

## Overview

# Mapping of the Current EU Sustainability Legislation on Human Rights Due Diligence and Comparison of the Requirements with the Services of the Food Security Standard (FSS)

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## About Cattwyk

On 1 January 2025 Cattwyk started with 15 experienced lawyers in Hamburg and Brussels. The new law firm focuses on the economically relevant regulatory issues of foreign trade and cross-border supply chains. The founders have decades of experience and have established their previous law firm as the leading foreign trade practice in Germany and of the leading practices in Europe.

Cattwyk stands for a clear focus on trade compliance, economic security and sustainability – the future topics for a sustainable economy. Cattwyk's expertise ranges from traditional topics such as customs law/anti-dumping law, sanctions and export control, excise duties and foreign direct investment; another strong focus is on sustainability in supply chains: German Supply Chain Act (LkSG), Corporate Sustainability Due Diligence Directive (CSDDD), CBAM, EUDR, Forced Labour Regulation and Ecodesign Regulation are just a few of the relevant legal acts – in addition to reporting requirements, such as those under the Corporate Sustainability Reporting Directive (CSRD). Cattwyk's strength lies in its ability to combine complex and specialised legal issues into a comprehensive advice package - in compliance, strategic issues, in disputes with authorities and other parties in the supply chain or in litigation before national or EU courts. In addition to its own expertise, Cattwyk uses a global network of experienced trade lawyers and numerous collaborations with experts in the field of software/IT or other technological disciplines.

Cattwyk is committed not only to legal excellence, but also to using all technological means to serve its clients effectively and efficiently as well as to sustainability and diversity.

For years, the renowned partners Dr Lothar Harings and Marian Niestedt have been ranked among Germany's leading lawyers for customs law, foreign direct investment, export control and sanctions by the German magazine JUVE. Dr Harings founded the 'Green Trade Team' at GvW Graf von Westphalen, which, under his leadership and with the experienced lawyers Max Jürgens, Lars Hillmann and Dr Julia Hörnig, has developed into a leading practice for legal advice on sustainability in supply chains before the members moved to Cattwyk. Dr Lothar Harings is honorary chairman of the European Forum for External Trade (EFA). The firm's other partners, Dr Hartmut Henninger, Dr Katja Göcke and Franziska Kaiser, are also recommended lawyers for foreign trade and customs law in Germany. They have been working in the renowned practice for more than ten years and have expanded the team's field of activity to such an extent that it is now possible to provide comprehensive advice on regulatory issues.

The respective teams of lawyers, assistants, research associates and student assistants joined the five partners to start a new and exciting success story with Cattwyk.

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## Summary

The FSS enables an analysis of the most relevant protected legal positions for the agricultural sector under the LkSG<sup>1</sup>, the CSDDD<sup>2</sup>, the EUDR<sup>3</sup>, the Conflict Minerals Regulation<sup>4</sup> and the FLR<sup>5</sup>. In the context of the CSRD<sup>6</sup>, the (comprehensive or risk-based) implementation of the FSS in the supply chain also contributes to the presentation of qualitative, supply chain-related characteristics under the ESRS standards E2, E3, S2 and S3<sup>7</sup>.

### Due Diligence and Protected Rights

While the due diligence and reporting obligations must be implemented and fulfilled by the companies that fall within the scope of the respective legal acts, human and environmental rights must be guaranteed not only within the obligated company, but also in the global supply chain. The protection of certain legal positions is therefore the objective of the various sustainability legal acts and has an impact on the entire supply chain.

### Relevance of Certificates

The various national and European legislative bodies have recognized the importance of standards and certificates, particularly with regard to the LkSG, the CSDDD, the EUDR and the CSRD.

A certificate that verifies compliance with certain protected legal positions as part of an audit by an independent auditor at the supplier's premises offers a relatively high guarantee that an identified risk does not actually exist. The resources of the risk analysis can thus be focused on suppliers with a higher risk profile, which is in line with the principle of prioritization that is common to all of the aforementioned regulations.

At the same time, it is clear that commissioning external third parties to carry out certifications does not release a company from its very own responsibility to protect human rights in the supply chain. Although certificates can be used as a measure for fulfilling due diligence obligations, they do not release a company from liability if it subsequently becomes apparent that the conditions for issuing the certificate are not (or no longer) met.

### Method

Against the background of the entry into force of various sustainability legal acts and taking into account the international frameworks on human rights and environmental protection in supply chains, we have carried out an assessment of the Food Security Standard (FSS) and its accompanying programs from a legal perspective. The content of the human rights-related standard was compared with the protected legal positions and the due diligence obligations from the various legal acts in order to determine which legal requirements companies meet when using the FSS or applying the accompanying programs. The following is a summary of these results. The information reflects the status as of January 2025 and is subject to future changes to the legal acts or interpretative guidance from the EU Commission or national authorities.

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<sup>1</sup> Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz – LkSG) of 16 July 2021 (BGBl. I S. 2959)

<sup>2</sup> Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760 of 5 July 2024

<sup>3</sup> Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150/206 of 9 June 2023

<sup>4</sup> Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130/1 of 19 May 2017

<sup>5</sup> Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937, OJ L 2024/3015 of 12 December 2024

<sup>6</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182/19 of 29 June 2013, as amended by Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322/15 of 16 December 2022

<sup>7</sup> Commission Delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the European Parliament and of the Council as regards sustainability reporting standards, OJ L 2023/2772 of 22 December 2023

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## Corporate Sustainability Due Diligence Directive

### Obligations under the CSDDD

The Corporate *Sustainability Due Diligence Directive* (CSDDD) requires companies to take appropriate measures to respect human rights and environmental standards along their entire value chain. They must identify and assess risks and take preventive and remedial measures to avoid adverse impacts on human rights and the environment. According to the CSDDD, companies are obliged to take 'appropriate measures'. The measures must therefore be both capable and effective in preventing potential violations. However, if a violation occurs in the supply chain (e.g. at a supplier) despite the implementation of appropriate measures, the sanction provisions of the CSDDD are not immediately triggered. In this respect, companies must 'endeavor' to prevent violations of human rights and environmental rights (duty of care). However, there is no strict obligation to succeed in the endeavor (no duty to succeed).

### The FSS and the CSDDD

A FSS certification offers a relatively high level of guarantee that the audited supplier complies with all human rights-related legal positions from the CSDDD and almost all environmentally protected legal positions from the CSDDD that are relevant for agricultural supply chains.

With regard to the protection of the seas in accordance with MARPOL 73/78<sup>8</sup> and UNCLOS<sup>9</sup>, the FSS indicators do not contain any explicit criteria that cover these obligations. However, the extent of possible violations of these conventions must be assessed in the context of a certified agricultural operation. For example, it is conceivable that a coastal farm could be in breach of regulations on the discharge of substances into the sea, which could also constitute a breach of MARPOL 73/78 or UNCLOS. However, the discharge of substances into waters is reviewed by the FSS. In the scope relevant to agricultural businesses, the FSS therefore contains sufficient criteria with reference to MARPOL 73/78 and UNCLOS. More detailed criteria are only absent for compliance with biodiversity and deforestation regulations.

### FOSSEM and the CSDDD

FOSSEM is an FSS-accompanying program that works towards compliance with all relevant regulations in the event of non-compliance with certain legal positions in an agricultural business. Even in the event of non-compliance with individual protected legal positions under the CSDDD at supplier level, FOSSEM provides obligated companies with a suitable measure for remedying negative effects, which they can use to fulfill their obligation to endeavor to prevent human rights violations.

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<sup>8</sup> International Convention for the Prevention of Pollution from Ships of 2 November 1973 as amended by the Protocol of 1978

<sup>9</sup> United Nations Convention on the Law of the Sea of 10 December 1982

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## EU Deforestation Regulation

### Obligations under the EUDR

The EU Regulation on Deforestation-free Products (EUDR) requires companies to ensure that relevant products sold in the EU, imported into the EU or exported from the EU are not associated with illegal deforestation or forest degradation. To this end, companies must fulfill a series of due diligence obligations that ensure the traceability of relevant products along the supply chain. This includes, in particular, obtaining information on the country of origin and geolocation data of the producer's land. Companies must also check whether the products have been manufactured in accordance with the applicable legislation in the country of production. Only if no or a negligible risk of non-compliance has been identified may the relevant products be placed on the market, made available or exported. In this respect, the EUDR contains an obligation to fully ensure compliance.

The relevant products covered by the EUDR consist of a relevant raw material (cattle, cocoa, coffee, oil palm, rubber, soy and wood) and are listed exhaustively in Annex I to the Regulation.

### The FSS and the EUDR

Although the Right to Food, which is the direct focus of the FSS, is not explicitly mentioned in the EUDR, it is indirectly covered by it. The EUDR refers to human rights in general and land use rights and the rights of third parties in particular as part of the 'law of the country of production' to be reviewed. The FSS offers concrete possibilities for review, particularly with regard to protection against forced eviction and the observance of formal, informal and customary land rights, including the principle of FPIC, which are explicitly and specifically mentioned in the EUDR. The EU Commission attaches great importance to these legal positions in the context of compliance with the EUDR.

According to Art. 10 para. 2 lit. n EUDR, existing information from certification systems can be taken into account when determining a "negligible risk", the identification of which is required for placing relevant products on the market or making them available. Audits and certificates are also explicitly a risk mitigation measure according to Art. 11 para. 1 lit. b EUDR. A FSS certificate is suitable for determining a "negligible risk" within the meaning of Art. 10 para. 1 EUDR with regard to the legal positions reviewed, as the FSS verifies compliance with a number of legal positions as part of an audit and as part of follow-up audits.

In the context of the auditing of producers, the FSS also offers the opportunity to collect information on site that can meet the EUDR requirements of 'appropriate, conclusive and verifiable'. FSS auditors collect their data at production level and analyze the conditions directly at the location of production, which increases the informative value of the audit results. At the same time, the FSS is generally able to review (samples of) the necessary geolocation data during an audit and thus create an additional verification component. The direct access of the FSS auditors to the respective farm gives the auditors the (simple) opportunity to collect or verify certain EUDR-relevant data locally. However, the FSS auditors' ability to collect and verify data presupposes that the auditors have the necessary expertise (e.g. through training or specific instructions).

With regard to the aspects that the FSS examines in the context of the EUDR at the production or producer location of the EUDR-relevant raw materials, the FSS also fulfills the governance requirements that the EU Commission places on certificates in the context of the FSS.

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## EU Regulation on Conflict Minerals

### Obligation under the Conflict Minerals Regulation

The EU Conflict Minerals Regulation aims to regulate and restrict trade in minerals that contribute to the financing of armed conflicts and serious human rights violations. In particular, the regulation refers to so-called “conflict minerals” such as tin, tantalum, tungsten and gold (together also referred to as “3TG”) and their ores. These minerals are often mined under conditions that cause or perpetuate human rights abuses and conflict, particularly in existing conflict zones. The Regulation requires importers who import 3TG into the EU to ensure that the minerals come from responsible sources and do not contribute to the financing of conflict. To this end, importers concerned must implement due diligence obligations in relation to the supply chain. An integral part of the due diligence obligations is the establishment of complete supply chain transparency, i.e. the origin of all imported 3TG must be traced back to the mine of origin.

### The FSS and the Conflict Minerals Regulation

FSS certification verifies compliance with almost all human rights relevant to the Conflict Minerals Regulation. The enforced disappearance of persons is considered a sub-category of the right to liberty and security, which is adequately verified by an FSS certification with the indicator 6.6.1. Only the destruction of ritually or culturally significant places is not covered by an FSS certification as a separate assessment criterion. Since the principle of FPIC must also take into account the preservation of cultural sites<sup>10</sup>, among other things, it is unlikely that a violation of these rights could be overlooked when reviewing the principle of FPIC or compliance with the prohibition of discrimination as part of an FSS certification.

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<sup>10</sup> Cf. Art. 13 of the United Nations Declaration on the Rights of Indigenous Peoples, UN Resolution 295 of 13 September 2007

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## Corporate Sustainability Reporting Directive

### Obligation under the CSRD

The CSRD was introduced by the EU to improve the transparency and comparability of corporate sustainability reports. The specific requirements of the CSRD are fulfilled by the European Sustainability Reporting Standards (ESRS). The ESRS provide a framework for detailed reporting on topics such as climate change, biodiversity, working conditions, human rights and anti-corruption. They ensure that companies' reports are consistent, comparable and meaningful. Both qualitative and quantitative data are required in order to comprehensively assess a company's sustainability performance.

The starting point for the reporting obligation under the CSRD is the so-called materiality assessment, according to which companies must identify the material sustainability issues that have a significant impact on their business activities and on stakeholders. Reporting companies must carry out a "Double Materiality Assessment": Companies assess both the impact of their business activities on the environment, society and governance, as well as the financial risks and opportunities arising from sustainability issues for the company. The results of the analysis are incorporated into the reporting and ensure that companies present the relevant sustainability aspects transparently and report on them comprehensively.

### The FSS and the CSRD

Neither the CSRD nor the ESRS require a supplier in the supply chain to be certified. The CSRD also does not stipulate any requirements for risk management systems or risk analyses. It does not contain any obligations regarding preventive or remedial measures.

However, the CSRD requires companies to report on a range of topics (including in relation to the supply chain). In the area of human rights, Standards S2 (Workers in the value chain) and S3 (Affected communities) are the starting points for reportable content in relation to the supply chain. At the level of reportable environmental topics, all standards are relevant as they do not differentiate between internal and external impacts.

It is clear that the FSS has a qualitative impact, particularly with regard to ESRS S2 and S3. This means that companies can use FSS certification or FOSSEM to fulfill the qualitative requirements of the reporting obligation within ESRS S2 and S3 - both in the case of comprehensive and risk-based implementation of the FSS or FOSSEM in the supply chain.

### NAFSA as part of the materiality assessment

As NAFSA reviews the abstract situation of food security in certain countries, it can be used as a source of information for the materiality assessment of any supply chain-related risks in accordance with the CSRD. If NAFSA identifies a relevant risk in a supplier country, the reporting company must check whether its business activities make a negative contribution to food security in order to determine whether the impact on food security is to be considered material. The consequence would be that the company would be required to report on these risks (particularly in relation to ESRS S2 and S3). NAFSA can assist in this process.

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## EU Forced Labor Ban

### Obligation under the FLR

The FLR stipulates that products manufactured using forced labor may no longer be imported into the EU, made available on the internal market or exported from it (Art. 3 FLR). The national authorities must provide evidence that the respective product was in fact manufactured using forced labor (Art. 17 para. 3 and para. 4, Art. 18 FLR). In doing so, they follow a risk-based approach (Art. 14 FLR). Apart from the ban on the manufacture of products using forced labor, the regulation does not stipulate any specific due diligence obligations for companies (Art. 1 para. 3 FLR) but assumes that these have taken place in some cases (Art. 11 lit. a), Art. 17 para. 1, Art. 18 para. 3 FLR). The due diligence obligations should include at least a risk analysis and risk mitigation measures.

### The FSS and the FLR

FSS certification can be used to verify compliance with the FLR's ban on forced labor based on FSS indicators 6.1.1, 6.6.1, 6.7.1, 6.7.2, 6.7.3, 11.2.4 and 16.2.1 at the certified company. In particular, FSS certification verifies the existence of written contractual agreements between employees, the withholding of identity documents or passports, the withholding of wages and restrictions on freedom of movement. In addition, all children living on the farm must have access to high-quality primary education. These criteria are suitable for eliminating any relevant risks of forced labor at an audited supplier. Therefore, FSS certification in the context of the FLR is a sufficient risk analysis and minimization measure that is generally suitable for averting a preliminary investigation by the authorities.



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## The FSS for Companies and Suppliers

### Coverage of the due diligence obligations by the FSS

The due diligence obligations (risk analysis, complaints procedures, preventive and remedial measures, documentation, etc.) must initially only be implemented by companies that are directly subject to the respective legal acts. However, the CSDDD and the EUDR in particular require obligated companies to contractually pass on their human rights and environmental expectations to suppliers. This includes, above all, the assurance of compliance with protected legal positions.

In the area of due diligence obligations, the FSS indicators and the criteria of the audit procedure only singularly check the company's internal implementation of due diligence processes.

In light of the fact that the CSDDD and the EUDR do not provide for a "safe harbor" provision through certification and the FSS certification does not make such a claim, the aforementioned deficits at the level of due diligence obligations are by no means serious. They only show that the aim of FSS certification is not to implement or review a comprehensive due diligence process in accordance with the requirements of the aforementioned EU sustainability laws, but to ensure that the certified company complies with human rights in accordance with international human rights standards.

### The FSS for Suppliers

If a supplier obtains FSS certification or undergoes the FOSSEM program, the FSS is a preventative and, if necessary, remedial measure from the perspective of the obligated company in relation to the certified or FOSSEM-supported supplier, by which the obligated company can showcase compliance with its duty of care.

Full FSS certification offers the obligated company a high degree of certainty that the supplier complies with the legal positions identified as covered. The auditing process, including an on-site visit, ensures an independent review of the supplier's actual risk disposition, taking into account the situation of a wide range of affected persons (*stakeholders*).

As FSS certification essentially proves compliance with the protected legal positions at the certified company (primarily through the audit procedure required for certification), other or further preventive measures will essentially be superfluous for the respective obligated company in relation to the certified supplier. This applies in any case as long as no new indications of any risks or violations become known. Suppliers with an abstractly high risk of human rights violations can be considered low risk and even compliant with human rights on the basis of FSS certification. This has the advantage for the company obliged under the EU legal acts that it can focus on other high-risk suppliers in order to meet its prioritization obligation (see e.g. Art. 9 CSDDD, Sec. 2 para. 2 sentence 1 LkSG) in a targeted manner. In the context of the EUDR, FSS certification can lead to the assumption of a "negligible risk" with regard to the legal positions covered, which allows the relevant products concerned to be placed on the market.

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Legal notice and disclaimer:

The statements above are based on the legal situation and the official interpretative notes at the time this writing was issued; subsequent changes to the legal provisions or supplementary interpretative notes may necessitate a re-evaluation.

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