

## MEETING WITH [REDACTED]

### [REDACTED] Confederation of German Employers' Association (BDA)

#### Scene setter

- You are meeting with [REDACTED] Confederation of German Employers' Associations (BDA).
- BDA is the central German business association organising the social and economic policy interests of the entire German economy, representing the interests of one million businesses with around 20 million employees via voluntary membership of employer's associations. BDA has a joint representation in Brussels with the Federation of German Industries (BDI).
- The aim of the meeting is to discuss the Commission's upcoming legislative proposal on **sustainable corporate governance**.
- Recent contacts with BDA include:
  - DG JUST (Alexandra Jour-Schröder, DDG) meeting with [REDACTED] BDA, 19 November 2020, and
  - Your participation, by way of a video message, at the "International Business and Human Rights Digital Conference: supply chains, human rights due diligence and the way forward", organised jointly by Deutsche Post DHL Group (that invited you), the International Organisation of Employers (IOE) and BDA, 20 April 2021.
- The work on the **German law on supply chains (Lieferkettengesetz)** is still ongoing in the Bundestag. The adoption, originally scheduled for 20 May, was postponed. **On 27 May, the governing parties agreed on a further compromise**, paving the way for formal adoption by the Bundestag in the second week of June (tbc).
- While the initiative has been gaining support in the business community, in a statement issued on 3 March 2021, the **BDA rejected the draft law** for being too far-reaching and creating legal uncertainty. They argued that companies would need to withdraw from developing countries with a challenging human rights situation, harming those who would need help. They were also worried about DE companies' competitiveness in DE (with only DE companies under the scope), in Europe and worldwide, and called for reducing the burdensome requirements, limiting responsibilities with regard to indirect suppliers and not extending liability.
- We understand that the political **compromise** now includes: 1) clarifying that the duties introduced by the supply chain law do not as such give rise to civil liability, while civil liability established outside that law remains unaffected; 2) covering companies which do not have their registered office or central place of administration in DE, have a branch in DE and at least 3000 employees in DE.
- Contributions to the **open public consultation** on the EU initiative and a summary of factual findings are now published on the Commission's better regulation portal. BDA participated: **not supporting EU harmonisation** of due diligence rules (although they see the benefits of a level playing field), strongly oppose plans on directors' duties and science-based targets, and call for seeing first the effects of SRD2 on directors' remuneration.

**BDA's position on the EU Sustainable Corporate Governance initiative:**

- As regards **corporate due diligence**, BDA acknowledges the potential benefits of EU harmonisation but is concerned that the rules would go **too far**, e.g. not only covering human rights but also **environmental impacts**, and setting out **liability** of EU companies in EU courts for damages caused by their business partners in third countries.
- They call for an EU framework which enables an **international level playing field**, **prevents the risk of withdrawal** from third countries, which is **risk-based, practical and effective**, which enables corporations to develop an **individual approach** according to the size, nature and structure of the organization, and **focus on tier 1 of the supply chain outside the EU**. It should be **uniform throughout the EU** and establish rules for **non-European** companies conducting business in the EU to ensure fair competition.
- A **smart mix** of hard and soft law measures is needed that translates the duties of the UNGP in a way that supports a culture of **cooperation**, solution-building and mediation.
- **SMEs'** specificities should be taken into account. They should be provided with suitable tools to implement due diligence obligations appropriately on a voluntary basis.
- Any new rules should be introduced only after the recovery from **COVID**.
- Regarding **directors' duties**, BDA does **not see a need for additional incentives** for directors to balance stakeholders' interest as this is already part of the measures of successful management, and are worried because of the **threat of legal liability**: directors' duties cannot be a checklist, **flexibility** should be retained for different sectors, companies **cannot carry out an exhaustive overview of all their stakeholders' interests**, a horizontally applicable definition of "stakeholder" is impossible to find. **Corporate governance codes, the NFRD and the Taxonomy Regulation already cover** several points, it is enough if directors take those into account in their decision-making. Legal requirements could **disrupt decision-making** in boards given that not all the interests of stakeholders are fully compatible with each other.
- BDA argues that risks and opportunities of sustainability for companies are **already reflected in corporate strategies** today. Corporate decisions already take into account ESG factors, beyond what is required by EU law, on own initiative ("all sustainability dimensions need to be reflected in order to ensure sustainable and long-term success"), increasing expectations of consumers, customers and financial investors or in order to comply with **national law**.
- Regarding board members' **remuneration**, BDA finds that a **good balance was reached in the recent Shareholder Rights Directive II** which increased disclosure requirements and introduced a shareholders' say-on-pay and we should first see its impact. It should remain for each individual company to decide how best to align executive remuneration with its business model, strategy and long-term goals.
- BDA believes that the board **should regularly assess the level of expertise** in its organisation on sustainability matters and take appropriate follow-up, including regular trainings but **legislation risks with creating a box-ticking exercise**. The sustainability (and digital) skillset of supervisory board members is expanding (also thanks to selection criteria), and sustainability committees of supervisory boards are increasingly common.









