Scientific Advisory Board
on Agricultural Policy, Food and
Consumer Health Protection
at the Federal Ministry of Food
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New due diligence obligations for companies in the agri-food sector: recommendations on current legislative developments

Preliminary translation

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Management of the Scientific Advisory Board

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Expert report of the

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Abstract

Sustainability issues in the agri-food sector have become more and more important in recent decades. In addition to a wide range of environmental problems, human rights issues are increasingly becoming the focus of discussion regarding agricultural supply chains. **Companies are increasingly expected to shoulder responsibility for helping to achieve sustainability goals**. So far, this obligation has essentially only applied to a company's own business area. Responsibility for the actions of suppliers, and even more so for the actions of indirect **suppliers** on the upstream stages of the **value chain,** has rarely been a topic of corporate management and has not been legally provided for. Therefore, the **supply chain due diligence regulations** discussed in this expert report constitute a **paradigm shift** for companies.

Due diligence obligations arise in particular from the German **Act on Corporate Due Diligence Obligations in Supply Chains** (*Lieferkettensorgfaltspflichtengesetz*, LkSG), which took effect in early 2023, and the **EU Regulation on Deforestation-Free Supply Chains** (EUDR), which came into force in the summer of 2023. Currently, the EU is negotiating the **proposal for a Directive on Corporate Sustainability Due Diligence** (CSDDD). This proposal goes beyond the LkSG with regard to environment-related and climate-related due diligence obligations, the introduction of civil liability and also the number of companies included.

This expert report examines due diligence regulations, which are a largely **new policy instrument**, with a focus on the **agri-food sector.** The conclusions and many of the recommendations are likely to be **transferable to other economic sectors**. It should be noted that so far there is only **limited experience** with the concrete implementation of the due diligence regulations that have already been adopted. Moreover, the CSDDD is still passing through the legislative procedure.

The Advisory Board has reached the following key **conclusion**: **The WBAE welcomes, in principle, legislation on corporate due diligence,** but also calls for the regulations to be designed and implemented for all stakeholders in a way that is effective and efficient. To this end, the WBAE considers an intensive dialogue with international trading partners, notably LMIC (low- and middle-income countries), and the provision of support measures to be necessary.

Based on this, the Scientific Advisory Board comes to the following **specific conclusions**:

- It is reasonable to **establish risk management systems** to ensure compliance with fundamental labour standards and human rights in companies directly affected by due diligence regulations. The direct costs are comparatively manageable, given that companies in the agri-food sector already have a great deal of experience with quality assurance systems in complex value chains. However, costs may also be incurred by upstream suppliers and due to unintended effects: Some companies might choose to withdraw from areas or from economic sectors facing difficult human rights situations ("cut and run") or choose other circumvention strategies rather than invest in the development of their suppliers. While certification schemes could play an essential role in the efficient and effective implementation of corporate due diligence procedures, they currently still have major shortcomings.
- The steering effect of the LkSG is, in legal terms, limited by the **lack of a liability regime**. A second problem lies in the necessary **proof of fault**. Individuals harmed by infringements of due diligence obligations will often not be in a position to provide corresponding evidence. Therefore, the authorities of the trading partner countries, trade unions and civil society organisations will play a key role, unless a **reversal of the burden of proof** is provided for in

the further legislative process. The draft CSDDD envisages civil liability with a right to compensation. Companies should be able to protect themselves against liability largely via contractual assurances and **certification schemes** ("safe harbour"-provision). So far, it has not been specified which schemes could be suitable for this purpose.

- The **effectiveness and efficiency** of due diligence regulations largely depend on the concrete design of **implementation and supervision.** In this context, **coordinated interfaces** between companies and authorities are of particular importance. Given that the due diligence regulations are a new instrument, it is also essential to **provide assistance** for companies and to **monitor and review** the impact of the regulations in order to identify problems at an early stage and make any necessary adjustments.
- At the European level, in addition to the due diligence regulations, there are **many other regulations** in the fields of trade and investment, environmental and agricultural policies, that use different instruments to improve sustainability. There are differences not only between the different approaches to due diligence, but also between due diligence and other regulatory approaches. These differences entail risks for the achievement of objectives and the regulations' acceptance as well as high implementation costs. These differences complicate implementation and raise questions as to the choice of the right **policy mix.** Corporate due diligence regulations complement trade and investment protection agreements between states, but do not replace them.
- Due to the high level of internationalisation of the agri-food sector, the already widespread uptake of quality standards and the experience with many types of non-tariff trade measures, the **negative impact** of due diligence regulations on trade volumes and trade partners might be **less** than is often assumed. As global **norm diffusion** progresses, **displacement and leakage effects** would also decrease. On the one hand, the **resilience** of agricultural supply chains is sustained by due diligence, for instance by promoting the connectivity of partners and encouraging learning. On the other hand, the number of trading partners could also decrease, which would have an opposing effect. The **risk of market segmentation** is real, but depends strongly on the supply and demand situation, which can vary widely for individual products.
- Due diligence regulations constitute **unilateral action** by Germany or the EU. The choice of unilateral action despite multilateral options and the **extraterritorial effect of the due diligence regulations** without consulting trading partners during the drafting of legislation should be viewed **critically.** In order to achieve the goals of the due diligence regulations, such as the protection of labour standards and human rights along international supply chains, cooperation with the governments of the trading partner countries is necessary. Especially in view of Europe's colonial past, a **focus on partnership** and the inclusion of acquired insights of local stakeholders on the part of trading partners are important for the implementation. Accordingly, there is a need to promote the trading partners' own policy approaches to improving the situation on the ground, to cooperate with trading partners in monitoring and reviewing the regulations' impact, and to make serious efforts to promote multilateral approaches.
- Wages and business incomes that fall short of a minimum subsistence level are a fundamental problem and cause many of the human and labour rights risks identified in agricultural value chains. Therefore, **compliance with minimum wages** should be a **key element** of due diligence regulations, which could also have a positive effect on food security. Adequate minimum wages contribute significantly to the realisation of the right to food.
- **Enshrining environmental and climate targets** in supply chain due diligence regulations (CSDDD) is currently still encountering significant limitations. They should, therefore, only be

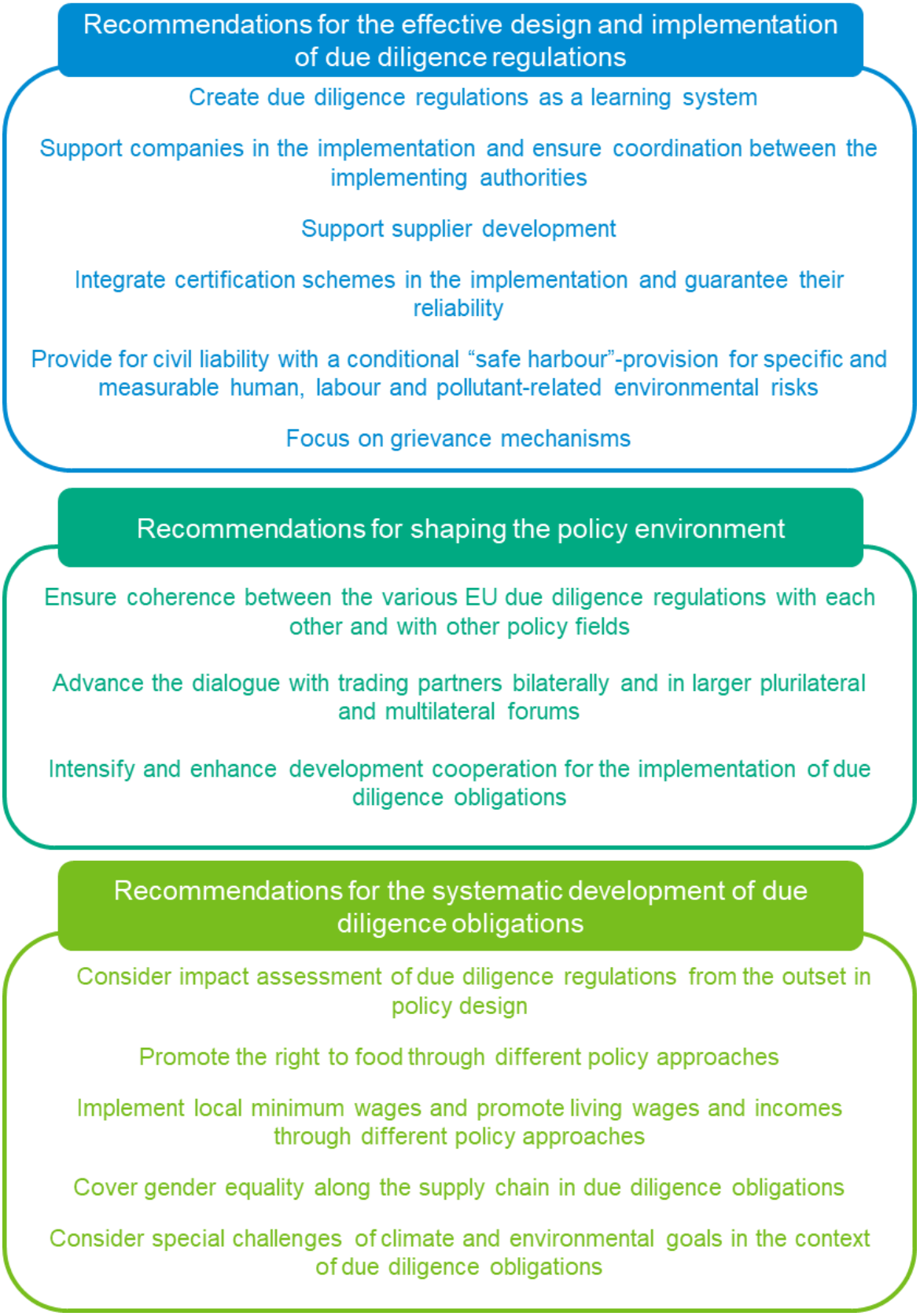
implemented step-by-step, as soon as the **necessary measurement and monitoring systems** are in place.

- The incorporation of additional objectives, such as **living income**, **gender equality** or **climate and biodiversity protection**, into due diligence regulations, requires the involvement of trading partners and the development of measurable corporate due diligence obligations. For this, a detailed derivation from these programmatic objectives is necessary. However, a policy mix with coherent coordination of instruments is also required to achieve these objectives. Corporate due diligence regulations do not release states from their obligation to continue to harness the policy instruments at their disposal to achieve sustainability goals.

The following **recommendations** are intended to contribute to an effective and efficient implementation of due diligence regulations and to prevent these regulations from becoming "a bureaucratic nightmare" if they focus too much on ineffective formalities. An effective and efficient implementation should also contribute to companies working towards positive developments among their suppliers instead of withdrawing from areas / sectors at risk. At the same time, against the backdrop of the current challenges in the EU's geopolitical environment, the recommendations also stress the importance of a partnership approach in working with LMIC.

Overall, the WBAE **supports the introduction of statutory due diligence obligations** in supply chains and recommends their gradual roll-out as **a learning system.** The Advisory Board calls on all stakeholders from the industry, politics and civil society to **work towards** a real improvement in the situation of people in the agri-food sector, thus making due diligence regulations a **success for human rights and labour standards as well as for environmental and climate goals.**

Figure Z1: Overview of recommendations by the Scientific Advisory Board on statutory due diligence obligations in supply chains



Source: WBAE illustration.

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I. Executive Summary

I. Introduction

Sustainability issues in the agri-food sector have gained importance in recent decades and are addressed in various sustainability goals of different policy regimes - such as the Sustainable Development Goals (SDGs) of the United Nations (UN), the Paris Agreement on Climate Change or the labour standards of the International Labour Organization (ILO). In addition to a wide range of environmental problems, human rights issues are increasingly becoming the focus of discussion for agricultural supply chains. Achieving these goals requires great efforts worldwide. In many cases, their success is not yet foreseeable.

For some time now, companies have had a responsibility to contribute to the achievement of sustainability goals on the basis of various guiding principles and recommendations. Until now, this obligation has essentially only applied to a company's own business area. Responsibility for the actions of suppliers, and even more so for the actions of indirect suppliers on the upstream stages of the value chain, has rarely been a topic of corporate management and has not been legally provided for. Therefore, the due diligence regulations discussed in this expert report are a paradigm shift for companies.

The significance of these new regulations both for the achievement of goals and for impacts on other actors can be considerable. Due to their purchasing power, larger companies have the possibility to influence compliance with human and labour rights and environmental due diligence (including climate protection) at the upstream stages. In the past, companies (and ultimately also consumers) were able to profit from violations of basic environmental protection and human rights in the form of lower prices. They, therefore, bear a share of the responsibility.

Voluntary implementation of human rights and environmental standards by companies is often difficult because human rights and environmental protection are typical credence attributes that are usually not visible in the end product. For this and other reasons, even though issues such as the absence of child labour are important to citizens, they can only translate this preference into a concrete purchase decision at the point of sale to a very limited extent.

Globally, the agricultural, fisheries and forestry sectors account for the bulk of child and forced labour. Analyses tend to locate child labour in smallholder farming structures, while forced labour is more commonly encountered in larger agricultural enterprises. The incidence of child labour and forced labour continues to vary widely by sector and region. In addition, informal contractual arrangements, self-exploitation and informal employment of workers on a day-to-day basis can also be found. The associated risks of human and labour rights violations are therefore widespread in agricultural supply chains. Similarly, the close ties between agricultural production and natural resources also give rise to an environment- and climate-related dimension of due diligence for the agri-food sector.

The adopted and imminent legislations on due diligence are of significant relevance for the German and European agri-food sectors and, in part, represent new legal and trade policy territory. Even though the German Act on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettensorgfaltspflichtengesetz*, LkSG) has already taken effect, the WBAE sees major open questions and need for action. Both gave rise to this expert report. The LkSG is a first step in what is likely to be a lengthy process of extending the responsibility of companies above a certain size for their supply chains. In particular, this includes the EU Corporate Sustainability Due Diligence Directive

(CSDDD), which is currently being negotiated in the EU, and the already adopted EU Regulation on Deforestation-Free Supply Chains (EUDR). In a broader sense, however, this also includes the European Commission's proposal for a regulation on the ban of products made with forced labour on the EU market and the already adopted Directive on an obligation for in-depth sustainability reporting by companies (Corporate Sustainability Reporting Directive; hereinafter: CSRD). These EU proposals go beyond the German LkSG in terms of scope of application and assets to be protected, especially with regard to the significance of environmental and climate change risks and civil liability, but also with regard to the number of companies included. For example, the EU's proposed CSDDD classifies agriculture as a high-risk sector. Therefore, in comparison to the LkSG, smaller companies with 250 or more employees would be affected.

With these regulations on due diligence along the supply chain, companies in the agri-food sector will also assume increased responsibility for people in other countries and thus also in low- and lower middle-income countries (LMIC). This entails a new division of labour between state and industry for the enforcement of basic human rights and labour standards as well as of environmental protection and climate stewardship.

The objectives of this expert report are:

- to contribute to a broader understanding of due diligence legislation (Section 2);
- to examine the extent to which this constitutes a paradigm shift (Section 2);
- to identify relevant issues in the fields of human and labour standards as well as environmental protections and climate change mitigation in agricultural value chains and to assess the resulting challenges for the agri-food sector in implementing supply chain legislation (Sections 3 and 4);
- to analyse the legislations and their potential effects, also in terms of trade-offs, including unintended effects of due diligence regulations, from different perspectives. Alongside a business, legal and policy perspective, the due diligence regulations are being assessed in terms of administration, foreign trade and also international relations (Section 5), and
- to derive recommendations for the handling, adaptation and further development of the major legislative initiatives at German (LkSG) and European levels (CSDDD, EUDR), and for flanking measures taken by the government (Section 6).

The recommendations in this expert report are derived from an analysis of the agri-food sector, which is a key area of application. Many of the recommendations are likely to be transferable to other sectors.

II General classification of the supply chain approach: Sustainability transformation and corporate responsibility

Due diligence regulations seek to improve the human rights and environmental situation through corporate obligations. The UN Guiding Principles on Business and Human Rights from 2008 provide a framework for corporate responsibility with regard to human rights. They emphasised the need for due diligence along the supply chain for the first time at the international level. Based on the proposal of the then UN Special Representative on Business and Human Rights, John Ruggie, they comprise three pillars:

1. The duty of the state to protect its citizens from human rights violations by third parties, including business enterprises,
2. the responsibility of business enterprises to respect human rights, and
3. the need and obligation of the state and business to create more effective access to remedy for victims.

Part of the business community has voluntarily engaged in this field in recent years, but the danger of undercutting competition remains – also between LMIC in the global competition for locations. Current due diligence approaches in wealthier countries now place an obligation on their companies to implement certain standards. These standards apply in their home countries, but also in most trading partner countries. Some of these companies can exercise considerable buyer power in the value chain.

The juridification of due diligence should also be understood as a reaction to the limits of "soft law", i.e. to the limits of non-binding regulations (guidelines). They are based on conventions that are binding on signatory states under international law, but which are themselves not binding on companies. In the emerging legislations, the implementation of due diligence remains with companies, but compared to voluntary approaches the state has a strengthened role in the definition of due diligence and due to the monitoring function. Other existing policies, such as sustainability chapters in trade agreements, show weaknesses as there are only weak enforcement rules.

Supply chain due diligence regulations are supposed to protect producers and traders from competitors who achieve cost advantages in international competition due to non-compliance with fundamental human rights standards and disregard for the environment. Due diligence regulations make producers and trading companies also responsible for human rights and environmental issues. Many of these companies already establish or observe standards in the value chain with regard to areas such as food safety and product quality.

There are central ethical-political lines of reasoning and principles for the responsibility of companies to work for the observance of human rights beyond the boundaries of their own company: According to these, responsibility is borne not only by those who have caused a problem (polluter pays-principle), but also by those who derive a benefit from it (beneficiary pays-principle) and/or who have the means to remedy it (ability to pay-principle). Due diligence laws with their focus on the responsibility of larger companies primarily based in countries with high per capita income do not necessarily assume a direct cause-effect relationship. The company's responsibility therefore does not only depend on whether it has caused the human rights violations through its own actions. Instead, the ethical principles also focus on the fact that buyers in wealthy countries benefit from their suppliers' disregard for human rights (beneficiary pays-principle) and, in particular, that companies are able to influence the actions of their suppliers (ability to pay-principle).

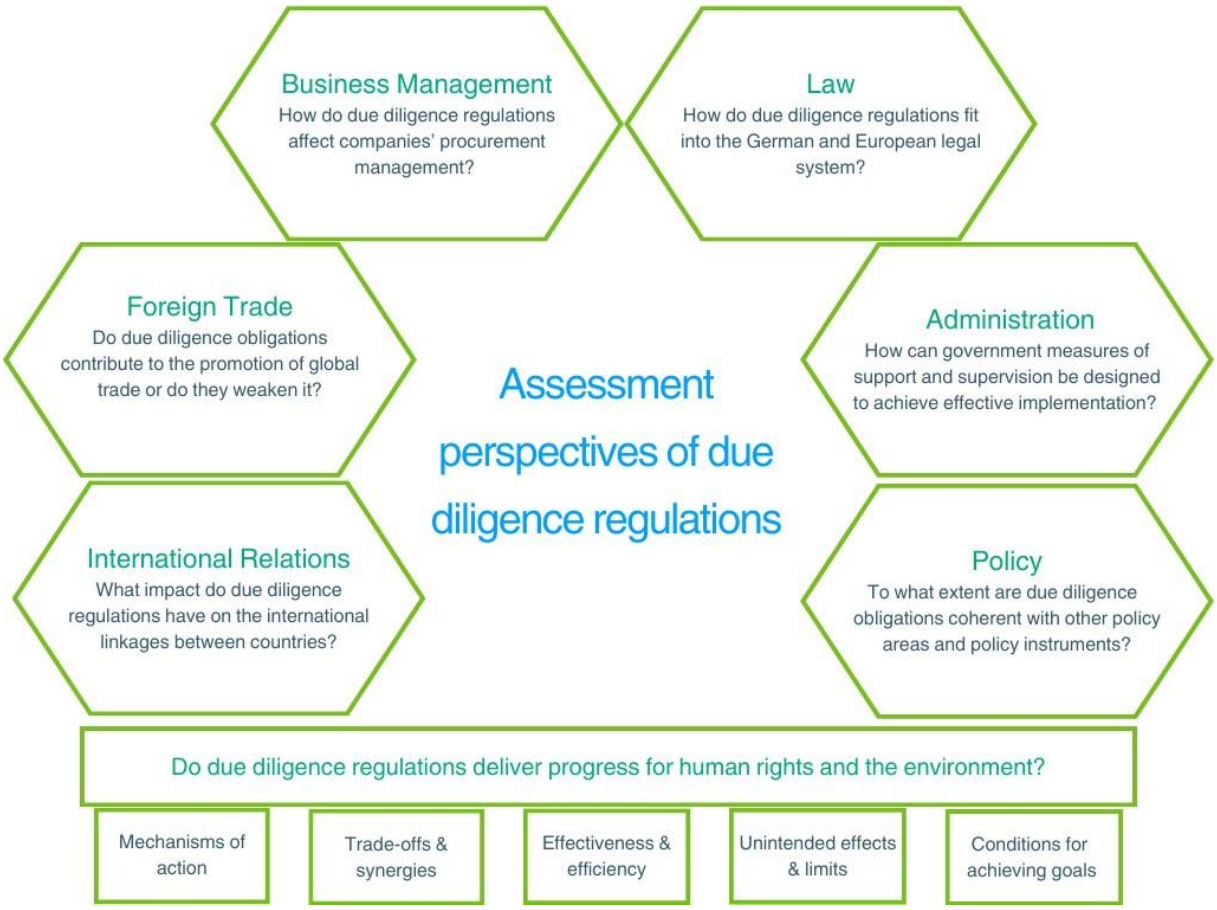
At least for larger buyers the general ability to significantly influence suppliers in their entrepreneurial behaviour through specifications can be assumed, as the already existing comprehensive influence in the area of quality management shows. Against the background of increasingly concentrated stages of the value chain, it is obvious that such larger and thus more capable actors should also be held accountable for the implementation of fundamental standards in human and environmental rights. This increase in concentration holds especially for the middle (e.g. in international agricultural trade) and the end (in retailing) of the food value chain.

Legal supply chain due diligence requirements have the potential to contribute to improving the human rights and environmental situation of trading partners. However, this is a new policy area in

which the coordination of different national and international regulations and the implementation details are still under development. It is a far-reaching step because due diligence regulations decisively change the division of tasks between the state and private actors with regard to the enforcement of human rights and environmental regulations along the value chain. From a business perspective in particular, they thus represent a fundamental change in the way companies must assume their responsibilities along their supply chains.

In view of the far-reaching change that the new approach is supposed to bring about in companies, essential questions arise, for example regarding the (constitutional) legal permissibility of obliging companies or regarding the measurement of possible sustainability effects. Furthermore, it must be asked what this approach means for existing trade policy in general, whether it could be associated with problems under international law, whether extraterritorially effective regulations of wealthy industrialised countries vis-à-vis affected LMIC are legitimate and how they fit into the EU's geostrategic interests and policies. Finally, it must be asked how complex the implementation of the due diligence regulations will be and what bureaucratic effort the implementation will trigger for the companies concerned and the competent authorities. This report therefore analyses the various due diligence regulations from a broad interdisciplinary perspective (cf. Fig. ES.1).

Figure ES.1: Assessment perspectives of due diligence regulations



Source: Own presentation.

III. Due diligence regulations: Basics, status quo and developments

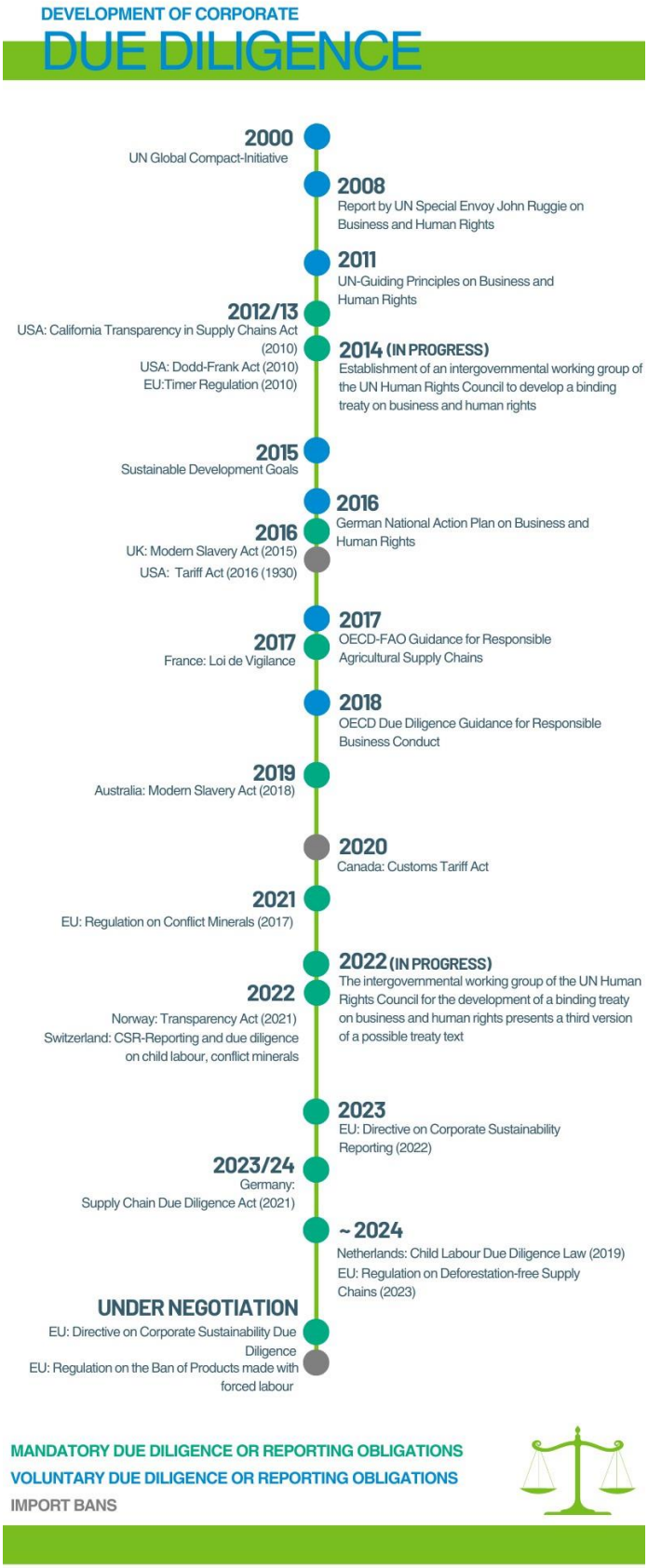
Over the past twenty years, the issue of corporate due diligence has gained significant momentum: initially on a voluntary basis, and more recently increasingly codified in legislation. The legal development started with specific regulations for problem sectors such as conflict minerals or product groups which are responsible for deforestation. With the adoption of the LkSG and CSDDD, horizontal, i.e. cross-sectoral regulations, are now being added (cf. Fig. ES.2).

In principle, due diligence regulations follow a risk-based approach: In order to fulfil their due diligence obligations, the companies concerned must, according to the German LkSG, establish systems in the areas of risk management, risk analysis, corrective measures and complaints procedures, develop preventive measures, draw up a policy statement and fulfil documentation and reporting obligations. This includes establishing an in-house responsibility for due diligence. Companies covered by the Act must conduct regular risk assessments, usually annually, for their own business and for direct suppliers, and take preventive and remedial action when risks are identified. The complaints procedure to be established must also be accessible to persons in the indirect suppliers' environment. The due diligence obligations are graduated along the supply chain. The responsibility of companies under the LkSG initially relates only to direct suppliers. However, indirect suppliers, i.e. those further up the value chain, must be included if there is substantiated knowledge of possible violations.

What the evolving legal due diligence obligations have in common is that they primarily refer to international conventions in the fields of labour, human and environmental rights. This similarity holds especially with regard to the initially eight of the ten fundamental conventions of the International Labour Organisation (ILO). These eight fundamental conventions are based on the ILO fundamental principles of (1) freedom of association and the right to collective bargaining, (2) elimination of forced labour, (3) abolition of child labour, and (4) elimination of discrimination in respect of employment and occupation. Differences arise in that the draft CSDDD provides for the inclusion of many other conventions under international law, thus potentially extending corporate due diligence obligations to environmental conservation and climate mitigation. In addition, the draft also provides for potentially more comprehensive obligations compared to the LkSG in terms of the depth of responsibility (entire chain, upstream and downstream sectors). The EUDR with its focus on zero deforestation is particularly relevant to the agricultural sector because of the range of products covered.

There are significant differences both between the different due diligence rules in the narrower sense and with a view to other approaches regarding trade. In this respect, the agricultural sector is affected by regulatory approaches which differ widely. Overall, the new due diligence regulations fit into an extensive catalogue of different policy approaches to sustainability along global supply chains, such as regulations in trade agreements.

Figure ES.2: Human rights-related regulations and due diligence obligations over time (selection)



Source: Own representation based on Grabosch 2022, Luthango and Schulze 2023.

IV. Context and relevance of human rights and environment-related due diligence obligations in the agri-food sector

Supply chains in the agri-food sector are very heterogeneous, especially with regard to the degree of cooperation, the importance of contractual ties and certification, but also with regard to the dominant actors in the supply chain. This variation also applies to the share of wage labour or smallholder structures, which results in different challenges with regard to labour standards relevant to due diligence and issues such as minimum wages. International agricultural value chains at the level of primary production are often multi-level, more fragmented and less transparent than value chains in other markets. Therefore, the issue of indirect suppliers plays a major role from the perspective of European companies.

Depending on the design of the value chain, this can facilitate the implementation of due diligence legislation (e.g. in the case of direct purchasing by food retailers from agricultural producers) or make it more difficult (e.g. in the case of many intermediaries). However, the market significance of the large international traders and the large food retailers in Europe is now so considerable that such companies can also assume greater responsibility for due diligence obligations.

Value chains in the agriculture and food sector are characterised by high risks of human rights violations and comparatively often by problematic working conditions. Compared to other sectors, jobs in agricultural supply chains are lower paid, more dangerous and insecure, and more prone to child and forced labour. Positive developments can only be observed to a limited extent, despite various voluntary measures. Moreover, various environmental risks are associated with agricultural production. In addition to the effects of domestic production, the EU and Germany, as important importers of agricultural products, also have a considerable environmental footprint elsewhere, for example in the area of deforestation. Therefore, environmental due diligence can also contribute to reducing environmental problems in trading partner countries.

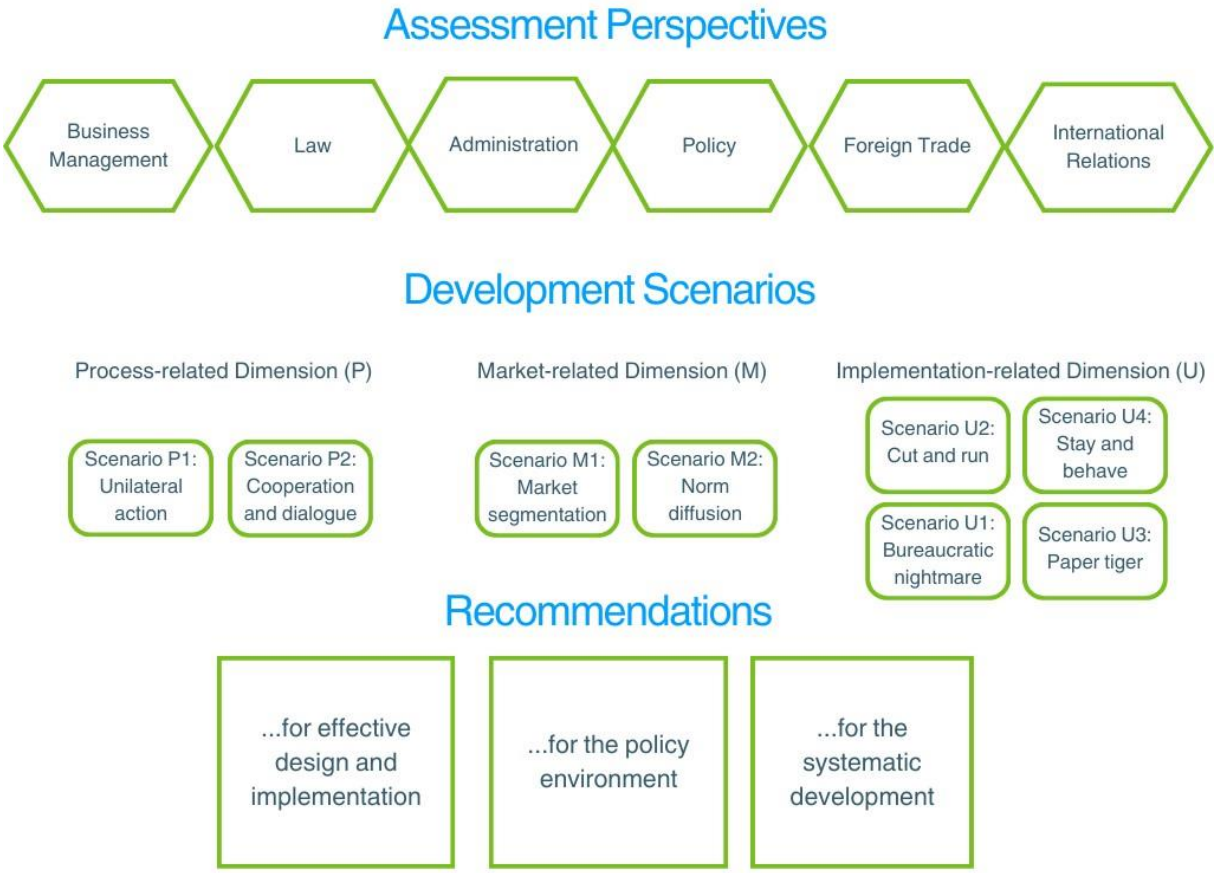
It should be emphasised, however, that the risks described are not limited to agricultural production in other countries including LMIC. For the EU and Germany, there is also sufficient evidence that risks of labour rights violations exist in various subsectors. Migrant workers are often affected. Due to these implementation gaps in regulatory law, which also exist in Germany and other EU states, it is appropriate that companies must also fulfil their routine due diligence obligations for their suppliers in the EU and Germany. It is appropriate that these are not excluded from the due diligence obligations, for example, via a country-specific positive list. The risks of human rights or labour rights violations may differ between the individual subsectors of the respective trading partners. Hence, it is better to prioritise risks in the context of internal risk management instead of country lists (cf. Section 3.4). However, this does not mean releasing the respective countries themselves from the primary duty to enforce their own regulatory law.

V. Opportunities, challenges and limits of due diligence regulations

In the following, the opportunities, challenges and limitations of due diligence systems are discussed from different assessment perspectives (cf. Fig. ES.3). Development scenarios are then derived from this assessment. Thereafter, summarised conclusions are drawn for the key questions: What progress can due diligence regulations bring for human and labour rights as well as the environment? Where could adjustments to the regulations still be necessary? Where do these regulations reach their limits?

The conclusions lead to key recommendations for decision-makers in politics, administration and business.

Figure ES.3: Structure of the expert report



Source: Own presentation

V.1 Business management perspective: Implementation in the interplay of operational organisation and certification

The organisational and procedural elements of risk management are familiar to large companies in particular, but also to a considerable number of larger medium-sized companies from comparable processes such as quality management. The direct costs of supply chain management are comparatively manageable. The indirect costs implied by the LkSG are much more difficult to estimate, e.g. if certain trading partners are considered too risky by the companies and other suppliers are therefore sought. Costs will also be incurred by upstream suppliers. These costs, if they can be passed on in the value chain, increase end consumer prices in Germany. If they cannot be passed on, they reduce the competitiveness of companies in markets where they compete with companies that are not subject to such due diligence obligations. The size of direct and indirect costs and the relevance of the resulting possible competitive disadvantages depends on many factors and can therefore hardly be estimated in general terms.

The direct and, in particular, indirect costs of complying with due diligence obligations must be set against possible economic benefits, especially through more stable value chains, if there is better

supplier development and the interest of customers in long-term supplier relationships grows, as well as through the reduction of reputational risks.

Comparing the LkSG and the proposed CSDDD, the following differences stand out:

- The CSDDD will probably also apply to much smaller companies than the LkSG. In the sense of the intended paradigm shift and to avoid circumvention (e.g. company splits), it seems sensible that medium-sized companies also assume responsibility for their suppliers. However, the differences in company size should be sufficiently taken into account in the implementation requirements or the speed of implementation.
- In contrast to the LkSG, the proposed CSDDD also includes indirect upstream suppliers and customers. This seems sensible in order to avoid evasive behaviour, e.g. through the intermediation of companies in non-EU countries.
- The proposed CSDDD also extends the due diligence obligations to the downstream part of the supply chain, on which comparatively little research has been done so far. It is currently unclear how such product stewardship approaches can be designed in concrete terms.
- In the proposed CSDDD, environmental risks are included more broadly than in the LkSG and specifically also for comprehensive, but less operationally concrete goals such as climate and biodiversity protection. For example, larger companies with more than 500 employees and more than 150 million euros in annual net turnover must explain how their business model and strategies are compatible with the goals of the Paris Climate Agreement. According to the CSDDD proposal, the degree of goal achievement must be duly taken into account in the variable remuneration of the management. In favour of such an extension is the buying power of companies, who bear product responsibility and are better able than upstream suppliers to provide impetus in the value chain. One argument against this is that the necessary clear indicators, measurement methods and monitoring systems are sometimes lacking, especially in the agricultural sector. If climate and biodiversity protection are to become verifiable elements of due diligence, the goals would have to be further specified.
- In contrast to the LkSG, the CSDDD draft so far provides for corporate liability under civil law. Threats of liability have a far-reaching influence on management action, as they can also lead to managerial liability. They can thus contribute to the implementation of due diligence obligations, but can also have the effect that suppliers are changed instead of attempting supplier development.

Previous experience from related areas such as quality and environmental management suggests that certification systems could play a prominent role in the implementation of supply chain management. According to the available studies, however, the impact of certification systems on various sustainability goals has so far been rather limited. There is selective participation of suppliers who are already in a better position, and the focus on formal procedures does not tend to lead to a continuous improvement process.

The challenges of certifying human rights-related due diligence are particularly high. In contrast to other due diligence obligations, there are no analytical procedures (such as DNA sequencing to identify the origin of timber) and technological innovations (such as satellite data to identify deforestation) to monitor them. The most fundamental criticism of certification systems is the market splitting effect that can occur if not all buyers demand certification. There is then a high probability of a selection of suppliers into those with high standards and those with deficits, who (can) continue to supply to buyers who do not require certification.

Irrespective of this question of principle, the question arises as to what status certification systems should be given in the LkSG and the CSDDD draft. Key questions are whether they should be recognised

as a central measure for fulfilling due diligence obligations and whether purchasing from substantially certified suppliers should protect the buyer from sanctions (so-called “safe harbour”-provision). The legislator in Germany has not taken a position on this, and the draft CSDDD remains vague. During the negotiations on the CSDDD, Germany advocated for such a “safe harbour”-provision.

Currently, the state of research indicates that certification systems remain limited in their impact and deficiencies in the control process reduce the reliability of audits. From the WBAE's perspective, (transaction-) cost-efficient certification systems could play a significant role in implementation. However, the existing certification systems have major weaknesses. Recognition as a sufficient due diligence instrument for indirect suppliers requires above all an improvement in the effectiveness and reliability of the systems. The potential function of certification in demonstrating compliance with due diligence obligations depends largely on the quality of the standards and procedures of certification. Various approaches on how these can be improved are under discussion:

- A first possibility could be stronger state regulation, e.g. state approval of certification systems, supervision of the work of the systems and especially "control of the controllers". The control system of organic farming would be a model here. The reliability of certification (independence and quality of the inspection process, skills of the inspectors, etc.) would have to be ensured through state requirements. The establishment of such a state level to control private-sector certification is a considerable challenge, as this goes well beyond the accreditation that is common today.
- A second possibility would be to change the incentive structures in such a way that the buyers develop a stronger self-interest in effective certification. Since the buyers today are institutionally responsible for most certification systems or at least have a significant say in them, they have a great deal of influence on their further development. For example, the state could make a “safe harbour”-provision dependent on proof of functioning certification structures.
- Both approaches could also be combined. In addition to government "control of controllers", it would then be pressure from buyers that would provide incentives to improve certification systems. It could make sense that buyers remain responsible for the implementation of due diligence and cannot delegate this completely to the certifiers by means of a “safe harbour”-provision, but that participation allows for substantial facilitations of proof (e.g. exceptions from a possible reversal of the burden of proof).

If the legislator wants to fully or partially recognise certification as a procedure for fulfilling due diligence obligations - for which there are a number of reasons - then this requires clear legal requirements for the certification systems, which would also have to be reviewed on an ongoing basis.

V.2 Legal perspective: How do due diligence regulations fit into the German and European legal system?

In the first instance, only the states that have signed the human rights agreements are legally bound by human rights. However, private companies can be obliged to respect human rights through the so-called indirect third-party effect of fundamental rights and through the duty to protect function. However, according to the current clear legal situation, German companies cannot regularly be held liable for foreign cases of damage by other companies (their suppliers) and also not for the actions of

their subsidiaries. The LkSG does not change this situation. Rather, the LkSG implements an obligation of effort and documentation.

Violations are subject to sanctions (fines, exclusion from public procurement procedures). However, the German legislator has rejected civil liability for damages incurred. The steering effect of the LkSG is limited by the lack of a liability regulation. Nevertheless, because of the amount of the fines and the social discredit of the company, if the state determines the disregard for human rights and environmental standards, it can be assumed that companies will take their due diligence obligations seriously.

The draft CSDDD, on the other hand, provides for civil liability with a claim for damages. This occurs if there is a breach of due diligence and damage occurs as a result. However, a breach of due diligence triggering liability is only to be assumed if a company has not taken reasonable measures to fulfil its entrepreneurial due diligence and if the damage was foreseeable. For indirect suppliers, no liability is foreseen if companies obtain a contractual assurance from their direct suppliers. In the contractual assurance the direct supplier promises compliance with due diligence obligations and, if necessary, a prevention plan, and further assures that it will in turn demand the same from its direct suppliers. Thus, creating a contractual cascade. An additional condition is further verification measures, in particular certification systems or industry initiatives.

Furthermore, compared to the LkSG, the draft CSDDD expands the scope of corporate due diligence beyond labour and human rights protection to include key environmental issues such as climate and biodiversity protection. Here, questions of culpability and causality are even more difficult to answer.

According to the WBAE, the weak point in both administrative offence law and civil liability is the necessary proof of fault by the plaintiff. Individual affected persons will regularly not be able to present evidence to European authorities. Therefore, the authorities of the trading partners and trade unions and civil society organisations will play a key role in collecting evidence, unless a reversal of the burden of proof is provided for in the further legislative process.

Furthermore, the CSDDD draft provides for the (limited) exclusion of liability of buyers in the case of contractual assurances along the value chain, combined with the use of certification systems or industry initiatives. Here, there is a lack of concretisation as to which systems could be suitable.

V.3 Administrative perspective: State implementation of due diligence regulations

The effectiveness and efficiency of due diligence regulations depend to a large extent on the concrete design of implementation and monitoring. In this context, the interface between companies and authorities is of particular importance. Responsibility for the various sectoral due diligence regulations and the LkSG is distributed among different authorities: the Federal Office for Economic Affairs and Export Control (BAFA), the Federal Office for Agriculture and Food (BLE), the Federal Institute for Geosciences and Natural Resources (BGR), and customs. Especially for companies in the agri-food sector, which may be affected by several due diligence approaches (LkSG, CSDDD draft, EUDR, Renewable Energy Directive (RED), EU draft regulation on forced labour), there is a high risk that they will be confronted with different requirements and/or double submissions during implementation if the authorities have not coordinated their processes. It is therefore important to have information requirements that are as uniform as possible, simple data recording (online input mask, etc.), joint or coordinated controls and uniform recognition of certifications.

Due to the degree of innovation and the considerable time pressure to implement the new due diligence obligations, government measures to support companies are appropriate. These support measures concern advice and information, but also the risk analysis as a core element of risk management. The Federal Government has sought to support companies in implementing the due diligence regulations from the very beginning. It has already developed extensive information and (individual) advisory services with the Helpdesk on Business & Human Rights, which focuses on human rights-related due diligence, and the Initiative for Sustainable Agricultural Supply Chains (INA). In addition, the various competent federal authorities also offer support services for business. The interplay of government support services should be well coordinated. The WBAE, on the other hand, is sceptical about blanket country risk lists as a support offer for companies.

Without sufficient control, there is no incentive for the actors in the supply chain to comply with the due diligence obligations. The regulations would then quickly lose their effect. On-site inspections by the competent authorities of the trading partners are not ruled out in principle, but in the view of the WBAE they are practically impossible, especially in the case of horizontal regulations that affect all sectors. There is therefore a risk of a pure “paper control of effort obligations”. Only in the rare case that those affected or third parties could present legally sound evidence of violations would there be sanctions that go beyond those for documentation violations. Therefore, due diligence regulations should explicitly include private sector certification in the control. Since certification systems are currently incomplete and subject to problematic incentives, they should be regulated by the state in terms of requirements for supervision, qualifications and testing methods of certifiers. Furthermore, state control of certifiers would require the EU to conclude corresponding (trade) agreements with trade partner countries.

The potentials of technological innovations in supporting supervision vary depending on the area of regulation. While some environmental problems, such as controlling for deforestation, can already be monitored comparatively well today using satellite imagery and DNA-based methods, the potentials of technical innovations for effective monitoring for other environmental problems, human rights and labour protection are limited. This is another reason why effective on-site certification is important.

The state can support compliance with due diligence obligations through sanctions and incentives. Sanctions are applied differently in the various regulations: the LkSG, for example, provides for relatively high fines and exclusion from public tenders. The EUDR also relies on "naming and shaming". The planned civil liability under the CSDDD is particularly controversial. Overall, effective sanctions should be threatened – but with a sense of proportion – because there are trade-offs. If the possible sanctions are high, it is more attractive for companies to withdraw from regions or countries that are associated with higher human rights and environmental risks (“cut and run”). This could jeopardise the key objective of due diligence regulations, namely to favour “stay and behave” over breaking off the business relationship. More important than the level of sanction threat is the calculability of the risk of sanctioning, especially with regard to the risk of non-intentional violations. If companies fear being held responsible for unintentional mistakes, they react cautiously according to the results of behavioural economics research, i.e. they are more likely to break off the business relationship. It is therefore important that sanctions are geared at targeted and substantial violations of the law. In addition, the state should also set positive incentives, e.g. project funding, prizes, etc., and if possible also aim at advantages in public procurement procedures.

Finally, legislative review and monitoring are important. Since there is hardly any experience with the due diligence instrument, an open-ended review of the achievement of objectives is indispensable. Thereby, a review presupposes the collection of suitable (impact) indicators, also from the business

side. The latter constitutes a certain trade-off with a low-bureaucracy implementation for companies. The review of the law can also provide conclusions on the required level or type of sanctions.

V.4 Policy perspectives: Multi-level policy mix at the interface of several policy fields

At the European level, in addition to the due diligence projects, there are numerous other regulatory systems with sustainability goals in the areas of trade and investment protection policy, environmental policy and agricultural policy. They use different instruments for greater sustainability. There are differences not only between the due diligence regulations, but also with other regulatory approaches. These differences in some cases harbour risks for the achievement of objectives, the implementation burden and acceptance. Overall, the coherence between the different regulatory systems should therefore be improved.

Corporate due diligence regulations complement trade and investment protection agreements between states, but do not replace them. Over time, the EU's trade policy has increasingly incorporated sustainability goals, with all its trade agreements now containing sustainability chapters that refer to similar reference agreements as the due diligence regulations. However, with very few exceptions, sanctions and incentives are limited. Other policy instruments are more important than due diligence regulations, especially for achieving environmental policy goals.

Furthermore, trade-offs with other foreign trade regulations can also arise beyond trade agreements: corresponding conflicts with investment protection agreements, for example, should be taken into account so that corporate lawsuits against trading partner countries due to stricter sustainability regulations can be avoided.

V.5 Foreign trade perspective: Effects on trade flows and markets

Even if an increase in transaction costs due to due diligence regulations along the supply chain is to be expected, the resulting effects are not clear. Due to the high degree of internationalisation of the agri-food sector, the already widespread use of sanitary and phytosanitary (SPS) and quality standards, and the experience with many types of non-tariff trade measures, it may be that the negative impacts on trade volumes and partners are more limited than often assumed. In addition, other important trading countries competing internationally with the EU (such as the US or UK) have also introduced due diligence requirements. This introduction could reduce the negative trade effects at least among these countries due to the potential equivalence of standards. Leakage effects can nevertheless occur, for example, when competing for the same markets with countries that have so far been able to offer their products without these regulations (such as China or Brazil). However, there are product-specific differences. Leakage effects will be smaller for cocoa and tropical fruits than for soy because of the high international EU market share. However, there is a lack of empirical evidence so far to answer this unequivocally.

The resilience of agricultural supply chains to market-affecting shocks is supported by due diligence on the one hand, e.g. by promoting the connectivity of partners and encouraging learning. On the other hand, the number of trading partners could also be reduced, which would have an opposite effect. Here, too, the empirical evidence is currently lacking to be able to make robust statements. The focus on supplier development in due diligence systems can help to maintain trade relationships and should

therefore be the primary goal. Therefore, it is important to support supplier development and “stay and behave” in the policy implementation of due diligence.

V.6 International relations perspective: What impact do due diligence regulations have on the international interdependence of countries?

Due diligence obligations are based on internationally consensual agreements under international law that have been ratified by a large number of trading partners. Despite general normative consensus, conflicts can arise because these agreements have now become more enforceable through due diligence. As a result, support for new agreements under international law may dwindle in the future. The possibility of weakened support can be particularly true for states that fear disadvantages for their export sector, for example, as is already evident in the EU-Mercosur negotiations.

The effects of due diligence regulations can therefore change trade policy relations: This change creates pressure for the EU with regard to new trade agreements. Trading partner countries, which often criticise due diligence as excessive, could try to negotiate compensation for disadvantages arising from due diligence in trade agreements.

The question of the extent to which unilaterally imposed due diligence obligations further cement the historically conditioned imbalance of power between wealthier countries and LMIC cannot be fully answered within the scope of the export report due to its complexity. However, the choice of unilateral action despite multilateral opportunities and the extraterritorial effect of due diligence obligations without consulting trading partners during the drafting of the laws should be viewed critically. Cooperation with the governments of trading partner countries is therefore necessary for implementation. This cooperation can, for example, take the form of direct involvement of the relevant state authorities in the review of due diligence regulations as well as in the development of accompanying support services. It could be part of the bilateral support *roadmaps* envisaged by the EU Commission. Target paths, timeframes and support for sustainability goals are to be negotiated individually with trading partners in the *roadmaps,* although their exact design is not yet clear. With regard to due diligence reviews, the joint definition of priorities, objectives and indicators with trading partner governments and other key local actors can contribute to the acceptance of due diligence implementation. The latter also applies to the reduction of human rights violations and negative environmental impacts that do not take place in the export sector of trading partners, but in production for the domestic market. If the aim is not only to ‘clean’ imports into the EU, it is necessary to promote the trading partners' own policy approaches to improving the situation on site.

At the same time, more efforts are needed for multilateral cooperative approaches to also better address the problem of the historically conditioned power imbalance between wealthier countries and LMIC.

V.7 Challenges and limitations of due diligence regulations

As part of the CSDDD, the inclusion of further human and labour rights as well as environmental goals is currently being discussed. These include food security, living wages and incomes, gender equality and climate and biodiversity protection. These goals also refer to recognised international conventions.

However, it remains unclear how these additional goals can be operationalised and implemented through corporate due diligence along international supply chains. The operationalisability of the goals is linked to certain preconditions. For all goals the existence of suitable indicators, measurement criteria, measurement procedures and monitoring systems plays an important role: (a) for food security, in order to achieve a tangible and company-related specification of the goal and to be able to establish a link with corporate due diligence, (b) for living wages and incomes, in order to be able to clarify the question of the necessary level of wages and incomes to secure a livelihood; (c) for gender equality, in order to initially create transparency about possible existing inequalities along the supply chain, (d) for climate and environmental goals, in order to be able to measure compare the impacts of corporate action – taking into account regionally different conditions. These prerequisites are also relevant for the subsequent supervision of corporate due diligence by the competent federal authorities (cf. Section 5.3).

With regard to the perspective options that due diligence regulations offer, it can be summarised:

- As an important part of the protection perspective, food security should be covered in the due diligence obligations, but there is a need to concretise the individual aspects in the form of verifiable due diligence obligations. The dimension 'access to food' according to the FAO definition is closely related to receiving a minimum wage.
- The payment of adequate wages, based on the national minimum wage, is already part of the LkSG. The CSDDD draft goes beyond this and demands (higher) living wages, the European Parliament even wants to include living (entrepreneurial) incomes. For both requirements, there are initial implementation efforts by some trading partners as well as political support from some importing countries and initial approaches from the business side. Yet, at the same time there are still considerable research and development challenges.
- Company-related aspects of gender equality are already part of the German LkSG and the draft CSDDD. Other relevant ILO conventions could be integrated relatively well into the system of due diligence regulations, although these conventions have so far been ratified by relatively few states. Gender aspects could also be well anchored in risk analysis and taken into account in the development of complaints procedures.
- The anchoring of programmatic and therefore not sufficiently specific environmental and climate goals, such as those of the Paris Climate Agreement, in the corporate due diligence regulations, is currently still encountering considerable limitations. Therefore, they should only be implemented step by step as soon as the necessary measurement and monitoring systems are available.

Against the backdrop of the challenges, the design details of the due diligence regulations are important. There is a danger of overburdening the regulations and thus risking less support or more resistance from the business community. In contrast, a due diligence regulation that is initially narrower but successfully implemented can generate positive policy feedback and later be extended to other areas. Broad duties that pose major implementation problems generate negative policy feedback that makes them vulnerable to efforts to abolish them again. However, trading partners should be consulted and an impact assessment conducted before any possible expansion over time.

In principle, the above-mentioned additional goals cannot only be achieved through the instrument of mandatory due diligence regulations for companies. Rather, a policy mix with coherent coordination of instruments is required (cf. Section 5.4).

VI Recommendations

Analysing the due diligence regulations from the various assessment perspectives reveals the complexity of the effects. Depending on how the legal regulations are designed and implemented, this can result in various developments regarding the orientation of companies, the (globalised) markets of the agri-food sector and regarding intergovernmental relations. In order to do justice to this complexity and also to the many development options that are still open, development scenarios are derived that are intended to depict the range of possible developments (cf. Fig. ES.3). Based on these scenarios, concrete recommendations are derived that relate to 1) effective design and implementation, 2) the policy environment and 3) questions of the systematic development of due diligence regulations.

VI.1 Development scenarios

Supply chain due diligence obligations are a largely new instrument for achieving greater sustainability. They are characterised by a unilateral approach in dealing with trading partners and in this respect represent a special feature compared to the bilateral and multilateral, i.e. negotiation-based, approaches to trade policy that have been pursued to date. The following Section therefore outlines development scenarios based on three dimensions, which are derived from the assessment perspectives (cf. Section 2.6) and their analysis in Section 5 and extend from the broader political framework to implementation: They are characterised by a unilateral approach in dealing with trading partners. Thus, they represent a special feature compared to the bi- and multilateral, i.e. negotiation-based, approaches to trade policy pursued to date. In the following, therefore, development scenarios are outlined on the basis of three dimensions. These dimensions result from the assessment perspectives (cf. Section 2.6) as well as their analysis in Section 5. They extend from the larger policy environment to implementation:

- Dimension P as a process-related view, which is predominantly based on the assessment perspective “International Relations” as outlined in Section 5.6;
- Dimension M as a market-related view based on the assessment perspectives “International Relations” (Section 5.6), “Foreign Trade” (Section 5.5.) as well as the policy perspective (Section 5.4);
- Dimension U as a consideration of operational and governmental implementation, based on the business perspective (Section 5.1), the administrative perspective (Section 5.3) and the policy perspective (Section 5.4).

The aim of these development scenarios is to work out the key aspects that will contribute to the success or failure of the regulations. At the same time, these scenarios make it clear which mechanisms policy could address.

Process-related dimension (Dimension P): Cooperation instead of unilateral action by the EU

As already described, the previous unilateral approach to enacting due diligence obligations must be viewed critically. Depending on the further procedure, two scenarios are conceivable in Dimension P:

- Scenario P1: *Continuation of the unilateral action*. The EU does not advocate multilateral solutions, e.g. within the framework of the WTO and the UN. There is no response to the

extraterritorial effect of due diligence legislation through cooperation and dialogue with trading partners. The EU plans the planned support offers for trading partners as well as the review and monitoring on its own initiative without the trading partners having any greater say. The unilateral due diligence obligations are perceived as an expression of the EU's economic and political dominance.

- Scenario P2: *Cooperation, partnership and dialogue*. The EU actively participates in WTO and UN formats, e.g. in the Working Group on the Binding Treaty on Business and Human Rights. Thereby, demonstrating its desire to anchor corporate due diligence in multilateral approaches. In the further course, trading partners are actively involved in the implementation and review of due diligence regulations. This involvement includes, for example, developing the benchmarking of trading partners within the framework of the EUDR or, in principle, the measurement of impact on site. Linking trade agreements with due diligence is also supported. Finally, the EU and Germany support implementation on site, e.g. through accompanying development cooperation, innovative projects or compensation payments for climate and biodiversity protection.

Market-related dimension (Dimension M): Norm diffusion instead of market segmentation

Important for the overall success of supply chain due diligence is the prevention of market segmentation, because in this case, globally, little or no improvement would be achieved with regard to the objectives. Depending on the further procedure, two scenarios are conceivable in Dimension M:

- Scenario M1: *Market segmentation*. This scenario characterises a situation in which the EU remains largely alone with its action and the effect will thus largely 'fizzle out', especially if the EU's share of global trade in the product in question is small and the EU also loses attractiveness for potential trading partners due to its high requirements. This scenario results in a cost burden for European buyers and consumers. However, the effects on labour standards, human rights and environmental protection among trading partners remain small.
- Scenario M2: *Norm diffusion*. In this case, other large countries or markets join the EU policy approach. A trade policy that is coherent with due diligence regulations and a supportive development policy could further promote this process. A widely accepted standard is developing in the area of basic human rights, labour standards and certain environmental norms. This effectively prevents companies and countries from gaining competitive advantages through environmental, labour and human rights dumping.

Implementation-related dimension (Dimension U): Motivational regulations instead of "bureaucratic nightmare"

Effective and efficient implementation is crucial to the success of due diligence regulations. This means that implementation does not exceed an appropriate level of administrative effort and is nevertheless supervised. Depending on the further procedure, four scenarios are conceivable in Dimension U:

- Scenario U1: "Bureaucratic nightmare". The supply chain due diligence obligations could develop into a "bureaucratic nightmare" if mainly documents have to be written and extensive online forms have to be filled out, but little changes on the ground. This development would be reinforced if the reporting obligations of the various due diligence regulations were to add up without at least some of the reporting obligations being harmonised. Policymakers would contribute to this if they focused regulatory scrutiny on the existence of this type of evidence

while paying little attention to actual progress on human rights, labour standards and environmental goals. In fact, there are some indications that this danger is looming. For example, the LkSG does not currently provide for on-site supervision of trading partners (cf. Section 5.3.3). Despite all due caution in view of the lack of implementation experience, experience from other, comparable management fields allows conclusions to be drawn about the limited effect of the due diligence regulations in such a case: It is a classic finding of business administration that the obligation to systematically control a previously neglected field initially brings with it a series of positive (one-off) effects. Management draws attention to new topics, recognises new risks, obtains more detailed figures and will typically achieve some quick improvements. However, it is less clear whether there will be larger or longer-lasting improvement processes. Similar examples of quality management show that in quite a few companies such management systems are used (misused) as facade of legitimacy (cf. Section 5.1). It then depends on state enforcement, e.g. through the state regulation of certification schemes, the expansion of complaint options or cooperation with trading partners, whether improvements are achieved even with opportunistic actors. If this does not happen and the motivated companies realise that their commitment is not shared, then supply chain due diligence regulations would fail.

- Scenario U2: 'Cut and run'. A situation of withdrawal from difficult regions and/or sectors would also be problematic. This withdrawal could occur if the state sanctions corporate misconduct severely, e.g. through civil liability, but companies see few opportunities to limit their supply chain risks. The latter could be the case if companies fail to establish transparency about their supply chain and if certification schemes (continue to) have weaknesses. If risks are therefore unclear and at the same time the pressure of sanctions on companies is pronounced, companies would often react with "cut and run"-strategies and withdraw from difficult regions and/or sectors. This withdrawal would further worsen the position of affected suppliers instead of providing them with support. It is likely that smallholder structures in particular would suffer, as the effort required to secure them would be relatively high. The companies that are specifically intended to be supported by the supply chain due diligence regulations could be sorted out.
- Scenario U3: 'Paper tiger'. Here, implementation is carried out with little bureaucracy, but insufficient enforcement of the due diligence regulations means that only a few companies tackle the problems seriously. Without noticeable sanctions and without effective supervision, which also takes place on site and protects whistleblowers as well as meaningfully incorporating technological innovations, due diligence regulations will not be taken seriously in the long run. If companies get the impression that official supervision and private sector certifications are not effective and blatant offences in their environment are not uncovered, the perceived competitive pressure to circumvent them increases. Supervision should therefore be able to uncover the 'big fish' in particular, i.e. major human rights violations and systematic violations of relevant environmental laws. In addition, the state should regulate certification schemes in such a way as to increase the likelihood of detection of violations. Complaints systems should be easily accessible and cooperation with trading partners on supervision should be intensified.
- Scenario U4: 'Stay and behave'. This scenario characterises a successful implementation. It combines an efficient and effective state structure with a high intrinsic motivation of companies to improve. If sensible risk management systems are introduced and monitored, a continuous improvement process can result. Effective and globally widespread certification schemes extend widely and deeply into global supply chains, so that even companies that purchase via spot markets are covered. Other companies are pursuing a strategy of intensive

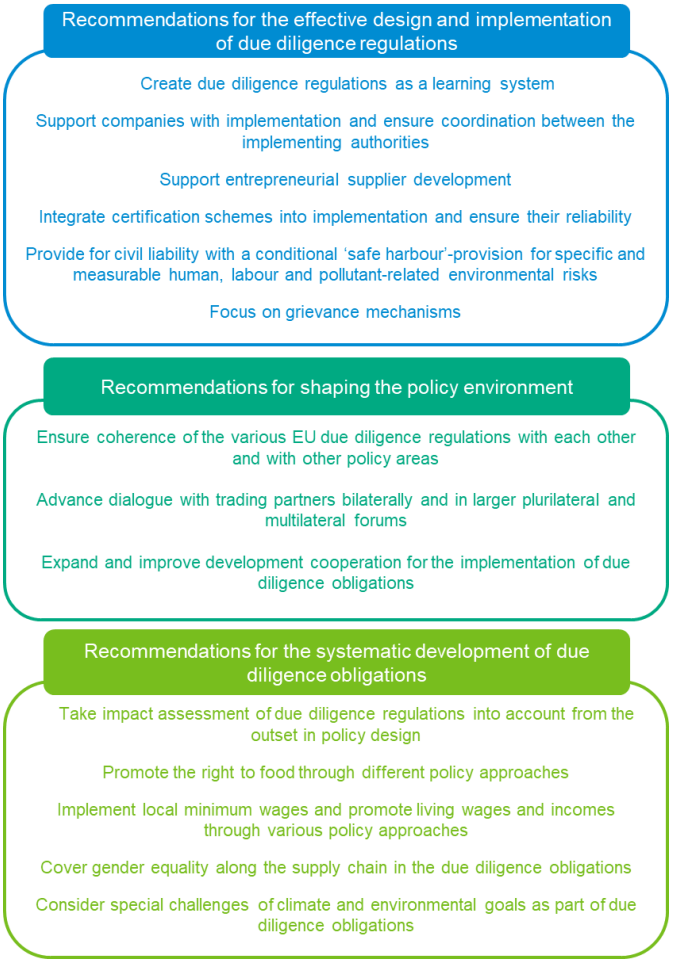
supplier development and are supported by Germany and the EU. This strengthens the existing intrinsic motivation of some companies to tackle difficult issues such as combating hunger among suppliers. If the EU also advocates for more corporate due diligence obligations in multilateral approaches at a global level and thus contributes to the global dissemination of the rules, the fundamental competition problem would be defused.

VI.2 Orientation of the recommendations

Against the background of a fundamentally positive assessment of due diligence regulations, but also in view of the risks of possible undesirable side effects outlined in the scenarios, the WBAE sees a need for action in three areas in order to make the binding due diligence regulations a model for success (cf. Fig. ES.4):

1. Implementation recommendations that enable effective design and implementation but with little bureaucracy. This group of recommendations directly addresses the implementation-related dimension of the development scenarios. It aims to move towards scenario U4 ‘Stay and behave’ by designing the implementation as a learning system, providing companies with targeted and, where possible, one-stop advice from the government, supporting supplier development, further developing certification schemes and focussing on complaints mechanisms.
2. A policy environment that effectively supports companies and the affected trading partners in the fulfilment of due diligence regulations. This group of recommendations relates in particular to the process-related and market-related dimensions of the development scenarios. It aims to move towards scenarios M2 "Norm diffusion" and P2 "Cooperation, partnership and dialogue" by ensuring coherence among the various due diligence regulations and with other policy areas, promoting dialogue with trading partners bilaterally and in plurilateral and multilateral forums, and expanding and improving development cooperation with particularly affected trading partners. In addition, positive effects can then also be expected in the implementation-related dimension.
3. Systematic development of due diligence obligations in fields that represent key human rights and environmental goals (such as the right to food and the protection of the environment), but in which the integration of existing international obligations into the due diligence approaches is (still) missing. This group of recommendations relates to all three dimensions described above. For example, by identifying weaknesses through a review of due diligence obligations and remedying them in further implementation, effective implementation is supported. By developing possible further extensions in the areas of gender equality, food security, climate and environmental protection in close consultation with trading partners, cooperation, partnership and dialogue are promoted with regard to the process-related dimension. In principle, further progress can also be made in the area of human rights, labour standards and environmental goals through systematic development.

Figure ES.4: Overview of the WBAE's recommendations on legal due diligence obligations in supply chains



Source: Own presentation.

A look at the addressees of the recommendations below makes it clear that the regulations on due diligence affect different policy levels (EU, Federal Government) and departments (various EU Directorates-General; various ministries in Germany such as the Federal Ministry for Labour and Social Affairs, the Federal Ministry for Economic Affairs and Climate Action, the Federal Ministry of Economic Cooperation and Development and the Federal Ministry of Food and Agriculture). Implementation, in turn, is the responsibility of federal authorities, at least in Germany. They are affiliated to the Federal Ministry for Economic Affairs and Climate Action (Federal Office for Economic Affairs and Export Control (BAFA)), the Federal Ministry of Food and Agriculture (Federal Office for Agriculture and Food (BLE)) and the Federal Ministry of Finance (customs). The support services, such as the Helpdesk on Business and Human Rights, are the responsibility of the Federal Ministry of Economic Cooperation and Development.

1. Accordingly, many of the recommendations emphasise the need for better coordination and networking between the various departments and stakeholders.

Further horizontal recommendations emphasise the "how" of implementation and possible developments of due diligence regulations:

2. Supporting companies in the implementation process,
3. Impact assessments for evidence-based development and
4. Dialogue with trading partner stakeholders, i.e. governments, companies, academia and civil society, including disadvantaged groups, on the design and development of due diligence obligations.

The recommendations are derived from an analysis of the agricultural and food sector, which is a key area of application. Many of the recommendations are also likely to be transferable to other economic sectors. It should be noted that there is only limited experience to date of the specific implementation of the due diligence regulations that have already been adopted and that the CSDDD is still in the legislative process.

VI.3 Recommendations

VI.3.1 Recommendations for the effective design and implementation of the due diligence regulations

Recommendation: Create due diligence regulations as a learning system

Due to its novelty, the introduction of supply chain due diligence obligations represents a paradigm shift for companies and public authorities. Against this background, it is important to proceed step by step and gain initial experience in order to prevent problematic path dependencies in the implementation design and resistance from the companies concerned. An initially narrowly defined but successfully implemented due diligence regulation can generate positive policy feedback and later be extended to other areas, while broadly defined obligations can generate negative policy feedback if they are associated with major implementation problems.

- **Collect implementation experience in the first two years, review the effectiveness of the LkSG and CSDDD after three to four years and regularly thereafter, and provide for the possibility of adapting the legal regulations accordingly after a "learning phase"** (addressee: Federal Government, EU).
- **Gain implementation experience with larger companies first** (addressee: EU, Federal Government). The enforcement of due diligence obligations requires the ability to manage value chains and experience with management systems. This is why these systems are generally much easier for large companies to implement. In addition to the implementation experience of the directly affected companies, the experience of the indirectly affected companies (suppliers) should also be analysed.
- **In the first years of implementation, i.e. in a predefined learning phase, the competent authority should use its discretionary powers and tolerate minor or unintentional errors (higher error tolerance of the implementing authorities)** (addressee: BAFA). Accordingly, penalties should only be imposed in the learning phase in cases of gross negligence or intent.
- **Systematically evaluate implementation experience even in the first few years. For this purpose, suitable evaluation questions and indicators to be collected must be defined and the evaluation commissioned in good time** (addressee: EU, Federal Government). It is important to define evaluation questions and indicators for the assessment of the implementation experience and corporate adaptations to the due diligence laws at an early stage. That is, before implementation begins in the case of the CSDDD and immediately in the case of the LkSG.

- **Set up and systematically analyse a digital database for complaints and suggestions for improvement from companies regarding the implementation of supply chain due diligence obligations** (addressee: EU and Federal Government). Companies should have the opportunity to feed negative implementation experiences and suggestions for improvement into the evaluation process in a low-threshold manner, if necessary, through an ombudsman's office.

Recommendation: Support companies in the implementation and ensure coordination between the implementing authorities

Taking responsibility for compliance with human rights along the supply chain is a new challenge for companies. To ensure effective and coherent implementation of the LkSG, the WBAE recommends supporting companies in its implementation. On the one hand, this includes the provision of information and other assistance with implementation. On the other hand, this includes a significantly better coordination between the federal authorities and service providers involved so that companies affected by multiple due diligence regulations have an easy-to-understand, standardised system.

- **Expand the Helpdesk on Business & Human Rights of the Agency for Business & Development as the central interface to companies in order to meet the information and advisory needs of companies** (addressee: Federal Government, EU). This requires long-term institutional and budgetary security for the Helpdesk and ensuring close cooperation and regular dialogue with the relevant federal authorities in order to continuously improve the advisory services. At EU level, the Helpdesk for the CSDDD, which is currently being set up there, needs to be supported so that information and advisory services for companies are harmonised across the EU.
- **Centralised bundling, provision and updating of information on the implementation of the LkSG by the Helpdesk on Business & Human Rights** (addressee: Federal Government). In doing so, attention should be paid to user-friendly presentation. To motivate companies, the information materials should contain successful practical examples of implementation. In addition to written documents, a sufficient amount of targeted advice and training should also be offered, e.g. differentiated according to possible topics relating to the EU internal market and those with EU third countries.
- **Strengthen cooperation between the implementing authorities at EU and federal level** (addressee: EU, Federal Government, implementing authorities). Joint working groups or project groups to coordinate the approach of individual federal or member state and European authorities could help to ensure coherence in the approach and avoid duplication for companies. Networking groups between the various authorities and companies on cross-cutting issues can also be set up with the involvement of both the companies concerned and civil society (see e.g. EU Platform on Animal Welfare).
- **Harmonise documentation requirements across the various regulations** (addressee: EU, Federal Government, implementing authorities). For example, direct data transfer for other supply chain regulations or at least the reuse of data via interfaces should be made possible for companies.
- **Expand advice and communication with trading partners** (addressee: EU, Federal Government). The government needs to provide advice and communication on the new due diligence regulations at an early stage so that suppliers, manufacturers and retailers know what requirements they will have to comply with. Communication should also be directed at companies of trading partners in order to improve their background knowledge and underlying structure of the new requirements. In addition, civil society and the trade unions of trading

partners should also be adequately informed, for example about the option of submitting complaints and reports to the BAFA about potential violations of the due diligence obligations of local suppliers of companies covered by the LkSG.

Recommendation: Support supplier development

In order to comply with legal due diligence obligations, companies can switch to a new, less risky supplier in the event of high human rights or labour rights risks at a supplier ("cut and run" strategy) or persuade the previous supplier to remedy problematic practices ("stay and behave" strategy). The "cut and run" strategy is problematic for several reasons with regard to the implementation of actual improvements and should therefore only be used as a last resort. Both the LkSG and the draft CSDDD sensibly prioritise supplier development over the termination of supplier relationships. Supplier development supports suppliers in the implementation of the addressed standards and promotes their performance. Implementation steps are developed together with the suppliers and implementation is monitored.

- **Provide support services for supplier development** (addressee: EU, Federal Government)**:** These support services can take the form of advice or (direct) financial support as part of public programmes. The WBAE recommends that the Federal Government and the EU support companies by means of accompanying economic and development policies, particularly those companies in regions or sectors with high human rights or environmental risks.
- **Do not create blanket country-specific positive or negative lists** (addressee: EU, Federal Government, BAFA). Negative lists can incentivise companies to withdraw from countries with a particularly high risk ("cut and run") - with possible sustainability risks as a consequence. Whereas in countries featuring on positive lists, there may also be gaps in the implementation of existing regulatory law.

Recommendation: Integrate certification schemes in the implementation and guarantee their reliability

The WBAE recommends sufficient control density in the supply chains in order to check whether the rights addressed in the due diligence obligations are actually being guaranteed. This will only be possible on the basis of private sector certification schemes, as it does not appear possible, either in terms of personnel or legally, for German authorities or the EU Commission to carry out comprehensive and sufficiently intensive implementation controls in non-EU countries. Certifications can play a key role in the implementation of due diligence obligations, but structural improvements are necessary. The state should set minimum criteria for recognized certification schemes and implement oversight of them. Only participation in schemes that are quality-assured in this way should give companies access to certain exemptions from liability (via a so-called "safe harbour"-provision).

- **Define minimum requirements for private sector certification schemes and certification bodies (inspection bodies)** (addressee: EU, Federal Government). Only those certification schemes that are subject to defined minimum criteria in terms of their standards, internal management, planned control procedures and monitoring should be recognised as appropriate risk management instruments. A professional profile and professional ethics for the certifier (auditor) should be created that is comparable to the field of auditing.
- **Officially monitor recognised certification schemes and certification bodies (inspection bodies)** (addressee: EU, BAFA/BLE). Following the example of organic farming, both system levels - companies and certifiers - of a recognised certification scheme should be monitored by the competent authorities with sufficient control intensity on the basis of system audits,

accompanying audits, follow-up audits and additional audits on an ad hoc basis. In the opinion of the WBAE, an actual on-site audit of the systems and certifiers in the trading partner countries is required. To this end, it is necessary for the EU to conclude corresponding agreements with third countries on the possibility of system monitoring.

- **Allow companies access to certain exemptions from liability via a "safe harbour"-provision if they use a state-recognised certification scheme** (addressee: EU, Federal Government): Quality-assured certification schemes can make an important contribution to the enforcement of due diligence regulations and significantly reduce transaction costs. The WBAE supports a "safe harbour"-provision that automatically recognises a supplier's obligation to obtain certification as proof of the buyer's obligation of effort and exempts the buyer from liability if only quality-assured, state-recognised and monitored certification schemes are recognised as sufficient for such an exemption.
- **Consider certification rating or certification benchmarking as a second-best solution only - but then without a "safe harbour"-provision** (addressee: EU, Federal Government): If no state system for quality assurance of certification is implemented, the WBAE recommends the implementation of a rating or benchmarking concept in order to provide companies with greater transparency about the performance of various schemes. A "safe harbour"-provision could only be considered for schemes rated particularly positively in such a rating if the rating system has proven its functionality.
- **Carry out impact assessments on certification schemes** (addressee: EU, BAFA): Impact assessments of the relevant certification schemes should examine their contribution to the fulfilment of due diligence obligations and be included in the development of due diligence regulations.
- **Strengthen the independence and trustworthiness of the scheme owners through institutionalisation as a multi-stakeholder non-profit organisation** (addressee: business, civil society). The trustworthiness and independence of the differently organised scheme owners (business, NGOs, etc.) could be increased by adding further stakeholders, including academia.
- **Develop and test new approaches to the independence of certifications, including new financing mechanisms** (addressee: EU, BAFA/BLE). With regard to the certification of smallholder farmers, consideration could be given, for example, to whether the auditors are randomly assigned to the farms and their fees are not paid by the farms but from a pool fund (financed by a pay-as-you-go system by the buyers in the EU). The obligation to rotate certification bodies should also be considered.
- **Strengthen the reputation mechanism through more transparency about the work of certification bodies** (addressee: EU, BAFA/BLE). To date, there has been little transparency for buyers as to which certification bodies carry out particularly reliable audits. The authorities should therefore centrally analyse violations of supply chain due diligence obligations in which certified companies were involved and publish the results. Reputational effects could be enhanced through greater transparency, e.g. if the authorities were to publish the results of accompanying audits or certification reports.
- **Make certification schemes more scientifically sound and improve staff training** (addressee: federal states). Taxation and auditing are a recognised academic discipline with independent focal points in degree programmes. The federal states should strengthen teaching and research in the area of sustainability certification, which is becoming increasingly widespread, so that sufficient well-trained personnel are available in the future.
- **Utilise internal company and industry knowledge through whistleblower systems** (addressee: EU, BAFA). When monitoring certification schemes, the competent authorities could systematically use whistleblower systems to find evidence of violations.

- **Grant certification bodies greater freedom to adequately carry out material supervision while at the same time expanding the liability of certifiers for grossly negligent or wilfully inadequate inspections** (addressee: EU Commission, BAFA). Certifications are sometimes perceived as very bureaucratic because inspectors tick off checklists and have little opportunity to respond appropriately and flexibly to local conditions. In particular in agriculture fluctuations in local conditions exist due to the natural nature of production processes. As this should not be a "carte blanche" for superficial inspections and in order to focus on the detection of serious offences, provision should be made in parallel for the liability of certifiers for consequential damage if they carry out grossly negligent or intentionally inadequate inspections.

Recommendation: Provide for civil liability with a conditional “safe harbour”-provision for specific and measurable human rights, labour standards and pollutant-related environmental risks

The civil liability of companies for breaches of their due diligence obligations towards those affected is currently the subject of intense debate within the CSDDD. The prerequisite for civil liability is the sufficient specification (including clear measurability) of the respective human rights and labour standards as well as environmental risks. Programmatic (insufficiently operationalised) goals do not allow for liability sanctions. The WBAE sees the possibility of those affected by breaches of due diligence suing for damages as an element for enforcing the rules. However, there is a trade-off with the risk of "cut and run". It is therefore important to offer companies at the same time a “safe harbour”-provision as well as a quality-assured certification scheme. The establishment of state-supervised certification schemes takes time, so that a build-up phase of several years should be planned until the liability regulation is "finalised".

- **Provide for civil liability in the CSDDD for specific, measurable due diligence obligations after a "build-up phase" in which state-recognised and monitored certification schemes are established that generally protect participating companies from liability (“safe harbour”-provision** (addressee: EU, Federal Government). The “safe harbour”-provision is the key economic incentive to encourage companies to participate in the quality-assured, state-monitored certification schemes described above and at the same time contributes to reducing "cut and run".
- **Examine reversal of the burden of proof in the context of the CSDDD's civil liability** (addressee: EU, Federal Government). Following the introduction of civil liability, the WBAE recommends monitoring whether affected parties succeed in enforcing such claims in a relevant number of cases or whether a reversal of the burden of proof is required, as otherwise the proof of breaches of regulations could regularly fail.

Recommendation: Focus on grievance mechanisms

Grievance mechanisms are of particular importance for uncovering possible violations of human rights and labour standards, both in the LkSG and in the CSDDD. This also applies in particular to complaints about indirect suppliers, which otherwise only fall within the due diligence obligations of the companies affected by the LkSG if there is substantiated knowledge. Complaints can be submitted by directly affected persons, indirectly affected persons and also on behalf of directly affected persons. The LkSG and the draft CSDDD are compatible with the EU Whistleblower Protection Directive with regard to the confidentiality of whistleblowers and protection against discrimination and penalisation.

Civil society actors, trade unions and industry solutions play a central role in the functioning of grievance mechanisms.

- **Strengthen civil society actors and trade unions on the part of trading partners** (addressee: EU, Federal Government). The prerequisites for actors such as trade unions and other civil society organisations to be able to play an active role in supporting employees are active civil societies on the ground and the active promotion of complaint channels, including in local communities. Civil society organisations can be strengthened in various ways. However, the possibilities also depend on the policy environment of the respective trading partners, e.g. with regard to the fundamental scope for action of independent trade unions.
- **Ensure the quality of industry solutions for external grievance mechanisms** (addressee: EU, Federal Government). External industry-wide grievance mechanisms can have advantages over in-house grievance mechanisms, including lower costs for the individual companies. Industry-wide solutions are particularly helpful in cases where one and the same supplier supplies several companies. This can increase supplier acceptance of the new requirements. As the market for industry-wide grievance mechanisms is still in its infancy compared to certification schemes, this opens up the opportunity to clearly define minimum requirements for industry-wide grievance mechanisms right at the start of market development.
- **Support the involvement of local stakeholders in the development of grievance mechanisms** (addressee: Federal Government). Cooperation with local partners (e.g. civil society organisations or trade unions) can be beneficial in order to reach the target group and build trust in the process. For smaller companies in particular, support in the search for an appropriate local partner through suitable organisations such as the Helpdesk on Business & Human Rights would be conceivable. In addition, companies should be enabled to establish contact with the local structures of the chambers of commerce, the GIZ or the German missions abroad in order to be able to enter into dialogue with local partners regarding the context-specific requirements of a grievance mechanism. This requires the networking of all possible support services.
- **Vulnerable groups must be given special consideration in the design and evaluation of grievance mechanisms** (addressee: Federal Government, companies, sector initiatives). Access to grievance mechanisms must be guaranteed in particular for vulnerable groups, such as indigenous peoples, smallholder farmers or groups with a low level of education, who are generally at a higher risk of being affected by violations of their labour and human rights or who must fear repression in the event of complaints. Companies should prepare themselves at an early stage for potentially higher requirements under the CSDDD, namely the consideration of gender equality along the supply chain, in order to avoid having to fundamentally change the implemented mechanisms at a later date. Government support services such as the Helpdesk should advise companies in this regard.
- **Communicate the option of submitting complaints to BAFA more strongly to trading partners** (addressee: EU and Federal Government). Information about the option to submit complaints and information about companies that (potentially) violate their due diligence obligations should be communicated intensively, especially in the partner countries, as (potential) violations of the rights covered are most likely to be observed by actors at the location where the incident occurred.
- **Review grievance mechanisms in a targeted manner** (addressee: EU, Federal Government). Grievance mechanisms are particularly relevant for uncovering possible violations of human rights and labour standards by indirect suppliers. At the same time, there is little experience with them, so it is important to review their functionality.

VI.3.2 Recommendations for shaping the policy environment

In recent years in particular, a large number of new sustainability-related approaches from different policy areas have been launched, some of which are still in the decision-making phase but will be in force together in the coming years. At best, their interaction can generate synergies by involving different stakeholders and compensating for the different weaknesses of individual approaches. However, there are also differences, for example in the implementation from the perspective of individual stakeholders such as companies, which can lead to inefficiencies, bureaucracy and leakage due to the reorientation of third-country deliveries and migration effects on the part of European companies. As a coherence approach, the OECD, for example, recommends that governments should promote corporate due diligence obligations across all relevant policy areas, such as trade and investment policy, bilateral and multilateral trade agreements and development cooperation, with a view to both voluntary and binding due diligence regulations.

Recommendation: Ensure coherence between the various EU due diligence regulations with each other and with other policy fields

The various due diligence regulations should be formulated consistently and without contradiction, complement each other with regulations from other policy areas and avoid obstructive effects. The aim should be to establish EU-wide coherence between the due diligence regulations and, with a sufficiently high level of ambition, to choose effective implementation in such a way that transaction costs are as low as possible. Coherence should also take into account the comparability of assessment approaches across the various due diligence regulations. However, the WBAE recognises that there are limits to this.

- **Strengthen standardised terminology as a starting point for coherence** (addressee EU, Federal Government)**.** A coordinated or harmonised terminology across all regulatory approaches could already strengthen comparability and regulatory certainty.
- **Ensure regulatory coherence between EUDR and CSDDD** (addressee EU, Federal Government). Despite the explicit deforestation focus of the EUDR, the same regulatory references should be used for the same sub-objectives.
- **Strengthen cooperation between the implementing authorities at EU and federal level** (addressee: EU, Federal Government and specific implementing authorities such as BAFA, BLE, customs). Coordination between the implementing authorities must take place within Germany, but also with the relevant EU institutions.
- **Ensure coherence with other approaches addressing the supply chain with reference to due diligence obligations** (addressee: EU, Federal Government). Other regulations with a supply chain approach (RED, Taxonomy Regulation, CBAM Regulation) use very different product or regional references (e.g. definition of risk products or countries) and priorities of sustainability goals among themselves and in comparison to the new due diligence obligations. Better harmonisation between the regulations is necessary here.
- **Establish coherence with trade policy and offer support** (addressee: EU). The Commission's own review report on sustainability chapters in trade agreements ("TSD Review") from 2022 offers a starting point for coherence. The Commission is expressly aiming to dovetail unilateral measures such as due diligence obligations with bilateral free trade agreements. The following approaches, which differ depending on the agreement status of the trading partner vis-à-vis the EU, are particularly suitable for this purpose:

- **Consider support for the implementation of due diligence obligations by trading partners regardless of the agreement status**. For newly negotiated trade agreements in particular, the Commission's idea of “roadmaps” and “milestones” to be agreed with the agreement partner mentioned in the TSD review can be used, which include individual timetables for targets to be agreed (e.g. by when covered conventions will be ratified or implemented). Even without an existing agreement or without current negotiations, preparatory support for the implementation of due diligence regulations should be considered.
- **Consider offers to take due diligence obligations into account in ongoing bilateral negotiations and in existing agreements**. Completely new offers would have to be examined, for example in the form of facilitated market access if due diligence obligations are fulfilled or if an improved country risk classification is achieved within the framework of the EUDR. For agreements that have already been concluded, however, the individual room for manoeuvre would first have to be identified as to how offers can still be created despite already agreed and in some cases large tariff reductions (e.g. through increased tariff quotas). Possible negative effects on LMIC, which have so far been the only ones to benefit from easier market access if sustainability requirements are met, must be taken into account. New forms of trade support could also be considered, as well as a possible waiver of the conflict-prone principle of sanctioning of sustainability chapters.

- **Avoid trade-offs between due diligence obligations and investment protection agreements** (addressee: EU). In the event that the due diligence obligations adopted in the EU trigger changes in the legislation of trading partners, foreign companies investing there could sue for compensation under investment protection agreements and attempt to have the stricter regulations categorised as "indirect expropriation". This could result in a compensation obligation for the states at the investment location. The EU Commission should therefore examine the extent to which the implementation of due diligence obligations could lead to conflicts through investment protection agreements and whether the new EU model for bilateral investment protection agreements should be utilised to a greater extent.

Recommendation: Advance the dialogue with trading partners bilaterally and in larger plurilateral and multilateral forums

There is a long tradition of intergovernmental dialogue formats in the form of government consultations and informally on the sidelines of, for example, G7/G20 ministerial meetings or in a plurilateral or multilateral framework (e.g. UN or WTO). A "genuine dialogue" should be characterised by mutual trust and initiate learning processes among the dialogue partners. For example, the Rural Africa Task Force, set up by the European Commission's Directorate-General for Agriculture and Rural Development (DG Agri) in 2019, addressed the "how" of relations between Africa and the EU and recommended, among other things: "the Africa EU partnership should operate at three levels: people to people, business to business, and government to government. It would institute a multi-stakeholder dialogue at all levels, starting locally, and enable a closer connection between African and European societies, business communities and governments" (Task Force Rural Africa 2019: 9). It is important to

consider these elements for a "genuine dialogue", especially in light of the debates on the colonial past between European states and LMIC.

- **Create forums for dialogue with trading partners or use existing ones to jointly monitor the implementation and impact of the due diligence regulations** (addressee: EU, Federal Government). These forums should be used to provide information about the due diligence regulations as early as possible in order to identify and network actors, offers and needs. These forums are also important for recognising specific implementation problems and striving for the ambitious implementation of the regulations. This type of *soft law cooperation* can not only help to improve implementation, but can also contribute to the harmonisation of regulatory standards in the medium term.
- **Strengthen existing structures for obtaining information for country-specific risk assessment and the exchange of experience, also utilising and strengthening the structures of trading partners** (addressee: EU, Federal Government). Companies affected by supply chain regulations, but also the Helpdesk, are dependent on country-specific information regarding the risks addressed. Chambers of commerce abroad, for example, or the (already existing) dialogue groups (e.g. also dialogues with civil society) from trade agreements and permanent representations can contribute to obtaining information. It is also useful to leverage the experience of these actors on the ground in order to be able to offer differentiated technical and financial assistance.
- **Strengthen risk classification of areas through partnership engagement** (addressee: EU). For the risk classification of areas provided for in the EUDR, partnership engagement and consultation are core elements for building trust in the classification system.
- **Proactively support the drafting of the treaty on business and human rights at international level** (addressee: EU, Federal Government). The intergovernmental working group of the UN Human Rights Council, which has been in existence since 2014 and aims to draw up a binding treaty on business and human rights, has so far been primarily supported by LMIC governments. In view of the criticism of the unilateral approach to due diligence obligations without consulting the partner countries ultimately affected, the EU could send a signal for dialogue and cooperation and play an active role in the working group. At the same time, the WBAE recommends that the German government should contribute with a supportive, harmonised position.
- **Promote additional plurilateral and multilateral agreements** (addressee: EU). In particular, many states should use comprehensive, plurilateral and multilateral agreements and dialogue formats in order to improve the policy environments for due diligence regulations at this level as well, to create coherence and to promote implementation. Examples of these formats could be the new dialogues within the WTO, e.g. on trade and the environment or trade and gender, as well as other international forums such as UNCTAD or the World Food Committee.

Recommendation: Intensify and enhance development cooperation for the implementation of due diligence obligations

German development cooperation has already begun to implement projects in cooperation with trading partners with regard to corporate due diligence obligations. These beginnings are to be welcomed and should be further expanded and considered in thematically similar projects in order to ensure coherence between development cooperation and the increased corporate requirements. Ideally, projects should be targeted at particularly major obstacles or problems.

- **Support trading partners and vulnerable actors affected by supply chain due diligence obligations** (addressee: EU, Federal Government). The EU and the Federal Government should support EU companies that source raw materials and products from LMIC with problems in the implementation of human, labour and environmental rights in systematically improving the implementation of due diligence obligations. These support measures should be seen in conjunction with the promotion of supplier development so that vulnerable groups outside LMIC are also taken into account.

VI.3.3 Recommendations for the systematic development of due diligence obligations

Recommendation: Consider impact assessment of due diligence regulations from the outset in policy design

In terms of an evidence-based policy, it is particularly important to review the impact from the outset, also in order to recognise and address unintended effects. For monitoring, key figures and indicators must be defined and collected by an authority to be determined in order to be able to observe and describe the implementation of the regulations. In the review process, further analyses should be carried out on the basis of this collected data and, if necessary, additional surveys in order to enable valid conclusions to be drawn about the impact of the regulations.

- **An ongoing review of the effects of the LkSG should be legally secured** (addressee: Federal Government). Although various reviews are planned for the German LkSG, these are only included in the explanatory memorandum and not in the text of the law itself, which means that there is no binding effect.
- **Utilise existing assessment approaches from other policy areas and dovetail them with the assessments of other policy approaches** (addressee: EU, Federal Government). Existing approaches for measuring human rights impacts should be incorporated into the planning of the impact assessment (such as the "Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives" of the EU Directorate-General for Trade). This could build on the numerous existing monitoring and review approaches in other policy areas. At the very least, however, interactions between policy approaches, for example between due diligence obligations and trade policy measures, should be explicitly taken into account in the assessment as a regulatory "coherence effect". Individually targeted reviews in the EUDR and CSDDD should also be coordinated.
- **Define the required data and its continuous collection for the accompanying monitoring, taking into account the special features of the agri-food sector** (addressee: Federal Government, BAFA, BLE). It must be clarified who is responsible for defining the indicators and key figures and who collects the data. According to the explanatory memorandum to the LkSG, the BAFA can, for example, generate data from the companies' electronic reports, which can also be used for monitoring. When collecting this data, it should be clarified which data are considered key figures, which are indicators and which are (interim) targets. The data from the reports is initially only limited to implementation; corresponding indicators must also be defined to measure target achievement.
- **Determine the targets/indicators or content of an impact assessment** (addressee: EU, Federal Government)**.** The content of the first reviews is clearly specified in the EUDR (assessment of whether to extend to other ecosystems, raw materials, etc.). The draft CSDDD provides for an impact analysis on the objectives set and, according to the government's explanatory memorandum, the LkSG also wants to examine the impact on the protection of human rights, among other things. The operationalisation of these goals, against which the impact is to be

measured, should take place promptly, as baseline data must be collected - especially if primary data is required - in order to be able to show changes from the introduction of the due diligence regulations. In addition, a broad selection of target indicators is necessary so that unintended effects can also be recorded as part of the review.

- **Create an impact assessment as an external evaluation with the involvement of trading partners** (addressee: Federal Government). Recording the causal relationships between the due diligence regulations and the various target indicators is a complex methodological task. Effects often only become apparent with a time lag. As part of the external evaluation, a continuous exchange with scientific actors who can observe certain effects in the longer term and independently of political processes can be particularly helpful. The impact assessment should be carried out with the involvement of trading partners. Local scientific expertise should be involved in this process.

Recommendation: Promote the right to food through different policy approaches

The WBAE expressly welcomes the fact that the essential human right to food has been taken into account. It is explicitly covered in the CSDDD and implicitly in the LkSG, but further concretisation of possible obligations is necessary. In principle, the recommendations made in the next Section on the minimum wage are an important basis for the realisation of the right to food.

- **Define food security at the workplace as a due diligence obligation** (addressee: EU, Federal Government). In addition to an affordable food supply at the workplace, sufficient breaks for catering also play a role.
- **Include land eviction and deprivation of production factors as part of the due diligence obligations as in the LkSG in the CSDDD** (addressee: EU, Federal Government). Land eviction and unlawful deprivation of land and other production factors whose use secures a person's livelihood directly affect the right to food and were in this sense also included in the LkSG. The WBAE therefore recommends including at least one comparable provision in the CSDDD. As a concrete definition for companies, their obligation could be defined that, as part of their obligation of effort for their supply chain, they have checked that no displacement is taking place or has taken place.
- **Examine further obligations relating to the right to food in the learning system** (addressee EU, Federal Government)**.** Due to the complexity of the factors influencing the right to food, the concretisation of further-reaching, more programmatic aspects should be examined in stages, e.g. the feasibility of implementing the Food Security Standard.
- **Strengthen problem awareness and systematic impact assessment for the right to food** (addressee: EU, Federal Government). Compared to the LkSG, the draft CSDDD explicitly refers to the right to food. The WBAE proposes that the impact of all due diligence regulations on food security be recorded as part of the general impact assessment.
- **Provide targeted support for companies in the implementation of due diligence obligations with regard to the right to food** (addressee: Federal Government, BAFA, Helpdesk). In order to achieve the implementation of these due diligence obligations, support offers for companies are recommended, e.g. through handouts or best practice examples for various starting points.
- **Establish and support dialogue forums and pilot projects with companies and local stakeholders** (addressee: EU, Federal Government). Development cooperation should organise forums to provide support. If several companies have supplier relationships in a region characterised by a high prevalence of malnutrition or moderate to severe food

insecurity, a first step could be to connect the companies with each other and with local stakeholders in order to jointly develop solutions. Experience in implementing the right to food should be strengthened, e.g. through pilot projects in supplier regions.

Recommendation: Implement local minimum wages and promote living wages and living incomes through different policy approaches

Wages and business incomes that do not reach a living wage are a fundamental problem and cause many of the human and labour rights risks identified in agricultural value chains, such as child labour and forced labour. Living wages and incomes play a key role in achieving the right to food in many countries. However, there are limits to the improvements that can be achieved through due diligence regulations. The WBAE sees different starting points for the situation of dependent employees through due diligence regulations than for achieving a living business income, the calculation of which is associated with many uncertainties. Therefore, a general effort by all social actors (science, politics, civil society and business) is necessary to develop concepts that can be applied in different value chain contexts. The regional context and policy environment must be taken into account, for example for comprehensive social or structural policies or employment options.

- **Ensure that the local minimum wage is paid** (addressee: EU). This is provided for in the LkSG. However, the WBAE considers it important that this is also clearly anchored in the CSDDD. This is because compliance with the minimum wage is a key part of corporate due diligence obligations.
- **Strengthen local systems for establishing minimum wages** (addressee: EU, Federal Government). In line with the criticism of unilateral due diligence regulations, which have an extraterritorial effect on LMIC, and the recommendation to "seek dialogue with trading partners", it is elementary to work together with trading countries from the outset, especially in the area of wage and income levels. Thereby, ideally building on existing local systems and helping them to be enforced.
- **Continue to support and expand initiatives to calculate living wages and living incomes** (addressee: EU, Federal Government). The calculation and routine adjustment of reference values as a necessary basis for private-sector implementation should be further supported. This should be done in exchange with the above-mentioned approaches of the trading partners. An expansion of the existing initiatives into a platform similar to the Science Based Target Initiative in the area of climate targets should be examined in order to establish a direct link between the calculated reference values and the efforts of companies.
- **Further develop antitrust law to enable sectoral agreements** (addressee: Federal Government, Federal Cartel Office, EU). In coordination with the Federal Cartel Office, the Federal Government should enable antitrust exemption for sectoral agreements to ensure living wages and living incomes - the latter primarily for countries in which farmers do not have sufficient non-agricultural labour alternatives. The German government should advocate the EU-wide expansion of sectoral agreements to ensure living wages and living incomes and examine how this can be made possible under antitrust law.

Recommendation: Cover gender equality along the supply chain in the due diligence obligations

Corporate due diligence obligations in the area of gender equality are already laid down in the German LkSG and in the draft CSDDD. Due to the disadvantages faced by women in agriculture and along supply chains, a potential expansion in this area through the CSDDD is a correct tendency. However, it must be considered to what extent possible extensions of the due diligence obligations can be concretised

at this point. The fundamental conventions of the ILO, which address company-related gender equality in particular, are a good starting point for concretisation.

- **Gradually expand the existing references to gender equality in the due diligence regulations after prior impact assessment and dialogue with trading partners** (addressee: EU, Federal Government). Further concretisation of gender equality in supply chains as an objective in the due diligence regulations could initially mean anchoring the UN Women's Rights Convention in the due diligence regulations. In addition, the ILO Convention on the Elimination of Violence and Harassment in the World of Work from 2019 or the ILO Maternity Protection Convention would also be suitable if ratification increases. However, this possible expansion and specification must be preceded by an impact assessment and a dialogue with trading partners in order to identify possible unintended negative effects, such as the risk of women being forced out of certain sectors.
- **Include gender aspects in all steps of due diligence obligations at an early stage** (addressee: EU, federal and implementing authorities, companies). In view of the draft CSDDD, which provides for a strengthening of due diligence obligations in the area of gender equality, companies should focus on this aspect at an early stage when setting up their risk management and collect relevant gender-related data accordingly. Gender aspects should also be specifically recorded and analysed as part of monitoring and impact assessment.

Recommendation: Consider special challenges of climate and environmental goals in the context of due diligence obligations

The anchoring of environmental and climate targets in the supply chain due diligence obligations (CSDDD) currently still has considerable limits and should therefore only be implemented gradually. It should start with a few, rather easily verifiable targets (climate plan, etc.) and experience should be gained with them, as there is a partial lack of the necessary clear measurement criteria, measurement methods and monitoring systems, especially in agricultural production. Collecting the necessary data in all the different countries and locations is also time-consuming and expensive.

- **Include mandatory climate protection in the CSDDD only to the extent that the required parameters are measurable and controllable for companies. The obligation to draw up a climate plan could be an acceptable starting point** (addressee: EU, Federal Government). Avoiding greenhouse gas emissions in agriculture is more challenging than in other sectors. The level of greenhouse gas emissions is not (yet) known for many agricultural and horticultural production processes in the various regions of the world, nor is it known how and by how much they can be reduced. For this reason, the due diligence obligations should not yet include any absolute greenhouse gas reductions, but merely require the preparation of a climate protection plan that reports on the measures taken.
- **Gradually integrate further environmental targets into the CSDDD as obligations as soon as the necessary measurement and monitoring systems are in place** (addressee: EU, Federal Government). Environmental objectives can only be meaningfully integrated into the CSDDD once harmonised measurement and monitoring systems have been created, because only what can be measured can be regulated or adapted. For example, as long as there is no mapping of areas worthy of protection and areas with high biodiversity potential in all countries from which agricultural products are purchased, it will not be possible to determine whether the cultivation of the purchased products has had a negative impact on biodiversity. It should first be examined which environment-related agreements under international law and which requirements therefrom are suitable for being integrated into the due diligence obligations.

- **Drive forward and promote the global development of harmonised and transparent measurement and monitoring concepts and portfolios of environmental instruments** (addressee: EU, Federal Government). If further environmental and climate protection targets are to become elements of the due diligence obligations, the EU would have to invest massively in the development of coordinated measurement and monitoring concepts in the areas of climate and environment and support LMIC.
- **Provide financial support to LMIC for the implementation of climate protection and environmental targets via international funds** (addressee: EU, Federal Government). If climate and environmental protection targets are implemented in supply chain due diligence obligations, operational implementation measures to enable companies in LMIC should be financially supported.

VII Conclusion

With its recommendations, the WBAE aims to contribute to effective and efficient implementation and prevent due diligence obligations from becoming a "bureaucratic nightmare" if they focus too heavily on ineffective formalities. This should also help to ensure that companies are committed to positive developments at their suppliers instead of withdrawing from risk areas/sectors. At the same time, the recommendations emphasise the importance of a partnership approach in cooperation with LMIC in light of the current challenges of the EU's geopolitical environment.

Overall, the WBAE supports the introduction of legal due diligence obligations in supply chains and recommends their gradual expansion as a learning system. It calls on all stakeholders from business, politics and civil society to work to ensure that a real improvement in the situation of people in the agricultural and food sector takes place and that the due diligence regulations are a success for human rights and labour standards as well as environmental and climate goals.

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ADI	Foreign direct investments
BAFA	Federal Office of Economics and Export Control
BGR	Federal Institute for Geosciences and Natural Resources
BITs	Bilateral investment protection agreements
BLE	Federal Office for Agriculture and Food
BMAS	Federal Ministry of Labour and Social Affairs
BMF	Federal Ministry of Finance
BMEL	Federal Ministry of Food and Agriculture
BMWK	Federal Ministry for Economic Affairs and Climate Protection
BMZ	Federal Ministry for Economic Cooperation and Development
BVerfG	Federal Constitutional Court
BVerwG	Federal Administrative Court
BRICS	Unification of Brazil, Russia, India, China and South Africa
B2B	Business-to-Business
B2C	Business-to-Consumer
CETA	Comprehensive Economic and Trade Agreement (free trade agreement between Canada and the EU)
CBD	Convention on Biological Diversity
CFI	Cocoa and Forests Initiative
CFS	Committee on World Food Security

CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CSDDD	EU corporate sustainability due diligence directive
CSR	Corporate Social Responsibility
DAkkS	German Accreditation Body GmbH
DEG	German Investment and Development Company
DESKOR	German inspection body EU due diligence obligations in raw material supply chains
EFSD	European Fund for Sustainable Development+
EU	European Union
EUDR	EU deforestation regulation
EUTR	EU timber regulation
FAO	Food and Agricultural Organisation
FHA	Free trade agreement
GAB	Basic requirements for operational management
GAP	Common agricultural policy
GGN	GLOBALG.A.P. Numbers
GIZ	German Association for International Cooperation
GMO	Common market organisation for agricultural products
GMP	Good Manufacturing Practices
IFC	International Finance Corporation
IFS	International Featured Standard
ILO	International Labour Organisation
INA	Initiative for sustainable agricultural supply chains
IUTC	International Trade Union Confederation
SMEs	Small and medium-sized enterprises

LEH	Food retail
LID	Living Income Differentials
LkSG	Supply Chain Due Diligence Act
LMIC	low and lower middle-income countries
NGOs	Non-governmental organisations
PSM	Plant protection products
RED	Renewable Energy Directive
RESPECT	Realising European Soft Power in External Cooperation and Trade
SDGs	Sustainable Development Goals
SPS	Sanitary and phytosanitary (measures)
TTIP	Transatlantic Trade and Investment Partnership (formerly planned transatlantic trade and investment partnership between the USA and the EU)
TSD	Trade and Sustainable Development (chapters)
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
VSS	Voluntary Sustainability Standards
WTO	World Trade Organisation

Glossary

CSDDD	EU proposal for a directive on corporate sustainability due diligence obligations and amending Directive (EU) 2019/1937 (Corporate Sustainability Due Diligence Directive)
LkSG	German law on corporate due diligence obligations to prevent human rights violations in supply chains (Supply Chain Due Diligence Obligations Act)
EUDR	EU Regulation concerning the making available on the Union market of certain raw materials and products associated with deforestation and forest degradation and their export from the Union and repealing Regulation (EU) No 995/2010 (**EU** Deforestation Regulation)
LMIC	Low and Lower Middle-Income Countries This expert report uses the term of LMIC (low and lower middle-income countries) to group together trading partners, where the risk of violations of employment protection rules, human rights or environmental infringements in the agricultural sector is relatively high. Gross national per capita income is mostly correlated with indicators which offer insight into governance, law enforcement etc. in a country, see for instance the Worldwide Governance Indicators https://info.worldbank.org/governance/wgi/Home/Reports. An up-to-date list of the LMIC can be accessed at https://researchonline.lshtm.ac.uk/id/eprint/4665736/2/Lohmann_etal_2022_List-of-low-and-lower.pdf, although it should be noted that the agricultural economies of other important trading partners, such as Brazil and China, are also affected by human rights and environmental risks. For the 2024 budget year, low-income economies are defined as those economies with a per capita gross national income of USD 1,135 or below in 2022; lower-middle income economies are those economies with a per capita gross national income between USD 1,136 and USD 4,465; https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups.
Due diligence regulations	Umbrella term that essentially includes CSDDD, EUDR and LkSG
“cut and run” strategy	The (abrupt) termination of (high-risk) supplier relationships
“stay and behave” strategy	Empowerment before withdrawal; supplier development
Supply chain	Value chain
Due diligence	Careful analysis, examination and valuation of a property. From American law, initially used in the purchase of companies or interests in companies for the obligations of the buyer. Today widely used for a risk assessment to ensure due diligence.
Trading partner	Generic term that includes partner countries, supplier countries, producer countries and export countries (all countries with which Germany and the EU trade).

1. Introduction

Sustainability issues in the agri-food sector have become increasingly important in recent decades and are addressed in various sustainability goals of different policy regimes - such as the Sustainable Development Goals (SDGs) of the United Nations (UN). In addition to various environmental problems in agricultural production (e.g. WBA & WBW 2016, WBAE 2020: Section 4.4, Pendrill et al. 2022), human rights issues are increasingly becoming the focus of discussion for agricultural supply chains (e.g. ILO and UNICEF 2020, ILO et al. 2022).

Agricultural supply chains are often widely ramified and stretch across borders, with a large number of agricultural companies usually being faced with a small number of suppliers and buyers (Hernandéz et al. 2023). Agricultural businesses are predominantly family-run, especially in low and lower middle-income countries (hereinafter: LMIC)[1] (Graeub et al. 2016). Globally, the agricultural, fisheries and forestry sectors account for the bulk of child and forced labour. Analyses tend to locate child labour in smallholder farming structures, while forced labour is more commonly encountered in larger agricultural enterprises (Brown et al. 2021, GIZ 2020, ILO 2017). The incidence of child labour and forced labour continues to differ widely by sector and region (cf. Section 4.2). However, informal contractual arrangements, self-exploitation and informal employment of workers on a day-to-day basis can also be found. The associated risks of human and labour rights violations are therefore widespread in agricultural supply chains (Brown et al. 2021, Nakamura et al. 2018, Mancini et al. 2005). The studies mentioned above indicate that the agriculture sectors in LMIC are particularly affected, but (risks of) labour standards and human rights violations are also being repeatedly reported in the EU (Open Society Foundations 2020).

The close link between agricultural production and natural resources due to land use also results in an environment-related dimension of due diligence obligations for the agri-food sector, either directly through environmental damage or when environmental damage leads to human rights violations. There is also a close link to the climate dimension, as the agri-food sector is both an emitter of greenhouse gas emissions and is affected by climate change. It can also contribute to the solution by storing additional carbon in agricultural soils or hedges and by reducing greenhouse gas emissions.

This expert report deals with value chains in the agri-food sector. It does not address in depth the human rights, environment- and climate-related due diligence obligations in the fisheries sector, as other international regulations apply there, such as the Illegal, Unregulated and Unreported Fishing Regulation (IUU). The same applies to the forestry sector, cotton farming, bioenergy production and the bioeconomic value chains, which are addressed in certain points below due to their overlaps and interdependencies with agriculture, but are not the main focus. However, many recommendations can probably be transferred to these sectors.

[1] This expert report uses the term of LMIC (low and lower middle-income countries) to group together trading partners, where the risk of violations of employment protection rules, human rights or environmental infringements in the agricultural sector is relatively high. Gross national per capita income is mostly correlated with indicators which offer insight into governance, law enforcement etc. in a country, see for instance the Worldwide Governance Indicators https://info.worldbank.org/governance/wgi/Home/Reports. An up-to-date list of the LMICs can be accessed at https://researchonline.lshtm.ac.uk/id/eprint/4665736/2/Lohmann_etal_2022_List-of-low-and-lower.pdf, although it should be noted that the agricultural economies of other important trading partners, such as Brazil and China, are also affected by human rights and environmental risks.
For the 2024 budget year, low-income economies are defined as those economies with a per capita gross national income of USD 1,135 or below in 2022; lower-middle income economies are those economies with a per capita gross national income between USD 1,136 and USD 4,465; https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups.

With the adoption of the Supply Chain Diligence Obligations Act[2] (LkSG), from 2023 onwards, companies based in Germany with at least 3,000 employees (from 2024 with at least 1,000 employees) are obliged to meet certain human rights, labour standards and environment-related due diligence obligations and to check these obligations for their direct suppliers and, on a risk basis, for their indirect suppliers, too. The human rights and labour due diligence obligations laid down in the LkSG are based on key international conventions (cf. Section 3.2). The LkSG also requires compliance with environment-related due diligence obligations, namely in those cases where environmental risks may indirectly cause human rights violations and with respect to three international conventions relating to pollutants (cf. Section 3.3).

Building on existing international guidelines, e.g. the UN SDG 8 ("Decent work and economic growth"), the UN Guiding Principles on Business and Human Rights and the French and Dutch due diligence acts, the European Commission has also tabled a number of legislative proposals aimed at strengthening the sustainability of the European economy with regard to human rights, environmental risks and climate protection. These include, in particular, the ongoing negotiations on an EU Corporate Sustainability Due Diligence Directive (hereinafter: CSDDD)[3] and the already adopted Regulation on Deforestation-free Supply Chains (hereinafter: EUDR).[4] In a broader sense, however, the due diligence regulations also include the proposed Regulation on an import ban for products from forced labour[5] and the already adopted Directive on an obligation for in-depth sustainability reporting by companies (hereinafter: CSRD).[6] In terms of their scope of application and assets to be protected, these EU proposals go beyond the German LkSG, especially with respect to the significance of environmental and climate change risks and civil liability, but also with respect to the number of businesses included. For example, the EU proposal for a CSDDD classifies agriculture as a high-risk sector, which is why even smaller companies with 250 employees or more would be affected.

It can, therefore, be assumed that there will be considerable debate about the design and impacts of both corporate due diligence obligations and the coherence of the regulations, especially pending the adoption of the CSDDD. Coherence concerns not only the relationship between the various legal acts, but also the relationship with other regulations in the context of sustainability, such as commercial import bans or sustainability chapters in bilateral trade agreements. Possible adjustments to the legal acts or their drafts can, for instance, concern the scope of application of the acts, for instance with

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[2] Act on Corporate Due Diligence in Supply Chains, https://www.bmas.de/DE/Service/Gesetze-und-Gesetzesvorhaben/gesetz-unternehmerische-sorgfaltspflichten-lieferketten.html.

[3] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0007.02/DOC_1&format=PDF. The term "due diligence" designates the careful analysis, examination and assessment of an object. Originally a concept in American law, the term was initially used in the acquisition of undertakings or shareholdings to outline the buyer's obligations. Today, it is used in a broad sense to designate a risk assessment to ensure the required due diligence.

[4] 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.

[5] Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market (2022/0269 (COD), https://single-market-economy.ec.europa.eu/system/files/2022-09/COM-2022-453_en.pdf.

[6] Directive 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 (2022/2464), https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=CELEX:32022L2464.

respect to possible assets to be protected as well as products concerned or companies. Companies based in Germany must first align their due diligence obligations with the requirements of the German LkSG prior to any adaptation of the LkSG to the forthcoming EU directive. In addition, the EU Regulation on deforestation-free supply chains must still be implemented by the companies. The provisions of this Regulation are to apply from 30 December 2024.

The adopted and imminent legislations are of significant relevance to the German and European agri-food sector and, in part, represent new legal and trade policy territory. Even though the German LkSG has already taken effect, the WBAE sees major open questions and need for action, which gave rise to this expert report. The LkSG is a first step in what is likely to be a lengthy process of extending the responsibility of companies for their supply chains and thus also for the people in other countries and therefore also in LMIC. This entails a new division of labour between state and industry for the enforcement of basic human rights and labour standards as well as of environmental protection and climate stewardship.

The objectives of this expert report are:

- to contribute to a broader understanding of due diligence legislation (Section 2);
- to examine the extent to which this constitutes a paradigm shift (Section 2);
- to identify relevant issues in the fields of human and labour standards as well as environmental protections and climate change mitigation in agricultural value chains and to assess the resulting challenges for the agri-food sector in implementing supply chain legislation (Sections 3 and 4);
- to analyse the legislations and their potential effects, also in terms of trade-offs, including unintended effects of due diligence regulations, from different perspectives. Alongside a business, legal and policy perspective, the due diligence regulations are being assessed in terms of administration, foreign trade and also international relations (Section 5), and
- to derive recommendations for the handling, adaptation and further development of the major legislative initiatives at German (LkSG) and European levels (CSDDD, EUDR), and for flanking measures taken by the government (Section 6).

The WBAE, generally, takes a positive view of the expansion of corporate responsibility. In its expert report on more sustainable food consumption (WBAE 2020), the Advisory Board already formulated recommendations for the promotion of healthy, socially, environmentally and animal welfare-friendly food consumption. In the process, the Advisory Board also derived initial recommendations regarding a supply chain act: The WBAE (2020: 611 et seq.) argued in favour of minimum social standards to be integrated into sustainability or quality assurance labelling, as to date producers in Germany (and the EU) have benefited from the cost advantages of international supply chains, but are not legally responsible for potential human rights and environmental protection deficits among their suppliers. Such a situation incentivises the outsourcing of risky value creation activities to independent suppliers. If protective regulations are then not (sufficiently) in place or are not enforced in the countries of origin (see e.g. ITUC 2023), breaches of basic legal interest can occur. In view of the above, the WBAE (2020) has deemed the focus on voluntary measures by the industry and on information requirements, which was previously favoured by some policy-makers, to be insufficient to ensure compliance with fundamental minimum social standards (need for protection perspective). It has, therefore, advocated a binding supply chain act for large companies.[7]

[7] In addition, there is the equity perspective, whose targets go beyond the minimum social standard. Undertakings can label social standards based on the equity perspective for consumers by means of social labels (WBAE 2020: 288).

This expert report follows up on this basic assessment by WBAE and elaborates on it in greater detail in the context of the adopted German LkSG, the adopted EU regulation on deforestation-free supply chains and the still ongoing negotiations on the CSDDD at EU level as well as the transposition into German law following the adoption of a CSDD Directive. The following Section begins with basic considerations on corporate due diligence obligations (Section 2). In addition to the genesis of the legal standardisation of due diligence obligations for companies, the Section explains why supply chain due diligence obligations constitute a paradigm shift for companies, the reasons why this political path should be embarked upon, and finally, the assessment perspectives to be considered when evaluating due diligence regulations. Section 3 briefly explains the international development of corporate due diligence regulations and the reference framework under international law, in order to then present the core elements of the German Supply Chain Due Diligence Obligations Act. The Section then compares them with binding due diligence obligations at EU level. Section 4 addresses the special features of human rights and environment-related due diligence obligations in the agri-food sector. The Section also shows that, irrespective of the highly heterogeneous nature of supply chains in the agri-food sector, this sector is characterised by particularly high risks of human rights and labour rights violations in many countries. The comprehensive Section 5 deals with the opportunities, challenges and limitations of due diligence rules. In so doing, the assessment draws on a variety of perspectives. Particular attention is paid to the business, legal, administrative, policy, foreign trade and international perspectives. Section 5 also discusses the opportunities and limitations of supply chain regulations for achieving (a) food security, (b) a living wage and a living income, (c) gender equality and (d) positive environmental impacts in climate stewardship and biodiversity protection. To summarise, Section 6 first gives an overall assessment and outlines possible development scenarios that identify key starting points that will contribute to the success or failure of the regulations. Finally, concrete recommendations for the designing and implementing the due diligence regulations effectively are set out for the Federal Government and the EU.

2. General classification of the supply chain approach: Sustainability transformation and corporate responsibility

2.1 Genesis of the legal standardisation of due diligence obligations for companies

At the World Economic Forum in Davos in 1999, UN Secretary-General Kofi Annan emphasised the central role of companies in upholding human rights and environmental standards. This gave rise to the UN Global Compact initiative (United Nations Global Compact) in 2000, which companies can join in order to voluntarily commit to respecting labour and human rights and environmental concerns, for example. The initiative has grown considerably in recent years, with more than 18,000 companies now signing up. [8]

The Global Compact and other sector initiatives stand for corporate social responsibility (CSR) measures, i.e. management concepts for companies to assume voluntary social responsibility. This specifically involves compliance with fundamental human and environmental rights by direct and, where applicable, indirect suppliers for which a company does not assume legal responsibility under traditional commercial and trade law. However, in view of potential image risks arising from the purchase of goods from suppliers that violate basic human rights, but also due to their own moral standards, some companies have decided to implement precautions in their procurement management to enforce compliance with such standards by suppliers. However, such measures, e.g. on-site supervision, are associated with costs. This is why only a small proportion of companies participate voluntarily, while some others engage in "green and blue-washing"[9] (Berliner and Prakash 2015). The success of voluntary initiatives is therefore limited (see e.g. Ullah et al. 2021, Amengual and Kuruvilla 2020, Lebaron and Lister 2022). The development is further complicated by the fact that end consumers are often unable or only able to recognise companies' commitment to human rights to a very limited extent based on the products they are buying. These existing information deficits and asymmetries (Gardner et al. 2019) (cf. Section 2.3) therefore make it considerably more difficult for consumers to take their moral convictions about respecting human and environmental rights into account when making their purchasing decisions. This is one explanation for the fact that although more and more end consumers want human and environmental rights to be respected, these moral convictions are not relevant to their behaviour. In addition, a "citizen-consumer gap" , (cf. e.g. Lusk 2018 and Section 2.3) between desire and action is particularly evident in the case of very distant problems. Overall, this means that not as many of these products are purchased at the actual cost as citizens state as their preference in surveys.

Voluntary commitment in this field often does not pay off on the market outside of narrower market segments (WBA 2015). CSR activities by companies can also address other stakeholders, such as political decision-makers, in order to try to prevent mandatory laws through CSR, for example, but they also only have a limited effect on the political framework (Davis and Blomstrom 1971). CSR therefore does not guarantee any fundamental changes overall. And finally, implementation among trading partners has often remained limited for various reasons - e.g. low government prioritisation and support on the ground and/or low implementation capacities (e.g. Johnson 2019).

[8] https://unglobalcompact.org/what-is-gc.

[9] The term "blue-washing" suggests that some companies simply want to clean their image with their social commitment. The blue colour is to be understood as a direct reference to the UN Global Compact initiative and the blue of the UN flag, in which companies want to wrap themselves through their participation in order to distract attention from their negative impact on human rights and the environment (Berliner and Prakash 2015: 132).

The next step towards strengthening supply chain responsibility was the proposal made in 2008 by the then UN Special Representative for Business and Human Rights, John Ruggie, who initiated new guiding principles for the relationship between business and human rights, which were then unanimously adopted by the UN Human Rights Council in 2011. They comprise three pillars:

1. The duty of the state to protect its citizens from human rights violations by third parties, including companies,
2. the responsibility of companies to respect human rights, and
3. the need and obligation of the state and companies to provide victims with more effective access to legal remedies (Ruggie 2008, UN 2011).

The UN Guiding Principles on Business and Human Rights, although not legally binding, provide a framework for corporate responsibility with regard to human rights and emphasised the need for due diligence obligations along the supply chain for the first time at an international level. The Guiding Principles are also the result of a change in social discourse initiated over several decades by various social movements and non-governmental organisations (NGOs), which have pointed out grievances in global supply chains and exerted pressure on governments and companies to introduce binding and enforceable rules. Accordingly, corporate responsibility should not be understood in the sense of a "completely voluntary nature", but rather as the fulfilment of a growing "social expectation" (Kaleck and Saage-Maaß 2016: 83). In recent years, the pressure from civil society on companies has grown considerably. In highly publicised global cases such as the fire at the Tazreen-Fashions textile factory in Bangladesh in 2012, which claimed many lives, the public debate attributed responsibility for compliance with minimum standards in supplier factories to European buyers. This incident and similar cases (see, for example, Koenig and Poncet 2022) led to serious image crises for some companies that sourced their products from such factories. Public opinion worldwide turned against the lack of safety precautions in factories in LMIC; exculpation by referring to the legal status of independent suppliers was hardly accepted in the media debate (Kolf 2018). The reporting of such incidents led to increased pressure on the companies concerned to review their supply chains and ensure that appropriate labour conditions are observed. Many companies were called upon by the public and policy makers to ensure compliance with social and safety standards in their supplier factories and to create transparency about their supply chains.

At the beginning of the 2010s, the situation was such that some companies in wealthy countries began to take a closer look at the human rights situation of suppliers in LMIC as part of CSR, either voluntarily or driven by public pressure. At the same time, there were growing considerations to legally prescribe supply chain due diligence obligations. In the USA, the "California Transparency in Supply Chains Act" was passed for the first time in 2012. The pressure for a supply chain law later also came from the business community itself, namely from companies committed to human rights, which criticised competitive disadvantages compared to suppliers who did not want to take responsibility for their suppliers. A level playing field was called for (Bradford 2020, Spiller et al. 2021), which would protect committed pioneering companies against "human rights dumping" or a *race to the bottom* (Porter 1999).[10] Measures such as targeted outsourcing of activities or price pressure on suppliers that force them not to comply with standards lead to competitive disadvantages for those companies that already ensure basic standards in their supply chain.

Another important element on the way to corporate due diligence obligations was the limited opportunities to address sustainability with reference to international human and labour standards in multinational or bilateral trade agreements (e.g. in the EU's free trade agreements with South Korea,

[10] The signatory companies included Nestle, Tchibo and Ritter Sport; https://media.business-humanrights.org/media/documents/BusinessStatement_Update_032021.pdf.

Vietnam or Singapore), as there are only weak enforcement rules here (Velut et al. 2022). The efforts that have been underway for several years at UN level on the initiative of Ecuador to develop a binding international agreement on business and human rights that would go beyond the provisions of the 2011 Guiding Principles have also not made any progress to date (partly because the EU has not yet been actively involved in the negotiation process).

The stronger legal anchoring of corporate due diligence obligations is thus the result of a complex interplay of several factors, including increased global trade with the outsourcing of production processes, an expanded UN discourse and growing pressure from civil society (Rudloff 2022). The impetus for the formulation of concrete legal acts in Germany and the EU came not so much from the ministries that are traditionally responsible for trade policy, but, in addition to NGOs and the parliamentary sphere, in Germany from the Federal Ministry of Labour and Social Affairs and the Federal Ministry for Economic Cooperation and Development (von Henn and Jahn 2020) and at EU level from the Directorate-General for Justice and Consumers (CSDDD) and the Directorate-General for the Environment (EUDR).

2.2 Supply chain due diligence obligations as a paradigm shift?

With the supply chain due diligence regulations at German and European level discussed in this expert report, policymakers have reinforced a change that has long since begun in specific sectors (e.g. conflict minerals): Due to the factors described above and the limitations of previous solutions, such as voluntary commitments, sustainability standards and CSR at company level, which are based on voluntary action, policymakers are now placing greater obligations on companies to help enforce certain human and environmental rights.

The WBAE views the supply chain due diligence regulations as a paradigm shift because they decisively change the division of tasks between the state and private actors with regard to the enforcement of human rights and environmental regulations along the value chain. From a corporate perspective in particular, they represent a fundamental change in the way in which companies must fulfil their responsibilities along their supply chains. Until now, companies have often argued that they are not responsible for the actions of their economically and legally independent suppliers. Several reasons are given for this:

- For example, it is argued that respect for human rights is fundamentally a state responsibility: "The protection of human rights must be prioritised by politics, legislation and the judiciary. Where politics fails to achieve uniform standards, the German economy cannot be held liable by a due diligence law that is questionable in terms of the rule of law" (Hauptverband der Deutschen Bauindustrie 2021: 2 [translated from German]). "Companies in Germany are only able to correct government deficits to a limited extent. Often, the lack of an enforceable state structure with an appropriate local administration in the countries of origin is the main factor for the occurrence and non-prosecution of violations." (Bundesverband der Deutschen Süßwarenindustrie 2021: 2 [translated from German]) "For mostly medium-sized confectionery companies in Germany, it is not possible in practice to correct government deficits, e.g. in cocoa-growing regions in West Africa."[11]
- In addition, there is the view that companies are only responsible for complying with the laws that protect human rights within their own company and that the state (and not the market

[11] https://www.bdsi.de/pressemeldungen/details/deutsche-suesswarenindustrie-plaediert-fuer-europaeisches-lieferkettengesetz-statt-fuer-nationalen-alleing/ [translated from German].

partners) must act if other companies do not comply with the rules: "A company should be liable for its own actions, but should not be punished with sanctions for the behaviour of its business partners" (IHK Lippe zu Detmold 2021: 1 [translated from German]).

- Many companies also use the reference to an intermediary trader or upstream producer as an argument for rejecting responsibility for human rights violations: "Companies' due diligence obligations must be limited to their own business area and to direct suppliers. An obligation to check indirect suppliers that goes beyond this would require companies to be familiar with the entire supply chain. However, this is not usually the case" (Wirtschaftsvereinigung Stahl n.d.). "It would be impossible for food manufacturers in Germany to fully monitor the often complex supply chains with regard to compliance with human rights at all times and to fulfil a corresponding legal requirement." (Federation of the German Food Industry 2020: 5 [translated from German])
- Finally, there are fears that companies will be overburdened because market competition will not allow companies to set higher standards for suppliers than their competitors. "The bureaucracy, effort and costs associated with geolocalisation, verification requirements and segregation of flows of goods within a very short time are not only a burden on countries of origin outside Europe, but also on farmers and traders in the EU." (Federal Association of the German Confectionery Industry et al. 2023 [translated from German])

Supply chain laws thus change the traditional view of companies as market players anchored in business administration, which can also outsource risks and responsibilities by outsourcing activities (Roloff 2022). This traditional view has already changed to some extent in recent years with regard to the voluntary agreements described above.[12] At the same time, however, the limits of the extended corporate responsibility described in Section 2.1 on the basis of voluntary commitments, such as those made within the framework of the Global Compact and similar codes, have become increasingly apparent.

The codification of due diligence obligations is therefore to be understood as a reaction to the limits of "soft law", i.e. the limits of non-binding regulations (guidelines) that are based on conventions that are binding for the signatory states under international law, but are not binding for companies (Berning and Sotirov 2023). In the developing laws, the implementation of due diligence obligations remains the responsibility of the companies, but the state has a stronger role in the formulation of due diligence obligations compared to voluntary approaches and through the control function, described in the literature as "bringing back the state into global governance" (Schilling-Vacaflor and Lenschow 2021). Over time, this also allows policymakers to gradually raise environmental and human rights standards in government regulations on supply chains (see Berning and Sotirov 2023 for the example of EUDR).

Based on the human rights tradition, the state must ensure the protection of human rights against the actions of third parties such as companies. This traditionally applies to the state's own territory. Due diligence regulations create an extraterritorial application of the duty to protect along international value chains. This is a far-reaching regulation that also has implications under international and trade law (cf. Section 5.6). Companies cannot operate outside the legal framework of the respective country, and contradictory situations can therefore arise in which supply chain due diligence obligations do not match the framework conditions of the trading partners (e.g. if no independent trade unions are formed or can be formed). However, at least the German LkSG allows "discretion and room for

[12] This was expressed, for example, in the letter of support from companies in favour of supply chain legislation, which has now been signed by 73 companies from over 10 sectors (https://media.business-humanrights.org/media/documents/BusinessStatement_Update_032021.pdf).

manoeuvre" here, so that the "individual company situation" (BAFA 2022) can be taken into account. Further implementation will show how companies will proceed in these situations, whether, for example, "empowerment before withdrawal"[13] from the countries of trading partners will become an accepted corporate option and whether economically strong countries (such as China) can "enforce" exceptions to these regulations for German companies (cf. ection 5.1.1).

The paradigm shift can therefore be summarised as follows:

- *Mandatory due diligence requirements*: The due diligence regulations require companies to ensure comprehensive due diligence with regard to human rights and environmental goals, e.g. formulated in international conventions, along their supply chains. They must identify risks and take measures to minimise these risks. This establishes a systematic precautionary approach.
- *Extension of responsibility:* supply chain laws extend the responsibility of companies beyond their direct business activities and stipulate that they must also fulfil mandatory due diligence requirements for human rights violations and certain environmental issues in their supply chains. This means that companies are no longer only responsible for their own actions but, depending on the design of the legal acts, also for the actions of actors in upstream or downstream stages, i.e. their suppliers and customers, in some cases also along multi-stage value chains.
- *Extraterritorial effects:* Germany and the EU hold companies accountable for their actions in countries outside their territory.
- *Transparency and disclosure*: Companies must report on their supply chain activities and be transparent. They must publicly disclose risks and their due diligence efforts and document their efforts to fulfil these obligations.
- *Liability and compensation*: According to the EU CSDDD directive proposal, which goes beyond the German LkSG on this point, companies should be able to be held liable in future for breaches of their due diligence obligations. Companies must ensure that they fulfil their due diligence obligations in order to minimise potential liability risks. The draft CSDDD provides for full compensation for the damage suffered by the person affected.

2.3 Why doesn't the market solve the problems? Classification of the due diligence laws in terms of economic theory

The introduction of several legal regulations on corporate due diligence obligations for human and environmental rights at both national and European level raises questions about the limits of the existing framework. In other words: Why does the market not ensure compliance with basic due diligence obligations to a sufficient extent? Studies conducted prior to the introduction of the LkSG have shown that corresponding risk management systems have not been established on a voluntary basis across the board.[14] The following Sections therefore provide a basic explanation of the economic

[13] This means that "companies are encouraged not to withdraw from regions with lower standards, but to work locally with their suppliers or within the industry to minimise risk". (https://wirtschaft-entwicklung.de/wirtschaft-menschenrechte/fragen-und-antworten/).

[14] See, for example, the final report on the monitoring of the National Action Plan (2018-2020); https://www.auswaertiges-amt.de/de/aussenpolitik/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2124010.

arguments that can be used to justify supply chain regulations - in other words, why the market alone cannot solve certain human rights and environmental challenges.
Due diligence regulations aim to implement socio-political goals through binding obligations for companies that do not fulfil these goals sufficiently on a voluntary basis. There are a number of reasons why companies are not sufficiently incentivised to implement social policy goals on their own. These causes are outlined below, focussing on human rights and - with regard to the CSDDD - environmental issues.

External effects
A frequently cited argument (especially for environmental problems) is the existence of negative externalities. Negative external effects on the production side exist when production decisions of an economic entity (e.g. a company) have negative consequences for other companies, persons and/or society and these do not have an effect on the originator (Scheele et al. 1993: 32). They are therefore not taken into account in production decisions.

In principle, all companies could voluntarily undertake to avoid certain external effects - in this case human rights violations or negative environmental impacts. However, there is a collective action problem here, as in the absence of sanction mechanisms, every company has an economic incentive not to comply with the voluntary agreement (free-rider problem). Even if companies in the EU voluntarily agree to implement social and environmental standards and if they could overcome the free-rider problem in the process, this may encounter difficulties when it comes to implementation in countries outside the EU if the same views on human rights and environmental protection are not shared in the countries in question.

A competitive disadvantage could be prevented by ensuring that the additional costs incurred by companies are borne by other market participants, e.g. by consumers, for example by voluntarily buying Fairtrade and environmentally friendly products at higher prices. However, for several reasons, there is also a fundamental gap on the consumer side between the preference for sustainable food production conditions identified in studies - especially in LMIC - and consumer behaviour at the point of sale. Research has recently identified the reasons for this problem under the term "consumer-citizen gap" (Wesseler 2014, Lusk 2018, Busch and Spiller 2020):

- Some consumers simply do not have the money to buy products with sustainability labels, as these are often offered at high price gaps due to low market shares (niche problem) and the suppliers' skimming price strategies. The price differences for Fairtrade products, for example, are considerably higher than the additional price premiums received by producers in the countries of origin (Naegele 2019 calculated that around 20 % of the price premium goes to the producers).
- There is also a free-rider problem *on* the consumption side, when consumers have the goal of avoiding human rights violations and environmental problems for all products in the relevant category - and not just for the product they buy. In this case, consumers perceive their influence on the market as very limited and sometimes react with passivity because they assume that they cannot solve the problem as individuals.
- This is related to consumers' doubts about the effectiveness of their own consumer behaviour (perceived consumer effectiveness, Ghvanidze et al. 2016); they have a feeling of powerlessness as individual consumers who cannot really change anything about global problems.
- With regard to both human rights and environmental problems, these are credence attributes that are difficult to recognise (Akerlof 1970). Consumers cannot recognise and check the production conditions of products, such as the treatment of workers, the remuneration of producers and the impact on the environment, even if these characteristics are relevant to

them. They would therefore have to trust the advertising claims made by suppliers, but this is not always justified.

- Some consumers see the responsibility for compliance with minimum social and ecological standards as lying more with the state and the economy and therefore do not take action at the point of sale.

If compliance with human rights and environmental protection measures are considered to be in need of improvement, there is little incentive for companies to improve them voluntarily under the current legal framework. If, on the other hand, there are legal regulations, for example in the form of standards or bans with the aim of greater internalisation (i.e. the protection of human rights and the environment), there is constant pressure to reduce costs, particularly in markets with high cost and competitive pressure, and this includes the agricultural and food industry markets. Cost avoidance can then also be realised through non-compliance with legal standards. The prerequisite for this is the assumption that, as is usual in the so-called New Institutional Economics, opportunistic behaviour exists, i.e. it must be assumed that companies do not always comply with laws and that deception is possible (Williamson 1993). This is particularly true when legal standards are not adequately enforced by the state, e.g. due to a lack of supervision. The incentive for companies to avoid labour and environmental protection costs is particularly high in anonymous markets for standard goods such as agricultural commodities (cf. Section 4.1) and in countries with a weak legal system.

For a long time, it was relatively risk-free for commercial consumers in wealthy countries to ignore human rights and environmental problems when purchasing many products in LMIC, as there was hardly any monitoring. The legal responsibility clearly lay with the countries of origin of the raw materials. However, this also applies to domestic markets: especially when such problems arise in Germany or the EU (e.g. exploitation of migrant labour in southern Europe, working and living conditions in German slaughterhouses (cf. Section 4.2)) and environmental problems in agricultural production (cf. Section 4.3), it is indeed the task of the state to ensure that the minimum standards enshrined in law are enforced (see WBAE 2020: 288). The need for supply chain due diligence laws therefore arises because compliance with basic human rights and environmental protection laws is not sufficiently ensured in all countries and the incentives of the market do not give companies sufficient impetus to ensure compliance on their own initiative.

Information asymmetry

Information asymmetries are another reason for a lack of incentives on the company side. They occur, for example, when two market participants do not have the same level of information about product characteristics. They become a problem if the one market participant with the better level of information gains an advantage.

Due to information asymmetry, the production conditions of a product are a credence attribute, i.e. the buyer must trust the seller that a product was produced under certain conditions - in this case, for example, without human rights violations. Producers know about the conditions, but these are not recognisable on the product for commercial buyers and even less so for consumers. Especially in widely ramified and/or small-scale supply chains, information on the environmental impact of production or on social and labour conditions is not accessible to all buyers or can only be obtained at high information costs. Agricultural supply chains are therefore often characterised by pronounced information asymmetries. Supply contracts along the supply chain with detailed quality requirements and contractual clauses attempt to reduce these (Williamson 2002, Barrett et al. 2022).

Remedial action, for example through voluntary certification of due diligence obligations, in which external auditors ensure transparency through supervision of the production process on site, has been taking place for many years, but is by no means universal and - as the continued high incidence of human rights violations shows - not always sufficiently effective (cf. Section 4.2).

The incentive to take voluntary measures can increase if suppliers' commitment to human rights and the environment can be used for marketing purposes. The best-known example of this is labels such as Fairtrade. However, to date these have only experienced very limited demand on the market and only reach niche markets (see above).

Market concentration and natural monopolies

Supply relationships in global supply chains can be characterised by dependencies and unequal negotiating power. Suppliers in LMIC are in fierce competition with each other and sometimes face oligopolistic demand structures (oligopsony). Procurement markets in LMIC tend towards natural monopolies if - e.g. due to poor infrastructures such as a lack of cooling and storage facilities and high economies of scale - producers are under high time pressure in marketing and only one (or a few) buyers are available locally. In this case, this one (or a few) buyer(s) can act as a monopoly and exercise market power. However, the studies on market power in LMIC are complex and the results are inconsistent, partly because the trend towards vertically integrated chains poses new challenges (Barrett et al. 2022). Customers with market power can put pressure on their suppliers. However, they may also be able to use monopoly profits to stabilise prices along the value chain and open up room for manoeuvre for their suppliers. Consumer-oriented companies at the end of the chain are also subject to particular public scrutiny, including with regard to the social conditions of their suppliers (Tang et al. 2021).

What conclusions can be drawn for corporate behaviour?

Against the backdrop of the market problems outlined to ensure social conditions and environmental protection in (international) supply chains, the initial situation for companies was complicated in the last decade, when the discussion about supply chain laws gained momentum: Companies that purchase goods globally on a purely cost-oriented basis, neglecting human rights and environmental concerns, can realise cost advantages, which is competitively relevant in agricultural markets where some trade with very low margins. Although there is still an image risk vis-à-vis a sensitised public, the probability of a media scandal occurring is probably relatively low for various reasons (even if it is hardly calculable and associated with high potential damage to image). However, taking advantage of human rights violations often does not correspond to the values of many people in management and among company employees. Against this backdrop, criticism of voluntary measures and initiatives such as the Global Compact has grown, including from business circles (e.g. Kaleck and Saage-Maaß 2016: 28).

In recent years, a whole range of companies has therefore campaigned for the introduction of mandatory supply chain due diligence laws in order to ensure a level playing field, i.e. equal competitive opportunities for companies that act in a morally responsible manner.[15] Various multi-stakeholder platforms for products such as bananas, cocoa and coffee have also been established to support broad implementation. However, these co-operative voluntary measures have not been implemented across the board and their implementation is limited (cf. Section 4.2).

In this sense, supply chain obligations protect producers and retailers from competitors who seek to gain cost advantages in international competition by not complying with basic human rights standards and disregarding environmental concerns. Supply chain laws attempt to make manufacturers and trading companies that have already established or observe standards in the value chain with regard to areas such as food safety and product quality also responsible for human rights and environmental

[15] See https://www.business-humanrights.org/de/schwerpunkt-themen/mandatory-due-diligence/gesetz/.

issues. Non-binding regulations (*soft laws*) are becoming legally binding regulations in the area of corporate due diligence obligations.

2.4 Why is the state not solving the problems sufficiently?

The obvious solution for enforcing fundamental human rights and environmental protection measures, to which almost all UN member states have committed themselves, would be for the state to enforce rights on the ground. However, there are implementation deficits here. For example, the influence of lobby groups can lead to environmental and labour protection laws being weakly formulated, hardly sanctioned or insufficiently monitored.[16] In some LMIC, weak state administrative structures and limited financial resources also make it difficult or impossible to implement human rights and environmental protection measures (Denter and Friess 2023).

In many cases, LMIC only have a few export-oriented sectors and depend on their competitiveness, also with regard to their state revenues. If there is a global trend towards undercutting standards, it is difficult for the countries concerned to enforce environmental and human rights in their country if this is associated with competitive disadvantages in the global competition between locations. In countries such as Côte d'Ivoire or Ghana, for example, the share of cocoa in export revenues (depending on the price situation on the world market) ranges from just under 20 % in Ghana to just under 40 % in Côte d'Ivoire (Boysen et al. 2023, van Huellen and Abubakar 2021). The pressure is therefore high to keep such a sector internationally competitive. Another example is the coffee market, where some countries, such as Brazil, have considerable competitive advantages over countries with more mechanised smallholder structures due to large farm structures, so that the latter are under pressure to avoid additional cost disadvantages. In cases of high international competitive pressure, there are situations in which countries find it difficult to implement the human rights and environmental protection standards they have set for economic reasons, which can lead to a race to the bottom. Compliance with the standards would require cooperation between the countries concerned - in other words, there is a social dilemma in which each individual state has an incentive to gain short-term locational advantages.

Textbox 2.1: The (so far) failed cocoa price cartel of Ghana and Côte d'Ivoire

In 2020, the governments of the two leading cocoa-growing countries, Côte d'Ivoire and Ghana, reached an agreement to achieve a living income for their smallholder farmers in the cocoa sector. The core of the agreement was to achieve a living income differential (LID) by adding a premium of USD 400 to the export price per tonne of cocoa to be paid by international buyers. In addition, a production quota was agreed for both countries in order to limit the volume. As a result, short-term price increases were implemented. However, declining demand, an unexpectedly large harvest and a lack of storage options led to a drop in export revenues, meaning that the higher income could not be successfully realised on the international market, at least so far (cf. Section 5.7.2 for more details).

In cases of state undercutting competition, the enforcement of human rights through international law is fundamentally difficult, as there is no authority that could force states to enforce the decisions of human rights courts or the UN or ILO (Kaleck and Saage-Maaß 2016: 55). Since only states are bound by international law, companies cannot be sued before these bodies (ibid). Furthermore, in the absence of a hierarchy of norms, human rights covenants do not automatically take precedence over international economic law; the two stand side by side. In the event of a collision between the two legal systems, economic interests will often prevail (ibid.). The implementation of corporate due

[16] One example of insufficient state supervision is the establishment of the QS system in Germany.

diligence obligations in the area of human rights therefore requires other control mechanisms. In this respect, addressing the actors in one's own national regulatory area offers enforcement advantages that also have an international impact along the supply chain. This also corresponds to the principle of co-operation under international law, according to which states should support each other in the enforcement of their obligations under international law.

Local vs. global effects using the example of the environment

With regard to environmental goods, their differing spatial impact is an additional complicating factor in state solutions. Both public goods and common goods can exist at different spatial levels (local to global). Climate is uniformly considered a global good in the literature, but there is disagreement as to whether it is a global public good (e.g. Kaul et al. 1999) or whether it should be treated as a global common good (e.g. Soroos 2005). This is because there is rivalry with regard to the emission of greenhouse gases under the conditions of today's fossil-fuelled industrial society, whereas all people would benefit from a stable global climate in a decarbonised world, i.e. there would no longer be rivalry and exclusivity in its use.

Regardless of whether they are categorised as public or common goods, global environmental goods require transnational regulations, as assumed in the Supply Chain Act. However, these may meet different regional preferences with regard to the need for regulation, prioritisation and regulatory intensity. For climate protection, the need for a global solution is clear, as greenhouse gases have a global impact, regardless of where they originate. For other environmental problems, on the other hand, there may be regional differences in the possible burdens or centres of causation or even in the preferences of society. In this respect, further differentiation of the type of environmental goals is required with regard to global, local and mixed environmental goods:

- Global environmental goods are defined by their utilisation across countries, people and generations (Kaul et al. 1999: 10). In addition to the climate, oceans are another example of a global environmental good. In this case, global solutions are therefore necessary.
- Compared to global public goods, the use of regional and local environmental goods is geographically regional or localised or their environmental impact is regional or localised. Examples include soil health and water quality. A local regulatory approach therefore makes sense here.
- Mixed environmental assets have a global as well as a regional or local level of utilisation or impact. One example is biodiversity, as species extinction partly involves a global loss of diversity, but the impact on local biodiversity is also important. This therefore makes the debate about starting points for regulations (local, global) and possible regulatory designs much more complex.

Environmental and climate-related supply chain due diligence regulations are based on globally harmonised minimum standards, i.e. they presuppose global environmental goods - assuming that the protection of these environmental goods is equally favoured by all countries. In the case of regional or mixed environmental goods, different standards will emerge because the countries must decide how important these environmental characteristics are to them in comparison to other social goals. In this respect, different regulatory approaches can be rationally justified for local environmental goods, but

also for wage levels or other social issues.[17] Supply chain due diligence regulations should therefore focus on standards that have been signed by (almost) all UN countries (such as the ILO core labour standards) or that have a global environmental good character.

2.5 Why should companies take responsibility on their own initiative?

In addition to the above-mentioned arguments under international law, there are also ethical and political justifications and principles anchored in philosophy for the responsibility of companies to work towards the observance of human rights beyond the boundaries of their own company: According to these, responsibility lies not only with those who have caused a problem (polluter pays principle), but also with those who benefit from it (beneficiary principle) and/or who have the means to remedy it (capability principle) (Hayward 2012). Due diligence laws, with their focus on the responsibility of larger companies primarily based in countries with high per capita incomes, do not necessarily assume a direct cause-and-effect relationship. The responsibility of the company therefore does not only depend on whether it has caused the human rights violations through its own actions. Instead, the ethical principles also focus on the fact that buyers in affluent countries benefit (beneficiary principle) if their suppliers disregard human rights (and can therefore offer them more favourably) and, in particular, that companies are in a position to influence the actions of their suppliers (capability principle).

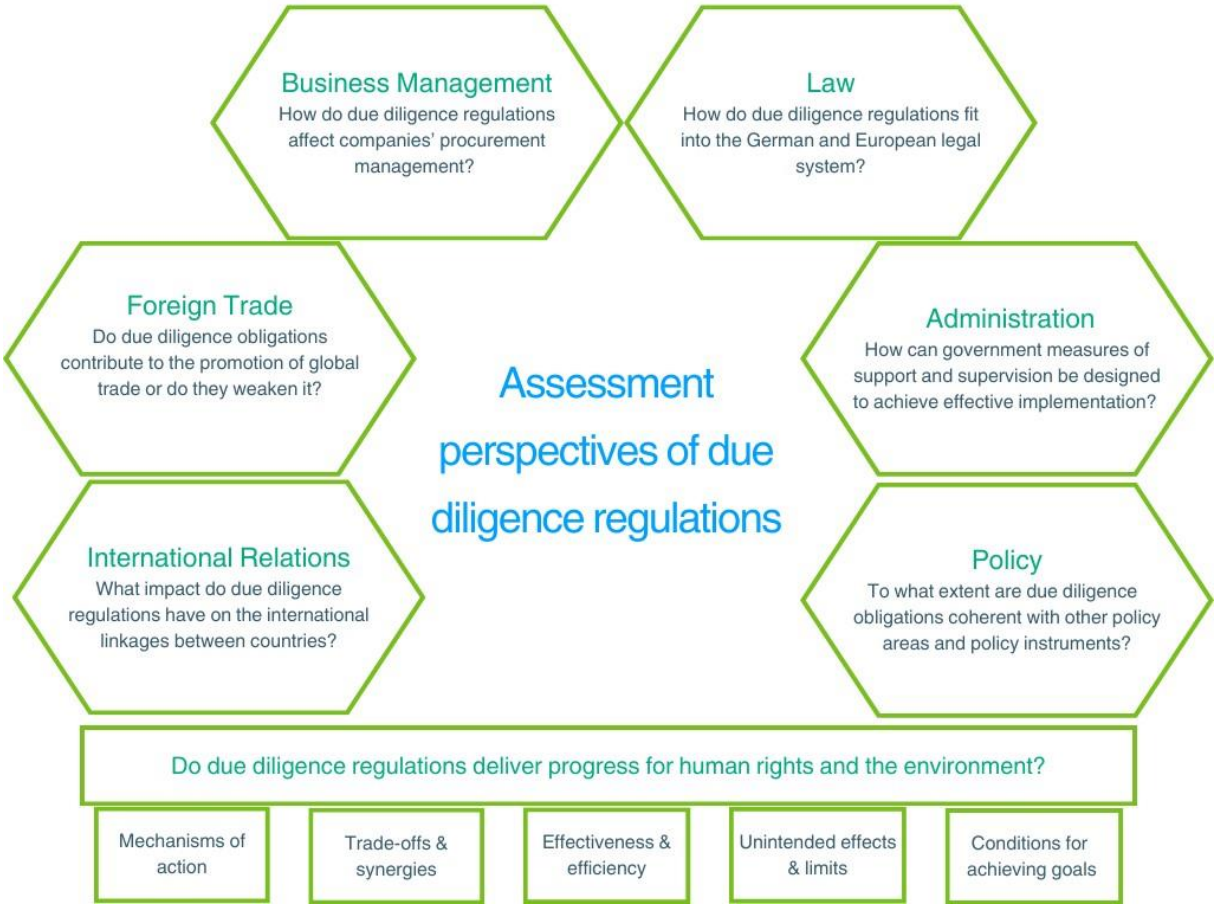
The basic ability to significantly influence suppliers in their corporate behaviour through specifications can be assumed, at least for larger buyers, as the already existing comprehensive measures of influence in the area of quality management show (cf. also Section 4.1). Against the background of increasingly concentrated value creation stages, particularly in the middle (e.g. in international agricultural trade) and at the end (in food retail) of the food value chain, it makes sense to hold such larger and therefore more capable players accountable for the implementation of basic human and environmental rights standards.

2.6 Assessment perspectives for the evaluation of due diligence legislation

In view of the far-reaching changes outlined above, which the new approach is intended to bring about in companies, fundamental questions arise, such as the (constitutional) legal admissibility of obligating companies or measuring the possible sustainability effects. It must also be asked what this approach fundamentally means for existing trade policy, whether it could be associated with problems under international law, whether extraterritorial requirements of wealthy industrialised countries towards affected LMIC are legitimate and how they fit into the geostrategic interests and policies of the EU. Finally, the question arises as to how costly the implementation of the due diligence obligations will be and what bureaucratic effort the implementation will entail for the companies concerned and the competent authorities (cf. Fig. 2.1). The following Section explains the different perspectives from which the due diligence regulations can be assessed.

[17] In international trade, this is regulated in the SPS Agreement of the WTO with regard to sanitary and phytosanitary regulations that go beyond international standards or set standards where there are no international regulations.

Figure 2.1: Assessment perspectives of due diligence regulations



Source: Own presentation.

The overarching goal of supply chain due diligence regulations is first and foremost progress in the enforcement of core human rights in the area of labour. Accordingly, it must be analysed whether supply chain legislation enables relevant human rights progress, how the due diligence obligations can be implemented and monitored and what conditions are required to achieve positive effects. More recently, the extent to which the implementation of global environmental goals (in particular climate protection and biodiversity) can also be promoted through this regulatory approach has also been discussed.

Due diligence regulations can lead to trade-offs, but also to synergistic effects. Strengthening human rights and environmental protection through due diligence obligations can, for example, have positive indirect effects on the resilience of agricultural and food systems in terms of an improved ability to respond to environmental changes (see UN 2020, FAO 2021, WBAE 2020). However, mandatory due diligence obligations can also trigger unintended effects, for example if they lead to companies withdrawing from high-risk areas and thus cause further deterioration for people in already precarious regions. Furthermore, they only cover part of the human rights and environmental risks and are not applied worldwide, which can lead to market segmentation (cf. Section 5.5.2).

From a *business management perspective,* it is necessary to analyse which concepts and how much effort companies use to implement the extended due diligence obligations (Section 5.1.1). At this stage, it is still relatively unclear which instruments will be prioritised for implementation. It is assumed

that certification schemes will play a central role, meaning that participation in a neutrally audited standard will increasingly become a prerequisite for supply in the agricultural and food industry. In this case, the effectiveness of due diligence regulations would depend on whether certification standards ensure sufficiently reliable implementation and supervision (Section 5.1.2). From an economic perspective, the question is whether the due diligence laws have a positive cost-benefit ratio compared to alternative regulations, i.e. whether they are efficient.

In contrast to the adopted German LkSG, the planned CSDDD currently provides for the civil liability of companies for violations committed by their suppliers. According to the draft, this liability could also include not only direct suppliers, but also further upstream suppliers. From a *legal* perspective, this raises questions of constitutional admissibility and proportionality as well as compatibility with the German legal system (Section 5.2). However, it must also be asked whether civil liability could remain a "paper tiger" in view of the problems of proof.

The German LkSG essentially contains an obligation of effort for companies, whereby the endeavours of the management must be proven through documents and other materials. From an *administrative point of view*, there is an obvious risk that this could lead to the creation of legitimacy facades, which would entail a high administrative burden, especially for small and medium-sized enterprises (SMEs), but whose benefits could be limited. Reporting and transparency alone do not automatically lead to more sustainable business practices (Mason 2020). This is particularly relevant for companies in the agricultural and food sector, as at least some of them are also affected by the EU regulation on zero deforestation supply chains, which entails further documentation requirements. It is therefore necessary to analyse which regulations contribute to the effectiveness of the standards and which primarily cause bureaucracy for companies and the state.

From a *policy* perspective, the largely parallel development of horizontal[18] and sector-specific supply chain regulations by different directorates-general in the EU and in several member states raises questions about policy coherence and the design of policy packages. Particularly in the process of accelerated sustainability policy that is emerging with the Green Deal and other strategies (such as in the policy fields of trade or foreign policy), the coordination of different departments is of great importance.

From the perspective of foreign trade (Section 5.5), due diligence regulations should be seen in their interplay with older multi- and bilateral trade policy agreements or newer unilateral import and export regulations. Corporate due diligence obligations complement existing trade policy approaches in order to pursue political goals such as sustainability. Corresponding trade policy measures include unilateral tariff concessions for developing countries motivated by development policy if they comply with certain human rights and environmental conditions. The sustainability chapters in bilateral trade agreements are also part of this, but are often criticised due to their limited enforceability - even though the EU introduced a corresponding sanction option for the first time in its free trade agreement with New Zealand (DG Trade 2022). This criticism was also an impetus for the development of due diligence regulations. These can therefore strengthen international implementation by basing supply chain laws on the obligations of domestic actors, but extending along the value chain into sovereign third countries (Rudloff and Wieck 2020). However, this may also result in conflicts with other existing objectives, for example in which the tariff preferences for developing countries (e.g. *everything but arms* (EBA)) lose their value due to the obligation to comply that now exists anyway (cf. Annex 1). The risk behaviour triggered by the due diligence obligations can also run counter to the intended development policy trade objectives if companies withdraw from certain countries ("*cut and run*"). Finally, the third country effect of unilateral approaches can be perceived as discriminatory or

[18] Horizontal regulations affect all sectors of the economy.

"colonialist" by the trading partner. Overall, it is unclear whether corporate due diligence obligations and traditional trade policy instruments have a complementary or conflicting effect.

From the perspective of *international relations,* there is the accusation of neo-colonialism. It is criticised that wealthy countries unilaterally introduce supply chain legislation - without any exchange with the affected LMIC (Section 5.6). These requirements are then enforced by companies from these countries with demand power. From the outset, this approach is therefore only possible on the basis of traditional trade patterns, which are characterised by the supply of raw materials from LMIC to countries with high per capita incomes and are often accompanied by economically more attractive further processing in the latter. This form of division of labour has long been criticised, even independently of supply chain legislation (e.g. Hickel et al. 2022), and characterises one dimension of the difficult partner relationship between LMIC and wealthier countries. On the other hand, conflicts are also increasingly arising for their own European goals: Finally, the resurgence of thinking in terms of economic blocs following Russia's war of aggression against Ukraine raises new *geostrategic questions* for the search for alliances. In general, trade-offs between unilateral due diligence obligations and the search for new partners - motivated by both trade policy and foreign policy - will play a greater role. In new trade agreements, it will therefore be possible for the EU to find new compromises in order to remain attractive for selected partners with new sustainability requirements.

2.7 Conclusion

Due diligence regulations attempt to improve the human rights and environmental situation through corporate commitments. Some businesses have voluntarily committed themselves to this field in recent years, but there is still a risk of undercutting competition - including between LMIC in the global competition between locations. Existing approaches to supply chain due diligence obligations in wealthier countries oblige their companies, some of which can exert considerable buying power in the value chain, to implement certain standards that apply in their home countries as well as with most trading partners.

Supply chain obligations are intended to protect producers and retailers from competitors who gain cost advantages in international competition by not complying with basic human rights standards and disregarding environmental concerns. The due diligence obligations also make manufacturers and retailers, many of whom have already established or observe standards in the value chain with regard to areas such as food safety and product quality, responsible for human rights and environmental issues.

There are central ethical and political lines of reasoning and principles for the responsibility of companies to work towards the observance of human rights beyond the boundaries of their own company: According to these, responsibility lies not only with those who have caused a problem (polluter-pays principle), but also with those who benefit from it (beneficiary principle) and/or who have the means to remedy it (capability principle). Due diligence laws with their focus on the responsibility of larger companies primarily based in countries with a high per capita income do not necessarily assume a direct cause-and-effect relationship. The responsibility of the company therefore does not only depend on whether it has caused the human rights violations through its own actions. Instead, the ethical principles also focus on the fact that buyers in affluent countries benefit (beneficiary principle) if their suppliers disregard human rights (and can therefore offer them more favourably) and, in particular, that companies are in a position to influence the actions of their suppliers (capability principle).

The fundamental ability to significantly influence suppliers in their corporate behaviour through specifications cannot be assumed, at least for larger buyers, as the already existing comprehensive influence measures in the area of quality management show. Against the background of increasingly

concentrated value creation stages - especially in the middle (e.g. in international agricultural trade) and at the end (in food retailing) of the food value chain - it makes sense to hold such larger and therefore more capable players accountable for the implementation of basic standards in human and environmental rights.

Legal supply chain due diligence obligations have the potential to contribute to improving the human rights and environmental situation of trading partners. However, this is a new area in which the harmonisation of various national and international regulations and the implementation details are still under development. It is a far-reaching step because the due diligence regulations decisively change the division of tasks between the state and private actors with regard to the enforcement of human rights and environmental regulations along the value chain. From a corporate perspective in particular, they represent a fundamental change in the way in which companies must fulfil their responsibilities along their supply chains. The fundamental ability to significantly influence suppliers in their corporate behaviour through specifications is not disputed, at least for larger buyers.

However, this raises numerous questions, including with regard to the procurement management of companies, the importance of certification schemes, international legal relations, geostrategic positioning and basic legal issues. These challenges are addressed in detail in Section 5. First, however, Section 3 presents the current state of legal development. Section 4 then provides an overview of the specific human rights and environmental problems in the agricultural and food sector, which supply chain due diligence systems are intended to help solve.

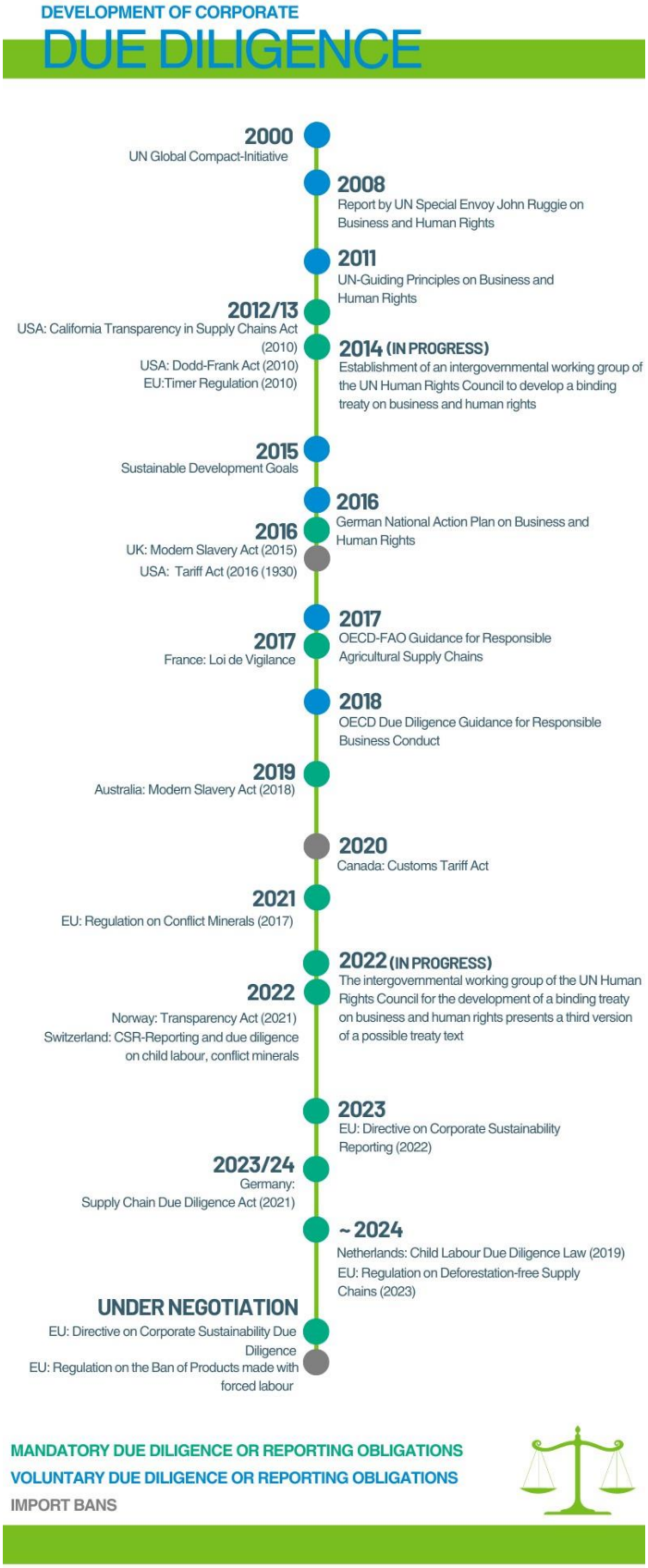
3. Due diligence regulations: Basics, status quo and developments

3.1 Due diligence regulations around the globe

Starting with the UN Global Compact initiative in 2000, the report by the UN Special Envoy John Ruggie on corporate due diligence obligations and the UN Guiding Principles on Business and Human Rights based on it, global standards of behaviour with regard to corporate due diligence obligations have been incorporated into national legislation in many places, for instance, the California Transparency in Supply Chains Act (2012), the UK Modern Slavery Act (2016), the French Due Diligence Act ("*Loi de Vigilance*", 2017), the Modern Slavery Acts of Australia and New South Wales (2019) and the Act against Child Labour in the Netherlands (2024). Figure 3.1 illustrates this development based on individual voluntary and mandatory due diligence and reporting obligations as well as import bans. What is striking is that more and more mandatory due diligence obligations are being added over time, especially in OECD countries. In general, this also indicates at international level a shift from so-called "soft law" in the field of corporate due diligence towards legally binding regulations. With the aim of presenting the differences and similarities between this growing number of legislations, the OECD is currently conducting a mapping exercise of existing due diligence legislation and initiatives, including other complementary measures of G7 states, which is scheduled for publication in late 2023.[19]

[19] https://www.g7germany.de/resource/blob/997532/2040144/8bd6097641a2c66114d95a2615c4d01d/2022-05-16-g7-agrarminister-eng-data.pdf?download=1

Figure 3.1: Human rights-related regulations and due diligence obligations over time (selection)



Source: Own presentation based on Grabosch 2022, Luthango and Schulze 2023.

3.2 Reference framework for due diligence regulations under international law

Labour standards

The evolving statutory due diligence obligations primarily refer to international conventions in the fields of labour standards, human rights and environmental legislation. What many of the acts or draft acts, as well as their predecessors of a voluntary nature, have in common is that they originally refer to eight of the ten fundamental conventions of the International Labour Organisation (ILO)[20] . Given this unifying character, the fundamental conventions are briefly presented here. The relevant international environmental conventions will then also be addressed, which are at least in part envisaged or discussed as part of the corporate due diligence obligations.

The ILO is based on the five fundamental principles (1) elimination of forced labour, (2) freedom of association and the right to collective bargaining, (3) elimination of discrimination in respect of employment and occupation, (4) abolition of child labour and (5) occupational health and safety. They serve as guidance for many of its conventions and recommendations. Two fundamental conventions can be assigned to each fundamental principle:

1. Principle of "Elimination of forced labour":
   - Convention No. 29: Forced Labour (1930)
   - Convention No. 105: Abolition of Forced Labour (1957)
2. Principle of "Freedom of association and the right to collective bargaining":
   - Convention No. 87: Freedom of Association and Protection of the Right to Organise (1948)
   - Convention No. 98: Right to Organise and Collective Bargaining (1949)
3. Principle "Elimination of discrimination in respect of employment and occupation":
   - Convention No. 100: Equal Remuneration (1951)
   - Convention No. 111: Discrimination in Employment and Occupation (1958)
4. Principle “Abolition of child labour":
   - Convention No. 138: Minimum age (1973)
   - Convention No. 182: Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999)
5. Principle “Occupational health and safety":
   - Convention No. 155: Occupational Safety and Health and the Working Environment (1981)
   - Convention No. 187: Framework for the promotion of occupational safety and health (2009)

Selected from a wide range of conventions, these are known as fundamental conventions, as they were included in the "Declaration on Fundamental Rights at Work" (ILO 1998) at the 86th session of the International Labour Conference in 1998 and thus acquired a pre-eminent status. This is characterised by a quickly achieved consensus, even without ratification: Four years earlier, at the World Summit for Social Development in Copenhagen, the participating governments had adopted commitments and an action plan, which was also intended to strengthen the fundamental rights of workers. However, ratifications of the various ILO conventions were slow in coming subsequently, which is why the ILO in the 1998 Declaration "solemnly undertakes [...] to assist its members to attain these objectives" (ILO 1998: 2).

[20] In 2022, the ILO added Conventions No. 155 and No. 187 as the basic principle of "occupational health and safety" to the so-called fundamental conventions, thus increasing their number from eight to ten; https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO.

By including the conventions set out under the fundamental principles one to four in the "Declaration on Fundamental Rights at Work", all countries undertake to comply with these fundamental conventions solely because of their ILO membership, irrespective of ratification. In the event of ratification, however, the ILO fundamental conventions become legally binding and both regular and special monitoring procedures commence. However, even without official ratification, the ILO member states are expected to report annually on the status of implementation of the fundamental conventions in a simplified procedure.

However, the fundamental principles have evolved over time and the long-established eight fundamental conventions were expanded to ten in 2022 (see conventions under fundamental principle 5). This has an impact on the progress in implementation achieved (by states). The two most recent fundamental conventions, in particular, have not even been ratified by all EU member states. Yet, the former eight fundamental conventions have meanwhile been ratified by the vast majority of all countries, including Germany.[21] In comparison, ratification of other conventions is lower, for instance, only 43 countries have ratified the ILO Maternity Protection Convention[22]. Relevant exceptions include, for instance, China with four non-ratified conventions (No. 29, 87, 98, 187) or the USA with merely two ratified fundamental conventions (No. 105, 182).[23] Failure by member states to ratify the fundamental conventions does not lead to the imposition of sanctions.

An annual analysis by the International Trade Union Confederation (IUTC) shows that ratifications of the respective ILO fundamental conventions often do not match the situation on the ground; violations of workers' rights often occur even in countries which have ratified most of the fundamental conventions (IUTC 2023).

The 1998 Declaration stresses that the fundamental conventions must neither be used for trade protectionist purposes nor for challenging a country's comparative advantage (ILO 1998: 5). This means that states may not, for instance, put up trade barriers because another state has not ratified the fundamental conventions. In the context of trade agreements, however, it is increasingly a question of linking market opening and compliance with core labour standards (cf. Section 5.6.2).

Environmental law

Furthermore, in addition to labour standards, relevant human rights and environmental conventions provide the reference for the (evolving) statutory due diligence obligations. Annex 1 contains a complete tabular overview of the environmental conventions that are being debated in the EU decision-making process.

In the field of international environmental conventions, what the German LkSG and the draft CSDDD initially have in common is that they refer to specific pollutant-related environmental risks, which, in turn, are addressed in three existing international conventions:

- The Minamata Convention which regulates the handling of mercury in manufacturing processes,

[21] However, Germany has not yet ratified Convention No. 155, which has also ranked among the fundamental conventions since 2022, see https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:2,F.

[22] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328:NO

[23] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:10011:0::NO::P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:2,F

- the Stockholm Convention, which regulates the handling of Persistent Organic Pollutants (POPs); it covers a number of plant protection products such as DDT,
- and the Basel Convention, which regulates the international importation and exportation of hazardous waste.

In the field of pollutants, the draft CSDDD also includes the Vienna Convention for the Protection of the Ozone Layer and the Rotterdam Convention on Trade in Hazardous Chemicals (cf. Annex 1). These pollutant-related conventions have been ratified by the vast majority of states. [24]

In the discussion on the planned CSDDD, a larger number and significantly more far-reaching international conventions, which set targets relating to biodiversity and climate change mitigation, have recently been put forward as a reference in the Commission proposal:

- The Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which regulates trade in endangered animal species and plants, has been in force since 1975 and has since been ratified by all states with a few isolated exceptions.
- The Convention on Biological Diversity (CBD), which aims to protect the diversity of fauna and flora and ecosystems, has been in force since 1993 and has been ratified by all states with a few isolated exceptions, although national implementation cannot be enforced.
- The so-called Nagoya Protocol, which creates a framework for access to genetic resources and the fair and equitable sharing of benefits, and the Cartagena Protocol on Biosafety both follow up on the CBD, although they have been ratified by far fewer states.[25]
- The Paris Agreement on Climate Change, which, among other things, aims to limit the global temperature rise to 1.5°C, if possible, was adopted in 2015 and has been ratified by all states with a few isolated exceptions.

The following Sections set out how the inclusion of these global environmental conventions is addressed in the LkSG (Section 3.3) and how this is proposed and discussed in the EU regulations (Section 3.4).

Further references to international objectives

It is also discussed whether some human rights, that are particularly relevant to the agricultural sector with its large number of micro-holdings and fired farm labour in rural areas, should also be addressed in the existing and emerging regulations - such as the right to food (Section 5.7.1), the right to a living income and a living wage (Section 5.7.2) and relevant rights related to gender equality (Section 5.7.3).

3.3 Elements of the German Act on Corporate Due Diligence Obligations in Supply Chains[26]

The draft Act on Corporate Due Diligence Obligations in Supply Chains (LkSG) was adopted by the Federal Cabinet in March 2021. On 16 July 2021, the Act was passed by the Federal German Parliament (Bundestag) and took effect on 1 January 2023. The Act arose from the Federal Government's 2016

[24] https://treaties.un.org/Pages/Treaties.aspx?id=27&subid=A&clang=_en

[25] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-8-c&chapter=27&clang=_en

[26] This Section presents the key elements of the LkSG. See Grabosch [ed.] 2021 for a detailed presentation.

National Action Plan on Business and Human Rights, which in turn is based on the UN 2011 Guiding Principles on Business and Human Rights cited above.

The due diligence obligations stipulated in the LkSG have already been described for Germany in the National Action Plan on Business and Human Rights. A representative business survey carried out in 2019 and 2020 as part of the National Action Plan showed that, according to self-disclosure, merely 13 to 17°% of all undertakings complied with these due diligence obligations.[27] Due to the low level of voluntary compliance with due diligence, the legislator believed that a "legally binding and internationally compatible due diligence standard" (Draft Act 2021: 2) was needed in order to ensure compliance.

The LkSG concerns companies with headquarters or branch offices in Germany, that employ at least 3,000 workers (from 2024: 1,000 workers). Based on a study for the Federal Ministry of Labour and Social Affairs (BMAS), it is assumed that 2,037 companies (and thus a relatively high proportion of companies of this size) are running a high risk of human rights violations occurring in their supply chains. [28]

The due diligence obligations listed in the Act relate to the identification of human rights risks with reference to eight of the ten ILO fundamental conventions (cf. Section 3.2) and the UN Civil Covenant and the UN Social Covenant. Accordingly, a human rights risk in your supply chain exists in particular if a violation of one of the following prohibitions relating to internationally recognised human rights conventions is likely to occur (cf. Section 2 and Annex thereof for a complete list):

- Employment of a child under the minimum admissible age (ILO No. 138),
- Worst forms of child labour for children under 18 years of age (ILO No. 182),
- Forms of forced labour (ILO No. 105, No. 29),
- Discrimination at work, for instance in wages (ILO No. 100, No. 111),
- Disregard of freedom of association (ILO No. 87, No. 98),
- Failure to comply with the occupational health and safety obligations applicable under the law of the place of employment, where this creates a risk of accidents at work or work-related health hazards,
- Deployment of security forces that use violence or impair the freedom of association and unionisation,
- Illegal evictions or illegal seizure of land, forests, etc.

[27] Final report of NAP monitoring (2018–2020); https://www.auswaertiges-amt.de/blob/2405080/23e76da338f1a1c06b1306c8f5f74615/201013-nap-monitoring-abschlussbericht-data.pdf

[28] According to the business register (Destatis), there are 2,891 undertakings with over 1,000 employees, of which 17°% already meet the requirements according to NAP monitoring (-636), further undertakings operate in sectors with value chains exclusively in Germany and thus face very low human rights risks (-38), a further group of undertakings is engaged in sectors with likewise low international shares of the value chain, but higher human rights risks (-180) (draft act 2021: 26). The study "Respect for human rights along global value chains – risks and opportunities for sectors of the German economy", which was commissioned by the BMAS, forms the basis for the assessment of the individual sectors in the draft act. The study's assessments are based on a multi-level analysis of international databases, such as the Sustainability Accounting Standards Board's standards on sustainability reporting (SASB) or the complaints database of the Business and Human Rights Resource Centers (BHRRC) (BMAS 2020). However, the BMZ has stated on its websites that 4,800 undertakings in Germany will be affected by the LkSG from 2024 (900 companies from 2023); https://www.bmz.de/de/entwicklungspolitik/lieferkettengesetz#:~:text=F%C3%BCr%20wen%20gilt%20das%20Gesetz,rund%204.800%20Unternehmen%20in%20Deutschland.

- Withholding of decent wage and
- Harmful environmental changes that may result in adverse effects on people.

It should be noted that aspects of gender equality are not explicitly mentioned as part of the human rights risks in the LkSG, only implicitly as part of the prohibition of discrimination at work, which includes unequal pay on gender grounds. However, violence against women and girls is deemed to be the most widespread and large-scale human rights violation worldwide.[29] In the agricultural sector, a significant proportion of employees are female; they are exposed to diverse risks notably in LMIC (cf. Sections 4.2.1 and 5.7).

Alongside human rights and labour standards, due diligence obligations under the German LkSG also relate to environmental risks, which either at the same time serve to protect human health or constitute specific pollutant-related environmental risks (cf. Section 3.2).

In order to comply with their due diligence obligations, the companies concerned need to set up systems in the field of risk management, risk analysis, remedial measures and complaints procedures, develop preventive measures, draw up a policy statement and comply with documentary and reporting requirements (cf. Fig. 3.2).[30] This also includes the definition of in-house responsibilities. Companies covered by this Act must carry out risk analyses within their own areas of operation and for direct suppliers on a regular basis, i.e. usually annually, and take preventive measures if risks are identified. The complaints procedure to be established must also be accessible to persons in the environment of indirect suppliers.

Figure 3.2: Due diligence system according the LkSG

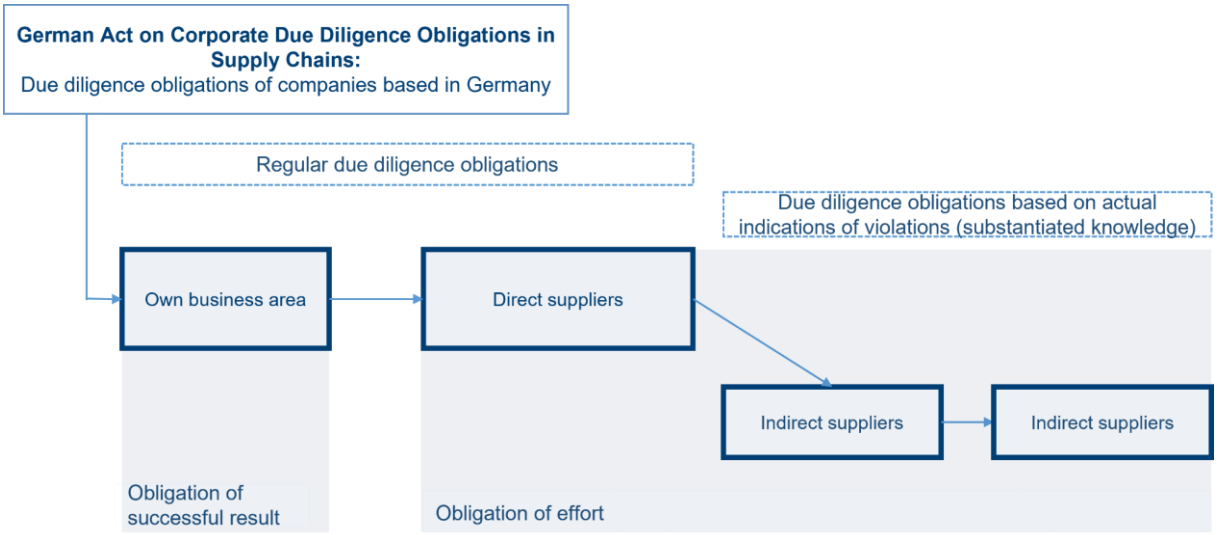
Source: Grabosch 2021: 120; colour adapted.

[29] See for example the United Nations "Global Database on Violence against Women": https://evaw-global-database.unwomen.org/en (last accessed on 16 March 2023).

[30] Section 3 to Section 10 of the LkSG set out details on the individual points.

The due diligence obligations are staggered along the supply chain (cf. Fig. 3.3). The responsibility of companies under the LkSG initially only refers to direct suppliers. However, indirect suppliers, i.e. those further upstream in the value chain, must be included if there is substantiated knowledge of possible violations. In this case, a risk analysis and preventive or remedial measures must be carried out on an ad hoc basis. Relevant evidence of possible violations at the companie's indirect suppliers also includes complaints received in the context of the above-mentioned complaints procedure. The Act only covers activities in the downstream supply chain on the way to the final customer if these fall within the company's own area of operation, for instance during deliveries. The Act focuses on upstream stages in the extraction of raw materials, manufacturing and the processing of and trade in products. Therefore, the focus below is on these stages.

Figure 3.3: Due diligence obligations along a value chain using the German LkSG as an example



Source: Own presentation.

The Act requires every company concerned to establish an appropriate complaints procedure that enables people to draw attention to risks or violations along the supply chain. This is designed to serve as an early warning system to point out possible grievances, and as access to remedial measures that avoid, end or minimise risks. Apart from directly affected groups of people, such as employees of the supplier, indirectly affected groups of people, for instance civil society organisations, that have information at hand on possible human rights violations at a supplier, must also be given the opportunity to report grievances (Sections 8 and 9 of the LkSG). Companies can set up their own complaints procedure and/or participate in industry solutions. The risk analysis carried out should serve as the basis for implementing a complaints procedure: The more risks are identified, the more effort must go into creating an effective procedure (BAFA 2022b: 7). It is possible to establish different procedures for different groups of people, for instance for employees of an in-house business segment vis-à-vis employees of a supplier. The competent authority has published a corresponding handout (BAFA 2022b) for companies in all sectors specifying detailed requirements, implementation issues and review criteria of complaints procedures. This manual, among other things, recommends using the effectiveness criteria of the UN Guiding Principles on Business and Human Rights (Guiding Principle 31) for an annual review of the procedure's effectiveness (ibid.: 16 et seq.). Unlike the UN Guiding Principles, however, the LkSG does not oblige companies to make reparation, but voluntary reparation

after the infringement would be taken into account in the event of a fine being imposed (Grabosch 2021: 165).

Furthermore, the LkSG stipulates that companies' responsibility for their supply chain is an obligation of effort and not an obligation of successful result or guarantee liability (Section 3 para. 1 of the LkSG). While companies must immediately put an end to violations of due diligence obligations in their own business operations, they are not obliged to prevent all human rights violations among their suppliers under any circumstances. Rather, the principle of proportionality applies; measures must be appropriate and reasonable with regard to the respective situation as regards, among other things, the company's actual ability to exert influence, the nature of the business activity, the likelihood of risks occurring and the severity of possible damage. Measures can lead to a gradual improvement without having to halt the corresponding risk immediately. If the implementation of preventive or remedial measures fails due to the factual situation or legal constraints of the country in question, then it is sufficient to demonstrate a serious effort.

In contrast to the first draft, the LkSG that was ultimately adopted does not contain any specific civil liability for remaining grievances. Rather, it addresses regulatory offences that may be punished by the imposition of regulatory fines of up to EUR 8 million or up to 2 % of the annual turnover. In addition to the fine, the company may also be excluded from the award of public contracts. The competent authority, the Federal Office of Economics Affairs and Export Control (BAFA), may enter company premises without prior notice during normal business and operating hours and inspect business documents and records. While checks on suppliers abroad are not explicitly regulated, they have probably not been provided for so far (cf. Section 5.2).

The impact of the Act will be evaluated in 2026 with a view to the protection of human rights achieved. In addition, in the event of the adoption of the EU Directive on the same regulatory matters, the LkSG is to be evaluated within six months, inter alia, with respect to achieving a level playing field within the EU. Furthermore, according to the government's explanatory memorandum, it should be examined by mid-2024 (also depending on developments at EU level) whether the LkSG's scope of application should be adapted, as appropriate.[31]

Control and enforcement of the due diligence obligations under the LkSG rests with the BAFA (cf. Section 19 of the LkSG). In preparation for the entry into force, the BAFA initially drafted various handouts on the different fields of requirements for companies, for instance on risk analysis, on the complaints procedure (see above) and on the adequacy and efficacy of due diligence obligations.[32] The BAFA translated the requirements for companies arising from the Act into a catalogue of questions. An online input mask for answering the questions is available for companies.[33] On the basis of the answers, a report is automatically generated and transmitted to the BAFA. If the companies post this generated report on their website, they have fulfilled the reporting requirement under the LkSG. The BAFA checks the companies' responses for plausibility. In addition, the BAFA has set up an online form for submitting complaints.[34]

Companies can also take advantage of diverse offers of assistance via the Helpdesk on Business & Human Rights of the Agency for Business and Development, an institution mainly staffed by DEG

[31] Government's explanatory memorandum, BT-Drs. 19/26849: 32; see https://dserver.bundestag.de/btd/19/286/1928649.pdf.

[32] see https://www.bafa.de/DE/Lieferketten/lieferketten_node.html.

[33] see https://elan1.bafa.bund.de/bafa-portal/lksg.

[34] see https://www.bafa.de/DE/Lieferketten/Beschwerde_einreichen/beschwerde_einreichen_node.html.

Impulse gGmbH and funded by the BMZ. The non-contributory assistance comprises general services such as the CSR risk check[35] or the Standards and SME Compass,[36] as well as individual (initial) consultations.

3.4 Regulatory context: Integration into other EU approaches of due diligence obligations and approaches with an international impact

As outlined in Section 3.1, a number of EU states have already developed or are preparing legislation on binding due diligence obligations for companies (European Commission 2022: 1, fn. 3). In addition to these horizontal legal acts, i.e. covering all sectors, there are laws - mostly dating back even further - for specific sectors such as the EU Regulation on Illegal, Unreported and Unregulated Fishing (IUU) (2008), the EU Timber Regulation (EUTR) (2010) and the EU Conflict Minerals Regulation (2021). Elements of these exerted an influence on the EU legislation currently under development:

- The *Regulation on Deforestation-free Supply Chains* (EUDR)[37], which took effect in the summer of 2023, is of particular relevance to the agricultural sector due to the range of products addressed. The EU Commission published its legislative proposal in late 2021 (European Commission 2021). Since the end of September 2022, the project has been negotiated in a trilogue procedure, in which an agreement was reached on 6 December 2022 (European Parliament 2022, European Council 2022, European Council 2022b). Adoption by the European Parliament and Council took place on 31 May 2023. EU regulations are directly applicable in all member states. There is no need to transpose them into the legislation of the respective member state first. However, there will be legal implementing provisions in the member states, for instance to clarify the competencies of the responsible national authorities. In Germany, this is incumbent on the Federal Agency for Agriculture and Food (BLE). The EUDR needs to be applied after 18 or 24 months (for micro enterprises or small companies), i.e. from 30 December 2024 (or 30 June 2025) at the latest. By addressing deforestation and thus climate change mitigation, the EUDR, unlike the other initiatives, covers environmental conservation in the proper sense (and not linked to labour standards and human rights) as the target of due diligence obligations.
- *The European Commission's proposal for a Directive on Corporate Sustainability Due Diligence* (CSDDD), which was published in mid-February 2022 after several postponements, is still subject to the European decision-making process (European Commission 2022). Since mid-October 2022, initial proposed amendments have been discussed in the European Parliament (European Parliament 2022b). Based on a first Council proposal and a joint decision of the European Parliament, negotiations between the EU institutions commenced in summer 2023 (Permanent Representatives Committee 2022, Ellena 2023). If an agreement is reached in the trilogue and the Directive is subsequently adopted by the European Parliament and the Council of Ministers, member states will have two years to implement the Directive after its entry into force, with smaller businesses to be given four years to implement it (according to the draft).

Differences between the German and European approaches manifest themselves in how corporate responsibility is regulated along the supply chain, including beyond the company's own area of

[35] https://wirtschaft-entwicklung.de/wirtschaft-menschenrechte/csr-risiko-check/

[36] https://kompass.wirtschaft-entwicklung.de/

[37] 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.

operation (cf. Table 3.1). The German LKSG focuses on the upstream supplier sector of the value chain. The Commission's draft CSDDD, on the other hand, also encompasses obligations for downstream actors and thus the users of resold products, which could in principle also include end consumers. The negotiating stance of the European Parliament narrowed this down to some degree and explicitly excluded, for instance, the product's disposal by individual consumers.[38] The Council also limited the downstream sector in its position by excluding the phase of use and the provision of services.[39] An extension to the downstream sector would require further complex information to be verified about actors that are sometimes very different from suppliers and for whose impact assessment there is usually less established experience (GBI 2023). A final decision on whether and to what extent the downstream sector will be covered will be clarified in further negotiations.

While the EUDR focuses on upstream activities, it covers a comprehensive supply chain in such a way that all indirect suppliers are included in corporate due diligence. Exports from the EU are also covered by the EUDR, as they may not be associated with deforestation either. However, proof for this lies upstream in the chain, i.e. in the production of the raw materials referred to above and not in the use, resale or disposal of the exported produce.

Both the EU Commission's proposal for a Directive on due diligence obligations and the German LkSG are designed horizontally for all sectors and thus include the agricultural sector. Both the German LkSG and the draft CSDDD only impose direct obligations on companies above a certain size, with the draft CSDDD setting lower limits than the German LkSG (cf. Table 3.1). Both the agriculture sector and the food sector were defined as particularly high-risk sectors in the draft CSDDD.[40] From this derives a faster-acting obligation for smaller companies. These companies are defined by employment and turnover size. This more rapid application was further strengthened by the Council proposal in November 2022; the European Parliament's negotiating stance does not provide for classification into risk sectors and directly includes all companies with more than 250 employees and a defined turnover threshold (European Council 2022c, European Parliament 2023). In both approaches, however, small companies are exempt from a direct obligation. The draft CSDDD also encompasses third-country companies, providing they generate a certain turnover in the EU. In addition, the obligations also apply to parts of companies located in a third country. The European Parliament also proposed that the draft CSDDD be reviewed more quickly than initially proposed (after six instead of seven years and subsequently every three years; European Parliament 2023: 163). With regard to the complaints

[38] European Parliament amendment of 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on corporate due diligence obligations with regard to sustainability and amending Directive (EU) 2019/1937 (COM(2022)0071 - C9-0050/2022 - 2022/0051(COD)); https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_DE.html#def_1_1.

[39] https://www.consilium.europa.eu/de/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/ and "Also, the chain of activities should cover activities of direct and indirect business partners that distribute, transport, store and dispose of the product, including inter alia the dismantling of the product, its recycling, composting or landfilling, **where those activities are carried out for the company or on behalf of the company.** The disposal of the product by consumers should be excluded in order to ensure the feasibility of due diligence obligations. Also, the chain of activities should not encompass the distribution, transport, storage and disposal of a product that is subject to export control of a Member State, meaning either the export control under the Regulation (EU) 2021/821 of the European Parliament and of the Council or the export control of weapons, munition or war material under national export controls, after the export of the product is authorised." (EU Council 2022: 23).

[40] Risk sectors were selected in accordance with the existing sector-specific OECD guidelines for the fulfilment of corporate due diligence obligations. In addition to the agricultural and food sectors, these include the textile sector and mining (EU Commission 2022: 42).

procedure to be established, the LkSG and the draft CSDDD are consistent with the EU Whistleblowing Directive in terms of confidentiality of whistleblowers and protection against discrimination and punishment (Grabosch 2021: 164). The ultimately valid provisions of the CSDDD will only be available after the conclusion of the trilogue procedure and the subsequent adoption by the European Parliament and the Council.

Differing positions of individual member states are not only evident in the Council proposal. Sweden, for instance, criticised a lack of compliance with the subsidiarity principle in the summer of 2022 with reference to the provisions governing variable remuneration and due diligence obligations of company management contained in the CSDDD draft (Swedish Government 2022). In general, however, Sweden is in favour of an EU-wide regulation for due diligence obligations (ibid.). The Council draft of late November 2022 also shows deviations from the Commission proposal with respect to the inclusion of financial companies (exclusion of investment funds and the inclusion of other obligated financial service providers by member state decision) (European Council 2022c).

The issue of liability is often mentioned as a key difference to both the LkSG and the EUDR. So far, the draft CSDDD provides for civil liability. According to this, aggrieved parties should be entitled to compensation from the responsible company. However, this point is currently still being negotiated between the EU institutions (as per September 2023).

In this context, the proposal of a so-called “safe harbour”- provision is also controversial. This would mitigate the controversial liability by excluding civil liability - except in cases of gross negligence or intent - through the use of certain certifications which have not yet been further defined or by means of participation in multi-stakeholder initiatives (Smit et al. 2023). In this regard, a particular conflict arose in the Council with the position of the German government, which strongly backs the “safe harbour”-provision (Tagesspiegel Background 2022).

The coverage of corporate due diligence obligations specifically in the environmental sector constitutes another arena for varying positions of EU institutions in the negotiation of the CSDDD. The Commission proposal comprises a comparatively long list of international environmental conventions as a reference for corporate due diligence obligations, including the conventions covering pollutants, biodiversity and climate set out in Section 3.2. In particular, the conventions governing biodiversity fall outside the European Parliament's negotiating stance. Instead, the European Parliament proposes the inclusion of the UNECE Water Convention, the UN Convention on the Law of the Sea and the Aarhus Convention (cf. Annex 1). There appears to be overwhelming agreement, at least according to the negotiating positions, with respect to the pollutant-related conventions and the Paris Agreement on Climate Change (ibid.).

With regard to due diligence obligations in the field of labour standard and human rights, the European Parliament proposes an extension of the conventions covered. The inclusion of a living income should be emphasised, as the Commission proposal only referred to a living wage (in each case with reference to the Universal Declaration of Human Rights, Article 23(3), and Article 7 of the UN Social Covenant) as well as the Convention on the Protection of the Rights of Peasant Families (UNDROP) and the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 269). Meanwhile, the European Council deleted the Declaration on the Rights of Indigenous Peoples (UNDRIP) from its negotiating stance (cf. Annex 1). The German LkSG does not refer to any of these conventions, but the issue of land rights, which is also covered by these conventions, is defined in the legal text by the prohibition of illegal withdrawal of land and factors of production and is, thus, part of corporate due diligence obligations (cf. Table 3.1).

The Regulation on deforestation-free supply chains (EUDR), which has already taken effect (with a transitional period of 18 months or 24 months for small businesses), is primarily aimed at the agricultural sector, which is evident from the coverage of products. The product selection is based on impact analyses in terms of a deforestation footprint of products (European Commission 2021). In its proposal, it explicitly names six mainly agricultural pilot products (soya, beef, palm oil, cocoa, coffee, wood and (processed) products derived from these) for which the Regulation is to be applied in the first phase pending the product-specific review of the Regulation's impact after two years. In the trilogue procedure, the European Parliament had proposed an extension to cover numerous products (pork, sheep, goat and poultry meat, palm oil-based products, maize, rubber as well as charcoal and printed products such as books and newspapers) (European Parliament 2022). In the trialogue procedure, however, the original six commodity products were then only extended to cover rubber and a further list of processing (products) was defined - such as ingredients for chocolate, palm oil in sanitary products, furniture or printing paper (cf. Table 3.1). Whereas the normal legislative procedure for a product list that may be extended after the envisaged review has been envisaged, new (processing) products should also be included more quickly, but with little parliamentary involvement, by means of a delegated act adopted by the Commission. Unlike the horizontal regulations, the EUDR also uses extended due diligence regulations by combining traditional due diligence obligations for individual value chains with a country-based risk classification ("benchmark"). This is based on criteria such as past deforestation trends, but can also encompass softer factors such as participation in existing partnerships. According to the risk classification, the obligations for companies as well as for public inspection frequency depend on an initially defined risk status with regard to deforestation and forest degradation of a supplier country in the corresponding value chain. The reference date for deforestation ("cut-off date") was set at the end of 2020 in line with the original Commission proposal. In principle, the EUDR obliges companies of any size, but limits the requirements for specific small companies. In addition, a so-called efficiency provision applies to large-scale companies so that they can rely on the due diligence of suppliers who are also subject to the obligation. If this turns out to be incorrect, however, the directly obligated company remains responsible.

Further differences in implementation and obligations between the European initiatives and the German LkSG are listed in Table 3.1. As negotiations are still ongoing, the information for the CSDDD is based on the European Commission's draft.

Table 3.1: Binding due diligence regulations at EU level compared to the German Supply Chain Act

Elements	Horizontal due diligence obligations		Sector-specific due diligence obligations
	LkSG: Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (16 July 2021 (Federal Law Gazette I p. 2959))	**CSDDD:** Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability and amending Directive (EU) 2019/1937 (2022/0051 (COD))	**EUDR:** Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 concerning the making available on the Union market of certain raw materials and products associated with deforestation and forest degradation and their export from the Union and repealing Regulation (EU) No 995/2010
Main objective **(Reference conventions)**	Annex Human rights and labour standards (11) Environmental targets (3) Section 2 (2) Prohibition of land eviction and deprivation of production factors, among other things	Annex Human rights and labour standards (11) Environmental targets incl. climate change mitigation targets (3+4)	Articles 1, 2, 3 Zero deforestation and forest degradation after the reference date of 31 December 2020 Legislation in force in the producer country, such as land use rights, environmental conservation, anti-corruption standards, labour standards and human rights
Obligated companies	Section 1: 2023 from 3,000 employees; 2024 from 1,000 employees	Article 2: EU and third-country companies (only EU turnover applies to third countries) Group 1 in general: 500 employees + EUR 150 million net turnover globally, requirement to have a strategy for climate change mitigation	Article 4, 5: all companies, different requirements for different market participants (placing on the market in the EU or exports / traders (provides) and large ("efficiency package" for only one inspection) or SME traders) ● 7 pilot commodities + relevant products such as chocolate, palm oil, in sanitary products (expandable)

Elements	Horizontal due diligence obligations		Sector-specific due diligence obligations
	LkSG: Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (16 July 2021 (Federal Law Gazette I p. 2959))	**CSDDD:** Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability and amending Directive (EU) 2019/1937 (2022/0051 (COD))	**EUDR:** Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 concerning the making available on the Union market of certain raw materials and products associated with deforestation and forest degradation and their export from the Union and repealing Regulation (EU) No 995/2010
		Group 2 for risk sectors (incl. agri-food production): 250 employees + EUR 40 million net turnover globally, of which 50 % from the risk sector	
Length of the value chain	Section 2 ● Own business area ● Only upstream value chain ● Direct supplier ● Indirect supplier, risk-based	Paragraph (18) introduction ● Entire value chain ● Upstream and downstream (direct and indirect, but only related to established relationships)	Articles 4, 6 ● Only upstream value chain, but very small-scale geolocalisation defined Article 9 ● "Geolocalisation"= Small-scale traceability of commodities, including all farms where cattle were kept
Due diligence obligations	Section 3 ● Risk management ● Regular risk analysis incl. prioritisation ● Preventive measures ● Remedial measures ● Complaint procedure ● Implementation obligations in relation to indirect suppliers	Articles 4, 6 ● Corporate due diligence obligations ● Identifying and mitigating actual and potential impacts on the environment and human rights ● Monitoring of efficacy Article 7	Articles 4, 6, 8, 9, 12, 27 1. Non-SME traders (Article 6) and market participants (Article 4): ● Information (sufficient for SME traders) ● Risk assessment and mitigation 2. Simplified due diligence regulations (Article 13) if the risk status is low ● Country(parts) benchmarking and control

Elements	Horizontal due diligence obligations		Sector-specific due diligence obligations
	LkSG: Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (16 July 2021 (Federal Law Gazette I p. 2959))	**CSDDD:** Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability and amending Directive (EU) 2019/1937 (2022/0051 (COD))	**EUDR:** Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 concerning the making available on the Union market of certain raw materials and products associated with deforestation and forest degradation and their export from the Union and repealing Regulation (EU) No 995/2010
	• Documentation and reporting obligations	Member state ensures that companies take appropriate measures	frequency for 3 risk categories (Article 29): low (1 %), normal (3 %), high (9 %).
Enforcement/ Civil liability	No specific civil liability Section 22 Exclusion from public procurement Sections 23, 24 Fines and penalties	Article 20 Member state provisions on sanctions, types of financial sanctions depending on turnover Article 22 Civil liability to be guaranteed by member state in the event of a breach of obligations	Articles 23, 24, 25 • No specific civil liability • Fines, seizure of goods and revenue, exclusion from public procurement Article 25 (3) • Public naming and shaming possible
Redress	Section 7 Remedial action Section 24(3), 7 Efforts to compensate for damages taken into consideration when determining the fine	Article 8 Member states shall ensure that companies take appropriate measures to remedy negative impacts, including financial compensation where appropriate	Article 29 Only related to national remedial action in the benchmarking system
Complaints mechanism	Sections 8, 9 Complaints procedure for directly and indirectly affected parties, including those representing	Article 9 Member states shall ensure complaints procedures for directly and indirectly affected parties, including	Articles 31, 32 • No explicit complaints mechanism • Taking into account substantiated concerns

Elements	Horizontal due diligence obligations		Sector-specific due diligence obligations
	LkSG: Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (16 July 2021 (Federal Law Gazette I p. 2959))	**CSDDD:** Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability and amending Directive (EU) 2019/1937 (2022/0051 (COD))	**EUDR:** Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 concerning the making available on the Union market of certain raw materials and products associated with deforestation and forest degradation and their export from the Union and repealing Regulation (EU) No 995/2010
	directly affected parties ● Internal and external procedure possible ● Optional dispute settlement procedure possible ● No obligation to remedy the damage ● In line with the EU Whistleblowing Directive ((EU) 2019/1937)	those representing directly affected parties ● Article 23 Protection of Whistleblowers ((EU) 2019/1937)	● Granting access to justice Article 31 ● Protection of whistleblowers by member states
Accompanying support/ Partnership	Section 20 Handout as corporate implementation assistance	Article 14 Support by member states and the European Commission also in third countries, recognition of indirect effects, EU-relevant liability rules from other regulations remain valid	Introduction: Guidelines for implementation by the EU Commission Article 15 Technical assistance Article 30 Cooperation with third countries ● Commission provides strategic framework ● Partnership agreements developed in a participatory manner (incl. smallholders,

Elements	Horizontal due diligence obligations		Sector-specific due diligence obligations
	LkSG: Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (16 July 2021 (Federal Law Gazette I p. 2959))	**CSDDD:** Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability and amending Directive (EU) 2019/1937 (2022/0051 (COD))	**EUDR:** Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 concerning the making available on the Union market of certain raw materials and products associated with deforestation and forest degradation and their export from the Union and repealing Regulation (EU) No 995/2010
			indigenous people), also as a criterion for benchmarking Article 34 Need for necessary support for trading partners explicitly for smallholders and indigenous people identified during the review
Review/ Flexibility	Explanatory memorandum to the Act: Evaluation has been scheduled for 2026	Article 29 Review of company thresholds, sectors and reference conventions as well as the extension of climatic impact by a cut-off date yet to be defined	Article 34 ● After one year at the latest, decide whether to extend to "other forested land" ● After two years at the latest, check whether other ecosystems such as wetlands, as well as financial institutions and products are to be included ● Carry out a general review no later than 5 years and at least every 5 years thereafter, that looks at additional necessary trade facilitation, special support for countries at higher risk and less developed countries, need for support specifically for smallholders and indigenous people and monitoring effectiveness

Elements	Horizontal due diligence obligations		Sector-specific due diligence obligations
	LkSG: Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (16 July 2021 (Federal Law Gazette I p. 2959))	**CSDDD:** Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability and amending Directive (EU) 2019/1937 (2022/0051 (COD))	**EUDR:** Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 concerning the making available on the Union market of certain raw materials and products associated with deforestation and forest degradation and their export from the Union and repealing Regulation (EU) No 995/2010
Competent authority in Germany	Federal Office for Economic Affairs and Export Control (BAFA)	Federal Office for Economic Affairs and Export Control (BAFA)	Federal Office for Agriculture and Food (BLE)

Source: Own compilation, based on the respective legal acts (cf. also Rudloff (2022)).

The agri-food sector, in particular, is at the same time affected by both the horizontal regulations and the EU's sectoral approach. However, the regulations are each based on different implementation mechanisms. Therefore, differences in approaches are particularly relevant for the agri-food sector and can increase costs of implementation and red tape for both obligated companies and for the competent authorities (cf. Section 5.3).

Further regulatory approaches to sustainability transformation

The new due diligence regulations fit into an extensive catalogue of different approaches to sustainability in global supply chains, which the EU and some member states in particular have increasingly used in recent years. These are referred to as unilateral, as they are decided without the involvement of trading partners - unlike bilateral regulations, for example in trade agreements or multilateral WTO regulations. The impact of the different approaches on sustainability can either be direct (trade-related approaches) or indirect (transparency measures). In addition to due diligence obligations specific to the agri-food sector (timber, fish), there are also a number of comprehensive trade-related measures (proposals), such as the Commission's proposal to ban imports of products made with forced labour and the Carbon Border Adjustment Mechanism (CBAM) applied from 2023 also to fertilisers. Furthermore, there are country-specific regulations, such as tariff preferences for developing countries if they comply with specific human rights and environmental rules.

Furthermore, some countries, such as France, strongly support the idea of so-called "mirror clauses" in trade agreements, that automatically apply European standards to imports, also in order to offset feared competitive disadvantages (Rees 2022, European Commission Report 2021). In most cases, this means production standards and not product standards, whereby compatibility with WTO rules is often deemed to be lower for the former (Rees 2022). Similar approaches already exist in the veterinary sector, albeit to a limited extent, for instance to slaughter regulations (cf. Table 3.2). After examining a general application to food safety, environment and animal welfare standards, the Commission stressed the need for a case-by-case review (European Commission 2022c).

Some of the approaches are repeatedly criticised as incompatible with WTO rules (EUDR by Brazil) or even indicted (Indonesia and Malaysia against the classification of palm oil as a high-risk product under RED). Felbermayr et al. (2022) and Erixon et al. (2022) undertook a general discussion of the WTO conformity of due diligence regulations.

Overall, import- and sales-related measures prevail, i.e. those that address market access to the EU. Recently, however, there has been an increase in legislation that also aims at export or export-related regulations. This includes the planned export ban on harmful plant protection products and Germany's moratorium on the transport of live animals to third countries. In addition, some regulations which focus on regulating sales in the EU are also export-related at the same time: in order to comply with the WTO national treatment principle of equal treatment of domestic and foreign conditions, for example, both the EUDR and the import ban on forced labour products mean that the rules also apply to exports from the EU. Some of the measures cover the same underlying human rights and environmental regulations – for example, the prohibition of forced labour is already included as a due diligence obligation in the LkSG and CSDDD, but is to be additionally flanked by an envisaged ban on trade-related imports, thus affording special protection where necessary.

Other regulations, some of which have a more indirect impact on sustainability in supply chains, include measures in the field of reporting requirements or investment protection in relation to foreign direct investment (FDI) (see "further approaches" in Table 3.2).

Table 3.2 provides an overview of the various existing approaches in the EU and individual member states, listed according to the respective legal act, its starting point and enforcement mechanism and coverage. The chronological presentation reveals an increased occurrence of such unilateral measures, notably in recent years.

Table 3.2: Increase in mandatory unilateral action at EU level on sustainability within international supply chains and selected member states

Legal act or proposal	Starting point and enforcement mechanism	Year (entry into force)	Product/ coverage
(1) Import/sales side			
EU Generalised System of Preferences (GSP) towards developing countries	Conditional tariff preference depending on ILO, environmental and governance regulations (cf. Annex 1)	Since 1970 with adjustments, most recently in 2012 for the 2014-2023 period	Depending on country group (all products except arms for least developed countries (LDCs) versus 75 % of customs lines defined)
EU Renewable Energy Directive (RED)	- Crediting towards the EU agrofuel target in transport as part of the GHG reduction - ILUC definition and phasing out of palm oil (D: 2023, EU: 2030)	2009 (current RED III 2023)	Agrofuels

	- Certification, including indirect land use		
EU Regulation on Illegal, Unregulated and Unreported Fisheries (IUU)	- Ban on imports of fish from IUU fisheries - Step-by-step measures based on a state catch certificate validated by the flag state and risk-based control and verification obligations of the importing member state, up to import bans and lists of IUU vessels and non-cooperating third countries	2010	Fishery products
EU Timber Regulation (EUTR)	Due diligence obligations to prove legal logging	2010/2013 (will be repealed by the EUDR at the end of 2024)	Timber
EU Seal Regulation	Ban on the import of seal products, except for indigenous people and for personal use	2015	Seal products
EU Anti-dumping regulation	Countervailing duty in the event of dumping (including a lack of human rights and environmental regulations)	2019	all
European Commission proposal for a regulation on products from forced labour	Import and export ban on products from forced labour	Not in force; Commission proposal 2022	all
EU Regulation creating a Carbon Border Adjustment Mechanism (CBAM)	Product-related compensatory duty	2023	Sectors in the emissions trading system: iron, steel, refineries, cement, aluminium, basic organic chemicals, hydrogen and certain defined fertilisers/substances
"Mirror clauses type": EU (mostly production) standards as import requirements			
EU legislation on import conditions for animal	Veterinary certificate for imports from EU third countries	2009	Meat

products (regarding slaughter)			
New comprehensive mirroring initiative by France and Germany	- Application of EU health and environmental standards to imported agricultural products and agri-food products - Various measures for imports conceivable	Not in force; review by the European Commission in 2022	all
Due diligence regulations			
France: *"Devoir de vigilance"*	Due diligence obligations, liability	2017	all
EU: Regulation on Deforestation-free Supply Chains (EUDR)	Due diligence obligations and country benchmarking	2023	Soya, beef, palm oil, cocoa, coffee, wood, rubber and some derivatives
EU: CSDDD	Due diligence obligations, regulatory law and, where applicable, liability and "safe harbour"-provision	Not in force; trilogue 2023	all
Germany: LkSG	Due diligence obligations, regulatory law	2023	all
(2) Export side			
European Convention for the Protection of Animals during International Transport	Duty of care of hauliers transporting live animals to third countries	2007	Live animals
Germany: Moratorium on issuing veterinary certificates for third-country transports	Withdrawal of veterinary certificates for live ruminants for breeding purposes	2023	Live animals
EU: Regulation on Deforestation-free Supply Chains (EUDR) (see above)	Application also to EU exports	2023	Soya, beef, palm oil, cocoa, coffee, wood, rubber and some derivatives
EU: Proposal for a regulation on products from forced labour (see above)	Import and export ban	Not in force; Commission proposal 2022	all
Germany: Proposal for a Regulation on a ban on exports of certain	Export ban on plant protection products banned in the EU to third countries	Not in force; announced 2022, draft regulation	Certain active substances in formulated plant protection products

plant protection products		available, implementation unclear	
(3) Further approaches			
Bilateral investment protection agreements (BITs)	Improved expropriation / compensation rules towards public objectives including the environment	More recent agreements since around 2010	all
EU Directive prohibiting Unfair Trading Practices (UTP Directive)	EU-wide harmonised minimum protection standard to combat unfair trading practices	2019	Agricultural, fishery and food products
EU Sustainable Finance Disclosure Regulation (SFDR)	Harmonised transparency rules for financial market participants and financial advisors regarding the inclusion of sustainability aspects in their investment decisions and financial advisory services	2020	Financial services
EU Taxonomy Regulation	Classification of economic activities as environmentally sustainable on the basis of defined criteria, with the aim of determining the degree of environmental sustainability of an investment	2020, applicable from 2022	Financial services
EU Directive on Corporate Sustainability Reporting (CSRD)	Reporting obligations on sustainability aspects such as environmental law, social rights, human rights and governance factors	2023	All

Sources: WBAE compilation based on Rudloff (2022) and APS https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:02012R0978-20180307&qid=1524555559361&from=DE; RED https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32018L2001 ; IUU https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:02008R1005-20220915; EUTR https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32010R0995; EU Trade in Seal Products Basic Regulation https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:52020DC0004&from=DE; Anti-dumping Regulation https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32016R1036; Forced Labour https://single-market-economy.ec.europa.eu/document/785da6ff-abe3-43f7-a693-1185c96e930e_en; CBAM https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=OJ:L:2023:130:FULL; Slaughter https://food.ec.europa.eu/animals/veterinary-border-control_de; Mirror clauses https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13371-Einfuhr-von-Agrar-und-Lebensmittelerzeugnissen-Anwendung-der-EU-Gesundheits-und-Umweltstandards-Bericht-_de; Live animals https://rm.coe.int/1680083737#:~:text=Artikel%204%20%E2%80%93%20Wesentliche%20Grunds%C3%A4tze%20des%20%C3%9Cbereinkommens&text=Die%20Tiere%20sind%20so%20zu,einschlie%C3%9Flich%20ihrer%20Gesundheit%2C%20gewahrt%20werden.&text=Die%20Tiere%20sind%20nach%20M%C3%B6glichkeit%20unver

z%C3%BCglich%20zu%20ihrem%20Bestimmungsort%20zu%20transportieren.&text=An%20den%20Kontrollstellen%20sind%20Tiersendungen%20vorrangig%20zu%20behandeln; Veterinary certificate: https://www.bmel.de/SharedDocs/Pressemitteilungen/DE/2022/148-tiertransporte.html; Plant protection products https://www.bmel.de/DE/themen/landwirtschaft/pflanzenbau/pflanzenschutz/pflanzenschutzmittel-ausfuhrverbots-vo.html; EUDR: https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32023R1115; BITs: https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf; UTP https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32019L0633 ; SFDR https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32019R2088&qid=1694114843983; Taxonomy https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32020R0852&qid=1694115055316; CSRD https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32022L2464.

3.5 Conclusion

Over the past twenty years, the issue of corporate due diligence has gained significant momentum: initially on a voluntary basis, and more recently increasingly codified in legislation. The legal development started with specific regulations for problem sectors such as conflict minerals or product groups which are responsible for deforestation. With the adoption of the LkSG and CSDDD, horizontal, i.e. cross-sectoral regulations, are now being added.

There are significant differences both between the different due diligence rules in the narrower sense and with a view to other approaches regarding trade. In this respect, the agricultural sector is affected by regulatory approaches which differ widely. Overall, the new due diligence rules are part of a comprehensive catalogue of different approaches to sustainability along global supply chains.

To date (in the Commission proposal), the CSDDD has imposed a potentially broader obligation on companies than the LkSG, both in terms of the scope of due diligence involved by adding environmental conservation and climate stewardship and in terms of the depth of responsibility (entire chain, upstream and downstream sectors). With its focus on zero deforestation, the EUDR is particularly relevant for the agricultural sector due to the range of products covered.

4. Context and relevance of human rights and environmental due diligence obligations in the agri-food sector

This Section introduces the special features of agri-food value chains and explains their relevance in connection with the previously discussed due diligence obligations. It also presents important findings on human rights and environmental risks in the context of the global and European agri-food sector.

4.1 Special features of agricultural value chains with regard to due diligence obligations

Agricultural and food value chains are characterised by a number of specific features that distinguish them from other sectors and present challenges for supply chain management. This applies in particular to the great heterogeneity of production conditions, the coexistence of very different farm sizes and the special features of different products and market segments, which lead to differently structured value chains.

Agricultural products are produced under enormously heterogeneous natural (climate, soil, terrain), institutional and infrastructural conditions. In addition, the natural conditions even at the respective production sites vary over time, e.g. with the weather, which also has an impact on the respective production methods, which is only recognisable to a very limited extent on the product itself, unless corresponding certification schemes for minimum standards exist and these are then labelled on the respective products.

Due to "open-air farming", agriculture is subject to many uncontrollable influences. Therefore, even with the best possible production, environmental impacts cannot be completely ruled out. For example, a very unfavourable nitrogen balance with potentially negative effects on the groundwater can result from the fact that the harvest is significantly smaller than calculated for the nitrogen fertilisation due to a period of bad weather. In addition, many agricultural (co-)caused environmental impacts (a) cannot be attributed to a single polluter (farm) due to spatial diffusion and (b) can result from production methods from several years ago - i.e. from previous producers.

In the vast majority of countries, there is a wide variety of often small-scale (smallholder) agricultural suppliers. At the same time, some countries also have large-scale, sometimes group-like agricultural structures, e.g. farms with several (hundred) thousand hectares of cultivated land or corresponding numbers of animals. In quite a few countries, e.g. in Eastern Europe, there is a direct, sometimes symbiotic coexistence of small and large farms (Visser 2008). Overall, agricultural and food value chains are diverse, branched and multi-levelled and therefore more complex than is often the case with other value chains.

In addition, international agricultural value chains differ significantly in their organisation depending on product specifics and marketing conditions (cf. Table 4.1). Four different product types and the value chains they determine are presented below, as they offer different starting points for supply chain management: (1) classic *arable* commodities such as soya, sugar or wheat (also known as bulk commodities), (2) luxury commodities with limited shelf life such as coffee or cocoa, (3) high-quality, high-value products such as fruit and vegetables and (4) premium value chains for luxury brands, organic or Fairtrade products, etc.

Table 4.1: Selected typical structures in international agricultural value chains

	Traditional arable commodities such as soya or wheat	Indulgence commodities such as coffee and cocoa	High-quality, high-value products such as fruit and vegetables	Premium segments such as luxury brands, organic or fair-trade products
Characteristics of the products	Standardised, listed qualities, largely homogeneous, storable, "bulk goods"	Largely standardised, homogeneous qualities (except premium segments, see right), limited shelf life	Qualitatively differing products, high e.g. sensory quality risk, perishable	Products that (have to) be processed and transported separately for marketing reasons
Price competition	Very high, low margins, volume business	Very high, low margins	High, rather low margins	High, larger margins for processing and trade, large price differences to the standard market
Importance of long-term supply contracts/vertical integration	Very low, spot market dominates	Rather low, often intermediaries	High (vertical integration and contract	Longer-term cooperation,

			farming dominate for global chains)	marketing and production contracts
Transparency/traceability	Hardly	Increasingly up to the co-operative, with less involvement of intermediaries	Different	High
Dominant player in the value chain	International agricultural trade	Primary processors, branded companies, food retailers (LEH)	LEH for global chains (local chains significantly less integrated)	Food industry and food retail
Importance of standards	Low, but increasing	Relatively high and increasing, company and industry standards and certification	High importance of public and private standards	High, certification standards (private and state) and increasingly in-house programmes
Producers	All company sizes	All farm sizes, in LMIC many small farms, some of which are organised in producer groups or cooperatives	All company sizes, in LMIC Mainly capital-intensive large companies with employees/day labourers	All company sizes, in LMIC many small companies

Source: Based on Feyaerts et al. 2019: 147, modified.

Many agricultural products have a **commodity character**. Typical examples of such highly standardised, storable products, many of which are traded on exchanges with very high price pressure, are cereals and oilseeds. These are interchangeable products that are traded on international markets and in which large batches of different origins but largely standardised chemical-physical qualities are grouped together by traders. These markets tend to be dominated by loose forms of exchange that can be changed at short notice (spot markets, in some cases forward contracts). The intermediary, highly concentrated international agricultural trade (Grabs et al. 2021; zu Ermgassen et al. 2022) is under high-cost pressure due to the qualitatively interchangeable products and has little incentive to make the markets transparent, as a lack of transparency generally strengthens the position of traders in the value chain (Grabs and Carodenuto 2021). In addition, the procurement strategies of internationally active agricultural traders are characterised by a high proportion of indirect procurement. In the case of soya, beef, cocoa and palm oil, for example, they source up to 40% of raw materials via local intermediaries (zu Ermgassen et al. 2022). This makes the traceability of the respective products and sustainable sourcing initiatives more difficult (ibid.). Recently, however, internationally active agricultural trading companies have come under political pressure in the EU and are increasingly participating in sustainability initiatives (e.g. for soya cultivation or cocoa, zero deforestation, etc., Grabs et al. 2021). In Brazil, for example, a central deforestation hotspot, around 60 % of soya and 85 % of beef exports are covered by zero deforestation commitments (ZDCs) (Haupt et al. 2018), although there are subnational differences, actual implementation is controversial and large proportions of production for the domestic market are not covered by ZDCs (zu Ermgassen et al. 2020a, b).

Many of these traditional **arable commodities** are processed in several stages and broken down into different product types before the actual products reach the market, such as cereals and oilseeds,

which, in addition to flour and oil, produce considerable residues that are utilised as animal feed (e.g. soya, rapeseed and sunflower extraction meal; see e.g. Castellari et al., 2018). The corresponding supply chains are therefore complex, and trade in the various product components is important (cf. Table 4.1). Due to the relatively high degree of concentration, international agricultural trade companies dominate these commodity value chains as so-called focal companies, i.e. companies that structure the value chain. They organise the flow of goods, while the processors of the various target products in Europe traditionally have little or no need to concern themselves with the origin of the raw materials.

Sector-wide certification schemes such as GLOBALG.A.P.[41] are increasingly being used in commodity chains as an instrument for safeguarding standards (cf. Section 5.1.2). These cause low transaction costs and - unlike company or value chain-specific standards - keep business relationships flexible, as the certification can be used as proof for many buyers and no specific contractual agreements are necessary. Separation of goods is therefore not necessary. Particularly in commodity value chains, segregation of goods or market segmentation is avoided wherever possible in view of the low margins. Only if corresponding quantities are realised can different, individually defined qualities coexist, such as GMO-free soya. In principle, however, such so-called bulk goods are transported to Europe in large quantities without product segregation.

The value chains for some **high-quality luxury commodities** such as cocoa, coffee and tea (also referred to as tropical commodities; Bemelmans et al. 2023) have a slightly different structure. At the agricultural level, smallholder producers dominate, especially in the case of cocoa, which is labour-intensive: For example, around 95% of the cocoa produced globally is grown by around five million smallholder farmers with a cultivation area of between two and five hectares (Grohs and Grumiller 2021). The next stage is often followed by several local or regional middlemen who sell their goods to international traders. In Ghana, for example, there is also a national sales organisation in between. The next stage is highly concentrated: seven transnational traders are responsible for 62% of the global cocoa trade, although the share is even higher for individual trading partners (Parra-Paitain et al. 2023). The subsequent processing step of grinding (production of cocoa butter, paste and powder) is dominated by three companies, which together account for around 60 % of global cocoa processing: Barry Callebaut (Switzerland), Cargill (USA) and Olam (Singapore) (Grohs and Grumiller 2021). The subsequent production of chocolate is carried out by internationally active branded goods manufacturers such as Mondelez (approx. 9 % global market share), Mars (8 %), Nestlé (7 %), Ferrero and Lindt & Sprüngli (Fountain and Huetz-Adams 2022). The next level of food retail is also highly concentrated. In Germany, the four leading retailers Edeka, Rewe, Aldi and Lidl/Kaufland have a market share of around 85%. This means that manufacturers are also in vertical competition with food retailers, which play a central role in private labels as they can change private label producers relatively flexibly. Overall, the market-leading (focal) role in the cocoa chain is not clearly defined, which makes the implementation of standards more difficult. International traders/processors, brand manufacturers and food retailers can enforce standards for cocoa, but are also in fierce competition with each other. Similar structures apply to the coffee market, where it is also not easy for companies in Europe to gain access to the cultivation structures (Freidberg 2017).

With regard to the standards for these tropical luxury commodities, there are company-specific standards (e.g. Nestlé Cocoa Plan), industry standards (e.g. sustainability initiative of the German Confectionery Association or the Cocoa and Forests Initiative (CFI)) and cross-sector certification

[41] GAP stands for Good Agricultural Practice. GlobalG.A.P. It is one of the first globally active quality assurance systems, founded in 1997 by European trading companies.

schemes (e.g. Rainforest Alliance). Traceability is possible for tropical commodities, but by no means complete. According to the Cocoa Barometer from 2020, the proportion of cocoa traceable down to the level of a specific cooperative was between 44% (Nestlé) and 100% (Hershey's) for various large companies (Fountain and Huetz-Adams 2020: 33). Overall, however, only 22% of all companies in the cocoa sector state that they are able to trace their cocoa back to the cooperatives (Parra-Paitan et al. 2023: 9). The total share of certified production in cocoa cultivation is currently estimated at around one third to 50 % (Grohs and Grumiller 2021). However, it is estimated that only 26% of traded cocoa is traded under some form of sustainability commitments (Parra-Paitan et al. 2023).

For other **high-quality, high-value products** such as fruit and vegetables, which were previously also coordinated by intermediary wholesalers, retailers in Europe have recently been trying to establish more direct and longer-term (contractual) supply relationships with (often rather large-scale) producers in LMIC (Feyaerts et al. 2019). For quality assurance reasons alone (e.g. avoidance of pesticide residues), but also to strengthen its negotiating position, food retailers, as the dominant tier, are establishing independent procurement structures in markets and cutting out middlemen (ibid.). These direct supply relationships are linked to the use of certification schemes, in this case supplemented by the food retailer's own audits of suppliers (cf. Table 4.1). This makes it easier to effectively monitor compliance with standards.

In **premium segments** with high added value, manufacturers seek direct buyer-producer relationships for marketing and sustainability reasons. Image risks are particularly significant for premium brands, so that in some cases multi-year and comprehensive contract systems have been established with agricultural producers in LMIC (Linton 2008). These often include concepts of supplier development, i.e. more or less partnership-based concepts for the expansion of production, training and quality assurance, sometimes including social aspects (minimum prices, development aid projects, etc.) (cf. Table 4.1). Such approaches are widespread, for example, among some organic producers in markets with a high public profile such as cocoa. Another example is Lindt & Sprüngli. The company is pursuing a "bean-to-bar strategy" with its cocoa farming programme, meaning that 100% of all cocoa beans have been traceable since 2020 (Grohs and Grumiller 2021). By 2025, all of the company's cocoa is to be sourced from sustainability programmes. With the development of premium retail brands, food retail companies are increasingly taking on a focal position in such chains alongside manufacturers and can drive standards forward.

Table 4.1 provides an overview of the typical value chains described for agricultural commodities. This overview is not complete, as it does not show value chains that include the export of products that have already undergone further processing. Very specialised value chains are also missing, e.g. when crabs from the North Sea are harvested in North Africa and then sold again in Germany. Table 4.1 is therefore only an excerpt - albeit a very significant one in terms of volume - from the unusual diversity of international value chains, which contributes to the fact that supply chain management is subject to significantly different initial conditions in each case. The institutional characteristics of certain value chains are also not included, e.g. the relatively large role of producer groups and cooperatives in some areas (which, for example, enable specific forms of supervision such as group certification).

To summarise, it should be noted that agricultural and food value chains are more heterogeneous than many other supply chains, as there are significantly different forms of coordination and companies that determine the chain depending on the product. The proportion of wage labour and smallholder structures also differs, resulting in different challenges with regard to due diligence obligations, occupational health and safety standards and issues such as minimum wages. Global food value chains at the level of primary production are often more fragmented, less transparent and more multi-levelled than value chains in other markets, meaning that the issue of indirect suppliers plays a major

role from the perspective of European companies. The spot market relationships, which are often traditionally dominant, present particular challenges for the implementation of the Supply Chain Act, as in this case there is no direct contact between European buyers and smallholder suppliers. However, there are signs of a trend towards longer-term and more direct contractual relationships, which could tend to simplify the implementation of due diligence obligations. The market significance of large international traders and major food retailers in Europe is now so considerable that such companies can also assume greater responsibility for due diligence obligations.

4.2 Human rights risks in agricultural production

Global value chains in the agri-food sector are characterised by a particularly high risk level of human rights violations and by what are often precarious working conditions. Compared to other sectors, jobs in agricultural supply chains are paid less, more hazardous and insecure, and more susceptible to child and forced labour (Barrett et al. 2022, USDOL 2020, ILO 2017). Accordingly, the Commission's proposal for the CSDDD classifies the agri-food industry among the sector with great potential for harm - with the consequence that more companies in this sector would be affected by the mandatory due diligence obligations from the outset (cf. Section 3.4). With respect to the German economy, too, a study in the context of the National Action Plan on Business and Human Rights classifies the food, beverage and tobacco industries among the sectors characterised by serious human rights risks (BMAS 2020).

As set out in Sections 3.3 and 3.4, internationally recognised declarations and conventions on human rights as well as international and national labour rights conventions serve as reference frameworks for the identification of human rights violations in the context of corporate due diligence regulations. The German LkSG chiefly refers to the fundamental conventions of the International Labour Organisation (ILO) when referring to human rights risks (cf. Section 3.2). The draft CSDDD has so far included other international agreements, for instance the reference to a living wage (cf. Sections 3.4, 5.7.2 and Annex 1).

The following outlines individual human rights and labour standard risks in the context of agricultural production in third countries (mainly in LMIC), in the European internal market and domestically, which may fall within the scope of the German and/or European due diligence approach to supply chains. In addition, human rights and labour standard risks that are not yet (explicitly) covered by due diligence legislation are also identified, such as gender equality and the right to food.

4.2.1 Production risks in EU third countries

Child labour comprises work which children are too young to perform and/or "work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons" or prevents them from attending mandatory schooling (see e.g. ILO 2020 and the corresponding ILO Conventions No. 138 of 1973 and No. 182 of 1999).[42] Further distinctions are made between child labour, hazardous child labour and the worst forms of child labour (e.g. FAO 2020). Child

[42] The Convention allows persons aged 13-15 years to perform light work. This must not be harmful to the child's health and development and must not interfere with school attendance. Furthermore, the minimum age for employment or work in a profession must not be lower than the age at which compulsory schooling ends (usually 15 years). If the work or employment is "likely to jeopardize the health, safety and morals of young persons" the minimum age is 18 years (cf. ILO Convention No. 138).

labour is demarcated from age-appropriate work, for instance in households or legal employment of young people, which are not included in the statistics provided.

According to estimates by the ILO and UNICEF, around 160 million children were affected by child labour worldwide in 2020, of which the agricultural sector accounted for 70 % (ILO and UNICEF 2020: 8 et seq.) This share exceeded 80 % in sub-Saharan Africa (ibid.: 38). 72 % of child labour takes place within the family. Just under 33 % of the work of children aged between 5 and 14 years in the agricultural sector is classified as hazardous child labour (ibid.: 41). Some of the goods produced with child labour enter global value chains, but they are also intended for the domestic market or for own consumption. According to calculations, between 9 % and 24 % of child labour in all sectors is linked to export goods, depending on the world region (ILO et al. 2019: 9).

As it is particularly well documented, cocoa cultivation stands out as particularly problematic: In Ghana and Côte d'Ivoire, the largest cocoa exporters, 1.56 million children were engaged in cocoa farming in 2018/19 (NORC 2020: 10)**.** In 94 % of cases, the children worked for their own parents or relatives (ibid.). Other examples of large-scale child labour in the agricultural sector are documented for cotton farming in India (Ferenschild 2018, Nayak and Manning 2021), for cotton harvesting in Burkina Faso (US DOL 2019) and Turkey (UNICEF 2017), sugar cane cultivation in Brazil and India (US DOL 2020), coffee cultivation in Brazil, Vietnam and Columbia (ibid.) and also in the palm oil sector (UNICEF 2016).

The vast majority of child labour cases are recorded in smallholder farming and medium-scale non-mechanised production. However, according to reports by NGOs such as Amnesty International, children also work on large plantations (Amnesty International 2016). In principle, this refers to the problem of recording child labour in agriculture. It is often particularly well documented where international organisations have actively collected data. Furthermore, it is not always directly identifiable or recordable, given that children accompany their parents to work without being paid, or are hidden by employers during checks (FAO 2020, cf. Section 5.1.2.4 on audits).

According to ILO Convention No 29 of 1930, **forced labour** comprises "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself [or herself] voluntarily". Just under 27.6 million people were in forced labour worldwide in 2021 (ILO et al. 2022). Here, a distinction is made between state forced labour (14 %) and forced labour in the private sector (63 %).[43] If only the latter is taken into consideration, 12.3 % of victims of forced labour can be found in the agricultural sector (2.8 million people, ibid.: 31). Forced labour specifically affects the fisheries sector, especially deep-sea fishing, which makes it difficult to protect workers because of the long time spent at sea and the restricted reach of national labour inspectorate systems (ibid.). This is consistent with the evaluation of the US Department of Labour, which lists shrimps (Burma) and fish (China, Taiwan, Thailand) as suspected forced labour goods due to the situation of migrant workers in long-distance fishing fleets (US DOL 2020). Reports of state forced labour mainly come from the Xinjiang region in China, where approximately 85 % of the country's cotton is being produced. Workers from the Muslim Uighur minority, most of whom live in Xinjiang, are primarily affected (Zenz 2020). In addition to cotton, the US Department of Labour also lists tomato products from China as commodities suspected of involving forced labour. Moreover,

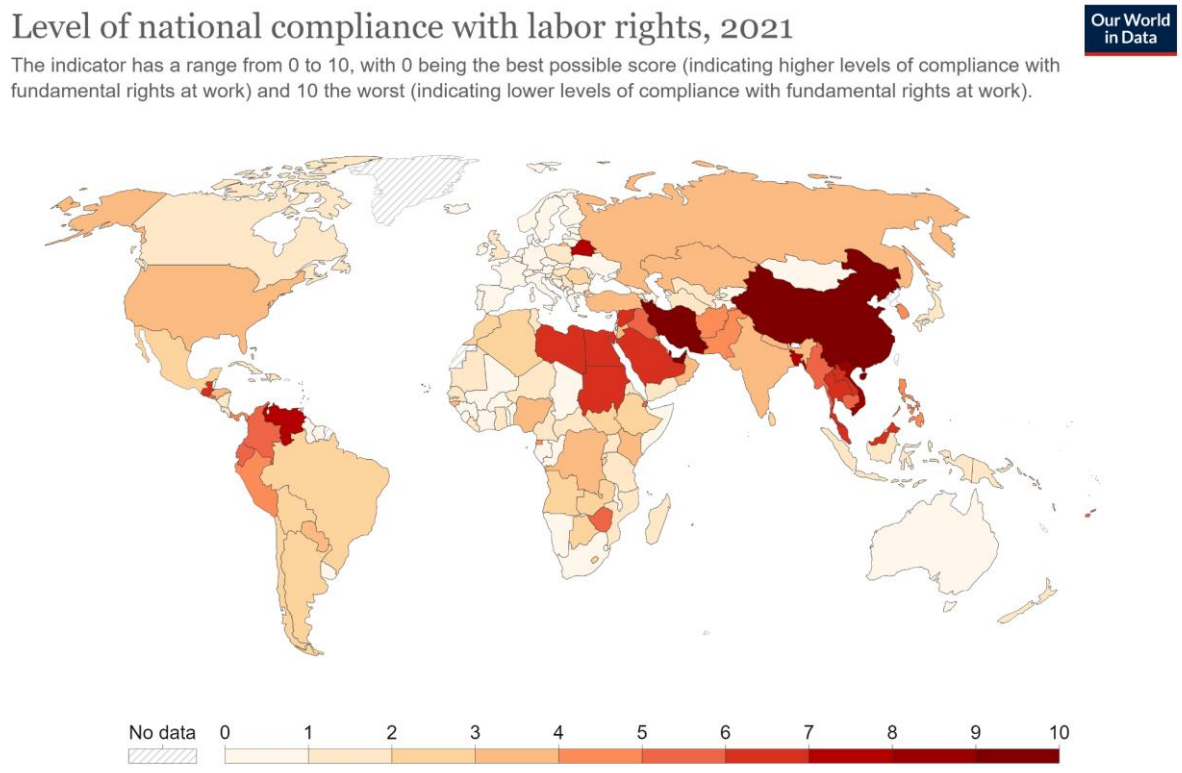
[43] In addition, a further 23 % are subjected to forced sexual exploitation (ILO et al. 2022: 3).

international human rights organisations have been in contact with the government of Turkmenistan for many years due to reports of state forced labour in the cotton harvest.[44]

The (improper) use of plant protection products (PPPs) in combination with the lack or non-provision of protective clothing can also result in **precarious working conditions** for farmers and their workers owing to the **associated health hazards**. For instance, serious implications of pesticide use on the health of farmers, especially female workers, have been documented in cotton farming in India (Mancini et al. 2005). Other examples include the use of PPPs classified as hazardous in cocoa growing in Nigeria (Tijani 2006), the lack of protective clothing in watermelon farming in Ghana (Miyittah et al. 2020) or the illegally imported PPPs in rice farming in Sierra Leone (Sankoh et al. 2016).

Initially, the ILO fundamental conventions on **freedom of association** and **collective bargaining** had not been ratified everywhere (cf. Section 3.2) and when they are, workers in the agricultural sector are often faced with obstacles in their efforts to organise themselves (ILO 2020). With respect to the food industry, a global business survey states that the presence of trade unions is comparatively low at 22 %, the share of collective agreements is also lowest in the agricultural sector compared to other sectors (ILO 2017). Violations of the right to freedom of association frequently occur (e.g. Braßel 2023 for Ecuador). Across sectors, Figure 4.1 shows the level of compliance with these two fundamental conventions in a country-by-country comparison.

Figure 4.1: Degree of national compliance with labour standards in 2021



[44] "Observation (CEACR) - adopted 2021, published 109th ILC session (2022), Abolition of Forced Labour Convention, 1957 (No. 105) - Turkmenistan", ILO; UN Human Rights Council, Summary of Stakeholders' submissions on Turkmenistan, Report of the Office of the United Nations High Commissioner for Human Rights Human Rights Council, A/HRC/WG.6/30/TKM/3 (2018); UN Economic and Social Council, Concluding observations on the second periodic report of Turkmenistan E/C.12/TKM/CO/2 (2018).

Source: Our World in Data based on ILO data [45]

A major issue is the level of **wages and incomes** in smallholder farming. They are often insufficient to ensure an adequate standard of living for households, which directly relates to Article 23(3) of the Universal Declaration of Human Rights: "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." Associated with this is the concept of a living wage and a living income, which goes beyond the guarantee of basic needs and the definition of a general poverty line of UDS 1.90 a day as calculated by the World Bank (cf. Section 5.7.2). For instance, calculations for rural areas in East Africa show that this amount does not suffice to live in dignity (van de Ven et al. 2021). With regard to smallholder incomes in the West African cocoa farming sector, it has been shown that in Cote d'Ivoire, the average annual net income is USD 2,346, but the reference value for a living income is USD 6,517; in Ghana the difference between the reference value and income is USD 2,455 or 52%, with a larger gap to a living income in the case of farmers with less farmland available in both countries (Tyzler et al. 2018 cited in Forster et al. 2021). Calculations also point out such gaps of varying magnitudes for wages, for instance on tea plantations in Sri Lanka [46] or banana plantations in South-Eastern Ghana[47].

In the context of **large-scale land investments**, (also called land grabbing) – the purchase or long-term lease of land – further human rights violations can occur. In addition to the construction of dams and mining, the large-scale purchase or leasing of farmland can also result in the displacement or expropriation of the local population, due inter alia to unclear land rights or the disregard of customary land rights, which can cause permanent or limited loss without compensation (German et al. 2013). This may involve the violation of land use rights or the right to food for instance.[48] Since 2005, there has been an increase in large-scale land acquisitions by foreign investors in sub-Saharan Africa, South-East Asia, and South America, with purchases often concentrated in individual regions[49]. It is estimated that around 12 million people around the globe were potentially affected by income losses due to such large-scale land purchases between 2000 and 2014, although this can differ widely between countries (Davis et al. 2014: 186). The extent to which land loss or loss of access to land negatively impacts the local population depends on different factors, for instance how the land was used beforehand (for a review of studies, see Neudert and Voget-Kleschin 2021). Voluntary guidelines to regulate land acquisition and its consequences are already in place, such as the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO 2012). Two studies commissioned by the European Parliament demonstrate that European businesses also play a key role in such land acquisitions through various mechanisms, that this has given rise to human rights violations in some cases (including the eviction and resettlement of people from their homes and farms) and that, at least in isolated cases, the products grown there are imported into the EU (Cotula 2014, EU 2016: Annexes 1-3). In general, EU energy policy has been

[45] https://unstats.un.org/sdgs/metadata/files/Metadata-08-08-02.pdf

[46] https://www.globallivingwage.org/wp-content/uploads/2019/07/Sri-Lanka-Living-Wage-report.pdf

[47] https://www.globallivingwage.org/wp-content/uploads/2018/04/Ghana_Living_Wage_Benchmark_Report.pdf

[48] The right to food is, for example, covered by Article 11 of the UN International Covenant on Economic, Social and Cultural Rights; land-use rights are partly covered by Article 10 of the Declaration of the Rights of Indigenous Peoples. While the Annex to the European draft Directive refers to both declarations, they do not form part of the German LkSG.

[49] See https://landmatrix.org/map for an up-to-date systematic overview of Large-Scale Land Acquisitions (LCLA) worldwide.

associated with investments in large-scale land acquisitions in countries with lower per capita incomes in order to grow energy crops for biofuels there (e.g. Carroccio et al. 2016, Graham et al. 2010)[50]. Via the International Finance Corporation (IFC) and the Foreign Investment Advisory Service, the World Bank has also promoted direct investment in large-scale land acquisitions in countries with lower per capita incomes (Rudloff 2012, Daniel 2011), with corporate interests taking centre stage (Oakland Institute 2011, Mulleta et al. 2014). Human rights violations related to IFC-funded land acquisitions have been documented in many places, for instance Ethiopia, Gabon and Sierra Leone (inclusive development international 2017).

Gender equality. Globally, female employment accounts for a large share in the agricultural sector. However, the database is either weak or not frequently updated (FAO 2023). Nevertheless, the available data can serve as a general indication. In 2019, for instance, women accounted for almost half of all employees at just under 40 % (FAO 2023). The share of independent women farmers as opposed to employed or informally employed farm helpers varies widely between countries: while only 11 % of all farm owners in Germany were female in 2020 (Davier et al. 2023), in Lithuania they account for almost 50 %. In LMIC, there are also large differences, ranging for instance from 35 % in Botswana in 2004 to only 8 % in Vietnam in 2001 and even less than 1 % in Saudi Arabia in 1999 (FAO n.d.).[51]

Gender equality is characterised by particularly high risks, especially in LMIC: As self-reliant women farmers, women not only have smaller farms than men, but their access to relevant resources in particular is often severely limited - for instance to credits and animal ownership, but also to land ownership, which is often a precondition for gaining access to loans (FAO n.d.). There is a severe shortage of information on land ownership – according to documentation, the FAO indicates that 50 % of all landowners in Ecuador are female in contrast to Peru with 12 %. Globally, the share is estimated at only 15 %. The share of women among all agricultural land owners differs significantly, with Pakistan at 7 % in 2018 and Malawi at 58 % in 2020 (FAO 2023: 78). In one third of the countries for which data are available, men account for at least 70 % of all landowners (ibid.).

In modern agricultural value chains, men tend to be represented at higher-value levels, whereas women are often represented in processing and packaging, catering or food sales in urban and peri-urban contexts, most of which involve unskilled and poorly paid jobs. For Pakistan, for instance, it is reported that women's wages in the sugar cane sector account for only half of men's wages (Care 2020). In wage labour in the agricultural sector, women earn on average 18.4 % less than men at the global level (FAO 2023: 59).

From the consumers' perspective, agricultural food supply plays a special role and is directly associated with the **right to food**. In general, this right is often severely violated by women's more limited access to food and lower incomes as one of the four pillars (besides availability, usability and stability) of food security under the FAO: The gender gap in food insecurity widened further in 2021: 31.9 % of the world's women suffered from moderate to severe food insecurity, compared to 27.6 % of men. Thus,

[50] See for instance a project run by the Swiss company Addax Bioenergy, which is, inter alia, funded by the German Investment and Development Company (DEG) to grow sugar cane and manioc for bioethanol in Sierra Leone (Graham 2010:49; answer of the German Bundestag to the minor interpellation from the DIE LINKE parliamentary group on the development policy effects of the Makeni project in Sierra Leone (https://dserver.bundestag.de/btd/18/087/1808747.pdf).

[51] However, key figures on farm owners barely cover the actual distribution of land ownership (or other rights) among household members, which is why the FAO instead focuses more on the individual land rights of men and women (FAO 2023: 76). More up-to-date figures on farm owners are therefore hardly available.

gender equality is deemed a relevant parameter in the fight against hunger (Asian Development Bank 2013). Especially in rural areas, hunger and poverty prevail and affect rural communities on a large scale, especially poorer farmers, agricultural workers and pastoralists. Given that women farmers are already at a disadvantage because of the many factors mentioned above, they can in turn be particularly vulnerable to food insecurity.

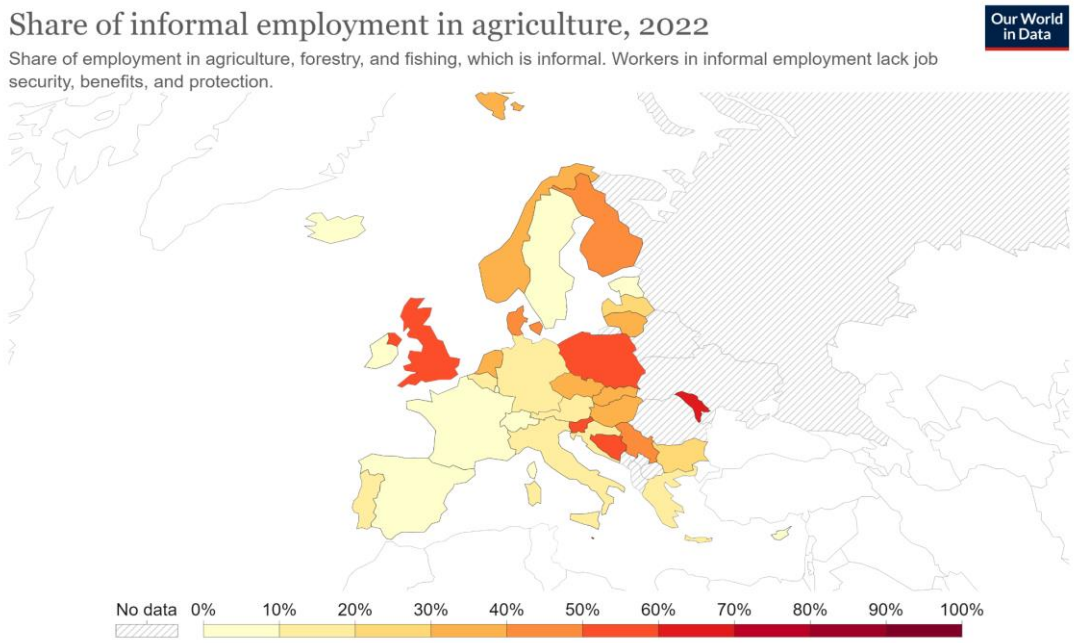
In addition, violations of existing land use rights can result in displacements and, in this way, jeopardise the foundations of income and supplies, thus violating the right to food. Large-scale land investments by both domestic and foreign investors also play a role in this respect. The above-mentioned FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security and also the Principles on Responsible Investment in Agricultural and Food Systems (RAI) (FAO et al. 2014) address this context and develop voluntary recommendations to protect, inter alia, indigenous and informal land rights, too.

4.2.2 Production risks in the EU

Precarious working conditions and human rights risks in agricultural production are also a problem in EU countries. Seasonal and contract workers, who migrate between EU countries or come from third countries, are particularly affected by this (Bartocha and Wiese 2023, EU EMN 2020, Open Science Foundation 2020, European Union Agency for Fundamental Rights 2019, Rye and Scott 2018, Gertel amd Sippel 2014). The sub-sectors of meat production (slaughter) and fruit and vegetable growing are particularly characterised by labour migration and labour rights violations. While workers from third countries such as Morocco and Tunisia predominate in Mediterranean countries, German and British agriculture relied – until Brexit – on seasonal workers from EU member states in Eastern Europe (EU 2021). In Sweden, over 95 % of migrant workers who were given work permits for berry picking and farming in 2019 came from Thailand (Open Society Foundation 2020). Many seasonal workers from Ukraine worked in Poland until the Russian war of aggression (EU EMN 2020). All in all, official records show an upward trend of migrant workers (EU and third countries) in European farming, with most of them being employed to perform simple tasks (EU 2019: 26, 32).

As a result of partly informal employment relationships (cf. Fig. 4.2) and undocumented migrant workers, it is only possible to record the percentage of migrant workers, especially from third countries, to a certain degree; and official statistics mostly do not cover them (EU 2021). Accordingly, estimates that also take into account the informal employment of migrant workers vary widely: from 24 % of the agricultural labour force in Spain, up to 50 % in Italy and up to 90 % in Greece (EU 2021, Rye and Scott 2018, Corrado 2017).

Figure 4.2: Share of informal employment in European agriculture in 2022



Source: Our World in Data; https://ourworldindata.org/grapher/informal-employment-in-agriculture

Migrant workers from third countries in particular are generally exposed to comparatively high labour and human rights risks. They are structurally disadvantaged by language barriers, reliance on placement agencies or employers, to which their residence permits may be tied, informal (illegal) employment relationships and the widespread absence of trade union activities (ibid.). Working conditions and wages are, in some cases, compared with the (even worse) situation in the country of origin and are therefore accepted. In other cases, illegal immigrants in particular may not have any other option.

In 2014, the EU Directive on Seasonal Workers[52] was adopted in order to regulate and control seasonal migrant workers from third countries. The Directive combines immigration law, which clarifies entry into and residence in the EU, with labour law, which governs the rights of seasonal workers. This includes the right to equal treatment in terms of employment conditions and occupational health and safety. Previously existing bilateral agreements between EU states and third countries which regulated and managed migrant workers, for instance, between France and Tunisia and Morocco, have had to be aligned with the Directive since 2016.

An analysis of the transposition of this EU Directive into national legislation relating to the living and housing conditions of seasonal third-country workers outlines, inter alia, practical challenges arising in the implementation of equal working conditions as well as reports of exploitation (European Migration Network 2020). This is consistent with other studies and reports documenting poor living conditions, precarious working conditions and cases of human exploitation and trafficking (e.g. European Union Agency for Fundamental Rights 2019). In Italy, underpayment, discrimination, the discrepancy between days or hours worked and paid, and particularly harsh living conditions are serious problems in some areas (Corrado 2017). This particularly affects tomato harvests, the production of canned

[52] Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and residence of third-country nationals for the purpose of employment as seasonal workers.

tomatoes and citrus fruit harvests (ibid.). In Spain, seasonal work is largely the domain of temporary employment agencies. As a consequence, work assignments are very short in some cases and there is a high turnover of the workforce – both of which invariably mean job insecurity. In addition, working hours and wages are often not documented. Living and working conditions differ according to the nationality and gender of the workers; migrants from African countries receive a lower daily rate in some Italian regions than migrants from Eastern Europe, and women from Eastern Europe receive a lower hourly wage than their male colleagues (Corrado 2017: 6). Strawberry and orange cultivation and work in greenhouses are particularly affected by precarious employment (ibid., Bartocha and Wiese 2023). There are reports of human trafficking and exploitation in Portugal of seasonal workers from Nepal and in Greece of seasonal workers from Pakistan and Bangladesh, some of which have been referred to the European Court of Human Rights (European Migration Network 2020). In Sweden, seasonal workers from Thailand are not covered by the EU Directive on Seasonal Workers, since they are not recruited through European but through agencies in Thailand. Here, too, there are documented cases of exploitation and human trafficking (European Migration Network 2020).

Alongside fruit and vegetable cultivation, other parts of the value chains, that also employ a large share of the migrant workers, are characterised by precarious working conditions, such as the working conditions in Spanish or German slaughterhouses, for instance (Open Society Foundations 2021).

4.2.3 Production risks in Germany

In the LkSG, the legislator refrained from exempting certain countries or regions (Germany or the EU) from the scope of the Act by means of a positive list ("white list"). In Germany, too, there may be implementation deficits and human rights risks, for instance if there are flaws in the regulatory environment or in law enforcement.

Similar to other European countries, migrant workers are particularly affected by the risk of labour exploitation, notably in the meat production and fruit and vegetable sub-sectors (BMAS 2020: 173, 253, OXFAM 2023) and most recently in the transport sector.[53] If this concerns one of the ILO fundamental conventions (cf. Section 3.2), the LkSG covers the corresponding cases. In the recent past, the working conditions of harvest workers in the special crops sector and of contract workers in slaughterhouses became the focus of public attention at the onset of the COVID-19 pandemic. With regard to workers' wages, there has long been criticism of the actions of subcontractors, who are responsible for contract workers and who drive down wages through different levies – or of the actions of companies using subcontractors (Voivozeanu 2019, Wagener and Hassel 2016). Public and political attention resulted in the adoption of an Occupational Health and Safety Control Act to improve working conditions in slaughterhouses (Schulten and Specht 2021). The introduction and increase of the minimum wage and the control of corresponding requirements are further main focuses of the national debate.

4.3 Environmental risks in agricultural production

As set out in Sections 3.3 and 3.4, the environmental risks in the due diligence regulations chiefly focus on pollutant-related environmental risks and deforestation. Due diligence for other environmental

[53] "Powered by the Supply Chain" - The strike in Gräfenhausen and the legal battles over the new Supply Chain Act; https://verfassungsblog.de/powered-by-the-supply-chain/.

goods, such as biodiversity and climate protection, is currently still being negotiated between the EU institutions on the draft CSDDD (cf. Section 3.4 and Annex 1).

In the past, several scientific advisory boards of the Federal Government have already tackled in depth the environmental impacts of agricultural production in several expert reports and made corresponding recommendations (WBA et al. 2013, WBA and WBW 2016, WBAE 2020, SRU 1985). Thus, the WBAE, in cooperation with the Scientific Advisory Board on Forest Policy, recommended, inter alia, the rewetting of peatlands used for agricultural purposes and the improvement of nitrogen efficiency in fertilisation as actions with a particularly high potential for climate change mitigation (WBA and WBW 2016). The expert report on sustainable food consumption describes in greater detail the connection between agricultural production and the exceedance of planetary boundaries. It widens the perspective to include the further stages of value creation – however, agricultural production is the problem hotspot in most cases (WBAE 2020: Section 4.4). The large impact of agricultural production on global deforestation has been proven beyond any doubt (Curtis et al. 2018, De Sy et al. 2019). In the entire food value chain, besides environmental impacts in agricultural production, there are also impacts in the manufacturing of means of production, processing, trade and consumption.

For the EU-27, the contribution of the agri-food system to total EU greenhouse gas emissions was estimated to be approximately 31 % in 2020 (EPRS 2023). If one focuses only on agricultural production (and land use changes), the share is around 11 % (EPRS 2023) and remains relatively constant over time. At the same time, the production value of the agricultural sector has risen steadily (Eurostat 2022). This means that, in relation to the greenhouse gas emissions from agriculture, it has been possible to decouple the environmental effects from production, at least to a certain degree, which is a positive trend. This is also evident in a comparison across different regions (OECD 2022: Figure 1.6). With respect to possible biodiversity targets, for instance, pollinating insects or loss of habitats, the European Environment Agency states that "The pressures and threats for all terrestrial species, habitats and ecosystems most frequently reported by member states" are associated with agriculture (EEA 2020:82). The EU and Germany, as major importing countries of agricultural products, also have a significant ecological footprint through their purchase of goods.

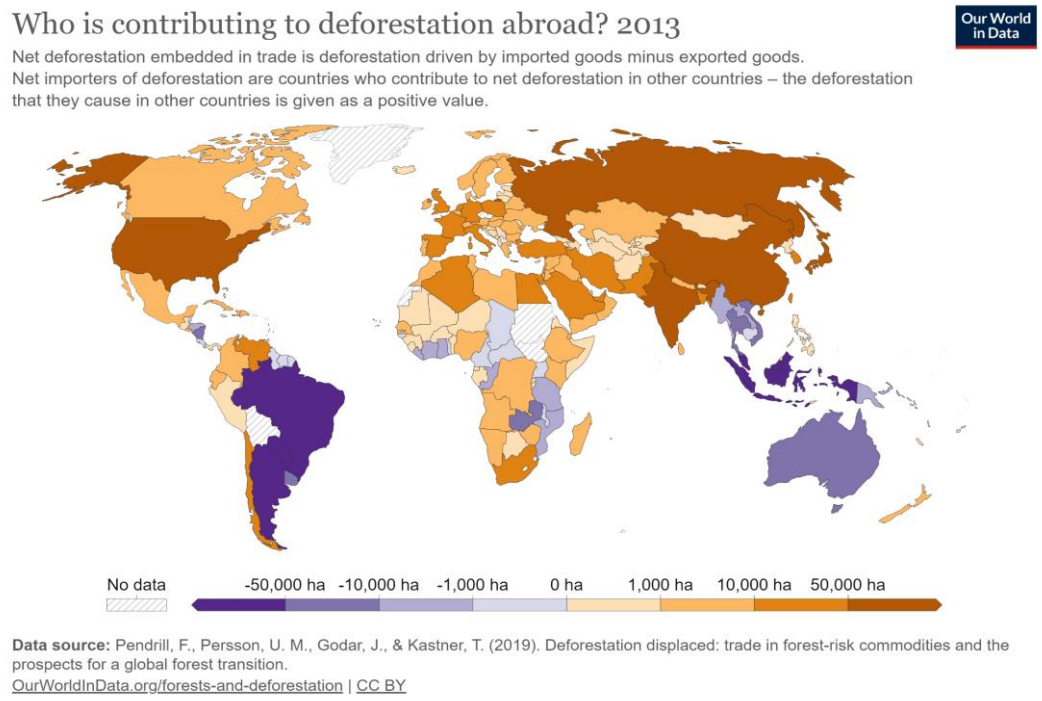
Agricultural production in LIMIC as supply regions is often characterised by the absence of comprehensive government rules for environmental conservation or, where such rules exist, their enforcement and control turn out to be difficult (e.g. Haggblade et al. 2021 for phytosanitary regulations in West Africa)[54]. However, studies on the deforestation problem, for instance, show that law enforcement would be the key lever to prevent deforestation (Busch and Ferretti-Gallon 2017, Fitz et al. 2022). While due diligence approaches endeavour to support law enforcement through impacts along the supply chain, the example of deforestation in Brazil shows that it is often a matter of shortcomings in enforcement on the ground – notably also with respect to activities by organised crime that are illegal under national legislation (EU INTA 2020).

Global cooperation is needed, especially when it comes to the provision of global public goods such as climate change mitigation or the associated forest protection with global impacts, but this has turned out to be rather difficult due to countries' differing interests. However, buyers in Europe can also

[54] Deficits in the implementation of environmental and nature conservation regulations are not confined to LMIC. There are also deficits in implementation in Germany and the EU, see for instance the EU Commission's report on the implementation of the Nitrates Directive (https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A52021DC1000).

contribute to the provision of the public good, because they benefit from the harm done to this good as part of their value creation and could exert influence through their strong position in the value chain.[55] One example is climate change: Seen in global terms, climate change is directly impacted by greenhouse gas emissions in agricultural production and, globally, to a similar extent also indirectly by greenhouse gas emissions associated with land use change (e.g. deforestation). Deforestation in the tropics from 2011 to 2015 was largely (90 to 99 %) caused by agricultural activities (Pendrill et al. 2022).[56] According to calculations, between 20 to 35 % of deforestation areas actively used for agricultural production can be attributed to international demand, although possible interactions between cultivated products have not yet been sufficiently taken into account (ibid.:7).[57] Figure 4.3 illustrates the role played by consumption in the countries of the Global North in deforestation in LMIC. The brown-shaded countries contribute more to deforestation in the countries from which they import products linked to deforestation than in their own countries.

Figure 4.3: Deforestation associated with imports



Source: Our World in Data; https://ourworldindata.org/grapher/net-deforestation-in-trade

[55] According to the beneficiary pays-principle, actors can be held (jointly) responsible for the elimination of a problem if they benefit from this problem (here: the (over)utilisation of global public goods). According to the so-called ability-to-pay-principle, actors who have not caused a problem and do not benefit from it, but are in a position to contribute to its elimination, can also be held responsible for eliminating it (cf. with reference to climate change: Hayward 2012).

[56] In their study, the authors distinguish between a) agriculturally-driven deforestation, the resulting areas of which are used for agricultural production, and b) agriculturally-driven deforestation, the resulting areas of which are not actively used for agriculture (Pendrill et al. 2022: 2).

[57] The main drivers of deforestation for agricultural production include the following activities: expansion of grazing land, cultivation of oil palm and soya and cultivation of rubber, cocoa, coffee, rice, maize and cassava, with wide variations between regions (Pendrill et al. 2022).

4.4 Conclusion

Supply chains in the agri-food sector are very heterogeneous, particularly in terms of the degree of cooperation, the importance of contractual obligations and certification, but also with regard to the dominant players in the supply chain. This also applies to the proportion of wage labour or smallholder structures, which results in different challenges with regard to labour standards relevant to due diligence obligations and issues such as minimum wages. International agricultural value chains at the level of primary production are often more fragmented, less transparent and more multi-levelled than value chains in other markets, meaning that the issue of indirect suppliers plays a major role from the perspective of European companies.

Depending on the structure of the value chain, this can make the implementation of due diligence legislation easier (e.g. where food retailers purchase directly from agricultural producers) or more difficult (e.g. where there are many intermediaries). However, the market significance of large international retailers and large food retailers in Europe is now so considerable that such companies can also assume greater responsibility for due diligence obligations.

Value chains in the agri-food sector are characterised by high risks of human rights violations and comparatively often by problematic working conditions. Compared to other sectors, jobs in agricultural supply chains are less well paid, more dangerous and insecure and more susceptible to child and forced labour. Despite various voluntary measures, positive developments can only be observed to a limited extent. In addition, various environmental risks are associated with agricultural production. In addition to the effects of domestic production, the EU and Germany, as important importing countries for agricultural products, also have a significant environmental footprint elsewhere through their purchases of goods, for example for deforestation, which means that environmental due diligence obligations can also contribute to reducing environmental problems in trading partner countries.

However, it should be emphasised that the risks described are not limited to agricultural production in other countries, including LMIC. For the EU and Germany, there is also sufficient evidence that there are risks of labour rights violations in various sub-sectors. Migrant workers are often affected. Due to these implementation gaps in regulatory law, which also exist in Germany and other EU countries, it is appropriate that companies must also fulfil their routine due diligence obligations for their suppliers in the EU and Germany and that they are not excluded from the due diligence obligations - e.g. via a country-specific positive list. Instead, the risks of human rights or labour standard violations can differ between the individual sub-sectors of the respective trading partners, which is why it is better to prioritise risks as part of the company's internal risk management instead of using country lists (cf. Section 3.4). However, this does not mean that the respective countries themselves should be released from the primary obligation to enforce their own regulatory law.

5. Opportunities, challenges and limits of due diligence regulations

In the following, the opportunities, challenges and limitations of due diligence regulations are discussed from the assessment perspectives developed in Section 2.6. Development scenarios are then derived from this and summary conclusions are drawn for the central question of what progress the due diligence regulations can bring for human rights, labour standards and the environment, where adjustments to the regulations may still be necessary in order to be able to carry out an assessment at all and where these regulations may also reach their limits.

5.1 Business management perspective: Implementation in the interplay of operational organisation and certification

Due diligence regulations generally increase the procurement costs of companies by making the division of labour more expensive (BMWK Scientific Advisory Board 2022). Compliance with key human, labour and environmental rights in an environment affected by these rights violations will also generally make production more expensive. This is undisputed - but the latter in particular is unavoidable in order to implement the international standards to which the EU has committed itself, at least for the business relationships in which local companies are involved.

However, it is less clear, depending on the degree of previous violations of rights and the design of the new regulations, whether the extent of the cost increases is relevant to competition and whether there may be unintended costs or effects. In economics, the division of labour, including the international division of labour, is generally viewed positively due to its positive welfare effects. The integration of companies from LMIC into global value chains is seen by economists as an important driver of economic development in these countries. An increase in procurement costs, possibly even the termination of business relationships for suppliers, e.g. from countries with governance problems, could therefore have unintended negative effects, especially for LMIC (Kolev-Schaefer and Neligan 2022). The following Section therefore looks at the costs and benefits of supply chain due diligence obligations, first with regard to the LkSG and then with regard to EU regulations.

5.1.1 Corporate challenges and design options

5.1.1.1 Basic business management response options to the LkSG

Due diligence regulations are nothing fundamentally new for companies. They oblige them to implement and document certain social objectives, such as those set out in environmental or emissions law or in the fight against corruption. In this case, we are talking about sustainability goals in the area of purchasing and, in some cases, selling goods.

The following remarks address possible business responses to these requirements, initially with reference to the German LkSG and with corresponding empirical data from Germany, including on the costs associated with implementation. In the second step (Section 5.1.1.5), additional challenges posed by the (forthcoming) EU regulations are then addressed, as they go further.

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Textbox 5.1: The concept of due diligence obligations in the corporate context

The term "due diligence obligations" refers to an obligation imposed on certain persons by law or on the basis of a legal transaction to perform or refrain from performing actions in a certain way so that there is no risk of damage to other persons, legal assets or property. If there is a potential danger in an action, special safety measures must be applied. Special safety obligations may exist in order to actively prevent damage to others by taking reasonable precautions. Which actions are required

depends on the objective standard of care. The scope of a person's necessary due diligence obligations is to be measured against the behaviour of a responsible, objective average person and is determined by their abilities and individual situation. If this fictitious person would act more responsibly in the situation, there is a breach of the due diligence obligations.

Due diligence obligations can be found in various areas of application and are more or less pronounced in different areas of law. In this respect, it is an undefined legal concept. Generally speaking, due diligence obligations are breached if a person negligently or intentionally causes damage (Section 276 BGB). However, the standard of care can also extend further if the duty of care normally observed in one's own affairs is breached (Section 277 BGB). A breach of this duty of care can give rise to contractual, tortious and pre-contractual claims for damages.

Significant manifestations can be found in labour and commercial law. Employers must protect the life and physical health of their employees. A commercial agent must act as a prudent and conscientious businessperson. Due diligence obligations thus arise in particular from their professional position. Corporate activities may also require compliance with human rights and certain environmental due diligence obligations. Furthermore, a duty of care arises from family ties or inheritance.

In management, *due diligence* is understood to mean a careful examination, initially focussing on a buyer's obligation to carry out an audit when purchasing a company, acquiring shares in a company or real estate, or when going public. In US commercial law, the buyer traditionally has a greater responsibility to examine the object of purchase than in the German legal system. However, German law now also assumes that the board of directors or managing director has due diligence obligations when they initiate a risky company acquisition. The aim of this classic *due diligence is* to comprehensively identify and assess all significant legal and economic risks prior to the purchase.

Due diligence procedures are no longer only discussed in the area of capital market law or company acquisitions; rather, the term *due diligence* has found wider acceptance for other risk management procedures in which legal (sometimes also social) requirements are placed on company management. These include procedures to safeguard against corruption, industrial accidents and even human rights and environmental protection violations (Peace et al. 2017).

---------End of box------

The obligation to implement due diligence obligations is forcing the companies concerned to take a closer look at the sustainability of their supply chain. In the course of globalisation and the concentration on core business competencies, many companies have built up complex, multi-level procurement structures in recent decades. Companies have outsourced key work steps, often to countries with low wages and low labour and environmental protection standards, in order to take advantage of locational benefits, including wage cost differences. Supply chains can be very complex and consist of several hundred companies, and in some cases only the direct suppliers are known to the companies. The UN Guiding Principles and ILO standards presented in Sections 2 and 3 have long assigned companies a responsibility to comply with minimum standards in the area of labour and environmental protection, even beyond their own business area. Part of this responsibility consists of identifying human rights risks and, if necessary, avoiding or minimising them or compensating those affected (Utlu and Niebank 2017). However, compliance with these requirements was not specifically regulated by law in the past and was therefore not monitored by the authorities. Against this backdrop, most companies did not focus on these problem areas in the past.

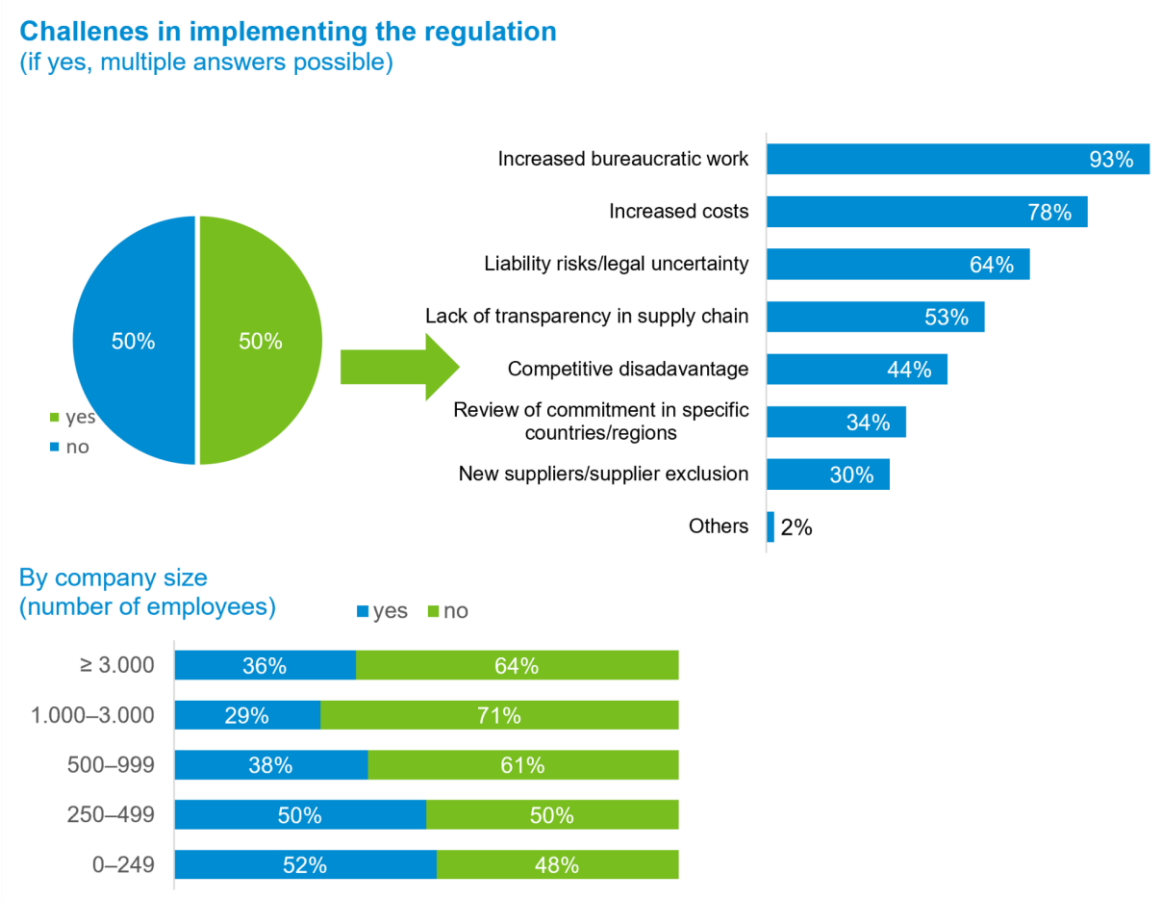
The introduction of the LkSG therefore poses new challenges that vary in scope depending on the initial situation of the companies, such as the extent to which the sector is affected, the number of companies

involved or the efforts made to date. From a corporate strategy perspective, companies can also implement the LkSG with varying degrees of ambition. The literature distinguishes between an active, opportunity-seeking strategy, the implementation of minimum standards and an attempt to circumvent the obligations (PWC 2022).[58] Depending on all of these factors, companies will react to the provisions of the law with varying degrees of intensity.

5.1.1.2 Potential economic costs and benefits of due diligence regulations

The costs and benefits of the LkSG will vary depending on the initial situation and corporate strategy. In this respect, the company surveys referred to below do not provide a uniform picture, partly because they are based on the expected effects prior to entry into force. Nevertheless, they allow an initial cautious estimate to be made. As a survey by the Association of German Chambers of Industry and Commerce (DIHK) of around 2,500 internationally active companies of all sizes in Germany shows, 64-71% of companies that are directly affected by the Supply Chain Act see challenges such as more bureaucracy, higher costs or legal uncertainty ahead (cf. Fig. 5.1).

Figure 5.1: Challenges in implementing the LkSG from a company perspective according to the DHIK survey



Source: DIHK 2022; translated.

[58] According to a survey by the DIHK (2022), 60% of companies directly affected by the law stated that they had already received enquiries about human rights and environmental risks in their supply chain.

In another company survey[59] commissioned by Hypo-Vereinsbank, a mixed picture emerged with regard to the basic assessment: a good third of companies expect only a minor economic impact, with just under a third each expecting positive or negative effects (FAZ Institute and Hypo-Vereinsbank 2021: 7). Studies, e.g. by the EU and the Handelsblatt Research Institute, on the costs of setting up a legally compliant management system and its ongoing implementation show a total of around 0.005-0.14% of turnover for personnel costs and expenses for service providers, depending in particular on the size of the company (Handelsblatt Research Institute 2021: 22, 24).[60] These expected average direct costs are therefore manageable. The requirements of the LkSG for setting up extended risk management are familiar in principle to large companies in particular from comparable processes such as quality assurance and environmental management. For example, large companies typically have a supplier management system to control direct and sometimes also indirect suppliers as part of quality management. The documentation and publication obligations are also generally familiar, for example from sustainability management or anti-corruption. The specific social criteria may be new, but the structural and procedural organisational elements of such compliance systems are familiar to the vast majority of large companies and also to a considerable proportion of larger SMEs. Relevant guides from management consultancies on implementing the LkSG therefore contain little that is methodologically innovative and are based on standard software such as that from SAP. This also shows that routines already exist here (PWC 2022).

It could be more problematic that some companies are subject to different due diligence and reporting obligations (LkSG (or CSDDD), EUDR, CSRD cf. Section 3.4), the compliance costs of which will add up if the legal regulations are not harmonised (Erixon et al. 2022: 87). It is therefore important to harmonise the documentation requirements in particular in order to save companies from having to enter similar data multiple times (cf. Section 5.3). Nevertheless, setting up supply chain-related management and compliance systems is "no witchcraft" for medium-sized and larger companies (Hamburger Stiftung für Wirtschaftsethik 2023).

It is much more difficult to estimate the indirect costs implied by the LkSG, which in many cases represent the costs of lost opportunities (opportunity costs) if, for example, certain trading partners appear too risky and other suppliers are therefore sought. Changes in the value chain generally lead to higher procurement costs, e.g. due to higher prices for primary products. The extent of these indirect cost increases resulting from changes in trade flows and the reorganisation of value chains is difficult to calculate (Felbermayr et al. 2022).

Finally, upstream suppliers may also incur costs if they have not complied with human rights and environmental standards as addressed in the LkSG in the past and are now obliged to implement them. These costs, if they can be passed on in the value chain, will increase end consumer prices in Germany. In this respect, there will be a certain amount of welfare loss on the consumer side in Germany, although this is necessary and intended by the legislator in order to help enforce basic global standards and prevent human rights and environmental dumping - even if consumers in Germany have benefited from this in terms of price to date. However, this also requires policymakers in Germany to consider the consequences of price increases for households at risk of poverty and to compensate for these if necessary (see the WBAE statement on food poverty (WBAE 2023)).

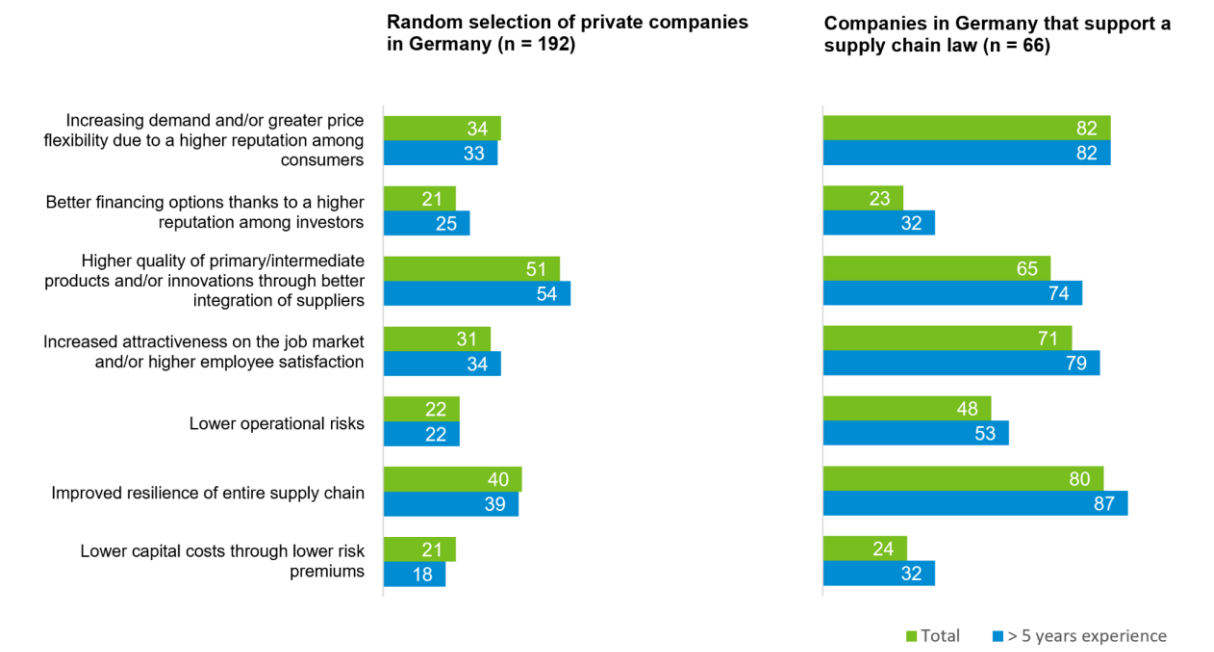
The higher direct and, in particular, indirect costs of complying with due diligence obligations must be set against possible economic benefits (cf. Fig. 5.2). The companies in the (non-representative)

[59] A total of 125 decision-makers in companies were interviewed for the study as part of an online survey.

[60] For the CSDDD, the administrative costs per directly affected company are estimated at an average of 84,000 euros in the first year and 65,000 euros in the following years (Erixon et al. 2022: 86).

Handelsblatt Research Institute survey consider higher product quality through better supplier integration, increased supply chain resilience and reputational effects to be particular advantages. Companies that have supported the German LkSG also see higher employee satisfaction and increased attractiveness on the labour market as business benefits. It is also conceivable that German companies in particular could gain *first mover advantages*, as they have to adapt to the new regulations earlier than many European and global competitors (Jänicke 2005).

Figure 5.2: Expected business benefits of implementing supply chain due diligence from the company's perspective (in % of respondents)



Source: Handelsblatt Research Institute 2021: 29; translated.

The fact that reputational effects to avoid media scandals are an important advantage of improved supply chain management is also shown by the example of the conflict minerals regulation of the *Dodd Frank Act.* Studies show that it was probably primarily the potential reputational costs or lower expected reputational risks that motivated companies to adopt more responsible procurement behaviour (Zadek 2007; Baik et al. 2021). Reputational risks are also generally a key factor influencing the motivation of companies to organise their supply chain management responsibly (Hoejmose et al. 2014), especially when companies are exposed to an increased reputational risk because they have a name to lose in the public eye (Roehrich et al. 2014). Media reports on child or forced labour can be damaging to the business of brand owners and consumer-related retail companies (Weyler and Esch 2019). Conversely, companies with a high level of commitment can achieve image benefits with a positive rating in relevant rankings (e.g. Oxfam Supermarket Check Human Rights https://www.oxfam.de/supermarkt-check).

However, the reputational benefits of improved supply chain management are difficult to quantify in business terms, as they depend to a large extent on the unpredictable likelihood of a media scandal and its consequences. Up to now, it has generally been NGOs or trade unions that have uncovered deficits and exerted pressure, possibly also local authorities (see Wright 2015 for trade unions). The risk of child labour, for example, being uncovered in the supply chain already exists, but is rather low

given the multi-level supply chains and small-scale rural structures in the agricultural sector. Reports of violations often do not always attract media attention. Many companies in the international agricultural sector are not known to customers, and social reputation plays a comparatively minor role for such companies. Only a few major scandals, such as the collapse of the Rana Plaza textile factory in Bangladesh with more than 1,000 fatalities, led to a public outcry. Systematic management of human rights risks was therefore not a business imperative for many companies in the past.

The mandatory due diligence regulations are now changing the way companies weigh up risks. Firstly, official monitoring contributes to this. In addition, the introduction of the complaints system increases the risk of human rights violations being uncovered, as the whistleblowers concerned can not only contact the company themselves, but complaints procedures can also be conducted on behalf of those directly affected. Furthermore, NGOs and trade unions can submit reports directly via the complaints procedure of the Federal Office of Economics and Export Control in order to uncover problems. Overall, due to the increasing likelihood of detection, the pressure on companies to protect themselves against reputational risks through a structured management system is growing.

5.1.1.3 Internal options for action for companies

One of the main objectives of the statutory due diligence obligations is to encourage companies to set up a specific risk management system in order to meet the above-mentioned challenges. An initial indication of how companies across all sectors are currently preparing for the Supply Chain Act is provided by a company survey conducted by the DIHK.

Almost half of the companies surveyed therefore see improved cooperation with suppliers as an important starting point, which corresponds to the intention of the legislator and is discussed in more detail in the following Section under supplier development. Internally, the development of a code of conduct is an initial measure for a good 40% of companies, which indicates that the minimisation of human rights and environmental risks has not yet been a fully formulated element of the corporate mission statement in these companies. Another key instrument is the development of a risk analysis to identify problem areas, which is explicitly required by law. This is followed by certifications and audits as well as supplier declarations. Many companies also consider external support to be necessary in order to fulfil their new obligations, especially when it comes to checking suppliers, tracing the supply chain or carrying out on-site supervision and investigations (DIHK 2022).

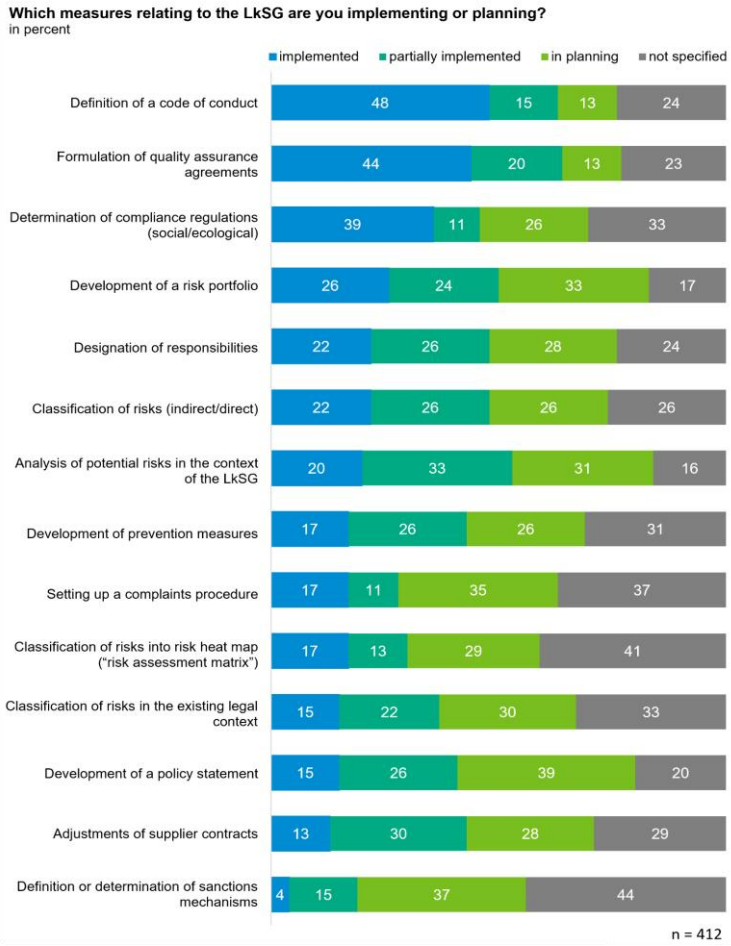
A further survey from 2022 specifically of companies in the agricultural and food sector (n=412) on the implementation or planning of measures in response to the requirements of the LkSG shows similar results (AFC and BVE 2022). According to this survey, too, a code of conduct is initially in the foreground. Almost half of the companies surveyed have already implemented this (cf. Fig. 5.3). Just under 44% have formulated quality assurance agreements and 30% compliance regulations in the area of social and environmental issues. Overall, it can be concluded from the responses that risk analysis is a high priority for the surveyed companies in the agricultural sector. The LkSG has led to greater integration and cooperation between the CSR, Legal Compliance and Purchasing/Procurement departments, which previously often operated independently of each other. Not only are individual new positions being created, such as that of a human rights officer, but in many cases cross-departmental project groups are being set up to deal with the LkSG. This significantly broader organisational anchoring of the topic promises greater management attention in the long term.

In this survey of agribusiness companies, the supplier declaration, i.e. the adaptation of supply contracts, also plays an important role, even though only 13% of companies had included corresponding contractual clauses in 2022. More recently, however, media reports from the business

press indicate that this instrument is rapidly becoming more widespread (see e.g. LZ of 20.01.23). This cascade of supplier declarations, which the respective suppliers demand from their upstream suppliers and which trigger corresponding adjustment measures in the latter, leads to cost increases along the entire chain (see below). The amount of these increases depends on the extent of the changes required to implement the due diligence obligations.

The development of a policy statement (15%) and the establishment of a complaints mechanism (17%) had also only been implemented by comparatively few companies at the time of the survey. These measures are explicitly provided for in the LkSG. When interpreting the results, however, it should be noted that only 22% of the participating companies stated that they fall within the direct scope of the LkSG; 65%, however, have already dealt with the LkSG (AFC and BVE 2022: 16f.). With regard to the complaints mechanism, there are many indications that industry solutions will play a significant role; various industry-wide complaints management systems are currently being developed on the market as a direct response to the requirements of the LkSG.[61] The associated costs are lower than setting up a separate procedure. In addition, complaints cannot always be assigned to an end customer, e.g. if the supplier has different customers, which is why industry-wide complaints mechanisms make sense.[62]

Figure 5.3: Status of implementation of LkSG-relevant measures in agribusiness companies in Germany in 2022 (in % of companies surveyed)



[61] https://www.ehi.org/presse/neue-aufgaben-fuer-globalg-a-p-chef-2/

[62] Statement by a BMW representative at the OECD event "XY" on XX.XX.XXXX.

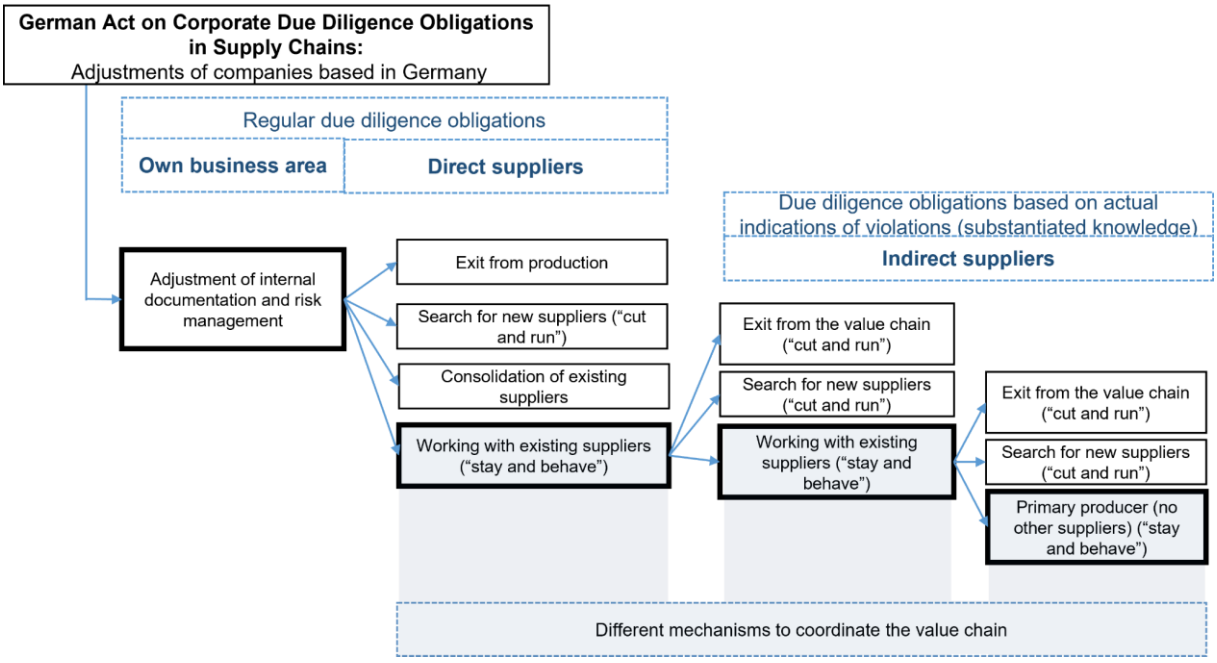
Source: AFC and BVE (2022); translated.

5.1.1.4 Possible courses of action for companies when dealing with suppliers

The companies affected by due diligence obligations can pursue three fundamentally different options if their risk management system identifies human or environmental risks with certain suppliers: They can (1) completely withdraw from the production of a certain product, (2) choose new, less risky suppliers or (3) persuade the existing supplier to discontinue problematic practices (cf. Fig. 5.4). Both the LkSG and the draft CSDDD imply a prioritisation of supplier development over the termination of supplier relationships. Companies should first endeavour to remedy the situation, i.e. supplier development (also referred to as the "stay and behave" strategy), before terminating the business relationship and looking for new (less risky) suppliers ("cut and run" strategy, change of supplier).

The justification for this direction desired by the legislator is the limited power of the EU countries. The aim of the LkSG is to achieve actual improvements in the value chain and not just market segmentation. If a company pursues a "cut and run" strategy, the overall situation with trading partners generally does not improve (cf. Section 5.5.2). It is therefore better to prioritise supplier development, even if this may not immediately lead to an optimal situation. In special situations, "cut and run" can even have negative effects: Vulnerable suppliers could be forced to cut costs by cancelling the business relationship, which may even worsen the situation of those affected by negative human rights impacts.

Figure 5.4: Conceptual effect of due diligence obligations along a value chain using the example of the German LkSG



Source: Own presentation

Exiting the production of a product or a certain value chain is a particularly far-reaching business decision that customers will only make if they are unable to control the risks or if production becomes unattractive compared to competitors who are not affected by due diligence obligations.

If production is to continue despite the risks, customers will calculate whether they can prevent certain problem areas such as child labour with sufficient certainty through improved economic incentives,

support or monitoring and how high the one-off and ongoing additional costs are when switching to a "safe" supplier. This business calculation is characterised by a high degree of uncertainty, as the probability of occurrence and the extent of damage in the case of reputational risks are difficult to determine. Risk-averse companies (e.g. those with well-known brands) are more likely to replace their supplier in case of doubt. Furthermore, it is not always clear whether a customer is in a position to enforce requirements against a supplier, e.g. depending on the quantity of a product purchased. A weak negotiating position could also argue in favour of a change of supplier. Supplier development is also difficult if there are structural governance problems in a region that a company cannot resolve on its own. Finally, a change of supplier is more likely to occur if the threat of liability for violations of due diligence obligations is high. A trade-off is emerging here, as stringent liability, as envisaged at EU level, gives the Supply Chain Act "teeth" overall, but can also lead to supplier development appearing too risky.

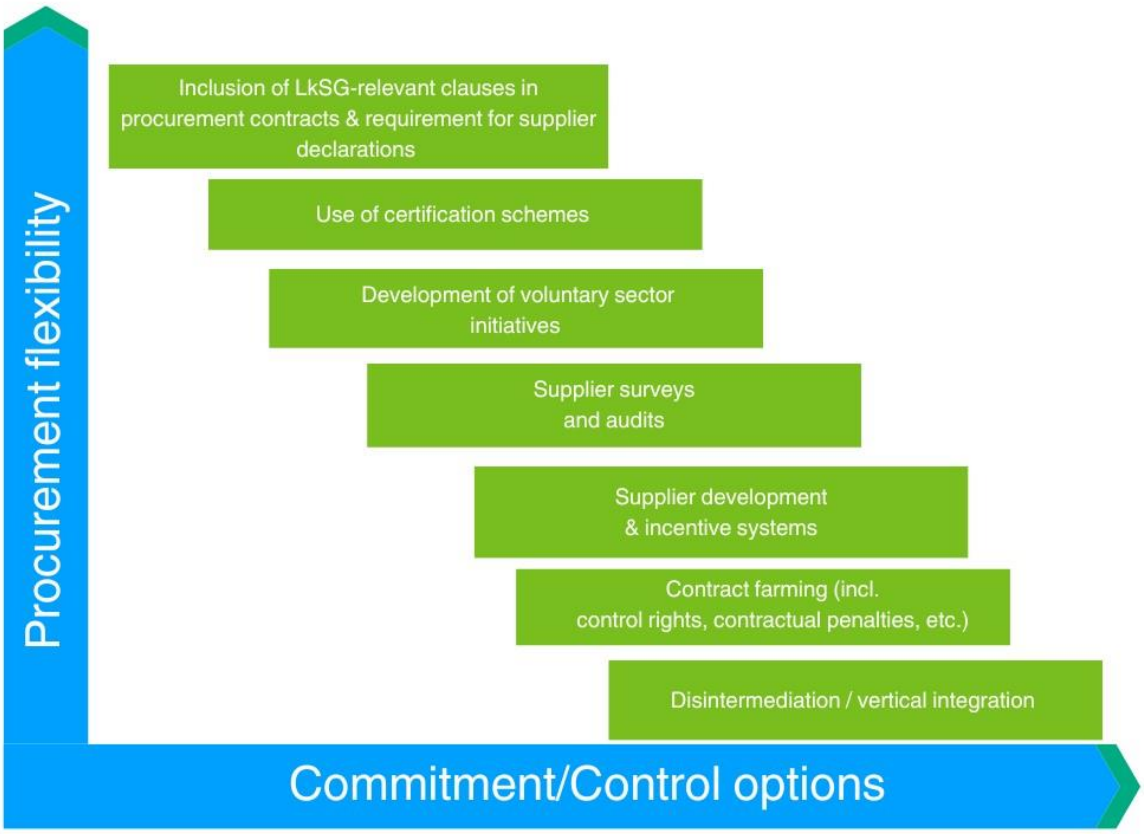
The costs of switching suppliers vary: In the simplest case, the change of supplier is successful if the discontinuation of business with a risky supplier can be compensated for by an increased purchase quantity from one (or more) other existing suppliers (Felbermayr et al. 2022: 45) because the latter is able to supply the required quantity. In this case, there are no search costs, but the company's dependence on individual suppliers increases. In most cases, however, switching suppliers is associated with the search for new suppliers and therefore generates search and switching costs.

From a customer's business perspective, the costs of changing suppliers are offset on the one hand by the costs of the development of the previous supplier and the remaining liability and reputational risks (if fines and/or a scandal do occur) on the other. To date, there are no studies that allow an assessment of the decision-making behaviour of companies in Germany at this central point. Measures to pass on responsibility, e.g. by using independent dealers as intermediaries, and to avoid responsibility through measures to reduce transparency in the chain are not intended, but cannot be ruled out. The use of intermediaries or several trading levels can increase the lack of transparency in the chain and also represent an option for companies to circumvent due diligence obligations. Such evasion strategies are known from the field of corruption, for example, when independent dealers take over sales in countries at risk of corruption instead of having their own sales departments.

From a social perspective or from the point of view of the affected workers at the local trading partners, the preference expressed in the LkSG for supplier development is plausible, as the termination of a business relationship would tend to increase the pressure on the social conditions of the labour force there, at least in the short term. The suppliers would have to look for new customers, possibly from countries with lower requirements with regard to compliance with human rights (and probably at lower prices). It is difficult to answer the question of whether, if several buyers in Germany/the EU break off supply relationships, the pressure on suppliers and the local government to solve human rights problems may not increase in the medium to long term.

The term supplier development used in the Section above, i.e. continuing to work with existing suppliers despite identified risks, is a collective term for a variety of instruments that companies can use to influence their suppliers (similar to Ermgassen et al. 2022). Figure 5.5 categorises supplier development into various business management instruments for safeguarding in the area of procurement, whereby the instruments shown are used individually or coordinated with each other. From left to right, the degree of influence on suppliers increases, while procurement flexibility decreases at the same time, as the commitment becomes stronger; more expenditure is invested in the existing business relationship (Krause et al. 2000).

Figure 5.5: Business procurement instruments



Source: Own presentation

A common, more or less unavoidable management tool for buyers is the inclusion of relevant contractual clauses in procurement contracts, e.g. to exclude child or forced labour. These are initially aimed at the direct suppliers. At least with regard to high-risk regions or high-risk products, companies will obtain additional assurances from their suppliers with regard to their upstream suppliers. In such supplier declarations, the direct suppliers assure that they will implement measures to ensure compliance with these contractual clauses by their upstream suppliers. This may result in a cascade of supplier declarations. The extent to which these supplier declarations fulfil the requirements of the LkSG in individual cases, e.g. depending on the company's risk assessment, available market information or government assessments, cannot yet be precisely estimated. However, initial developments in the direction of required contract supplements to food retail suppliers (see, for example, the Lebensmittelzeitung reports of 2 February 2023 and 14 April 2023) have prompted the BAFA to publish a corresponding handout, which emphasises that a "simple" transfer of responsibility to the direct suppliers is not in line with the spirit of the LkSG and thus does not automatically fulfil the due diligence obligations of the company concerned (BAFA 2023).[63] However, many medium-sized

[63] In addition, an examination under the UTP Guidelines with regard to the prohibition of unfair trading practices is also conceivable in this area, as unilateral changes to the terms of the contract by the buyer are considered unfair (see Table 3.4 in Section 3.4).

suppliers in the agricultural and food industry, including the German agricultural sector, are at least partially affected by the provisions of the LkSG due to these supplier declarations.

Certification schemes are particularly important in the agri-food sector (cf. Section 5.1.2 for more details). Here, independent (private) control institutions ensure compliance with criteria that can no longer be verified on the end product through supervision (third-party audits) on the basis of a recognised standard. A number of certification schemes have now taken extensive measures to include compliance with the LkSG in their audits.[64]

Market observers expect that extended certification schemes will make up a very significant part of the implementation of the LkSG (Möller 2021). As general, i.e. agribusiness-wide certification schemes such as GLOBALG.A.P. are less widespread in certain sectors and may not be specific enough to the particularly major challenges of certain product groups, there are specific sustainability initiatives (voluntary sector initiatives) for some products such as soya, palm oil or cocoa. These increasingly include aspects of the LkSG. In some cases, these approaches are also focussed on sectors in certain countries of origin (see zu Ermgassen et al. 2022). In more recent cooperative approaches, such as the Initiative for Sustainable Agricultural Supply Chains (INA) by the Deutsche Gesellschaft für Internationale Zusammenarbeit and leading companies in the German food trade, attempts are being made to establish cross-sectoral binding regulations to improve social conditions and certification on the basis of extended antitrust law permissions. In this case, key players in Germany agree to comply with binding joint procurement standards in order to ensure a *level playing field.* Such a purchasing agreement is generally relevant to cartels. Recently, however, there has been a growing realisation that such sustainability agreements should be exempt from the ban on cartels.[65] Since December 2021, Art. 210a of the CMO (Regulation No. 1308/2013 on a common organisation of the markets in agricultural products) has provided an exemption from the ban on cartels for supra-legal sustainability standards in the food supply chain. This article offers scope for implementing sustainability projects between agricultural producers and along the entire value chain ("sector solution") in compliance with antitrust law.

A key advantage of certification schemes and industry initiatives is that suppliers who undergo these supervisions are recognised by various buyers. These instruments therefore enable market-based, flexible exchange relationships. Buyers in the Global North do not have to commit to specific suppliers, but can change their suppliers at short notice - depending on price, for example. This market flexibility still plays a major role in agricultural markets today. Global agricultural traders purchase a significant proportion of commodities indirectly, i.e. from local traders; multi-level chains are the rule rather than the exception (zu Ermgassen et al. 2022).

The other business management instruments listed in Figure 5.5 involve more intensive cooperation between buyers and certain suppliers. In economic terms, this leads to specific investments in the business relationship that bind the partners together. A widespread, still relatively weak instrument in this direction is the implementation of supplier surveys on the social and ecological conditions of production using specific questionnaires, whereby the information provided by suppliers is typically verified (at least on a random basis) by the buyers through on-site inspections (so-called supplier audits).

Supplier development in the narrower sense goes further, with which customers endeavour to strengthen their suppliers and improve social conditions: There is a transfer of expertise, training is

[64] See e.g. the Food Security Standard; https://foodsecuritystandard.org/ (last accessed on 16.5.23).

[65] For this reason, Austria has included sustainability as an objective in its competition law (Malinauskaite 2022).

offered and, in many cases, economic incentives such as bonuses and prizes are offered for improvements. All of this is part of longer-term supplier relationships. Supplier development projects can be partnership-based or participatory, i.e. developed jointly by the customer and its suppliers, or they can be imposed unilaterally.

In many cases, supplier development is then legally secured by multi-year contracts (e.g. contract farming). Such contracts often contain regulations on the implementation of production and quality specifications, instruction and control rights as well as contractual penalties. The degree of commitment and centralisation can vary. The extent to which contract farming generally leads to an improvement in social conditions for smallholder farmers is a much-discussed topic in the literature with differentiated results (see, for example, Special Issue 1/2022 on "*The Political Economy of Contract Farming*" of the Journal of Agrarian Change). Naturally, results on the specific impact of the Supply Chain Act are not yet available.

The most far-reaching influence to secure supply is vertical integration, in which a company itself takes over upstream stages of the value chain, e.g. farming under its own responsibility. Studies show better social conditions in this case, which is plausible as the conditions are more transparent and the responsibility of the company management is direct (Murcia et al. 2021). However, the purchase of agricultural land in LMIC, e.g. by European producers for the purpose of farming, could itself pose human rights risks and requires compliance with due diligence obligations, for example in accordance with the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests (cf. Section 4.2.1).

It is not yet entirely clear to what extent the LkSG will influence the procurement concepts outlined above. There is some evidence to suggest that certification schemes will play a major role in safeguarding, as they maintain market flexibility, require little investment and are relatively inexpensive, at least for somewhat larger suppliers. If the obligation of direct suppliers and their upstream suppliers to participate in a certification system is recognised as part of the preventive and/or remedial measures under the LkSG, then this field will become even more important. The success of the LkSG would then depend heavily on the success (impact) of the certification schemes, including the reliability and integrity of the auditors/inspection companies (cf. Section 5.1.2 and Section 6).

5.1.1.5 Special features of the EU proposals on due diligence obligations and zero deforestation supply chains

The CSDDD will probably also apply to significantly smaller companies than the LkSG. Food and agricultural production is considered a risk sector in the draft CSDDD, meaning that companies with at least 250 employees and a global net turnover of EUR 40 million, 50% of which comes from the risk sector, are already affected. The inclusion of medium-sized companies also raises the question of the control options available to these companies, i.e. their chances of asserting themselves on international procurement markets. The degree of formalisation of management in medium-sized companies is also generally lower, meaning that these companies find it more difficult to set up specialised positions and specific processes. However, it is possible that the difference between the LkSG and CSDDD at this point will not be as great in practice as it initially appears, as it is already becoming apparent that large companies in Germany are "passing through" the requirements placed on them in the value chain (contractual cascades, cf. Section 5.2.3), so that many SMEs are already dealing with the issue (Hamburg Foundation for Business Ethics 2023). In addition, cooperative implementation instruments such as certifications (see below) or joint whistleblower systems could

reduce the implementation costs for SMEs. In terms of the envisaged paradigm shift (cf. Section 2), it would appear to make sense for SMEs to take responsibility for their suppliers. However, the implementation requirements and the speed of implementation should take sufficient account of the differences in company size (cf. Section 6.2).

In contrast to the LkSG, the CSDDD draft also explicitly includes indirect upstream suppliers (synonymous: indirect suppliers) and customers. From a business perspective, the focus on the entire value chain, including indirect suppliers and the subsequent stages, will require a broader approach. The inclusion of indirect suppliers, which have rarely been the subject of supply management to date, represents a significant expansion compared to the LkSG. Currently, companies' existing systems are primarily focussed on direct suppliers, who in turn may have a large number of suppliers. With the CSDDD, companies are encouraged to focus on these upstream suppliers, at least to a certain extent. However, for economically understandable reasons, direct suppliers (e.g. a globally active agricultural trader or trader in LMIC) do not always have an interest in providing their customers with transparency about the upstream chain, as they must fear being forced out of business by entering into direct business relationships with the producers (Franke 2021). This risk of exclusion (known as disintermediation) is particularly pronounced in the retail sector. Among other things, it can lead to the need to create transparency across the entire supply chain in the face of resistance from suppliers, which increases costs.

Companies must also define the limits of their reach in the value chain using cut-off criteria, as not every upstream supplier of even the least valuable upstream products can be included in the responsibility. Where these limits of "upstreaming responsibility" (Scherer and Palazzo 2011) lie is difficult to define in general terms. The draft regulation therefore limits responsibility to established business relationships that are stable and not insignificant. Against the background of the challenges mentioned, the CSDDD has more far-reaching implications for the coordination of global food value chains than the LkSG, although these are currently difficult to assess as details of the regulation and its implementation are still lacking. In principle, however, it seems sensible to also consider indirect suppliers in the CSDDD in order to prevent evasive behaviour (e.g. by using companies in non-EU countries as intermediaries).

The question of what due diligence obligations mean in relation to buyers has been discussed relatively little to date (GBI 2023). For example, the implementation of labour standards in small-scale catering in Germany is unclear, so the food industry could face challenges here. In general, however, sustainability management has been discussing the responsibility of companies for the utilisation phase of their products for some time. In the area of pesticides, for example, the industry's responsibility for the use of its products on farms is discussed under the term *product stewardship* and recommended by the FAO in the *Code of Conduct on Pesticide Management* (FAO and WHO 2014).

There are also specific challenges in the draft CSDDD regarding corporate due diligence obligations with regard to environmental risks. The most important point for management at present probably relates to Article 15 of the planned directive, according to which larger companies with more than 500 employees and an annual net turnover of more than 150 million euros must explain how their business model and strategies are compatible with the Paris Climate Agreement and the goal agreed there of limiting global warming to well below 2°C above pre-industrial levels and aiming for an increase of less than 1.5°C. If such a company identifies a significant risk of non-compliance, it must include emission reduction targets in its plans. In addition, according to the CSDDD Commission's proposal, the degree of target achievement must be duly taken into account in the variable remuneration of the

management.[66] This essentially prescribes a procedure that a number of companies have voluntarily implemented today as part of the Science Based Target Initiative.[67] In the Science Based Target Initiative, companies record their greenhouse gas emissions not only for the greenhouse gas emissions they cause directly, but along the entire value chain (referred to as Scope 3 in greenhouse gas accounting). The inclusion of upstream and downstream activities in greenhouse gas reporting is also required in the Corporate Sustainability Reporting Directive (CSRD), which came into force in January 2023. Reduction targets will then be set on this basis, which should be in line with the Paris Climate Agreement, for example. However, the question of how companies in the agricultural and food sector, which face particularly complex climate protection challenges (e.g. because not only CO2, but also nitrous oxide and methane emissions are relevant in agriculture, which can only be avoided to a limited extent), can organise their management to achieve climate neutrality has not yet been clarified.

The inclusion of climate protection in the CSDDD thus raises fundamental questions. In companies, climate protection management has not typically been part of supplier or procurement management, but rather part of an environmental or CSR department. However, the majority of greenhouse gases from most food products are not produced during the manufacturing phase, but in agriculture (WBAE 2020), so it would make sense for companies to link climate protection management and procurement management more closely. Human rights and climate protection are process characteristics that are no longer detectable in the end product (Krebs et al. 2020: 62).

A greater challenge lies in the fact that avoiding greenhouse gas emissions in agriculture is more challenging than in other sectors, as the emissions arise in connection with natural processes of land use and animal husbandry, are distributed and affect not only the energy sector (and thus carbon dioxide), but also methane and nitrous oxide in particular. In addition, there are complex issues of carbon storage in the soil that have not yet been sufficiently researched. The reversibility of carbon storage is also problematic.

In addition, companies may be inclined to merely change their product portfolio in order to reduce emissions. Shifting effects then lead to a situation where the company has reduced its emissions, but overall emissions have remained the same (cf. Section 5.5.2). It is therefore still scientifically unclear how to determine whether food manufacturers and food retailers are on track to meet the Paris climate protection target. Reporting in the *Science Based Target Initiative* is already the subject of controversial scientific debate (Tilsted et al. 2023) and is even more complex for the agricultural and food sector (WBA and WBW 2016).

The inclusion of climate protection in supply chain due diligence obligations is therefore a corporate challenge for several reasons: it requires a further expansion of organisational anchoring, different know-how and new indicators and measurement methods in relation to human rights issues. In contrast to human rights and occupational health and safety targets, greenhouse gas reduction is not a question of compliance with a given standard (i.e. whether it is met or not), but a moving target, a *key performance indicator* (KPI) in business parlance, which requires continuous improvement. The system of measurement and certification is therefore different (Freidberg 2017).

At the same time, the issue is a top priority for society, so it is worth discussing whether it makes sense to include climate protection in several EU regulations (*sustainability reporting, due diligence, green*

[66] This remuneration should be critically scrutinised for various reasons. On the one hand, such remuneration can incentivise people not to set targets too high (easily achievable) and, on the other, to "adjust" the data used to determine emissions.

[67] Cf. https://sciencebasedtargets.org/ .

claims) in order to build up the necessary pressure on companies, or whether this parallel approach will lead to inconsistencies and a specific standard would be more suitable.

In addition to climate protection, the CSDDD in the current draft also addresses biodiversity targets. Here it is even more difficult to specify clear, verifiable targets (Lindenmayer et al. 2023). Climate protection and even more biodiversity are not a yes/no proposition like human rights issues, but long-term goals with continuous progress. And biodiversity is in itself an extremely complex field of local, regional and global goals in a variety of sub-fields (biodiversity, nature conservation, etc.). Here, even more than in the case of climate protection, many countries lack corresponding targets, data, harmonised indicators and monitoring concepts, so that the question arises as to how companies (but also the reviewing authorities, cf. Section 5.3) can or want to proceed here. As long as there is no mapping of areas worthy of protection and areas with high biodiversity potential in all countries from which agricultural products are purchased, it is not possible to determine whether the cultivation of the purchased products has reduced biodiversity in these areas to a problematic extent. If - as envisaged in the Kunming-Montreal Global Biodiversity Framework[68] - 30% of the respective national land and marine areas are then placed under protection in 2030, companies could be obliged not to jeopardise these areas in their supply chains.

Other biodiversity goals, however, are already tangible, e.g. the responsible use or reduction of the use and risk of pesticides (in accordance with Target 7 of the Kunming-Montreal Global Biodiversity Framework) or the renunciation of the use or promotion of the protection of endangered species in accordance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Another field could be soil protection, e.g. measures against soil degradation, soil erosion or purchasing from agricultural systems that promote soil fertility.

One problem that poses a major challenge for climate and environmental protection is food loss along the value chain, both at suppliers and customers. The responsibility for suppliers and customers set out in the CSDDD could be applied here. For example, investments in warehousing and logistics to reduce losses could be promoted in supplier development; at the customer's end, reductions could be achieved through suitable packaging or portion sizes.[69]

Overall, the question is whether the supply chain due diligence approach is suitable for contributing to the undoubtedly central objectives of climate and biodiversity protection. From the perspective of operational management, there are, as shown, arguments in favour and against. In favour is the buying power of customers, who bear product responsibility and are better placed than upstream suppliers to provide impetus in the value chain. On the other hand, there is a partial lack of the necessary clear indicators, measurement methods and monitoring systems, particularly in the agricultural sector.[70] If

[68] see https://www.cbd.int/gbf/targets/

[69] In Target 16 of the Kunming-Montreal Global Biodiversity Framework, halving the loss of life is addressed as a goal, although this has so far been formulated more in terms of consumption.

[70] If the measurement of climate and environmental damage were significantly improved, it might also be possible in the future to monetise this and make it more suitable for supply chain management from a business perspective. In recent years, a new research direction has emerged in science under the term true cost accounting, which attempts to go beyond the economic costs and also broadly record, monetise and (also) report the external effects of the agricultural and food system, i.e. its external costs and benefits, on a product-specific basis (Hendriks et al. 2021, True Cost Initiative 2022, Michalke et al. 2022; von Braun and Hendriks 2023). These "true costs" are related to individual products so that it becomes clear which external costs and, if applicable, benefits must be taken into account in addition to the costs recorded so far. In high-profile campaigns, individual retail companies in Germany and other countries have also attempted to add these costs to the end consumer

climate and biodiversity protection are to become an element of due diligence obligations, the EU would have to invest massively in these areas and support LMIC. In the area of biodiversity, it should also be specified more precisely which biodiversity targets can be influenced by companies, can be verified by governments and are based on global agreements.

Another important point for operational management is the coherence of the CSDDD with other EU regulations, not only those that directly affect the supply chain (e.g. EUDR), but also those that are different but address the same issues, such as the CSRD, which sets out requirements for sustainability reporting, and the planned Green Claims Directive, which will define advertising with environmental benefits and set out requirements for the substantiation of advertising claims.

Another difference between the LkSG and the Commission's CSDDD draft is the question of companies' liability under civil law. This point is the subject of particularly contentious debate, both generally with regard to the meaningfulness of this threat of sanctions and specifically with regard to a possible “safe harbour”-provision, according to which liability on the part of buyers would be excluded when using certain certifications - except in cases of gross negligence or intent. Liability threats have a far-reaching influence on management behaviour, as they not only affect the company as an actor, but also regularly raise questions of manager liability (cf. Section 5.2). They can thus make a decisive contribution to the implementation of due diligence obligations, but can also trigger an excessive threat of sanctions, which then reinforces undesirable "cut-and-run strategies''.

5.1.2 Certification schemes as a central implementation tool of corporate practice

5.1.2.1 Structure of certification schemes and overview

The implementation of the LkSG and the CSDDD (if adopted) poses considerable challenges for buyers, especially when it comes to companies with many, even changing suppliers and multi-level global supply chains. The question of how best to ensure compliance with standards in such supply structures has been posed to companies in the area of classic product quality management for many years and has led to the development of a new service sector: (quality) certification. Specialised auditing companies take on the supervision of compliance with standards. The certificate obtained serves as proof that is recognised by many customers. This means that customers do not have to carry out their own checks; suppliers are only checked once. Accordingly, this system is considerably more cost-effective in terms of transactions than an inspection by each individual buyer by means of so-called supplier audits. Pande (2017) lists around 500 private certification schemes worldwide in the field of sustainability, which indicates the boom in this field (Bemelmans et al. 2023).

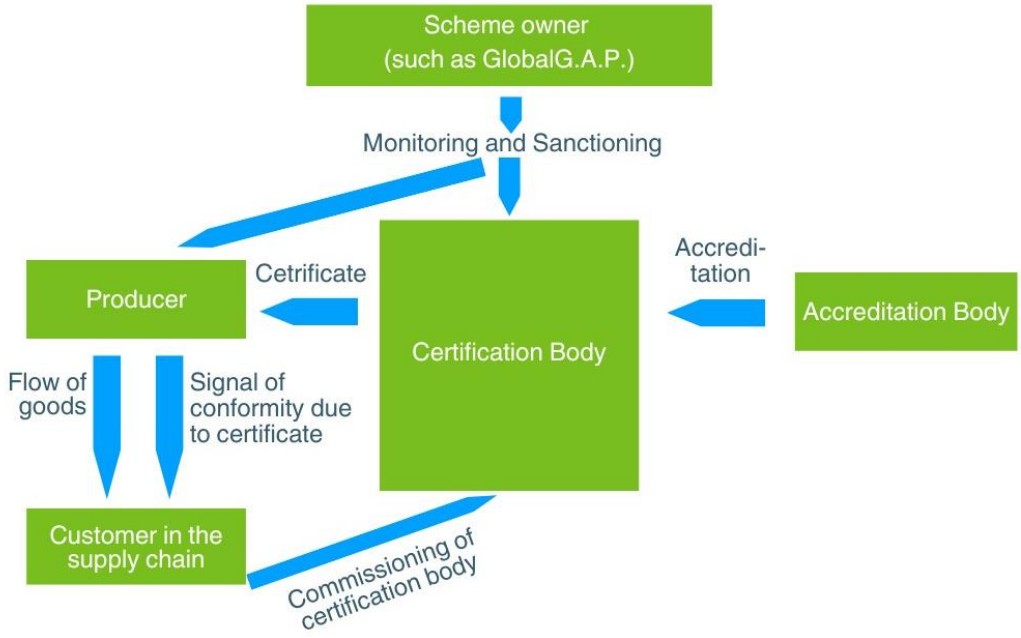
Supply chain due diligence obligations will in all likelihood further increase the - already relatively high - importance of these certification schemes in global agribusiness supply chains. Almost all major certification schemes in the agri-food industry are currently working on revising their standards in line with the LkSG. Achieving the objectives pursued by the legislation is therefore likely to depend largely on whether the certification schemes can fulfil the expectations associated with them in terms of

price and charge them to consumers. However, without sufficiently precise data collection for all key sustainability dimensions along the entire product life cycle and thus along the entire value chain, true cost accounting of this kind does not make sense. And a second building block is still missing: the subsequent monetisation of the various impacts is also still in its infancy despite many years of research. Different valuation methods are used (e.g. damage costs, avoidance costs, contingent valuation, see Arendt et al. 2020). True cost accounting is therefore currently an exciting field of research, but not yet applicable to supply chain due diligence obligations. Nor is its use for government (environmental economic) instruments such as taxes, certificate markets or subsidies to internalise external costs ("true pricing", Hendriks et al. 2021).

reducing human rights and, where applicable, environmental risks. In the area of traditional product quality, there have also been discussions in the past about the performance of the certification approach and relevant scandals (Albersmeier et al. 2010, Schulze et al. 2008). The following Section provides a brief overview of relevant certification schemes, including the voluntary industry initiatives associated with them.

Certification schemes are procedures that can be used to demonstrate compliance with certain standards in the manufacturing process through independent supervision by third parties. They therefore serve to safeguard quality standards, particularly for those (trust) characteristics that - such as compliance with human rights - can no longer be verified on the end product. These standards can be set by the state (e.g. in the case of organic food) or by a private scheme owner (a business association, stakeholder groups, etc.). Another characteristic of such schemes is that neutral external supervision (certification) is carried out by independent testing organisations (certification bodies) (Meuwissen et al. 2003). The latter must in turn be authorised by another institution, the accreditation body. Overall, the aim is for the scheme sponsor and the certification organisations to be independent of the companies to be audited in order to ensure the credibility of the overall procedure. However, the order for certification is issued by the company to be audited. Figure 5.6 provides an overview of the basic structure of a certification scheme.

Figure 5.6: Exemplary structure of a classic certification scheme



Source: Own presentation

Certification approaches are more widespread in the agricultural and food industry than in other economic sectors (UNCTAD 2023, cf. Fig. 5.8 in Section 5.5.1), so that the experience gained here is also of general interest for the LkSG. Table 5.1 provides an overview of particularly relevant certification schemes for the Supply Chain Act. [71]

[71] An overview of more than 300 sustainability standards can be found at https://www.standardsmap.org/en/identify.

Table 5.1: Overview of selected certification schemes within the scope of the LkSG

Certification scheme	Objectives/content focus	Focus in the value chain and orientation
Fairtrade	Higher producer prices, social sustainability	Agriculture, across product groups, premium B2C standard
Food Security Standard	Right to food, social sustainability	Agriculture, planned as an add-on to existing standards with a specific focus on the right to food for small farms and agricultural workers
GLOBALG.A.P.	Food safety, additional module for social sustainability	Agriculture, focus on fruit & vegetables, aquaculture, B2B standard
International Featured Standards (IFS)	Food safety	Processing industry, across product groups, B2B standard
Organic farming (EU, USDA, IFOAM, etc.)	Organic cultivation	Entire food chain, B2C standard (regulated by law)
Rainforest Alliance	Zero deforestation, nature conservation, social sustainability	Agriculture, focus on coffee, cocoa, tea, bananas, B2B and B2C standard
Roundtable of Sustainable Palm Oil (RSPO)	Zero deforestation, nature conservation, human rights	Agriculture, industry initiative, palm oil, B2B standard, mass market
Round Table on Responsible Soy Association (RTRS)	Zero deforestation, nature conservation, human rights	Agriculture, industry initiative, soya, B2B standard, mass market

Source: Own compilation

With the exception of organic farming, the sponsorship of the above-mentioned systems is in the private sector. For example, in the GLOBALG.A.P. system, which is important for the LkSG, the GLOBALG.A.P. brand belongs to FoodPLUS GmbH, based in Cologne. At its core, GLOBALG.A.P. is an institution dominated by the retail sector that deals with issues of standard development through a Scientific Advisory Board in which companies from the entire supply chain are represented.[72] Other private standards are more pluralistic and involve NGOs in the standard-setting process (e.g. Fairtrade). Scientific institutions are rarely represented, although the new Food Security Standard was developed by Welthungerhilfe and the WWF in cooperation with the Centre for Development Research (ZEF) and

[72] https://www.globalgap.org/de/who-we-are/governance/

with the support of the BMEL (cf,´. Section 5.7.1, text box 5.7).[73] None of the standards mentioned have been designed specifically for the LkSG, but extensive efforts are currently being made in many systems to develop them further with a view to implementing supply chain due diligence obligations.

In addition to the systems set up by individual stakeholders from the value chain (especially the trade sector, see GlobalG.A.P., International Featured Standard/IFS) or as foundations (e.g. UTZ) or registered associations (e.g. Fairtrade Labelling Organisations International e.V.), which generally address several product groups, there is a second group of standards that were established as industry initiatives for specific product groups. The two most important are the Roundtable on Sustainable Palm Oil (RSPO) and the Round Table on Responsible Soy Association (RTRS). These are organised as "round tables", i.e. in the case of the RSPO they bring together, for example, palm oil producers, the palm oil processing industry and traders, manufacturers of consumer goods, retailers, banks and investors as well as non-governmental organisations from the environmental and development aid sectors. RSPO and RTRS both address the problems of traditional bulk commodities and specifically the problem of deforestation of primary forests. At their core, they are also based on certification. These industry initiatives play a special role in ensuring zero deforestation supply chains.

In addition to the traditional model of segregation, there are also models in which certified and non-certified goods are no longer physically separated further down the value chain in order to avoid segregation costs (Gassler and Spiller 2018). In this so-called mass balancing, certified and non-certified raw materials can be mixed in the supply chain. With mass balancing, it is sufficient if the purchasers who use the certificate on the market have paid for a sufficient quantity of certificates for the quantities they sell. There is no guarantee that the soya product labelled with the RTRS label, for example, comes from certified cultivation. Fairtrade and Rainforest Alliance also do not require a separation of the flow of goods and the associated physical traceability for certain raw materials (cocoa, fruit juices, sugar and tea). It is argued that otherwise many small farmers would have to be completely excluded from the programme, as the costs of consistently separating goods along the entire chain are high for many suppliers and for bulk goods. However, at least the EU regulation on zero deforestation supply chains does not allow mass balancing, as precise traceability must be guaranteed, as it is a matter of due diligence obligations in the respective supply chains and ensuring that they are met (cf. Section 3.4). The existing systems will therefore probably have to be further developed at this point if they are to be useful in ensuring due diligence obligations under the LkSG.

The systems mentioned are based on the definition of a set of rules to be complied with and the on-site inspection. The latter, the so-called audit, is generally carried out by private inspection companies (certifiers). This market is organised competitively; there are some larger providers (such as TÜV and SGS), but also many medium-sized inspection organisations, some of which specialise in certain countries or certification schemes. Testing companies are generally selected by the suppliers to be tested, who also bear the costs of the entire procedure. Certification companies must themselves be approved (accredited), which in most countries is carried out by state or semi-state accreditation bodies, in Germany by the Deutsche Akkreditierungsstelle GmbH (DAkkS), a limited liability company that operates as a state-authorised institution.[74] In addition, further authorisation is required from the system owner, who also carries out more or less extensive monitoring of the testing activities.

Many economic operators believe that this structure of certification schemes and industry initiatives, which has become widely accepted in the agricultural and food industry in recent years, could be used

[73] https://foodsecuritystandard.org/about/?lang=de#what-is-fss

[74] https://www.dakks.de/de/home.html

to implement the LkSG and other due diligence regulations.[75] To this end, the standards would have to be revised in line with the LkSG in order to cover the content of the due diligence obligations. To date, it remains unclear whether and, if so, in what form the "supervision of inspectors" should be developed as part of the supply chain due diligence regulations and whether the state should possibly, if it recognises these systems to a certain extent as suitable risk management instruments, become more involved in the recognition and verification of certification schemes (cf. Section 5.1.2.4).

Textbox 5.2: Certifications and labels

Certifications can (but do not have to) be made visible to consumers at the end of the value chain by means of a label. Accordingly, a distinction must be made between *B2B* systems (*business-to-business* such as GlobalG.A.P. and IFS) and B2C systems (*business-to-consumer* such as organic farming or Rainforest Alliance with a label). B2B systems generally do not include a label, as they are aimed at commercial buyers (WBAE 2020: 611). B2B schemes primarily serve to hedge risks in the value chain, not to inform end consumers and generate higher prices. Classic examples of this are food safety certification schemes such as the International Featured Standard (IFS), as food safety is typically assumed as a basic quality by end consumers and is therefore not suitable for B2C marketing.

One interesting example is GlobalG.A.P. As long as food safety criteria were in the foreground, no label was used. Recently, however, the focus at GlobalG.A.P. has shifted towards sustainability standards, with the result that a consumer-focused label, the GGN label for responsible agriculture, has been introduced to characterise criteria such as environmental protection, animal welfare, social responsibility and supply chain transparency.[76] The UTZ label has developed in a similar direction, which was initially aimed at commercial buyers, but was then merged with the more consumer-oriented Rainforest Alliance label and merged into it.

In its expertise report on more sustainable nutrition, the WBAE explained why labels are not well suited as instruments for ensuring basic minimum social standards in the value chain (WBAE 2020: 614f.). Labels are often associated with high niche marketing costs and premium marketing strategies by companies, which result in high price premiums in Germany that limit the target group. The WBAE believes that the possibilities of using social labels to noticeably improve the social conditions of those working in the agricultural and food sector on a broader level are very limited. In addition, consumers should be guaranteed when shopping that basic minimum social standards, such as human rights, have been observed in the manufacture of products. Compliance with human rights should not be at the discretion of consumers' willingness to buy. Social labels are therefore no substitute for compliance with basic minimum social standards, as defined by the legal due diligence obligations in this area (protection perspective). There is also the equity perspective, whose objectives go beyond the minimum social standard. Companies can certainly use social labels to make social standards that go beyond the minimum standards recognisable to consumers (WBAE 2020: 288). A well-known example of this would be the Fairtrade label.

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[75] For example, the certification schemes GLOBALG.A.P. and IFS, together with the service providers GS1 and F-Trace, which specialise in data exchange in value chains, have agreed to cooperate with regard to the LkSG, see https://web.ftrace.com/kooperation-ftrace-mit-globalgap-und-ifs.

[76] https://www.globalgap.org/de/ggn-label/about-the-ggn-label/index.html

5.1.2.2 Integration of certification into the German Supply Chain Due Diligence Act

The LkSG does not explicitly mention certification schemes. However, there is currently a discussion between trade associations and NGOs as to whether the use of certificates as a sufficient due diligence instrument for the supervision of indirect suppliers should be regularly recognised by BAFA and whether such use should exempt a company from liability claims in the CSDDD yet to be adopted ("safe harbour"-provision, Leifker et al. 2022: 15, see below). However, such outsourcing of due diligence obligations is also criticised (e.g. Grabosch 2021: 50), sometimes with reference to problem cases that have not been uncovered in the past, and the classification of the use of such certificates as an effective measure within the meaning of Section 4 (2) LkSG is disputed (Glinski and Rott 2018). A group of certification institutions, primarily from the organic and Fairtrade sectors, is also sceptical about the extensive delegation of due diligence efforts to certification schemes (Forum Fairer Handel 2022).

If one follows the indications from the government side, certifications are seen more as a support instrument for compliance with corporate due diligence obligations, at least in the context of the German LkSG. "*Insofar as the seals, certificates or audits demonstrably fulfil the legal due diligence requirements, they can serve as important points of reference for the fulfilment of due diligence obligations*."[77] The Helpdesk on Business and Human Rights has created its own Standard Compass to provide support and guidance for companies. For this, industry initiatives and certifications were evaluated to determine the extent to which they are suitable for supporting companies in their due diligence obligations. However, an assessment of the implementation of the respective requirements and supervision in practice is not carried out.[78] It is also pointed out: "Legally prescribed due diligence obligations cannot be fulfilled by standards, but only supported." Companies also have access to the German government's "Seal Clarity" initiative, which checks the credibility of seals based on the principles of the ISEAL Alliance, among other things. [79]

However, these rather restrictive assessments of the usability of certifications are contrasted by experience from quality management, where proof of certification ultimately represents the core of quality management for many companies. The question therefore arises as to whether there is a need for greater state involvement in the certification market, which has so far been largely unregulated, over and above the information and transparency services mentioned above. The desire for increased regulation in this area can at least be recognised to some extent on the part of companies. According to the aforementioned survey of companies in the agricultural and food sector, 34% of the participating companies would like support in the form of government certificates and 70% would like information services (cf. Section 5.1; AFC and BVE 2022: 19). Further regulation could include, for example, the development of a procedure for the state authorisation of certification schemes and the establishment of a monitoring system for these schemes (cf. Section 5.1.2.4).

Textbox 5.3: Organic farming certification as a model for state-regulated certification schemes

The certification schemes mentioned so far for the area of due diligence obligations are of a private sector nature. However, there are also state or semi-state certification schemes in the sense of criteria defined by the legislator, namely in the supervision of organic food. The basis for this is the EU

[77] According to BAFA in the questions and answers Section on the BAFA website at https://www.bafa.de/DE/Lieferketten/Ueberblick/ueberblick_node.html#doc1469782bodyText5

[78] https://kompass.wirtschaft-entwicklung.de/standards-kompass/methodik

[79] https://www.siegelklarheit.de/glossar?term=Glaubw%C3%BCrdigkeit

regulation on organic farming, which defines the "rules of the game" for agricultural production, processing and trade. [80]

In this system, which has been in place for 30 years, the EU has given the member states different options for organising the supervision of the standards. While the Danish system, for example, completely relies on state supervision, organic certification in Germany and most other EU countries is carried out as a "public-private partnership". So-called organic inspection bodies act as private certification companies and are commissioned by the competent authorities of the federal states to carry out organic inspections in agriculture and the upstream and downstream stages of the value chain. The inspection bodies must be accredited by the Deutsche Akkreditierungsstelle GmbH (DAkkS). Final approval is then granted by the Federal Office for Agriculture and Food (BLE). The EU, BLE, DAkkS and the authorities of the federal states monitor the activities of the organic inspection bodies.

Even though a number of cases of fraud and deception have been uncovered since the introduction of EU organic inspection in 1992, the approach of state supervision of private sector certification companies is generally considered to be successful (Spiller et al. 2023). Through specific requirements, the state has the opportunity to define and monitor the training and further training of auditors, audit procedures, monitoring, supervision of auditors and other system elements.

_____Ende Kasten_____

5.1.2.3 Integration of certification into EU legislation on supply chains

In contrast to the German LkSG, certification is explicitly addressed in the EU CSDDD directive proposal. In this context, verification by independent third parties and the use of industry initiatives in accordance with Art. 7 (2) as a measure within the framework of contractual cascades[81] is possible in order to ensure that the immediate upstream suppliers in turn ensure compliance with the behavioural requirements. It is interesting to note the reference in Art. 8 (5) to the assumption of certification costs by the buyer vis-à-vis supplying SMEs: "Where compliance verification measures are carried out in relation to SMEs, the company shall bear the costs of verification by independent third parties." It is unclear how this is to be understood in relation to certification costs, e.g. because there will often be several buyers at several subsequent stages, which are not always already known when a certifier is commissioned. New payment models may have to be developed. However, it is important to note that the CSDDD obviously assigns greater importance to certification than is the case in the LkSG.

The Regulation on deforestation-free supply chains, Article 10 (Risk assessment and mitigation) states that criteria to be taken into account for the risk assessment of trading partners can also be "supplementary information on compliance with this Regulation, which may include information from certification schemes or other schemes verified by third parties, including voluntary schemes recognised by the Commission in accordance with Article 30(5) of Directive (EU) 2018/200134". What is new here is the reference to the possibility that the Commission must recognise certain certification schemes in advance so that they can take the place of the buyer's own assessment. However, the criteria on the basis of which the Commission could recognise systems are still open.

[80] From 1 January 2022, the new basic regulation Regulation (EU) 2018/848 will apply, supplemented by the implementing regulation Regulation (EU) 2020/464 and other delegated and implementing regulations.

[81] Contractual cascades along the supply chain arise when companies demand contractual assurances of compliance with due diligence obligations from their direct upstream suppliers and ask these direct upstream suppliers to demand the same from their respective upstream suppliers, and so on.

The Supply Chain Act initiative[82] is therefore calling for the development of specific quality criteria for certification schemes, e.g. with regard to greater involvement of producers, affected parties and stakeholder groups.

The example of the Conflict Minerals Regulation could serve as a guide at EU level (cf. Annex 2). The Regulation provides for a Commission list of accepted certifications or certified smelters and refiners to which companies can refer when reporting on their due diligence obligations along their supply chain. The list is to be drawn up in close cooperation with the OECD.[83] However, this list was not yet available at the time the regulation came into force, which, according to the responsible inspection body, led to problems in the reporting of corporate due diligence obligations (DEKSOR 2022)

The draft CSDDD provides for civil liability, according to which injured actors are entitled to compensation from the responsible company. In the discussion on the CSDDD, Germany and the business community are calling for participation in a certification or multi-stakeholder initiative to exclude such civil liability (Smit et al. 2023). Certifications could thus serve as a safe harbour, which would make them even more attractive to buyers. An argument in favour of the "safe harbour"-provision is that companies could reduce incalculable risks in this way, which would also enable them to deal transparently with existing risks (i.e. not expose themselves to liability through the published risk report) (Smit et al. 2023). One argument against the "safe harbour"-provision however, is that the success of the due diligence regulations would then largely depend on the effectiveness of the certification. The buyers themselves would have little incentive to (1) minimise risks locally and (2) exert pressure on the certification schemes to improve their local audits (Romppanen 2012). On the contrary: buyers would then have more of an economic interest in low-cost audits. Such a race to the bottom could possibly be observed in the implementation of REDD certification, in which the two German pioneer standards approved with the introduction in Germany, which are monitored more strictly by the BLE, have continued to lose market share to cheaper, internationally approved certification schemes where the EU monitors in less detail (European Court of Auditors 2016, Glinski 2019, BLE 2021: 21).

In addition to the protection of human rights in comparison to the LkSG, the planned CSDDD also refers to central global environmental protection standards in the areas of climate and biodiversity. The certification of these requirements differs significantly from human rights issues. Such certification schemes use a different audit approach. For example, when assessing the Paris compatibility of a company's climate protection management (Scope 3) in the food industry, the focus is on greenhouse gas emissions along the entire value chain, including agriculture and its upstream services. A management system for the reduction of greenhouse gases is certified here, i.e. the setting of operational targets, the monitoring of emissions, the organisation and supervision of implementation steps and so on. As with human rights, it is not a question of complying with a clear standard and testing it as a yes or no decision, but of testing a system that is intended to ensure continuous improvements. The exact level of improvement is the responsibility of the company, subject to certain framework conditions.

One example of this type of certification is the verification of company-related carbon footprints, which currently takes place on a voluntary basis. In 2021, more than 1,000 companies worldwide had already joined the Science Based Target Initiative (SBTi) with formulated reduction targets and were

[82] The Supply Chain Act Initiative is a civil society alliance of more than 130 organisations campaigning for a European supply chain law; https://lieferkettengesetz.de/.

[83] Delegated Regulation (EU) 2019/429; https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:32019R0429&from=de.

voluntarily certified as to whether their climate targets were in line with the Paris temperature targets (Tilsted et al. 2023). However, the certification of climate management requires significantly different knowledge and procedures in the audit than that for human rights. The approach is already completely different, as *carbon footprints* require the joint involvement of all parties along the value chain, while the certification of human rights is commissioned by the individual suppliers. The documentation and publication requirements are also completely different here (Giesekam et al. 2021). If the CSDDD were to include a commitment to cross-stage climate protection, another field of certification would therefore develop that has little overlap with human rights controls. According to current studies, the certification approaches in the *Science Based Target Initiative* are not comprehensive and not sufficiently transparent (Ruiz Manuel and Blok 2023).

Certification in the area of biodiversity is even more complex, as there is neither a clear target nor a generally accepted metric (CO_{2eq}), as is the case with climate protection, and different regional targets have to be taken into account. In addition, there is currently a lack of consensus on suitable indicators and monitoring systems (Lindenmayer et al. 2023). As a result, there are currently no generally recognised certification schemes.

5.1.2.4 Effectiveness of private certification schemes and potential for improvement

Certification ultimately represents an outsourcing of the supervision of compliance with specifications, in this case compliance with human and environmental rights, to mostly private sector auditing organisations. A key advantage is the reduction in transaction costs, as the suppliers, who usually sell to different customers, are then only checked once and not by every customer. Another advantage is that with certifiers, a third party carries out on-site supervision at all, which is otherwise sometimes not the case, e.g. with poorly functioning state institutions. However, the certifier is usually commissioned and paid by the company to be audited, which can compromise the independence of the auditor (Jahn et al. 2005, Gailhofer and Glinski 2021). As the certifiers are selected by the companies to be audited, they have an interest in choosing the cheapest possible auditor who also minimises the risk of failing the audit ("*certificate shopping*", Dranove and Jin 2010). There is also an effect that is known from auditing: audit firms earn more money from long-standing clients because they know them and a high level of client loyalty limits acquisition costs (Jahn et al. 2005). They therefore endeavour to avoid scaring off clients with a very strict audit.[84] Thus, there is a certain dependency of the inspectors on the companies to be audited. Certifiers will often act as cost minimisers with a superficial audit if this is not countered by transparent minimum standards, compliance with which is in turn independently monitored. A certification practice that is perceived as inadequate can in turn jeopardise the purpose of building trust and render the certification worthless.

If we look at the overall impact of certification schemes on sustainability targets, a topic that has recently been the subject of increased research, the results are only partially convincing. A comprehensive study on the effects of the certification schemes for sustainable palm oil (RSPO), for example, shows no positive effects in the certified companies compared to a control group, neither in ecological, social nor economic terms (Morgans et al. 2018). This also applies, for example, to the grievance mechanism, which is part of RSPO certification, but which does not automatically lead to effective remediation of risks or grievances, as empirical analyses have shown (Wielga and Harrison

[84] A widely discussed example of economic pressure on the certifier is the breach of a dam near Brumadinho in Brazil in January 2019, which had previously been classified as stable by a subsidiary of TÜV SÜD AG. Evidence suggests, among other things, that the mine operator, the mining company VALE, exerted pressure on TÜV SÜD AG to issue the stability declaration (ECCHR 2021).

2021). Based on a literature review, Meemken et al. (2021) assess the state of research on the effects of certification standards on social and environmental targets as unsatisfactory. In principle, variation between the study results is recognisable depending on the region and the target variable measured. Even in the renowned Fairtrade system, the financial benefits for smallholder farmers are small and there is no evidence of any benefits for workers on plantations (Meemken et al. 2019). Another study, which covers a large number of relevant certifications, comes to a very similar conclusion: although the studies it covers come to different results, sceptical conclusions on the effects of certifications predominate (Dietz et al. 2022). Certifications in the field of social audits are also heavily criticised by NGOs due to their low effectiveness (Human Rights Watch 2022).

Kaplinsky and Morris (2017) look at the reasons why certification standards tend to exclude smallholder farmers and cite the cost of certification and the basic skills required, which marginalised groups sometimes do not have (e.g. reading, writing, arithmetic), among others. Studies that record endpoints for the impact of certification, such as the financial situation of a smallholder household, instead of intermediate points, such as the price achieved by the smallholder household, also more frequently come to a sceptical conclusion (Dietz et al. 2022: 12). The authors explain this with possible other influencing factors on the target variables that cannot be controlled by the certifications, e.g. the question of whether a grievance mechanism is actually used (endpoint) if it has been set up (intermediate point).

A very fundamental problem with certification schemes is the selective participation of suppliers. Suppliers with lower compliance costs participate more frequently than average. The improvements remain small if the actual "problem suppliers" deliver to customers who do not require a certificate. This leads to market segmentation (cf. Section 5.5.2, Clapp 2017, Lambin et al. 2018). This is particularly true for certification schemes with a low market share, while industries such as the cocoa or coffee sector, where certification is widespread, are likely to be subject to fewer self-selection processes (Meemken et al. 2021). In this sense, due diligence regulations in Germany and other countries could improve the impact of certification on human rights issues if the systems were to become more widespread. However, as long as major importers or large buyer countries such as China do not require certification, the risk of market segmentation remains high.

Insufficient effects of certification schemes can also be due to inadequate supervision or enforcement on the ground. A study on the limits of audits and certifications in the area of human rights, which analyses four case studies, shows that there could be problem areas here (ECCHR 2021). For example, human rights violations were repeatedly reported in connection with the RSPO label for sustainable palm oil. The study criticised the following in particular: overly ambitious standards, a widespread focus on checklists, inadequate monitoring and insufficient quality assurance. The complaints mechanisms used for audits were also said to be ineffective. No remedial action has been taken, even after increased reports. Other studies point to the challenges of verifying social conditions in supply chains when companies use deception and trickery (e.g. double accounting systems, individual flagship companies, illegal shadow factories; see Roloff 2022, Egels-Zandén 2007, Changing Markets Foundation 2018).

In its special report on the EU system for the certification of sustainable biofuels, the European Court of Auditors (2016:28) states the following, among other things:

- “Under the Renewable Energy Directive, the Commission is not obliged to monitor the voluntary schemes. The Court found that the Commission did not monitor the voluntary schemes after it had recognised them (see paragraph 57). According to the Commission, its only control instrument is to withdraw the recognition of a scheme if it has evidence that the

scheme has seriously breached its certification rules and requirements. However, as the Commission does not monitor the functioning of voluntary schemes, it is very unlikely that it will be able to obtain sufficient evidence in this respect.

- Indeed, the Court's review of the work carried out by the certification bodies shows that the standards submitted by the voluntary schemes as a basis for their recognition are not always applied in practice, which highlights the need for active monitoring of the functioning of the voluntary schemes by the Commission."

Against this background, the European Court of Auditors (2016:36) recommends, among other things, that the Commission should "carry out a more comprehensive assessment of voluntary schemes" as part of future recognitions. In the opinion of the European Court of Auditors, a file audit is not sufficient for this. "The Commission should monitor the recognised voluntary schemes with immediate effect" (European Court of Auditors (2016: 38).

The following options for improvedi audits are suggested in the literature (Jahn et al. 2005, Dranove and Jin 2010, European Court of Auditors 2016, Roloff 2022, Gailhofer and Glinski 2021):

1. Minimum national requirements for the content of the certifications used to verify supply chain due diligence obligations.
2. State supervision of the work of certification schemes.
3. An extension of the liability of certifiers, which increases the expected costs of a certifier in the event of inadequate own supervision.
4. Increased reputational effects on the certification market so that, for example, customers are not indifferent to which certification companies their suppliers choose.
5. Reduced economic dependence of the certifier on the company to be audited.
6. Improved certification technology, i.e. the frequency and manner in which the tests are carried out, e.g. also through improved software or the use of artificial intelligence.

Ad 1 State minimum requirements: There is a negative correlation between the stringency and associated costs of a certification scheme on the one hand and its diffusion in the market on the other (Okereke and Stacewicz 2018). Therefore, strict and verified government requirements for certification could be important to prevent undercutting competition at the level of certification schemes. This starts with the content of the certification, the standards. However, this also applies to the frequency of audits and the type of audit, e.g. whether this is only carried out upon registration for reasons of simplification. In addition to the content of the standards to be audited, further requirements must be placed on the certification: If one compares the certification business with the auditing profession, for example, it is noticeable that training and further education requirements for auditors in the certification field have not been specified very much to date.[85] A professional code of conduct comparable to auditing, for example, which incentivises proper auditing activities through specific investments in training and a professional ethos, is lacking. Without government guidelines, this is obviously difficult to enforce on the market.

Ad 2 Government monitoring: The European Court of Auditors (2016) used the example of biomass sustainability certification (see above) to show that the EU and the Member States do not sufficiently monitor the approved certification schemes. It could be useful, for example, to "supervise the supervisors" during on-site audits by means of so-called accompanying or witness audits, in which the

[85] For example, GlobalG.A.P. requires auditors to have at least two years of higher education plus four years of relevant professional experience, e.g. on a farm, as well as several courses lasting several weeks (GLOBALG.A.P. 2017).

competence of the auditors is observed. State supervision of certification schemes could also take up complaints and link them to ad hoc audits.

Ad 3 Expansion of liability: The global market for sustainability certifications has grown considerably in recent years and is largely unregulated and non-transparent (Pande 2017). Certifiers are generally not yet liable for inadequate supervision. It is conceivable that due diligence regulations could provide for civil liability on the part of the certifier towards the end users of the certificate. A buyer in Germany may suffer damage if the certifier overlooks problems at certain suppliers.[86] For example, the buyer could be publicly criticised or excluded from public procurement if, despite certification, misconduct by a supplier is uncovered, e.g. due to complaints.

So far, however, it is unclear whether certifiers are liable for such testing deficiencies (see also the lawsuit against TÜV SÜD AG in the dam collapse in Brazil and the successful lawsuit against TÜV Rheinland AG for incorrectly certified breast implants ECCHR 2021). Civil liability of certifiers due to inadequate compliance would be a relatively far-reaching measure. However, its legal implementation is controversial, partly because the affected customers have no contractual relationship with the testing companies (Glinski and Rott 2019, Gailhofer and Glinski 2021).

Ad 4 Strengthening the reputation effects: Certification companies are not particularly well known today, neither among the general public nor in business circles. Reputation has not yet played a major role in this market. However, if the users of a certificate have no comparative information on audit quality, they cannot exert any pressure on the selection of auditors.

Dranove and Jin (2010) point out that the market for certification functions better when the "end customers", in this case the companies affected by the LkSG in Germany, have a high level of interest in correctly conducted audits and therefore build up their own competences for the assessment of various certifiers, i.e. when the market is less "naive" and reputation counts. For this reason, when implementing the LkSG, care should be taken to ensure that universal certification alone does not completely absolve buyers of responsibility. In particular, buyers with market power (e.g. global agricultural traders) could check the quality of certification companies through their own control audits and set quality incentives.

Another way of making audit quality visible would be, for example, for the scheme operator to publish "failure rates" for different auditors so that customers can recognise which auditors are taking a closer look. The literature points to considerable heterogeneity in audit ratings between different certification bodies, which can be attributed to different audit competences or audit efforts (Zheng and Bar 2021). Research also shows that in competitive audit markets with a larger number of certification providers, inspectors typically award better audit scores - another indication of problematic incentive mechanisms (Anders et al. 2007; Zheng and Bar 2021). However, the group of suppliers to be audited in the different country markets is probably relatively heterogeneous, which makes comparisons difficult.

Another option for generating and utilising reputation effects could be to create something similar to rating agencies for the area of certification, i.e. to introduce a second level of assessment. On the

[86] One important case is the fire at the Pakistani textile company Ali Enterprise in 2012, which claimed 255 lives. The company had been successfully certified for safety three weeks earlier. In March 2015, those affected sued the only known international customer, the German textile retailer KIK, at the Dortmund Regional Court, which in turn considered the Italian certification company RINA to be responsible for the fire due to the probably inadequate previous SAS 8000 audit. However, no judgement was made against KiK due to the statute of limitations. Cf. Terwindt and Saage-Maaß 2017 and Dohmen 2018.

capital market, rating agencies ensure transparency about the creditworthiness of companies (or countries). Here, they could assess the trustworthiness of certification schemes, certification companies or suppliers.

Ad 5 Reducing the certifier's economic dependency: Certifiers are paid by the companies to be audited. This constellation, which is also familiar from auditing, whereby the auditee is also the client, creates economic disincentives that are often discussed (Jahn 2005). An obligation to regularly change the certification company could help to reduce the auditors' dependence on the company to be audited, as there would then no longer be any financial incentive for a favourable audit, at least in the last audit period.

In view of the numerous points of criticism, consideration could also be given to a fundamental reorganisation of the financing system so that in future the customers, e.g. through an institution jointly commissioned by them, and no longer the companies to be audited, select the certifier. This would eliminate significant economic disincentives that lead to "*opinion shopping*" by suppliers and overly lenient audit behaviour on the part of auditors. Such a reorganisation would therefore have to be designed in such a way that flexible supply relationships continue to be possible and transaction costs remain low. For example, if a supplier has several customers, it should not have to undergo certification for each one. Buyers and stakeholders could set up a company to monitor the certification market and award contracts.[87] A scale of fees would also be conceivable in order to reduce price pressure or for the buyers to pay the inspection fees via a company to be organised. At the same time, this would address another problem area in the certification of smallholder farms, as certification costs can exclude smallholders from value chains (Kersting and Wollni 2012, Handschuh et al. 2013).

Ad 6 Improvement of certification technology: Testing technologies in certification are still underdeveloped. To date, most (and in some systems all) audits are announced, which greatly limits the possibilities of detecting fraudulent behaviour. In some systems, there are unannounced audits, e.g. in GLOBALG.A.P. for at least 10 % of all certified producers (GLOBALG.A.P. 2019: 12). In reality, however, "unannounced" at GLOBALG.A.P. means notification prior to the inspection to ensure that contact persons are available on site and that supervisors do not arrive in vain (ibid.). In addition, such an "unannounced" appointment can be cancelled once by the company to be inspected. Other systems even provide for unannounced audits only as a voluntary option (e.g. RTRS 2021) or not at all. Announced audits give suppliers the opportunity to eliminate some of the violations that they themselves are aware of, namely those that can be remedied or concealed in the short term. In the case of human rights-related due diligence obligations, for example, children could not be brought along on the day of the supervision or employees could be instructed beforehand on what answers they should give regarding their working hours or remuneration. Announced supervision is viewed critically in the literature (Padilla Bravo et al. 2013).

Another important point is the intensity of inspections: studies indicate, for example, that "window dressing" can occur on farms before the audits, but that the improvements are reversed after the audit (Mengistie et al. 2017: 809: "once an audit is completed, little is done until the next audit, and this confines certification to a one or two-day event per annum"). Most certification schemes provide for an annual audit, although in many cases a full audit is only carried out every five years. In the smallholder sector, group certification dominates for cost reasons, with only random audits of individual farms within a producer group. Ansah et al. (2020) state that in their sample, only half to a

[87] In a controlled experiment, Duflo et al. (2013) found that audits would then be more truthful and that fundamentally reformed incentive systems for external auditors would improve their reporting.

quarter of the cocoa farmers in three certification schemes were ever audited, the others were visited by neither internal nor external auditors. Such a low inspection intensity raises questions.

A related issue to the previous points is the focus of supervision on the examination of documents and processes using checklists. Especially when auditors are not well trained and have little interest in detecting errors, supervision focussed on the existence of written documents dominates (Albersmeier et al. 2009). Instead of concentrating on major problems and risks, formalised management systems are audited. In contrast, the literature calls for a stronger orientation of audits towards risk characteristics - up to and including investigative audits, i.e. the targeted search for e.g. major human rights violations, extensive deforestation of rainforest, etc. (Albersmeier et al. 2009).

One approach to improving certification could also lie in the greater use of result indicators. Most certification schemes today focus on management systems and documentation, not on ecological targets that would be systematically collected and compared between companies (Tscharntke et al. 2015, Meemken et al. 2021). However, a focus on results quickly reaches its limits. For example, there is often no clear connection between a measured environmental problem and the actions of an individual farm. Depending on the local conditions, environmental problems can be the result of the economic activities of many farmers and also non-agricultural actors or, in some cases, can be traced back many years, as ecological effects often persist over long periods of time or only become visible with a delay. This can create obstacles to attributing an unsatisfactory environmental status to individual actors with certainty and certainty in court at justifiable costs (see e.g. WBAE 2019: Section 3.4). The same applies to social indicators in many human rights audits, which may focus too much on system indicators and too little on material metrics (such as the level of wages) (Terwindt and Saage-Maaß 2017). Analyses of social audits to ensure compliance with human rights indicate that these companies have conspicuous deficits in ensuring employee rights to unionise, possibly because these measures are particularly underestimated by the management (Anner 2012). The European Center for Constitutional and Human Rights (a human rights organisation) therefore proposes interviewing workers during on-site inspections and involving trade union members more closely in the inspection procedures (Terwindt and Saage-Maaß 2017). This approach requires adequate protection against repression. Improved inspection technologies, including the increased use of whistleblowing and digital technologies (e.g. digital working time recording, AI-supported analysis of satellite images for the supervision of deforestation) (cf. Section 5.3.2), could also improve the effectiveness and efficiency of certification for certain problem areas. Despite the limitations described above, research and development of ecological outcome indicators that take into account regional conditions, can be attributed to individual actors and can be determined at reasonable cost should continue to be pursued.

5.1.3 Conclusion

Section 5.1 analyses the business challenges of supply chain due diligence obligations. The UN Guiding Principles on Business and Human Rights and ILO core labour standards have long assigned companies a responsibility to comply with minimum standards in the area of labour and environmental protection beyond their own business operations. The various new due diligence regulations outlined in Section 3 now ensure that these requirements are monitored by the state, which puts the issue at the centre of management attention.

The structural and procedural organisational elements of risk management are familiar to large companies in particular, but also to a considerable proportion of larger SMEs from comparable processes such as quality management. The direct costs of supply chain management are

comparatively manageable. The indirect costs implied by the LkSG are much more difficult to estimate if, for example, certain trading partners are categorised as too risky by the companies and other suppliers are therefore sought. Costs will also be incurred by upstream suppliers. These costs, if they can be passed on in the value chain, will increase end consumer prices in Germany. If they cannot be passed on, they will reduce the competitiveness of companies in markets where they compete with companies that are not subject to such due diligence obligations. How high the direct and indirect costs are and how relevant the resulting potential competitive disadvantages are depends on many factors and can therefore hardly be estimated in general terms.

The higher direct and, in particular, indirect costs of complying with due diligence obligations must be set against possible economic benefits, in particular through more stable value chains, if there is better supplier development and buyers' interest in long-term supply relationships grows, as well as through the reduction of reputational risks.

A comparison of the LkSG and the proposed CSDDD reveals the following differences:

- The CSDDD will probably also apply to significantly smaller companies than the LkSG. In line with the envisaged paradigm shift (cf. Section 2) and to avoid circumventions (e.g. company splits), it seems sensible for medium-sized companies to also take responsibility for their suppliers. However, the differences in company size should be sufficiently taken into account in the implementation requirements and the speed of implementation.
- In contrast to the LkSG, the draft CSDDD also includes indirect upstream suppliers and customers. This seems sensible in order to avoid evasive behaviour, e.g. by using companies in non-EU countries as intermediaries.
- The CSDDD draft also extends the due diligence obligations to the downstream part of the supply chain, on which comparatively little research has been carried out to date. How such approaches to product stewardship can be organised in concrete terms is still somewhat unclear at present.
- In the draft CSDDD, environmental risks are included more broadly than in the LkSG and specifically for comprehensive but less operationally concretised goals such as climate and biodiversity protection. For example, larger companies with more than 500 employees and annual net sales of more than 150 million euros must explain how their business model and strategies are compatible with the goals of the Paris Climate Agreement; according to the CSDDD proposal, the degree of target achievement must be duly taken into account in the variable remuneration of the management. The buyer power of customers, who bear product responsibility and are better placed than upstream suppliers to provide impetus in the value chain, speaks in favour of such an extension. One argument against this is that the necessary clear indicators, measurement methods and monitoring systems are sometimes lacking, particularly in the agricultural sector. If climate and biodiversity protection are to become verifiable elements of due diligence obligations, the targets would need to be further specified.
- In contrast to the LkSG, the CSDDD draft has so far provided for the civil liability of companies. Liability threats have a far-reaching influence on management behaviour, as they can also lead to manager liability. They can thus contribute to the implementation of due diligence obligations, but can also cause suppliers to be changed instead of attempting to develop suppliers.

Previous experience in related areas such as quality and environmental management suggests that certification schemes could play a prominent role in the implementation of supply chain management. According to the studies available, however, the impact of certification schemes on various sustainability goals has so far been rather limited. There is selective participation by suppliers who are

already better positioned, and the focus on formal procedures does not tend to lead to a continuous improvement process (Goerzen et al. 2021).

The challenges of certifying human rights due diligence obligations are particularly high because, unlike other due diligence obligations, there are no analytical methods (such as DNA sequencing to identify the origin of wood) and technological innovations (e.g. satellite data to identify deforestation) for their supervision (cf. Section 5.3.2). The most fundamental criticism of certification schemes is the market division effect that can occur if not all buyers demand certification. There is then a high probability of a selection of suppliers into those with high standards and those with deficits, who (can) continue to supply to buyers without certification requirements.

Irrespective of this fundamental issue, the question arises as to what status certification schemes should be given in the LkSG and CSDDD. The key questions are whether they should be recognised as a central measure for the fulfilment of due diligence obligations and whether purchasing from certified suppliers should protect the buyer from sanctions ("safe harbour"-provision). The legislator in Germany has not taken a position on this and the draft CSDDD remains vague. Germany has advocated such a "safe harbour"-provision as part of the negotiations on the CSDDD.

The current state of research indicates that certification schemes remain limited in their impact and deficits in the control process reduce the reliability of audits. From the WBAE's perspective, (transaction-) cost-efficient certification schemes could play a key role in implementation. However, the existing certification schemes have major weaknesses. However, recognition as an adequate due diligence instrument for indirect suppliers requires an improvement in the effectiveness and reliability of the systems. The potential function of certification in demonstrating the fulfilment of due diligence obligations depends largely on the quality of the certification standards and procedures (Gailhofer and Glinski 2021). Various approaches as to how these can be improved are under discussion:

- A first option could be stronger state regulation, e.g. state authorisation of certification schemes, supervision of the work of the schemes and, in particular, "supervision of the inspectors". The control system for organic farming could serve as a model here. The reliability of the certification (independence and quality of the inspection procedure, skills of the inspectors, etc.) would have to be ensured by state regulations. The establishment of such a state level for the control of private sector certification represents a considerable challenge, as this goes far beyond the accreditation that is customary today.
- A second possibility would be to change the incentive structures in such a way that buyers develop a stronger self-interest in effective certification. As the buyers today institutionally support most certification schemes or at least have a significant say in them, they have a great deal of influence on their development. For example, the state could design a "safe harbour"-provision dependent on proof of functioning certification structures.
- Both approaches could also be combined. In addition to state "supervision of the supervisors", it would then be pressure from buyers that incentivises improvements to certification schemes (Romppanen 2012). For example, it could make sense for buyers to remain responsible for the implementation of due diligence obligations and not to be able to delegate these entirely to the certifiers by means of a "safe harbour"-provision (OECD 2022b), but for participation to enable significant facilitation of evidence (e.g. exceptions to a possible reversal of the burden of proof).

If the legislator wants to recognise certifications as a procedure for the fulfilment of due diligence obligations in whole or in part - for which there are a number of reasons - then this requires clear legal

requirements for the certification schemes, which would also have to be reviewed on an ongoing basis (cf. Section 5.3).

5.2 Legal perspective: How do due diligence regulations fit into the German and European legal system?

5.2.1 Respect for human rights – a corporate responsibility?

The previous Sections have indicated the particular challenges of respecting human rights in the global production chains of the agricultural and food industry. This Section now discusses in more detail and from a legal perspective who (state or company) is actually responsible for respecting human rights beyond their own company and to what extent supply chain legislation fits into the German and European legal system.

In the legal sense, human rights initially only bind the states that have signed the human rights agreements. Human rights guarantees therefore only have a direct effect between states as duty bearers and individuals as bearers of human rights. A person can therefore only invoke a human rights guarantee if they are the victim of an act or omission by a *state.* At the same time, neither private individuals nor private companies are directly obliged to respect human rights.

However, drawing the conclusion from this that human rights play no role in the legal relationships between companies and the persons affected by the companies' actions falls far short of the mark. Private companies can be obliged to respect human rights a) on the one hand via the so-called indirect third-party effect of human rights, b) on the other hand via the duty to protect.

The indirect third-party effect of human rights means that although fundamental rights do not apply directly to legal relationships under private law, they can be of significance there by influencing private law via the undefined legal concepts and general clauses. The indirect third-party effect always occurs when the application of human rights does not take place directly between citizens, but every decision to be made must be considered in the light of human rights. This indirect third-party effect of human rights is a logical consequence of the fact that all state powers are bound by human rights. The judgement of a court is an expression of state action. Therefore, when courts review legal relationships under private law between a company and a person, they must not disregard human rights when reaching their judgement. All state institutions such as courts or administrative authorities must therefore take human rights into account when making their judgement: They must examine whether the defendant company may have disregarded human rights.

Insofar as man-made environmental pollution cannot be attributed to the state, the doctrine developed by the Federal Constitutional Court (BVerfG) on the duty to protect fundamental rights is applied under certain conditions. According to this doctrine, the state is not only prohibited from interfering with the legal interests protected by fundamental rights, but also has a duty to actively protect these legal interests. The BVerfG initially developed duties to protect fundamental rights in relation to the protection of unborn life, but subsequently extended them to other legal interests and areas of risk. Accordingly, the state may not stand idly by if its citizens suffer damage to their rights to life, health or property as a result of environmental pollution by private individuals. Assuming known causal processes, the relevant risk threshold is therefore measured according to the factors of the extent of damage and the probability of damage occurring. The more important the legal interest

affected, the lower the probability of damage occurring must be (je-desto formula). Of course, these requirements do not provide a solution for a large number of anthropogenic environmental impacts, the consequences of which are characterised by long-term, distance and cumulative effects. However, duties to protect only establish abstract duties to act, which are primarily addressed to the legislator. As a rule, it will not be possible to condense these obligations into specific duties to act. Rather, the legislator must weigh up the need for protection against other legal interests (namely the fundamental rights of the addressees of possible protective interventions) and can choose very different solutions.

Respect for human rights is therefore also a corporate task from a legal perspective.

5.2.2 Liability issues

5.2.2.1 Who is liable for damage abroad under the LkSG?

Liability issues arise both with regard to the German company's own actions abroad and for the actions of companies in the supply chain abroad. Human rights only have an indirect third-party effect where the legislator has granted the courts and administrative authorities room for manoeuvre, i.e. in the case of undefined legal terms and general clauses. How effectively does the indirect third-party effect bind companies? So far, there is no binding effect. This is due to the fact that the legislator has provided the courts with a fixed framework that makes it almost impossible to attribute human rights violations via undefined legal terms or general clauses. This is because, as a rule, German companies cannot be held liable for foreign cases of damage caused by other companies - including subsidiaries - according to the clear legal situation to date. German law only applies to foreign claims in exceptional cases. As there is usually no contractual relationship between the German company and the injured party, the applicable law is based on the Rome II Regulation if the case takes place within the EU.

According to Art. 4 I Rome II Regulation, the law of the country in which the damage occurred (place of success) is primarily applicable. This provision serves to protect the victim, as the injured party should be able to rely on the validity of his domestic legal system and not be confronted with a foreign legal system in addition to the consequences of the offence. It must be emphasised that most legal systems in the world have a tort law that awards damages to injured parties in the event of an unlawful violation of their rights. Injured parties are therefore not defenceless because they cannot make use of the German legal system.

Even if German law were to apply in exceptional cases (both within and outside the EU), a claim for damage caused by a third party would not be possible under German liability law. This is because under German law, only a person who intentionally or negligently breaches a contractual obligation (Sections 280 et seq. BGB) or causes damage through a tortious act (Sections 823 et seq. BGB) is liable to pay compensation. Exceptionally, a party other than the actual tortfeasor can also be held liable for damages as an agent or vicarious agent via Section 278 and Section 831 BGB. However, within a supply chain, a supplier will generally not be regarded as a vicarious agent of the manufacturer or retailer. This fault-based liability forms the basis of German liability law and prevents liability for damage over which a person or - as is relevant in the context of this expertise report - a company had no influence.

The fault of subsidiaries cannot be attributed to the parent company under company law without further ado. Legal entities - here: Parent company and subsidiary - are generally treated as third parties with regard to their internal and external rights and obligations (principle of separation). Group-wide recourse liability is therefore only possible in very exceptional cases.

This legal judgement is not changed by the LkSG. The LkSG has a special feature compared to other regulations that protect fundamental rights. It does not contain a separate civil liability provision - even

for domestic cases. In this respect, it also differs from the EU Commission's draft directive on the CSDDD (cf. Section 5.2.2.3). If the governing body of a company that is bound by the Due Diligence Act (due to the number of employees) violates the LkSG, it is not liable for damages to a greater extent than it was previously. The same applies to the (external) liability of the company. The company should also not be more liable than it was under the previous law. Instead, the law imposes an audit and reporting obligation on the company. Violations of this are administrative offences that can be punished with fines and other sanctions such as exclusion from public procurement procedures (cf. Section 5.3).

5.2.2.2 Duty to protect abroad too?

In addition, as described under 5.2.1, companies can be obligated via the duty to protect function: The second category of human rights impact vis-à-vis companies includes so-called duties to protect. According to this, the state is obliged to defend against attacks by a private individual or a company against other persons in order to protect the human rights guarantees of the victims. How the state realises this lies within its broad scope of action, which ranges from notices and recommendations to regulatory or even criminal sanctions. This room for manoeuvre is limited by the principle of proportionality. The state may not protect less than is absolutely necessary through its measures (or through its omission) (prohibition of under-proportionality), but neither may its protective measures go beyond the objective (prohibition of over-proportionality). This is to be measured by whether the measure (or omission) of the state is suitable and necessary to achieve the protection objective. As a rule, the (German and European) legislator approaches the limit - initially of the prohibition of going too far.

According to the case law of the Federal Constitutional Court and the Federal Administrative Court, fundamental rights are applicable abroad without restriction as rights of defence. Insofar as German authorities restrict the fundamental rights of German or foreign persons abroad, they are bound by German fundamental rights. A more differentiated answer must be given to the question of whether the fundamental rights also have an effect abroad as duties to protect. The BVerwG accepts this in principle. In its climate protection judgement, the Federal Constitutional Court at least considered the validity of the duties to protect abroad to be conceivable. Based on Article 1 (3) of the Basic Law, such a duty to protect should exist if there is a sufficient connection to the German state. In the climate protection judgement, the BVerfG considered a breach of the duty to protect because some of the emissions contributing to climate change also originated from German territory. In the case of supply chains, the link to the German state is more difficult to justify, as the human rights and environmental violations are primarily caused by foreign suppliers based abroad. A causal attribution and thus a link is only conceivable through the argument that German companies place orders with suppliers even though they are aware, or at least should be aware, of the labour conditions or environmental damage that violate human rights there. The state has considerable room for manoeuvre with regard to the content of protection obligations. In principle, it can decide for itself how it fulfils its obligations, as long as the measures taken are not obviously unsuitable or completely inadequate or fall significantly short of the protection goal. In the case of supply chains, the state fulfils its duty to protect if it legally imposes a duty of care and monitoring on the company. Further obligations to act, in particular towards foreign companies, cannot be derived from the duty to protect, as these are not permitted under international law. If necessary, an obligation can be inferred to support the supplier countries in implementing labour and environmental standards, insofar as they are willing to do so.

The (European) legislator initially worked with recommendations. As early as 2016, for example, it stipulated in Directive 2014/95/EU (CSR Directive) that safe and human rights-compliant working

conditions are mandatory for foreign subsidiaries and suppliers of the (European) economy. The CSR Directive is an expression of a pan-European objective to promote a sustainable corporate policy. In Germany, this directive has been implemented in Sections 289b, 289c and Sections 315b, 315c of the German Commercial Code (HGB). Since then, all corporations (or groups) with more than 500 employees must issue a "non-financial" declaration. This must provide public information on group-wide measures for environmental protection, employee protection, social commitment, respect for human rights and the fight against corruption and bribery. This has created an exclusively social and societal pressure to act, but not a legal one. In some cases, companies have nevertheless paid out millions in compensation to victims in cases of damage - mainly for "image reasons" and often without any legal requirement to do so.

With the LkSG, the German legislator has now increased the intensity of regulation in Sections 23 and 24 of the LkSG by introducing a penalty payment and provisions on fines.

5.2.2.3 The question of liability in the European CSDDD draft

In the EU Commission's draft directive on corporate due diligence obligations (CSDDD), the European legislator takes up sanction regulations and goes one step further than the LkSG by establishing for the first time in Art. 22 a civil liability for companies for damages in the event of breaches of due diligence obligations. Specifically, the companies covered by the scope of the proposed Directive (see Art. 2 and 3a of the proposed Directive) are liable if the due diligence obligations set out in Art. 7 and 8 of the proposed Directive are breached and damage occurs as a result. In order to limit excessive liability, a breach of due diligence - which triggers liability - can only be assumed if a company fails to take reasonable measures to fulfil its corporate due diligence. The customer is therefore not liable for any damage caused by its suppliers, e.g. to their employees, but for neglecting its obligation of effort. If the company can show that it has taken action on the basis of information, e.g. through targeted support of its supplier, through investments or through its own supplier audits, etc. (Art. 22 para. 2), then it has initially fulfilled its obligation of effort.

A further limitation of liability is that companies are only liable for foreseeable damage. According to Art. 22 para. 2, no liability is envisaged for indirect suppliers if companies obtain a contractual assurance from their direct suppliers in which compliance with the due diligence obligations and, if necessary, the introduction of a prevention plan is assured and it is further agreed that the direct supplier will in turn demand the same from its direct suppliers, thus creating a contractual cascade.[88] In addition, the buyer must implement suitable measures to verify compliance; in particular, it may use certification schemes or industry initiatives for this purpose (Art. 7, para. 4).[89] The exclusion of liability does not apply if it would have been unreasonable to expect the measures to take effect in the individual case. The Commission's proposal is therefore a limited “safe harbour”-provision, although it does not specify what requirements should be placed on the certifications.

However, the liability of corporate bodies is increased, as the obligations to be fulfilled by the company management with regard to proper management are also expanded. For example, the draft requires the managing director and the board of directors to consider the short, medium and long-term consequences of their decisions on the sustainability of their business activities, including human rights, climate change and environmental impacts. The basis for liability claims can be found in the

[88] The Council's negotiating stance is that liability for indirect suppliers should be excluded in principle.

[89] Art. 7 para. 4, the draft CSDDD stipulates that the costs of verification/certification for SMEs are to be borne by the buyers.

general national regulations on directors' and officers' liability, in Germany in particular Section 93 AktG and Section 43 GmbHG.

Civil liability is mandatory under the proposed directive. If the draft is adopted, the German legislator must include this liability in civil law and ensure in its regulations on private international law that the basis for the liability claim also applies. The German legislator has room for manoeuvre when it comes to the procedurally decisive question of who bears the burden of proof that a corporate measure was not appropriate in an individual case and therefore constitutes a breach of the duty of care giving rise to liability. The German legislator can either leave it at the usual distribution of the burden of proof in German civil proceedings, according to which the burden of proof lies with the plaintiff, or decide in favour of a reversal of the burden of proof. In principle, the duty to protect will not require the legislator to reverse the burden of proof. However, it could be argued here that with the usual distribution of the burden of proof, it will hardly be possible for the plaintiff to fulfil this burden of proof. This is because the plaintiff will have no positive knowledge of the arrangements and processes that a company has with its suppliers. The plaintiff has no insight into the company's internal system and the organisation of business relationships with suppliers; he does not know what efforts the company has made to implement the due diligence obligations. As a result, the implementation of the liability claim could be practically cancelled out. This is not prevented by the fact that the injured party can report the breach of due diligence to the supervisory authority, which is obliged to investigate the report. This is because, on the one hand, the authority may wrongly conclude that there has been no breach of the duty of care. Secondly, it does not necessarily follow from the authority's duty to investigate that the injured party has a right to inspect the files. In this respect, the legislator would not fulfil its duty to protect, as it offers too little protection. The legislator is more likely to fulfil this duty to protect if, in the event of a complaint, it obliges the company to demonstrably document which specific measures it has taken in detail by reversing the burden of proof. This would also be reasonable for the company, as such a documentation obligation already exists vis-à-vis the supervisory authority and must be established as part of the risk management instruments (cf. Section 5.1). Against this background, a reversal of the burden of proof in the Member State organisation of civil liability in accordance with the European draft would therefore appear to make sense.

The CSDDD leaves open the question of international jurisdiction if a non-EU company covered by the scope of the draft directive causes damage. In this case, it must be examined whether the court of a member state has jurisdiction for the action for damages at all. If a competent court of a non-EU state is seized, the liability regulations (issued in implementation of the final directive) only apply if the conflict of laws of the forum state declares the law of a member state to be applicable.

5.2.3 Environmental due diligence obligations: What is legally possible in the CSDDD?

Compared to human rights due diligence obligations, environment-related due diligence obligations have two special features which must be taken into account with regard to the further development of due diligence obligations. Firstly, it should be emphasised that environmental due diligence obligations are linked to precautionary measures that are rarely concretised in international agreements. As a rule, the company's due diligence obligations are only concretised through the state's implementation of the target agreement under international law. Whether and how it is implemented is at the discretion of each state. Therefore, there are already methodological limits to the ideas of developing supply chain approaches into a key to enforcing numerous international environmental agreements. For example, the state of the supplier company may have implemented its precautionary obligations differently from the recipient state. In this case, the implementation in the receiving state cannot be taken as a yardstick for the concretisation of the obligation under international law.

In addition, the enforcement of environmental due diligence obligations has the special feature in liability law that, in view of the continuing burden of proof, the injured party must prove that the specific damage is causally linked to the actions of the company or supplier. This significantly reduces the number of claims where damage has multiple environmental causes or can be caused by a large number of companies. This is of particular importance in agriculture as many of the environmental impacts caused or contributed to by agriculture (such as nitrate pollution of groundwater) cannot (a) be attributed to a single polluter (farm) due to spatial diffusion and (b) have arisen from production methods from several years ago and cannot then be blamed on today's producers.

5.2.4 Conclusion

Human rights initially only legally bind the states that have signed the human rights treaties. However, private companies can be obliged to respect human rights via the so-called indirect third-party effect of human rights and via the duty to protect. However, according to the clear legal situation to date, German companies cannot generally be held liable for foreign cases of damage caused by other companies (their suppliers) or for the actions of their subsidiaries. The LkSG does not change this situation. Rather, the LkSG implements a duty of endeavour and documentation.

Violations are subject to sanctions (fines, exclusion from public procurement procedures). However, the German legislator has rejected civil liability for damages incurred. The steering effect of the LkSG is limited by the lack of a liability regulation. It can be assumed that companies will nevertheless take their due diligence obligations seriously, both because of the amount of the fines and because of the social discrediting of the company as a result of a governmental finding of non-compliance with human rights and environmental standards.

The draft CSDDD, on the other hand, provides for civil liability with a claim for damages (Section 22). This liability arises if there is a breach of due diligence obligations and damage is caused as a result. However, a breach of due diligence that triggers liability can only be assumed if a company has not taken reasonable measures to fulfil its corporate duty of care and if the damage was foreseeable. There is no liability for indirect suppliers if companies have a contractual assurance from their direct suppliers in which compliance with due diligence obligations is assured and, if necessary, a prevention plan exists and a further assurance is given that the direct supplier will in turn demand the same from its direct suppliers, thus creating a contractual cascade. An additional condition is further verification measures, in particular certification schemes or industry initiatives.

In addition, compared to the LkSG, the draft CSDDD extends the scope of application of corporate due diligence obligations beyond labour and human rights protection to key environmental issues such as climate and biodiversity protection. Questions of fault and causality are even more difficult to answer here. According to the WBAE, the weak point in both administrative offence law and civil liability is the need for the plaintiff to prove fault. Individual offenders will regularly not be in a position to provide evidence to European authorities. Therefore, the authorities of the trading partners and trade unions and civil society organisations will play a central role in gathering evidence, unless a reversal of the burden of proof is provided for in the further legislative process. The German legislator could do the latter when implementing the CSDDD Directive.

Furthermore, the CSDDD draft provides for the (limited) exclusion of buyer liability in the event of contractual assurances along the value chain, combined with the use of certification schemes or industry initiatives.

5.3 Administrative perspective: State implementation of due diligence regulations

Key requirements for good governance are (Kühn 2021):

- Regulations should actually have the intended (steering) effect,
- they should avoid unintended (side) effects as far as possible and
- they should be practicable, i.e. they can be understood and efficiently implemented by the target group.

Section 5.3 deals with the latter point against the background of research on good governance. Corporate due diligence obligations arising from the various regulations lead to greater interaction between companies and the authorities. Effective and efficient implementation of the due diligence obligations imposed also depends on the design of government support and control measures. A functioning institutional organisation of the entire process of implementation and supervision at the interface between companies and authorities therefore plays a crucial role. Against this background, the following topics are examined in more detail in this Section: Implementation (determination of the competent authority, government support measures for companies), supervision, possibilities for innovative technological aids, incentivisation and the review and monitoring of laws.

5.3.1 Implementation

In addition to the companies that have to implement the due diligence regulations, the state is also assigned an important role in their application, as it not only lays down the rules for implementation, but also offers support services and is ultimately responsible for supervision. Against the backdrop of what is perceived as an increasing bureaucratic burden for many companies, which means that a significant proportion of companies do not feel able to fully implement all legal requirements (Röhl 2020: 18), the implementation of laws plays an important role.

5.3.1.1 Competent authority

The introduction of the various new due diligence regulations opens up a field for official action for which there was no competent authority due to the novelty of the tasks. In such a case, the legislator can either create a new federal authority or distribute the tasks of supervision, enforcement and sanctioning to one or more existing institutions.

In the case of due diligence regulations, Germany has opted for the latter option, stipulating those different federal authorities are responsible depending on the regulation:

Table 5.2: Responsible German authorities for different due diligence regulations or sustainability regulations in international supply chains

Regulation	Authority
EU Renewable Energy Directive (RED)	Federal Office for Agriculture and Food (BLE)
EU Timber Regulation (EUTR)	Federal Office for Agriculture and Food (BLE)
EU regulation on illegal, unregulated and unreported (IUU) fishing	Federal Office for Agriculture and Food (BLE)
EU Conflict Minerals Regulation	German Monitoring Centre for EU Due Diligence Obligations in Raw Materials Supply Chains (DEKSOR) at the Federal Institute for Geosciences and Natural Resources (BGR)

German LkSG (perspective CSDDD)	Federal Office of Economics and Export Controls (BAFA)
EU regulation on deforestation-free supply chains (EUDR)	Federal Office for Agriculture and Food (BLE) + Customs
European Commission proposal for a regulation on goods from forced labour	Intended: Customs in co-operation with responsible authority of the member state

Responsibility for supervision, enforcement and sanctioning of due diligence obligations under the LkSG lies with the BAFA, which is a federal authority within the portfolio of the BMWK. To date, the BAFA's tasks have focussed on export controls (including decisions on export applications for military equipment or the implementation of embargo decisions), the implementation of import regulations, various tasks in the area of "energy" such as the promotion of energy efficiency measures, the promotion of business and SMEs, but also the supervision of auditors (Auditor Oversight Office). BAFA established a new department to implement the LkSG and has budgeted for around 100 new posts to fulfil this new task.[90]

The BLE is responsible for verifying compliance with the sectoral due diligence obligations under the EU Regulation on zero deforestation supply chains, as it is for the sustainability certification of biofuels under the RED, the EU Timber Regulation and the EU Regulation on illegal, unregulated and unreported fishing (cf. Table 5.2). As a legally independent institution, the BLE is assigned to the BMEL and fulfils a wide range of tasks, particularly in the area of agriculture.[91] For example, it is a market regulation body in the area of EU agricultural market and foreign trade regulations, an authorisation body for cross-border trade in goods and services, an enforcement authority for the EU directive prohibiting unfair trading practices and has supervision and certification tasks in the area of renewable raw materials. With regard to the BLE's other areas of responsibility in the field of due diligence obligations and certification, the EUDR can build on existing expertise.

The Federal Institute for Geosciences and Natural Resources (BGR), a higher technical and scientific federal authority within the remit of the BMWK, is responsible for further sectoral due diligence obligations relating to conflict minerals (cf. Annex 2 for more information on the Conflict Minerals Ordinance). Its areas of responsibility include energy resources and mineral raw materials, groundwater and soil and the use of the deep geological subsurface. The German Monitoring Centre for EU Due Diligence Obligations in Raw Materials Supply Chains (DESKOR) was set up as part of the BGR to implement the EU Regulation.[92]

The possible ban on goods from forced labour is currently (as of October 2023) still being negotiated in the EU. According to the European Commission's proposed regulation, a competent authority of the respective member states is also envisaged for implementation in addition to customs.[93] As this regulation is horizontal and therefore affects many different sectors in the future, a link to the BAFA would be conceivable.

The list of different competent authorities immediately points to a potential problem. Since companies in the agricultural and food sector can be affected by several due diligence approaches (LkSG, EUDR,

[90] https://www.bafa.de/SharedDocs/Pressemitteilungen/DE/Bundesamt/2022_16_borna.html?nn=1469182

[91] The BLE is also responsible for tasks in the areas of food and nutrition, rural development, fisheries, climate and energy and services; https://www.ble.de/DE/BLE/Aufgaben/aufgaben_node.html.

[92] https://www.bgr.bund.de/DE/Gemeinsames/UeberUns/DEKSOR/DEKSOR_node.html

[93] https://single-market-economy.ec.europa.eu/system/files/2022-09/COM-2022-453_en.pdf

Regulation proposal on forced labour, RED), there is a high risk that they will be confronted with different requirements during implementation if the authorities have not coordinated their approaches. It is easier for companies to implement the various due diligence obligations if there are uniform information requirements and data collection provisions (online input mask, etc.) and if a joint or coordinated supervision and uniform recognition of certifications exist.

These requirements could be implemented more easily by a standardised (new) federal authority, because it is easier to coordinate the implementation requirements within the authorities than to exchange information between different authorities, which are also assigned to different ministries.

Nevertheless, Germany has decided in favour of allocating the responsibility to several federal authorities - possibly for pragmatic reasons, e.g. due to faster implementation and possible path dependencies, as the BLE is already responsible for the EUTR and RED certifications. This certainly makes it easier to set up the responsible bodies, but according to all experience from administrative management, it makes it more difficult to coordinate activities and make a coordinated approach to companies that are affected by several of the regulations. This makes targeted coordination and the exchange of experience between the authorities all the more important.

However, as far as the Scientific Advisory Board is aware from discussions, such coordination between the various federal authorities has hardly taken place to date, but is only being considered for the future. However, it would be important that there is good coordination between the competent authorities and that standardised requirements are applied at least within the individual authorities.

In addition to better networking, it is important to ask what expertise the various federal authorities have in the respective areas. For example, the monitoring of the LkSG requires in-depth knowledge of the respective national markets and their social conditions, as well as overarching knowledge of human rights and labour protection issues - areas that the BAFA has not dealt with in the past, as far as can be seen. If the CSDDD were to include two complex areas of environmental law, climate protection and biodiversity, the spectrum of necessary competences would be considerably broader.

It is a well-known "law of bureaucracy" that ministries and subordinate authorities are incentivised to expand their competencies and increase their staff. Administrative institutions intrinsically strive to increase their budgets and staff, as both are seen as a measure of power and influence (Niskanen 1971). Accordingly, it is hardly surprising that the various ministries responsible have each commissioned authorities in their own area of responsibility with the implementation. However, this makes it all the more important that the regulations are consistently harmonised. Today, sustainability policy is generally cross-Sectional and affects various government ministries (WBAE 2020). Consistent networking via joint working groups and projects must therefore also be ensured at the level of downstream federal authorities and requires new forms of cross-Sectional organisation. In addition, the development of expertise in this new field must be promoted.

5.3.1.2 Support measures for companies

Advisory services and information

The state or the competent authorities can support companies in implementing the due diligence regulations by providing information. This is particularly relevant for smaller companies, which generally do not have existing sustainability departments and corresponding expertise compared to large companies.

The Helpdesk on Business and Human Rights should be mentioned in this context. The Helpdesk on Business and Human Rights was set up as part of the National Action Plan for Business and Human Rights, i.e. initially independently of the due diligence regulations that have now been adopted or are being planned. Since 2017, the Helpdesk on Business and Human Rights has been part of the Agency for Business and Development, which was set up in 2016 on behalf of the Federal Ministry for Economic Cooperation and Development and is mainly supported by DEG Impulse, a subsidiary of the German Investment and Development Company (DEG). The Business and Development Agency sees itself as a "central point of contact for funding and financing opportunities in development cooperation".[94] In addition to the agricultural and food sectors, the energy sector in particular is taking advantage of this free support programme offered by the German government.[95] The Helpdesk on Business and Human Rights focuses on human rights-related due diligence obligations and has already developed extensive information and (individual) advisory services in this area, which are now specifically aimed at companies that are either directly or indirectly affected by the German LkSG as suppliers. It is also aimed at SMEs that implement human rights due diligence obligations independently of this.[96] Since the German LkSG came into force, the number of enquiries from companies to the Helpdesk has increased by around 30% compared to the previous year.

The helpdesk has now grown into an important centre of expertise which, in addition to providing initial and referral advice to individual companies, primarily advises and trains the organised economy such as chambers of commerce and associations as important multipliers. Training courses are not only held in Germany, but also, for example, in cooperation with chambers of industry and commerce, with trading partners. Through DEG Impulse's links to the various global locations, the helpdesk is often also the first point of contact for international suppliers with questions relating to the requirements of due diligence obligations, whereby the Helpdesk does not limit its advice to suppliers in partner countries of development cooperation, but also processes enquiries from China and Iran, for example. This international networking of the helpdesk is also relevant for supporting trading partners (cf. Section 5.6.3).

In addition, BMZ and GIZ support the Initiative for Sustainable Agricultural Supply Chains (INA), which sees itself as an open multi-stakeholder platform and works in particular on the topics of zero deforestation supply chains, living wages and incomes, sustainability standards and digitalisation. INA's services include support in the context of legislative measures.[97] Specifically, INA organises public information events, e.g. on the requirements of the German LkSG, develops guidelines, for example on the traceability of supply chains, organises the retail working group on living wages in the banana sector (cf. Section 5.7.2) and, together with the BMZ, a competition fund to promote corporate due diligence obligations (see below on positive incentives). [98]

In addition to the Helpdesk and the INA, the various competent federal authorities also offer support services for businesses. For example, the BAFA has already published handouts on the requirements of the LkSG (cf. Section 3.3). The BLE is also planning information materials and individual consultations

[94] https://wirtschaft-entwicklung.de/fileadmin/user_upload/Blog/Blog_2021/ZDF_2020/210216_AWE_Zahlengrafik.pdf

[95] In 2020, almost 600 requests for advice came from the agricultural and food sector, followed by almost 500 requests from the energy sector; https://wirtschaft-entwicklung.de/fileadmin/user_upload/Blog/Blog_2021/ZDF_2020/210216_AWE_Zahlengrafik.pdf..

[96] https://wirtschaft-entwicklung.de/fileadmin/user_upload/5_Wirtschaft_und_Menschenrechte/Downloads/Twopager_HelpdeskWiMR_DEU.pdf.

[97] https://www.nachhaltige-agrarlieferketten.org/fileadmin/INA/Ueber_die_Initiative/Factsheet_INA_D.pdf.

[98] https://www.nachhaltige-agrarlieferketten.org/foerderungen/due-diligence-fund

to support the fulfilment of due diligence obligations under the EUDR.[99] Since 2020, the BMEL has also organised the national stakeholder forum for deforestation-free supply chains, which is currently focusing on the national implementation of the EUDR.

The government support services offered by the various bodies (Helpdesk, INA, competent authorities, in particular BAFA and BLE) should be well coordinated so that companies receive the best information for their particular situation from the wealth of different services and information provided. As an alternative to the different contact points, it would also have been possible to assign the advisory tasks only to the relevant federal authorities. However, if the state creates a cross-Sectional advisory institution such as the helpdesk with the understandable argument that companies affected by several regulations should receive advice from a single source, then this should also be responsible for all issues related to supply chain regulations, e.g. also for the EUDR (*one face to the customer* principle, cf. text box 5.4).

In addition, government support programmes in other sectors that have been supporting the implementation of due diligence obligations for some time can serve as a model. In the area of conflict minerals, for example, there is a continuously updated platform that defines conflict and high-risk areas in detail.[100] This information can serve as a reference point for companies when analysing risks.

Textbox 5.4: "One face to the customer" principle and "complaint ownership"

The "one face to the customer" principle is a form of company organisation, particularly in the sales area, in which each customer has (only) one contact person who takes care of all their problems. Such a concentration of communication on one person, even if this person is not a specialist for a topic per se, leads to higher customer satisfaction through better support and helps to avoid loss of information.

A similar principle exists in complaint management under the term "complaint ownership". According to this principle, the first person in customer contact who learns of a complaint is responsible for recognising, recording and processing this complaint. This person therefore has "ownership" of a complaint and is responsible for finding a satisfactory solution. If the "complaint owner" does not have the technical expertise to resolve the problem, it is their task (and not that of the customer) to involve suitable departments or people within the company. However, the "complaint owner" remains responsible for the entire process of monitoring the complaint and providing feedback to the customer.

By analogy with these principles of customer-centred corporate governance, the Federal Government could bundle the management of enquiries and requests for support via the various supply chain due diligence regulations. If the Helpdesk is now to fulfil this task for the LkSG and other due diligence obligations, it would need to be equipped with more competencies in its cooperation with the federal authorities.

In the international trade sector, the "single window" for all issues relating to customs formalities has long been propagated and has also become mandatory with Art. 10.4 in the WTO Trade Facilitation Agreement (European Commission n.d.). The EU has now also incorporated this obligation into its regulations since 2022 and is preparing to implement it. Use within the framework of the EUDR for the exchange between customs and BLE is planned (cf. Section 5.3.2).

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[99] https://www.bmel.de/SharedDocs/Downloads/DE/_Wald/praesentation-ble.pdf?__blob=publicationFile&v=2

[100] https://www.cahraslist.net/

Overall, it is clear that the German government has endeavoured to support companies in the introduction of the due diligence regulations from the outset. However, the new requirements for risk analysis of the entire value chain, including indirect suppliers, which are expected to be further strengthened by the CSDDD, require considerable development of corporate systems, so that, in the opinion of the Scientific Advisory Board, further in-depth information and implementation support is necessary.

Risk classifications ("benchmarking")

The regulation for zero deforestation supply chains provides for the categorisation of trading partners or even parts of countries into different risk levels, which entail different due diligence obligations for companies (e.g. simplified reporting obligations and fewer supervisions, cf. Table 3.2). Similar proposals also exist in the debate for horizontal due diligence obligations (WB BMWK 2022), but have not yet been taken up by the competent authority when the German LkSG came into force. However, the example of conflict minerals shows that a differentiated classification at regional level is much more likely to correspond to a more realistic risk assessment than a classification at country level.[101] The risk classification of countries into positive and negative lists, as proposed elsewhere, could however create an incentive for “cut and run”, with unintended development policy consequences, even though the German LkSG and the European directive proposal expressly provide for "empowerment before withdrawal" (cf. Section 5.1.1). If such lists relate to suppliers that are associated with potential human, labour or environmental risks, the affected suppliers can also quickly form under new names (Jäger et al. 2023: 9). There are also fears that maintaining negative lists can lead to diplomatic tensions (ibid.). The WBAE is therefore sceptical about such blanket country lists.

5.3.2 Supervision

Without sufficient supervision and thus a corresponding probability of detection in the event of non-compliance with due diligence obligations, there is a lack of economic incentives for the economic actors involved to behave in accordance with the law: Buyers want to purchase as cheaply as possible; suppliers fear competitive disadvantages compared to competitors due to higher standards, and certifiers want to audit at low cost. Audits for compliance with human rights are difficult, as experience with voluntary *social audits* has shown in the past (Roloff 2022). In particular, the question of how the state intends to verify compliance with due diligence obligations in other nations where it has no enforcement rights is therefore challenging (Schilling-Vacaflor and Gustafsson 2023). Enforceability and controllability are key requirements for good regulation (Kühn 2021). State control measures are therefore an important aspect for the successful implementation of mandatory due diligence obligations (Schilling-Vacaflor and Lenschow 2021, Harrison 2023). In addition to the review of reports, supervision also includes the examination of complaints received directly by the state authority. [102]

Responsibility for supervision of the various supply chain due diligence regulations lies with the above-mentioned federal authorities (cf. Table 5.2). Routine inspections in accordance with the German LkSG

[101] See https://www.cahraslist.net/ for the example of conflict minerals.

[102] The review of grievance mechanisms only concerns the BAFA, which is responsible for the implementation of horizontal supply chain legislation. The EU regulation on zero deforestation supply chains does not provide for a grievance mechanism (cf. Section 3.4).

include checking whether a report has been submitted and whether it fulfils the requirements, has gaps or contains implausible answers. The latter would be the case, for example, if, according to the company, there were no risks at all from its own suppliers in a known risk area (cf. Section 13 LkSG). According to the law, the BAFA should follow a risk-based approach (Section 19 (3) LkSG). Action is at the discretion of the BAFA, which gives the BAFA a wide scope for decision-making (Engel and Schönfelder 2021: 175). If the companies' responses are inadequate or if there are gaps in the reports, BAFA can demand that the company make improvements. In these cases, the LkSG stipulates an obligation for companies to tolerate and cooperate (Section 18 LkSG). This means, for example, that they must provide documents and grant BAFA access to company premises or that employees can be summoned and questioned.

In addition to routine inspections, BAFA is required by law to investigate complaints received (Section 14 LkSG). If violations of the due diligence obligations are identified during further supervision, BAFA can first require the company to design and implement remedial measures before sanctions are imposed (see below on negative incentivisation). The BAFA's planned inspection activities are similar to the requirements under the EU Conflict Minerals Regulation, for the implementation of which the German Monitoring Centre for EU Due Diligence Obligations in Raw Materials Supply Chains (DEKSOR) is responsible (cf. Table 5.2; Engel and Schönfelder 2021: 181).

The draft CSDDD is openly formulated as a directive with regard to the control activities and powers of the implementing authority of the respective member state and only specifies basic requirements that the member states must take into account when setting it up. For example, the authority must have appropriate powers and resources, e.g. to request information from companies or to initiate investigations (Art. 18, para. 1, 2). In addition to routine checks, the draft CSDDD also provides for the authority to take action when complaints are received and investigate them (Art. 20).

Under the EUDR, companies must submit a due diligence declaration (see Annex 2 of the EUDR) when importing the raw materials or products concerned. They must keep the necessary information (e.g. on the geolocalisation of the products concerned or on risk minimisation procedures taken) for five years and make the information available to the federal authority (the BLE) for inspection upon request (Art. 9 EUDR). The corresponding supervision is to be carried out by the authority on a risk-based basis, whereby this depends on the risk classification of the producing regions (cf. *benchmarking* in Section 3.4) and increases with increasing risk (Table 3.2). It is also envisaged that supervision will be unannounced (Art. 19, para. 13). Each Member State must provide the public and the European Commission with an annual report on the supervision carried out (Art. 22 EUDR). For an effective exchange between the different authorities (EU, customs and BLE), the establishment of an information system in accordance with Article 33 is envisaged. This is also to be used by companies to submit the required documents directly. The EU *Forest Observatory*, an EU Commission database in which forests are mapped worldwide and which is to be available to companies, is also expected to play an important role for the EUDR and is planned for the end of 2023.[103]

In order to keep administrative costs low, it is expected that the authorities will also use AI-supported methods in the future when reviewing reports and documents as part of the various due diligence regulations. In auditing, for example, AI-supported methods are used to detect unusual patterns in transactions. In the context of the LkSG, attempts could be made in this way to identify copied report elements or implausible assessments. However, supervision also requires appropriate personnel expertise with control know-how (Harrison 2023: 28). Supervision could also be facilitated by good

[103] The EU Forest Observatory will build on existing databases, see https://environment.ec.europa.eu/system/files/2023-06/FAQ%20-%20Deforestation%20Regulation_1.pdf.

cooperation and coordination between the different authorities, including within the EU, for example through the targeted exchange of information on "problematic cases".

However, a central weakness of the due diligence regulations lies in the issue of on-site supervision of trading partners, as mentioned above.[104] The LkSG contains an obligation of effort. Supervision of efforts through the review of reporting obligations alone runs the risk of rewarding companies with a high level of competence in formalised procedures. This problem is not new in the area of management systems. The first external control procedures in the area of quality auditing, the review of so-called Good Manufacturing Practices (GMP), were dubbed "*Give me Papers"* in corporate practice - although audits were carried out on site. An audit procedure that relies solely on formalistic audits would be even more exposed to this problem. A due diligence-induced change in the management systems (cf. Section 5.1) could certainly have a one-off effect, as management would initially pay greater attention to this area. In the medium to long term, however, companies would realise that there is no relevant probability of detection in the event of non-compliance.

How could BAFA or BLE react if companies provide them with extensive documentation that they have intensively endeavoured to carry out risk assessments in a region and have come to the conclusion that the due diligence requirements are being met? What could the authorities do if reports from external observers and company assessments contradict each other? How can social auditing be used to detect criminal practices that have been repeatedly uncovered in recent years, including separate accounting and shadow companies? To put it bluntly: Are the due diligence regulations developing into "bureaucracy monsters" whose main benefit lies in the greater formalisation of management systems?

Germany's and the EU's options for local supervision (outside Europe) are very limited, especially in cases where trading partners will not cooperate with European authorities (cf. Section 5.6). First of all, EU or federal authorities do not have the right to take sovereign action against trading partners. Local control rights could only be granted to them by means of bilateral agreements with the relevant trading partners.

The issue of on-site inspections is addressed differently in the various supply chain due diligence regulations: The EUDR does not exclude on-site supervisions. If necessary, these could be carried out in close coordination with the authorities in EU third countries (Art. 21, para. 1 EUDR). The proposed regulation on the ban on goods from forced labour also mentions possible on-site supervision in coordination with the authorities of the third country (Art. 5, para. 6). However, the German LkSG and the draft CSDDD do not yet provide for such on-site supervision.

There are examples from other areas of law where on-site supervision by foreign authorities is possible. For example, supervision of phytosanitary, hygiene and animal health conditions in food production is possible in order to obtain export licences from importing countries, which are of central importance for the meat market in particular. The EU has concluded agreements with important importing countries that set hygiene standards on the one hand and grant the countries (e.g. Russia, China, Japan) and the EU reciprocal opportunities for local supervision on the other. When a trade agreement is concluded, these agreements are often adopted (see, for example, the EU trade agreement with Canada). Individual slaughterhouses, but also countries, can have their export licence withdrawn if the audits by the veterinary authorities of the importing countries are not satisfactory.

[104] To date, little is known about how supervision in Germany and the other EU Member States, which are covered by the LkSG and CSDDD in the same way, will be carried out. On its own territory, the BAFA has considerably more extensive control options at its disposal. It is unclear whether and how these will be utilised and how the authorities will deal with the domestic effect of the LkSG and CSDDD.

Export licences have been withdrawn time and again in the past. Germany has also agreed to such supervision in order to be able to export meat to China or Russia, for example. Ultimately, it is market pressure that forces countries to allow such supervision by foreign authorities in Germany (and vice versa).

Against this backdrop, the question arises as to whether Germany or the EU would also want to exert such pressure with regard to supply chain due diligence obligations. As the LkSG and CSDDD affect all economic sectors and countries, such an approach would be very ambitious and possibly risky from a geo-strategic point of view in view of the already strong criticism of the EU by some trading partners. Such an approach would also seem rather unrealistic in terms of the control capacities of the EU or BAFA.

The procedure for importing organic food shows what a control system that works "on site" can look like. Over the last three decades, the EU has developed a control system that focuses on the supervision of certification companies (called control bodies in the organic market) (cf. text box 5.3 in Section 5.1 on the organic control system in general). The following text box outlines the procedure for the supervision of organic imports.

Textbox 5.5: The supervision of imports of organic food as a case study to enable an on-site inspection

A considerable proportion of the organic food consumed in the EU is imported into the EU from a total of 114 countries (EU Court of Auditors 2019). The EU has therefore set up a system to ensure that these imports meet the standards set out in the EU Organic Regulation. With the amendment of the EU Organic Regulation, this system is currently undergoing radical change.

In the past, the import of organic food from third countries was regulated by two different procedures: firstly, imports of products from systems recognised as equivalent in third countries, including countries such as Argentina, Australia, Canada, Costa Rica, India, Israel, Japan, Tunisia, Korea, New Zealand and the USA, which account for around 13% of imports; secondly, imports of products from countries without a system recognised as equivalent. Here the inspection is carried out by recognised private inspection bodies. These are authorised and monitored by the EU Commission's inspection bodies.

According to Section 46 of the new EU Organic Regulation[105] , the recognition of third-country inspection authorities will in future require that they work in accordance with standards and conditions that conform to the EU Organic Regulation (and no longer in accordance with the organic regulations of the respective countries). The inspection and recognition of inspection bodies will continue to be carried out by the EU Commission's inspection bodies. The European Court of Auditors estimates that the new EU Organic Regulation and the change to the requirement of compliant standards will make it easier to audit inspection bodies, as the equivalence audit that was previously necessary when working on the basis of country-specific regulations will no longer be necessary (European Court of Auditors 2019).

The (mutual) recognition of biocontrol systems of other countries will in future be determined by regulations in trade agreements. This already applies to the import of goods from Chile, Switzerland

[105] For an overview see: https://www.boelw.de/themen/eu-oeko-verordnung/importe/

and the United Kingdom (https://agriculture.ec.europa.eu/farming/organic-farming/trade/agreements-trade-organic-products_en). In this case, the EU Commission only has to ensure that the organic system of the respective partner country is functional, but does not have to check the individual supervision.

In a report on the control systems for imported organic products, the European Court of Auditors (2012) criticised the EU Commission for the fact that it hardly checks the certification companies on whose audits the import of organic food is based in the vast majority of countries. As a result, the Commission carried out on-site inspections in most of the recognised third countries and in some of the recognised inspection bodies, including their activities. At the time of reporting, the latter covered around one third of imported products (European Court of Auditors 2019: 29). At the end of 2018, there were around 57 recognised control bodies, most of which are based in Europe but often carry out audits in up to 50 countries, resulting in many different combinations of control body and country, which makes auditing by the Commission more difficult (ibid.).

The control intensity of the monitoring of these approximately 57 certification organisations is low. For example, the EU Court of Auditors (2019, paragraph 58) explicitly criticises: "In 2018, the Commission audited a recognised inspection body that has been operating in the Dominican Republic since 2013. The audit revealed significant weaknesses in the certification activities of the inspection body. The Dominican Republic is the third largest exporter of organic products to Europe (...) and around one third of the organic products imported into the EU from the Dominican Republic are certified by the control body. This was the first audit of this control body and the first visit that the Commission had made to the Dominican Republic in the context of such an audit."

During the audits weaknesses were identified in the standards and procedures of the individual recognised inspection bodies, which affected imports from the Dominican Republic and China, for example, but also imports from recognised third countries (European Commission 2020b: 30, 31). In the case of one recognised inspection body for imports from China, the Commission issued recommendations, e.g. to carry out unannounced inspections, and also withdrew recognition from another inspection body (ibid.). Recognition was withdrawn in a total of seven cases (ibid.: 34). The changes in the new EU Organic Regulation also provide for the faster withdrawal of recognition in future.

The example of the EU organic control system shows that not only companies should be audited by certification companies, but that the work of the certification companies themselves must also be monitored. A "supervision of the supervisors" level is required - including on-site supervision in the various countries, each of which has its own challenges.

The two examples of veterinary agreements and organic food show that on-site supervision of compliance with supply chain due diligence obligations is rather unrealistic for the large number of companies in all sectors in all countries. BAFA and the EU Commission would probably be hopelessly overstretched to ensure sufficient control intensity, even if a risk-orientated selection were carried out.

Against this background, there is an important fundamental decision to be made when implementing the supply chain due diligence regulations:

- The decision will either be made to limit itself to a paper check of the obligations of effort and to seek dialogue with the companies in the event of contradictory data or information from affected parties or third parties. The occurrence of sanctions (see below) will then depend very much on BAFA's actions and discretionary decisions - and, in the case of complaints received there, on the respective evidence of violations. It will then only be possible to impose major sanctions in the event that affected parties or third parties are able to provide legally certain evidence of violations.
- Or the LkSG and/or the CSDDD explicitly include certification in the supervision in a regulated form. Private certification companies that operate on a contractual basis can carry out on-site inspections at the companies. If a company does not agree to supervision or obstructs it, it can be excluded from the certification system.

In the latter case, the authorities could limit themselves to the supervision of the work of the certification companies. However, in view of the weaknesses of certifications (cf. Section 5.1.2), additional requirements would be needed in this case with regard to the supervision procedure, qualifications and testing methods of the certifiers.

And finally, EU supervision of certifiers presupposes corresponding (trade) agreements between the EU and the respective importing countries. The example of organic food shows that such on-site monitoring of certifiers is necessary (but also feasible). From the WBAE's point of view, this option makes sense in order to enable comprehensive on-site supervision of the regulations.

5.3.3 Potential of technological innovations in the implementation of due diligence obligations

Even before the now mandatory due diligence regulations, initiatives aimed at increasing transparency along supply chains had already been launched. The type and use of the information collected and the coverage of the individual Sections of a supply chain differ depending on the initiative (Gardner et al. 2019). For example, traceability data on operations in the supply chain can be linked to spatial geodata in order to establish a link between the downstream actors in the supply chain and the conditions at the production site (ibid.: 169). The initiatives to date have mostly focussed on individual regions and raw materials in connection with the risk of deforestation.

In some sectors, analytical methods can be used for supervision, such as DNA-based methods and stable isotope ratio measurements for the detection of geographical origin. Extensive reference data is required for both analytical methods. Further methods are currently being developed. Genetic methods are used, for example, to check that timber products are correctly labelled, do not come from protected species and do not originate from illegal logging. In the meantime, the Thünen Institute has created a comparative database with material from over 50,000 trees worldwide, making it easier to check the regulations in timber production.[106]

Furthermore, satellite images are used for supervision in the area of zero deforestation. The comparison of geodata provided with satellite data enables a relatively efficient verification of corporate due diligence obligations with regard to zero deforestation supply chains by state control authorities, even down to the small-scale obligation of geolocalisation. However, the prerequisite is that the geodata provided is true. The methods mentioned could also be used to check whether traded food has been grown on mapped, possibly protected areas rich in biodiversity.

[106] https://www.thuenen.de/de/fachinstitute/forstgenetik/arbeitsbereiche/holzherkunftsidentifizierung

The government control bodies could also use existing transparency initiatives as an information basis for reviewing reports, e.g. to identify high-risk areas not only at country level, but also at regional level. For example, GIZ and BMZ have commissioned the Trase initiative as part of the zero deforestation supply chains to evaluate the risk position for Germany.[107]

In contrast, other environmental problems, especially those caused by agriculture, and production in compliance with human rights are not detectable in the end product. Analytical methods such as DNA analysis of product characteristics, as is conceivable for GMOs, are therefore not suitable as control instruments. Actors must rely on audits and the associated certification. The weaknesses of certifications and the associated human rights audits were discussed in detail in Section 5.1.2.

However, the Supply Chain Act also incentivises innovation. As traceability in the supply chain can be beneficial in order to fulfil due diligence obligations, it can be assumed that *blockchain* procedures[108] for traceability will be used more widely and that there will be increased investment in innovations in this area (Grünewald et al. 2022). This can lead to positive side effects, as innovations in the area of *blockchain* involve further advantages (Marvin et al. 2022). For example, payments and flows of goods can be checked and traced via electronic wallets. However, with this process, incorrect entries or false information at the beginning of the chain are passed through all stages accordingly. *Blockchain processes* are already being used in agricultural and food value chains, but mainly to ensure the safety of food. Applications for integrating small farmers into LMIC are being tested. On the one hand, the focus is on the transparency of the sale of products to intermediaries (see e.g. Kraft and Kellner 2022); on the other hand, there often is no clear statement on how the absence of human rights risks can be guaranteed in the first step of the chain, i.e. when the original information is entered, without at least the first entry also having to be made via audits (e.g. Senou et al. 2019).

The demand for (innovative) solutions for transparency and traceability, particularly in the area of human rights-related due diligence obligations, is also driving the supply of private sector service providers in this area in order to fulfil the legal requirements.[109] The GIZ and BMZ-funded Initiative for Sustainable Agricultural Supply Chains (INA) has also set up an open access traceability system with a view to the needs of actors at the beginning of the chain. INATrace is based on *blockchain technology* and aims to ensure seamless traceability of fair payment for smallholder farmers.[110] INATrace was

[107] https://insights.trase.earth/insights/germany-prepares-for-eu-law-on-deforestation-free-imports; this allows export volumes to be linked to sub-national production regions, among other things, in order to take into account the heterogeneous environmental impacts of trading partners, which can theoretically be included in risk analyses. Good examples exist for soya and beef imports from Brazil, where environmental impacts (deforestation and CO_2 footprint) vary greatly depending on the region.

[108] Blockchain technology is "a series of digital data records that are linked together by a digital chain. The blockchain solution stores all data points and transactions in a decentralised manner so that they are tamper-proof. This is achieved by cryptographically linking the individual data records, which are docked to the previous block using a private and a public key. The new block integrates the transaction history of the previous chain element and encodes a new digital fingerprint. The blockchain can be continued indefinitely; a new block can be appended to the last data record as often as required. In this way, the blockchain verifies every transaction and enables transparent visualisation of supply chains, for example." https://www.nachhaltige-agrarlieferketten.org/in-der-praxis/inatrace-rueckverfolgbarkeit-in-lieferketten

[109] Siehe z. B. www.comarch.de/produkte/datenaustauch-und-dokumentenmanagement/lieferkettengesetz-umsetzen/, www.eqs.com/de/compliance-loesungen/software-lieferkettengesetz/, https://www.pwc.de/de/nachhaltigkeit/sustainable-supply-chain/lieferkettensorgfaltspflichtengesetz.html, www.sap.com/germany/products/spend-management/lksg.html (Auswahl).

[110] https://www.nachhaltige-agrarlieferketten.org/in-der-praxis/inatrace-rueckverfolgbarkeit-in-lieferketten

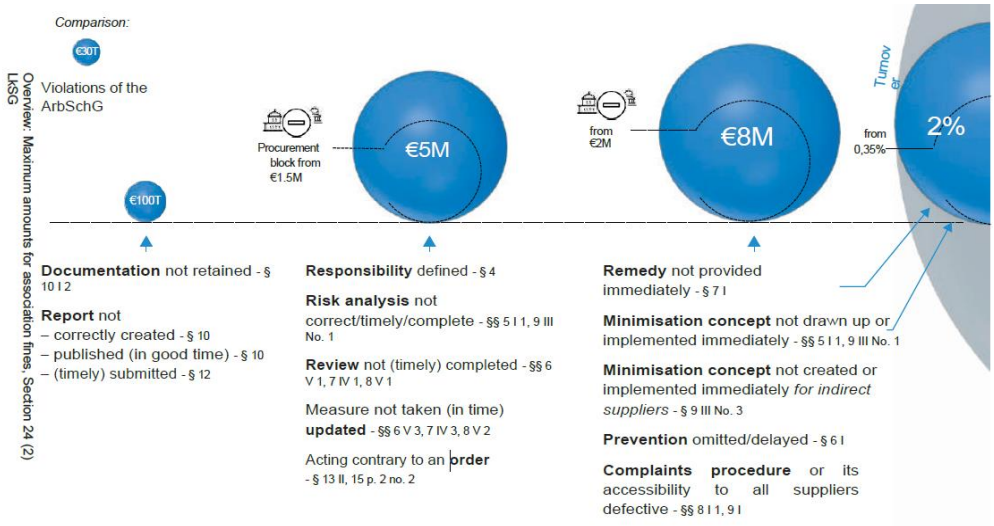
initially intended as a development policy instrument, but could also be used for supply chain management if issues such as living wages are anchored in the due diligence obligations (cf. Section 5.7.2). INA also supports the Digital Integration of Agricultural Supply Chains Alliance (DIASCA) to create interoperability between the various digital traceability systems. Within this framework, common open standards are to be developed that enable the interoperability of traceability systems so that data does not have to be entered, stored and converted multiple times. [111]

5.3.4 Sanctions and positive incentives

In addition to active supervision of corporate due diligence obligations, the state can also contribute to ambitious implementation by companies by setting positive and negative incentives.

High costs for non-compliance with due diligence obligations can motivate companies to fulfil their obligations. The German LkSG provides for fines and exclusion from public tenders as sanctions for companies that fail to comply with due diligence obligations (in contrast to trade policy sanctions imposed on states for non-compliance with regulations in the agreement, Section 5.4.3). The amount of the fines depends on the severity of the violation (cf. Fig. 5.7), with a possible fine of up to two per cent of the average annual turnover allowing for relatively severe sanctions (Engel and Schönfelder 2021: 171). For companies that have a large number of public-sector customers, a procurement ban, i.e. exclusion from public procurement procedures, also represents a significant threat. However, this sanction is likely to be less relevant for companies in the agricultural and food sector than for companies in the construction sector, for example, but the public sector is also an important customer in the out-of-home catering sector.

Figure 5.7: Potential sanctions (maximum amounts) for violations of due diligence obligations under the LkSG



Source: Engel and Schönfelder 2021: 191; colour-adjusted and translated.

[111] https://www.nachhaltige-agrarlieferketten.org/en/in-practice/diasca-interoperability-between-traceability-solutions

The draft CSDDD also provides for sanctions (Art. 18, para. 5b, cf. Table 3.1). Financial sanctions must be based on the company's turnover (Art. 20, para. 3). If sanctions are decided, they must be made public (Art. 20, para. 4). In addition, there is an even more far-reaching threat of sanctions in the form of planned civil liability, which is currently the subject of controversial debate (cf. Section 3.4).

The EUDR also relies on naming and shaming, i.e. the public announcement of companies that violate the regulation, which entails reputational costs. In addition, non-compliant goods, including the associated revenue, are confiscated and fines are imposed, which must be proportionate to the damage, the value of the goods and the company's total turnover (Art. 25, para. 2 EUDR). The regulation also provides for a time-limited exclusion from public contracts (Art. 25, para. 3). The proposed regulation on the prohibition of goods from forced labour provides for the removal of non-compliant goods (Art. 20; EU Commission proposal).

Relevant threats of sanctions are important to encourage rationally calculating companies to comply. However, criminological studies show that companies are hardly deterred from committing offences by high penalties alone. Rather, a high probability of detection proves to be a deterrent, which in turn requires many or effective supervisions. Overall, the empirical results speak in favour of a balanced mix of different measures, e.g. increased detection efforts, sanctions, but also other accompanying measures such as information, cooperation and motivation, etc. (Simpson et al. 2014, Schell-Busey et al. 2016).

If the focus on high sanctions is too one-sided, there is a risk of undesirable unintended effects: If the possible consequences are too severe, it may be more attractive for companies to withdraw from regions/countries (“cut and run”) that are associated with higher human rights and environmental risks. This could jeopardise the central objective of the due diligence regulations, namely to prioritise “stay and behave” over breaking off the business relationship. More important than the level of the threat of sanctions is the calculability of the risk of sanctions, especially with regard to the risk of unintentional violations. According to the results of behavioural economics research, if companies fear being held responsible for unintentional mistakes, they react in a risk-averse or cautious manner, i.e. they are more likely to break off the business relationship (Tversky and Kahneman 1991). A further consequence of strict sanctions, such as civil liability, could be negative effects on innovation. If the expected liability costs increase, the costs for the innovations affected by the liability rules also increase (Kardung et al. 2022). It is therefore important to focus sanctions on targeted and materially relevant breaches of the law.

Accordingly, the state should also provide positive incentives. One small example is the BMZ and the Initiative for Sustainable Agricultural Supply Chains (INA) competition fund to promote due diligence obligations, which companies can apply for together with non-profit partners.[112] Selected companies receive up to 123,000 euros for a one-year project funding. Possible starting points for further incentives could include positive consideration of a committed implementation of due diligence obligations in public procurement procedures or through prominent awards.

5.3.5 Review and monitoring of legislation

From the WBAE's perspective, supply chain due diligence obligations represent a paradigm shift for companies' procurement management. There is hardly any international experience in this area. It is therefore to be expected that not all of the regulatory elements defined to date will prove their worth.

[112] https://www.nachhaltige-agrarlieferketten.org/foerderungen/due-diligence-fund

Systematic monitoring, comprehensive review and timely corrections should therefore be provided for in the interests of science-based policy. [113]

According to the government's explanatory memorandum[114] of the LkSG, a review of the impact with regard to the protection of human rights is planned after three years (2026). In addition, if the CSDDD is adopted, an evaluation will take place to examine the impact of the LkSG on the international division of labour and possible leakage effects, among other things. The government's explanatory memorandum also provides for a review of the scope of application by mid-2023 in order to make any necessary adjustments (cf. Section 3.3). The reports submitted are to form the basis for the evaluation. However, these reviews are not set out in the legal text itself, which is why they are not binding; they are, however, used when interpreting a legal text. [115]

Article 29 of the draft CSDDD provides for a review report to be submitted seven years after entry into force to assess effectiveness with regard to the achievement of objectives. In addition to the effectiveness review, this report should assess the threshold values for the scope of application, the inclusion of risk sectors and the coverage of international agreements and negative climate impacts.

According to Art. 17 of the EU Conflict Minerals Regulation, it is reviewed every three years with regard to its functioning and effectiveness, including the recording of local impacts, the costs of sourcing affected minerals from high-risk areas and the impact on companies in the EU.

Article 24 of the EUDR defines the framework conditions for the review of the Regulation (cf. Section 3.4). In different time sequences, this includes an impact assessment and an examination of whether the scope should be extended with regard to other forested areas (by mid-2024) and with regard to other natural ecosystems, other raw materials and products and financial institutions (by mid-2025). In addition, a general review of the Regulation is planned every five years (see Art. 14 para. 6 EUDR for details).

In view of the limited experience with statutory due diligence regulations, systematic monitoring and an open-ended review of target achievement are essential. It is important that the starting point before entry into force ("baseline") is also recorded. Furthermore, not only indicators at the implementation level (e.g. how many reports are submitted in full) should be measured, but also result indicators that relate to the situation of labour standards, for example.

Good verifiability of compliance with due diligence obligations requires the collection of indicators, including from the company side, which could be transferred to the BAFA and analysed there through the reporting obligation. There is a certain trade-off between this and minimising bureaucracy for companies.

The review of the law can also provide conclusions about the necessary level or type of sanctions: If the implementation of due diligence obligations appears to be insufficient or incomplete on the part of the companies, the sanctions under the law can be tightened (possibly by introducing a reversal of the burden of proof) or supervision can be intensified in the further course. Conversely, it is more difficult to weaken a law again over time (tendency to persist), even if, for example, sanctions that are

[113]Examples from other policy areas, such as the Monitoring, Evaluation, Accountability, Learning (MEAL) approach, can also be used to identify a suitable approach for monitoring and review, see https://www.kit.nl/wp-content/uploads/2019/10/WPS_3-2016-web.pdf.

[114]Draft law of the Federal Government: Draft law on corporate due diligence obligations in supply chains, BT-Drs. 19/26849: 32; see https://dserver.bundestag.de/btd/19/286/1928649.pdf.

[115]https://www.bundestag.de/resource/blob/425296/697f2cacf303d1d9e5854525e2496bea/WD-3-114-16-pdf-data.pdf

set too high result in unintended effects, such as withdrawal from regions or countries that are associated with higher human rights and environmental risks.

5.3.6 Conclusion

The effectiveness and efficiency of due diligence regulations depend to a large extent on the specific organisation of implementation and supervision. The interface between companies and authorities is of particular importance here. The responsibilities for the various sectoral due diligence regulations and the LkSG are distributed among different authorities (BAFA, customs, BLE, BGR). Especially for companies in the agricultural and food sector, which may be affected by several due diligence approaches (LkSG, CSDDD draft, EUDR, draft regulation on forced labour, RED), there is a great risk that they will be confronted with different requirements and/or double submissions during implementation if the authorities have not coordinated their approach. It is therefore important to have standardised information requirements, simple data collection (online input mask, etc.), joint or coordinated supervision and uniform recognition of certifications.

Due to the degree of innovation and the considerable time pressure to implement the new due diligence obligations, government measures to support companies are reasonable. This concerns advice and information, but also support with risk classification as a core element of risk management. The German government has endeavoured to support companies in implementing the due diligence regulations from the outset and has already developed extensive information and (individual) advisory services with the Helpdesk on Business and Human Rights, which focuses on human rights-related due diligence obligations, and the Initiative for Sustainable Agricultural Supply Chains (INA). In addition, the various competent federal authorities also offer support services for businesses. The interplay of government support services should be well coordinated in line with the *one face to the customer principle. In* contrast, the WBAE is sceptical about blanket country risk lists as an offer of support for companies.

Without sufficient supervision, there is no incentive for the supply chain actors concerned to comply with the due diligence obligations. The regulations would then quickly lose their effect. Although on-site supervision by the competent authorities of the trading partners is not ruled out in principle, the WBAE believes that it is practically impossible, especially in the case of horizontal regulations that affect all sectors. There is therefore a risk of a pure "paper check of the obligations of effort". Only in the rare case that affected parties or third parties could provide legally binding evidence of violations would sanctions be imposed that go beyond documentation violations. The due diligence regulations should therefore explicitly include private sector certification. As certification schemes are currently incomplete and subject to problematic incentives, they should be regulated by the state in terms of requirements for supervision, qualifications and testing methods of certifiers. Furthermore, state supervision of certifiers would require the EU to conclude corresponding (trade) agreements with the importing countries.

The potential of technical innovations to support supervision varies depending on the area of regulation. While some environmental problems, such as the supervision of deforestation, can already be monitored comparatively well today using satellite images and DNA-based methods, the potential of technical innovations for effective monitoring of other environmental problems, human rights and labour protection is limited. This is another reason why effective local certification is important.

The state can support compliance with due diligence obligations through sanctions and incentives. Sanctions are set differently in the various regulations: for example, the LkSG provides for relatively

high fines and exclusion from public tenders. The EUDR also relies on *naming and shaming*, among other things. The planned civil liability under the CSDDD is particularly controversial. Overall, effective sanctions should be threatened - but with a sense of proportion - as there are trade-offs. If the potential sanctions are too high, it is more attractive for companies to withdraw from regions or countries that are associated with higher human rights and environmental risks. This could jeopardise the central objective of the due diligence regulations, namely to prioritise "stay and behave" over breaking off the business relationship. More important than the level of the threat of sanctions is the calculability of the risk of sanctions, particularly with regard to the risk of unintentional violations. If companies fear being held responsible for unintentional mistakes, the results of behavioural economics research show that they react cautiously, i.e. are more likely to break off the business relationship. It is therefore important to focus sanctions on targeted and substantial breaches of the law. In addition, the state should also provide positive incentives, e.g. project funding, prizes, etc., and, if possible, target advantages in public procurement procedures.

Finally, reviewing and monitoring the law is important. As there is hardly any experience with the instrument of due diligence regulations, an open-ended review of the achievement of objectives is essential, which requires the collection of suitable (impact) indicators, including from the company side. The latter is in a certain trade-off with a low-bureaucracy implementation for companies. The review of the law can also provide information on the necessary level and type of sanctions.

5.4 Policy perspective: Multi-level policy mix at the interface of several policy fields

The due diligence obligations in the EU draft regulation and in the German Supply Chain Due Diligence Act address objectives that are assigned to various policy fields, in particular human rights and development policy as well as environmental and climate policy. There are also cross-references to social policy objectives. A policy field refers to a relatively stable configuration of institutions and actors over time that are grouped around specific objectives (Blum and Schubert 2018). In different policy fields, different policy paradigms develop, i.e. dominant ideological frameworks that determine which problems should be the subject of state intervention, which objectives are pursued and which instruments are considered appropriate (Hall 1993). In the EU, the various policy fields each form their own multi-level system, which are embedded in the overarching multi-level system of European and member state institutions (Heinelt and Knodt 2008). In political multi-level systems, competences for political decisions and their implementation are distributed across different political levels. In the policy fields affected by the due diligence obligations, there are different distributions of competences and different degrees of policy communitisation. While competences in environmental and climate policy are shared between the EU and the Member States, competences in social policy lie exclusively with the Member States and in foreign trade policy exclusively with the EU. As a result, the due diligence obligations are part of a very complex policy mix of different objectives, instruments and political levels.

Complex policy mixes regularly raise questions about the coherence of objectives, the consistency of instruments and the congruence between instruments and objectives (Howlett 2018). From this perspective, due diligence obligations initially represent an instrument that is intended to support the achievement of objectives in various policy areas. This raises questions about possible trade-offs between the policy areas involved or affected (and within the various policy areas), about the consistency of the instrument with existing instruments in the policy areas concerned, and about the congruence of the due diligence obligations instrument with the objectives in the various policy areas concerned.

In the EU, the principle of a coherent policy for all areas and therefore also for internal market policy and external relations is laid down in Art. 7 TFEU (Pelkmans 2020). Irrespective of the different semantics, this must include coherence of objectives, consistency of instruments and congruence between instruments and objectives.

However, operationalisation is difficult. The coherence of a number of policy *objectives* often cannot be assessed in the abstract, but only in a specific context (Howlett, 2018). Whether trade-offs exist often also depends on the instrumentation or even the calibration of instruments. Calibration refers to the intensity, specificity and flexibility with which an instrument is used (Howlett et al. 2022, Grohmann and Feindt 2023). For example, occupational health and safety requirements that merely reflect the status quo or are easy to circumvent (weak calibration) lead to fewer conflicts with company income targets, but reduce the contribution to the goals of improved occupational health and safety. Conversely, very strict and strictly controlled requirements (strong calibration) that lead to company relocations or closures can lead to trade-offs between occupational health and safety and employment objectives. The trade-off is therefore not a general one, but is mediated by the instrument and its calibration.

The same applies to the congruence of instruments and objectives. The congruence of a policy mix depends on the composition of the instruments and their effect on the various objectives. However, the impact on objectives is in turn a function of calibration. High taxes have a different effect than low taxes, target group-oriented communication has a different effect than abstract communication. Problems of congruence occur in particular with uncoordinated sets of instruments or unbalanced calibrations of different instruments. If, for example, stricter requirements in occupational health and safety or environmental protection are linked to incentive programmes for corresponding company investments, it is important that the subsidised investments also match the requirements and that the subsidy rates roughly correspond to the actual costs.

Lack of policy coherence or congruence is also often difficult to identify and address because the undesirable effects often occur outside the policy field in which they are caused and because there is a lack of information flows between different policy fields that could lead to a correction of policies. One structural reason for this is that policy feedback mechanisms mainly take place within policy fields and neglect effects on those affected outside the clientele of the policy field (Pierson 1993, Daugbjerg and Kay 2020). This is of considerable importance for the problems that are to be addressed by due diligence obligations.

In complex policy mixes in multi-level systems, a completely coherent, congruent and consistent policy cannot realistically be expected. This is due to the fact that policy mixes are the result of political compromises and negotiation processes in the past. However, the coherence principle of Art. 7 TFEU does entail the task of anticipating and avoiding possible incoherences and minimising existing incoherences. In practice, this often means that policy mixes need to be recalibrated in order to improve policy coherence. This is usually associated with a de facto shift in the weighting of different policy objectives and the interests of different groups. Policy coherence is therefore not only a technical task, but also always a political one. The question of the extent to which a lack of coherence is tolerated is therefore not just a question of the operationalisation of indicators, but also a political question. In order to achieve possible improvements in policy coherence, the reasons for incoherence must be identified, alternatives developed and their consequences assessed. From a cost-benefit perspective, a reduction in incoherence may well be associated with more effort than benefit, which must at least be weighed up qualitatively (Sandholz et al. 2020: 13). However, questions of legitimacy and justice are also important if the negative consequences of an incoherent policy affect certain groups in a particular way.

In the field of development policy, approaches have been developed to operationalise policy coherence. They aim to define concrete sub-goals in existing policy areas, the degree of achievement of which is then compared for individual measures (Koff et al. 2020). The OECD (2019) has developed recommendations for policy coherence specifically for sustainability. Institutional coordination across several policy areas is at the centre of these recommendations. This should already take place at the beginning of the decision-making process, but at the latest in the planned reviews and impact analyses. The European Parliament recently once again called on the Commission to systematically examine the development impact of other approaches in particular (EP 2023).

In the following, we focus on a discussion of the consistency of the various due diligence obligations with each other and with other existing instruments. At EU level, in addition to the projects on due diligence obligations, there are a large number of other regulatory systems that use different instruments for greater sustainability (cf. Table 3.2 in Section 3.4). These address human rights and the environment in different ways (cf. Annex 1). The interplay of these instruments has an influence on the achievement of individual goals and on possible trade-offs between the different initiatives. Using individual aspects as examples, potential inconsistencies between the different approaches (Table 3.2 in Section 3.4) and the resulting possible consequences can be identified. To this end, we discuss differences and coherence effects (1) between the currently developing due diligence regulations, (2) between these and other regulations that are also based on supply chains, (3) as well as in relation to other state regulations on foreign trade that are currently also developing strongly, i.e. trade policy and investment-related regulations. Furthermore, (4) coherence with environmental policy regulations and with (5) agricultural policy is also considered.

5.4.1 Differences between the evolving due diligence regulations

In the EU's multi-level political system, the interplay between national and European regulations is of great importance. There is a difference here between EU regulations, which apply directly in all Member States, and EU directives, which must be transposed into national law and then only apply via the law in the respective Member States. On the one hand, the Deforestation Regulation is directly applicable and legally binding in all Member States. On the other hand, differences between the Member States are to be expected due to the necessary transposition of the CSDDD into national law. It is likely that the German LkSG will have to be adapted once the corresponding EU directive comes into force.

There are differences between the two EU legal acts and in relation to the German LkSG in the following aspects, which may still change in the course of the negotiations for the CSDDD (cf. Table 3.1): Firstly, there are differences in the objectives that take centre stage, on the one hand human rights and on the other environmental and climate protection. The size of the directly responsible companies and the obligations for small companies also differ. Different emphases are also placed on supporting small businesses: The CSDDD emphasises a necessary support for small business owners also in third countries as a task of the member states, but mentions a possible addition of such support by the Commission. It also explicitly recognises that there may be indirect effects beyond the burden on directly obligated companies. In principle, this could also include the risk of certain suppliers being forced out of the affected supply chains. Possible burdens for suppliers are addressed more clearly in the EUDR. The specific need for support for small farmers and indigenous peoples is to be identified in the course of the planned review process.

A complaints mechanism to be set up by the companies is missing as an obligation in the EUDR. The EUDR also contains a more differentiated review approach than the CSDDD (cf. Section 3.3): In certain

time phases, it is to be assessed whether ecosystems on the one hand and other products on the other are to be included in the EUDR. Such a review mechanism is only included in the German LkSG in the government explanatory memorandum, but not in the legal text. The EUDR should also explicitly examine the impacts and necessary support for small-scale producers and indigenous peoples who are important in agriculture. The draft CSDDD provides for an extension of the reference agreements and adjustment of the company thresholds to be examined. The evaluation of the EUDR has so far been focussed on a possible expansion to include products and ecosystems, for example; the withdrawal of products where negative effects of the law have been identified has not yet been addressed.

The three laws and legislative proposals address marginalised and vulnerable groups in different ways. For example, indigenous people and small-scale producers are mentioned in the EUDR as particularly relevant for the impact assessments, whereas gender equality is not. However, this is addressed in the draft CSDDD with reference to the UN Convention on the Status of Women. The right to food is explicitly included in the draft CSDDD on the basis of Article 11 of the UN Social Covenant, while the EUDR makes no reference to it. The German LkSG makes a reference to the UN Social Covenant, but does not explicitly mention Article 11 (cf. Annex 1).

In the area of environmental due diligence obligations, the LkSG mainly addresses pollutant-related risks that affect the health of employees or the quality of the local environment (cf. Section 3.3). The proposed or already adopted legal acts at EU level, on the other hand, address other environmental risks. For example, the EUDR refers to the deforestation risk associated with the production of agricultural commodities and their processed products. In the draft CSDDD, biodiversity and climate protection also address environmental goods that are partly (biodiversity) or entirely (climate protection) global in nature. For example, the draft CSDDD stipulates that companies must check whether their supply chains contribute to meeting the EU's climate protection targets. The environmental risks taken into account therefore differ between the German LkSG and the European proposals in terms of their spatial impact and the environmental effects they focus on. The German LkSG focuses entirely on due diligence obligations that have a spatially limited (regional) effect. The European legal acts aim to ensure that companies also cover global environmental goods or environmental goods with a global component (cf. Section 2.4) in their due diligence obligations.

The inclusion of possible violations of the right to food in the due diligence obligations has so far been concretised in different ways. The EUDR specifically refers to the consideration of property rights in the country of production and the German LkSG contains a ban on land displacement and the deprivation of production factors (cf. Table 3.1). In the negotiations on the CSDDD, the extent to which reference is made to UN conventions in this area, for example on the protection of indigenous peoples (UNDRIP) or rural families (UNDROP), is still open (cf. Annex 1).

Further differences relate to the concept of partnerships, with which supplier regions and stakeholders are to be integrated into newly developed implementation-supporting partnership agreements. The EUDR explicitly provides for such partnerships and the Commission is to present a strategic framework for this. Partnership approaches can take different forms, such as structural dialogues, but they can also be the framework for financial support. The EUDR also mentions a possible link with existing partner regulations, e.g. existing Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreements. Their existence could be used as a criterion to improve the risk status of a country. The risk classification of a country can in turn influence the scope of the due diligence obligations to be applied if simplified due diligence obligations apply in the case of lower risk. In addition, the EUDR also envisages an exchange with other importing countries and emphasises the importance of efforts to "promote requirements aimed at minimising the contribution of these countries to deforestation and forest degradation and promoting a global level playing field" (Art.

30.5). The CSDDD and the LkSG do not provide for comparable partnership approaches for supplier countries.

Overall, the due diligence regulations of the EUDR, the CSDDD and the LkSG therefore differ considerably. These can be attributed not least to the different institutional responsibilities in the formulation of the regulations. The Directorate-General for Justice and Consumers was responsible for the CSDDD, the Directorate-General for the Environment for the EUDR and the BMAS for the LkSG. At the level of the individual pieces of legislation, this results in different weightings in the objectives, but in their interplay there are potential problems with the coherence of objectives, the consistency of the different instruments and the congruence between the different instruments and the multitude of objectives pursued.

5.4.2 Differences to other regulations based on supply chains

The regulations and reporting obligations of the LkSG, the EUDR and the CSDDD differ not only from each other, but also from requirements in other legal regulations that address similar target dimensions.

The first thing to consider here are other approaches to strengthening sustainability that have recently been increasingly focussed on supply chains, especially transnational supply chains, or have an influence on them (cf. Table 3.2). These include, for example, reporting obligations on the sustainability of a company (Directive (EU) 2022/2464), which the EU Taxonomy Regulation of 2020 (Regulation (EU) 2020/852) equates to financial obligations, so that investment decisions should also be based on sustainability. They apply above all to large groups and groups operating on the capital market.

There are also further differences between the RED II criteria for the certification of sustainable agricultural fuels and the rules of the EUDR. RED II certification authorises the national crediting of shares of agricultural fuels to be used in the European emission-relevant specifications, for example in the transport sector, and the granting of support by the respective member states. This is intended to make the sale of certified agricultural fuels more attractive in the EU market. The requirements for certification include, in particular, that there are no indirect land use effects due to the displacement of production to other areas (Henn 2021). So far, only palm oil has been named as a high-risk product, for which certification for recognition in accordance with EU requirements will therefore expire in 2030. Soya, on the other hand, is not yet a risk product. However, palm oil and soya are included in the EUDR, but not the more highly processed stages of bioethanol and diesel. Therefore, processed products sold in the EU could still be based on soya from recently deforested areas. Companies in the agricultural sector in particular are affected by both approaches with different requirements for products or ecosystems.

5.4.3 Differences to trade and foreign investment policy approaches

Approaches to improving sustainability in international supply chains can also be found in trade and foreign investment policy. Here, however, there is a stronger focus on the state as an implementing actor (Rudloff 2022) (cf. Table 3.2 in Section 3.4). Of particular interest here are current trade policy initiatives to better anchor sustainability requirements in regional and bilateral agreements and, more recently, unilateral approaches, including the EUDR and the CSDDD.

Conditionalised preferential tariff regimes for certain groups of developing countries have long been an established instrument of EU trade policy. These include, in particular, duty-free imports of non-military imports from the least developed countries ("everything but arms'' initiative (EBA)), the Generalised System of Preferences (GSP) and the extended GSP+. Here, the EU can suspend tariff

concessions in the event of violations of human rights and environmental regulations (Annex 1). However, when human rights violations are identified under the EBA regime, there is initially the option of enhanced engagement. The EU conducts political dialogue with the country in question and presents a list of points for improvement that need to be addressed. The tariff preference is only withdrawn if the human rights situation has not improved following a subsequent review.[116] Although this option has rarely been utilised in the past (Rudloff 2022), the monitoring system for determining which countries comply with which regulations has been developed. [117]

Mention should also be made of the sustainability chapters that have long been included in all EU trade agreements, which cover an increasingly wide range of topics (cf. Annex 1). The majority require ratification of the core labour standards of the ILO, but usually no explicit ratification of the 15 multilateral environmental agreements, conventions and protocols most frequently covered by the WTO.[118] In addition, increasingly expanded content on, for example, cooperation on animal welfare or gender equality has been integrated (Hagemejer et al. 2021: Table 21). However, these sustainability chapters are excluded from the basic dispute procedure in EU free trade agreements, according to which tariff preferences of the agreement can be suspended as a sanction in the event of other agreement violations (van t' Wout 2022). This was agreed for the first time in the most recent EU free trade agreement with New Zealand in 2022, although not for all sustainability requirements. It applies specifically to the Paris Agreement on climate change and four core labour standards (cf. Annex 1). Otherwise, in the past the EU has focussed more on assistance with implementation and partnership than on sanctions.

The requirements of the due diligence regulations and the criteria for granting development-stimulating tariff preferences are only partially similar. The latter include, for example, additional conventions on governance quality (cf. Annex 1). However, some of the topics currently being negotiated for the CSDDD have not yet been covered (cf. Annex 1). The reform of the GSP system for 2024 initially envisaged an extension of the requirements for the granting of tariff preferences. However, no agreement could be reached in the EU negotiations, which is why the existing GSP regulations were extended until the end of 2027 while the requirements remained unchanged.[119] An interaction between the GSP system and the new unilateral due diligence regulations, which have an extraterritorial effect on LMIC (cf. Section 5.6.2), has not yet been discussed.

In addition to regional and bilateral approaches in the form of trade agreements, the EU is increasingly pursuing *unilateral approaches*, i.e. solely decided specifications and requirements for cross-border

[116] https://www.gspplatform.eu/everything-but-arms

[117] https://gsphub.eu/monitoring-database

[118] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); United Nations Fish Stocks Agreement (UNFSA); Port State Measures Agreement (PSMA); International Tropical Timber Agreement (ITTA); International Plant Protection Convention (IPPC); Convention on Biological Diversity (CBD); Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity; Cartagena Protocol on Biosafety to the Convention on Biological Diversity; Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Remediation to the Cartagena Protocol on Biosafety; Montreal Protocol and Vienna Convention on Substances that Deplete the Ozone Layer; United Nations Framework Convention on Climate Change (UNFCCC), Kyoto Protocol and Paris Agreement; Basel Convention on the Supervision of Transboundary Movements of Hazardous Wastes and their Disposal; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade; Stockholm Convention on Persistent Organic Pollutants; and Minamata Convention on Mercury.

[119] https://www.europarl.europa.eu/news/en/press-room/20230918IPR05424/meps-want-to-extend-rules-on-relaxed-tariffs-for-developing-countries

trade. These include, for example, import and export bans for certain goods (cf. Table 3.2 in Section 3.4). The Commission's proposal for an import ban on products produced under forced labour should be mentioned here in particular (cf. Section 3.4). The EUDR and the CSDDD can also be categorised as unilateral approaches to trade policy because they seek to influence the production conditions of imported goods and services through unilateral requirements without negotiating the rules to be followed with the trading partners.

A coordinated interplay of trade policy approaches and due diligence obligations can contribute to better achievement of objectives. Conversely, a lack of consistency between the various approaches can not only impair the success of implementation, but also increase the implementation effort. One critical point here is the large number of different authorities that need to be involved in the implementation of the same or similar regulations. In Germany, for example, the BAFA is responsible for due diligence obligations, while customs regulates import bans (cf. Section 5.3).

What is less obvious is that multi- and bilateral agreements on the protection of foreign direct investments (FDI) must also be taken into account when assessing policy coherence in connection with the introduction of due diligence obligations. FDI can be associated with agriculturally relevant sustainability risks, including possible violations of human rights. For example, large-scale land purchases and leases can be associated with the displacement of local populations, for example due to unclear or unverifiable land rights. This possible deprivation of access to land can also violate the right to food. To prevent this, there are international guidelines for observing responsible land use, for example to protect the property rights of indigenous populations (cf. Section 4.2.1 and Section 5.7.1). FDI regulations can also be directly linked to rules for supply chains and trade regulations or have a reciprocal effect with these.

FDI can be regulated inter-governmentally in bilateral investment treaties (BITs), which primarily offer protection for investments in a foreign target country. Many developing countries have concluded such agreements with the EU or its member states. BITs recognise only a few exceptions to the principle of necessary compensation in the event of expropriation of an investor. The concept of expropriation can also include indirect reductions in the value of an investment, for example as a result of the adoption of stricter, utilisation-limiting environmental protection regulations. If new due diligence regulations in the EU lead to stricter sustainability requirements for FDI in the target country of a foreign investment, foreign investors could attempt to derive the offence of indirect expropriation from this and sue for compensation in the target country (Andrina 2017). Whether such claims are recognised is part of an international arbitration dispute. Nevertheless, fundamental trade-offs should be taken into account: On the one hand, EU regulations on due diligence obligations are intended to incentivise greater sustainability among trading partners. On the other hand, compensation claims against legislative changes towards more sustainability by investing companies - in the case of existing investment protection agreements of these countries - could prevent laws on more sustainability for fear of high compensation sums. New approaches for EU investment protection agreements follow the US model and integrate at least vaguely defined exceptions to the offence of indirect expropriation if usage-restricting rules serve to protect consumers and the environment (Yotova 2019).

A more in-depth analysis of due diligence regulations with coherence with WTO law does not take place here, as at least Felbermeyer et al. (2022) and Erixon et al. (2022) have come to the conclusion that these are compatible with WTO law. It is true that process-related regulations such as those in the due diligence obligations are often assessed as being in conflict with WTO regulations (Charnovitz 2005). However, the possibility of using the general exception clause of GATT Art. XX in specific point a. for the protection of public morals as legitimation (EPRS 2021).

5.4.4 Differences to environmental regulations

In addition to the supply chain regulations mentioned in Section 5.4.2, it is also necessary to take a look at other environmental regulations. Section 3.2 and Annex 1 list the environmental agreements that are referred to in the LkSG and the EU due diligence regulations or that are being discussed in the course of the negotiations on the CSDDD. Building on this, the EU Commission is preparing or has already adopted various other environmental regulations in the European Green Deal, but also in order to fulfil its international obligations.

In principle, the due diligence regulations, if they also cover environmental due diligence obligations, and the other EU legal acts or drafts in the environmental sector appear to reinforce each other. With regard to the creation of a carbon border adjustment mechanism (CBAM)[120], the draft CSDDD complements the planned CBAM regime, which does not cover the agricultural sector with the exception of fertiliser production. The inclusion of climate protection in the draft CSDDD would indirectly change this, at least to some extent. In general, a company's environmental due diligence obligations could be used as a criterion under the EU Taxonomy Regulation for classification as environmentally sustainable. However, at first glance, these would not be suitable as a criterion for environmental claims within the framework of the EU proposal for a directive on the substantiation of explicit environmental claims (Green Claims Directive)[121] , as advertising with self-evident claims is not permitted. The proposed EU regulation on the restoration of nature[122] , which is part of the implementation of the EU Biodiversity Strategy[123] , aims to set binding targets and obligations to improve the state of nature, among other things. This would tie in with the potential biodiversity targets set out by the European Commission in the CSDDD and could positively reinforce them for supply chains in Europe, depending on how they are implemented. However, the CSDDD targets can only be achieved through the possible regulation on nature restoration if individual companies, such as agricultural businesses, can also make a concrete, clearly defined and measurable contribution, e.g. through biodiversity-promoting land use or habitat protection, so that a link to the company's due diligence obligations is recognisable. In the EUDR, this is attempted by achieving traceability through geolocalisation and thus demonstrating the contribution of an individual company to protecting against deforestation. However, this is currently only possible for seven pilot raw materials and only for one specific environmental goal ("protection against deforestation"), which is easily measurable (by measuring areas with the help of satellite observation). If an attempt were made to transfer this approach to the protection of pollinator insects, for example, the measurement and monitoring would be much more complex and the specific contribution of a company would be much more difficult or even impossible to attribute. Negative interactions cannot be recognised ex ante between the above-mentioned regulatory approaches and the due diligence obligations, which is why monitoring of interactions does not appear to be a priority. However, it would be important to harmonise environmental and sustainability indicators across the various regulations.

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[120] EU regulation on the creation of a CO_2 border adjustment system (*CBAM* (*Carbon Border Adjustment Mechanism*)); https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=OJ:L:2023:130:FULL

[121] EU proposal for a directive on the substantiation of explicit environmental claims and related communication 2023/0085(COD) "Green Claims" Directive; https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:52023PC0166

[122] EU proposal for a regulation on the restoration of nature 2022/0195 (COD) *(nature restoration law*); https://eur-lex.europa.eu/legal-content/DE/TXT/HTML/?uri=CELEX:52022PC0304

[123] See https://environment.ec.europa.eu/strategy/biodiversity-strategy-2030_en

5.4.5 Differences to agricultural policy regulations

Links can be established between the EU's Common Agricultural Policy (CAP) and the due diligence regulations, at least to some extent. Conditionality, a summary of basic requirements that every agricultural business must fulfil in order to receive agricultural support, contains two elements that are relevant to due diligence obligations: firstly, the statutory management requirements (SMR)[124] , which state that farmers must comply with basic legal requirements (e.g. regulations on water protection, biodiversity or food law) in order to receive premiums. A link can be made here to environmental due diligence obligations (e.g. in the LkSG), although here in particular, if one disregards the pollutant-related due diligence obligations (which are not addressed in the CAP), a loose connection can be observed, as the references to due diligence obligations (e.g. in the CSDDD) are of a very general nature and their inclusion has not yet been fully negotiated. The CAP goes much further with its much more specific specifications on requirements in the areas of climate and the environment (albeit still inadequate, as is often stated by the scientific community, see e.g. Pe'er et al. 2019, 2022, Röder et al. 2022).

Since the beginning of the 2023-2027 funding period, there has been "social conditionality", which requires that regulations on labour standards, occupational health and safety and health protection must also be taken into account in agricultural management from 2025 at the latest.[125] With regard to occupational health and safety in particular, there are clear references to the due diligence regulations in the LkSG and the CSDDD draft, where "occupational health and safety obligations" or "harmful environmental changes that may lead to harm to people" are explicitly mentioned (cf. Section 3.3). With regard to the obligated companies, it should be noted that conditionality must be complied with by all agricultural businesses if they receive agricultural support[126] (in the form of the various types of direct payments). This means that the scope and number of obligated companies in the CAP are significantly broader than proposed in the LkSG or the CSDDD. The number of employees above which farms fall under the LkSG or the CSDDD (draft) is so high compared to the size of farms in Germany that almost no farm is likely to be directly affected by these regulations. An indirect impact may arise if downstream affected companies (e.g. agricultural trade, dairies or food retailers) are assured of compliance with the due diligence obligations of agricultural businesses. The consequences of this for agricultural businesses depend on the organisation of cooperation in the supply chain (cf. Section 5.1.1.4).

With regard to possible environmental and climate-related due diligence obligations, it may also make sense to take a somewhat "broader" view of developments in the agricultural sector in addition to the "narrow" view of the relationship between CAP requirements and due diligence regulations. As described in Section 4.3, there is still a considerable need for action in the EU's agricultural and food system when it comes to climate, environmental and biodiversity protection. Nevertheless, the EU has succeeded to a certain extent in decoupling environmental impacts from production, which is a positive development (see OECD 2022: Figure 1.6). However, complex ecosystemic environmental impacts can only be addressed to a very limited extent with due diligence regulations; other policy instruments are better suited for this.

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[124] Details on this can be found in the CAP Strategic Plan Regulation (Regulation (EU) 2021/2115) in Annex III "Rules on conditionality under Article 12".

[125] Details can be found in Regulation (EU) 2021/2115 in Annex IV "Rules on conditionality under Article 13".

[126] Wording: "Beneficiaries receiving direct payments under Section II or the annual payments referred to in Articles 70, 71 and 72" (Article 12, EU 2021/2115).

The following conclusions can be drawn: 1) Social conditionality contributes to the fact that the CAP fits well with the due diligence regulations in this area. 2) The climate and environmental protection ambitions in the CSDDD and CAP are coherent with each other, but it is precisely the rather inadequate achievement of climate and environmental protection targets in the CAP that means that a significantly higher contribution to climate and environmental protection would be possible in the CAP if the level of ambition in the CAP or the national CAP strategic plans were higher. Due to the spatial heterogeneity of production conditions and the associated complexity of policy instruments, the WBAE is not in favour of pushing for improved climate and environmental protection in agriculture primarily through due diligence obligations, but rather of using other policy instruments for this purpose - including as part of the next CAP reform.

5.4.6 Conclusion

At European level, in addition to the projects on due diligence obligations, there are a large number of other regulatory systems with sustainability objectives in the areas of trade and investment protection policy, environmental policy and agricultural policy, which use different instruments for greater sustainability. This Section looks at the differences and similarities, highlights trade-offs and identifies possible need for action to improve coherence.

There are not only differences between the due diligence obligations, but also with other regulatory approaches, which in some cases harbours risks for the achievement of objectives, the implementation burden and acceptance. Overall, the coherence between the various regulatory systems should therefore be improved.

The company-related due diligence obligations supplement - and do not replace - the trade and investment protection agreements agreed between states. The EU's trade policy has increasingly incorporated sustainability goals over time, with all of its trade agreements now containing sustainability chapters that refer to similar reference agreements as the due diligence regulations. However, sanctionability and incentivisation are limited with very few exceptions. Other policy instruments are more important than due diligence regulations, especially when it comes to achieving environmental policy goals.

Furthermore, trade-offs with other foreign trade regulations can also arise beyond trade agreements: corresponding conflicts with investment protection agreements, for example, should be taken into account in order to avoid corporate lawsuits against trading partner countries due to stricter sustainability regulations.

5.5 Foreign trade perspective: Effects on trade flows and markets

Foreign trade, i.e. the trade of raw materials and goods in the agricultural and food industry with EU member states and non-EU members, is directly affected by the due diligence regulations, as foreign trade is an important element of many supply chains. The increase in transaction costs along the supply chain resulting from compliance with due diligence obligations can have an impact on the number of trading partners of a company as well as on the volume traded. However, if one looks at the numerous and very well scientifically analysed experiences of the agricultural and food industry with other non-tariff trade measures, e.g. to protect against animal diseases or to ensure food quality, it is not necessarily to be expected that there will really be strong leakage or supply chain shortening effects. This will be discussed in the following Section. In addition, the question of how the resilience of supply

chains can change as a result of due diligence obligations and whether there can be a development towards split markets will be explored.

5.5.1 Effects on trade flows

The main trading partners for EU agri-food products are Brazil, the UK, Ukraine, the USA and China on the import side and the UK, USA, China, Switzerland and Japan on the export side (European Commission 2023). Important import products are oilseeds, fruit and nuts, coffee, tea, cocoa, spices and cereals, while on the export side, processed products with cereals (preparations made from cereals and flour), dairy products, wine, cereals and mixed food preparations and ingredients are important. As already outlined in Section 4.1, the EU's import and export portfolio shows that very different types of supply chains are affected by the existing due diligence regulations under the LkSG and the CSDDD, which is currently being implemented.

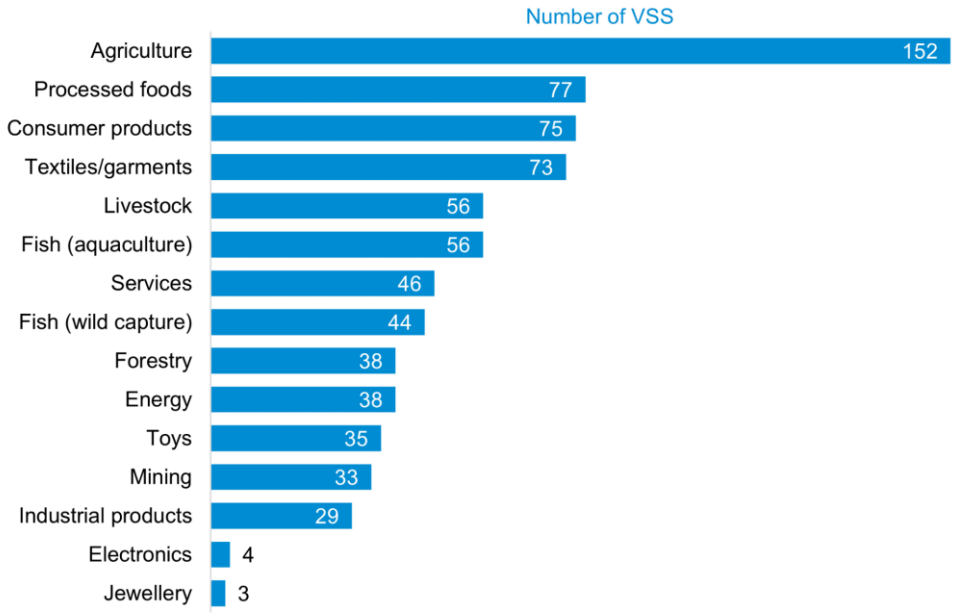
In its theoretical analysis of the potential effects of the LkSG, the Scientific Advisory Board of the BMWK already states that due diligence laws increase the costs of the business relationship by a fixed amount (WB BMWK 2022: 12). They can therefore tend to cause companies to discontinue international trade relations or at least reduce the number of their trading partners. In relation to the agricultural and food sector, this is a scenario that could be relevant when it comes to products that could theoretically also be produced in Europe, but were previously sourced from a third country for cost reasons or other comparative advantages, for example. It may then be safer or more favourable to source these products from an EU country in the future. However, this shift in trade patterns does not necessarily have to be the case, as there is also a considerable proportion of raw materials and goods that cannot be produced in the EU due to climatic conditions or cultural developments in demand (cf. Mensah et al. 2023) and where imports will therefore continue to be necessary if the status quo is to be maintained (Jäger et al. 2023: 25). As a result, the due diligence obligations for these products would lead to an increase in costs, which would then have to be offset at some point in the value chain (see also Sections 2.2 and 4.1). Alternative reactions by the importer, as shown in Figure 5.4 in Section 5.1, are also conceivable. In addition, the economic consequences of the due diligence regulations have already been discussed in detail in Section 5.1. However, it is also conceivable that the increase in trade costs could reduce the export volume of the companies concerned, as argued in Felbermeyer et al. 2022 (p. 45), for example. We are not yet aware of any trade analyses with a specific focus on the agricultural and food sector (as of September 2023). The geostrategic implications if, for example, trading partners look for alternative sales markets outside the EU (or other countries with similar due diligence regulations) are set out in Section 5.6.2.

The literature examples show that there is still considerable uncertainty regarding the impact of due diligence regulations on international trade. Experience from the introduction of sanitary and phytosanitary (SPS) and quality standards in the agricultural and food sector shows that companies generally adapt these after an adaptation and learning phase and price them into their cost structure (e.g. Peterson et al. 2013) or that regulatory heterogeneity is important (e.g. Winchester et al. 2012, De Faria and Wieck 2015). However, it has also been shown that it is significantly more difficult for LMIC in particular to fulfil these standards than for countries with better conditions (e.g. Xiong and Beghin 2014, Meemken et al. 2021, Kareem 2022) and that domestic conditions, e.g. with regard to infrastructure (roads) or export clearance, also play a significant role (e.g. Xiong and Beghin 2011, Kareem et al. 2016, Bouët et al. 2022). A very comprehensive literature study by Meemken et al. 2021 on private standards and certification schemes for the environmental and social sectors also emphasises once again that their effects can vary greatly and that it is therefore difficult to draw general conclusions.

As an equalisation of standards in the exporting country with those of the EU also means lower adaptation costs, the impact analysis must also differentiate between where the products come from and whether similar due diligence obligations may already be mandatory for companies in the country of origin. This would be the case, for example, for imports from the US or UK - both of which are important trading partners of the EU. In this case, the additional transaction costs could be lower and the "learning phase" for the introduction of due diligence obligations could be relatively short. It would also be important to push for coherence and equivalence of the due diligence regimes early on in the policy design process in order to minimise reciprocal adjustment costs. The German G7 Council Presidency has provided an important impetus here by commissioning the OECD to prepare a study on "mapping due diligence regulations".

The coverage of imports with voluntary sustainability standards (VSS), as well as SPS and TBT standards (see above), must also be taken into account. The more these are already applied in certain sectors (e.g. fruit and vegetables), the better the starting position for companies to take other parameters into account (see also the Section on certification schemes, Section 5.1.2). This can also be clearly seen in Figure 5.8, where it once again becomes clear that private sustainability standards are already very widespread, particularly in the areas of agriculture, processed food, but also animal husbandry and fish.

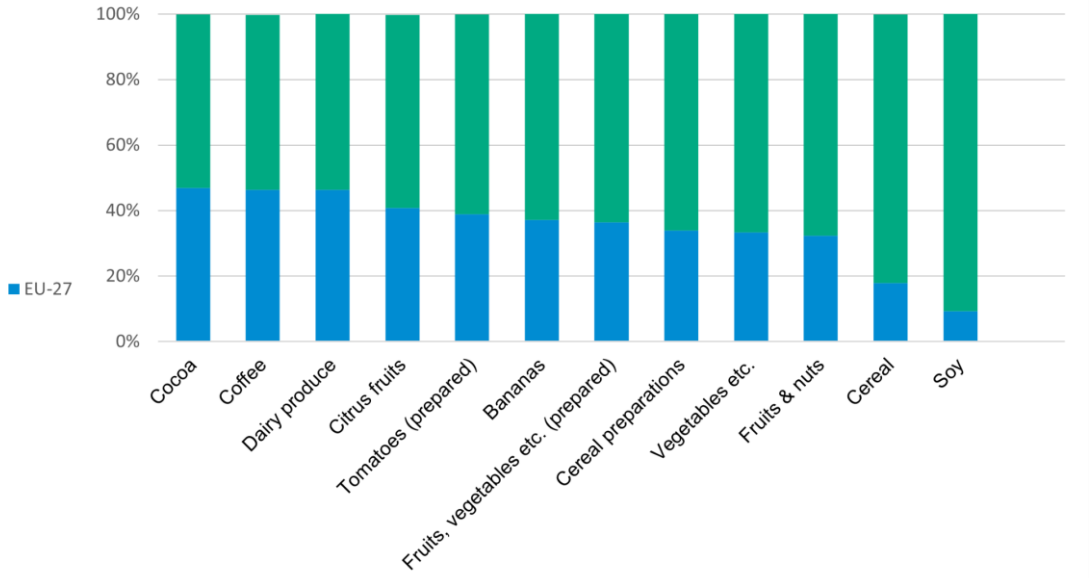
Figure 5.8: Distribution of voluntary sustainability standards (VSS) across sectors



Source: UNCTAD 2023; graphically adjusted.

In addition to the question of the possible cost impact of due diligence regulations, it is also important to better understand what proportion of global trade flows could be affected by them. While the LkSG only affects large German companies, the CSDDD could be very far-reaching, so that in the near future practically all EU companies and thus inevitably all imports into the EU would be affected. As shown in Figure 5.9, the EU holds high shares of global trade for some products. For example, cocoa imports into the EU account for around 50 % of world trade in cocoa. The same applies to coffee, citrus fruit and tomato preparations, for example. Against this background, it can be assumed that the regulations that the EU adopts or will adopt will have a significant influence on the organisation of global trade in these products (cf. also Section 5.5.2).

Figure 5.9: EU-share (in %) in world imports of selected products in2022



Note: The percentages were calculated from the EU import share of total global imports, measured in US dollars.

Source: Own illustration based on ITC Trade Map.

Here, too, it becomes clear that the EU is an important player on the global markets. Erixon et al. (2022: 88) writes in this context: "The EU needs to be careful of the burden it puts on its trade partners and the effects it may have on their diplomatic relations". By focussing on specific risk products, the EUDR is much more selective here. Nevertheless, this statement makes it clear that the due diligence regulations will entail new rules for the majority of imported products (as well as for those on the EU internal market). It is therefore important to consider not only the physical and monetary scope of trade, but also the political implications and effects on trading partners. These topics are explored in greater depth in the next Section (cf. Sections 5.6.2 and 5.6.3).

At this point, we will also take another look at other development-related dimensions of EU foreign trade and the extent to which these are affected by the various elements of the due diligence obligations. Indirect effects of EU foreign trade on poverty development and income in trading partners are possible and have already been discussed many times in various contexts (e.g. Knösslsdorfer and Qaim 2023, Chibanda et al. 2023, Matthews 2022, Chibanda et al. 2022, Rudloff 2019, Rudloff and Schmieg 2018, Rudloff and Bruentrop 2018, Boysen et al. 2016), as exports to LMIC can contribute to lower prices and thus the cost of living there, just as exports from LMIC to the EU market, for example, can generate additional income for trading partners. As already explained in many places, the causes of hunger and poverty in the world are multifactorial and complex (e.g. Wieck 2022), so the impact of due diligence regulations is likely to be low. Due diligence obligations are certainly not the best instrument to address these problems. However, the example shows that the development-related dimension of EU policy must always be taken into account in accordance with the concept of "policy coherence for development"[127], to which the EU has also committed itself, and that coherence with development goals is important. This is discussed in detail in this expertise report

[127] See also: https://international-partnerships.ec.europa.eu/policies/european-development-policy/policy-coherence-development_de. This is also set out in SDG Goal 17 (partnerships to achieve the goals), Target 17.14.

in Sections 5.6.3. and 5.7. It is also clear from the above that there is still a considerable need for research into the impact of due diligence obligations on producers in LMIC and trade flows.

Another field for which there is little evidence to date is the question of how due diligence regulations will influence the resilience of value chains. Since the Covid-19 pandemic and the associated experiences of the closure of production facilities, trade corridors and national borders and the market distortions caused by Russia's war of aggression against Ukraine, the topic of resilience has once again been high on the political and economic agenda (Rudloff 2022b). Resilience means the "ability to overcome challenges" (Meuwissen et al. 2019). In relation to companies, corporate resilience is defined as "the ability of a company to withstand external shocks or upheavals in the social, economic or political environment and to adapt to the new conditions" (Gabler's Business Dictionary, n.d.). The following are cited as characteristics of resilient systems (Biggs 2015 in Zurek et al. 2022)

1) Maintain diversity and redundancy,
2) Promote connectivity between stakeholders,
3) Observe feedback and sluggish adjustments,
4) Promote thinking in complex adaptive systems,
5) Encourage learning,
6) Expand participation, and
7) Promote polycentric governance.

Unlike the sustainability approach, however, resilience is less operationalised in the sense that there are no targets or indicators derived from international consensus (Rudloff 2022b).

Some interfaces between resilience and due diligence regulations can be identified here: As the implementation of due diligence obligations with the requirements for risk assessments, information sharing, supplier training, advice, etc. also leads to closer links between companies in the supply chain, this can support the development of more resilient value chains. This would be consistent with resilience characteristics 2, 4, 5 and 6. However, it is also possible to assume opposing effects between the requirements of the due diligence obligations and resilient value chains, as the conceptual analyses of the Supply Chain Due Diligence Obligations Act theoretically deduce (e.g. WB BMWK 2022) that this could reduce the number of trading partners of a company, which is a contradiction to characteristic 1 (maintaining diversity and redundancy). This would also happen if companies, instead of investing in their supplier development as part of the introduction of due diligence obligations, would focus only on a few suppliers in less problematic countries. This would lead to less resilient supply chains and could also deprive small farmers or other affected companies of development opportunities. It is therefore important in the political implementation of due diligence obligations to support supplier development, i.e. endeavours to improve and "stay and behave". Which of the effects will ultimately predominate is a question that can only be answered empirically. However, such an analysis can only be carried out once due diligence obligations have been implemented for a sufficiently long period of time.

5.5.2 Emergence of segmented market?

A very fundamental criticism of due diligence regulations is the risk of market segmentation that can occur if only a few companies or countries globally formulate corresponding due diligence obligations for their customers. In this context, market segmentation means that there is a selection of suppliers into those with stricter standards, which are categorised in the markets with supply chain due diligence obligations, and those with deficits in human rights or other relevant sustainability standards. The latter would then supply to buyers or countries without such sustainability requirements and no

improvement would be achieved globally in the areas of sustainability addressed by due diligence obligations. For example, the modelling of an EU ban on the import of palm oil from deforestation risk areas in Indonesia shows that this would only lead to a slight reduction in deforestation, as the original EU imports would be shifted to other countries (Busch et al. 2022).

As the standards formulated in the supply chain laws lead to higher costs and therefore also to higher prices, suppliers that already fulfil these standards have an interest in supplying such customers. Problematic suppliers, on the other hand, will avoid EU buyers. This would lead to self-selection and thus to divided markets. And if the market share of countries with due diligence obligations is lower than the proportion of suppliers that already fulfil these standards, there would be little or no material improvement.

The greater the proportion of countries that are not bound by supply chain laws, the more problematic the market division effect becomes, i.e. if globally important buyer countries do not introduce corresponding rules (cf. Section 5.6.3). In this respect, the planned CSDDD is to be welcomed, as it already considerably expands the target group compared to the existing national solutions. For certain issues such as conflict minerals or forced labour, there are also due diligence approaches in the USA (e.g. the Dodd-Frank Act, cf. Annex 2).

Conflict minerals are a good example of the risk of split markets (cf. Annex 2). The higher requirements for transparency and due diligence obligations in mineral supply chains as a result of the US Dodd-Frank Act led to other buyers from other markets temporarily stepping in to buy the products at lower costs (in this case China). China's share of the global cobalt trade, for example, is around 50 %. If such an important buyer has no specific due diligence obligations, there is a risk that goods from problematic suppliers/supplying regions will be diverted to this sales channel. There were similar problems in gold mining, partly because most exports went to the Middle East and Asia and therefore did not have to comply with the requirements (Parker et al. 2016).

Looking at the EU's share of international trade in agricultural products, it becomes clear that the due diligence regulations will have different effects depending on the product due to different market power: for example, the share of EU imports in cocoa exports is very high at over 50%, so it is to be expected that the major exporters will have to comply with the EU conditions. The same applies to bananas and citrus fruits, for example. In other markets, such as soya, other importing countries, such as China, but also the trading partners' own consumption play a much greater role (cf. Fig. 5.9 in Section 5.5.1). Accordingly, in the case of soya in the EUDR, for example, there is the possibility that buyers supplying the EU will only source from low-risk areas of Brazil, which would increase the proportion of soya from areas with a high risk of deforestation in other export markets (Fern 2023: 6).

Price incentives to comply with the requirements of the due diligence regulations only arise if there is a shortage of the corresponding goods on the market. If the USA, the EU and possibly other important buyer countries demand goods with better conditions and there is only a limited supply, i.e. there is excess demand in this part of the market, then the price here should rise. The price premium in the "due diligence obligations market segment" would then incentivise suppliers in the problem regions to improve their conditions in order to be able to serve this market segment as well. Conversely, in cases where only a few buyers on the world market demand due diligence obligations and many producers can fulfil these conditions, there are few economic incentives for improvement. There would then be a high probability that trade flows would merely shift.

Due to this risk of market segmentation, it is important that due diligence regulations are primarily aimed at improving the situation on the ground. The focus should be on improving production

conditions, not on preventing imports and "preserving the moral innocence" of the purchasing countries. The German LkSG and the EU draft directive therefore focus on supplier development, not on the termination of the supply relationship. However, the question is whether the regulations actually provide sufficient incentives to invest in supplier development (cf. Section 5.3). If no additional incentives are provided by supply chain legislation, then the decision of companies to "cut and run" versus "stay and behave" depends on the factors outlined in Section 5.1.1: Cost of switching suppliers, liability and reputational risks, and supplier development costs.

Positive incentives for supplier development could be created, for example, through accompanying development policy projects. A commitment to supplier development could also be positively evaluated for sustainability assessments of companies, e.g. as part of the EU sustainability taxonomy.

5.5.3 Conclusion

Even if an increase in transaction costs due to diligence regulations along the supply chain is to be expected, the resulting effects are not clear. Due to the high degree of internationalisation of the agricultural and food industry, the already widespread use of SPS and quality standards and experience with many types of non-tariff trade measures, it is possible that the negative impact on trade volumes and partners will be more limited than feared. In addition, other important trading countries that compete internationally with the EU (such as the US or UK) have also introduced due diligence obligations, which could reduce the negative trade effects, at least between these countries, due to the potential equivalence of standards. However, displacement effects can still occur if, for example, there is competition for the same sales markets with countries that were previously able to offer their products without these regulations (such as China or Brazil). However, there are product-specific differences. The displacement effects will be lower for cocoa and tropical fruits than for soya due to the high international EU market share. However, there is still a lack of empirical evidence to provide a clear answer to this question.

On the one hand, the resilience of agricultural supply chains to market-influencing shocks is supported by due diligence obligations, e.g. by promoting the connection of partners and encouraging learning, but on the other hand, the number of trading partners could also be reduced, which would have the opposite effect. Here, too, there is currently a lack of empirical evidence to be able to make reliable statements, and the focus on supplier development in the due diligence regulations can help to maintain trade relationships and should therefore be the primary goal. It is therefore important to support supplier development and "stay and behave" in the political implementation of due diligence obligations.

5.6 International relations perspective: What impact do due diligence regulations have on the international interdependence of countries?

5.6.1 The importance of international conventions in the context of due diligence regulations

The various due diligence approaches refer to multilateral conventions in the areas of labour standards, human rights and environmental rights (Annex 1). These conventions were negotiated internationally at state level and ratified by the majority of states, although not all conventions have been ratified equally. The due diligence obligations for companies now refer to these conventions in order to define which labour, human and environmental rights must be complied with in the supply

chains.[128] The reference to multilateral conventions in the unilateral due diligence approaches thus represents an explicit link to international law.

The reference to international conventions and their ratification by trading partners suggests that trading partners, even if they were not involved in the development of the due diligence approaches of the EU and Germany, should automatically support them. Nevertheless, it should be noted that the signing of international conventions usually does not lead to strict enforcement measures and subsequent improvements on the ground (Neumayer 2005, Davies 2014 for human rights conventions). The focus is on reporting on the status of implementation, whereby reporting obligations are also not fulfilled.[129] If no progress is made on the basis of the reports or problems with reporting are recognised, positive incentives can be used by the UN, for example. These include capacity building or financial support for implementation for countries that do not have sufficient capacities and resources for this.[130] Support in capacity building is relevant as it has been shown, at least for the implementation of the UN Civil Pact, that non-compliance is often unintentional and depends on the efficiency of the respective country's administration (Cole 2015). In the case of the ILO core labour standards, there is also a gap between ratification and the actual legal situation of workers on the ground (cf. Section 3.2). In addition to monitoring implementation, the ILO also offers technical support services and training measures.[131] Sanctions are not possible for non-compliance with the respective conventions despite ratification.

The inclusion of the conventions in the due diligence obligations now leads to a strengthening of the enforceability of the conventions, which was not immediately foreseeable at the time of signing. The due diligence legislation thus promotes the enforcement of the conventions. In general, this can be seen as a departure from principles that have characterised international relations in the past, such as the principle of common but differentiated responsibilities, which takes into account the different conditions and possibilities of countries to contribute to the achievement of common global goals.[132] Originating in environmental law, references to this principle can also be found in other areas, including human rights conventions (Martens 2014: Ch. 1). Despite recognising the universality of human rights, the (economic) capacity of countries to implement them is also taken into account to a certain extent (Obendland 2014). States are obliged to implement human rights "to the fullest extent of their possibilities", but if the possibilities are insufficient, international support must be provided (ibid.: 11).

As a consequence of the increased enforceability of international agreements through unilateral due diligence regulations, negotiation processes for future international agreements could be met with

[128] The distinction between the areas of labour law, human rights and environmental law is blurred; for example, the ILO also takes into account the rights of indigenous people, thus creating a link between labour and human rights. The UN Social Covenant, on the other hand, also takes labour standards into account. Individual conventions in the environmental field also establish a direct link between pollutant-related environmental risks and health risks for humans (cf. Section 3.2).

[129] See, for example, the UN database with missing reports from states that would be obliged to submit them due to ratification: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/LateReporting.aspx

[130] See e.g. the UN Treaty Body Capacity Building Programme; https://www.ohchr.org/en/treaty-bodies/treaty-body-capacity-building-programme.

[131] https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/technical-assistance-and-training/lang--en/index.htm

[132] The principle of Common But Differentiated Responsibilities (CBDR) is explicitly described in the Rio Declaration of 1992. "At that time, governments recognised their different contributions to environmental degradation - and thus their different responsibilities to pay for ecosystem restoration and adaptation to environmental damage." (Martens 2014: 5).

more reluctance by states that fear disadvantages for their export sector, for example, as is already evident in the EU-Mercosur negotiations (Rudloff and Stoll 2023).

5.6.2 Trade policy and geostrategic implications

The recent past in particular has seen significant changes in European trade policy, initially triggered by reactions to other trade players such as the USA and China and their trade conflicts with each other (Eliasson et al. 2023). However, the recent shocks to international supply chains caused by the coronavirus pandemic and, above all, the Russian war of aggression against Ukraine have also sharpened the EU's focus on securing its own supply (Orbie and De Ville 2020, Bongardt and Torres 2023).

Overall, a stronger domestic focus can be seen in the EU, for example by supporting its own competitiveness, but also through increased direct state intervention to secure stocks of raw materials (for example by holding reserves of critical raw materials). At the same time, however, it is also increasingly looking for new partners for agreements in order to diversify its supply or to cooperate in the development of raw materials (Raza 2022; Blockmans 2021; Schmucker and Kober 2023). De-risking and diversification in the sense of a new partner orientation are based not only on (newly perceived) political criteria of partner reliability but also on the actual availability of relevant required supplier products. These criteria can sometimes be in conflict. For some of these products, there are few alternative options from the perspective of companies and countries, which has long been taken into account in the EU definition of the "criticality" of raw materials in lists of raw materials defined as critical (European Commission 2020). However, agricultural raw materials - with the exception of individual fertiliser components - are not included in this list (ibid.).

Last but not least, this intensified search for trade policy partners also aims to strengthen general foreign policy positioning in order to strengthen political coalitions through the means of trade policy - currently vis-à-vis Russia, for example (Felbermeyer 2023). In its newly defined guiding principle of "open strategic autonomy", the EU trade strategy of 2021 already points to the area of tension that underlies these new developments of more domestic orientation and partner search (European Commission 2021). Despite and alongside these more offensive approaches geared towards its own supply, the EU is continuing to tighten its sustainability goals (Pelkmans 2020), which it is seeking to anchor horizontally in all policy areas, including trade policy, by means of the *Green Deal. It is* also increasingly utilising unilateral trade measures for this purpose (cf. Table 3.2). With regard to bilateral agreements, there has been a committed (re)commencement of negotiations with the USA, India and Indonesia and a relaunch of agreements that have already been concluded - at least politically - (e.g. with Mercosur and New Zealand). Over time, an increase in sustainability dimensions can be observed in the EU agreements (Felbermeyer 2023: Fig. 3). What they all have in common, however, is their lack of sanctionability through effective trade policy measures at state level (in contrast to the sanctionability of companies for violations of due diligence obligations) - with the exception of the most recent agreement with New Zealand for sub-areas (climate protection, some core labour standards of the ILO) (cf. Annex 1). It is therefore not possible to respond to violations of sustainability requirements by suspending agreed concessions, as is customary for other agreement contents. Due to this weakness in enforcement, the EU has focussed more strongly on the implementation of sustainability requirements, which ultimately cannot be sanctioned, also with the support of its partner. In its new 2022 position paper on the sustainability chapters ("Review of the trade and sustainability chapter (TSD)" European Commission 2022c) in particular, the Commission emphasised country-specific agreements (roadmaps) for better implementation. In the review, it also relativises

the position that the often called-for strengthening of trade policy sanctionability should explicitly only be seen as a last resort for better implementation.

The sustainability chapters in free trade agreements also have a growing strategic role with regard to new partners for new agreements: The weak enforceability of the sustainability chapters has always provoked great resistance within the EU, not only at the level of European civil societies, but also at the level of individual governments in view of some agreements. Depending on the type of agreement, this resistance can jeopardise member state ratification and thus the entire agreement, as was demonstrated during the Transatlantic Trade and Investment Partnership (TTIP) negotiations and the Comprehensive Economic Trade Agreement (CETA) negotiations with the USA and Canada.

The new initiatives for unilaterally decided due diligence obligations can counteract this internal criticism, as the corresponding sustainability regulations now apply in any case, even without and despite weakly enforceable agreements. Conversely, however, they can either reduce interest in agreements on the partner side or increase their demands on the EU, as partners would otherwise have to fulfil EU requirements without any consideration in return. Here, the new partnerships proposed by the EU for the sustainability chapters in its review ("TSD review") can provide an incentive if they are accompanied by appropriate support. In addition, the general character of future EU trade agreements may change in view of geopolitical changes and the simultaneous intensification of sustainability monitoring: Partners can challenge the EU's willingness to compromise more strongly by pursuing more of their own interests, including in terms of greater market access to the EU, from a strengthened position as relevant partners. This is currently reflected in the Mercosur states' demands of the EU (Stoll and Rudloff 2023b).

5.6.3 International relations in between cooperation and dependency

Accusations of "green colonialism, protectionism, imperialism" and the like have been made time and again, not just since the start of the debate on the legal regulation of corporate due diligence obligations in Germany and other EU member states, when it comes to the interaction between states (e.g. at UN level when discussing global environmental protection agreements), the negotiation of bilateral or multilateral free trade agreements or the general tele-coupling[133] and globalisation of societies.

5.6.3.1 Criticism and arguments in the international debate

At the heart of the accusations is the existing economic and political inequality in the international community, characterised by colonial history, which continues to determine the balance of power and interactions between states and is cemented by further multilateral agreements and unilateral state action, including in the environmental sector. This debate is important because every bilateral or global agreement between states links national legislation to bilateral or global developments, so that national legislation must react to them. This means that some national sovereignty is lost, even if, as discussed in 5.6.1, there may be implementation deficits. On the other hand, something is also gained by participating in bilateral and multilateral agreements, either in the form of global capacity to act to address cross-border environmental problems that cannot be controlled at national level Or, for example, bilaterally in the form of a reduction in transaction costs in international trade. However,

[133] In socio-ecological and agricultural systems research, the term telecoupling has become established to describe the linkages between agricultural systems and anthropogenic processes in different regions of the world (Friis et al. 2016).

there is always the question of the extent to which the underlying negotiations can be conducted on an equal footing - despite existing (economic) power asymmetries and (economic) dependencies. Particularly in the case of environmental protection issues, the question also arises as to whether shifting the problem or the solution to the problem to LMIC is part of the motivation. This becomes clear in the debate on carbon colonialism, for example (Parsons 2023).
The accusations outlined above, which arise from the constellation of power imbalances between states and the higher standards demanded by wealthy countries in particular in the areas of environmental, human and labour rights, are discussed under a variety of terms, each with a slightly different focus. The aspect of the ability of a state or a community of states to impose its laws on another state or another community of states and thus expand its sphere of influence is commonly referred to as imperialism. The term "green imperialism" is used to describe the environmental standards demanded (Ariffin 2010). The term "green colonialism" is based on this, although there are further differentiations depending on the activity/action. This includes so-called "green grabbing", the appropriation of land and resources for environmental purposes (Fairhead et al. 2012). A particular manifestation of this is "carbon colonialism": international investment in forest conservation projects in LMIC for the purpose of carbon offsetting (compensation programmes). Industrialised countries can thus continue to maintain their emission levels, while negative effects on livelihoods in the communities adjacent to the projects can occur (for the example of Uganda, see Lyon and Westoby 2014).

Irrespective of the respective terminology, it is generally criticised in this context that the above-mentioned environment-related projects are not only often initiated and financed by western industrialised nations, but also that the mechanisms of planning, decision-making and implementation often allow only limited opportunities for participation and objection by the affected communities and groups in LMIC. Furthermore, it is criticised that the economic benefits and resulting income opportunities for the affected communities are often not given and that corresponding projects lead to the further economic development opportunities, and in some cases also the current livelihoods of the affected communities and groups, being restricted or taken away. This criticism often applies in particular to environment-related projects, some of which require high protection standards on the affected land, which can, however, have a strong impact on local agricultural and forestry use and rural economic development opportunities (Fairhead et al. 2012).

There are also accusations that the wealthier and industrialised countries are carrying out these projects and, in a broader sense, their sustainability transformation at the expense of LMIC, thereby addressing the issue of global justice and compensation. This criticism is most evident in the context of global climate protection and was discussed in Section 5.6.1 in the context of the principle of common but differentiated responsibilities. Wealthier countries have historically contributed the most to global warming and therefore have a responsibility to contribute the most to climate protection (e.g. Page 2008), while LMIC should be enabled to develop economically (e.g. Rosales 2008) or compensation payments should be made, e.g. for climate protection in LMIC (e.g. Grainger 1997; cf. Textbox 5.6).

Textbox 5.6: Balancing nature conservation and climate mitigation on the global level and economic development opportunities using the example of the Democratic Republic of the Congo

The negotiation between nature and climate protection and economic development opportunities can currently be seen in the Democratic Republic of the Congo. Oil deposits are suspected there in the world's largest tropical peatland, which stores very large quantities of CO_2 . The peatland is located in

the middle of the Central African rainforest. The Congolese government is either demanding that the Global North finance the protection of this area or that licences be issued to companies for test drilling (Raupp 2023). In this context, Congo, together with Brazil and Indonesia, officially agreed a rainforest alliance in November 2022 after years of negotiations, which aims to negotiate climate budgets with the countries of the Global North to preserve the rainforest, among other things.[134] During the same period, UN Secretary-General António Guterres called for a historic climate pact at the Climate Change Conference (COP 27), which emphasises, among other things, financial support from the Global North for countries of the South.[135] However, environmentalists in the Congo doubt that this can bring benefits for Congolese society without transparency and good governance (Raupp 2023). This example thus impressively shows how complex the implementation of the principle of common but differentiated responsibility for achieving global environmental goals is in practice.

In addition to criticising the imposition of environmental and human rights standards and the search for solutions in LMIC to problems for which wealthy countries are primarily responsible (see carbon colonialism), the historically shaped trade patterns between LMIC and the wealthier countries have long been criticised: There are two accusations: (1) the accusation that high agricultural subsidies in the form of direct payments and external protection would lead to a distorted production, demand and trade pattern in the EU and thus disrupt actually competitive supply chains in/from third countries, whose sales on the EU market would be additionally burdened by import regulations (Kornher and von Braun 2020; Boysen et al. 2016); (2) the accusation of asymmetric power and competitive relationships resulting from the supply of raw materials from LMIC to higher-value processing in countries with higher per capita incomes (Hickel et al. 2022, Dorninger et al. 2021).

The extraction of natural resources in mining or agriculture for export (extractivism) is usually a colonially grown trade pattern that is associated with negative impacts on the respective producing country (e.g. Alonso-Fernandéz and Regueiro-Ferreira 2022, Greco 2020). Irrespective of due diligence legislation, this unbalanced trade pattern has long cast a shadow over partner relationships between LMIC and wealthier countries. This is evident, for example, during negotiations in the trade sector (Drahos 2003, Odell 2006), in the context of development cooperation (Wilhelm Otieno 2023) and - particularly relevant to the context of the expertise report - in the context of international law (so-called Third World Approaches to International Law (TWAIL); Mutua 2000, Okafor 2008).

5.6.3.1 Classifying the criticism of human rights and environmental due diligence regulations

The due diligence regulations must now be categorised against this background. In terms of content, the requirements of the LkSG and the draft CSDDD focus on labour standards and human rights due diligence obligations (including on child and forced labour), which are based on international conventions such as the ILO core labour standards. These have been supported and ratified by many countries worldwide, including LMIC (cf. Section 3.2). Human rights are also considered universal.

The pollutant-related and other environmental due diligence obligations (climate protection and biodiversity), which are primarily contained in the draft CSDDD, are also based on international conventions that have been ratified by the majority of countries worldwide (cf. Annex 1). However, it

[134] https://edition.cnn.com/2022/11/14/world/rainforest-alliance-brazil-indonesia-congo-intl-hnk/index.html.

[135] Opening speech by UN Secretary-General António Guterres at COP27.

should be noted that the signing of international conventions is itself linked to weak implementation measures. By incorporating the conventions into due diligence legislation, the implementation of these conventions by Germany and the EU is being accelerated, which was not necessarily foreseeable to this extent by the signatory states (cf. Section 5.6.1). It is therefore conceivable that individual countries have ratified agreements without being able to fully implement the respective obligations. By pushing through the German or European due diligence regulations (without coordination in advance), this could now be seen by trading partners as an exploitation of the (economic and political) power of the EU or Germany, which could possibly result in a competitive disadvantage for their own export sector.

In principle, however, it can be argued that mandatory due diligence regulations help precisely those trading partners that make an effort to implement minimum standards in the area of human, labour and environmental rights themselves or do not actively act against minimum standards. This is because they, for their part, are in (price) competition with countries that undermine these standards in order to be able to offer (even) cheaper agricultural commodities (Jäger et al. 2023: 25). For buyers from wealthier countries, it becomes more attractive to source from countries that comply with the relevant standards and that are not considered high-risk areas, particularly in the case of the EUDR, even if production costs are therefore higher than those of other trading partners.

However, critical voices do not doubt the content of these international agreements and thus the content of the due diligence regulations, but rather the established power relations in the international legal discourse and the "political-economic agenda" of Western states when invoking human rights or environmental agreements (Kaleck and Saage-Maaß 2016: 49, with reference to Mutua (2001) and Anghie (2009)). This accusation corresponds to the above discussion of the unequal balance of power and its influence on the various negotiations in the international context, to which the central criticism of the due diligence regulations can be directly linked: instead of relying on a multilateral solution (and in some cases Instead of relying on a multilateral solution (and in some cases even counteracting it, see below on alternatives), individual countries and now the EU have decided to unilaterally draft due diligence regulations that have an extraterritorial effect on LMIC without involving LMIC as affected parties in a consultation during the drafting phase of these due diligence regulations (Bose 2023). [136]

The potential extraterritorial effect becomes particularly clear in the case of the EUDR: the EUDR can have an impact on national property rights in the buyer countries, as the raw materials covered by the regulation must come from cultivation areas for which property rights have been clarified and can be proven. However, if this is not the case for local, traditional or similar reasons, national laws may have to be amended. In this case, the reason for amending a national law in a producer country would be unilateral EU legislation that has an extraterritorial effect - without the countries concerned having been involved in advance (cf. footnote 141).

In principle, due diligence regulations can have a particular impact on small-scale producers and the informal sector in LMIC in general. The risk of them being pushed out of supply chains - due to fewer documentation or certification options - can lead to a greater increase in the informal sector. This

[136] See, for example, the joint letter to the WTO dated 27 July 2022 from Indonesia and Brazil and signed by other trading partners regarding the EUDR, which states, among other things, "We encourage the EU to entertain further consultation with third countries, particularly developing producing countries before the final approval of the proposed legislation. Some of the concerns expressed by developing countries in formal public consultations about the proposed legislation have, regrettably, been given scarce consideration."; https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/G/AG/GEN213.pdf&Open=True.

would undermine the objective of supply chain approaches to protected employment. The exact mechanisms of action, i.e. whether small-scale producers are pushed out or perhaps better integrated into existing supply chains, are discussed differently (see e.g. Jäger et al. 2023: 20). Therefore, possible effects on the informal sector and small-scale producers in LMIC should be specifically evaluated when reviewing the laws (cf. recommendation 6.4.1).

The disadvantage that trading partners - unlike partner countries in trade agreements, for example - were not consulted in the design of the regulations can be remedied in the further course by actively involving the trading partners in the implementation and review of the laws. The involvement of trading partners in the implementation of the laws can take place at different levels, for example through intergovernmental development cooperation or through opportunities for participation and exchange (e.g. participatory supplier development, cf. Section 5.1.4).

5.6.3.2 Support services and dialogue formats in the context of due diligence regulations

To date, specific offers of support for trading partners have been anchored in the EUDR in particular (Art. 30 EUDR).[137] The European Commission also intends to develop strategic framework plans for these partnerships. This is intended to define country-specific support. These can incorporate existing initiatives, such as the Alliance for Sustainable Cocoa, which uses a framework plan to link actions between the EU, Ghana and Côte d'Ivoire, or the EU's forest partnerships with various countries (Fern 2023: 10). The global Team Europe initiative is already underway, supported by Germany among others, to support trading partners in the implementation of the EUDR with the aim of "forest conservation and the involvement of smallholders".[138] In addition, the European Commission, Indonesia and Malaysia have already decided to set up a joint task force to strengthen cooperation on the implementation of the EUDR. [139]

Similarly, the European Commission is pursuing a better partnership not only for the EUDR, but also in its new trade agreements through the development of concrete roadmaps *(*cf. Section 5.4.3*)*: In its review of the sustainability chapters, for example, it mentions better linking with unilateral measures, but also country-specific roadmaps with priorities and timeframes for achieving them. Another example of trade policy is the "Handbook of Implementation" for the free trade agreement with Ecuador, which develops specific ideas for involving local stakeholders to improve the implementation of trade policy sustainability regulations. It was supported as a pilot project by Sweden (National Board of Trade Sweden 2019).

Such support services and dialogue formats for trading partners are not explicitly anchored in the German LkSG. Nevertheless, support services for companies are available from trading partners or are currently being developed. In the German embassies, for example, there are to be focal points that provide information on the requirements of the LkSG and offer local support networks.[140] A GIZ project

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[137] "Partnerships and cooperation mechanisms may include structured dialogues, administrative arrangements and existing agreements or provisions thereof, as well as joint roadmaps to facilitate the transition to agricultural production that complies with this Regulation, paying particular attention to the needs of indigenous peoples, local communities and small farmers and ensuring the participation of all stakeholders." Art. 30 (1) EUDR.

[138] see https://www.bmel.de/SharedDocs/Downloads/DE/_Wald/bmz-entwaldungsfreie-lieferketten.pdf?__blob=publicationFile&v=1

[139] https://www.eeas.europa.eu/sites/default/files/documents/2023/Joint%20Statement%20IDN%20MAL%20EU-Consolidated%20final.pdf

[140] https://www.bmz.de/resource/blob/154772/lieferkettengesetz-faktenpapier-partnerlaender-deu-bf.pdf

is also being carried out with individual trading partners, for example, to improve the implementation of human rights and environmental due diligence obligations in partnership.[141] The Helpdesk on Business and Human Rights presented in Section 5.3.1.2 also provides support in this area, for example by advising on the establishment of similar advisory services (e.g. Helpdesk Vietnam) at the respective trading partners. Training is also provided for multipliers and in cooperation with associations and business support organisations. In general, existing partner approaches in producer regions should also be utilised, such as those that exist in Brazil between public, municipal and private institutions (Hagemejer et al. 2021: 95). Training is also provided for multipliers and in cooperation with associations and business support organisations. The introductory text of the draft CSDDD points out that the EU and its Member States should continue to work in partnership with third countries to prevent negative impacts of economic activities on human rights and the environment (European Commission 2022: 41). However, the legislative proposal itself does not include any support for the implementation of due diligence regulations in third countries. However, the establishment of an advisory service comparable to the Helpdesk is currently being planned at EU level. The Helpdesk on Business and Human Rights is also involved here as a pioneer in providing advice. The establishment of such a structure is to be welcomed for coherent counselling at European level. In principle, the support services for trading partners should be geared towards the needs of the respective local stakeholders and should be developed through dialogue, particularly in light of the fact that there was hardly any consultation when the laws were being drafted. This can be taken into account when developing the European advisory services. The legal anchoring of support services for trading partners in the EUDR can serve as a model for the further negotiations of the CSDDD, as it establishes long-term support for trading partners.

5.6.3.3 Multilateral alternatives to unilateral due diligence regulations

In order to counteract the problem of the imbalance of power and the challenges associated with unilateral approaches, multilateral alternatives are of great importance. The WTO is an organisation that is primarily dedicated to international trade issues. It has the following functions: Administration of WTO trade agreements, forum for trade negotiations, handling of trade disputes, monitoring of trade policy, technical assistance and training for developing countries and cooperation with other international organisations. The WTO is therefore also an important forum for discussion of existing trade agreements and general international trade issues, as is evident, for example, in the periodic reviews of trade policy or in the ongoing work of the SPS Committee. In addition, plurilateral agreements have already been negotiated in the past within the framework of the WTO (e.g. on public procurement). These are agreements that are only relevant for a subgroup of WTO members. The topic of due diligence obligations has not yet been dealt with in depth in the WTO, but many related topics have, such as general development issues and questions on the interactions between international trade and the environment, gender, human rights and food security. Against this background, dialogue within the WTO and also in other international forums, such as UNCTAD, the Committee on World Food Security (CFS) and similar organisations, is important.

An alternative to unilateral approaches to binding corporate due diligence obligations is also offered by the intergovernmental working group of the UN Human Rights Council, which aims to draw up a binding agreement on business and human rights.[142] This working group was set up in 2014 on the initiative of Ecuador, arguing that the UN's voluntary guidelines were not sufficient and that an

[141] https://www.giz.de/de/weltweit/122202.html

[142] https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc

international legal instrument was therefore needed (Luthango and Schulze 2023). Since then, the working group has primarily been supported by LMIC. The group of BRICS countries, with the exception of Brazil, has been actively involved in the text of the Binding Treaty since its inception, although their support is motivated in different ways (cf. ibid.:4f.) Initially, the EU member states and the USA, among others, spoke out against the working group. They argued that national legislation would be better suited to this issue. International mechanisms could not replace them; instead, the polarisation of states through the working group would hinder the implementation of the UN Guiding Principles on Human Rights and Business (Bose 2023: 24, 26). The EU initially criticised the discussed scope of the Binding Treaty, which was limited to transnational corporations in the first drafts (but now includes all companies) and the insufficiently close alignment with the UN Guiding Principles (EPRS 2022). Although more countries from the Global North have joined the negotiations since 2021, some of them openly criticise the current draft (ibid, Luthango and Schulze 2023). As an observer, the EU continues to criticise the need for more work on the draft text, particularly with regard to the level of detail and prescriptive nature of the text, which would make it more difficult to obtain sufficient support from UN member states (EPRS 2022). However, the EU does not yet have a negotiating mandate and there is no agreed German position on the Binding Treaty (Luthango and Schulze 2023: 6). Meanwhile, the European Parliament is a supporter of the initiative and some parliamentarians called on the EU as early as 2020 to agree a negotiating mandate and actively participate in the working group (EPRS 2022). This could send a signal that the EU is also interested in dialogue and cooperation despite the unilateral due diligence regulations.

France has already suggested that the Binding Treaty could be modelled on the relevant laws in the EU, as these have a high standard with regard to business and human rights (Bose 2023: 26). From the perspective of approaches such as the aforementioned Third World Approaches to International Law, however, this approach would again eclipse the voices from the LMIC by using the law of the wealthier countries as a starting point (ibid.). The EU's involvement in the negotiation process should therefore ideally be open-ended in order to send a genuine signal for dialogue.

5.6.4 Expansion of due diligence obligations at international level

Due diligence obligations can be extended at international level in two ways: (1) by other countries introducing similar regulations (diffusion of standards); (2) by market mechanisms leading to due diligence obligations being applied not only in supply chains to the EU, but also within the markets of trading partners and in their trade relations with non-EU countries ("Brussels effect").

5.6.4.1 Norm diffusion

The introduction of due diligence regulations in some countries can also stimulate developments elsewhere. For example, some analysts describe the Dodd-Frank Act discussed in Appendix 3 as having brought new momentum to mining reforms at the international level, as can be seen in the subsequent EU Conflict Minerals Regulation and the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains published in 2015 (Saegert and Grossmann 2018). In this case, the USA had assumed the role of norm leader (Partzsch and Vlaskamp 2016). A similar development could also be observed in the timber trade. For example, the trade in timber from illegal sources was initially banned in the USA in 2008 (Lacey Act Amendment (2008)). In 2010, the EU issued its Timber Regulation, which stipulates that no illegal timber or timber products may be sold in the EU. Similar regulations have also been designed and implemented in Australia (Illegal Logging Prohibition Act, 2012), Japan (Clean Wood Act, 2016), South Korea (Revised Act on the Sustainable Use of Timbers, 2018), China (Measures on Strengthening the Legality of Imported Timber, 2019), Vietnam (Timber Legality Assurance System Decree, 2020) and Malaysia (Peninsular Malaysia Timber Legality Assurance System, 2013) (Wuttke

2022: 22). These developments follow the idea that pioneers, i.e. countries that introduce regulations at an early stage, change expectations and concerns in other countries and motivate them to introduce comparable reforms, which can create a positive feedback loop (Evans 2020: 678). This pioneering role also brings first mover advantages for the national industry, as private sector players can adapt to the new regulations at an earlier stage (Jänicke 2005).

So far, however, there are few signs that China or India, for example, as important buyers on the global agricultural markets, will formulate comprehensive due diligence regulations that go beyond voluntary regulations. Whether the German and European due diligence regulations will be a global success will therefore also depend on the power of these rules as a model for other regions and whether they contribute to the diffusion of standards in other regions. If the CSDDD finds many imitators, then the potential gap and thus the risk of divided markets will become smaller - and vice versa (cf. Section 5.5.2). However, it is currently unclear whether the CSDDD will prove to be a beacon project in the global trade debate or whether it will meet with resistance in countries, e.g. in countries that want to keep human rights out of the trade discourse.

5.6.4.2 "Brussels effect"

There are a number of areas in which European standards have certainly shaped the global discourse in the past. The term "Brussels effect"[143] is used to describe how market mechanisms are sufficient to transform EU standards into global standards without the need for negotiations, such as international treaties or agreements between regulatory authorities (Bradford 2015 and 2020). The Brussels effect is promoted when the following conditions, among others, are present:

1. Market size: "The larger the market of the importing country in relation to the market of the exporting country, the more likely it is that the Brussels effect will materialise" (translated by Bradford 2015: 161), whereby the relative market power depends on the respective sector.
2. EU regulatory capacity: This includes regulatory expertise and resources to enforce the standards, e.g. the ability to impose sanctions, e.g. to exclude non-compliant companies or force them to adapt.
3. Internal preference in favour of strict rules, i.e. when trading partners also have forces working in this direction.
4. Indivisibility of standards: EU standards can only become global standards if it is not worthwhile for companies to supply different markets with products manufactured according to different standards. Producing on the basis of a uniform standard can lead to economies of scale in production. However, it can also be technically very difficult for a company to operate according to different standards. One example of technical indivisibility is data protection regulation. For example, the EU requires companies such as Google to adapt their data storage and other business practices to European data protection standards. Since it is technically complicated to isolate its data collection for the EU, Google is forced to adapt its global activities to EU standards (Bradford 2015: 164). However, if divisibility is unproblematic, i.e. the company's costs for adapting production or business practices depending on the standard are low, the Brussels effect is less likely to materialise.

[143] The term was coined in reference to the "California Effect". Companies that want to export to California must fulfil the standards there, which are usually stricter than in other US states. When switching to uniform production standards, economies of scale come into play, which is why companies have an incentive to harmonise their entire production with the (stricter) standards (Bradford 2015: 159).

5.6.4.3 Importance of extending due diligence obligations to the domestic market of trading partners

The extension of due diligence obligations to the domestic market of trading partners is relevant because a large proportion of the risks and violations of human rights, labour standards and environmental standards relate to production for the domestic market. By definition, however, the due diligence obligations only cover production for exports to the EU. With regard to deforestation, Pendrill et al. (2022) show, for example, that on average only ¼ of agriculture-related deforestation can be linked to exports, while ¾ is due to domestic demand. In Africa, even higher proportions of deforestation are attributable to domestic demand. In addition, only around 45 to 65% of deforested areas are subsequently actively used for agricultural production. The remainder is the result of speculative deforestation, land ownership issues, short-lived and abandoned agriculture and agricultural fires that spread to neighbouring forests. Accordingly, the authors argue that guidelines for zero deforestation supply chains are important, but are only of limited use in reducing deforestation for the reasons mentioned.

The same applies to human rights issues. Depending on the region, between 9% and 24% of child labour in all sectors is linked to export goods (ILO et al. 2019: 9). Accordingly, production for national consumption is also of great importance in the fight against child labour (cf. Section 4.2.1). The implementation of or compliance with rights may be limited by trading partners due to low prioritisation or insufficient implementation capacities (e.g. Johnson 2019). Against this backdrop, supply chain regulations can have a greater impact if they spill over to trading partners - and vice versa.

For this effect, improvements in human rights and environmental standards must first be recognisable in those parts of the economy that are affected by the due diligence regulations, e.g. triggered by institutional improvements such as an increasing level of trade union organisation. On the other hand, dialogue, technical and financial support and the involvement of local companies can generate "ownership", i.e. local support, for the new requirements, as shown, for example, by the research project "Realising European Soft Power in External Cooperation and Trade" (Hoekman 2021) in the context of trade agreements. Ideally, the due diligence regulations can also be linked to locally driven reform processes (ibid: 15). Both processes - visible improvements and ownership of the regulations by the trading partners (cf. also Section 5.6.2) - can be self-reinforcing.

An overall assessment of the medium to longer-term effects of due diligence regulations in the area of tension between market segmentation and the diffusion of standards is difficult at the present time. The best solution would certainly be globally harmonised minimum standards, such as those contained in the proposal for a binding treaty at UN level, if these were also reliably enforced at national level. This would prevent market segmentation. However, there is a crucial lack of both points, not least due to the strong international competitive pressure in agricultural and food supply chains.

5.6.5 Conclusion

Due diligence obligations are based on international conventions agreed by consensus and ratified by a large number of trading partners. Despite a general normative consensus, conflicts may arise due to the fact that these conventions have now become more enforceable as a result of due diligence obligations. As a result, support for future new international agreements could dwindle. This may apply in particular to countries that fear disadvantages for their export sector, for example, as is already evident in the EU-Mercosur negotiations.

The effects of due diligence regulations can therefore change trade policy relationships: this creates pressure for the EU to conclude new trade agreements. Trading partner countries, which often

criticise due diligence obligations as overbearing, could try to negotiate compensation for disadvantages arising from due diligence obligations in trade agreements. At the same time, the aforementioned trade-offs must be taken into account or absorbed by conflicting regulations, for example in investment protection agreements, which could otherwise lead to stricter sustainability regulations resulting in extensive expropriation claims by trading partners.

The question of the extent to which unilaterally imposed due diligence obligations further cement the historical imbalance of power between wealthier countries and LMIC cannot be fully answered within the scope of the expertise report due to its complexity. However, the choice of a unilateral approach despite multilateral possibilities and the extraterritorial effect of the due diligence obligations without consulting the trading partners during the drafting of the laws must be criticised. However, cooperation with the governments of the trading partner countries is necessary to achieve the objectives of the due diligence regulations, such as the protection of labour and human rights along international supply chains. Direct involvement of the relevant state authorities in the LMIC in the review of due diligence regulations, especially when it comes to local impacts, and in the development of accompanying support services for implementation are therefore key (see example of roadmaps). With regard to verification, the joint definition of priorities, targets and indicators with the governments of trading partners and other key local actors can help to ensure that unilateral due diligence obligations are adopted, thereby facilitating effective implementation and verification (Hoekman 2021: 15). This is particularly important as human rights violations and negative environmental impacts occur not only in the export sector of trading partners, but also in production for the domestic market.

If the aim is not just to "clean" imports into the EU, trading partners need to promote their own approaches to improving the situation on the ground. At the same time, more efforts are needed in favour of multilateral cooperative approaches in order to better address the problem of the historical imbalance of power between wealthier countries and LMIC.

5.7 Challenges and limitations due diligence legislation

The German LkSG, the EUDR and the draft CSDDD partially cover different human and labour standards as well as environmental risks in the mandatory due diligence obligations (cf. Section 3.4). Depending on the course of negotiations between the EU institutions, the CSDDD may extend the due diligence obligations for companies to other areas (cf. Annex 1). This raises the question of where the limits of corporate due diligence obligations lie and which other areas would be desirable, but which are not yet explicitly covered by the LkSG or not covered to the same extent. In line with the Commission's draft CSDDD, this question is addressed below for the objectives of Food security, living wages and income, gender equality, climate and biodiversity protection.

5.7.1 ... to achieve food security

The right to food is a very basic human right that aims to ensure that everyone has access to adequate, sufficient and healthy food. It can already be found in the United Nations Universal Declaration of Human Rights adopted in 1948, which states in Art. 25 (1): "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food..." (UN 1948). In the UN Social Covenant of 1966, more than 170 states have now committed themselves under international law to implementing this human right. In Article 11 (para. 1) of the UN Social Covenant, the contracting states explicitly recognise the right to food in the above-mentioned formulation and

undertake to take "appropriate steps to ensure the realisation of this right". In Art. 11 (para. 2), the parties of the states also recognise a "fundamental right of everyone to be protected from hunger".

In view of the hunger figures, the human right to food is often cited as the "most frequently violated human right" (CSM 2018). It is a crucial human right for the agricultural sector in particular, as a large proportion of the world's hungry people are smallholder farmers. For Germany and the EU itself, there are fewer supply risks in terms of available food, but there may be risks in terms of price levels due to rising food prices.

The importance of the right to food within human rights is also reflected in the fact that the UN has appointed a Special Rapporteur specifically for the right to food as one of various thematic mandates of the UN Human Rights Council since 2000.

While the focus at the time of the development of these legal norms was on the availability of and access to food, the difference between the right to food and the right to nutrition has since been increasingly discussed (see Fanzo et al. 2019). Nutrition depends not only on the quantity and quality of the food consumed, but also on other factors such as hygiene conditions and health status (Fanzo et al. 2019, CFS 2012). In the international discussion relating to human rights, the term "right to food" or "right to adequate food" is still predominantly used. As explained below, the recommendations for implementing this human right, for example in the form of voluntary guidelines, are more and more aimed at taking into account the many factors that are relevant for a healthy diet beyond the availability of food.

Such an expanded perspective on the right to food is also evident in the FAO definition of "food security", which has been further developed in recent decades and now encompasses four dimensions: Availability, Access, Utilisation and Stability. Accordingly, food security exists "when all people at all times have physical and economic access to adequate, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life." (CFS 2012). There is also an international discussion about expanding the term "food security" to "food and nutrition security" (CFS 2012). In German, the term "Ernährungssicherheit", which covers both aspects, is usually used.

The UN International Covenant on Economic, Social and Cultural Rights sets out human rights-based state responsibilities for food security. These include the possibility of realising food for an individual, in particular in the form of sufficient and qualitatively appropriate food. These state responsibilities also apply to behaviour of third-parties , non-state actors such as companies.

The draft CSDDD explicitly refers to Article 11 of the UN Social Covenant, as well as Article 25 of the Universal Declaration of Human Rights (cf. Annex 1). However, there are no explicit references to this specific human right in the LkSG or the EUDR and it has not yet been explicitly provided for in the review of the EUDR.

The realisation of the right to food - similar to the included due diligence obligations - falls under the responsibility of several policy areas, which is why Germany, for example, is calling for closer cooperation between the BMEL, the BMZ and the BMWK in placing this human right in the various policy instruments, e.g. Welthungerhilfe (2023) (Welthungerhilfe 2023).

Some international principles and guidelines have therefore been aimed at implementing this right for some time: SDG 2 pursues the specific goal of ending hunger and malnutrition by 2030 and increasing agricultural productivity and income, especially for women and marginalised groups (Martens and Ellmers 2020; cf. also Section 5.7.2). Following negotiations in an intergovernmental working group, in which the above-mentioned UN Special Rapporteur also participated, the FAO adopted "Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of

national food security" in 2004 (FAO 2005). These contain 19 individual guiding principles for states to implement the right to food in the context of national food security (FAO 2015: 2). The guidelines relate to democracy and good governance, economic development, food security and access to resources, among other things. They address the state level, but also make reference to other actors. Guideline 4 "Market systems", for example, refers to the state's promotion of CSR measures and the commitment of all market participants and civil society to the realisation of the right to food (ibid.: 13). Guideline 10 addresses "Nutrition" and includes a wide range of measures, for example in the areas of education and health, which are relevant for a healthy diet.

Since then, the UN Committee on Global Food Security (CFS) has adopted further voluntary guidelines to support the implementation of the right to food. These include a Global Strategic Framework for Food Security and Nutrition, which was revised in 2021 (CFS 2021), and Voluntary Guidelines on Food Systems and Nutrition (CFS Voluntary Guidelines on Food Systems and Nutrition, CFS 2021).

In view of the problems for food security caused by the large-scale appropriation of land by investors, which often involves the risk of people being displaced ("land grabbing"), the UN Food and Agriculture Organisation (FAO) issued Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO 2012, revised 2022) in 2012. In addition, the Committee on World Food Security adopted Principles for Responsible Investment in Agriculture and Food Systems (CFS 2014) in 2014.

With regard to international supply chains, the right to food is frequently the basis for special regulations, often as an exceptional reason for trade restrictions that would otherwise have to be avoided (UNCTAD 2021, Fakhri 2021). According to the WTO, it can justify export restrictions in situations of scarcity in order to safeguard the country's own population, which can, however, have a counterproductive effect in large agricultural exporting countries. In contrast, food security is rarely explicitly anchored in bilateral agreements - one exception is the EU-Ghana Interim Agreement (EP INTA 2021). The mandatory impact assessments for EU trade agreements also hardly include any effects on food security (Rudloff 2019).

At the same time, this human right also plays a role in foreign and security policy in the context of humanitarian objectives, for example for food aid, the supply of which is often specifically supported by trade policy or explicitly exempted from trade restrictions. In relation to sanctions, this right should also be preserved both for the sanctioned state and for indirectly affected states (Kluge 2022).

With regard to the integration of the right to food into corporate due diligence obligations, it should be noted that there are differences between countries in how the right to food is handled at national level. South Africa, for example, has explicitly enshrined the right to food in its constitution (Boyle and Flegg 2022: 12). India passed a National Food Security Act in 2013, which is seen as a paradigm shift from a welfare state to a rights-based approach. Around two thirds of the population are entitled to subsidised food on the basis of this law.[144] However, subsidies related to food security often cause conflicts at WTO level (Siddiqui 2014, Rudloff 2015). Overall, therefore, the various trading partner countries have very different, sometimes constitutional, anchoring systems that companies face along the supply chains.

In Germany, food security is currently being addressed in different ways, for example in the German government's national security strategy, which identifies strengthening global food security as part of its broader understanding of security. It defines the realisation of the right to food as a guiding principle for its actions (Federal Foreign Office 2023b: 68). There is also a debate initiated by the German

[144] See https://nfsa.gov.in/portal/nfsa-act

Farmers' Association on the "right to food", which, as explained above, is equivalent to the "right to nutrition" (Martinez 2022). In Germany, this right is state-related from a legal perspective, but individual duties dominate. Citizens are obliged to secure their own basic needs. If this is not sufficient or he/she is unable to secure this basic provision, the right to food as a right to benefits from the state applies.

Furthermore, the right to food in the German legal system does not include the right to be able to live from the profits of one's labour. If a farmer has to give up his business and loses his income as a result, this does not constitute a violation of the right to food. In this respect, the German legal system does not recognise a right to a living income that can be earned on the market. This legal limitation hinders integration into corporate due diligence obligations. This is relevant because a right to a living income is being discussed internationally in connection with corporate due diligence obligations (cf. Section 5.7.2).

However, there are already operationalised examples of voluntary certification approaches for recording food security along international supply chains, such as the Food Security Standard (FSS), which is explained in more detail in Textbox 5.7. This offers certification along the four FAO dimensions of food security (Gamba et al. 2020; cf. Box 5.7).

The FAO dimensions mentioned above cover four complex aspects of food security: availability, access, usability and stability. This addresses very different influencing parameters, which are also influenced by different actors: from imports to food aid and income-relevant social policy to land use rights.

An example of a more indirect but far-reaching effect is the above-mentioned problem of land grabbing, which can lead to hunger. If due diligence obligations lead to the prevention of land grabbing, they could thus contribute to the right to food. The LkSG already explicitly lists the unlawful deprivation of land and other production factors as a human rights risk (Section 2, para. 2 no. 10, cf. Section 3.4).

Due to the complexity of the right to food and the different concretisation of the aspects of food security in corporate obligations, it seems sensible to differentiate which aspects should be included directly in the due diligence regulations and which aspects can be step by step and could be added after an impact assessment. The FSS can serve as a valuable basis for this. As listed in Textbox 5.7, the FSS contains some criteria that cover the due diligence obligations under the LkSG, such as the provisions of the ILO core labour standards and the provisions relating to the protection of land rights. The FSS thus offers LkSG-compatible certification, supplemented by additional aspects that are specifically aimed at food security. Its coherence with the German due diligence obligations has been legally reviewed (GvW 2023) and an extension to the requirements of the CSDDD is planned. Criteria in the FSS that have a very direct connection to corporate action should also explicitly be categorised as corporate due diligence obligations. One example of this is ensuring the availability of food in the workplace for dependent employees. In addition, other regulations, such as educational programmes for healthy nutrition in companies, could be considered voluntary measures and experience could be gathered in the sense of a learning system. Overall, the FSS can play an important role in strengthening the perception of violations of the right to food.

Textbox 5.7: Details of the *Food Security Standard (FSS)*

The Food Security Standard was developed by Welthungerhilfe and the WWF in cooperation with the Centre for Development Research (ZEF) and with the support of the BMEL.[145] It offers certification along

[145] https://foodsecuritystandard.org/about/?lang=de#what-is-fss

the four dimensions of food security contained in the above-mentioned FAO definition (availability, access, utilisation and stability). In detail, the FSS contains both regulations that relate to dependent employees in agriculture (agricultural workers) and regulations that are applicable to self-employed farmers. With regard to dependent employees, the FSS includes all regulations provided for in the ILO labour standards. In addition, nutrition-related regulations are included, such as the rule that farm workers are made available diverse and nutritious food at fair prices if they cannot bring food with them or purchase it in the neighbourhood (Indicator 13.1.2, Gamba et al. 2020: 22). Rules relating to fair and living prices (criterion 5.2), regulations for the protection of land rights (criterion 9.1) and water rights (criteria group 10) as well as regulations on good agricultural practice (criteria group 11) are related to self-employed farmers.

The provisions of the FSS can therefore be categorised as follows: (1) regulations that are also covered by other human rights regulations; (2) regulations that are not contained in other human rights regulations, or not as specifically as in the FSS. The latter regulations differ in terms of how direct the connection is between the regulation and the individual food security of a person. The spectrum ranges from regulations with a very direct link (e.g. availability of food at the workplace for dependent employees in indicator 13.1.2) to regulations with a more indirect link (e.g. the rule that crop rotation should be practised, indicator 11.1.4). There are also regulations that refer to a direct connection, but this is not explained in more detail. One example is criterion 17.1.2: "the food and nutrition security situation of communities in the area of influence of the operation does not deteriorate due to the operation."

There are also regulations in the FSS that are certainly helpful with regard to food security, but which are not prescribed or consistently implemented within companies in Germany, such as the following regulation: "A training programme that focuses on improving food and nutrition security shall be provided to all people working for the operation. At a minimum, this training must cover proper nutrition and healthy diets. Other aspects of the training should be determined in collaboration with the target group." (Indicator 16.1.1).

To summarise, it can be said that the right to food is a fundamental human right, which is why it seems sensible to include it in companies' supply chain due diligence obligations. This is the case to some extent in the CSDDD draft. However, in order to further embed this human right in corporate due diligence regulations, it is important to provide a more concrete and company-specific specification of how companies can fulfil the protection of this human right, even in countries where the right to food is enshrined differently. Coherence with other existing obligations must also be ensured. It should also be noted that living wages and incomes are of central importance for securing the right to food. These are dealt with in the next Section.

5.7.2 ... to achieve a living wage and a living income

With regard to human rights risks, the various due diligence obligations focus on the protection perspective, i.e. compliance with basic minimum social standards such as the ILO core labour standards. At first glance, the equity perspective is not at the forefront of the developing legislation at German and EU level. In the equity perspective, the objectives go beyond the minimum social standard. Companies that establish social standards based on the equity perspective along their supply chain generally use voluntary social labels such as Fairtrade (WBAE 2020: 288). Whether such an equity

perspective can also be implemented in the context of supply chain due diligence obligations, on the other hand, is much more challenging.

Living wages and incomes are well above the amounts defined as the absolute poverty line. In addition to food security, they also include housing, other essential needs such as education and health, as well as risk reserves (cf. Fig. 5.9). Calculating a living wage and a living income is not trivial, as the reference values are often difficult to define: Does the living wage per hour refer to the monthly wage for full-time or part-time employment? How can the price of agricultural products be determined to ensure a living income?

The issue of non-living wages and incomes for agricultural producers of predominantly tropical commodities such as cocoa and coffee has been discussed for several decades.[146] More recently, not least due to the limitations of the Fairtrade label concept, which has increasing but limited market shares and whose efficiency is being criticised, as less than 20% of the additional consumer price usually reaches the producers (Naegele 2019: 23). To what extent can due diligence regulations also serve to cover such objectives from an equity perspective?

In the German LkSG, there is a reference to the payment of an "appropriate wage", which is based on the minimum wage of the country concerned (LkSG Section 2 para. 8). The draft CSDDD potentially goes beyond this, as at least the annex also mentions the violation of the prohibition of withholding an adequate living wage in accordance with Article 7 of the UN Social Covenant: "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, complemented, where appropriate, by other social protection measures."

There has been ongoing work on the definition, measurement and implementation of living wages and incomes in various areas for many years. This discussion has been further intensified by the developments surrounding supply chain regulations. Broad-based platforms include the Global Living Wage Coalition[147] for wages and the Living Income Community of Practice[148] for income, the latter of which is supported by the BMZ and GIZ, among others.

The Anker method has become established for calculating regionally adjusted living wages and incomes (Anker and Anker 2017). In both cases, the first step is to estimate the costs of an appropriate lifestyle for the households of employees and small business owners. These are divided into four expenditure groups: Food, housing, other essential needs such as education and health, and risk reserves (cf. Fig. 5.10). On the other hand, there are either the actual wages of employees or the income of small business owners. In turn, household income is also made up of different components: net farm income, net non-farm income, such as the wage income of a family member, and other income, such as remittances from migrants (cf. Fig. 5.10). In rural areas in particular, non-farm income

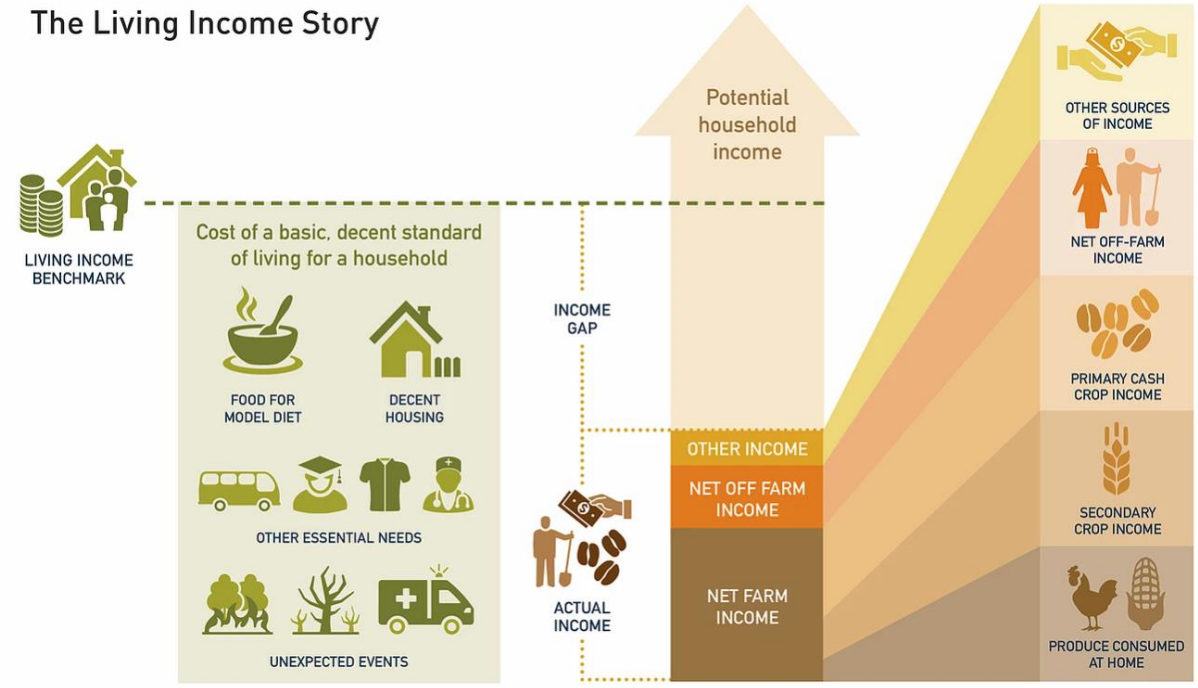
[146] Various regulations in the past were aimed at stabilising revenues for exporting countries at state level against the background that the prices of some commodities, including agricultural commodities, fluctuate strongly: these included various phases of agreements on metals and agricultural products such as coffee, cocoa, sugar, wheat and olive oil (ODI 1982). At the centre were joint commitments by importing and exporting countries to stabilise prices through sales and purchase targets. To this end, quantitative export interventions, balancing reserves and a common fund were envisaged (Seitz 1978). The EU also had such a mechanism as part of its Lomé agreements (Stabex in general, Stabmin for minerals). The impact of these agreements is considered to be limited, as the interests involved are considered to be too heterogeneous.

[147] https://www.globallivingwage.org/about/

[148] https://www.living-income.com/

can account for up to 50 % or more of household income (e.g. Schmitt 1988, Wesseler 1997, Reardon et al. 2007), although there are variations between countries (Davis et al. 2017).

Figure 5.10: Components taken into account to calculate the living income and the actual household income



Source: The Living Income Community of Practice

In economic terms, the question of living wages and living incomes should be assessed differently: Living wages are similar to the minimum wage approach, which is also familiar from Germany. If a country has a statutory minimum wage that provides a living wage, then it may be a question of enforcing this statutory minimum wage along the supply chain, even if the states themselves cannot ensure this. However, calculations by the Global Living Wage Coalition have shown that statutory minimum wages are often (far) below the calculated reference value for a living wage.[149] In addition, the Global Living Wage Coalition's calculations take regional differences into account and consider that the reference values must be constantly adjusted, especially in the event of high inflation.[150] In practice, it therefore makes a considerable difference whether reference is made to minimum wages or living wages.

In the absence of a statutory minimum wage or its strong deviation from the reference value of the living wage, corresponding equivalents would have to be defined and periodically adjusted for inclusion in due diligence regulations for the various trading partners based on the respective cost of living. This is a difficult case, as it may result in purchase price differences that are relevant to competition. Therefore, such living wages would have to be defined in a cooperative approach for the entire agricultural sector of the respective countries, possibly adapted for the respective parts of the

[149] https://www.globallivingwage.org/resource-library/

[150] See for the example of Sri Lanka: https://www.globallivingwage.org/wp-content/uploads/2019/07/Updatereport_Sri_Lanka_June2022_210722-FINAL.pdf

country, for inclusion in due diligence regulations. It would need to be clarified which actors are responsible for coordinating and implementing this task.

The issue of living (entrepreneurial) incomes is even more complex, for the following reasons:

1. In many developing countries, the agricultural sector is a social "catch basin", i.e. a traditional income option for survival, even if the farm size is often insufficient or uncompetitive. How high should producer prices be set for such micro-agricultural enterprises so that the total income is sufficient to secure a livelihood? How should the other (different) sources of income of the households be dealt with? How can it be ensured that marginal farms are not the first to be excluded from the value chain when production costs vary greatly, as they require the highest subsidies, especially in countries with hardly any social security systems?
2. For various reasons, agricultural *c*ommodity markets are sometimes subject to pronounced price fluctuations. It is also known from EU markets that producer prices can be below production costs during low price phases. These price fluctuations are reactions to changes in supply and demand and serve to adjust the supply volume. Despite numerous analyses, there are no simple instruments to prevent such low price phases. How should European buyers react to such low price phases in living income concepts? The long-standing discussions about milk prices in Germany have not yet produced any solutions for price stabilisation that do not ultimately end in state market interventions and quota systems (see below).
3. Product prices have an important steering function in market-based systems. Approaches to achieving social goals via prices are problematic because they are not precisely targeted (so larger producers can benefit more from them) and incentivise increased production without limiting quantities (Wright 2009).

Both living wages, e.g. for workers on plantations, and income, e.g. for smallholder farmers, are of considerable importance for agricultural supply chains. In both areas, there have recently been initial implementation efforts on the part of some trading partners as well as political support from some importing countries and initial approaches from companies.

5.7.2.1 Exemplary policy approaches

With the aim of achieving a better income for smallholder farmers in the cocoa sector, the governments of Côte d'Ivoire and Ghana have designed a so-called living income differential (LID) for the 2020/21 season. A premium of USD 400 was added to the export price per tonne of cocoa, which is to be paid by international buyers. International traders appear to have initially supported this approach.[151] 70% of the final price (FOB plus premium; average price of the season) goes to the cocoa farmers, whereby a minimum price is not to be undercut. If world market prices for cocoa are very low, so that the minimum price is not reached despite the LID supplement, the price gap could be compensated for by a stabilisation fund introduced at the same time. In order to better control the incentive to increase production due to the higher price, a production quota is also planned for both countries.

The previous and potential effects of the LID have already been observed, assessed and discussed (see in particular Forstner et al. 2021 (unpublished) for a summary, assessment and classification of previous analyses), with the coronavirus pandemic and the associated decline in demand creating special conditions for the introduction of the LID. In the short term, producer prices initially rose in

[151] see https://www.reuters.com/world/africa/cocoa-buyers-subsidise-ivory-coast-ghanas-cocoa-premium-2022-07-09/

both countries in the 2020 peak season compared to the previous period, with the decline in demand leading to a drop in export revenues. At the same time, there was an unexpectedly large harvest. In Ghana, the LID was paid out with a delay, which initially led to resentment among producers (Forstner et al. 2021). However, the effects still need to be monitored further.

In principle, Forstner et al. 2021 draw two different scenarios (2021: 58; abbreviated here): 1) Due to the LID, cocoa farmers in both countries receive higher prices and a higher income. This leads to investments, e.g. the planting of new, higher-yielding trees, which leads to productivity increases and frees up land. This in turn can be used for the cultivation of other products and promote diversification (if there is also a quota for cocoa). 2) LID leads to an increase in production, but without an increase in productivity. This can lead to a higher demand for labour, such as agricultural workers or increased child labour. Small farmers in particular only have a limited amount of land available, which is why in particular farmers with more acreage would benefit. Accordingly, the authors recommend a large number of accompanying measures in the areas of increasing productivity, supply management, good governance and structural reforms in order to actually create a living income for the smallholder sector in both countries. In essence, however, in view of the large differences in productivity, a minimum price creates additional production incentives for suppliers with favourable costs, so that the countries must introduce internal production quotas and jointly limit the quantity on the world market via a quantity and price cartel. The chances of functioning supply cartels, which are always threatened by outsiders, depend on various criteria (homogeneity of the objectives of the countries involved, storage options, etc.), but OPEC-like cartels on the agricultural commodity markets have generally not been very successful in the past. Without a volume limit, however, the risk of volume surpluses increases (see the EU experience with "milk lakes" and "butter mountains") and the market price falls or the costs of intervention rise. Cartels only work - see OPEC - if all major producing countries are prepared to reduce capacities in the short term if necessary and thus forego export revenues. However, short-term adjustments are a key problem for agricultural cartels, especially if there is no storage capacity (Wright 2009), and are also a very expensive solution at the macroeconomic level (Wesseler 2020).

Boysen et al. (2023) also simulate similar scenarios with regard to the possible effects of LID on cocoa farmers in Ghana and Côte d'Ivoire and the rest of the world. For farmers' income, it is crucial that the price-setting mechanism described above is transparent and based on clear rules so that the LID premium is not misappropriated (Boysen et al. 2023). Based on their findings, they also conclude that both LID countries should use their collective market power and keep future cocoa production below demand, e.g. with production quotas or restrictive planting rights. This would also make us less dependent on the possible evasive behaviour of chocolate manufacturers towards other trading partners. If there were also positive effects on institutions and infrastructure as a result of the LID in both countries, this would reduce the costs for chocolate manufacturers to fulfil due diligence obligations and sustainability requirements. This in turn would incentivise chocolate manufacturers to continue sourcing cocoa from LID countries (ibid.).

An analysis of stakeholder assessments in the cocoa sector in Ghana supports the above-mentioned calls for accompanying government measures and basic good governance so that LID can have a positive impact on farmers' incomes and so that no unintended effects, e.g. deforestation, arise (Adams and Carodenuto 2023). In addition, some stakeholders criticise the fact that the heterogeneity of farmers with regard to land rights and sharecropping arrangements is not taken into account in the LID concept. This harbours the risk that particularly vulnerable groups, such as women and migrants, will potentially benefit less (ibid.).

One example on the part of the importing countries is the joint declaration signed in 2021 between Germany (BMZ) and the Netherlands (Ministry of Foreign Trade and Development Cooperation) on

living wages and living incomes. It states, among other things, that they are committed to the inclusion of living wages and incomes in EU policy on sustainable value chains.[152] To this end, the ILO should also support the development of benchmarks for the cost of living in sourcing countries as a "normative basis" for living wages and incomes.

In addition, the Sustainable Cocoa Initiative is a platform launched by the EU to increase sustainability in the cocoa value chain, with the aim of achieving a living income for cocoa farmers (EU Sustainable Cocoa Initiative 2022).

5.7.2.2 Exemplary approaches by companies

There are also discussions in the private sector about individual and cooperative measures to ensure living wages and incomes, as well as support for companies from international initiatives. For example, the aforementioned UN Global Compact initiative (cf. Section 2.2) developed the Living Wage Analysis Tool in 2023 to help companies identify ways to pay all employees a living wage. It is also intended to enable companies to measure their progress in this area.[153]

In 2020, Nestlé and partner organisations launched the income accelerator programme as a corporate pilot project with around 1,000 families involved in cocoa farming in Côte d'Ivoire. After two years, the programme was expanded to include around 10,000 families, with the aim of reaching up to 160,000 families by 2030.[154] The core of the programme is to achieve a living income for these households through annual one-off payments for special services. For example, CHF 100 for the "school attendance" benefit is transferred directly to the family by mobile phone, with half of the amount going to the male and half to the female head of household. Households can receive further payments in the areas of "good agricultural practice", "agroforestry" and "diversified income". If all four benefits are fulfilled, the household receives a further bonus of CHF 100 (maximum CHF 500 per year and family).

Other companies have also taken up the issue. Mars founded the Farmer Income Lab with the aim of finding innovative solutions to improve the income of smallholder farmers.[155] Coop, HALBA and Max Havelaar are running a pilot project with Fairtrade in Ghana, which pays participating smallholders additional remuneration and thus leads to a living income "under certain agricultural conditions".[156] In the Dominican Republic, meanwhile, Coop and Fairtrade are running a project for living wages in banana cultivation. [157]

Co-operative solutions have also been increasingly sought recently, as even larger companies have difficulties in implementing cost-increasing standards across the board. This is in light of the fact that the additional costs of ensuring living wages and incomes are not high in terms of the final consumer price, as the producers' current share of the final consumer price for cocoa products, for example, is only around 6%. However, they are relevant to competition for an industry in which raw materials are

[152] https://www.nachhaltige-agrarlieferketten.org/fileadmin/INA/News/210121_Gemeinsame_Erklaerung_LI_NLD_DEU.pdf

[153] https://livingwagetool.unglobalcompact.org/about/ (last accessed on 5 May 2023).

[154] https://www.nestle.com/sites/default/files/2022-01/nestle-income-accelerator-program-infographic.pdf

[155] https://www.farmerincomelab.com/

[156] https://www.fairtrademaxhavelaar.ch/ueber-uns/fairtrade-global/arbeitsschwerpunkte/besseres-einkommen/existenzsichernde-loehne-in-der-dominikanischen-republik-1

[157] https://www.fairtrademaxhavelaar.ch/ueber-uns/fairtrade-global/arbeitsschwerpunkte/besseres-einkommen/existenzsichernde-loehne-in-der-dominikanischen-republik

traded on international markets from a cost perspective (cf. Table 4.1 in Section 4.1). The Lidl Fairtrade banana case outlined in Textbox 5.8 is an example of the difficulties faced by even large companies (risk of first-mover disadvantages, Monopolies Commission 2022).

The working group on living incomes and wages set up in 2020 in response to the Lidl-Fairtrade banana case by seven major German food retail companies (Aldi Süd, Aldi Nord, Lidl, Kaufland, Rewe Group, dm, tegut) together with GIZ, politically supported by BMZ, is considered a pioneering case.[158] The starting point for the pilot project was a wage gap analysis (cf. Fig. 5.9), which showed considerable undercutting, e.g. in the banana sector (cf. also Section 4.2.1).

However, as food retailers in Germany do not have a direct supply relationship with the smallholders or labourers on the plantations, it is not possible to directly fix wages and incomes. Instead, it must be ensured that the higher prices paid by buyers in Germany are also passed on to the workers and smallholders. This is difficult because retailers usually have no insight into the cost structures of their suppliers (e.g. wholesalers). In many cases, the supply chain is also multi-levelled.

In the banana initiative, the companies involved are therefore relying at least in part on the "open book costing approach" familiar from the automotive industry. Aldi-Süd communicated this approach in a press release in autumn 2022 (LZ of 09.09.2022). According to this, the suppliers involved must disclose their cost structures so that customers in Germany can assess the various types of costs, including labour costs and the producer prices paid. In addition, labour rights are to be strengthened, probably also to reduce circumvention strategies. This approach is currently being trialled with selected larger importers. The aim is to see to what extent "open book costing" approaches can be implemented in practice and how the very heterogeneous cost structures of suppliers can be taken into account. Most recently, for example, an evaluation by the Thünen Institute showed that a ban on purchasing food and agricultural products below production costs, as in France and Spain, does not make sense due to the very different production costs, which depend on numerous influencing factors (Forstner 2023).

In the long term, however, the industry initiatives could lead to a significant change in the value chain:

- A transparent calculation of all upstream suppliers for the company controlling the chain will only be supported by them if in return longer-term purchase commitments are entered into.
- Suppliers are thus integrated into more stable value chains under the clear control of a manufacturer or retailer. This creates "quasi-integrated" value chains, controlled by a dominant (focal) company. The suppliers become integrated suppliers - comparable to contract fattening in the poultry industry, for example - who are economically dependent on the decisions of the controlling company. The controlling company ultimately allocates margins to the upstream suppliers. Markets are replaced by asymmetrical but more stable value chains.
- The focal company also has the role of volume control in the chain in order to prevent suppliers from building up excess capacity that cannot be sold.
- This approach will tend to shorten value chains, as it is hardly applicable to multi-stage supply chains.

[158] https://www.nachhaltige-agrarlieferketten.org/in-der-praxis/arbeitsgruppe-des-einzelhandels/

5.7.2.3 Effects and limitations of existing approaches

At the current pilot stage, it is not possible to assess how the concepts of the trading partners outlined above (such as the LID initiative of Côte d'Ivoire and Ghana) can interact with sector initiatives and individual company approaches or whether it will be possible to solve the classic problems of state minimum price and volume control in this way. In any case, the approach requires intensive horizontal coordination between the main buyers in Germany. Here, too, there is a risk of outsiders joining in. For example, Edeka, Germany's largest food retailer, is not participating in the working group on living incomes and wages, which threatens the stability of the agreement that will lead to higher purchase prices. Bananas as a mono-product are still a relatively simple example. In markets with a more diverse buyer structure, such as the cocoa market, where the major chocolate producers are also relevant alongside the traders, voluntary agreements between all key players will be much more difficult to achieve. This is also due to the fact that manufacturers not only face national competition, but may also face competitors in export markets who do not pay such higher purchase prices.

In addition, such industry agreements are subject to antitrust concerns. Even if the participating companies in Germany do not agree on end consumer prices, they do jointly determine a significant cost component and intensively exchange information on the market. This increases the risk of competitive agreements and price-fixing behaviour and is therefore being closely monitored by the Federal Cartel Office. There is a growing debate in competition law literature about the possibilities and limits of such sustainability agreements. However, in the case of the sustainability initiative to promote living wages in the banana sector, the Federal Cartel Office has not yet expressed any competition concerns, as there is "no price fixing in the classic sense". [159]

Textbox 5.8: The discontinuation of non-Fairtrade-certified bananas at Lidl and cancellation of the measure in 2018/2019

In autumn 2018, Lidl made a media-effective commitment (Lidl 2018) to only market fairly traded bananas. The company started with a gradual switch from non-Fairtrade-certified bananas, which previously carried the Rainforest Alliance label, to exclusively Fairtrade-certified bananas. As Lidl's organic bananas were already Fairtrade-certified at this time, only bananas from "fair trade" were to be listed once the changeover was complete. The decision to delist non-Fairtrade-certified (i.e. Rainforest Alliance) bananas was reversed in May 2019, as market share was lost to other retailers. Since then (i.e. since summer 2019), Lidl has offered three banana varieties in all shops: organic Fairtrade bananas, conventional Fairtrade bananas and conventional bananas that are not Fairtrade but Rainforest Alliance certified.

The withdrawal of the delisting was discussed by Lidl in the media as a problem of customers' unwillingness to pay. The prices for Fairtrade bananas in spring 2019, when Lidl listed only Fairtrade bananas in around 40% of its 3,200 shops, were 1.19 euros. The comparable price for conventional bananas at Lidl's main competitor Aldi was €0.99 at the time. Despite individual price promotions in which Lidl occasionally offered Fairtrade bananas for €0.99 and in some cases even for €0.89, Lidl lost market share. Aldi lowered the price of organic Fairtrade bananas from €1.69 to €1.39 during the promotional periods (previous year 2019) and was able to occupy the entry-level price segment thanks to the permanent low price, which was usually 20 cents/kg lower. Other competitors also ran special offers to gain market share. In statements justifying the switch back Lidl criticised that other food

[159] https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2022/B2-90-21.pdf?__blob=publicationFile&v=2

retailers had unfortunately not gone along with the discontinuation of non-Fairtrade-certified bananas.

In 2018, around 10 % of German bananas were Fairtrade-certified at around 92,400 tonnes. The volume almost tripled from 2013 to 2018 (Hielscher 2019, n.d. 2019a). The example of Fairtrade bananas illustrates the key role that consumers play. Even with relatively inexpensive products such as bananas (with a price per kg of around one euro), a relatively well-known label and limited price premiums of around 20%, some consumers are not willing to pay more for Fairtrade. It should be noted that the proportion of particularly price-sensitive households is greater among customers of discount retailers such as Lidl than among customers of supermarket operators such as Edeka and Rewe.

As the case also shows, a label in a highly competitive (oligopolistic) market is only suitable for raising social standards across the industry if all major competitors join in (as was the case with the animal welfare issue of "caged eggs"). As competition agreements between retailers are problematic under antitrust law, this is a risky decision for the pioneers, who have to weigh up the expected reputational gain against possible losses of market share and the risk of first-mover disadvantages (Monopolies Commission 2022).

Overall, the food trade plays an important role in Fairtrade labelling as well as in sustainability marketing. The success of retail initiatives ultimately depends largely on consumers' willingness to pay and the reaction of competitors. After coffee, bananas are the second strongest Fairtrade product, so a complete delisting at least seemed possible. For many other imported foods, however, a complete delisting would not be feasible at present.

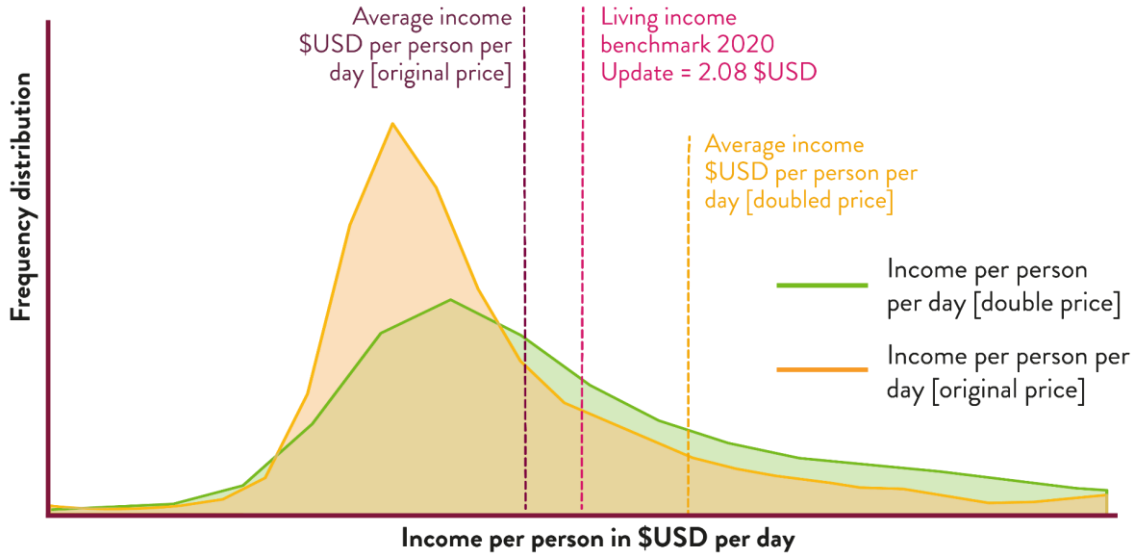
The banana case subsequently led to discussions in the German trade, and with the support of the GIZ an initiative was launched to improve the income of banana growers, to which almost all major food retailers have committed themselves (cf. Section 5.7.2 for details). This initiative was largely initiated by the LkSG, but took place as a pilot initiative in the run-up to its entry into force.

Source: WBAE 2020: 154 (slightly modified and supplemented)

------ End of text box_____

If we follow modelling approaches and practical examples (see, for example, Tony's Chocolonely (2021)), an approach that focuses solely on higher producer prices seems insufficient to generate a living income for the majority of households in the cocoa sector. For example, Waarts and Kiewisch (2021) show in a simulation calculation that even a doubling of the producer price would not raise half of the farming families in Ghana to a living income and thus above the living income threshold. Figure 5.11 shows the income distribution of farming households working with Cocoa Life in Ghana at a cocoa price of USD 1500 per tonne. As can be seen, even in this case, the majority of growers are still below the income benchmark (green line). At the same time, the more productive farms would benefit particularly from these higher prices, as indicated by the change in average income (Waarts and Kiewisch 2021: 35). The lowest-income households with comparatively low production volumes would only be supported ineffectively through prices or production-related premiums, which is why non-production-related measures (training and advice, schooling, support for diversification, etc.) would be important (ibid.), which points to the need for more comprehensive cooperation with government agencies, development aid, NGOs, etc.

Figure 5.11: Distribution of income among the farming households registered with *Cocoa Life* in Ghana in the status quo and with a doubling of the producer price



Note: The official living income benchmarks based on the Living Income Community of Practice are calculated in $USD per month per household for a reference household size consisting of adults and children. For the conversion to per-person-per-day rate, the authors applied a flat conversion across all household members as an approximation.

Source: Waarts and Kiewisch 2021: 36

Even though the discussion about living income and living wage has gained considerable momentum in the international debate, it is currently not foreseeable that supply chain laws will consistently commit buyers in the EU to this goal in the near future - the unresolved implementation issues are too great. Nevertheless, it makes sense to think through such a scenario. What would be the consequences of obliging EU buyers to pay living wages in the smallholder sector?

- In a negative scenario, market segmentation would result from EU buyers sourcing their raw materials primarily from larger, more productive suppliers who already earn a sufficient income. Small farmers with insufficient incomes would deliver their goods to countries that do not impose such conditions. There would be a great risk that this would tend to widen the social divide among local trading partners.
- In a positive scenario, buyers would invest not only in supplier development, but also more comprehensively in the social conditions of producer cooperatives, binding them to themselves through long-term contracts and thus creating examples that exert pressure on other buyers and the governments of the countries of origin.

A total of four cases can therefore be distinguished in relation to the LkSG and the CSDDD:

1. With regard to wages, the LkSG requires an appropriate wage. This means that if there is a statutory minimum wage, this must be paid as a minimum. If there is no such statutory minimum wage, the appropriate wage must be determined on the basis of other (meaningful) criteria. However, these criteria have not yet been defined, so the situation is unclear and companies have a lot of room to manoeuvre.

2. The CSDDD refers to the (presumably) significantly higher living wage, albeit with relatively little concrete reference to the UN Social Covenant. This due diligence obligations would mean that companies would de facto have to endeavour to achieve a significant wage increase for their employees in LMIC and, to some extent, in wealthier countries.
3. The LkSG does not address the living income of (small business) suppliers.
4. The Commission's proposal on the CSDDD does not mention living wages, but the European Parliament's negotiating position on the CSDDD refers to them (as with wages) (as of October 2023).

As explained above, the calculation and realisation of such (corporate) income is problematic in a market economy system. Significant research is still required in this area. Nevertheless, it is especially the self-employed (small business) suppliers who often find themselves in particularly precarious income situations (see in particular Section 4.2.1).

5.7.3 ... to achieve gender equality

Under international law, gender equality in relation to work and pay is (implicitly) enshrined in Article 23 of the Universal Declaration of Human Rights. "Everyone, without distinction, has the right to equal pay and work." The United Nations Convention on the Rights of Women is also of a fundamental nature. Signatory states undertake to take measures to prevent states themselves and all persons, organisations or companies from discriminating against women. States must report on the steps taken at regular intervals. The EU draft directive CSDDD refers to the UN Convention on the Status of Women.

In employment and occupation along international supply chains, gender aspects are covered in the ILO core labour standards 100 (equal remuneration of male and female workers for equal work and work of equal value) and 111 (prohibition of discrimination in respect of employment and occupation) - both are part of both the German LkSG (cf. Section 3.2) and the EU's draft CSDDD directive. In addition, the ILO's Maternity Protection Convention is highly relevant for workers in global supply chains, which, among other things, provides for two weeks of maternity protection with the right to remuneration, as well as the Convention on the Elimination of Violence and Harassment in the World of Work from 2019. Neither of these are part of the German LkSG or the CSDDD, although they fall within the sphere of influence of companies.

International guidelines relating to gender equality have existed for some time, such as the UN Women Empowerment Principles, which are intended to support companies in promoting gender equality in the workplace, labour market and society (UN Women 2021). In 2016, the FAO introduced a gender-sensitive value chain approach (FAO 2016) and developed practical guidelines based on this (FAO 2018). The OECD, in cooperation with the FAO, has developed guidelines aimed directly at companies on how to add a gender perspective to due diligence obligations in the agricultural sector (OECD and FAO 2021).

This development is also increasingly reflected in private supply chain regulations. For example, gender aspects are increasingly being addressed in the supplier guidelines of German food retailers (ALDI NORD 2021, REWE GROUP 2021, Lidl 2022).

Since 2023, Germany has been pursuing a feminist foreign policy whose guidelines also include gender issues in foreign trade. The agricultural sector and international supply chains are mentioned as particularly problematic (Federal Foreign Office 2023). The BMZ also pursues a feminist development policy: part of the BMZ's work includes support for better access to land and land ownership for women and the promotion of fair working conditions in global supply chains (BMZ 2023: 26). Both approaches

are harmonised, although the Federal Foreign Office's approach in its Guideline 5 places a stronger focus on economic aspects of gender equality (Rudloff and Stoll 2023 (in preparation)).[160]

Various analyses show particular inequalities in the treatment of women, especially in international economic activities:

- According to the OECD, a wage premium can be observed particularly for employment in the export sector - i.e. exporters pay higher wages than non-exporters (Korinek et al. 2021). However, women are less likely to be employed in export sectors: The proportion of women in export-dependent jobs out of all jobs held by women shows wide ranges and is low in some cases, even in developed countries: for example, it ranges from 57.3% in Luxembourg to 7.2% in the United States. At the same time, a particularly large pay gap is estimated in the export sector, as employees are required to be particularly flexible due to the international orientation. Similar results can also be seen in estimates for the situation in LMIC (Juhn et al. 2014).
- In trade policy, the consideration of differentiated trade effects in the sense of different affected actors has a longer tradition: for example, micro-entrepreneurs or indigenous populations have long been explicitly mentioned in the EU's mandatory impact assessments or in the sustainability chapters of its trade agreements. An explicit focus on gender equality has only emerged in the last 15 years. Under the previous government, Sweden explicitly pursued a feminist trade policy until 2020, citing specific customs inequalities in gender-related consumer goods for men and women.[161] The guidelines of German feminist foreign policy do not cover trade policy individually, but only generally as a measure to strengthen feminist foreign trade (Federal Foreign Office 2023).
- At WTO level, gender issues were first recognised as a topic of Aid for Trade in 2011 and a Joint Declaration on Trade and Women Economic Empowerment was adopted at the Ministerial Conference in Buenos Aires in 2017. Among other things, this aimed to strengthen the exchange of best practice examples for implementation in economic and trade policy and also on the causalities of gender issues in economic relations. The aim is to reduce barriers to engagement and support the participation of women in trade and economic activities. An informal working group on trade and gender was established in 2020, followed by a "Group of friends" of 19 WTO member states under the coordination of Botswana, El Salvador and Iceland (Pavese 2021). This was followed in 2021 by the establishment of a Research Hub by the WTO. The Covid pandemic once again strengthened the need to better analyse the economic consequences, especially for women.
- There are also increasing references to gender aspects in bilateral agreements: for example, gender is at least explicitly mentioned as an issue in 36 of 46 EU free trade agreements. In 2019, the EU and Canada adopted the CETA Trade and Gender Recommendation (Pavese 2021). Chile plays a special role, having included independent Sections on trade and gender for the first time in its free trade agreements with Uruguay (2016), Argentina (2017) and Brazil (2018). Others followed in 2019, such as the Chilean agreement with Canada (Hughes 2019).

[160] In some cases, the political debate on gender equality extends beyond the binary gender issue. In addition, related aspects of justice are also being discussed with regard to the various simultaneously existing discriminatory characteristics of actors ("interSectionality"), such as women in agriculture (Zilla 2023 (in preparation)).

[161] For example, the duty for a silk blouse would be considerably higher than for a silk shirt (https://www.sueddeutsche.de/politik/schweden-neuer-exportschlager-1.4553507).

Certain company-related aspects of gender equality are already part of the LkSG and CSDDD; others could be integrated relatively well into the system of supply chain due diligence obligations. For example, gender aspects could be well anchored in the risk analysis and taken into account when setting up complaints procedures. At the same time, it is once again important to be sensitive to unintended effects in countries with poor implementation to date, so that women involved are not counterproductively pushed out of the supply chain.

Relevant standards include, for example, the ILO's Maternity Protection Convention, which has only been ratified by 43 countries to date.[162] The Convention on the Elimination of Violence and Harassment in the World of Work has been signed by 32 countries.[163] This limited ratification rate can be an obstacle to inclusion in supply chain due diligence obligations, as many trading partners have not yet committed to these goals and the issue of the dominant character of Western standards is therefore becoming more explosive (cf. Section 5.6.2). Accordingly, efforts should be made at the political level in favour of ratification by more countries. This is because the multi- and bilateral initiatives described above show that work is also being done in this context towards a stronger commitment to gender equality.

5.7.4 ... to achieve positive environmental impacts in climate and biodiversity protection

With the establishment of the first due diligence regulations, the proposal to use the same mechanism of obligating larger companies in wealthy countries to enforce global climate protection and biodiversity targets has recently been increasingly promoted. As things stand, the CSDDD contains a commitment to climate and biodiversity protection, even if the implementation regulations are currently not very concrete. In the following, we summarise the potential contribution of supply chain due diligence regulations to climate and biodiversity protection, building on the above assessments (cf. Section 5.1.1.2)

While existing conventions in the area of labour and human rights are widely recognised, "international environmental treaty law is characterised by its rather fragmentary nature" (UBA 2020: 64). Accordingly, it is more difficult to find a link between environmental due diligence obligations and multilateral agreements in the environmental field (ibid.). Nevertheless, the CSDDD proposal extends the due diligence obligations of companies into this area. It refers to specific multilateral environmental agreements from which clear corporate obligations can be derived, such as the Minamata Convention on the Prevention of Emissions and Releases of Mercury or the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora. Other multilateral environmental agreements mentioned in the CSDDD require country-specific targets (Paris Climate Agreement: nationally determined contributions (NDCs)), which would in principle allow corporate due diligence obligations to be linked. However, there is still a lack of temporal and, in some cases, sectoral concretisation that would enable specific targets for companies. Compared to these, the Convention on Biological Diversity (CBD), for example, is very broad and therefore allows even less concrete due diligence obligations to be derived for companies.

[162] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328:NO (as at October 2023).

[163] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:3999810:NO (as at October 2023).

The global nature of climate protection speaks in favour of companies committing to the Paris climate protection goals. However, the inclusion of climate protection in supply chain due diligence obligations presents companies with difficulties for several reasons. For example, avoiding greenhouse gas emissions in agriculture is more challenging than in other sectors, as the production processes in agriculture are very diverse with sometimes very different levels of emissions. These can also be very location-dependent, as the emissions arise in connection with natural processes of land use and animal husbandry and affect not only the energy sector (and thus carbon dioxide), but also methane and nitrous oxide in particular. Another related challenge is that the level of greenhouse gas emissions for many agricultural and horticultural production processes in the various regions of the world is not (yet) known, nor is it known how and by how much they can be reduced. However, these would be important prerequisites for companies to be able to make a concrete and verifiable contribution to reducing emissions. There is a considerable need for action here, as even in Europe the available data does not cover all relevant production processes and production conditions in a representative and valid form.

As greenhouse gas reduction, unlike human rights and labour protection targets, is not a question of compliance with a given standard (i.e. whether it is met or not), but a "moving target" that requires continuous improvement. Consideration should be given to not anchoring absolute greenhouse gas reductions in the due diligence obligations, but rather to requiring the preparation of a climate protection plan, as proposed in the CSDDD, which reports on the measures taken. The specification of absolute greenhouse gas reductions per company would also not take into account their marginal abatement costs, which can vary greatly between companies. In order to reduce GHG emissions at the lowest possible economic cost, (ideally global) emissions trading is a prioritised but often incomplete instrument for CO_2 emissions (Leining et al. 2019). The WBAE welcomes the fact that the consumption of fossil fuels in buildings, road transport and other sectors in the EU will be subject to an emissions trading system from 2027.[164] However, the agricultural sector is largely excluded from the emissions trading system, partly because it is increasingly concerned with non-CO2 emissions in natural processes (WBA and WBW 2016).

The fact that companies might be inclined to merely change their product portfolio or shift the production of products with very high energy consumption to other smaller, possibly newly established companies in order to reduce emissions also speaks against targets for the level of emissions reduction at company level. Relocation effects would then lead to the company reducing its emissions, but overall emissions could remain the same or even increase. In the case of absolute reduction targets per company, it would also have to be clarified what the reference basis should be, as the targets should not result in a company no longer having any opportunities for growth.

The anchoring of biodiversity in the due diligence obligations also comes up against considerable limits. It would first have to be clarified whether the primary aim is to avoid a reduction or even an increase in biodiversity. In addition, biodiversity itself is an extremely complex field of local, regional and global goals in a large number of sub-fields (biodiversity, nature conservation, etc.). Here, too, there is a lack of harmonised and regionally adapted measurement and monitoring concepts, especially due to the strong natural fluctuations of many components of biodiversity. First of all, it is necessary to map areas worthy of protection and areas with high biodiversity potential, as without this it is not possible to determine whether the cultivation of the acquired agricultural products has a negative impact on biodiversity. Without such documentation of the current status, as is done today for zero

[164] "Reform of EU emissions trading: buildings and transport have a greater duty to protect the climate"; https://www.bundesregierung.de/breg-de/schwerpunkte/klimaschutz/eu-emisionshandel-1684508

deforestation, it is difficult for companies to fulfil possible biodiversity due diligence obligations. Another option - as with the certification of sustainable soya, for example (RSPO, cf. Section 5.1.2) - would be to require that a biodiversity plan is drawn up and monitored to ensure that ecologically valuable habitats are preserved. An evaluation of the sustainability certifications for soya or palm oil could determine how effective or successful this approach ultimately is. Following an evaluation, it would be necessary to examine whether the rules described in the sustainability certifications for soya and palm oil could be included in the due diligence obligations. However, it would only make sense to oblige companies not to jeopardise these areas in their supply chains until 2030, when - as envisaged in the Kunming-Montreal Global Biodiversity Framework - 30% of the respective national land and sea areas are protected. In principle, it must be clarified which biodiversity targets are manageable for companies and verifiable for the state.

Consideration could also be given to including soil protection in the due diligence obligations. The initial focus here is on documenting measures to prevent soil degradation and soil erosion. Food losses along the value chain should also be considered. The documentation of measures to reduce food losses could also be included in the due diligence obligations. For example, investments in warehousing and logistics to reduce losses could be promoted in supplier development.

To summarise, it should be noted that the anchoring of environmental and climate targets in supply chain due diligence obligations is currently still reaching its limits and should therefore only be implemented gradually. One should start with a few, more easily verifiable requirements and build on the experience gained from them. This is because the necessary clear measurement criteria, measurement methods and monitoring systems are sometimes lacking, particularly in agricultural production. Collecting the necessary data in all the different countries and locations is also time-consuming and expensive. If environmental and climate protection are to become an element of due diligence obligations, the EU would have to invest massively in these areas and support LMIC.

5.7.5 Reflections on the interplay between due diligence, sanctions and certifications

As already explained above (cf. text box 5.1 on due diligence obligations), "due diligence obligations'' are to be understood as an obligation imposed by law or legal transaction on certain persons to perform or refrain from performing actions in a certain way so that there is no risk of damage to other persons, legal interests or property. Due diligence obligations are therefore linked to specific duties to act or refrain from acting that are by law precisely defined in advance. Looking at the canon of international conventions that serve to protect human and environmental rights and that are to be effectively implemented via supply chain regulations, it can be seen that not all conventions establish such specific duties to act or refrain from acting. In principle, a distinction must be made between two categories of international conventions: on the one hand, conventions that have objectives as their subject matter, whereby the "how" of achieving the objectives is left to the contracting states. On the other hand, conventions that are "self-executing", i.e. that establish specific obligations to act or refrain from acting (rules and prohibitions) with regard to specific addressees. An example of a target agreement is the Paris Agreement. It contains a reduction target, but leaves it up to the signatory states to determine who should contribute to this target, how and to what extent. Such target agreements are very common in the area of environmental protection. They are less common in the area of human rights protection. Particularly when it comes to human rights that have a financial impact, states are reluctant to agree on specific obligations/rights and leave it at setting targets. One example is the right to food. Rather, this right needs to be standardised by the national legislator. Without such concretisation by the Member State, no due diligence obligations can be derived from such a programmatic goal.

If there is no such concretisation and therefore no due diligence obligations, the obligation under international law cannot give rise to liability, as this necessarily implies a breach of the due diligence obligations. Insofar as such programmatic target agreements are included in the due diligence regulations, they are merely symbolic, as they do not trigger any legal consequences. It would therefore make more sense to expand the catalogue of agreements to be enforced via the supply chain regulation to include agreements that are "self-executing". Numerous environmental agreements come into consideration here, particularly in the areas of hazardous substance protection, nature and species protection, water protection and immission control.

However, if there are specific prohibitions and bans and therefore also due diligence obligations, enforcement is possible via liability regulations or fines. However, it should be noted that this is uncharted legal territory and therefore companies and enforcement authorities are still in disagreement about the scope of their due diligence obligations. Therefore, the implementation of enforcement mechanisms such as liability and fines should be gradual, taking into account a learning phase on both sides that allows for a margin of error. "Safe harbour"-provisions implemented by certification bodies can contribute to legal certainty. However, they must be designed in such a way that they do not hinder the enforcement of due diligence obligations. Against this backdrop, it would appear necessary for certification bodies to be subject to (state) quality assurance management.

Figure 5.12: Due diligence regulations in the interplay of rules and prohibitions and programmatic goals

Source: Own presentation.

5.7.6 Conclusion

The CSDDD is currently discussing the inclusion of further human rights, labour standards and environmental goals. These include food security, living wages and incomes, gender equality and climate and biodiversity protection. These goals also refer to recognised international conventions, but it remains unclear how these additional goals can be operationalised and implemented through corporate due diligence obligations along international supply chains. The previous Sections have shown that the operationalisability of the goals is linked to certain prerequisites, and the existence of suitable indicators, measurement criteria, measurement procedures and monitoring systems plays an important role for all goals: (a) for food security, in order to achieve a concrete and company-related specification of the goal and to be able to establish a link with corporate due diligence obligations, (b) for the goal of living wages and incomes, in order to be able to clarify the question of the necessary level of wages and incomes to secure livelihoods; (c) gender equality, in order to first create transparency about possible existing inequalities along the supply chain, (d) climate and environmental goals, in order to be able to measure and compare the impact of corporate action, taking into account regional differences. These requirements are also relevant for the subsequent supervision of corporate due diligence obligations by the competent federal authorities (cf. Section 5.3).

With regard to the perspective possibilities offered by due diligence regulations, it can be summarised as follows:

- As an important part of the protection perspective, food security should be covered in the due diligence obligations, but the individual aspects need to be concretised in the form of verifiable due diligence obligations. The "access to food" dimension as defined by the FAO is closely linked to receiving a minimum wage.
- The payment of appropriate wages, based on the national minimum wage, is already part of the LkSG. The draft CSDDD goes beyond this and calls for (higher) living wages, while the European Parliament even wants to include living (corporate) incomes. Some trading partners are making initial efforts to implement both requirements, as well as political support from some importing countries and initial approaches from companies, but there are still considerable research and development challenges.
- Company-related aspects of gender equality are already part of the German LkSG and the draft CSDDD. Other relevant ILO conventions could be integrated relatively well into the system of due diligence regulations, although relatively few states have ratified these conventions to date. Gender aspects could also be well anchored in the risk analysis and taken into account when setting up complaints procedures.
- The anchoring of programmatic environmental and climate targets, such as those of the Paris Climate Agreement, which are not sufficiently specific for companies, s currently still has considerable limits in the due diligence regulations and should therefore only be implemented step by step as soon as the necessary measurement and monitoring systems are in place.

In light of the challenges, the details of the design of the due diligence regulations are crucial. There is a danger of overburdening the regulation and thereby risking less support or more resistance from the business community. On the other hand, due diligence regulations that are initially narrower but successfully implemented can generate positive policy feedback and later be extended to other areas, while broad obligations that are associated with major implementation problems generate negative policy feedback that makes them vulnerable to efforts to abolish them again (Sewerin et al. 2023, cf. Recommendation 6.2.1). However, trading partners should be consulted and an impact assessment carried out before a possible extension over time (cf. Recommendation 6.4.1).

In principle, the above-mentioned additional objectives cannot be achieved solely through the instrument of mandatory due diligence regulations for companies. Rather, a policy mix with a coherent coordination of instruments is required (cf. Section 5.4).

6. Recommendations

6.1 Overall assessment and possible development scenarios

6.1.1 Overall assessment

Weighing up the opportunities, challenges and limits of due diligence regulations, the WBAE generally welcomes the legislation on corporate due diligence obligations at both German and EU level. The WBAE sees this further "building block" as an opportunity to strengthen sustainability in terms of human rights and environmental due diligence obligations in the agricultural and food sector. European harmonisation of these due diligence obligations is to be welcomed, as this can reduce potential competitive disadvantages for German companies and market segmentation.

Due diligence obligations for international supply chains can make an important contribution to the enforcement of human rights and environmental policy objectives. They are a central lever for ensuring global minimum standards in the area of human rights, labour standards and environmental protection. However, the standards addressed are largely internationally accepted sets of rules that have to date not often been successfully enforced. In this way, policymakers are responding to government implementation deficits in various sectors, to the limit of voluntary corporate measures, but also to the limit of traditional trade policy measures.

Based on the interdisciplinary analysis of the due diligence regulations in Section 5 (cf. Fig. 2.1), the following summarised assessments can be made:

- It is reasonable to establish risk management systems to ensure compliance with fundamental labour standards and human rights in companies. The direct costs are comparatively manageable, as companies in the agri-food sector already have a great deal of experience with quality assurance systems in complex value chains. However, costs may also be incurred by upstream suppliers and due to unintended effects: Some companies might choose to withdraw from areas or economic sectors facing difficult human rights situations ("cut and run") or choose other circumvention strategies rather than invest in the development of their suppliers. While certification schemes could play an essential role in efficient and effective implementation of corporate due diligence regulations, they currently still have major shortcomings (cf. Section 5.1).
- From a legal perspective, the steering effect of the LkSG is limited by the lack of a liability regime. A second problem lies in the necessary proof of fault. Individual injured parties will often not be able to provide the necessary evidence. For this reason, the authorities of the trading partner countries and trade unions as well as civil society organisations will play a key role, unless a reversal of the burden of proof is provided for in the further legislative process. The German legislator could do the latter when implementing the directive. The draft CSDDD envisages civil liability with right to compensation. Companies can largely protect themselves from liability through contractual assurances and certification schemes. So far, it has not been specified which schemes could be suitable for this purpose (cf. Section 5.2).
- The effectiveness and efficiency of due diligence regulations depend to a large extent on the concrete design of implementation and supervision. In this context, coordinated interfaces between companies and authorities are of particular importance. Given that the due diligence regulations are a new instrument, it is also essential to provide assistance for companies and to monitor and review the impact of the regulations in order to identify problems at an early stage and make any necessary adjustments (cf. Section 5.3).
- At the European level, in addition to the due diligence regulations, there are many other regulations in the fields of trade and investment as well as environmental and agricultural

policies, that use different instruments to improve sustainability. These cover human rights and the environment in different ways. There are differences not only between the different approaches to due diligence, but also between due diligence and other regulatory approaches. These differences entail risks for the achievement of objectives and the regulations' acceptance as well as high implementation costs. These differences complicate implementation and raise questions as to the choice of the right policy mix. Corporate due diligence regulations complement trade and investment protection agreements between states, but do not replace them (cf. Section 5.4).

- Due to the high level of internationalisation of the agri-food sector, the already widespread uptake of SPS and quality standards and experience with many types of non-tariff trade measures, the negative impact of due diligence regulations on trade volumes and trade partners might be less than is often assumed. As global norm diffusion progresses, displacement and leakage effects would also decrease. On the one hand, the resilience of agricultural supply chains is sustained by due diligence, e.g. by promoting the connectivity of partners and encouraging learning. On the other hand, the number of trading partners could also decrease, which would have an opposing effect. The risk of market segmentation is real, but depends strongly on the supply and demand situation, which can vary widely for individual products (cf. Section 5.5).
- Due diligence regulations constitute unilateral action by Germany and the EU. The choice of unilateral action despite multilateral options and the extraterritorial effect of the due diligence regulations without consulting trading partners during the drafting of legislation should be viewed critically. In order to achieve the goals of the due diligence regulations, such as the protection of labour standards and human rights along international supply chains, cooperation with the governments of the trading partner countries is necessary. Especially, in view of Europe's colonial past, a focus on partnership and the inclusion of the experience and knowledge of local stakeholders on the part of the trading partner countries are important for the implementation. Accordingly, there is a need to promote the trading partners' own policy approaches to improving the situation on the ground, to cooperate with trading partners in monitoring and reviewing the regulations' impact, and to make serious efforts to promote multilateral approaches (cf. Section 5.6).
- Wages and business incomes that fall short of a minimum subsistence level are a fundamental problem and cause many of the human and labour rights risks identified in agricultural value chains. Therefore, compliance with minimum wages should be a key element of due diligence regulations, which could also have a positive effect on food security. Adequate minimum wages contribute significantly to the realisation of the right to food. In principle, additional goals, such as a living income, gender equality and climate and biodiversity protection, cannot be achieved solely through the instrument of mandatory corporate due diligence regulations. Instead, a policy mix with coherent coordination of instruments is required. In order to integrate these additional goals, it is necessary to develop measurable corporate due diligence obligations by concretising programmatic goals (cf. Section 5.7).

The due diligence regulations are based on the assumption that if the pressure on companies (through supervision, complaints mechanisms for those affected and sanctions) is sufficiently high, fewer violations will occur in the future. In addition, a further effect of the due diligence regulations could be a diffusion of these standards to other countries. This would mean that more and more companies globally follow a catalogue of due diligence obligations and that the positive effect could be multiplied. It is possible that these regulations could also have a positive impact on the domestic markets of trading partners. Such further-reaching effects of due diligence regulations require accompanying

political measures, e.g. in development cooperation, as well as intensive dialogue with trading partners. However, there are still considerable challenges in implementing due diligence obligations in relation to the EU market. Support elements such as advisory services, certification schemes and industry dialogues are therefore also important here.

Overall, the WBAE supports the introduction of statutory due diligence obligations in supply chains and recommends their gradual roll-out as a learning system. The Advisory Board calls on all stakeholders from industry, politics and civil society to work towards a real improvement in the situation of people in the agri-food sector, thus making the due diligence regulations a success for human rights and labour standards as well as for environmental and climate goals.

6.1.2 Development scenarios

Supply chain due diligence obligations are a largely new instrument for achieving greater sustainability. They are characterised by a unilateral approach in dealing with trading partners and in this respect represent a special feature compared to the bilateral and multilateral, i.e. negotiation-based, approaches to trade policy that have been pursued to date. The following Section therefore outlines **development scenarios based on three dimensions,** which are derived from the assessment perspectives (cf. Section 2.6) and their analysis in Section 5 and extend from the broader political framework to implementation

- Dimension P as a **process-related view**, which is predominantly based on the assessment perspectives "International Relations", as outlined in Section 5.6;
- Dimension M as a **market-related view** based on the assessment perspectives "International Relations" (Section 5.6), "Foreign Trade" (Section 5.5.) as well as the policy perspective (Section 5.4);
- Dimension U as a consideration of **operational and governmental implementation**, which is based on the business perspective (Section 5.1), the administrative perspective (Section 5.3) and the policy perspective (Section 5.4).

The aim of these development scenarios is to identify the key aspects that will contribute to the success or failure of the regulations. At the same time, these scenarios make it clear which mechanisms of action policy could address. Sections 6.2 to 6.4 then present detailed recommendations.

6.1.2.1 Process-related dimension (Dimension P): Cooperation instead of unilateral action by the EU

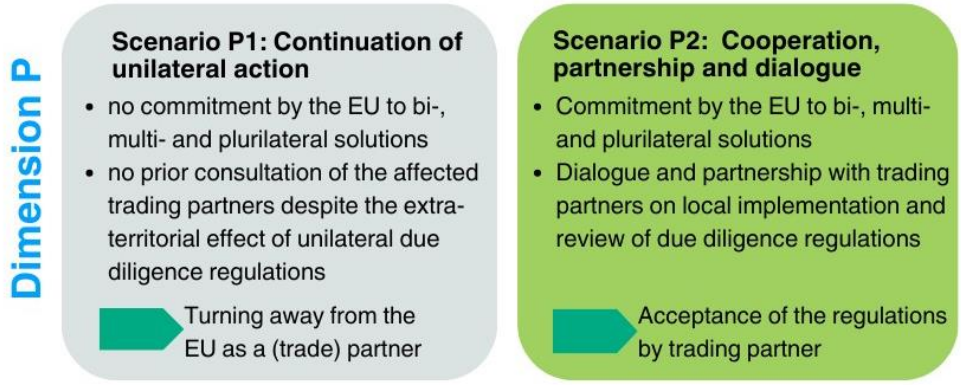
Depending on the process of introducing due diligence regulations, these can lead to tensions at intergovernmental level, which in turn can have a perspective impact on relationships in the foreign or trade policy area. In particular, the extraterritorial effect of unilateral due diligence obligations on trading partners, including the lack of consultation with the countries concerned during the drafting of the regulations, is sometimes observed and critically commented on by them (cf. Section 5.6.3). At the same time, the EU has not yet sufficiently advocated binding multilateral solutions, such as the UN's binding treaty. *Against the* backdrop of the historically determined power imbalances between EU countries and the affected trading partners (predominantly LMIC), this creates the image of unilateral standardisation by the economically dominant side, the EU. This accusation relates less to the content of the human rights and labour due diligence regulations, which are mostly based on undisputed international conventions (cf. 5.6.2), but rather to the hierarchical and asymmetrical control mechanism based on unilateral rule-making. Cooperation with trading partners is therefore important for the success of due diligence regulations in the international context, measured in terms of progress

for human rights and the environment, as suppliers based there are more likely or more easily able to implement the requirements if the local political conditions are also favourable.

Depending on the further procedure, two scenarios are conceivable in dimension P (cf. Fig. 6.1):

> Scenario P1: *Continuation of unilateral action*. The EU does not advocate multilateral solutions, e.g. within the framework of the WTO and UN. It does not respond to the extraterritorial effect of due diligence legislation with cooperation and dialogue with trading partners. The planned offers of support for trading partners as well as the review and monitoring are planned by the EU rather arbitrarily without greater opportunities for trading partners to have a say. The unilateral due diligence obligations are perceived as an expression of the EU's economic and political dominance.
>
> Scenario P2: *Cooperation, partnership and dialogue*. The EU actively participates in WTO and UN formats, e.g. in the working group on the Binding Treaty on Business and Human Rights, thereby demonstrating its desire to anchor corporate due diligence obligations in multilateral approaches. In the further course, trading partners are actively involved in the implementation and review of due diligence regulations. This includes, for example, the development of the risk classification of trading partners within the framework of the EUDR or, in principle, impact measurement on site. Linking trade agreements with due diligence obligations is also supported. Finally, the EU and Germany support implementation on the ground, e.g. through accompanying development cooperation, innovation projects or compensation payments for climate and biodiversity protection.

Fig. 6.1: Development scenarios along the process-related dimension (Dimension P)



Source: Own presentation

6.1.2.2 Market-related dimension (Dimension M): Norm diffusion instead of market segmentation

A core danger with due diligence regulations that already exist or are expected to be introduced at EU level in the near future is that this will only lead to market segmentation. Companies that already comply with the aforementioned human rights and environmental protection standards will then supply the EU or Germany, while non-compliant suppliers will serve the other markets. It is therefore important for the regulations to be highly effective that as many buyers as possible are subject to these due diligence obligations. European harmonisation is therefore to be welcomed, as is the fact that the European Commission has presented an ambitious draft for the CSDDD. In order to minimise leakage effects within the EU and in the global context and to ensure that the due diligence regulations have a

broad impact and that the intended protection goal can ultimately be achieved, it would be important for the EU's approach to be emulated globally as much as possible. Such a norm diffusion is crucial for the long-term success of due diligence regulations.

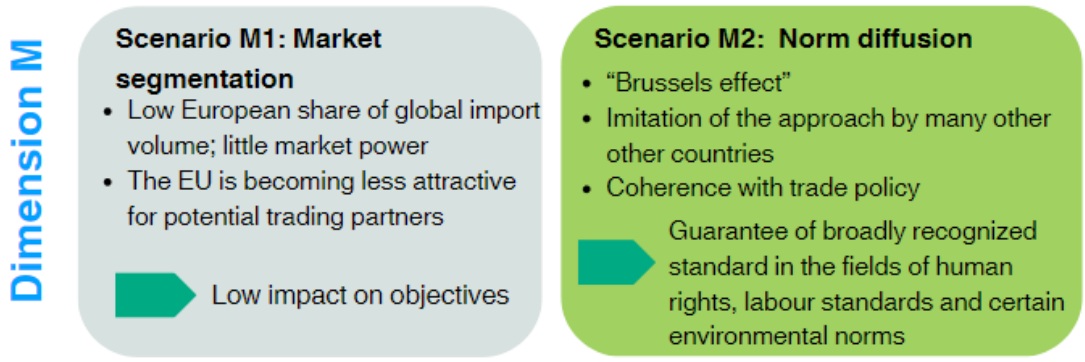
Whether other important regions of the world will adopt the EU regulations or, on the contrary, whether these regulations will be undermined, e.g. to gain price advantages, is one of the major open and current geostrategic questions that this expertise report cannot answer conclusively. However, some hopeful processes are emerging, e.g. in the area of conflict minerals, where China has joined the USA and the EU in implementing at least voluntary sectoral due diligence regulations. A similar development has also been observed in the timber trade (cf. Section 5.6.3). At the same time, however, there is also considerable criticism of the severity and process of deforestation regulations in the Mercosur countries, for example.

Preventing market segmentation is therefore important for the overall success of supply chain due diligence obligations, as in this case no improvement would be achieved globally with regard to the objectives. For supply chain due diligence obligations to actually lead to such improvements, as many countries as possible must follow the EU's approach in order to achieve real improvements (cf. Section 5.6.3, in which the expansion of EU rules was described as the "Brussels effect", and Section 5.5.2).

Depending on the further procedure, two scenarios are conceivable in dimension M (cf. Fig. 6.2):

> Scenario M1: *Market segmentation.* This characterises a situation in which the EU remains largely alone with its approach and the effect will therefore largely "fizzle out". Especially so, if the EU's share of global trade in the relevant product is low (cf. Fig. 5.8) and the EU also loses attractiveness for potential trading partners due to its high requirements. This scenario results in a cost burden for European buyers and consumers; however, the impact on labour standards and human rights as well as environmental protection among trading partners remains low.
>
> Scenario M2: *Norm diffusion*. In this case, other large countries and markets follow the EU approach. A trade policy that is coherent with the due diligence regulations and a supportive development policy could additionally promote this process. A widely recognised standard is developing in the area of basic human rights, labour standards and certain environmental norms. This scenario effectively prevents companies and countries from gaining competitive advantages through environmental, labour and human rights dumping.

Figure 6.2: Development scenarios along the market-related dimension (Dimension M)



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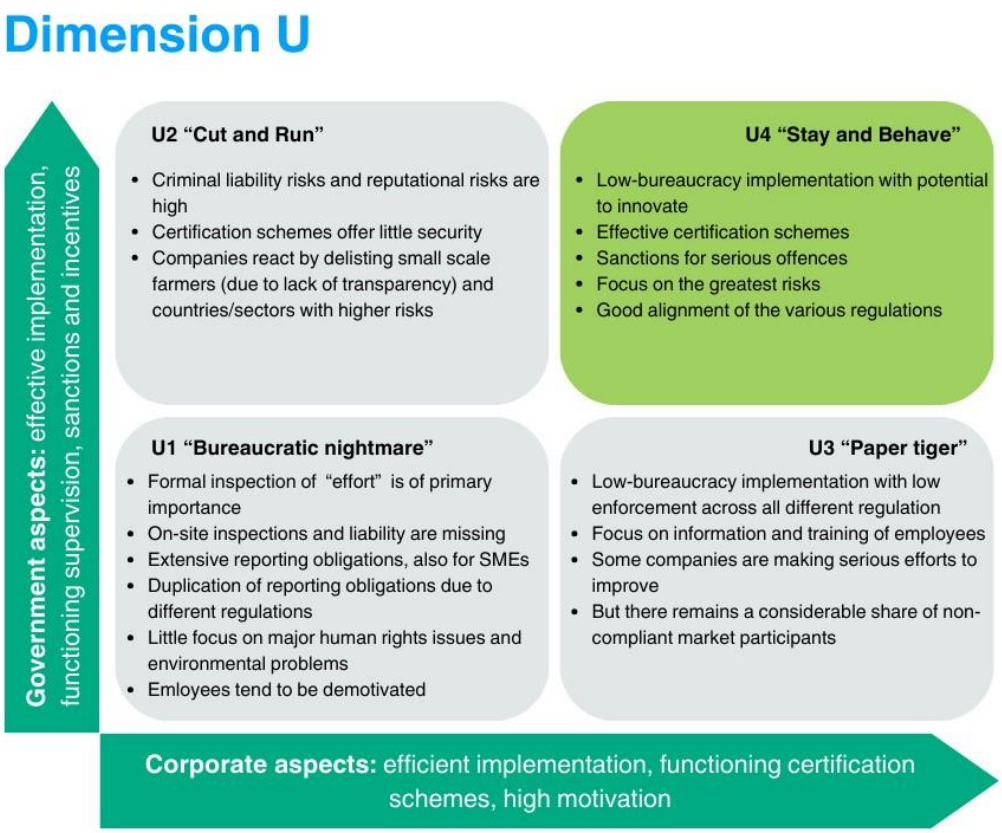
6.1.2.3 Implementation-related dimension (Dimension U): Motivational regulations instead of a "bureaucratic nightmare"

The WBAE is fundamentally in favour of the approach of binding corporate due diligence regulations for supply chains. However, effective and efficient implementation is crucial. This includes ensuring that implementation does not exceed an appropriate level of administrative effort and is nevertheless monitored. Assuming that human rights goals such as the renunciation of child labour or climate protection are issues that are also important to most employees in the companies, a basic motivation to act can be assumed. It would be important for the CSDDD to be formulated (and the LkSG regulations to be adapted) in such a way that this motivation is promoted - and that at the same time, for reasons of fairness, it is ensured that supervision of actual implementation takes place and that not just formalities are checked. The development of certification schemes is also important for this.

In Dimension U, four scenarios are conceivable, which could occur depending on how the legal regulations are structured and depending on corporate implementation (cf. Fig. 6.3).

Figure 6.3: Development scenarios along the implementation-related dimension (Dimension U)



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Scenario U1: "Bureaucratic nightmare". The supply chain due diligence obligations could develop into a " bureaucratic nightmare" if mainly documents have to be written and extensive internet forms have to be filled out, but little changes on the ground. This development would

be reinforced if the reporting obligations of the various due diligence regulations were to add up without at least some of the reporting obligations being harmonised. Policymakers would contribute to this if they focused regulatory scrutiny on the existence of this evidence while paying little attention to actual progress on human rights, labour standards and environmental goals. In fact, there are some indications that this danger is looming. For example, the LkSG does not currently provide for on-site supervision of trading partners (cf. Section 5.3.3). Despite all due caution in view of the lack of implementation experience, experience from other, comparable management fields allows conclusions to be drawn about the limited effect of the due diligence regulations in such a case: It is a classic finding of business administration that the compulsion to systematically control a previously neglected field initially brings with it a series of positive (one-off) effects. Management draws attention to new topics, recognises new risks, obtains more detailed figures and will typically achieve some quick improvements. However, it is less clear whether there will be larger or longer-lasting improvement processes. Similar examples of quality management show that in quite a few companies, such management systems are used (misused) as legitimation fronts (cf. Section 5.1). It then depends on state enforcement, e.g. through the state regulation of certification schemes, the expansion of complaint options or cooperation with trading partners, whether improvements are achieved even with opportunistic actors. If this does not happen and the motivated companies realise that their commitment is not shared, then supply chain due diligence regulations would fail.

Scenario U2: "Cut and run". A situation of withdrawal from difficult regions and/or sectors would also be problematic. This could occur if the state imposes harsh sanctions for corporate misbehaviour, but companies see few opportunities to limit their supply chain risks. The latter could be the case if companies fail to establish transparency about their supply chain and if certification schemes (continue to) have weaknesses. If risks are therefore unclear and at the same time the pressure of sanctions on companies is pronounced, companies would often react with “cut and run” strategies and withdraw from difficult regions and/or sectors. This would further worsen the position of affected suppliers instead of providing them with support. It is likely that smallholder structures in particular would suffer, as the effort required to safeguard them would be relatively high. This could lead to the delisting of precisely those farms that the supply chain due diligence regulations are intended to support in particular.

Scenario U3: "Paper tiger". Although there is little bureaucracy involved in implementation, too little enforcement of the due diligence regulations means that only a few companies take the problems seriously. Without tangible sanctions and effective supervision, which also takes place on site and protects whistleblowers as well as meaningfully incorporating technological innovations, due diligence regulations will in the long term not be taken seriously. If companies get the impression that official supervision and private sector certifications are not effective and blatant offences in their environment are not uncovered, the perceived competitive pressure to circumvent them increases. Supervision should therefore be able to uncover the "big fish" in particular, i.e. major human rights violations and systematic violations of relevant environmental laws. In addition, the state should regulate certification schemes in such a way as to increase the likelihood of detection of violations. Complaints systems should be easily accessible and cooperation with trading partners on supervision should be intensified.

Scenario U4: “Stay and behave”. This scenario characterises a successful implementation. It combines an efficient and effective state structure with a high intrinsic motivation of companies to improve. If sensible risk management systems are introduced and monitored, a

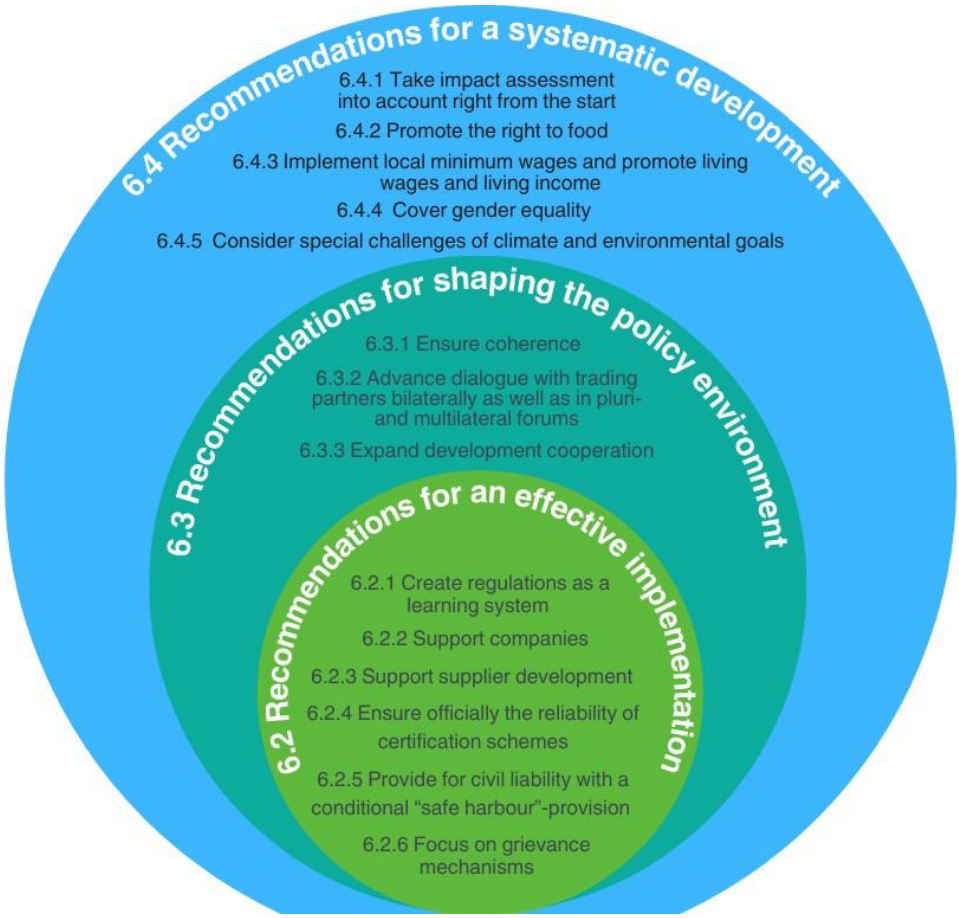
continuous improvement process can result. Effective and globally widespread certification schemes extend widely and deeply into global supply chains, so that even companies that purchase via spot markets are covered. Other companies are pursuing a strategy of intensive supplier development and are supported by Germany and the EU. This strengthens the existing intrinsic motivation of some companies to tackle difficult issues such as combating hunger among suppliers. If the EU also advocates for more corporate due diligence obligations in multilateral approaches at a global level and thus contributes to the global dissemination of the rules, the fundamental competition problem would be defused (cf. Fig. 6.1).

6.1.3 Orientation of the recommendations

Against the background of a fundamentally positive assessment of due diligence regulations, but also in view of the risks of possible undesirable side effects outlined in the scenarios, the WBAE sees a **need for action in three fields in** order to make the binding due diligence regulations a model for success:

1. Implementation recommendations that enable an **effective design** and the most effective, yet low-bureaucracy implementation possible. This area of recommendations directly addresses the implementation-related dimension of the development scenarios and aims to move towards scenario U4 "*Stay and behave*" by designing implementation as a learning system (Recommendation 6.2.1), providing companies with targeted advice from a single source, if possible (Recommendation 6.2.2), supporting supplier development (Recommendation 6.2.3), further developing certification schemes (Recommendation 6.2.4) and focussing on complaints mechanisms (Recommendation 6.2.6).
2. **Policy environment** that effectively supports companies and affected trading partners in the fulfilment of due diligence regulations. This area of recommendations relates in particular to the process-related and market-related dimension of the development scenarios and is aimed accordingly at the development towards scenarios M2 "Diffusion of norms" and P2 "Cooperation, partnership and dialogue" by ensuring coherence between the various due diligence regulations as well as with other policy areas (Recommendation 6.3.1). This would also promote dialogue with trading partners bilaterally and in plurilateral and multilateral forums (Recommendation 6.3.2) and expand and improv development cooperation with particularly affected trading partners (Recommendation 6.3.3). In addition, positive effects can then also be expected in the implementation-related dimension.
3. **Systematic development** of due diligence obligations in fields that represent key human rights and environmental goals (e.g. the right to food, protection of the environment), but in which the integration of existing international obligations into the due diligence obligations approaches is (still) lacking. This area of recommendation relates to all three dimensions described above: For example, by identifying weaknesses through an impact assessment of due diligence obligations (Recommendation 6.4.1) and remedying them in further implementation, effective implementation is supported. By designing possible developments in the areas of gender equality, food security, climate and environmental protection in such a way that they are developed in close consultation with the trading partners, cooperation, partnership and dialogue are promoted with regard to the process-related dimension. In principle, further progress can also be made in the area of human and labour standards and environmental goals through systematic development.

Figure 6.4: Key recommendations



Source: Own presentation

A look at the **addressees of** the recommendations below makes it clear that the regulations on due diligence obligations **affect different policy levels (EU, Federal Government) and departments (various EU Directorates-General; various ministries in Germany such as the Federal Ministry for Labour and Social Affairs (BMAS), the Federal Ministry for Economic Affairs and Climate Action (BMWK), the Federal Ministry of Economic Cooperation and Development (BMZ) and the Federal Ministry of Food and Agriculture (BMEL)** (cf. Section 5.3)). Implementation, in turn, is the responsibility of federal authorities, at least in Germany. They are affiliated to the Federal Ministry for Economic Affairs and Climate Action (Federal Office for Economic Affairs and Export Control (BAFA)), the Federal Ministry of Food and Agriculture (Federal Office for Agriculture and Food (BLE)) and the Federal Ministry of Finance (customs). The support services, such as the Helpdesk on Business & Human Rights, are the responsibility of the Federal Ministry of Economic Cooperation and Development.

2. Accordingly, many of the recommendations emphasise the need for better **coordination and networking between** the various departments and stakeholders.

Further horizontal recommendations emphasise the **"how"** of implementation and possible developments of the due diligence regulations:

5. **Supporting companies** in the implementation process,
6. **Impact assessments** for evidence-based development and
7. **Dialogue** with trading partner stakeholders, i.e. governments, companies, academia and civil society, including disadvantaged groups, on the design and development of due diligence obligations.

The recommendations are derived from an analysis of the agricultural and food sector, which is a key area of application. Many of the recommendations are also likely to be transferable to other economic sectors.

6.2 Recommendations for the effective design and implementation of the due diligence regulations

6.2.1 Recommendation: Create due diligence regulations as a learning system

Due to its novelty, the introduction of supply chain due diligence obligations represents a paradigm shift for companies and public authorities (cf. Section 2.1). Against this background, it is important to take a step-by-step approach and gather initial experience in order to prevent problematic path dependencies in the implementation design and resistance from the companies concerned. One example of a step-by-step approach is the EU regulation for zero deforestation supply chains (EUDR), which uses an impact assessment in the first and second year after entry into force to examine the extent to which other ecosystems and products need to be included (cf. Section 3.4). However, the review in the EUDR is unilaterally focussed on the possible extension to other products, for example, but not on the identification of problems and the derivation of "*lessons learned*". An initially narrowly defined but successfully implemented due diligence regulation can also generate positive policy feedback and later be extended to other areas, while broadly defined obligations, if they are associated with major implementation problems, generate negative policy feedback that makes them susceptible to calls for their abolition.

The first two years of the EU Common Agricultural Policy (CAP) from 2023 are also considered a "learning phase" due to the newly introduced "eco-scheme" instrument. During this phase, adjustments to subsidies are easily possible and the agricultural budget can be used more flexibly than in subsequent years. Against this background, the WBAE recommends the following as an overarching guideline for the implementation of due diligence obligations:

- **Collect implementation experience in the first two years, review the effectiveness of the LkSG and the CSDDD after three to four years and regularly thereafter**, **and provide for the possibility of adapting the legal regulations accordingly after a "learning phase"** (addressee: Federal Government, EU). In the CSDDD, the evaluations should be planned and fed in at a similar rhythm to the EUDR (different times of 1, 2 and 5 years), as there is still little implementation experience due to the newness (e.g. compared to the CAP). The WBAE also recommends the following:
- **Gain implementation experience with larger companies first** (addressee: EU, Federal Government). The enforcement of due diligence obligations requires the ability to manage value chains and experience with management systems (cf. Section 5.1). These systems are therefore generally much easier for large companies to implement. The WBAE proposes applying a step-by-step approach in the CSDDD as with the LkSG and thus first gathering the experience of larger companies (>3000 employees) in implementation and then gradually expanding the group of obligated companies (>1000 employees) after evaluating the

experience gained (cf. Section 3.3). In addition to the implementation experience of the directly affected companies, the experience of the indirectly affected companies (suppliers) should also be analysed. The establishment of a new platform for due diligence obligations in the agri-food sector could also be conceivable for this purpose - modelled on existing institutions such as the EU Platform on Food Loss and Waste and the EU Platform on Animal Welfare, which bring together different actors.

- **In the first years of implementation, i.e. in a predefined learning phase, the competent authority should use its discretionary powers and tolerate minor or unintentional errors (higher error tolerance of the implementing authorities)** (addressee: BAFA). Accordingly, penalties should only be imposed in the learning phase in cases of gross negligence or intent.
- **Systematically evaluate implementation experience even in the first few years. For this purpose, suitable evaluation questions and indicators to be collected must be defined and the evaluation commissioned in good time** (addressee: EU, Federal Government). It is important to define evaluation questions and indicators for the assessment of the implementation experience and corporate adjustments to the due diligence laws at an early stage - i.e. before the start of implementation in the case of the CSDDD and immediately in the case of the German LkSG. These include questions on implementation problems or the scope of the various operational adaptation measures or information on the grievance mechanisms. From the outset, companies must be obliged to document the information required for an evaluation and to make it available for the evaluation as well as to participate in implementation surveys.

- **Set up and systematically analyse a digital database for complaints and suggestions for improvement from companies regarding the implementation of supply chain due diligence obligations** (addressee: EU and Federal Government). Companies should have the opportunity to feed negative implementation experiences and suggestions for improvement into the evaluation process at a low threshold, if necessary through an ombudsman's office.

6.2.2 Recommendation: Support companies in the implementation and ensure coordination between the implementing authorities

Taking responsibility for respecting human rights along the supply chain is a new challenge for companies. To ensure effective and coherent implementation of the LkSG, the WBAE recommends supporting companies in its implementation. This includes information provision and other assistance with implementation, as well as significantly better coordination between the federal authorities and service providers involved so that companies affected by multiple due diligence regulations have an easy-to-understand, standardised system (Section 5.3).

In this context, the WBAE welcomes the fact that the Federal Government (BMZ) has set up the Helpdesk on Business and Human Rights in good time, which supports companies with a variety of formats in the implementation of human rights due diligence processes. As implementing authorities, the BAFA also provides information on the implementation of the LkSG and the BLE on the implementation of the EUDR.

- **Expand the Helpdesk on Business & Human Rights of the Agency for Business & Development as the central interface to companies in order to meet the information and advisory needs of companies** (addressee: Federal Government, EU). This requires long-term institutional and budgetary security for the Helpdesk and ensuring close cooperation and regular dialogue with the relevant federal authorities in order to continuously improve the advisory services. The

current staffing of the Helpdesk does not appear sufficient to the WBAE in view of the tasks at hand. Cooperation and coordination should go beyond human rights and labour law-related due diligence obligations and also cover the requirements under the EUDR. At EU level, the Helpdesk for the CSDDD, which is currently being set up, needs to be supported so that information and advisory services for companies are harmonised across the EU.

- **Centralised bundling, provision and updating of information on the implementation of the LkSG by the Helpdesk on Business & Human Rights** (addressee: Federal Government). Attention must be paid to user-friendly presentation. A survey of companies regarding the comprehensibility and completeness of the information could be helpful here. In this context, the Helpdesk's CSR risk check should be further developed to include not only national, but also region-specific information. To motivate companies, the information materials should contain successful practical examples of implementation. In addition to written documents, a sufficient amount of targeted advice and training should also be offered, e.g. differentiated according to possible topics relating to the EU internal market and those with EU third countries.
- **Strengthen cooperation between the implementing authorities at EU and federal level** (addressee: EU, Federal Government, implementing authorities). Joint working groups or project groups to coordinate the approach of individual federal or member state and European authorities could help to ensure coherence in the approach and avoid duplication for companies. Networking groups between the various authorities and companies on cross-cutting issues can also be set up with the involvement of both the companies concerned and civil society (see e.g. *EU Platform on Animal Welfare*).
- **Harmonise documentation requirements across the various regulations (**addressee: EU, Federal Government, implementing authorities). In addition to the definition of standardised categories/indicators, direct data transfer for other supply chain regulations or at least the reuse of data via interfaces should be made possible for companies.
- **Expand advice and communication with trading partners** (addressee: EU, Federal Government). The government needs to provide advice and communication on the new due diligence regulations at an early stage so that suppliers, manufacturers and retailers know what requirements they will have to comply with. Communication should also be directed at companies of trading partners in order to improve their background knowledge and the underlying structure of the new requirements. In addition, civil society and the trade unions of trading partners should also be adequately informed, for example about the option of submitting complaints and reports to the BAFA about potential violations of the due diligence obligations of local suppliers of companies covered by the LkSG (cf. Recommendation 6.2.5). On the part of the EU and Germany, the Helpdesk on Business & Human Rights should be intensively involved as an important centre of expertise in the preparation of offers to trading partners (cf. Section 5.6.3). On the part of the trading partners, important multipliers, such as the organised business community (chambers of commerce and associations), should be involved in the development.

6.2.3 Recommendation: Support supplier development

In order to comply with legal due diligence obligations, companies can switch to a new, less risky supplier in the event of high human rights or labour rights risks at a supplier (“cut and run” strategy) or persuade the previous supplier to remedy problematic practices (“stay and behave” strategy). The “cut and run” strategy is problematic for several reasons with regard to the implementation of actual improvements and should therefore only be used as a last resort. Both the LkSG and the draft CSDDD

sensibly prioritise supplier development over the termination of supplier relationships. Companies should first endeavour to remedy the situation, i.e. supplier development, before terminating the business relationship and looking for new (less risky) suppliers (cf. Section 5.5.2).

Supplier development is also key because the aforementioned certification is often perceived by the suppliers concerned as a form of monitoring and is accordingly held in low regard or seen as a necessary evil. Supplier development, on the other hand, supports suppliers in implementing the addressed standards and promotes their performance. Implementation steps are developed together with the suppliers and implementation is monitored. Supplier development is typically viewed positively by suppliers and is particularly important for small and medium-sized suppliers. Here too, it is important to consider the gender dimension (cf. also Section 6.4.3). While this Section deals with the topic of supplier development in more general terms, Section 6.3.3 lists other instruments that are more strongly aimed at supplier development in LMIC and are therefore categorised as development cooperation. Nevertheless, it is important for us to emphasise here too that supplier development should also take place within the EU.

- **Provide support services for supplier development** (addressee: EU, Federal Government)**:** These support services can take the form of advice (cf. also recommendations in Section 6.2.1) or the form of (direct) financial support as part of public programmes. The WBAE recommends that the Federal Government and the EU support companies by means of accompanying economic and development policies, particularly those companies in regions or sectors with high human rights or environmental risks. E.g. through pilot programs and accompanying programs of the BMZ, BMEL and BMWK, or at EU level, as this would also be in the spirit of "stay and behave".
- **Do not create blanket country-specific positive or negative lists** (addressee: EU, Federal Government, BAFA). Instead of possible country-wide lists, individual supplier development and prioritisation of risks as part of internal company risk management should be used, as provided for by the LkSG (cf. Section 3.4). This is against the background that negative lists can incentivise companies to withdraw from countries with particularly high risks ("cut and run") - with possible sustainability risks as a consequence (cf. Section 5.3). Whereas in countries featuring on positive lists, there may also be gaps in the implementation of existing regulatory law (cf. Sections 4.2.2 and 4.2.3).

6.2.4 Recommendation: Integrate certification schemes in the implementation and guarantee their reliability

The WBAE recommends sufficient control density in the supply chains in order to check whether the rights addressed in the due diligence obligations are actually being guaranteed. This will only be possible on the basis of private sector certification schemes, as it does not appear possible, either in terms of personnel or legally, for German authorities or the EU Commission to carry out comprehensive and sufficiently intensive implementation controls in non-EU countries. The rapidly developing market for certification services, which operate on a contractual basis, can fulfil this task. However, this sector is currently largely unregulated and there are too few economic incentives for demanding certification. Against this backdrop, the studies available (cf. Section 5.1.2.4) show a mixed picture. Therefore, the WBAE is of the opinion that significant improvements to the schemes are necessary. Certifications can play a central role in the implementation of due diligence obligations, but structural improvements are needed that should follow the model of state-private certification in organic farming (Sections 5.1 and 5.3). The state should set minimum criteria for recognised certification schemes and implement oversight of them. Only participation in schemes that are quality-assured in this way should give companies access to certain exemptions from liability (via a so-called “safe harbour”-provision).

- **Define minimum requirements for private sector certification schemes and certification bodies (inspection bodies)** (addressee: EU, Federal Government). Only those certification schemes that are subject to defined minimum criteria in terms of their standards, internal control, planned control procedures and monitoring should be recognised as appropriate risk management instruments. Particularly relevant points are: 1. As a rule, at least annual inspections, possibly more differentiated according to risk; 2. A sufficient number of unannounced audits; 3. Collection of audit results and their transparent communication(e.g. non-compliance rates, causes of non-compliance, etc., broken down by region, certification body, etc.); 4. Mandatory standards for education of professional training. A professional profile and professional ethics for the certifier (auditor) should be created that is comparable to the field of auditing.

- **Officially monitor recognised certification schemes and certification bodies (inspection bodies)** (addressee: EU, BAFA/BLE). Following the example of organic farming, both system levels - companies and certifiers - of a recognised certification scheme should be monitored by the competent authorities with sufficient control intensity on the basis of system audits, accompanying audits, follow-up audits and additional audits on an ad hoc basis. In the opinion of the WBAE, it is not sufficient to develop a list of recommended systems based solely on a "paper audit" of a standard. Rather, what is required is an actual audit of the systems and certifiers on-site in the trading partner countries. To this end, it is necessary for the EU to conclude corresponding agreements with third countries on the possibility of system monitoring.
- **Allow companies access to certain exemptions from liability via a "safe harbour"-provision if they use a state-recognised certification scheme** (addressee: EU, Federal Government): Quality-assured certification schemes can make an important contribution to the enforcement of due diligence regulations and significantly reduce transaction costs. However, the WBAE is sceptical about a fundamental "safe harbour"-provision that automatically recognises a supplier's obligation to obtain certification as proof of the buyer's obligation of effort and exempts the buyer from liability. Rather, only quality-assured, state-recognised and monitored certification schemes should be recognised as sufficient for such an exemption.

- **Consider certification rating or certification benchmarking as a second-best solution only - but then without a "safe harbour"-provision** (addressee: EU, Federal Government): If no state system for quality assurance of certification is implemented, the WBAE recommends the implementation of a rating or benchmarking concept in order to provide companies with greater transparency regarding the performance of various schemes. In this case, however, the WBAE advises against a "safe harbour"-provision. A "safe harbour"-provision could only be considered for schemes that have been particularly positively assessed in such a rating if the rating system has proven its functionality.
- **Carry out impact assessments on certification schemes** (addressee: EU, BAFA): Impact assessments of the relevant certification schemes should examine their contribution to the fulfilment of due diligence obligations and be included in the development of due diligence regulations (cf. Section 6.4.1).
- **Strengthen the independence and trustworthiness of the scheme owners through institutionalisation as a multi-stakeholder non-profit organisation** (addressee: business, society). Some of the certification schemes today are supported by the private sector, others are institutionalised as multi-stakeholder initiatives including NGOs and academia. The trustworthiness and independence of the scheme owners could be increased by adding further stakeholders.
- **Develop and test new approaches to the independence of certifications, including new financing mechanisms** (addressee: EU, BAFA/BLE). Section 5.1 describes the fundamental problem of

incentivising audits, which occurs because companies pay their auditors directly. With regard to the certification of smallholder farmers, it could be considered, for example, that the auditors are randomly assigned to the farms and their fees are not paid by the farms but from a central fund (financed by a pay-as-you-go system by the buyers in the EU). Controlled experiments could be carried out to scientifically analyse whether such an arrangement would be better accepted and more effective. Obligations to rotate certification bodies could work in a similar direction (an obligation to change the auditor after 5 years, for example).

- **Strengthen the reputation mechanism through more transparency about the work of certification companies** (addressee: EU, BAFA/BLE). To date, there has been little transparency for buyers as to which certification bodies are particularly reliable. The authorities should therefore centrally analyse violations of supply chain due diligence obligations in which certified companies were involved and publish the results. Reputational effects could be enhanced through greater transparency, e.g. if the authorities were to publish the results of accompanying audits and similar inspections by the inspectors. The publication of certification reports could also contribute to this by making non-compliance with due diligence obligations clear to all relevant actors.
- **Make certification schemes more scientifically sound and improve staff training** (addressee: federal states). Taxation and auditing is a recognised academic discipline with independent focal points in degree programmes. The federal states should strengthen teaching and research in the area of sustainability certification, which is becoming increasingly widespread, so that sufficient well-trained personnel are available in the future.
- **Utilise internal company and industry knowledge through whistleblower systems** (addressee: EU, BAFA). When monitoring certification schemes, the competent authorities could systematically use whistleblower systems to find evidence of violations. In many cases, there have been suspicions about problem cases in the market for some time. It would be an advantage, if these could also be reported using easily accessible whistleblower systems.
- **Grant certification bodies greater freedom to adequately carry out material supervision while at the same time expanding the liability of certifiers for grossly negligent or wilfully inadequate inspections** (addressee: EU Commission, BAFA). Certifications are sometimes perceived as very bureaucratic because inspectors tick off checklists and have little opportunity to respond appropriately and flexibly to local conditions. In particular in agriculture fluctuations in local conditions exist due to the natural nature of production processes. As this should not be a "carte blanche" for superficial inspections and in order to focus on the detection of serious offences, provision should be made in parallel for the liability of certifiers for consequential damage if they carry out grossly negligent or intentionally inadequate inspections. More leeway for certifiers could include, among other things, systematic relief for compliant companies, reducing the frequency of inspections for companies that have never become conspicuous, focusing on on-site inspections, developing an attitude of "professional scepticism" and risk orientation; strengthening the professional and social skills of auditors.

6.2.5 Recommendation: Provide for civil liability with a conditional “safe harbour”-provision for specific and measurable human rights, labour standards and pollutant-related environmental risks

The civil liability of companies for breaches of their due diligence obligations towards those affected is currently the subject of intense debate within the CSDDD (cf. Section 5.2.2.3). The prerequisite for civil liability is the sufficient specification (including clear measurability) of the respective human rights and labour standards as well as environmental risks. Programmatic goals (Section 5.7.5) do not allow for sanctions under liability law. The WBAE sees the possibility of those affected by breaches of due diligence suing for damages as an element for enforcing the rules. However, there is a trade-off with

the risk of "cut and run" (cf. Fig. 6.2). It is therefore important to offer companies at the same time a "safe harbour"-provision as well as a quality-assured certification scheme. However, as it will take some time to set up the state-supervised certification schemes recommended in Section 6.2.4, it is advisable to allow for a build-up phase of several years until the liability regulation is "finalised".

In many cases, the evidence in civil liability cases before German courts becomes difficult given the usual distribution of the burden of proof, because the plaintiff has no positive knowledge of the precautions and processes of the buyer and his suppliers. It might therefore be reasonable to combine the introduction of civil liability in the CSDDD with a reversal of the burden of proof (cf. Sections 5.2 and 5.7.5).

- **Provide for civil liability in the CSDDD for specific, measurable due diligence obligations after a "build-up phase" in which state-recognised and monitored certification schemes are established that generally protect participating companies from liability ("safe harbour"-provision)** (addressee: EU, Federal Government). The "safe harbour"-provision is the key economic incentive to encourage companies to participate in the quality-assured, state-monitored certification schemes described in Section 6.2.4 and at the same time contributes to reducing "cut and run".
- **Examine reversal of the burden of proof in the context of the CSDDD's civil liability** (addressee: EU, Federal Government). Following the introduction of civil liability, the WBAE recommends monitoring whether affected parties succeed in enforcing such claims in a relevant number of cases or whether a reversal of the burden of proof is required, as otherwise the proof of breaches of regulations could regularly fail. In principle, the WBAE believes that such a reversal of the burden of proof is reasonable for companies, as they are required to carry out appropriate documentation as part of their risk management in line with their obligation of effort anyway.

6.2.6 Recommendation: Focus on grievance mechanisms

Grievance mechanisms are of particular importance for uncovering possible violations of human rights and labour standards. This also applies in particular to complaints about indirect suppliers, which otherwise only fall within the due diligence obligations of the companies affected by the LkSG if there is substantiated knowledge (cf. Section 3.3).

The requirements and the resulting potential of complaints procedures to reduce human rights and environmental risks in the German LkSG and the CSDDD are generally comparable. In contrast, the EUDR lacks a mechanism to be established by the company as an obligation. In the other two cases, both the company's own procedures and external service providers can be used. Notifications can be submitted by directly affected persons, indirectly affected persons and also on behalf of directly affected persons (cf. Section 3.3). The LkSG and the draft CSDDD are compatible with the EU Whistleblower Protection Directive with regard to the confidentiality of whistleblowers and protection against discrimination and penalisation (cf. Section 3.4). Further negotiations on the CSDDD will clarify further details, such as the extent to which an optional dispute resolution procedure will be provided for.

Civil society actors, trade unions and industry solutions play a central role in the functioning of grievance mechanisms, which is why they are at the centre of the following recommendations.

- **Strengthen civil society actors and trade unions on the part of trading partners** (addressee: EU, Federal Government). Trade unions and other civil society organisations can actively

submit reports of (imminent) violations of human rights or labour standards via the planned grievance mechanisms and also do so on behalf of directly affected persons. In addition, they can be involved in dispute resolution proceedings in order to support the whistleblower and thus compensate for structural power imbalances in the proceedings (BAFA 2022b: 10). The prerequisites for such actors to be able to play an active role in supporting employees are active civil society organisations on the ground and active communication of complaint channels, including in local communities. Civil society organisations can be strengthened in various ways, for example by setting topics in dialogue events with trading partners, supporting existing programmes of trading partners or through specific development policy measures on site, e.g. through political foundations (cf. Recommendation 6.3.3). However, the possibilities also depend on the policy environment of the respective trading partners, e.g. with regard to the fundamental scope for action of independent trade unions.

- **Ensure the quality of industry solutions for external grievance mechanisms** (addressee: EU, Federal Government). External industry-wide grievance mechanisms can have advantages over in-house grievance mechanisms. For example, the associated costs for a company are lower than when setting up its own mechanism, which is why this option is particularly suitable for smaller companies. Industry-wide solutions are also particularly helpful in cases where one and the same supplier supplies several companies. From the perspective of the individual suppliers, industry-wide standards help to avoid redundancies, as parallel structures do not have to be set up for each customer. This can increase suppliers' acceptance of the new requirements.

  Quality assurance of industry-wide or company-specific mechanisms based on criteria that, like the UN Guiding Principles, only focus on the grievance process does not automatically lead to effective remediation of risks or grievances, as empirical analyses of existing grievance mechanisms have shown (cf. Section 5.1.2.4). The establishment of effective industry-wide grievance mechanisms can therefore be guided by the recommendations for the use of certification schemes for the other parts of due diligence, such as setting minimum requirements for industry-wide grievance mechanisms (cf. Recommendation 6.2.3). As the market for industry-wide grievance mechanisms is still in its infancy compared to certification schemes, this opens up the opportunity to clearly define requirements right at the start of market development. This can serve as a guide for companies when selecting an industry-wide mechanism and help BAFA to assess grievance mechanisms that companies use as part of their due diligence obligations.

- **Support the involvement of local stakeholders in the development of grievance mechanisms** (addressee: Federal Government). Examples from practice show that cooperation with local partners (e.g. civil society organisations or trade unions) can be beneficial in order to reach the target group, i.e. the supplier's employees or people who could be negatively affected by the supplier's actions, and to create trust in the process. In order to facilitate this process, especially for smaller companies, support in the search for an appropriate local partner by suitable organisations such as the Helpdesk on Business & Human Rights (cf. Section 5.3) would be conceivable. In addition, companies should be enabled to establish contact with the local structures of the chambers of commerce, the GIZ or the German missions abroad in order to be able to enter into dialogue with local partners regarding the context-specific requirements of a grievance mechanism. This requires the networking of all possible support services (cf. Recommendation 6.2.2).
- **Vulnerable groups must be given special consideration in the design and evaluation of grievance mechanisms** (addressee: Federal Government, companies, sector initiatives).

Access to grievance mechanisms must be guaranteed in particular for vulnerable groups, such as indigenous people, smallholder farmers or groups with a low level of education, who are generally at a higher risk of being affected by violations of their labour and human rights or who must fear repression in the event of complaints. In principle, the draft CSDDD focuses in particular on gender equality along the supply chain. It would therefore make sense to integrate this issue into internal and external grievance mechanisms from the outset (cf. Recommendation 6.4.4). For example, special attention could be paid to the barriers to accessing grievance mechanisms for women, complaints offices could be equipped with specially trained staff and companies could analyse incoming complaints (and other data) broken down by gender. Government support services such as the Helpdesk should advise companies in this regard, even if the topic initially goes beyond the specific requirements of the LkSG. Companies should generally prepare themselves early on for potentially higher requirements under the CSDDD so that they do not have to fundamentally change the implemented mechanisms at a later date.

- **Communicate the option of submitting complaints to BAFA more strongly to trading partners** (addressee: EU and Federal Government). In addition to the company's own or industry-wide grievance mechanisms, it is also possible to submit complaints and information about companies that (potentially) violate their due diligence obligations directly to BAFA. Information about this option should be communicated intensively, particularly in the partner countries (in line with Recommendation 6.2.2), as (potential) violations of the rights covered are most likely to be observed by actors at the location of the incident.
- **Review grievance mechanisms in a targeted manner** (addressee: EU, Federal Government). Grievance mechanisms are particularly relevant for uncovering possible violations of human rights and labour standards by indirect suppliers. At the same time, there is little experience with them, so it is important to review their functionality. The review of the established grievance mechanisms should not only be based on the documents submitted by the companies. For example, BAFA should also carry out random checks of the hotlines provided for submitting complaints.

  In addition to the review of grievance mechanisms as part of BAFA's supervision, key figures on grievance mechanisms should also be included in the monitoring of due diligence regulations mentioned in Recommendation 6.2.1. Ideally, monitoring of the grievance mechanisms should not only cover the company's own and sector-based mechanisms, but also include the mechanism that BAFA has set up for complaints submitted directly to it.

6.3 Recommendations for shaping the policy environment

In recent years in particular, a large number of new sustainability-related approaches from different policy areas have been launched, some of which are still in the decision-making phase but will be in force together in the coming years (cf. Sections 3.3 and 3.4, Table 3.1). In the best case scenario, their interaction can generate synergies by involving different stakeholders and compensating for the different weaknesses of individual approaches (Section 5.6.2). However, there are also differences, for example in the implementation from the perspective of individual stakeholders such as companies, which can lead to inefficiencies, bureaucracy and leakage due to the reorganisation of third-country deliveries and migration effects on the part of European companies. In addition, trade-offs can arise between the different approaches and objectives addressed. It therefore makes sense to coordinate approaches with similar objectives across the board. A comprehensive coherence assessment is not possible - there is also a lack of methodological concepts for this. Nevertheless, some general recommendations can be derived with regard to better coordinated processes and harmonised

objectives or to avoid trade-offs. Due to the sometimes very different policy areas involved (e.g. trade policy, environmental policy), the distribution of competences of political decision-makers in the EU, for example, is also different, which has an influence on decision-making procedures and timelines, such as the multi-year agricultural policy decision-making framework at fixed points in time compared to trade policy with the continuous possibility of starting negotiations. This makes coordination more difficult. As a coherence approach, the OECD, for example, recommends that governments should promote corporate due diligence obligations across all relevant policy areas, such as trade and investment policy, bilateral and multilateral trade agreements and development cooperation, with a view to both voluntary and binding due diligence regulations.

6.3.1 Recommendation: Ensure coherence between the various EU due diligence regulations with each other and with other policy fields

The various due diligence regulations should be formulated in a consistent and non-contradictory manner, complement each other with regulations from other policy fields and avoid obstructive effects. When creating coherence, the trade-off with possible effects must be taken into account. This is because coherent due diligence obligations that only implement a low level of ambition lead to little or no impact, but still cause transaction costs. If coherence or a Europe-wide harmonisation of the rules is dispensed with, distortions of competition will occur on the EU internal market on the one hand and market segmentation may occur on the other. This would also result in increased transaction costs for companies. Therefore, the most desirable solution would actually be to establish EU-wide coherence between the due diligence regulations and, in addition to a sufficiently high level of ambition, to choose an effective implementation so that transaction costs are as low as possible despite the high level of ambition. Coherence should also take into account the comparability of assessment approaches, for example with regard to risk assessments of products that are covered differently in some cases, across the various due diligence regulations. However, the WBAE recognises that there are limits to this. The following recommendations can contribute to greater consistency:

- **Strengthen standardised terminology as a starting point for coherence** (addressee: EU, Federal Government)**.** A coordinated or harmonised terminology across all regulatory approaches (e.g. the terminology of supply chain, value chain or activity chain in the various approaches) could already strengthen comparability and regulatory certainty.
- **Ensure regulatory coherence between EUDR and CSDDD** (addressee: EU, Federal Government). Despite the explicit deforestation focus of the EUDR, the same regulatory references should be used for the same sub-objectives (cf. Annex 1).
- **Strengthen cooperation between the implementing authorities at EU and federal level** (addressee: EU, Federal Government and specific implementing authorities such as BAFA, BLE, customs). This recommendation is closely linked to the recommendation in 6.2.2, which also deals with the coordination of implementing authorities. This must take place within Germany, but also with the relevant EU institutions.
- **Ensure coherence with other approaches addressing the supply chain with reference to due diligence obligations** (addressee: EU, Federal Government). Other regulations with a supply chain approach (RED, Taxonomy Regulation, CBAM Regulation) use very different product or regional references (e.g. definition of risk products or countries) and priorities of sustainability goals (emission reduction, zero deforestation) among themselves and in comparison to the new due diligence obligations. One example is the RED Directive, which covers similar products to the EUDR but uses different sustainability criteria. Better harmonisation between the regulations is necessary here.

- **Establish coherence with trade policy and offer support** (addressee: EU). The Commission's own review report on sustainability chapters in trade agreements ("TSD Review") from 2022 offers a starting point for coherence. The specific form this will take is still open and will play a role in the course of trade negotiations: The Commission is expressly aiming to dovetail unilateral measures such as due diligence obligations with bilateral free trade agreements (cf. Section 5.6.2). The following approaches, which differ depending on the agreement status of the trading partner vis-à-vis the EU, are particularly suitable for this purpose:
    - **Consider support for the implementation of due diligence obligations by trading partners regardless of agreement status.** This should be harmonised with the support already provided for in trade agreements. For newly negotiated trade agreements in particular, the Commission's idea of “roadmaps” and “milestones” to be agreed with the agreement partner mentioned in the TSD review can be used, which include individual timetables for targets to be agreed (e.g. by when covered conventions will be ratified or implemented). Even without an existing agreement or without current negotiations, implementation support for due diligence regulations should be considered, which should then be combined with forms of cooperation under the agreement when negotiations begin.
    - **Consider offers to take due diligence obligations into account in ongoing bilateral negotiations and in existing agreements.** Completely new offers would have to be examined, for example in the form of facilitated market access if due diligence obligations are fulfilled or if an improved country risk classification is achieved within the framework of the EUDR (cf. Section 5.3.1.2). For agreements that have already been concluded, however, the individual room for manoeuvre would first have to be identified as to how offers can still be created despite already agreed and in some cases large tariff reductions (e.g. through increased tariff quotas). Possible negative effects on LMIC, which are already the only trading partners for which improved market access is possible if sustainability criteria are met, must be taken into account. New forms of trade support could also be considered (cf. Section 5.4.2 and recommendation 6.3.3). The new due diligence obligations, which can enforce sustainability for imports, also offer scope for a special offer to negotiating partners: in new negotiations, for example, the EU could decide to waive the principle of sanctioning of sustainability chapters, which has often been a source of conflict to date.
- **Avoid trade-offs between due diligence obligations and investment protection agreements** (addressee: EU). In the event that the due diligence obligations adopted in the EU trigger changes in the legislation of trading partners, foreign companies investing there could sue for compensation under investment protection agreements and attempt to have the stricter regulations categorised as "indirect expropriation". This could result in a compensation obligation for the states at the investment location, the anticipation of which could possibly lead to the avoidance of such legislative changes through "regulatory chill" (cf. Section 5.6.2). The extent to which such indirect effects fall within the scope of investment protection agreements is clarified on a case-by-case basis in international arbitration proceedings. It is therefore unclear whether companies can invoke business models based on the violation of fundamental and internationally recognised human rights, labour standards and environmental principles as a reference in such claims. The EU Commission should therefore examine the extent to which the implementation of due diligence obligations could lead to conflicts through investment protection agreements and whether the new EU model for bilateral investment protection agreements should be utilised to a greater extent. This offers more room for manoeuvre for national legislative changes based on certain objectives such as health and environmental protection. Advice on avoiding such risks for trading partners could also be useful.

6.3.2 Recommendation: Advance the dialogue with trading partners bilaterally and in larger plurilateral and multilateral forums

In addition to the aforementioned bilateral approaches to partnerships, for example in view of trade agreements, expanded plurilateral and multilateral forums should also be utilised. Intergovernmental dialogue formats in the form of government consultations and informally on the sidlines of, for example, G7/G20 ministerial meetings or in a pluri- or multilateral framework (e.g. UN or WTO) have a long tradition. A "genuine dialogue" should be characterised by mutual trust and initiate learning processes among the dialogue partners. In terms of dialogues between governments, this means that learning processes must also lead to political compromises and solutions in which both/all sides in the dialogue feel that they have achieved an improvement, e.g. in international trade flows, working and living conditions or similar. The Rural Africa Task Force, set up by the European Commission's Directorate-General for Agriculture and Rural Development (DG Agri) in 2019 to provide new impetus and recommendations for shaping EU-Africa relations, has not only identified specific fields of activity, but has also addressed the "how" of relations between Africa and the EU and recommended, among other things: ”the Africa EU partnership should operate at three levels: people to people, business to business, and government to government. It would institute a multi-stakeholder dialogue at all levels, starting locally, and enable a closer connection between African and European societies, business communities and governments” (Task Force Rural Africa 2019: 9). Especially in light of the debates about the colonial past between European states and LMIC, it is important to take these elements into account for a "genuine dialogue". The WBAE therefore recommends

- **Create forums for dialogue with trading partners or use existing ones to jointly monitor the implementation and impact of the due diligence regulations** (addressee: EU, Federal Government). These forums should be used to provide information about the due diligence regulations as early as possible (cf. Section 6.2.2) in order to identify and network actors, offers and needs. The involvement of civil society actors and business organisations can help to facilitate an exchange at various levels. Local implementation experience from partner approaches from existing trade agreements, such as the "Handbook of Implementation" for the free trade agreement with Ecuador, should also be prepared and utilised. These forums are important for recognising specific implementation problems and striving for the ambitious implementation of regulations. This type of soft law cooperation can not only help to improve implementation, but also to achieve harmonisation of regulatory standards in the medium term (cf. Section 5.6.4).

- **Strengthen existing structures for obtaining information for country-specific risk assessment and the exchange of experience, also utilising and strengthening the structures of trading partners** (addressee: EU, Federal Government). Companies affected by supply chain regulations, but also the Helpdesk, are dependent on country-specific information regarding the risks addressed. Chambers of commerce abroad, for example, or the (already existing) dialogue groups (e.g. also dialogues with civil society) from trade agreements and permanent representations can contribute to obtaining information. It is also useful to leverage the experience of these actors on the ground (e.g. in the use of existing national certification schemes and their compatibility with international schemes) in order to be able to offer differentiated technical and financial assistance that meets the conditions and priorities of trading partners.

- **Strengthen risk classification of areas through partnership engagement** (addressee: EU). For the risk classification of areas provided for in the EUDR, partnership engagement and consultation are core elements for building trust in the classification system. The EUDR also provides for special

partnerships for high-risk areas. Risk classification can also be used to target resources, partnership efforts and incentives at high-risk areas (cf. Recommendation 6.3.3).

- **Proactively support the drafting of the treaty on business and human rights at international level** (addressee: EU, Federal Government). Since 2014, there has been an intergovernmental working group of the UN Human Rights Council that aims to draw up a binding treaty on business and human rights. To date, this working group has primarily been supported by LMIC governments (cf. Section 5.6.2). In view of the criticism of the unilateral approach to due diligence obligations without consulting the partner countries ultimately affected, the EU could send a signal for dialogue and cooperation and play an active role in the working group. At the same time, the WBAE recommends that the German government should contribute with a supportive, harmonised position.

- **Promote additional plurilateral and multilateral agreements** (addressee: EU). In particular, many states should use comprehensive, plurilateral and multilateral agreements and dialogue formats in order to improve the policy environment for due diligence regulations at this level as well, to create coherence and to promote implementation. This would also be an important contribution to preventing segmented markets (cf. Section 5.5.2). Examples of these formats could be the new dialogues within the WTO, e.g. on trade and the environment or trade and gender, as well as other international forums such as UNCTAD or the World Food Committee (cf. Section 5.6.3.3).

6.3.3 Recommendation: Intensify and enhance development cooperation for the implementation of due diligence obligations

The EUDR provides for support for trading partners in implementing the requirements of the law, and German development cooperation has already begun to implement projects in cooperation with trading partners with regard to corporate due diligence obligations (cf. Section 5.6.3). These beginnings are to be welcomed and should be further expanded and taken into account in thematically similar projects in order to ensure coherence between development cooperation and the increased corporate requirements. Ideally, projects should be targeted at particularly major obstacles or problems. The results of the planned reviews of the laws can be used to identify obstacles or problem areas (Recommendation 6.4.1). To identify areas with particularly high (deforestation) risks, the results of the risk classification provided for in the EUDR can be used (Recommendation 6.3.2). The following recommendation is closely related to the recommendation "Support supplier development" (6.2.3) and "Ensure coherence with trade policy and offer support" as part of Recommendation 6.3.1.

- **Support trading partners and vulnerable actors affected by supply chain due diligence obligations** (addressee: EU, Federal Government). The EU and the German government should support EU companies that source raw materials and products from LMIC that have problems with the implementation of human, labour and environmental rights in systematically improving the implementation of due diligence obligations. This should be done in cooperation with European and German companies. The dialogues provided for in the EUDR are a good starting point. These support measures should be seen in conjunction with the promotion of supplier development so that vulnerable groups outside LMIC are also taken into account (cf. Section 6.2.2). This should also be linked to the risk classification from the EUDR (cf. Section 6.3.2), which already provides special support for high-risk areas.

6.4 Recommendations for the systematic development of due diligence obligations

6.4.1 Recommendation: Consider impact assessment of due diligence regulations from the outset in policy design

As a relatively new policy instrument, little is known so far about the impact of due diligence regulations, which is why it is particularly important in terms of evidence-based policy to review the impact from the outset, also in order to be able to recognise and address unintended effects (as in the implementation of development cooperation projects). Such a review is closely linked to the monitoring of implementation, as described in Recommendation 6.2.1. For monitoring, key figures and indicators must be defined and collected by an authority to be determined in order to be able to observe and describe the implementation of the regulations. In the review process, further analyses should be carried out on the basis of this collected data and, if necessary, additional surveys in order to enable valid conclusions to be drawn about the impact of the regulations. Gender aspects should be regularly recorded and analysed (cf. Recommendation 6.4.4).

The various due diligence regulations so far have provided for such reviews in different ways. On the one hand, the EUDR provides for targeted reviews with regard to a possible extension of the scope of application and, on the other hand, a general review of the regulation. The draft CSDDD provides for a report by the European Commission after seven years on the effectiveness with regard to the achievement of the directive's objectives.[165] Accordingly, the Scientific Advisory Board makes specific recommendations for the German LkSG:

- **An ongoing review of the effects of the LkSG should be legally secured** (addressee: Federal Government). Although various reviews are also planned for the German LkSG, these are only included in the explanatory memorandum and not in the text of the law itself (cf. Section 5.3.4), which means that there is no binding effect (cf. Section 5.3.5).

The following recommendations concern the concrete planning and implementation of an impact assessment of the LkSG, which can also be transferred to the CSDDD depending on its further design. Accordingly, the Federal Government and, in part, the EU are also addressed.

- **Utilise existing assessment approaches from other policy areas and establish a link with the assessments of other policy approaches** (addressee: EU, Federal Government). In line with Recommendation 6.3.1 and in order to ensure sufficient comparability between the impact analyses of approaches from other areas, existing approaches for measuring human rights impacts should be incorporated into the planning of the impact assessment (such as the "Guidelines on the analysis of human rights impacts in impact assessments for trade-related policy initiatives" of the EU Directorate-General for Trade). This would make it possible to build on the numerous existing monitoring and review approaches in other policy areas. Interlinking these would increase awareness of cross-policy impacts. To this end, the impact assessments from the Catalogue for Better Regulation of the EU could be used - for example by linking relevant policy-specific assessment tools (such as tool #27: external trade and investment and tool #29: fundamental rights, including the promotion of equality). In addition to the separate assessments provided for individual legislative initiatives, a joint assessment could be carried out across different policy areas. At the very least, however, interactions between policy approaches, for example between due diligence obligations and trade policy measures, should be explicitly taken into account in the assessment as a regulatory "coherence effect". Individually targeted reviews in the EUDR and CSDDD should also be coordinated. In addition

[165] https://www.bundestag.de/resource/blob/425296/697f2cacf303d1d9e5854525e2496bea/WD-3-114-16-pdf-data.pdf

to comparable review categories to be developed, inconsistency could also be specifically covered as a review criterion.

- **Define the required data and its continuous collection for the accompanying monitoring, taking into account the special features of the agri-food sector** (addressee: Federal Government, BAFA, BLE). In view of the large number of departments involved, it is first necessary to clarify responsibilities. Who is responsible for defining the indicators and key figures and who collects the data? According to the explanatory memorandum to the LkSG, the BAFA can, for example, generate data from the companies' electronic reports, which can also be used for monitoring. When collecting this data, it should be clarified which data are considered key figures, which are indicators and which are (interim) targets. In this context, it is important to consider whether additional data should be requested from the companies for this purpose, although this is in trade-off with a low-bureaucracy implementation (cf. "Bureaucracy monster" in Section 6.1.2). The data from the reports is initially only limited to implementation; in order to measure the achievement of objectives, additional indicators must be defined, such as the development of the extent of child labour. The collection of this data or the use of suitable secondary data goes beyond the scope of monitoring and must be done specifically for the review (see below).
- **Determine the targets/indicators and content of an impact assessment** (addressee: EU, Federal Government)**.** The content of the first reviews is clearly specified in the EUDR (assessment of whether to extend to other ecosystems, raw materials, etc.). The draft CSDDD provides for an impact analysis on the objectives set and, according to the government's explanatory memorandum, the LkSG also wants to examine the impact on the protection of human rights, among other things (cf. Section 5.3.4). The operationalisation of these goals, against which the impact is to be measured, should take place promptly, as baseline data must be collected - especially if primary data is required - in order to be able to show changes from the introduction of the due diligence regulations. In addition, a broad selection of target indicators is necessary so that unintended effects can also be recorded as part of the review. For the general review of the EUDR, for example, it is planned to consider, among other things, the supply effects on local markets (Fern 2022: 18) and to pay particular attention to effects on vulnerable or marginalised groups. In principle, the effects of due diligence obligations on their tariff preferences should be examined specifically for LMIC within the framework of the Generalised System of Preferences, as these are partly based on different reference agreements than the due diligence obligations (based on Recommendation 6.3.1, cf. Annex 1).
- **Create an impact assessment as an external evaluation with the involvement of trading partners** (addressee: Federal Government). Recording the causal relationships between the due diligence regulations and the various target indicators (see previous recommendation) is a complex methodological task that ties up a lot of capacity. It is therefore advisable to put the review out to tender and have it carried out by third parties. As part of the external evaluation, a continuous exchange with scientific actors who can observe certain effects in the longer term and independently of political processes can be particularly helpful. In line with Recommendations 6.3.1 and 6.3.2, the review should be designed with the involvement of trading partners, as the impacts on human rights and labour standards predominantly take place at the beginning of the supply chain. For a successful review, it therefore makes sense to involve local scientific expertise. When interpreting the results of a review, it is also important to bear in mind that environmental impacts, as well as effects on human rights risks such as child labour, usually occur with a time lag.

6.4.2 Recommendation: Promote the right to food through different policy approaches

The WBAE expressly welcomes the fact that the essential human right to food has been taken into account. It is explicitly covered in the CSDDD and implicitly in the LkSG, but further concretisation is necessary. For further and company-relevant concretisation, the WBAE recommends defining specific obligations where possible. Notwithstanding the recommendations made in Section 6.4.3 on the minimum wage as an important basis for the realisation of the right to food and the development of living wages and incomes, the WBAE proposes the following additional starting points:

- **Define food security at the workplace as a due diligence obligation** (addressee: EU, Federal Government). In addition to affordable food supplies at the workplace, sufficient breaks for catering also play a role here (Section 5.7.1.).
- **Include land eviction and deprivation of production factors as part of the due diligence obligations as in the LkSG in the CSDDD** (addressee: EU, Federal Government). Land eviction and unlawful deprivation of land and other factors of production whose use secures a person's livelihood directly affect the right to food and were in this sense also included in the LkSG (cf. Section 3.3). The WBAE therefore recommends including at least one comparable provision in the CSDDD. As a concrete definition for companies, their obligation could be defined that, as part of their obligation of effort for their supply chain, they have checked that no displacement is taking place or has taken place. Similar to the EUDR in relation to deforestation, it would also be conceivable to choose a suitable reference year after which it can be proven that no displacement has taken place (cf. Section 4.2.1, Section 5.7.1).
- **Examine further obligations relating to the right to food in the learning system** (addressee: EU, Federal Government)**.** Due to the complexity of the factors influencing the right to food (Section 5.7.1), the concretisation of further-reaching, more programmatic aspects should be examined in stages. To this end, existing approaches to certification, such as the Food Security Standard (cf. text box 5.7), could be monitored in the sense of a learning system and their impact and feasibility reviewed.
- **Strengthen problem awareness and systematic impact assessment for the right to food** (addressee: EU, Federal Government). Compared to the LkSG, the draft CSDDD explicitly refers to the right to food. Accordingly, it can be expected that this area will be strengthened in the due diligence obligations if the CSDDD is adopted. As part of the risk analysis, companies should therefore check at an early stage whether there is a corresponding risk in their supply chains. Mentioning other relevant conventions - as is currently still being negotiated in the CSDDD - could in principle increase companies' awareness of the complexity of issues relating to the right to food, but their broad regulatory scope does not appear to be specific enough for the right to food. It would be more expedient to record the impact of all due diligence regulations on food security as part of their.
- **Provide targeted support for companies in the implementation of due diligence obligations with regard to the right to food** (addressee: Federal Government, BAFA, Helpdesk). In order to achieve the implementation of these due diligence obligations, support offers for companies are recommended, e.g. through handouts or best practice examples for various starting points, including the issue of land displacement.
- **Establish and support dialogue forums and pilot projects with companies and local stakeholders** (addressee: EU, Federal Government). Companies should be supported in the implementation of such formats, e.g. through networking opportunities (cf. also Recommendation 6.2.2). If several companies have supplier relationships in a region characterised by a high prevalence of malnutrition or moderate to severe food insecurity, a first step could be to connect the companies

with each other and with local stakeholders. Solutions can be developed jointly without overburdening the individual companies. Development cooperation should organise forums to support this. Experience in implementing the right to food should be strengthened, e.g. through pilot projects in supplier regions. Corresponding projects are already in place for existing certification approaches, for example on the topics of catering/canteens for employees, nutritional education, school meals for employees' children, etc.

6.4.3 Recommendation: Implement local minimum wages and promote a living wage and a living income through different policy approaches

As explained in Section 5.7.2, wages and business incomes that do not reach a living wage are a fundamental problem and cause many of the human and labour rights risks in agricultural value chains identified in Section 4.4, such as child labour and forced labour. Living wages and incomes play a key role in achieving the right to food. However, there are limits (as described in Section 5.7.2) to the improvements that can be achieved through due diligence regulations. For the situation of dependent employees, the WBAE sees other starting points for due diligence regulations than for achieving a living business income. The explanations in Section 5.7.2 make it clear that in a market economy, continuously ensuring a living income is anything but trivial. In commodity markets in particular, with their periodic price fluctuations and strong international competition, there are currently no simple instruments for guaranteeing a living income. There are also many uncertainties associated with the calculation of living business incomes. For this reason, a general endeavour by all social actors (science, politics, civil society and business) is necessary in order to develop concepts that can be applied in different value chain contexts. The regional context and policy environment must be taken into account, for example for comprehensive social or structural policies or employment options.

This results in different recommendations:

- **Ensure that the local minimum wage is paid** (addressee: EU). This is provided for in the LkSG. However, the WBAE considers it important that this is also clearly anchored in the CSDDD. This is because compliance with the minimum wage is a key part of corporate due diligence obligations.
- **Strengthen local systems for establishing minimum wages** (addressee: EU, Federal Government). In line with the criticism of unilateral due diligence regulations, which have an extraterritorial effect on LMIC (cf. Section 5.6.2), and the recommendation to "seek dialogue with trading partners" (Section 6.3.2), it is elementary to work together with the trading countries from the outset, especially in the area of wage and income levels. Thereby, ideally building on existing local systems and helping them to be enforced.
- **Continue to support and expand initiatives to calculate living wages and living incomes** (addressee: EU, Federal Government). The calculation and routine adjustment of reference values as a necessary basis for private-sector implementation should be further supported. This should be done in exchange with the above-mentioned approaches of the trading partners. An expansion of the existing initiatives into a platform similar to the Science Based Target Initiative in the area of climate targets should be examined in order to establish a direct link between the calculated reference values and the efforts of companies (cf. Section 5.7.2). By defining clear (interim) targets and increasing the transparency of corporate efforts, companies can be incentivised to address the problem.
- **Further develop antitrust law to enable sector agreements** (addressee: Federal Government, Federal Cartel Office, EU). In consultation with the Federal Cartel Office, the Federal Government should enable antitrust exemption for sectoral agreements to ensure a living

wage and a living income - the latter primarily for countries in which farmers do not have sufficient non-agricultural labour alternatives (cf. practical example in Section 5.7.2). The BMZ, BMWK and BMEL should provide intensive support for sectoral agreements to ensure living wages and living incomes in the development phase, as this increases the chances of a broader participation by companies. The German government should advocate the EU-wide expansion of sectoral agreements to ensure living wages and living incomes and examine how this can be made possible under antitrust law.

6.4.4 Recommendation: Cover gender equality along the supply chain in the due diligence obligations

Corporate due diligence obligations in the area of gender equality are already included in the German LkSG and in the draft CSDDD via two fundamental conventions of the ILO. The CSDDD expands on this aspect by referring to the UN Women's Rights Convention. Due to the disadvantages of women in agriculture and along supply chains described in Sections 4.3 and 5.7.3, which can be exacerbated by the interaction with other social categories, a potential expansion in this area through the CSDDD is a correct tendency. However, in accordance with the discussion in Section 5.7.5 and the recommendations below, it must be considered to what extent possible extensions of the due diligence obligations can be concretised at this point. The other fundamental conventions of the ILO, which address company-related gender equality in particular (cf. Section 5.7.3), are a good starting point for concretisation.

- **Gradually expand the existing references to gender equality in the due diligence regulations after prior impact assessment and dialogue with trading partners** (addressee: EU, Federal Government). Certain company-related aspects of gender equality are already part of the LkSG. The draft CSDDD expands the reference again by also referring to the UN Women's Rights Convention. Due to the existing discrimination of women along supply chains (cf. Section 4.2) and the further multilateral and bilateral efforts taking place in this area (cf. Section 5.7.3), it would be consistent to concretise gender equality in supply chains as an objective in the due diligence regulations. This could initially mean the incorporation of the UN Women's Rights Convention and the inclusion of other relevant fundamental conventions of the ILO (cf. Section 5.7.3). The ILO Convention on the Elimination of Violence and Harassment in the World of Work from 2019 or the ILO Maternity Protection Convention would lend themselves to this if ratification increases. However, this possible expansion and specification must be preceded by an impact assessment and a dialogue with trading partners (cf. Recommendation 6.3.2) in order to identify possible unintended negative effects, such as the risk of women being forced out of certain sectors if, for example, the employment of women is associated with higher costs.
- **Include gender aspects in all steps of due diligence obligations at an early stage** (addressee: EU, federal and implementing authorities, companies). In view of the draft CSDDD, which provides for a strengthening of due diligence obligations in the area of gender equality, companies should take this aspect into account at an early stage when setting up their risk management. In addition to taking it into account as part of the grievance mechanism (cf. Recommendation 6.2.5) or the risk analysis, this could be done by integrating it into the policy statement provided for by the LkSG (which is part of the due diligence obligations). In addition, relevant gender-related data could be collected in order to initially get an idea of the gender equality situation in the company's own supply chains. Gender aspects should also be specifically recorded and analysed as part of the monitoring (cf. Recommendation 6.2.1) and the impact assessment (cf. Recommendation 6.4.1).

6.4.5 Recommendation: Consider special challenges of climate and environmental goals in the context of due diligence obligations

The anchoring of environmental and climate targets in the supply chain due diligence obligations (CSDDD) currently still has considerable limits and should therefore only be implemented gradually. It should start with a few, rather easily verifiable targets (climate plan, etc.) and experience should be gained with them, as there is a partial lack of the necessary clear measurement criteria, measurement methods and monitoring systems, especially in agricultural production. Collecting the necessary data in all the different countries and locations is also time-consuming and expensive.

- **Include mandatory climate protection in the CSDDD only to the extent that the required parameters are measurable and controllable for companies. The obligation to draw up a climate plan could be an acceptable starting point** (addressee: EU, Federal Government). Avoiding greenhouse gas emissions in agriculture is more challenging than in other sectors, as the production processes in agriculture are very diverse with emissions levels that sometimes vary greatly from region to region. These arise in connection with natural processes of land use and animal husbandry and affect not only the energy sector (and thus carbon dioxide), but also methane and nitrous oxide in particular. Another related challenge is that the level of greenhouse gas emissions for many agricultural and horticultural production processes in the various regions of the world is not (yet) known, nor is it known how and by how much they can be reduced. Furthermore, unlike human rights and labour protection targets, greenhouse gas reduction is not a question of compliance with a given standard (i.e. whether it is met or not), but a "moving target" that requires continuous improvement. It should also be noted that companies can reduce company-related emissions simply by changing their product portfolio. However, this may not achieve much, as leakage effects can lead to emissions and thus remain the same overall. Against this backdrop, there are some arguments in favour of not anchoring absolute greenhouse gas reductions in the due diligence obligations at present, but merely requiring the preparation of a climate protection plan that reports on the measures taken.
- **Gradually integrate further environmental targets into the CSDDD as obligations as soon as the necessary measurement and monitoring systems are in place** (addressee: EU, Federal Government). Environmental goals can only be meaningfully integrated into the CSDDD once harmonised measurement and monitoring systems have been created, because only what can be measured can also be regulated or adapted. Example: Biodiversity is in itself an extremely complex field of local, regional and global targets in a large number of sub-fields (species diversity, nature conservation, etc.). Here, too, there exists a lack of harmonised and regionally adapted measurement and monitoring concepts. As long as there is no mapping of areas worthy of protection and areas with high biodiversity potential in all countries from which agricultural products are purchased, it is not possible to determine whether the cultivation of the purchased products has had a negative impact on biodiversity. In principle, it must be clarified which biodiversity targets are manageable for companies and verifiable for the state. A ban on the use of pesticides banned in Europe and the responsible use of pesticides as well as refraining from using endangered species could possibly be anchored in the due diligence obligations quite quickly. With regard to global food security, consideration should be given to including soil protection in the due diligence obligations. The documentation of measures against soil degradation and soil erosion would be the first priority. Food losses along the value chain should also be considered. The documentation of measures to reduce food losses could also be included in the due diligence obligations. It should be examined which environment-related international agreements and which requirements therefrom are suitable for being integrated into the due diligence obligations (cf. Section 5.7.5).

- **Drive forward and promote the global development of harmonised and transparent measurement and monitoring concepts and portfolios of environmental instruments** (addressee: EU, Federal Government)**.** If further environmental and climate protection targets are to become elements of due diligence obligations, the EU would have to invest massively in the development of coordinated measurement and monitoring concepts in the areas of climate and environment and portfolios of instruments that lead to the reduction of GHG emissions or to environmental improvements in the agricultural sector, and support LMIC. All necessary information should be identified and presented transparently and made available to all stakeholders via the Internet. The databases should be continuously expanded and regularly updated.
- **Provide financial support to LMIC for the implementation of climate protection and environmental targets via international funds** (addressee: EU, Federal Government). If climate and environmental protection targets are implemented in supply chain due diligence obligations, operational implementation measures to enable companies in LMIC should be financially supported. In the area of climate protection, for example, financing could be provided via the Green Climate Fund, which can be used to promote low-emission and climate-resilient agricultural practices, among other things (cf. Recommendation 6.2.3).

Weighing up the opportunities, challenges and limits of due diligence regulations, the WBAE generally welcomes the legislation on corporate due diligence obligations at both German and EU level. The WBAE sees this further "building block" as an opportunity to strengthen sustainability in terms of human rights and environmental due diligence obligations in the agri-food sector. European harmonisation of these due diligence obligations is to be welcomed, as this can reduce potential competitive disadvantages for German companies and market segmentation. Against the background of the novelty of this instrument, the WBAE supports the gradual expansion of due diligence obligations as a learning system, calls for an effective and efficient design and implementation of the regulations for all parties involved and, on the other hand, calls on all actors involved to work towards a real improvement in the situation of people in the agri-food sector, thus making due diligence regulations a success for human rights and labour standards as well as for environmental and climate goals.

7. Appendix

Annex 1: Human rights, labor standards and environmental protection references in different trade policy agreements and unilateral approaches

		EU trade policy				Due diligence regulations		
		bilateral	unilateral					
		FTA EU-NZ	GSP/ EBA	GSP+	Import ban forced labour	CSDDD	EUDR	German Supply Chain Act (LkSG)
Human rights and labor rights								
ILO fundamental conventions	Convention No. 29: Forced Labor Convention							
	Convention No. 105: Abolition of Forced Labor Convention							
	Convention No. 87: Freedom of Association and Protection of the Right to Organise	not ratified: NZ						
	Convention No. 98: Right to Organise and Collective Bargaining							
	Convention No. 100: Equal Renumeration							
	Convention No. 111: Discrimination (Employment and Occupation)							
	Convention No. 138: Minimum Age	not ratified: NZ						
	Convention No. 182: Worst Forms of Child Labour							
	Convention No. 155: Occupational Safety and Health	Not ratified: 11 EU states				*		
	Convention No. 187: Promotional Framework for Occupational Safety and Health	Not ratified: NZ + 10 EU states				*		

Human Rights	International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted on 16 December 1966							
	- Article 11 recognizes the right to an adequate standard of living. This includes, but is not limited to, the right to adequate food, clothing and housing.							
	International Covenant on Civil and Political Rights (ICCPR) adopted on 16 December 1966							
	- Article 1 recognizes the right of all peoples to self-determination; a people are not to be deprived of its means of subsistence.							
	Universal Declaration of Human Rights							
	- Article 3 recognizes the right to life, liberty and security							
	- Article 5 bans torture or cruel, inhuman or degrading treatment and punishment							
	- Article 9 bans arbitrary arrest, detention or exile							
	- Article 17 recognizes the right to own property and bans the arbitrary deprivation of property							
	- Article (23(3)) recognizes the right to just and favorable remuneration ensuring for themselves and their family an existence worthy of human dignity [conditions of work, right to a living wage for employees and living income for self-employed workers and smallholders (cf. Article 7 of ICESCR)					**		
	- Article 25 recognizes the right to a standard of living adequate for the health and well-being of themselves and their family, including food, clothing and housing (cf. Article 11 of ICESCR)					*		
	UN Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG)							
	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)							

	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)							
	UN Convention on the Rights of the Child, CRC							
	- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC)							
	UN Convention on the Rights of Persons with Disabilities							
	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)							
	International Convention for the Protection of All Persons from Enforced Disappearance							
Gender	UN Convention on the Elimination of all Forms of Discrimination Against Women							
	ILO Convention No. 183: Maternity Protection							
	ILO Convention No. 190: Violence and Harassment							
	Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)					*		
	Beijing Declaration and Platform for Action (Declaration of the fourth UN World Conference on Women in 1995)							
Indigenous Groups	UN Declaration on the Rights of Indigenous Peoples (UNDRIP)					****	Bei Zusammen-arbeit	
	- Free, Prior, and Informed Consent (FPIC)					*		
	UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP)					*		
	ILO Convention No. 169: Indigenous and Tribal Peoples					*		
	UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities							
Governance	UN Convention Against Transnational Organized Crime							
	UN Convention Against Corruption					*		
	OECD Anti-Bribery Convention					*		
	UN Single Convention on Narcotic Drugs (UNSCND)							

	UN Convention on Psychotropic Substances							
	UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances							
	Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration; ILO)							
	ILO Convention No. 81: Labour Inspection Convention							
	ILO Convention No. 144: Tripartite Consultation							
	ILO Declaration on Social Justice for a Fair Globalization							
	The International humanitarian law instruments as laid out in the Geneva Conventions and additional protocols					*		
Environmental protection								
Pollutants	Minamata Convention on Mercury							
	Stockholm Convention on Persistent Organic Pollutants							
	Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal							
	Vienna Convention for the Protection of the Ozone Layer and its Montreal Protocol							
	Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade					***		
Biodiversity	International Plant Protection Convention (IPPC)							
	Convention on Biodiversity (CBD)					***		
	Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol to the CBD)					***		
	Protocol on Biosafety to the Convention on Biological Diversity (Cartagena Protocol to the CBD)					***		
	Nagoya-Kuala Lumpur Supplementary Protocol on liability and redress to the Cartagena Protocol on Biosafety							
	International Tropical Timber Agreement (ITTA)							

	Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, Washington Convention)							
	Convention on the Protection and Use of Transboundary Watercourses and International Lakes					*		
Fishing	UN Fish Stocks Agreement (UNFSA)							
	UN Convention on the Law of the Sea (UNCLOS)					*		
	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA)							
Klima	Paris Agreement under the United Nations Framework Convention on Climate Change (2015)						+	
	United Nations Framework Convention on Climate Change (UNFCCC, 1992)							
	Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998)							
Partici pation	Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)					*		
Further sustainability issues covered								
	Forst							
	Gender							
	Maori communities (Treaty of Watangi)							
	Sustainable supply chains (cf. OECD gudielines, FAO guidelines land tenure)							
	Sustainable and resilient food systems							
	Animal welfare							
	Antibiotics							
	Food security							
	Subsidies for fossil energy sources							
	Trade and investment for sustainability							
Complementary Agreements								
	Equivalence agreement on organic farming							

Notes: * yes, but only in the negotiating position of the EU Parliament; ** yes, but in the EU Commissions' draft related to living wage only (but extended to living income in the negotiating position of the Parliament); *** yes, but not included in the negotiating position of the EU Parliament; **** yes, but not in the negotiating position of the EU Council; however, still retained by the EU Parliament; + Own deforestation target: zero, cut-off date (31/12/2020); UNFCCC reduction targets and Article 5 of the Paris Climate Agreement can be taken into account in the benchmarking of producer countries (according to Art. 29, para. 4 (a), (c)); GSP/EBA: sanctionability has so far only been used for Cambodia, Sri Lanka, Belarus and Myanmar (Rudloff 2022: 5).

Sources: Based on Rudloff, B. (2022); CSDDD: Annex to the European Commission's draft directive + https://www.europarl.europa.eu/doceo/document/TA-9-2023-0209_EN.html; EUDR: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0109_EN.pdf ; https://www.forestpeoples.org/en/blog/eu-impact-forest-peoples-rights; Trade agreements: IEEP 2008, EU Kom 2017, Hagemejer, Maurer, Rudloff et al. (2021). Trade aspects of the EU-Mercosur Association Agreement, Study for the EP; GSP/GSP+: Conventions (gsphub.eu); https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32012R0978; For the selection of relevant agreements in the field of human rights: DG Trade (n.d.): Guidelines on the analysis of human rights impacts.

Annex 2: Box: Initial analyses of the conflict minerals regulation in the *Dodd-Frank Act*

Empirically, there is little experience to date on the effects of due diligence regulations. The longest experience and some initial empirical work exists on Section 1502 of the *Dodd-Frank Act* in the USA. This federal law, enacted in 2010, imposes due diligence obligations on companies listed on US stock exchanges with regard to the origin of conflict minerals such as tin, tantalum, tungsten, their ores and gold in order to break the link between American consumers (via the purchase of mobile phones, computers, jewellery, etc.) and the financing of rebel groups in the DR Congo. Empirical studies show that immediately after the introduction of the law, small-scale artisanal mining in eastern DR Congo suffered considerable losses of income and jobs (e.g. Cuvelier et al. 2014). Although the law does not include a boycott per se, it triggered a de facto boycott of minerals from the conflict regions of the DRC as a first step (Pöyhönen et. al. 2010): First, the Congolese government did not allow mining in three conflict regions, then a coalition of large electronics and high-tech companies (Electronic Industry Citizenship Coalition -EICC) announced that they would no longer buy from smelters that could not certify that the minerals used did not come from conflict regions. However, the formalisation and associated certification of artisanal small-scale mining, which employs over 800,000 workers in eastern DR Congo according to estimates, was fundamentally complicated and characterised by a slow start (Radley and Vogel 2015). Nevertheless, as part of the *Dodd-Frank Act* and the previously published reports on the financing of rebel groups through illegal mining, trade and taxation of minerals in the DRC and the associated serious human rights violations, various certification programmes have emerged (Hilson et al. 2016, Young 2018). Some of these are *based* on so-called *chokepoints,* such as smelters, as there are far fewer of these compared to individual mines and extraction sites. The Conflict-Free Smelter Programme has certified most smelters and refineries to date (Young 2018).[166] One criticism of this programme is that it has often led to a withdrawal from conflict regions instead of focusing on improvement and support on the ground (Rüttinger and Greistop 2015). This criticism is comparable to the fear of a "cut and run" instead of a "stay and behave" approach in the context of due diligence regulations. Nevertheless, it is questionable whether an improvement in the human rights situation on the ground is possible in all cases, especially when it comes to conflict regions.

Analyses of the short and medium-term effects of the Dodd-Frank Act vary widely. One study finds an increase in infant mortality rates in the vicinity of the affected mines (in the conflict zone) and identifies lower health expenditure, such as for disease-preventing mosquito nets, as one of the reasons (Parker et al. 2016). Another study shows that the likelihood of conflicts has increased due to the law (Stoop et al. 2018, Bloem 2022). One mechanism lies in the lower income of the affected households in the conflict regions, which would reduce the opportunity costs of joining a rebel group (ibid.). The activity of rebel groups around tin and tantalum mining sites, which were now better regulated, has also shifted towards artisanal gold mining - and in this respect merely represents a shift in the problem (study cited in Schütte 2018).

If a medium-term time frame and other indicators are included in analyses, a different picture can also be drawn. A study using aggregated import data for tin and tantalum between 2007 and 2017 shows a slump in imports in the two years following the introduction of the Dodd-Frank Act, but a recovery in imports in the following years and no trade disadvantage for the region in the medium term (Schütte 2018). The consistency and accuracy of trade data on tin and tantalum has also improved, which could

[166] However, there are also certifications that focus on the upstream value chain. For example, the Federal Institute for Geosciences and Natural Resources (BGR) has been active in the DR Congo since 2009 with a certification system focussing on artisanal and small-scale mining in the east of the country. (https://www.bgr.bund.de/DE/Themen/Zusammenarbeit/TechnZusammenarbeit/Projekte/Abgeschlossen/Afrika/2049_2017-2135-6_Kongo_Kontrolle_Rohstoffsektor.html?nn=1547826)

be helpful in identifying irregularities in the future, for example to uncover smuggling of minerals (ibid.). Nevertheless, this study also points out that medium and long-term effects at micro level need to be considered and measured, as it is not possible to tell from the production volume which actors/miners are benefiting and which groups are being disadvantaged.

Regardless of the measurable effects, another criticism is levelled at the intentions of the due diligence approaches of the Dodd-Frank Act and the OECD Guidance on Conflict Minerals (Diemel and Hilhorst 2018). According to them, the approaches are designed in such a way that they primarily give buyers a clear conscience instead of contributing to a better situation on the ground. The following reasons are cited: 1) Reforms are mostly implemented in areas where there is no conflict (so-called low hanging fruits) 2) Too strong a focus on supply chain transparency instead of looking at the governance of the extractive sector in general 3) Uncritical cooperation with the Congolese state despite problematic governance 4) No systematic attention to artisanal small-scale mining, although its negotiating basis has been weakened by formalisation (ibid.).

Nevertheless, other analyses see the American initiative as a window of opportunity that has given momentum to reforms in Congolese mining, as can be seen, for example, in the growth of certification initiatives (Rüttinger and Scholl 2016) and other international developments, such as the EU Conflict Minerals Regulation or the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains published in 2015 (Saegert and Grossmann 2018). According to Rüttinger and Scholl (2016), not all of the effects described can be attributed to the Dodd-Frank Act, but both the reaction of the Congolese government to its introduction and the falling world market prices for 3T minerals at the time play a role.

8. References

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