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Lessons learned from Germany with impressions from Norway:

Recommendations regarding the risk-based approach, SME suppliers, and civil liability for the Omnibus based on experiences from the implementation of the LkSG

An expert assessment by Daniel Schönfelder, June 10th 2025

The German Supply Chain Act (LkSG) was adopted almost 4 years ago, and companies are having to implement it for almost 2.5 years. Several successes show that the law is being taken seriously by companies and is used by rightsholders to improve their situation: [1] For example, workers and NGOs have been using the law's mechanisms to tackle exploitation faced by truck drivers in Germany, factory workers in China, plantation workers in Latin America, and to strengthen union rights in Africa and South-East Asia. Supported by a dialogue-based enforcement approach, practical guidance by the authorities and tools provided by or financed by the Government, companies in Germany and in their supply chains have invested in building capacity to implement Human Rights and Environmental Due Diligence (HREDD). Countries around the world started systematically preparing their companies for HREDD or even started to work on their own HREDD laws.[2] These important successes are likely to even expand as companies' HREDD-processes become more mature, especially as the CSDDD will bring scale to mandatory HREDD . For this paper, however, the focus is on some of the challenges faced in the implementation of the LkSG and lessons to be learned from these challenges. In summary, the current Omnibus package and subsequent implementation by member states should:

1. Avoid diluting the risk-based approach by imposing a focus on tier-1 suppliers
2. Strengthen the principle of fair engagement with SME suppliers
3. Harmonize civil liability rules

[1] In detail, see on the improvements for rightsholders: ECCHR, Brot, Misereor: Zwei Jahre Lieferkettengesetz - Ein Erfahrungsbericht (2025); Schönfelder: Lieferkettengesetz: Weniger Aufwand, mehr Wirkung. Vorschläge aus der Praxis (2025).

[2] On the implementation efforts by firms, see Die BME-Studie „Zwei Jahre deutsches Lieferkettengesetz".

These lessons reflect the most relevant concerns voiced in Germany:[3] bureaucratic implementation tendencies that overwhelm small and medium-sized enterprises (SMEs) with excessive questionnaires and attempts to shift responsibility onto them. The focus of the regular risk analysis on direct suppliers incentivizes large-scale but superficial tickboxing practices, instead of an efficient implementation approach focused on the highest risks. The approach of risk-based HREDD across the supply chain, as established by the CSDDD and by the Norwegian Transparency Act (2021), was also positively perceived by companies in Norway.[4] Nevertheless, and against the view of important business actors that perceive it as bureaucratic,[5] the direct supplier approach was proposed to be replicated through the omnibus proposal for the CSDDD by the European Commission. Rightfully, relevant voices among the member states prefer to leave the risk-based approach untouched.[6]

This paper was prepared by a lawyer who advises and trains companies on implementing HREDD. Additional experts from German and European corporate practice were involved in its development, particularly regarding the implementation of due diligence obligations.[7]

Challenges in the implementation of LkSG

There are legitimate points of criticism regarding current practices in implementing the LkSG. Some companies place an excessive burden on SMEs through the use of one-size fits all questionnaires and attempts to shift responsibility onto them.[8] The LkSG emphasizes responsibility primarily for direct suppliers and only in exceptional cases – especially in the case of "substantiated knowledge" of possible violations in the deeper supply chain – requires addressing them.[9] As a result, many implementation approaches concentrate on direct suppliers, aiming to integrate them comprehensively and uniformly into compliance systems and trying to avoid obtaining substantiated knowledge.

The standard risk analysis is often composed of the following steps: first, a classification of tier 1 suppliers according to country and sector risk factors; second, a large number of (often not even prioritized) tier 1 suppliers receive the same standard questionnaire developed by the company, its consultancy or respective IT tool provider. This practice is at the same too much and too little: Too many suppliers are contacted, but too superficially. Suppliers, in turn, receive the essentially same superficial questions in different formats from several clients, generating the impression that HREDD and the LkSG are mainly a paper exercise. Using standardised questionnaires for all suppliers exacerbates the bureaucracy: a banana supplier has an entirely different risk situation than a t-shirt supplier. Template-based questions like

[3] Wirtschaftswoche, Warum diese Mittelständer sich mehr Regulierung wünschen, abrufbar unter: https://www.wiwo.de/unternehmen/industrie/lieferkettengesetz-warum-diese-mittelstaendler-sich-mehr-regulierung-wuenschen/30242858.html.
[4] KPMG Norway, Review of the effects of the Norwegian Transparency Act (2024), p. 17 f., 26 and 47.
[5] Business Europe, OMNIBUS I CS3D, CSRD AND TAXONOMY (2025), p. 6 f. OMNIBUS I.
[6] Note from the General Secretariat of the Council (Polish Presidency) to the Permanent Representatives Committee, regarding COM(2025) 81 final [Omnibus I], Interinstitutional File: 2025/0045(COD), 22 May 2025, Sec. 9.
[7] Many thanks for the constructive feedback, especially to Michaela Streibelt (DE), Céline da Graça Pires (FR), Stéphane Brabant (FR), Kristin Tallbo (SE), Olivia Windham Stewart (UK), and Martijn Scheltema (NL).
[8] Wirtschaftswoche, Warum diese Mittelständler sich mehr Regulierung wünschen, available at: Lieferkettengesetz: Warum sich diese Mittelständler mehr Regulierung wünschen.
[9] Regular risk analysis pursuant to Section 5 (1) for direct suppliers, as opposed to the ad hoc risk analysis required under Section 5 (4) and Section 9 (3) for indirect suppliers.

"Do you respect the prohibition of child labour" or "Do you have adequate measures to address child labour" are unlikely to create the deep understanding needed to actually address problems.[10] Additionally, only focusing on tier 1 does often not meaningfully contribute to reducing human rights and environmental risks, since in many supply chains, the actual issues typically occur deeper in the supply chains.[11] For example, in the coffee supply chain, the risks related to living wages and child labor occur on farms, not in the office of a coffee trader in Hamburg. These issues are simply ignored by a risk analysis approach that mainly addresses direct suppliers.

The most widely spread approach of preventive measures is often focused on boilerplate risk-shifting.[12] Direct suppliers are required to sign unilateral contractual clauses or "Supplier Codes of Conduct". In these, suppliers must often guarantee to comply with all human rights and that no risks or violations occur under threat of immediate termination. These commitments are unrealistic, as most companies and their supply chains are in fact exposed to human rights risks and violations: For example, discrimination and unequal pay for equal work are risks to be addressed in both LkSG and CSDDD, while the pay gap is still broad in most countries.[13] Furthermore, such commitments are harmful because they incentivize suppliers to hide problems rather than address them. They also ignore the responsibilities of buying companies, especially to responsible purchasing, for example to pay fair prices.

These approaches - even though wide-spread - do not align with the LkSG. The German Federal Office for Economic Affairs and Export Control (BAFA) has made it clear that companies should adopt a risk-based approach when gathering information and proceed in a more targeted manner.[14] They must first develop their own understanding of risks – i.e., identify which risks might be relevant for the supplier – and then ask specific questions accordingly. Sector-specific and industry-wide approaches are particularly effective here, as they can standardize the handling of typical risk scenarios. Companies must live up to their shared responsibility: [15] Only when companies act cooperatively and support their suppliers can the required standards generally be met. Principles and proposals for how to reflect this in contracts have been developed, for instance, by the Responsible Contracting Project.[16]

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[10] A better approach are sector-specific questions related to the typical risk situation the supplier operates in as used by Hapag-Lloyd, see Hapag Lloyd, Bericht zum LkSG 2024, p. 8.

[11] Rightly stated by the European Commission in SWD-omnibus 80-81_EN of 26 February 2025, final version, p. 35: "A strict limitation to tier 1 would have a detrimental effect on the effectiveness of due diligence since the main risks to human rights and the environment most often occur further upstream (and downstream) in the value chain (for instance upstream at the stage of raw material sourcing or at initial manufacturing stages, or downstream at the transport stage)."

[12] In detail: Dadush / Schönfelder / Braun: Complying with Mandatory Human Rights Due Diligence Legislation Through Shared-Responsibility Contracting: The Example of Germany's Supply Chain Act (LkSG) (March 3, 2023). Contracts for Responsible and Sustainable Supply Chains: Model Contract Clauses, Legal Analysis, and Practical Perspectives, ABA Business Law Section 2023, Rutgers Law School Research Paper, available at SSRN: https://ssrn.com/abstract=4389817.

[13] Overview: https://www.weforum.org/publications/global-gender-gap-report-2023/in-full/benchmarking-gender-gaps-2023/.

[14] BAFA FAQ zum risikobasierten Vorgehen (2025): https://www.bafa.de/SharedDocs/Downloads/DE/Lieferketten/faq_risikobasierte_vorgehen.pdf%3F__blob%3DpublicationFile%26v%3D2%23:~:text%3DDas%2520LkSG%2520und%2520auch%2520die,Zulieferer%2520in%2520der%2520Lieferkette%2520ber%25C3%25BCcksichtigen.&ved=2ahUKEwirIIDAw8iNAxUOKvsDHURtAGcQFnoECBUQAw&usg=AOvVaw3sHA7gfeXbMdHlfxATmZw.

[15] BAFA Guidance collaboration in the supply chain between obliged enterprises and their suppliers, available at: BAFA - Homepage - Collaboration in the supply chain between obliged enterprises and their suppliers.

[16] https://www.responsiblecontracting.org/

The CSDDD addressed LkSG's implementation challenges well, Omnibus risks repeating these mistakes

Many provisions of the CSDDD initially addressed the problems that have emerged during the implementation of the LkSG in Germany. Compared to the LkSG, the adopted version of the CSDDD strengthens the risk-based approach - and accordingly reduces bureaucratic burdens. Companies are required to take a holistic view of their entire supply chain ("chain of activities") through a preliminary mapping exercise but only conduct in-depth analyses in areas identified as particularly relevant.[17] This gives companies the freedom to concentrate their limited resources on the parts of the supply chain where the most significant impacts actually occur. The approach builds on established international frameworks and corresponding regulatory standards, thereby enhancing regulatory coherence and creating synergies for companies.[18] This is accompanied by an even stronger emphasis on shared responsibility and fair treatment of SMEs.[19]

Maintaining the risk-based tier n approach

According to the European Commission's proposal, companies would generally only be required to monitor their own operations and direct suppliers – as under the LkSG – and only include indirect suppliers where they have "plausible information."[20] This risks reproducing the same bureaucratic implementation problems as seen with LkSG. This is acknowledged by the EU Commission itself: "A strict limitation to tier 1 would have a detrimental effect on the effectiveness of due diligence since the main risks to human rights and the environment most often occur further upstream (and downstream) in the value chain (for instance upstream at the stage of raw material sourcing or at initial manufacturing stages, or downstream at the transport stage). […] [The company] will have to rely more on contractual cascading. This may increase the trickle-down effect on SMEs compared to the CSDDD as in force, in particular on low-risk EU SMEs which are often direct contractors."[21]

Consequently, many actors, among them the UN High Commissioner for Human Rights, business representatives and the Polish Council Presidency as well as BHR practitioners criticize the envisioned tier 1 approach as a move away from the established risk-based approach that complicates matters.[22] It risks incentivizing the above described bureaucratic

[17] See Article 8 (2a) on "mapping" and (2b) on in-depth analysis in risk areas.
[18] Both the UNGPs and the OECD Guidelines require risk-based due diligence throughout the entire supply chain. The OECD Guidelines are referenced in Article 4 of the Norwegian Transparency Act, the EU Conflict Minerals Regulation, the EU Battery Regulation, and Article 18 of the EU Taxonomy Regulation.
[19] Dadush / Schönfelder / Streibelt, What the EU Corporate Sustainability Due Diligence Directive Says About Contracts (2024) https://www.responsiblecontracting.org/csddd-policy-brief.
[20] Article 8 (2) and (2a) of the CSDDD as proposed in the Omnibus draft.
[21] SWD-omnibus 80-81_EN of 26 February 2025, final version, p. 35 f.
[22] See OHCHR Commentary on the Omnibus Proposal, (5/2025), p. 2 f., https://www.ohchr.org/sites/default/files/documents/issues/business/mhrdd/ohchr-commentary-omnibus.pdf; Business Europe, OMNIBUS I CS3D, CSRD and Taxonomy, Position Paper (4/2025), p. 8 https://www.businesseurope.eu/wp-content/uploads/2025/04/2025-04-Businesseurope-position-paper-on-omnibus-I.pdf; Council of the European Union, 2025/0045(COD), Note from General Secretariat oft he Council to

tick-boxing measures that bind significant resources but fail to deliver impact and call for a move back to tier n risk-based obligations. Many BHR experts view the risk analyses required under the original CSDDD as an opportunity to address supply chain risks in a systematic and structured way, rather than reacting only to media coverage or NGO reports. The Norwegian experience, where companies are obliged to conduct risk-based HREDD in their whole supply chain,[23] shows that this is well-founded:

Lessons learned from the Norwegian Transparency Act[24]

The Norwegian Transparency Act stands out in several ways: Besides requiring risk-based HRDD in the whole supply chain, it directly covers 9000 companies, among them many SMEs.

- The risk-based approach in the Transparency Act is supported by a great majority of businesses, other stakeholders and experts and is perceived as feasible, including by SMEs.
- The risk-based approach is not perceived as overly bureaucratic but rather as allowing for focusing on the most serious and relevant issues, setting incentives for practices that focus on impact
- The requirements are perceived as clear by a majority of companies
- While being under more pressure than bigger companies, even obliged SMEs do not report being overwhelmed by the Act
- Despite the risk-based approach, there has been an initial tendency of using too many questionnaires to suppliers and sub-suppliers
- Asked specifically, Norwegian experts recommend that the EU should not move away from the risk-based approach to an approach focused mainly on tier 1 as they see this as not being aligned with international standards but undermining the very concept of a risk-based approach and therefore risking a more bureaucratic approach

This opportunity is now at risk due to the vague criterion of "plausible information," as the Commission itself rightly points out.[25] It remains unclear why the European Commission wants to dilute the risk-based approach, despite its own compelling analysis. While the Commission highlights that many companies already look beyond their direct suppliers,[26] it fails to acknowledge the significant disincentives its proposal creates for such frontrunners. These leading companies may now find themselves penalized: those who carry out risk analyses in

Permanent Representatives Committee (22 May 2025), parr. 9; Views from business and human rights advisory practice and academia on the EU omnibus proposal, https://media.business-humanrights.org/media/documents/Omnibus_Letter_BHR_Professionals.pdf.

[23] Transparency Act, Art. 4 b), english version available at: https://www.regjeringen.no/contentassets/c33c3faf340441faa7388331a735f9d9/transparency-act-english-translation.pdf.

[24] These lessons learned are based on an evaluation of the Act by KPMG Norway, Review of the effects of the Norwegian Transparency Act (2024), see especially p. 17 f., 24, f., 26 ff., 39 f., 43 and 47 and experts interviews with Norwegian BHR experts Kristel Tonstad, Beate Ekeløve-Slydal, Simen Høy Dypvik.

[25] SWD-omnibus 80-81_EN of 26 February 2025, final version, p. 36: "Another countervailing factor is that companies might be less able to carry out a structured risk analysis and proper risk management, as their actions may be more driven by media reports and information gathered through complaints."

[26] SWD-omnibus 80-81_EN of 26 February 2025, final version, p. 36.

line with international standards and regulatory expectations are precisely the ones most likely to generate "plausible information" – thereby triggering additional obligations.[27]

Better explanation of the risk-based tier n approach

The criticism some voice regarding obligations in the deeper supply chain is, however, based on legitimate concerns of overburdening. Many companies – rightly – fear that they will not be able to monitor their entire supply chains down to the last tier in order to manage all risks. However, this is not what the CSDDD legally requires. It follows a risk-based approach and establishes rules on prioritization[28] and proportionality, framing due diligence obligations as obligations of means.[29] Only those parts of the supply chain that carry significant risks must be subject to in-depth analyses, and even then, what is expected as part of the obligation of means is continuous improvement, not immediate perfection. A process to implement tier n risk-based due diligence could look like this:

Step 1: Mapping of the product groups, including:
• Mapping of own procurement categories to risk indicators (industry risks, countries of production if known, possibly influence (e.g. purchasing volumes or revenue share)). • To support this, existing government data in the CSR Risk Check should be expanded, differentiated around all relevant products, services and raw materials and, above all, be made exportable in a more user-friendly way. • Prioritizing the riskiest categories and deprioritizing others, for examples by prioritising a certain percentage of product groups and supply chains every year
Step 2: Mapping the typical supply chain and risks, including:
• Mapping of typical steps of the supply chain (processing stages, transport, raw materials, etc.), and typical risk scenarios at that step of the supply chain, including typical risk causes. • To support this, existing data in the CSR Risk Check should be expanded to include all products, services, and raw materials with a representation of the typical processing steps. • Involvement of stakeholders for plausibility checks (NGOs, suppliers, industry exchanges, etc.). • Prioritization of the most relevant risk scenarios according to the adequacy criteria (e.g. Focus on 4-6 most relevant risk scenarios).

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[27] They could, of course, use the the generated information about tier n risk to argue that they can deprioritize some tier 1 risks under Art. 9 CSDDD, which might still make it benefitial to proactively analyse tier n risks. But the first impulse of many is likely to be avoiding knowledge about plausible information to avoid obligations.
[28] Art. 9 CSDDD.
[29] The proportionality principle from Article 3(o) is referenced throughout all due diligence obligations and allows companies, for example, to limit their actions to those "reasonably available to the company," which is reinforced by the emphasis on the obligation of means in Recital 19.

Step 3: Development and implementation of preventive and corrective measures, including:
• Development of typical strategies for prevention and correction in relation to the affected category, including the integration of strategies into purchasing practices, for example through incentives for good measures from suppliers (if available, assessed via credible certifications). • Targeted approach to contacting suppliers, for example through sector-specific questionnaires and requirements based on assessing typical risks and measures. • To support this, existing data in the CSR Risk Check should also be expanded to include standard questions based on sector- or country-specific risk scenarios in the excel format to all companies. • Development and implementation of common approaches and standards in the industry. • Targeted approach to selective disclosure of risky upstream suppliers.

Companies are not required to be perfect: The CSDDD obliges companies to take "appropriate measures", constituting an obligation of means.[30] The appropriateness criteria offer the companies a margin of discretion that could be compared with the administrative figure of discretion or the business judgement rule. The German legislator[31] describes the appropriateness criteria of the LkSG as giving companies a "necessary flexible space for and scope for action when selecting appropriate measures" (own translation) and designing the risk management procedure overall. The more a certain criterion (for example: scale, scope, remedy) is present in an issue, the more it can be expected for the company to address that issue. This logic can be applied to the CSDDD as well: Where a company decides to focus on a certain issue in a certain depth and – logically in a context of limited resources – not to focus on another issue in return, this is justified as long as the company bases that judgement on a reasonable application of the appropriateness criteria.[32] While desirable, it might not be possible to weigh all appropriateness criteria for any given judgement because of the lack of information on them. What some companies describe as lack of legal certainty is actually a consequence of freedom.

To support effective implementation by giving companies more confidence in dealing with complex tier n issues, it is essential that the European Commission issues guidance, describing how companies can use the appropriateness criteria to tailor their HREDD, outlining a practical approach to risk-based due diligence in the deeper supply chain, grounded in these principles. The need for better guidance was also highlighted in the Norwegian context,[33]

[30] Art. 3 (o). Recital 19 explains this: "Companies should take appropriate steps to set up and carry out due diligence measures, with respect to their own operations, those of their subsidiaries, as well as those of their direct and indirect business partners throughout their chains of activities in accordance with this Directive. This Directive should not require companies to guarantee, in all circumstances, that adverse impacts will never occur or that they will be stopped. For example, with respect to business partners, where the adverse impact results from State intervention, the company might not be in a position to arrive at such results. Therefore, the main obligations in this Directive should be obligations of means."

[31] BT-Drucksache 19/28649, p. 42.

[32] Article 29 also excludes liability for damages resulting from appropriately deprioritised impacts.

[33] The KPMG Norway study on page iv called for guidance on „proportionality, prioritisation, what is to be considered 'sufficient' due diligence"

where the practice of some companies to focus on questionnaires shows that tier n risk-based approaches need to be clearly explained.

Strengthen and clarify the Principle of Fair Engagement with SME Suppliers

Many SME suppliers report feeling overburdened by extensive questionnaires and one-sided contractual clauses.[34] In contrast, the BAFA and Helpdesk guidance on collaboration in the supply chain,[35] as well as the CSDDD,[36] clearly state that suppliers, especially SMEs, must only be included in the due diligence processes of larger companies in a fair manner and in line with their capacity.

- The principle of fair inclusion of SME suppliers should be further specified in the guidelines to be issued by the European Commission, for example:
    - Due to the principle of proportionality, SME suppliers should face lower requirements than larger suppliers with comparable risk profiles.
    - Clarification of what constitutes “fair, reasonable, and non-discriminatory” contractual clauses towards SME suppliers. For example, SME suppliers should only need to cascade contractual obligations in their own supply chains in selected cases—specifically within their own high-risk categories involving high volumes.
    - Risk analysis and audit results should be shared with SME suppliers by default.
- Standardized, automated questionnaires are not appropriate—they should be tailored by sector and to the SME status of the supplier. In this regard, the Omnibus proposal to limit information requests for companies with fewer than 500 employees to the VSME Standard,[37] is only partially suitable. The standard is too general to provide the information necessary for effective risk analysis:
    - Instead, sector-specific questionnaires should be used that are shorter but more precise in collecting information on typical risk scenarios and mitigation measures. The Commission and Member States could support this by continuously developing templates for such questionnaires for particular relevant sectors. For SME suppliers, the number of questions could be reduced.
    - In line with this, standards for the use of IT tools must be better defined and enforced. If such tools rely on generic, automated questions, they contribute to bureaucratic burden-shifting onto suppliers.
    - Interoperability and mutual recognition should be improved: If a supplier has already completed a questionnaire from a particular tool or company, this should be

[34] See also Wirtschaftswoche, Warum diese Mittelständler sich mehr Regulierung wünschen, available at: Lieferkettengesetz: Warum sich diese Mittelständler mehr Regulierung wünschen.
[35] https://www.bafa.de/SharedDocs/Downloads/EN/Supply_Chain_Act/guidance_cooperation_supply_chain.html.
[36] See in particular Articles 10(2)(e) and (5), and 11(2)(f) and (6) CSDDD.
[37] See Art. 8(5) of the Omnibus proposal by the European Commission.

accepted and evaluated by other companies—unless key information is missing. IT tools must be able to facilitate such interoperability.

- State support services for companies, especially SMEs. Article 20 CSDDD provides that Member States shall support companies, especially SMEs, including via financial assistance. In Germany and other Member States, positive approaches are already being implemented in this regard. These should be further expanded, ideally coordinated across the EU. Some of these approaches are outlined below:
    - BAFA actively monitors whether companies are indiscriminately shifting responsibilities and risks onto SME suppliers. This welcome monitoring practice should be emulated across Member States and strengthened – for example, by establishing a central, easily accessible dispute resolution body that can mediate in cases of unfair burden-shifting.
    - Process descriptions for SME due diligence and cooperation with SMEs, differentiated by size (micro, small, medium) to clarify what can be reasonably expected of them under the proportionality principle. Collections of best practices in due diligence implementation by SMEs.[38]
    - Targeted development of practical tools, checklists, and templates (e.g. in Excel) for specific steps in the due diligence process – by consolidating existing resources such as the CSR Risk Check[39] or the guidance for measures from the Swedish regions,[40] KMU-Kompass,[41] and the BHR Navigator,[42] and identifying and closing any gaps.
    - Informational resources and training programs for SMEs, and the targeted expansion of Helpdesks to offer hands-on SME advisory services.

Omitting civil liability provisions undermines legal certainty and hinders harmonization

In Germany, there was no political majority in favor of regulating civil liability. As a result, LkSG does not contain liability provisions, but only ambiguous statements regarding civil liability.[43] The absence of a specific liability rule does not mean that companies are free from liability risks. Liability may still arise under national or foreign contract or tort law. Currently, damage

[38] A positive example is the textile SME Hakro, which - despite its small size - has implemented such ambitious measures that it has been recognized as a “Leader” by the Fair Wear Foundation, which advocates for sustainability and labor rights in supply chains. See: https://www.fairwear.org/brands/hakro/.
[39] https://www.mvorisicochecker.nl/en
[40] Available in English at: https://www.hållbarupphandling.se/en/vagledning.
[41] KMU Kompass.
[42] Startseite • Business & Human Rights Navigator.
[43] Section 3(3) sentence 1 of the Supply Chain Act (LkSG), along with the explanatory memorandum of the committee report (BT-Drs. 19/30505, p. 39), appears to speak relatively clearly against applying the LkSG as a protective law within the meaning of Section 823(2) of the German Civil Code (BGB). In contrast, Section 3(3) sentence 2 LkSG and the provision in Section 11 LkSG allowing trade unions to represent claimants in civil proceedings seem to assume the basic applicability of at least some tort-based liability norm – suggesting that Section 823(1) BGB may apply. This hardly amounts to legal certainty.

cases in international supply chains involving German and European companies are subject to a wide range of different liability regimes as in most cases the law of the place where the harm occurred applies.[44] This creates uncertainty for both companies and rights holders.

The CSDDD was originally intended to provide remedy. Article 29(1) stipulates that all Member States must adopt liability provisions under which companies are held liable for culpable contributions to harm affecting protected legal interests. According to Article 29(7) CSDDD, such provisions would apply as overriding mandatory rules, regardless of where the harm occurred. Harmonized rules of this kind across all Member States would create legal certainty for both companies and rights holders.

However, the European Commission's Omnibus proposal now aims to remove the CSDDD's standalone liability regime. This would leave it to the Member States to adopt their own liability rules and determine whether they qualify as overriding mandatory provisions. The result could be up to 27 different liability regimes across the EU, in addition to the many different liability regimes of the countries from which European companies are sourcing, leading to considerable legal uncertainty – particularly for companies operating in multiple Member States.[45] Cases with similar underlying facts could be decided very differently depending on the Member State and the country of production. This would also undermine fair competition, as companies in some countries could be held more strictly accountable, while others might face no liability at all. Such a development runs directly counter to both legal certainty and the interest in uniform rules for the European single market.

At this moment, Article 29 CSDDD provides for a balanced approach: fault-based liability for own actions, no liability for the actions of third-parties, and no liability for damages resulting from appropriately deprioritised impacts. That serves victims and businesses best, with fair and unitary liability rules that provide a decent degree of legal certainty.

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[44] Article 4 of the Rome II Regulation generally provides for the application of the law of the place where the damage occurred.

[45] See Legal opinion: How the Omnibus creates uncertainty on civil liability for companies by Prof. Geert Van Calster of KU Leuven commissioned by Tony's Chocolonely, available at: Policies & Position Papers.