

## 德國落實供應鏈盡職調查法與歐盟指令草案之規範分析

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### 摘要

《德國供應鏈盡職調查法》於今(2023)年1月1日生效,旨在消除供應鏈中強迫勞動之情形。歐盟於去(2022)年公布三份與公司盡職調查有關之草案,分別為執委會發布之「公司永續性盡職調查指令草案」、由議會法律事務委員會提出之「沃爾特斯報告草案」、以及理事會提出之「公司永續性盡職調查指令草案談判立場」,目前三方正針對最終草案進行談判。因《德國供應鏈盡職調查法》與「公司永續性盡職調查指令草案」可能相互影響,本文比較該法與歐盟公布之三份草案的主要相異之處,包括:個別企業之適用範圍、企業之供應鏈範圍、以及集團層面之盡職調查規範與董事責任,並作潛在影響之評析。

(取材資料: Anna Burghardt-Kaufmann et al., *Due Diligence in Supply Chains – Update on Corporate Human Rights and Environmental Due Diligence Requirements in the EU and Germany*, WHITE & CASE (Jan. 11, 2023), <https://www.whitecase.com/insight-alert/due-diligence-supply-chains-update-corporate-human-rights-and-environmental-due>; Florian Drinhausen et al., *The Corporate Sustainability Due Diligence Directive Proposal*, ASHRST (Feb. 8, 2023), <https://www.ashurst.com/en/news-and-insights/legal-updates/the-corporate-sustainability-due-diligence-directive-proposal/>.)

今(2023)年1月1日,德國旨在防止供應鏈迫害人權之《供應鏈盡職調查法(Lieferkettensorgfaltspflichtengesetz, LkSG)》正式生效,該法規定了有關供應鏈盡職調查之新義務<sup>1</sup>。然而,歐盟執委會於去(2022)年2月即已公布「公司永續性盡職調查指令(Corporate Sustainability Due Diligence Directive, CSDDD)」(以下簡稱執委會草案)之文本草案<sup>2</sup>,且歐洲議會法律事務委員會於同年11月7日公佈一份旨在修訂CSDDD之「沃爾特斯報告草案(Draft Wolters Report)」

<sup>1</sup> Gesetz Über Die Unternehmerischen Sorgfaltspflichten In Lieferketten [LkSG] [The Act on Corporate Due Diligence Obligation in Supply Chains], July 22, 2021, BGBL I at 2959, (Ger.).

<sup>2</sup> *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM (2022) 71 final (Feb. 23, 2022) [hereinafter *Proposal for CSDDD*]; 張育璋, 歐盟要求公司實施人權盡職調查之可能影響, 經貿法訊, 300期, 頁12-18, 2022年5月25日, <http://www.tradelaw.nccu.edu.tw/epaper/no300/3.pdf>。

(以下簡稱議會草案)<sup>3</sup>。歐洲理事會復於同年 12 月 1 日正式通過其 CSDDD 之談判立場 (General Approach, 以下簡稱理事會草案)<sup>4</sup>。就此, CSDDD 指令草案之最終文本將由執委會、議會與理事會進入三方會談 (trilogue)<sup>5</sup>。一旦該指令草案通過, 歐盟成員國將有兩年時間將其納入國內法<sup>6</sup>。由此發展可知, 該法通過後勢必影響德國 LkSG, 而現已施行之 LkSG, 其施行經驗也將影響 CSDDD 草案三方會談, 故三份草案與 LkSG 之主要差異值得進一步探究。

以下先簡介德國 LkSG 以及三份草案, 並說明三份草案與德國 LkSG 之規範重要的相異之處, 以及對德國 LkSG 可能產生的影響, 最後作一結論。

## 壹、簡介德國盡職調查供應鏈法案以及執委會、議會、理事會草案

### 一、德國盡職調查供應鏈法案

今年 1 月 1 日, 德國 LkSG 生效, 此法為消除供應鏈中強迫勞動之情形, 新增有關供應鏈盡職調查之義務, 並適用於僱員超過 3000 人的公司<sup>7</sup>。詳言之, 該法案要求公司在價值鏈中進行有關環境及人力之盡職調查, 並公開有關此盡職調查的政策及程序報告<sup>8</sup>。另規定於 2024 年, 該法之適用門檻將調降至僱用超過

<sup>3</sup> Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022 – 2022/0051(COD)), COM (2022) 0071 (Nov. 7, 2022) [hereinafter *Proposal for CSDDD European Parliament Legislative Resolution*].

<sup>4</sup> EUR. CONSULT., *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, General Approach*, No. Cion Doc. 6533/22 (2022) [hereinafter *General Approach*].

<sup>5</sup> 三方會談 (trilogue) 為歐盟執委會、議會及理事會代表就立法草案談判所舉行之會議, 會議中達成之任何協議皆為非正式協議。 *Interinstitutional Negotiations*, EUR. PARLIAMENT, <https://www.europarl.europa.eu/olp/en/interinstitutional-negotiations> (last visited Mar. 10, 2023); *Ordinary Legislative Procedure*, EUR. PARLIAMENT, [https://www.europarl.europa.eu/infographic/legislative-procedure/index\\_en.html](https://www.europarl.europa.eu/infographic/legislative-procedure/index_en.html) (last visited Mar. 10, 2023).

<sup>6</sup> *Proposal for CSDDD*, *supra* note 2, art. 30 (“Member States shall adopt and publish, by ... [OJ to insert: 2 years from the entry into force of this Directive] at the latest, regulations and administrative provisions necessary to comply with this Directive.”).

<sup>7</sup> Gesetz Über Die Unternehmerischen Sorgfaltspflichten In Lieferketten [LkSG] [The Act on Corporate Due Diligence Obligation in Supply Chains], July 22, 2021, BGBL I at 2959, §1 (1) no. 2 (Ger.) (“(1) This Act applies to enterprises regardless of their legal form that...that normally have at least 3,000 employees in Germany; employees posted abroad are included.”).

<sup>8</sup> *Id.* §§3 (1), 10 (2) (“The enterprise must prepare an annual report on the fulfilment of its due diligence obligations in the previous financial year and make it publicly available free of charge on the enterprise’s website no later than four months after the end of the financial year for a period of seven years.”) (“Enterprises are under an obligation to exercise due regard for the human rights and environment-related due diligence obligations set out in this Division in their supply chains with the aim of preventing or minimising any risks to human rights or environment-related risks or of ending the violation of human rights-related or environment-related obligations.”).

1000 名員工之公司<sup>9</sup>。

## 二、執委會、議會、理事會草案

另一方面，去年 2 月執委會草案公布後，同年 11 月歐盟議會經檢視該草案，復提出一份尚未被法律事務委員會認可之修正版本，即議會草案。隨後議會將文本草案交予理事會再進行草案議題之妥協，以期透過統一且明確之指令規範，對歐盟的會員國建立更臻完整之盡職人權架構，要求規範內的企業以評估、識別其供應鏈中的人權與環境，避免對規範所涵蓋之公司或個人產生負面之影響<sup>10</sup>。

值得注意的是，歐盟指令之性質係僅要求各成員國達成其規範目標，至於之詳細之內容與做法，則留給各成員國自行決定<sup>11</sup>。目前德國 LkSG 甫生效，其可能被納入 CSDDD 實務面的案例，作為歐盟 CSDDD 最終文本之參考。

## 貳、三份草案與德國盡職調查供應鏈法案之規範差異及影響

鑑於三份草案與德國 LkSG 可能相互影響，本文分析兩者之主要差異，包括：個別企業之適用範圍、企業之供應鏈範圍、以及集團層面之盡職調查規範與董事責任，最後探討前開差異帶來之潛在影響。

### 一、個別企業之適用範圍

執委會草案與理事會草案提出之「適用 CSDDD 之公司門檻」相似，可分為歐盟公司與非歐盟公司：

如為歐盟公司，則其全球淨營業額須超過 1.5 億歐元，且平均雇用超過 500 人<sup>12</sup>；或是平均僱員超過 250 人，且全球淨營業額達到 4000 萬歐元，而其中至少有 2000 萬歐元的淨營業額係來自高風險行業（例如紡織、農業、食品、金屬及礦物開採）<sup>13</sup>。如係非歐盟公司，則不考慮僱員人數，只要求其在歐盟的淨營業額超過 1.5 億歐元；或是在歐盟的淨營業額高於 4000 萬歐元，但低於 1.5 億歐元，且至少 2000 萬歐元之淨營業額來自高風險部門<sup>14</sup>。然而，議會草案建議將

<sup>9</sup> *Id.* §1 (1) no. 2 (“From 1 January 2024 the thresholds stipulated in sentence 1 no. 2 and sentence 2 no. 2 amount to 1,000 employees, respectively.”).

<sup>10</sup> *General Approach*, *supra* note 4, at 22, para. 17.

<sup>11</sup> *Sources and Scope of European Union Law*, at 3, [https://www.europarl.europa.eu/ftu/pdf/en/FTU\\_1.2.1.pdf](https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.1.pdf) (last visited Mar. 10, 2023).

<sup>12</sup> *Proposal for CSDDD*, *supra* note 2, art. 2.1 (“[T]he company had more than 500 employees on average and had a net worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been prepared.”).

<sup>13</sup> *Id.* (“[T]he company...had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million in the last financial year for which annual financial statements have been prepared, provided that at least 50% of this net turnover was generated in one or more of the following sectors....”). 本文提及之「高風險行業」根據 CSDDD 之定義，為「該些具有高度風險受不利影響，且存在於 OECD 指南中的部門」。 *Id.* at 21.

<sup>14</sup> *Id.* art. 2.2 (“This Directive shall also apply to companies which are formed in accordance with the

歐盟公司的門檻進一步調降至全球淨營業額 4000 萬歐元，而非 1.5 億歐元；再者，該份報告建議以平均 250 名取代 500 名員工作為門檻<sup>15</sup>。

有別於前述 CSDDD 草案及議會草案中將企業淨營業額納入考量之企業適用門檻，德國 LkSG 僅以僱員人數作為依據，適用門檻之界定不考慮企業在德國境內之收入<sup>16</sup>。因此，如該指令草案通過後，德國可能需考慮將企業淨營業額納入適用門檻之認定標準。

## 二、企業之供應鏈範圍

為了釐清公司對於供應鏈調查的規範界線，理事會對此展開許多討論並進行商討與妥協。最初在執委會草案中，係以「價值鏈 (value chain)」作為界定供應鏈範圍之用語，此用語係指公司之商品生產或服務提供，包含開發產品或服務、使用與清除產品、以及上下游與該公司建立業務關係之相關活動<sup>17</sup>。然而，理事會草案則以較為中性之用語——「活動鏈 (chain of activities)」取代執委會草案中的「價值鏈」一詞，藉以因應成員國對應履行盡職調查義務之供應鏈範圍之歧見，換言之，對於盡職調查責任究竟應涵蓋整個「價值鏈」，抑或是僅限於「供應鏈」，成員國間存有不同意見。再者，使用活動鏈之用語亦可避免與「價值鏈」一詞已存在之定義相互混淆<sup>18</sup>。

另一方面，德國 LkSG 對企業供應鏈的規範，係指所有製造產品及提供服務所需經過之流程<sup>19</sup>。針對上述由理事會提出之供應鏈立場，可發現修改

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legislation of a third country, and fulfil one of the following conditions: (a) generated a net turnover of more than EUR 150 million in the Union in the financial year preceding the last financial year; (b) generated a net turnover of more than EUR 40 million but not more than EUR 150 million in the Union in the financial year preceding the last financial year, provided that at least 50% of its net worldwide turnover was generated in one or more of the sectors listed in paragraph 1, point (b).”)

<sup>15</sup> *Proposal for CSDDD European Parliament Legislative Resolution*, at 13 (“...EU companies with more than 250 employees on average and a worldwide net turnover exceeding EUR 40 million in the financial year preceding the last financial year should be required to comply with due diligence..., and employees in third party undertakings with which the company has entered into a vertical agreement in return for the payment of royalties, should be included in the calculation of the number of employees in the user company.”).

<sup>16</sup> *See Gesetz Über Die Unternehmerischen Sorgfaltspflichten In Lieferketten [LkSG] [The Act on Corporate Due Diligence Obligation in Supply Chains]*, July 22, 2021, BGBl I at 2959, §1 (Ger.).

<sup>17</sup> *Proposal for CSDDD*, *supra* note 2, art. 3 (g) (“[V]alue chain’ means activities related to the production of goods or the provision of services by a company, including the development of the product or the service and the use and disposal of the product as well as the related activities of upstream and downstream established business relationships of the company.”).

<sup>18</sup> *General Approach*, *supra* note 4, at 6, para.18 (“The term ‘value chain’ contained in the Commission’s proposal has been replaced by a neutral term of ‘chain of activities’ in order to reflect divergent views of Member States on the issue of whether to cover the whole ‘value chain’ or limit the scope to the ‘supply chain’, and to avoid confusion with already existing definitions since the content of the term has been modified.”).

<sup>19</sup> *Gesetz Über Die Unternehmerischen Sorgfaltspflichten In Lieferketten [LkSG] [The Act on Corporate Due Diligence Obligation in Supply Chains]*, July 22, 2021, BGBl I at 2960, §2(5) (Ger.)

後之理事會草案與德國 LkSG 下的供應鏈概念更趨於一致。

### 三、集團層面之盡職調查規範與董事責任

執委會以及議會草案中並沒有提及母公司是否需對子公司的行為負盡職調查之義務，但理事會草案中新增相關規定。其明確規定母公司應履行之義務，即將盡職調查納入公司的政策及風險管理系統、認定實際與潛在的不利影響與防止潛在不利影響等<sup>20</sup>。而德國 LkSG 第 1 條規定，除了母公司之外，子公司亦須承擔義務，換言之，如果子公司本身高過於 LkSG 之有關門檻，其亦涵蓋在上述之公司範圍內<sup>21</sup>。

執委會草案將董事對公司之業務策略、長期利益、以及永續性之貢獻，納入其變動薪酬之評斷標準，以提供董事為公司制定減排計畫之財務誘因<sup>22</sup>。議會草案更進一步強化此概念<sup>23</sup>。而理事會草案刪除該些規定，其認為董事會薪酬係屬於公司治理下有關公司及其相關機構或股東權限下的的問題。

然而，LkSG 並沒有將氣候變遷等環境責任與公司高層薪酬之關聯納入規範。若最終版本之 CSDDD 草案包含此規定，德國可能須調整其規範。

### 肆、結論

儘管 CSDDD 的最終版本尚未出爐，但有鑑於德國 LkSG 已經生效，其實務面的案例或將成為歐盟訂定盡職調查規範之參考；另一方面，若 CSDDD 之最終版本發布後，德國將可能根據 CSDDD 之內容進行修正，以彌補其條文之不足，故有關之企業仍應提前做好審查規劃並持續關注此議題之發展。

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(“The supply chain within the meaning of this Act refers to...all steps in Germany and abroad that are necessary to produce the products and provide the services....”).

<sup>20</sup> *General Approach*, *supra* note 4, art. 4a.2.

<sup>21</sup> Gesetz Über Die Unternehmerischen Sorgfaltspflichten In Lieferketten [LkSG] [The Act on Corporate Due Diligence Obligation in Supply Chains], July 22, 2021, BGBL I at 2959, §1 (Ger.).

<sup>22</sup> *Proposal for CSDDD*, *supra* note 2, at 41, para. 51 (“With a view to increasing the financial incentives of directors, a significant portion of directors’ variable remuneration should be linked to the achievement of sustainability and in particular greenhouse gas emission reduction targets.”).

<sup>23</sup> *Proposal for CSDDD European Parliament Legislative Resolution*, *supra* note 3, amendment 39.