LEGAL OPINION

Possibilities and limitations of changing the scope of application of the Act on Corporate Due Diligence Obligations in Supply Chains (LkSG) when implementing the Corporate Sustainability Due Diligence Directive (CSDDD)

Summary

The legal opinion by Anne-Christin Mittwoch (Professor of Civil Law, European and International Business Law at Martin-Luther University Halle-Wittenberg) engages with two central questions regarding the scope of application of the Act on Corporate Due Diligence Obligations in Supply Chains (LkSG). The legal opinion was commissioned in view of the upcoming implementation of the EU Corporate Sustainability Due Diligence Directive (CSDDD).

The opinion firstly assesses whether it is **possible**, on the basis of EU law, to deviate from the requirements of the staggered scope of application of Art. 37 CSDDD when implementing the CSDDD. More specifically, it examines if the German legislature can choose to maintain the threshold of 1,000 employees in Sec. 1 LkSG, as well as not to introduce turnover thresholds. The staggered application of the CSDDD affects companies starting with 5,000 employees and EUR 1.5 billion net turnover. Secondly, the report analyses the question of whether, based on EU law, it is **mandatory** for the German legislature to deviate from the requirements of the staggered scope of application pursuant to Art. 37 CSDDD when implementing the CSDDD and instead to retain the threshold of Sec. 1 LkSG. In other words, the legal opinion **examines whether the German legislature is prevented from introducing the turnover thresholds of the CSDDD and from thus reducing the scope of application of the LkSG**.

With regard to the first question, the expert opinion concludes that the German legislature is free to retain the broader scope of application of the LkSG and not to limit the number of companies covered (such as by introducing the higher CSDDD thresholds with regards to number of employees or turnover). Since the provisions relating to the scope of application are not subject to maximum harmonisation, but only stipulate a minimum standard, the legislature may deviate 'upwards'. The decisive question in a case of maximum harmonisation does not arise here, namely whether the national legislature is working within or outside the scope of the Directive. The German legislature may extend the scope of application of the CSDDD at national level by increasing the number of companies covered.

Secondly, due to the prohibition to reduce an existing level of protection in Art. 1 para. 2 CSDDD, the Directive may not constitute grounds for lowering an already achieved national level of protection. Since,

based on Recital 31 of the CSDDD and the overall purpose of the Directive, the design of its scope of application also affects the level of protection it creates, **the legislature may not reduce the scope of application and the number of companies covered when transposing** the Directive. Due to the advance effect of directives and the prohibition on frustrating EU law, according to which the member states may not enact any provisions that seriously jeopardise or call into question the regulatory objectives of the directive prior to its transposition, **Art. 1 para. 2 CSDDD (once it enters into force) precludes both a change to the existing employee thresholds of the LkSG and the introduction of turnover thresholds**.