450 million
	Art. 2(1)(b)	ultimate parent company of a group with > 1000 employees and net worldwide turnover > EUR 450 million
	Art. 2(1)(c)	certain cases of franchise agreements
Third-country companies	Art. 2(2)(a)	net turnover > EUR 450 million in the EU
	Art. 2(2)(b)	the ultimate parent company of a group with net turnover > EUR 450 million in the EU
	Art. 2(2)(c)	certain cases of franchise agreements

c) Special scheme for holding companies

Art. 2(3) CSDDD lays down a special provision for cases where the ultimate parent company is a pure holding company: It can then apply to the competent supervisory authority for an exemption if it designates an EU subsidiary that fulfils the obligations set out in Art. 6-16, 22 CSDDD on its behalf.[35] 15

d) Significance from a German perspective and comparison with the LkSG

The criteria determining the scope CSDDD differ significantly from those of the German LkSG[36], so that the latter must be adapted in this respect. Therefore, more German companies are expected to be affected overall. Although the LkSG has so far applied regardless of the legal form of the legal entity, it requires German companies to have at least 1,000 employees in Germany (cf. § 1 LkSG); by contrast, for the CSDDD 1,000 employees worldwide suffice, provided that a net worldwide turnover > EUR 450 million is achieved. 16

3. Step-by-step implementation

In order to reach a consensus in Coreper, a staged approach was introduced[37]: from 26 July 2027, the CSDDD will apply to EU companies with > 5000 employees and a net worldwide net turnover of > EUR 1,500 million as well as to third-country companies with a net turnover of > EUR 1,500 million in the EU; from 26 July 2028, the CSDDD will apply to EU companies with > 3,000 employees and > € 900 million net worldwide turnover as well as to third-country companies with a net turnover of > EUR 900 million in the EU; from 26 July 2029, it will apply to the remaining companies covered (cf. Art. 37 CSDDD). 17

[35] This was also only added during the negotiations in Coreper, cf ST 7327/1/24 REV 1, Art. 2(2a) CSDDD draft.
[36] Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz – LkSG) v. 16.7.2021, BGBl. I, 2959.
[37] Vgl. ST 7327/1/24 REV 1, S. 3 f.

4. Cascade effect

18 However, *de facto* the CSDDD affects many more companies than those directly covered by its scope. The CSDDD expressly stipulates that undertakings directly covered by the national legislation implementing the CSDDD must seek contractual assurances from their business partners in order to ensure compliance with the CSDDD requirements (→ IV.3.f)cc). At any rate, the companies covered will have to request extensive information from their business partners. As a result of this cascade effect, almost all companies in the EU will be affected by the CSDDD, as well as many third-country companies.[38] The European legislator has recognized this and has included special provisions to support SMEs in the CSDDD; however, it seems doubtful whether these will be sufficient (→ IV.3.f)cc), IV.4).

III. Level of harmonisation

19 The CSDDD mostly only establishes minimum standards; however, the requirements for the identification and assessment of adverse impacts in Art. 8(1)-(2) CSDDD and on preventing potential and ending actual adverse impacts in Art. 10(1), 11(1) CSDDD are fully harmonizing (Art. 4 CSDDD).

IV. Due diligence obligations in the chain of activities

20 The main object of the CSDDD is to establish due diligence obligations for the companies covered regarding human rights adverse impacts and environmental adverse impacts that arise with respect to their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chain of activities.

1. Protected interests: human rights and environment

21 The meaning of "adverse human rights impacts" and "adverse environmental impact" is specified by reference to a whole series of different international agreements listed in the Annex (cf. Art. 3(1)(b)-(c) CSDDD). This is certainly much more precise than if companies were simply generally required to protect "human rights" and "the environment". However, such international agreements are very different from "normal" legal provisions addressed to citizens or companies, because their genuine function is to regulate the relationship between states, not impose specific legal obligations on citizens and companies.[39]

22 Moreover, the interests protected by the CSDDD go way beyond those protected by the LkSG;[40] the CSDDD also covers, for example, the prohibition of torture, the right to liberty and

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[38] See also Brock GmbHR 2022, R132 (R134); Graf von Westphalen ZIP 2024, R6; Kalss GesRZ 2022, 165 (166); Nordic and Baltic Company Law Scholars N&ECL 22-01, 3.4; Sanjath ÖZW 2023, 163 (170, 175); Schäfer/Schütze BB 2024, 1091 (1092); Schall (2024) 21 ECL n° 3, 1; Stöbener de Mora/Noll, EuZW 2023, 14 (24); Ventura EBLR 2023, 239 (253).

[39] See *Bettermann/Hoes* WM 2022, 697, 699; *ECLE* ECGI-Blog 2 August 2022; *Nordic and Baltic Company Law Scholars* N&ECL 22-01, 3.3; *Lutz-Bachmann/Vorbeck/Wengenroth* BB 2022, 835, 839; *Sanjath* ÖZW 2023, 163, 176; *J. Schmidt* BB 2022, 1859, 1861; *Spindler* ZIP 2022, 765, 769; *Stöbener de Mora/Noll* EuZW 2023, 14, 16 f. See also *Le club des juristes, commission devoir de vigilance*, Devoir de vigilance, quelles perspectives européennes?, 2023, p. 30.

[40] Cf. also Schäfer/Schütze BB 2024, 1091 (1095).

security and the prohibition of interference with freedom of thought, conscience and religion within the meaning of the ICCPR[41] (see Annex Part I 1 CSDDD).

2. Chain of activities

Upon the initiative of the Council[42], the term "value chain" used in the Commission's draft has been replaced by the neutral term "chain of activity" and its design has been significantly changed compared to the Commission's draft. According to the definition in Art. 3(1)(g) CSDDD, the chain of activities extends both upstream and downstream. 23

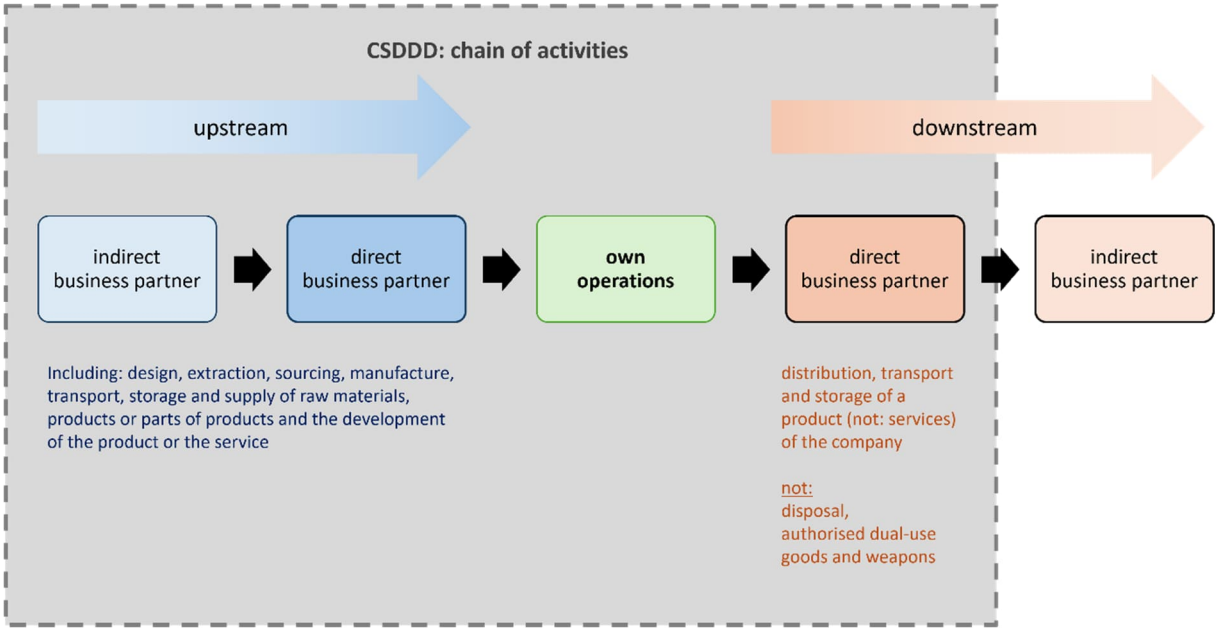
On the one hand, it covers the activities of all upstream business partners of a company related to the production of goods or the provision of services by that company (Art. 3(1)(g)(i) CSDDD). 24

Downstream, on the other hand, it only covers the activities of those downstream business partners related to the distribution, transport and storage of a product if the company carries out those activities for the company or on behalf of the company (Art. 3(1)(g)(ii) CSDDD). It does not cover the disposal of the product (cf. recital 25 sentence 2 CSDDD), activities of the downstream business partners related to the company's services (cf. recital 26 sentence 1 CSDDD) and cases where an export licence for dual-use goods, weapons, ammunition or war material has been obtained (Art. 3(1)(g)(ii) CSDDD). 25

Special rules apply to the – politically highly sensitive – area of regulated financial undertakings. After controversial discussion, it was finally agreed that only the upstream part of the chain of activities of such regulated financial undertakings is covered (cf. recital 26 sentences 2-3 CSDDD). *De facto*, regulated financial companies are thus largely outside the scope of the CSDDD, because their relevant customers operate downstream.[43] 26

The CSDDD's chain of activities thus differs significantly from the supply chain within the meaning of § 2(5) LkSG. 27

[41] International Covenant on Civil and Political Rights of 19 December 1966, BGBl. 1973 II 1533.
[42] Cf. ST 15024/1/22 REV 1, p. 6.
[43] *J. Schmidt* EuZW 2024, 291.



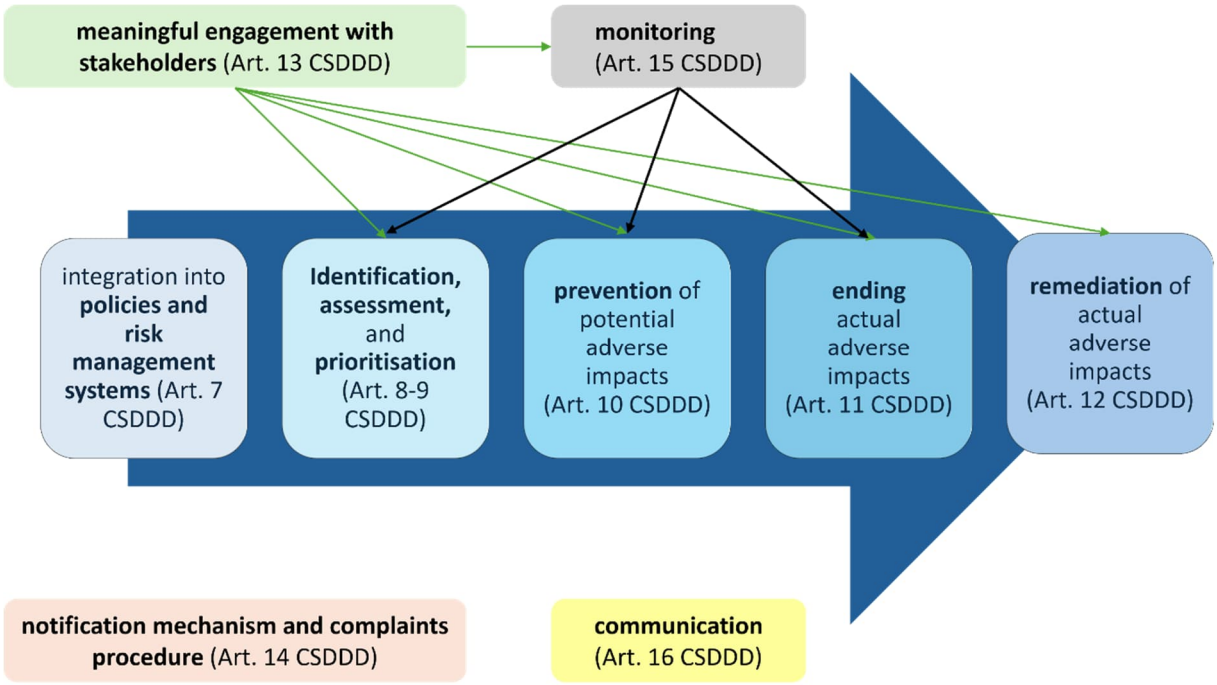
3. Due diligence obligations

a) Overview

28 With regard to the individual due diligence obligations of companies in the areas of human rights and the environment, the final version of the CSDDD essentially adheres to the model of the Commission's draft, which in turn is based on the UN Guiding Principles on Business and Human Rights (UNGP)[44] . However, to make the requirements more practicable for companies and to adapt them to the international framework[45], a risk-based approach was adopted (cf. Art. 5(1), 8(2), 9 CSDDD). In addition, a "group clause" (Art. 6 CSDDD, → IV.3.c)), a duty to carry out meaningful engagement with stakeholders (Art. 13 CSDDD, → IV.3.h)) and rules on the protection of trade secrets in the context of the exchange of information (→ IV.3.b)) were added.

29 The following illustration provides a (simplified) overview of the due diligence obligations listed exhaustively in Art. 5(1) CSDDD:

[44] HR/PUB/11/04.
[45] See on this ST 15024/1/22 REV 1, p. 6.



In this respect, Art. 7-12 CSDDD can be characterized as primary due diligence obligations that are supported by the secondary due diligence obligations pursuant to Art. 13-16 CSDDD. 30

The core due diligence obligations under Art. 8, 10 and 11 CSDDD as well as the duty to carry out meaningful engagement with stakeholders under Art. 13 CSDDD were deliberately not designed as obligations of result, but only as obligations of means[46]. Fortunately, the European legislator has recognized that designing these obligations as an obligation of results could, in certain cases, demand something impossible from companies (e.g. if a certain behaviour of the company itself or its business partners is mandated by government regulations in a country).[47] 31

The undertakings are therefore not obliged to achieve a specific result in this respect, but only to take "appropriate measures". According to Art. 3(I)(o) CSDDD, these are measures that are capable of achieving the objectives of due diligence by effectively addressing adverse impacts in a manner commensurate to the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including the nature and extent of the adverse impact and relevant risk factors. This definition, which employs numerous vague legal concepts, leaves courts *ex post* considerable room for interpretation and thus does not necessarily provide legal certainty and clarity.[48] In addition, Art. 8, 10, 11 and 13 CSDDD lay down extremely high, extensive and detailed requirements. Although they may only be designed as "obligations of means", they are therefore at least very close to obligations of results and will thus pose considerable challenges for companies – especially with regard to the many vague legal concepts. 32

[46] Cf. recital 19 sentence 4 CSDDD.
[47] See also recital 19 sentences 2-3 CSDDD.
[48] See also *Jung* GPR 2022, 109, 118; *Roessingh/Horemann* OBLB 1 July 2022.

b) Information sharing and protection of trade secrets

33 In order to effectively fulfil the due diligence obligations, Art. 5(2) CSDDD explicitly allows companies to share resources and information for this purpose both within the respective group of companies and with other legal entities. The tension that inevitably arises from this with regard to the legitimate interest in protecting the business interests of the companies involved and, if necessary, also the security interests of a state is addressed by Art. 5(3) CSDDD, which was amended on the initiative of the Council[49]. According to Art. 5(3)1 CSDDD, trade secrets within the meaning of Art. 2 point 1 Trade Secrets Directive[50] do not have to be disclosed. However, this does not apply to the identity of the direct and indirect business partners or essential information needed to identify actual or potential adverse impacts; in this respect, there is only the possibility of protection through the mechanisms established in the Trade Secrets Directive (Art. 5(3)1-2 CSDDD). At any rate, business partners shall never be obliged to disclose information if the disclosure would cause a risk to the essential interests of a state's security (Art. 5(3)3 CSDDD).

c) Group clause (Art. 6 CSDDD)

34 After the Commission's draft had been widely criticised – and rightly so – for ignoring group issues[51], a special "group clause" was enshrined in Art. 6(1) CSDDD. Provided that both the parent company and the subsidiary fall under the scope of the CSDDD, Art. 6(1) CSDDD allows the parent company to fulfil the due diligence obligations[52] on behalf of its subsidiary, if this ensures effective compliance (Art. 6(1) CSDDD). However, Art. 6(2) CSDDD makes this subject to five cumulative conditions: (a) exchange of information, (b) compliance with the parent's strategy by the subsidiary, (c) integration in the subsidiary's policies and risk management systems, (d) where necessary, the subsidiary continues to take appropriate measures pursuant to Art. 10-13 CSDDD; (e) where relevant, the subsidiary seeks contractual assurances and suspends/terminates business relationships. In addition, Article 6(1)2 of the CSDDD explicitly states that the subsidiary nevertheless continues to be subject to supervision pursuant to Art. 25 CSDDD and to civil liability pursuant to Art. 29 CSDDD (→ IV.5.b)[53].

35 This group clause is undoubtedly a significant improvement over the purely entity-based approach of the Commission's draft. It entails at least certain simplifications for corporations: notification mechanism, complaints procedure, monitoring and communication (Art. 14-16 CSDDD) can be fully covered at group level; the other due diligence duties at least partially. However, Art. 6 CSDDD subjects this to strict conditions, which are likely to pose challenges in practice.

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[49] Vgl. ST 15024/1/22 REV 1, S. 78.
[50] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 2017 OJ L 157/1.
[51] See e.g., *DAV* statement 28/2022, S. 19; *Nordic and Baltic Company Law Scholars* N&ECL 22-01, 4. In detail *Sørensen* (2022) 19 ECL 119 ff.
[52] Insofar as Art. 6(1) CSDDD refers only to Art. 7-11 CSDDD (instead of Art. 7-16 CSDDD), this is likely to be a drafting error; Art. 6(2) CSDDD refers to Art. 7-16 CSDDD and all due diligence obligations were also covered in the versions previously adopted in Coreper.
[53] See also recital 22 CSDDD.

In addition, Art. 6 CSDDD only works if both the parent company and the subsidiary fall within the scope of the CSDDD. If the parent company but not the subsidiary falls within the scope of the CSDDD, the parent company must cover the operations of the subsidiary as part of its own due diligence obligations.[54] Conversely, if the subsidiary, but not the parent company, falls within the scope of the CSDDD, the CSDDD simply refers to the possibility of sharing resources and information under Art. 5(2)-(3) CSDDD.[55]

d) Integration into company policies and risk management systems (Art. 7 CSDDD)

As a kind of foundation, Art. 7(1) CSDDD requires companies to integrate due diligence into all their relevant policies and risk management systems. They must also have a due diligence strategy in place, which includes a description of the company's approach, a code of conduct, as well as a description of the processes put in place to integrate due diligence into the company's policies and to implement due diligence (Art. 7(1)-(2) CSDDD). This strategy must be reviewed at least every 24 months and updated if necessary; in the event of significant changes, without delay (Art. 7(3) CSDDD). 37

A publication of this due diligence strategy itself is not expressly required. However, companies subject to sustainability reporting must publish similar information in their sustainability report anyway (cf. Art. 19a(2), 29a(2) EU Accounting Directive); for all other companies, the Commission might require (partial) publication in the annual statement provided for in Art. 16 CSDDD (→ IV.3.k) . 38

e) Identification and assessment of actual or potential adverse impacts and, if necessary, prioritisation (Art. 8-9 CSDDD)

As a second step, the CSDDD requires an identification and assessment of the actual and potential adverse environmental or human rights resulting from the company's own operations as well as from the business activities of its subsidiaries and those of its business partners (Art. 8(1) CSDDD). In this context, appropriate measures[56] must be taken, taking into account relevant risk factors[57], to identify and assess general areas where adverse impacts are most likely to occur or to be most severe (Art. 8(2) CSDDD). The text of the CSDDD itself does not set any time limits. However, according to recital 41 subpara. 2 sentence 2 CSDDD, the assessment should be carried out at least every 12 months, as well as immediately after any significant change and whenever there are reasonable grounds to believe that new risks may arise. 39

This risk analysis then serves as the basis for prioritisation in the context of preventing potential and ending actual adverse impacts in accordance with Art. 10-11 CSDDD (→ IV.3.f): The most severe and most likely adverse impacts must be addressed first (cf. Art. 9(2)-(3) CSDDD). 40

[54] Recital 21 sentence 5 CSDDD.
[55] Recital 21 sentence 6 CSDDD.
[56] See already IV.3.a).
[57] Definition in Art. 3(1)(u) CSDDD.

f) Preventing potential and ending actual adverse impacts (Art. 10-11 CSDDD)

aa) Overview

41 At the heart of the entire system of due diligence obligations are the largely parallel requirements for preventing potential and ending actual adverse impacts in Art. 10 and Art. 11 CSDDD.

42 In this respect, a two-stage system is established. At the first stage, the company must take appropriate measures in accordance with the prioritisation according to Art. 9 CSDDD to prevent or at least mitigate potential adverse impacts (Art. 10(1) CSDDD) or to bring actual adverse impacts to an end (Art. 11(1) CSDDD). If this fails, at the second stage, the company must "freeze" the business relationship with the problematic business partner and, as a last resort, terminate it (Art. 10(6), 11(7) CSDDD).

bb) Appropriate measures

43 To determine the appropriate measures in the specific case, due account shall be taken of the degree of participation of the company in the (potential) adverse, i.e. specifically, by whom the (potential) adverse impacts are caused, where they can occur and whether the company can influence the person or entity responsible (Art. 10(1) subpara. 1, Art. 11(1) subpara. 1 CSDDD).[58]

44 Art. 10(2) and Art. 11(3) CSDDD then each set out a catalogue of appropriate measures that must be taken where relevant. As the following overview shows, these catalogues are largely designed in parallel; however, appropriate measures for ending actual adverse impacts also include their neutralisation or minimisation as well as remediation in accordance with Art. 12 CSDDD (cf. Art. 11(3)(a), (h) CSDDD).

appropriate measure to prevent potential adverse impacts according to Art. 10(2) CSDDD	appropriate measure to end actual adverse impacts according to Art. 11(3) CSDDD
• prevention action plan • contractual assurances of direct business partners • investments, adjustments, upgrades • modifications of business plan, overall strategy and operations • support for SME business partners • collaboration with other entities	• neutralisation/minimisation • corrective action plan • contractual assurances of direct business partners • investments, adjustments, upgrades • modifications of business plan, overall strategy and operations • support for SME business partners • collaboration with other entities • remediation

45 In addition to these catalogue measures pursuant to Art. 10(2) or Art. 11(3) CSDDD, which are mandatory where relevant, the company may, pursuant to Art. 10(3) or Art. 11(4) CSDDD,

[58] See also the explanations in recital 45 CSDDD.

where relevant, (voluntarily) take additional appropriate measures. Examples include engaging with business partners on expectations, guidance, loans or financing.

cc) In particular: Contractual assurances

Particularly noteworthy is the instrument of contractual assurance. Pursuant to Art. 10(2)(b) and Art. 11(3)(c) CSDDD, mandatory appropriate measures include seeking contractual assurances from a direct business partner[59] that it will ensure compliance with the company's code of conduct and, as necessary, a prevention action plan or corrective action plan, including by establishing corresponding contractual assurances from its own business partners, to the extent that their activities are part of the company's chain of activities. The Commission will adopt guidelines for model contractual clauses for such contractual assurances (Art. 18 CSDDD).[60] 46

With regard to adverse impacts that cannot be prevented, appropriately mitigated, brought to an end or adequately minimised by the catalogue measures pursuant to Art. 10(2) or Art. 11(3) CSDDD, the company may also seek corresponding contractual assurances from indirect business partners[61] (Art. 10(4), 11(5) CSDDD). 47

Such contractual assurances thus lead to contractual cascades that can then also affect companies that themselves do not fall within the scope of the CSDDD – especially SMEs. Due to the economic balance of power, they are regularly forced to give the assurances required by their business partners, but typically do not have the necessary resources and competencies to adequately meet the resulting requirements. The European legislator wants to counter this by stipulating that the terms used in case of contractual assurances by an SME must be fair, reasonable and non-discriminatory (Art. 10(5) subpara. 2 sentence 1, Art. 11(6) subpara. 2 sentence 1 CSDDD). Firstly, this is very vague and, secondly, it will be difficult for the SME to enforce due to the economic power relationships. It is similarly doubtful whether it will actually help SMEs in practice that Art. 10(5) subpara. 2 sentence 2 CSDDD and Art. 11(6) subpara. 2 sentence 2 CSDDD require the company to assess whether the contractual assurances given by an SME should be accompanied by support measures pursuant to Art. 10(2)(e) or Art. 11(3)(f) CSDDD. Firstly, this establishes only an obligation to "assess" and not to actually provide such support, and secondly, the typical economic power structure also makes it questionable whether such support is actually provided in the end or whether companies will not rather look for another supplier or ultimately recuperate the costs indirectly from the SME. 48

Furthermore, it is required that such contractual assurances shall be accompanied by appropriate measures to verify compliance (Art. 10(5) subpara. 1 sentence 1, Art. 11(6) subpara. 1 sentence 1 CSDDD). According to Art. 10(5) subpara. 1 sentence 2 and Art. 11(6) subpara. 1 sentence 2 CSDDD, the company "may" refer to an independent third-party verification[62] for this purpose, including through industry or multi-stakeholder initiatives. In order to ensure that such contractual assurances are actually kept, an audit by an independent third party is in principle, certainly useful. Moreover, in terms of efficiency, it is welcome that this can also be done through industry or multi-stakeholder initiatives. However, there is a risk 49

[59] Definition in Art. 3(1)(f)(i) CSDDD.
[60] See on this also recital 66 CSDDD.
[61] Definition in Art. 3(1)(f)(ii) CSDDD.
[62] Definition in Art. 3(1)(h) CSDDD.

that the "may" will later be interpreted by the courts as "must" or at least as *best practice*, with the consequence that such an independent third-party verification will become *de facto* mandatory, although the wording would also allow for verification by the company itself.

50 Moreover, such verification measures will often involve a great deal of effort and costs for the company, which it may then try to pass on to its business partners, in particular SMEs. Art. 10(5) subpara. 2 sentence 3 and Art. 11(6) subpara. 2 sentence 3 CSDDD stipulate that the company shall bear the costs the independent third-party verification where measures to verify compliance are carried out in relation to SMEs; however, in practice, these costs will probably still often end up with the SME by other means. At least, Art. 10(5) subpara. 2 sentence 4 and Art. 11(6) subpara. 2 sentence 4 CSDDD provide that the SME may share the results of such verification with other companies, if it either bears part of the costs itself or if the company agrees to it.

dd) Last resort: "freezing" or terminating business relationships

51 If it is not possible to prevent or adequately mitigate potential adverse impacts by means of appropriate measures or to bring to an end or minimise actual adverse impacts, the company shall "freeze" the business relationship with the problematic business partner, i.e. it may no longer enter into new relationships with the latter or no longer extend existing relationships (Art. 10(6) subpara. 1, 11(7) subpara. 1 CSDDD).

52 As a last resort, Art. 10(6), 11(7) CSDDD even require the termination of the business relationship, but rightly only subject to strict conditions. First, such an obligation exists only if the national law governing the relations entitles the company to suspend or terminate the business relationship in such situations; all Member State legal systems must provide for this (except for contracts where the parties are obliged by law to enter into them) (cf. Art. 10(6) subpara. 1, subpara. 3, Art. 11(7) subpara. 1, subpara. 3 CSDDD). This proviso is imperative, because otherwise one would demand something impossible from companies or at least force them to expose themselves to high claims for damages. At the same time, this opens up the possibility for companies to evade the obligation to terminate the business relationship by means of a clever choice of law.

53 Secondly, there is no obligation to temporarily suspend or terminate the business relationship if it can reasonably be expected that the adverse impacts of doing so will be manifestly more severe than the adverse impacts that cannot be prevented, adequately mitigated, brought to an end or adequately minimised (Art. 10(6) subpara. 2, 11(7) subpara. 2 CSDDD). Since "adverse impacts" always means an adverse environmental impact or adverse human rights impact (cf. Art. 3(1)(d) CSDDD), only such adverse impacts are to be taken into account in this respect, but not any economic disadvantages for the company itself. However, manifestly more severe adverse impacts may, for example, exist in cases where it can reasonably be expected that the environmentally harmful production site will be continued to be operated by another company with even greater environmental damage.

54 Thirdly, the company must, in principle, first try to use its leverage by temporarily suspending the business relationship (enhanced prevention action or enhanced corrective action plan, Art. 10(6) subpara. 1 letter a, 11(7) subpara. 1 lit. a CSDDD). An obligation to terminate the business relationship only exists if there is no reasonable expectation that this will succeed

from the outset (e.g. in situations of state-imposed forced labour[63]) or if it is actually unsuccessful and the adverse impact is severe[64] (Art. 10(6) subpara. 1 letter b, 11(7) subpara. 1 lit. b CSDDD).

Despite the strict requirements that have now been established, the obligation to terminate the business relationship is and remains highly problematic. Apart from the fact that the numerous vague legal terms lead to legal uncertainty, the interests of the company itself are not taken into account anywhere. If the conditions described above are met, the company must, according to the wording of the relevant provisions, terminate the business relationship even if it will itself suffer considerable economic losses or will even falls into insolvency as a result. This can be particularly problematic in cases where the business partner is the only source for a product (*single source*).[65] In addition, termination would be required even if the company is a provider of services of general interests which it will then no longer be able to provide.[66] 55

g) Remediation of actual adverse impacts (Art. 12 CSDDD)

Art. 12 CSDDD, which was inserted upon the initiative of the EP[67], establishes a due diligence obligation to provide remediation based on the UNGP[68]. Pursuant to Art. 3(l)(t) CSDDD, the concept of remediation means the restoration of the *status quo ante*, including by financial or non-financial compensation and, where applicable, the reimbursement of the costs incurred by public authorities for any necessary remedial measures. However, the company is only required to provide remediation if it has caused an actual adverse impact alone or jointly with others (Art. 12(1) CSDDD). Where the adverse impact was caused only by the company's business partner, the company may provide remediation voluntarily, but does not have to do so (Art. 12(2) 1 CSDDD). 56

It is problematic and unclear how this obligation of remediation relates to the fault-based civil liability pursuant to Art. 29 CSDDD. The enacting terms of the CSDDD are silent on this. Recital 58 sentence 4 CSDDD merely states that stakeholders affected by an adverse impact are not required to seek remediation prior to filing claims in court. However, if Art. 12(1) CSDDD requires a company to restore the *status quo ante* and to pay compensation in the context of remediation even if it has merely (jointly) caused an adverse impact, this evidently conflicts with the fact that Art. 29 CSDDD expressly requires fault (intent or negligence) for civil liability to pay damages to arise.[69] Depending on how narrowly or broadly one understands the scope of remediation, the fault requirement for civil liability to pay damages is thus substantially undermined, or at least qualified considerably. 57

[63] Cf. recital 50 subpara. 2 sentence 2 CSDDD.
[64] Definition in Art. 3(1)(l) CSDDD.
[65] On the parallel problem in the context of the LkSG see: Spießhofer/Späth/*Welling/Brouwer*, LkSG, § 7 para. 40 ff. with further references.
[66] On the parallel problem in the context of the LkSG see: Spießhofer/Späth/*Welling/Brouwer*, LkSG, § 7 para. 41.
[67] Cf. P9_TA(2023)0209, Art. 8c CSDDD-draft.
[68] UNGP principle 25.
[69] See on the similar demarcation issue between Art. 8(3)(a) and Art. 22 of the Commission's draft (COM(2022) 71): *Bettermann/Hoes* WM 2022, 697, 701; *Stöbener de Mora/Noll* EuZW 2023, 14, 20; *DAV* statement 28/2022, p. 13 ff.; differing *Charnitzky/Weigel* RIW 2022, 413, 418.

h) Meaningful stakeholder involvement (Art. 13 CSDDD)

58 The obligation to meaningfully involve stakeholders, which is now enshrined in Art. 13 CSDDD, also goes back to the EP[70].

59 The concept of stakeholders is understood very broadly.[71] According to Art. 3(1)(n) CSDDD, it covers the employees of the company itself as well as of its subsidiaries and business partners, trade unions and workers' representatives, consumers and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of the company, its subsidiaries and its business partners. This explicitly includes national human rights and environmental institutions as well as civil society organisations whose purposes include the protection of the environment. In the case of a globally active conglomerate, this effectively begs the question of who does not belong to the "stakeholders".

60 Admittedly, companies are not required to always engage with all these stakeholders, they only need to "take appropriate measures to carry out effective engagement with stakeholders [...] " (Art. 13(1) CSDDD). Although this is thus also only an obligation of means, its precise scope remains overall rather vague.

61 At any rate, Art. 13(3) CSDDD requires the consultation of stakeholders at all essential steps in the due diligence process. To this end, the company shall, as appropriate, provide them with relevant and comprehensive information or justify in writing why certain information requested by the stakeholders is not provided (Art. 13(2) CSDDD). This results in a conflict with the legitimate interests of the company in the protection of its trade secrets, which the European legislator once again addresses with a reference to the Trade Secrets Directive (cf. Art. 13(2) CSDDD).

62 On the other hand, there is a risk that the stakeholders consulted will become victims of retaliation or retribution as a result; Art. 13(5) CSDDD therefore requires companies to ensure that this does not happen, in particular by maintaining confidentiality and anonymity.

63 Where it is not reasonably possible to carry out effective engagement with stakeholders, the company shall additionally consult experts (Art. 13(4) CSDDD).

64 In order to reduce the burden on the individual company and to make engagement with stakeholders more efficient overall, the obligation to meaningfully engage with stakeholders (with the exception of the company's employees and its representatives) can be fulfilled fully through industry or multi-stakeholder initiatives (Art. 13(6) CSDDD).

65 Overall, the meaningfulness of this engagement with stakeholders seems questionable: The concept of stakeholders is extremely broad and it is not really specified exactly who should be when and how. Above all, however, it is doubtful whether such consultations, which – despite the reference to the Trade Secrets Directive – carry the risk of "information leaks", will provide real added value or whether they will not rather just result in costly and time-consuming "debating clubs".

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[70] Cf. P9_TA(2023)0209, Art. 8d CSDDD-draft.

[71] Cf. *J. Schmidt* EuZW 2024, 291; *J. Schmidt* NZG 2024, 417; see also *Spindler* ZIP 2022, 765, 777 on the Commission's draft.

i) Notification mechanism and complaints procedure (Art. 14 CSDDD)

In order to ensure that companies can be made aware of actual or potential adverse impacts by those affected at an early stage[72], Art. 14 CSDDD requires the establishment of a notification mechanism and a complaints procedure. However, their use is not a prerequisite for the submission of substantiated concerns to the supervisory authority pursuant to Art. 26 CSDDD or for bringing a claim for damages pursuant to Art. 29 CSDDD (Art. 14(7) CSDDD). 66

According to Art. 14(2) CSDDD, natural and legal persons affected by an adverse impact and their legitimate representatives, trade unions and other workers' representatives as well as civil society organisations are entitled to submit a complaint. Companies must establish a fair, publicly available, accessible, predictable and transparent procedure for dealing with such complaints and ensure that the identity of the complainant is treated confidentially in accordance with national law (Art. 14(3) subpara. 1 CSDDD). If the complaint is well-founded, the adverse impact in question is deemed to be identified within the meaning of Art. 8 CSDDD[73] and the company shall take appropriate measures in accordance with Art. 10-12 CSDDD. In addition, Art. 14(4) CSDDD grants the complainants very comprehensive rights: they may not only request appropriate follow-up, but are also entitled to meet with the company's representatives to discuss adverse impacts and potential remediation and to be provided by the company with the reasons as to why the complaint has been considered (un)founded and what the company intends to do in this regard. 67

This complaints procedure is legally understood as a mechanism separate from the internal reporting procedure set up by companies in accordance with the Whistleblower Directive[74].[75] If the prerequisites of both procedures are met, the person concerned can therefore use both.[76] The Whistleblower Directive has been amended accordingly (cf. point E.2 of Part I of the Annex to the Whistleblower Directive). 68

Upon the initiative of the EP[77], an obligation to set up a notification mechanism was added in Art. 14(5) CSDDD; through this notification mechanism, anyone can submit notifications regarding actual or potential adverse impacts, either anonymously or at least confidentially. 69

In view of the considerable effort and costs involved in setting up such notification mechanisms and complaints procedures, Art. 14(6) sentence 1 CSDDD (which was initiated by the Council[78]) nevertheless allows several companies to set them up jointly, in particular through industry associations, multi-stakeholder initiatives or global framework agreements. 70

j) Monitoring (Art. 15 CSDDD)

In addition, Art. 15 CSDDD sets out a monitoring obligation: companies must not only carry out assessments of their own operations and measures, but also of those of their subsidiaries 71

[72] Cf. UNGP principle 29.
[73] For more details on the problems associated with this knowledge fiction, see *Hübner/Habrich/Weller* NZG 2022, 644, 647; *Schäfer/Schütze* BB 2024, 1091, 1097.
[74] 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, OJ 2019 L 305/17; last amended by Regulation (EU) 2024/573, OJ L, 2024/573, 20.2.2024.
[75] Recital 60 sentence 1 CSDDD.
[76] Cf. recital 60 sentence 2 CSDDD.
[77] Cf. P9_TA(2023)0209, Art. 9 CSDDD-draft
[78] Cf. ST 15024/1/22 REV 1, Art. 9(5) CSDDD-draft.

and business partners in the chain of activities immediately after a significant change occurs[79], but at least every 12 months, and update their due diligence policy and measures on this basis where appropriate.

k) Communication (Art. 16 CSDDD)

72 Finally, Art. 16 CSDDD obliges companies to report on the fulfilment of their due diligence obligations. This is not only intended to ensure transparency and at the same time to control behaviour by means of public pressure, but also to facilitate supervision.[80]

73 Since the EU Accounting Directive as amended by the CSRD[81] already sets out comprehensive sustainability reporting requirements, it makes sense that the European legislator differentiates in this respect:[82] If a company is subject to sustainability reporting pursuant to Art. 19a, 29a, 40a of the EU Accounting Directive, the communication obligation is already fulfilled by this (cf. Art. 16(2) CSDDD). All other companies must publish an annual statement on their website, the exact content of which will be determined in delegated acts yet to be adopted by the Commission (Art. 16(1), (3) CSDDDD). Like the sustainability reports (cf. Art. 33a EU Accounting Directive), this statement must also be made accessible via the European Single Access Point (ESAP) (Art. 17 CSDDD).

l) Significance from a German perspective and comparison with the LkSG

74 The new requirements of the CSDDD will require a fundamental revision of the LkSG. Although the LkSG is also based on the UNGP and follows a similar model as the CSDDD in terms of its basic approach, there are some significant differences.

75 This starts with the fact that the LkSG is based on a gradual due diligence concept (1st level: own business operations, 2nd level: direct supplier, 3rd level: indirect supplier)[83]; by contrast, the CSDDD is not based on such a concept.

76 As the following (significantly simplified) tabular overview shows, the due diligence obligations laid down in the CSDDD correspond in principle largely with those of the LkSG. However, in detail, there are sometimes significant differences, or the emphasis is placed on different aspects; overall, in many aspects the CSDDD goes much further than the LkSG.

77 In addition, the LkSG does not lay down a due diligence obligation for remediation within the meaning of Art. 12 CSDDD or a requirement for meaningful engagement with stakeholders like it is now enshrined in Art. 13 CSDDD. Furthermore, although it is possible to carry out risk management and the due diligence process on the group level within the framework of the LkSG[84], there is no special group clause like in Art. 6 CSDDD.

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[79] The term is used defined recital 61 subpara. 1 sentences 5-6 CSDDD and illustrated by examples.
[80] On the comparable external reporting obligations pursuant to § 10(2) LkSG see: Explanatory Notes LkSG, BT-Drs. 19/28649, p. 52; Spießhofer/Späth/*Spießhofer*, LkSG, § 10 para. 37.
[81] 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, OJ 2022, L 322/15.
[82] Cf. recital 62 CSDDD.
[83] Cf. Explanatory Notes LkSG, BT-Drs. 19/28649, p. 40; Spießhofer/Späth/*Späth*, LkSG, § 2 para. 153; Hopt/*Leyens*, HGB, 43rd ed. 2024, § 2 LkSG para. 28.
[84] According to the FAQs of BMAS, BMWK and BAFA, it is possible to carry out risk management and the due diligence process centrally in cases where the parent company has a decisive influence on a subsidiary and both

CSDDD Requirements	(partially) comparable requirements in the LkSG
Integration of due diligence into company policies and risk management systems (Art. 6 CSDDD)	§ 4 LkSG (risk management) § 6(2) LkSG (policy statement)
Identification and assessment of actual or potential adverse impacts and, if necessary, prioritisation (Art. 8-9 CSDDD)	§ 5 LkSG (risk analysis)
Prevention of potential and ending actual adverse impacts (Art. 10-11 CSDDD)	§ 6 LkSG (preventive measures) § 7 LkSG (remedial measures)
remediation of actual adverse impacts (Art. 12 CSDDD)	-
meaningful engagement with stakeholders (Art. 13 CSDDD)	§ 4(4) LkSG (consideration of the interests of stakeholders in the course of establishing and implementing the risk management system); § 106(3) No. 5b Works Constitution Act (consultation with the economic committee)
notification mechanism and complaints procedure (Art. 14 CSDDD)	§ 8 LkSG
monitoring (Art. 15 CSDDD)	§ 4(3)1 LkSG (monitoring of risk management)
communication (Art. 16 CSDDD)	§ 10(2)-(3) LkSG

4. Accompanying measures

In order to support companies in the practical application of their due diligence obligations and the authorities in their enforcement, the Commission shall issue guidelines in accordance with Art. 19 CSDDD. This seems evidently sensible – especially with regard to the vague legal terms used by the CSDDD. However, the Commission has until 30 or 36 months after the entry into force of the CSDDD to adopt these guidelines, i.e. they will only be available 6 months before or exactly at the start of application of the CSDDD for the first companies, so that companies are likely to have little or no time to deal with them in a meaningful way.[85] 78

In addition, Member States shall set up dedicated websites, platforms or portals to provide information and support to companies, their business partners and stakeholders (Art. 20(1) CSDDD). They may also provide financial support to SMEs (Art. 20(2) CSDDD). 79

Moreover, it is expressly emphasised that companies may participate in industry or multi-stakeholder initiatives and may also use independent third-party verification to support the implementation of due diligence obligations (Art. 20(4) subpara. 1, (5) subpara. 1 CSDDD); the 80

fall within the scope of the LkSG (BMAS/BMWK/BAFA, FAQ zum LkSG, IV.8.b) (https://www.bafa.de/DE/Lieferketten/FAQ/haeufig_gestellte_fragen_node.html).

[85] Sceptical also *Thomale/Schmid*, Das Private Enforcement der EU-Lieferkettenrichtlinie, RabelsZ 88 (2024) (in the review procedure).

Commission shall also issue guidelines with respect to this (Art. 20(4) subpara. 2, (5) subpara. 2 CSDDD).

81 Furthermore, the Commission shall establish a central helpdesk (Art. 21 CSDDD).

82 However, it is doubtful whether this package of measures will succeed in sufficiently counterbalancing the burdens caused by the due diligence obligations for companies.[86] To some extent, they seem more like an attempt to cover a gaping wound with a plaster strip.

5. Enforcement

a) Supervision and administrative sanctions

83 Supervision is carried out by the national competent authority(ies) (NCAs) designated by each Member State (Art. 24(1) CSDDD). In case of EU companies, the competent supervisory authority is that of the Member State of the registered office, in case of third country companies, the competent supervisory authority is that of the Member State where the company has a branch or the largest net turnover in the EU (Art. 24(2)-(3) CSDDD).

84 Pursuant to Art. 26 of the CSDDD, it must be possible to submit substantiated concerns that a company is failing to comply with the national provisions implementing the CSDDD to the national supervisory authorities through easily accessible channels.

85 In accordance with the general EU standard, Member States must provide for effective, proportionate and dissuasive penalties for violations of the national legislation implementing the CSDDD (Art. 27(1) CSDDD). As a minimum standard, Art. 27(3)-(4) CSDDD require pecuniary penalties with a maximum of not less than 5 % of net worldwide turnover as well as rules on "naming and shaming".

86 Finally, compliance with the obligations arising from the national rules implementing the CSDDD can also be taken into account as part of the award criteria of public and concession contracts (Art. 31 CSDDD).

87 Overall, the administrative sanctions are thus very harsh.

b) Civil liability

88 In contrast to the LkSG[87], the CSDDD also expressly provides for civil liability. Its design was a particularly neuralgic point. It was significantly revised in the last few meters.

aa) Liability requirements

89 Upon the initiative of the Council[88], the conditions for civil liability were specified more clearly. According to Art. 29(1) subpara. 1 CSDDD, a company can only be held liable for damages in case of intentional or negligent failure to comply with the due diligence obligations to prevent potential or end actual adverse impacts pursuant to Art. 10 and Art. 11 CSDDD. In addition, rights, prohibitions or obligations listed in the annex aimed to protect natural or legal persons are affected (Art. 29(1) subpara. 1 lit. a CSDDD). According to recital 79 sentence 3 CSDDD this is intended to ensure that derivative damage caused indirectly to other persons is not

[86] See also *Jung* GPR 2022, 109, 117 ff.
[87] For an overview of the discussion on civil liability under the LkSG see recently Kieninger ZIP 2024, 1037 ff.
[88] Cf. ST 15024/1/22 REV 1, Art. 22 CSDDD-draft.

covered.[89] Furthermore, liability arises only if, as a result of the failure to comply, damage to the natural or legal person's legal interests that are protected under national law was caused (Art. 29 (1)(b) CSDDD). As examples, recital 79 sentence 2 CSDDD cites death, physical or psychological injury, deprivation of personal liberty, loss of human dignity, or damage to a person's property. However, ultimately, this means that the determination of an essential aspect with respect to the exact scope of liability is thus left to national law; national law could, for example, also include pure financial losses.

In addition, two other essential aspects are left to national law: the burden of proof[90] and (apart from the clarification that a company cannot be held liable if the damage was caused only by its business partners in the chain of activities, Art. 29(1) subpara. 2 CSDDD) causality[91]. This is a far cry from a level playing field.[92] 90

bb) Extent of liability

Pursuant to Art. 29(2) CSDDD, liability is directed to full compensation (albeit again in accordance with national law); however, it shall not lead to overcompensation (e.g. through punitive damages or multiple damages). 91

If damage was caused jointly by the company and its subsidiary or business partner, they are jointly and severally liable (Art. 29(5) subpara. 2 CSDDD). 92

cc) Litigation and statute of limitations

The CSDDD deliberately refrains from setting out any specific rules upon which conditions civil proceedings can be initiated.[93] In particular, there are no special rules on jurisdiction, so that the general rules apply.[94] However, at least companies that have their statutory seat, their central administration or their principal place of business in the EU, can always be sued at the general place of jurisdiction in accordance with Art. 4(1), 63(1) Brussels Ia Regulation. 93

However, at the instigation of the EP[95] a number of provisions on the statute of limitations and the framework for civil proceedings were added in Art. 29(3) CSDDD. Firstly, Art. 29(3)(a) CSDDD lays down rather comprehensive requirements regarding the statute of limitations (limitation period: at least 5 years) in order to prevent civil liability from being undermined by strict limitation periods.[96] Secondly, Art. 29(3)(b) CSDDD provides that the costs of proceedings must not be prohibitively expensive for claimants to seek justice – but the relevant standard is not specified (what is reasonable for an average European claimant may 94

[89] Recital 79 sentence 4 CSDDD gives the example that the damage suffered by an employee's landlord as a result of the employee not being able to pay his rent because he was injured due to the company's violation of safety standards in the workplace need not be compensated.
[90] Cf. recital 81 CSDDD.
[91] Cf. recital 79 sentence 5 CSDDD.
[92] Cf. already *Pacces* ECGI Blog 12 April 2022; *J. Schmidt* BB 2022, 1859, 1862. For criticism with regard to the burden of proof see also *Bomsdorf/Blatecki-Burgert* ZRP 2022, 141, 143; *Lennarts* Ondernemingsrecht 2023, 257, 261 ff.).
[93] Cf. recitial 81 CSDDD.
[94] For more on the consequences, see: *Thomale/Schmid*, Das Private Enforcement der EU-Lieferkettenrichtlinie, RabelsZ 88 (2024) (in the review procedure).
[95] Cf. P9_TA(2023)0209, Art. 22(2a) CSDDD-draft.
[96] See in more detail *Kieninger* ZIP 2024, 1037, 1045 ff.

be exorbitant for a claimant from a developing country). Thirdly, the plaintiffs must be able to seek injunctive measures, including through summary proceedings (Art. 29(3)(c) CSDDD).

95 Fourthly, Article 29(3)(d) CSDDD addresses the involvement of trade unions and NGOs. This had been extremely controversial from the beginning. In the end, especially at the instigation of Finland[97], the relevant rules were significantly defused.[98] However, the fact that alleged injured parties may authorise trade unions, NGOs and human rights institutions to bring actions to enforce their rights remains problematic. The deletion of the words "in their own capacity" (i.e. that they would have been able to sue in their own name, i.e. by way of representative action), as well as the admissibility of other requirements (in particular: requirement of permanent presence, no commercial engagement) may somewhat curb the risk of the emergence of a "litigation industry",[99][100] but it does not eliminate it.

96 Furthermore, despite the restrictions laid down in Art. 29(3)(e) CSDDD, the discovery procedure required by this provision is also extremely problematic.[101]

dd) Design as overriding mandatory provisions

97 According to Art. 29(7) CSDDD, the national rules on civil liability in implementation of Art. 29 CSDDD shall be of overriding mandatory application in cases where the law applicable is the law of a third country. The apparent rationale of this design as overriding mandatory provisions[102] is to ensure that the courts of the Member States apply the national provisions implementing the European liability standards of Art. 29 CSDDD even if, according to the relevant rules of private international law, the law of a third country providing for no or only less far-reaching liability in the specific case would be applicable.[103] However, the rather paradox consequence is that the national provisions implementing Art. 29 CSDDD will have to be applied even if the law of a third country would actually be more favourable to the injured party (e.g. because it requires less stricter conditions for liability or provides for higher damages).[104] It seems rather doubtful that these consequences were actually considered or even intended. In light of the clear wording and the fact that in the run-up to the CSDDD, the idea to allow victims to choose the applicable law was discussed[105], but ultimately not adopted, it does not seem possible to interpret Art. 29(7) CSDDD to the effect that it is not applicable in cases where the law of the third country would, in effect, be more favourable to

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[97] Cf. ST 7156/24 ADD 1, p. 1, ST 72327/1/24 REV 1, p. 3.
[98] Cf. ST 72327/1/24 REV 1, p. 3.
[99] *J. Schmidt* NZG 2024, 417.
[100] See also *Jaspers* GmbHR 2024, R52, R53; *Schäfer* BB 3/2024, I; *Schäfer/Schütze* BB 2024, 1091, 1099; *Wüstemann/Büchner* BB 2024, 579 (584).
[101] Cf. *Schall* (2024) 21 ECL n° 3, 3; *J. Schmidt* NZG 2024, 417.
[102] For more details, see, for example, *Kieninger* ZIP 2024, 1037, 1046 ff.; *Lennarts* Ondernemingsrecht 2023, 257, 264; *Thomale/Schmid*, Das Private Enforcement der EU-Lieferkettenrichtlinie, RabelsZ 88 (2024) (under review).
[103] *Blach* JbJZ 2022, 167, 186 ff. also criticizes this. For more details on the problems associated with the design as an overriding mandatory provision see also *Lennarts* Ondernemingsrecht 2023, 257, 264 ff.; *Nietsch/Wiedmann* CCZ 2022, 125, 133 f.
[104] Cf. *Thomale/Schmid*, Das Private Enforcement der EU-Lieferkettenrichtlinie, RabelsZ 88 (2024) (under review); see also *Nietsch/Wiedmann* CCZ 2022, 125, 134.
[105] In particular, the 2021 JURI Report (A9-0018/2021) had proposed a new Article 6a Rome II Regulation, which provided for the right of the (potentially) injured party to choose between the *lex fori damni*, the *lex loci delicti commissi* and the law of the country where the parent company has its domicile. For criticism of this model see Rühl EAPIL blog 9 October 2020.

the claimant. From the company's point of view, this has at least the advantage that if a claim is brought before a court of a Member State, it must "only" expect civil liability under the respective national provisions implementing Art. 29 CSDDD.[106]

ee) Bottom line

Overall, the liability regime of Art. 29 CSDDD appears to be half-baked – despite or precisely because of the changes made in the course of the legislative process. The fact that national law continues to govern essential aspects (protected legal interests, causality, burden of proof) entails the danger that, in designing their national rules on civil liability, Member States will either turn civil liability into a "toothless tiger" or, conversely, impose conditions that are so strict that civil liability becomes a sword of Damocles for companies. However, civil liability will at any rate be a sword of Damocles for companies because the due diligence obligations, for the violation of which civil liability is imposed, are characterised by so many vague legal terms as well as unclear and dubious provisions that there is considerable legal uncertainty as to what is actually required of the companies in the first place.[107] In addition, as explained, the procedural requirements are in some cases extremely problematic and the design as overriding mandatory provisions has apparently not been thought through to the end. 98

6. Conclusion on the CSDDD's due diligence concept

In some aspects the due diligence concept now anchored in the CSDDD constitutes an improvement compared to the Commission's draft and the trilogue result, but there are also numerous "disimprovements". In part, this is certainly due to the fact that the final version was hastily stitched together in the last phase of the legislative process, because the proponents of the CSDDD fought tooth and nail to reach any compromise at all – with end result of the creation of a partly inconsistent "patchwork"[108]. 99

Be that as it may, it is generally doubtful whether such a concept of due diligence obligations for companies will lead to a significant improvement in the protection of human rights and the environment at all. Instead, it must be feared that, in case doubt, European companies will simply withdraw from "risky" markets, and thus either urgently needed jobs and investments will disappear altogether or the production sites and markets in question will be taken over by companies from third countries working with much lower standards.[109] 100

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[106] See also *Kieninger* ZIP 2024, 1037, 1048.

[107] Similarly with respect to the Commission's draft, see also *Bomsdorf/Blatecki-Burgert* ZRP 2022, 141, 144; *Stöbener de Mora/Noll* EuZW 2023, 14, 22.

[108] Cf. *J. Schmidt* NZG 2024, 417.

[109] *J. Schmidt* NZG 2024, 417; *J. Schmidt* EuZW 2024, 291, 292. Similarly, *Bomsdorf/Blatecki-Burgert* ZRP 2022, 141, 144; *Felbermayr/Friesenbichler/Gerschberger/Klimek/Meyer* (2024) 59, Intereconomics 28, 30 f.; *Nietsch/Wiedmann* CCZ 2022, 125, 137; *Roessingh/Horemann* OBLB 1 July 2022; *Thomale/Schmid*, Das Private Enforcement der EU-Lieferkettenrichtlinie, RabelsZ 88 (2024) (under review); *Schall* (2024) 21 ECL n° 3, 3; *Stöbener de Mora/Noll* EuZW 2023, 14, 22, 24; *Thomson* OBLB 14 April 2022. See also Regulatory Scrutiny Board, SEC(2022) 95, p. 4. In a BDI survey on the LkSG, 24 % of companies stated that they were reducing the number of their suppliers and 14 % that they were considering withdrawing from high-risk countries (https://issuu.com/bdi-berlin/docs/20240123_unternehmensumfrage_bdi_lksg). On withdrawal effects as a result of the LkSG, see also *Kolev-Schaefer/Neligan* IW-Report 8/2024.

What is certain, however, is that European companies will face considerable new financial and bureaucratic burdens; in addition, there is a threat of enormous liability risks.[110] In light of the current economic and geopolitical situation, it would, however, be urgently necessary to strengthen the competitiveness of European companies and reduce bureaucracy.[111]

V. Transition plans for climate change mitigation

102 The second component of the CSDDD is the obligation to adopt and put into effect a transition plan for climate change mitigation, as laid down in Art. 22. In principle, this obligation applies to all companies covered by the CSDDD[112], including those in the financial sector[113].

103 Since the rules originally set out in the Commission's draft would have led to friction and duplication with sustainability reporting under Art. 19a, 29a and 40 of the EU Accounting Directive[114], they were fundamentally revised in the course of the legislative process.

104 The requirements for the content of the transition plan in Art. 22(1) CSDDD have been specified and aligned with the requirements for transition plans for climate change mitigation in Art. 19a, 29a, 40 EU Accounting Directive and the ESRS[115].[116] According to Art. 22(1)(1) CSDDD, companies shall adopt and put into effect a transition plan for climate change mitigation which aims to ensure, through best efforts, that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality, including its intermediate targets and 2050 climate neutrality targets and, where relevant, the exposure of the company to coal-, oil- and gas-related activities. This corresponds (almost) verbatim to the requirements for the content of the sustainability report in accordance with Art. 19a(2)(a)(iii), 29a(2)(a)(iii) EU Accounting Directive. The specific items to be included in the transition plan that are now listed in Art. 22(1) subpara. 2 CSDDD (targets, decarbonisation levers and key actions, investments and funding, role of administrative, management and supervisory bodies) correspond with the requirements for transition plans for climate change mitigation under ESRS E1.

105 Moreover, Art. 22(2) CSDDD now provides that companies that report a transition plan for climate change mitigation in accordance with Art. 19a, Art. 29a or Art. 40 EU Accounting Directive or that are included in the transition plan for climate change mitigation of their

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[110] *J. Schmidt* NZG 2024, 417; *J. Schmidt* EuZW 2024, 291, 292; see also, for example, *Schäfer* BB 3/2024, I; *Thomale/Schmid*, Das Private Enforcement der EU-Lieferkettenrichtlinie, RabelsZ 88 (2024) (under review). In a BDI survey on the much less far-reaching LkSG, 92 % of companies stated that the additional bureaucratic effort was "very high" or "high" (https://issuu.com/bdi-berlin/docs/20240123_unternehmensumfrage_bdi_lksg).

[111] *J. Schmidt* EuZW 2024, 291, 292.

[112] The trilogue result had excluded the special category of companies that were only covered due to their activities in a high-risk sector (ST 5893/24, Art. 15(1) CSDDD-draft); but this special category has now been completely deleted (cf. II.2.b)). However, this history explains why Art. 22 CSDDD continues to refer specifically to all companies pursuant to Art. 2(1)(a)-(c), (2)(a)-(c) CSDDD.

[113] Cf. ST 7327/1/24 REV 1, S. 5.

[114] See on this e.g., *Ringe* OBLB 28 April 2022; Le club des juristes, commission devoir de vigilance, Devoir de vigilance, quelles perspectives européennes?, 2023, p. 48 f.

[115] Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, OJ L, 2023/2772, 22.12.2023.

[116] Cf. ST 15024/1/22 REV 1, p. 9; ST 7327/1/24 REV 1, p. 5; *J. Schmidt* EuZW 2024, 291, 292.

parent undertaking shall be deemed to have complied with the obligation to adopt a transition plan for climate change mitigation pursuant to Art. 22(1) CSDDD. This is consistent and very welcome, as it at least avoids double reporting.

Regardless of whether the company adopts up the transition plan in accordance with Art. 22(1) CSDDD or in accordance with the EU Accounting Directive, it must in any case not only update it every 12 months and describe the progress made (Art. 22(3) CSDDD), but also implement it (Art. 22(1) CSDDD).[117] 106

The obligation to adopt and put into effect a transition plan may also be fulfilled at group level under the conditions specified in more detail in Art. 6(1), (3) CSDDD[118]. 107

The link between the transition plan and the remuneration of the directors, which was included in the Commission's draft[119] and – in a slimmed-down version – also in the trilogue result[120] was deleted at the last minute. This is to be welcomed, as it would have represented a significant intervention in corporate governance.[121] 108

From the German point of view, these transition plans are a novelty. On 22.3.2024, the Federal Ministry of Justice has already submitted a draft bill for the implementation of the CSRD[122] , which is intended to implement, among other things, Art. 19a, 29a of the EU Accounting Directive (cf. Sections 289c, 315b HGB-E). However, regulations are still required to implement the further requirements of Art. 22 CSDDD. 109

VI. No directors' duties

As a third major regulatory topic, the Commission's draft had also addressed the fundamental question of the scope of directors' duties. Art. 25(1) CSDDD Commission draft stipulated that, when fulfilling their duty to act in the best interest of the company, directors take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term. 110

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[117] Cf. recital 73 subpara. 2 sentence 3 CSDDD.
[118] See already IV.3.c).
[119] COM(2022) 71, Art. 15(3) CSDDD-draft: "Member States shall ensure that companies duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability."
[120] ST 5893/24, Art. 15(3b) CSDDD-draft. This provision stipulated that companies with an average of more than 1000 employees must have an appropriate policy to promote the implementation of the transition plan, including through, among others, financial incentives to the members of the administrative, management or supervisory bodies concerned.
[121] Cf. ST 15024/1/22 REV 1, p. 9; *ECLE* ECGI-Blog 2 August 2022; *Hansen/Lilja* CBS Law Research Paper 22-01; *Lidman* OBLB 27 April 2022; *Nordic and Baltic Company Law Scholars*, N&ECL 22-01, 2.5; *J. Schmidt* BB 2023, 1859, 1862; *J. Schmidt* NZG 2024, 417*; J. Schmidt* EuZW 2024, 291, 292.
[122] Entwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2022/2464 des Europäischen Parlaments und des Rates vom 14. Dezember 2022 zur Änderung der Verordnung (EU) Nr. 537/2014 und der Richtlinien 2004/109/EG, 2006/43/EG und 2013/34/EU hinsichtlich der Nachhaltigkeitsberichterstattung von Unternehmen (https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_CSRD_UmsG.pdf?__blob=publicationFile&v=3).

This provision, which was highly problematic from a corporate governance point of view, has fortunately been deleted at the instigation of the Council[123] . It would not only have been an inappropriate interference with the national provisions regarding directors' duty of care, but most importantly, it would have potentially undermined the duty of directors to act in the best interests of the company.[124]

VII. Summary and conclusion

112 1) In the last stages of the legislative process, the scope of the CSDDD was restricted significantly and now essentially covers only very large companies. However, due to the de facto cascade effect of its far-reaching due diligence obligations, many more companies – especially SMEs – will be affected.

2) The main subject of the CSDDD is the establishment of due diligence obligations for the companies covered by it regarding actual or potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries and of their business partners in the chain of activities.

   a) The chain of activities within the meaning of the CSDDD covers in principle both the activities of the (direct and indirect) upstream business partners and the direct downstream business partners. However, in the case of regulated financial undertakings, only the upstream part is covered. Since all relevant customers of such regulated financial undertakings operate downstream, the politically particularly sensitive financial sector is thus largely excluded.

   b) The extensive catalogue of due diligence obligations includes: integrating due diligence into company policies and risk management systems; identifying and assessing actual or potential adverse impacts and, where necessary, prioritising them; preventing potential adverse impacts and bringing actual adverse impacts to an end; providing remediation for actual adverse impacts; carrying out meaningful stakeholder engagement; notification mechanism and complaints procedure; monitoring; and communication.

   c) The main alterations compared to the Commission's proposal are the explicit risk-based approach, the possibility to fulfil most due diligence obligations at group level ("group clause") and the newly added – and very problematic – obligations to provide remediation for actual adverse impacts and to carry out meaningful engagement with stakeholders.

   d) If they fail to fulfil their due diligence obligations, companies face not only severe fines and "naming and shaming", but also civil liability for damages based on rather half-baked and problematic rules.

3) The second component of the CSDDD is the obligation to adopt and put into effect a transition plan for climate change mitigation. Its content corresponds to the transition

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[123] Cf. ST 15024/1/22 REV 1, p. 10.

[124] Cf. ST 15024/1/22 REV 1, p. 10; *J. Schmidt* BB 2023, 1859, 1862; *J. Schmidt* EuZW 2024, 291, 292; see in more detail *J. Schmidt* NZG 2022, 481; with criticism also *ECLE* ECGI-Blog 2 August 2022; *Hansen/Lilja* CBS Law Research Paper 22-01; *Lidman* OBLB 27 April 2022; *Nordic and Baltic Company Law Scholars*, N&ECL 22-01, 2.5.; *Thomsen* OBLB 14 April 2022; *Ventura* EBLR 2023, 239, 260 f.

plans that companies subject to sustainability reporting must prepare anyway; for them, the obligation is therefore deemed to have been fulfilled.

4) In contrast to the Commission's draft, the final version of the CSDDD does not contain any rules on directors' duties.

5) Overall, the CSDDD is a cautionary landmark of what EU legislation should not be – both in terms of the development of the legislative process and in terms of the result. A bureaucratic hydra is not constructive – neither for the protection of human rights and the environment nor for the global competitiveness of European companies.