



Environmental Due Diligence Workshop Report

11 May 2021

Objective of the workshop

Gather different perspectives from industry practitioners, policy-makers, academia and civil society on what environmental due diligence means and how it should be framed as part of an overall legal framework on human rights and environmental due diligence (HREDD), a framework which is feasible in practical terms and enables business to deliver.

Session 1: International Frameworks

OECD

The OECD plays an important role in providing global guidance on responsible business conduct, the main reference framework being the 2011 Guidelines for Multi-National Enterprises, complemented in 2018 with the OECD Due Diligence Guidance for Responsible Business Conduct to provide more practical support to enterprises on the implementation of the 2011 Guidelines. These guidelines were the result of a broad consensus, having been developed with business (and other stakeholders) for business, translating into plain language what due diligence means.

The guidelines have a broad scope which goes beyond human rights. Environmental expectations under the OECD MNE guidelines, chapter 6, comprise recommendations for enterprises to raise environmental performance, incorporating the precautionary principle, with environmental management systems as a key lever. The scope is direct and indirect supply chains, beyond what is covered by legislation, also in reference to international environmental agreements.

In practice, companies are being asked to establish an Environmental Management System (EMS) as a key component of EDD, conduct EDD in their operations and supply chains, ensure communication of impact, train supply chain partners, contribute to the development of environmentally meaningful public policy. There is also sector-specific environmental guidance for targeted sectors, such as the garment industry, agriculture, extractives, etc.

The OECD National Contact Points (NCP) play an important role in promoting the guidelines and assisting enterprises and stakeholders in implementation. They also provide a mediation and conciliation platform for resolving practical issues that may arise. 30% of cases raised with NCPs concern alleged breaches of the environmental chapter of the OECD guidelines (impacts in mining, financial services and manufacturing), having increased in the last 3 years with climate change related complaints now gaining momentum.

More practical tools are being developed and the guidelines themselves are currently being updated:

- in view of the need to address more specifically climate change and biodiversity,
- to reference all relevant international treaties,
- to specify the link between human rights and environment,
- and also to provide more guidance on the link with the circular economy.

A number of events will be organised by the OECD mid-2021 to take stock and advance the thinking.

Environmental due diligence under international law – what is required from States?

When we refer to due diligence we are not exclusively speaking about a duty of care for companies. International law applies to the **States' obligation to regulate private actors to ensure they implement due diligence.**

The EU and its Member States are obliged to comply with international treaties they have signed up to, as well as with international customary norms (e.g. the prohibition of significant transboundary harm or harm to areas beyond national jurisdiction). This means they have to put in place a level playing field through relevant legislation to oblige private actors to reach the objectives of the international treaties. Under international law, what is considered to be the due diligence of States includes ensuring:

- Adoption of necessary and adequate measures and regulations (including on private actors)
- Effective monitoring and enforcement of rules
- Implementation of the precautionary approach principle
- Environmental impact assessment
- Applying best environmental practices

- Means to compensate for harm
- Consultation and cooperation with other States in good faith.

This is supported by rulings and opinions from international tribunals, such as the International Court of Justice (ICJ) or the International Tribunal on the Law of the Sea (ITLOS).

The importance of an enabling environment for due diligence

We see more uptake by companies on environmental due diligence as part of their sustainability agendas and as part of complying with a host of existing environmental legislation. But governments seem to be struggling to integrate environmental aspects into the full due diligence spectrum in their efforts to design HREDD legislation.

In addition to enacting due diligence legislation, governments need to **create the enabling environment for companies to carry out this obligation**, through adapting existing rules and frameworks, but also implementing accompanying measures.

In the case of HREDD, there are clear links to the EU's trade & development agenda, sustainability taxonomy, corporate social reporting legislation, sector legislation on timber or batteries, etc. **Policy coherence is essential.**

Another important challenge is how to trigger a sustainable and scalable uptake of due diligence. Systemic issues require in-depth governance changes in some sourcing countries. These can be influenced through the trade & development agenda of the EU. But how can we encourage change whilst avoiding that the cost burden of responsible sourcing and due diligence are shouldered only by the weakest link in the supply chain, often the farmer or the miner in the country of origin? How can we ensure that EU sourcing standards do not create unrealistic entry barriers for upstream supplier countries?

Due diligence is focused on risk management, but this needs to be reconciled with an often very wide range of environmental risk categories covered by relevant environmental legislation. In how far can existing recognised certification schemes for sourcing from risk regions and sectors play a role? Measurable performance targets are also important; these need to be tied to international conventions.

Another important question is how to move EDD beyond process (e.g. box ticking with effect of offloading responsibility), but without holding companies responsible for every single damage/risk linked to their activities in their supply chains (obligation of results)?

Environmental due diligence guidance in Japan

Published in August 2020 by the Japanese Ministry for the Environment, the Japanese environmental due diligence guidelines attempt to explain in more detail the OECD MNE guidelines.

The 5-step process for environmental due diligence is comprised of the following components:

1. Integrate into policies and management systems
2. Identify and assess negative impacts and risks
3. Cease, prevent, mitigate negative impacts and risks
4. Track implementation and results
5. Disclose information

Discussions in Japan have focused on the following key questions:

- How is environmental due diligence different from having an Environmental Management System in place, especially in light of group level ISO 14000 certification emerging in Japan?
- How is environmental due diligence different from existing due diligence legislation on timber or conflict minerals?
- Is there an expected level of mitigation of environmental impact? Is legal compliance enough or should environmental due diligence align with objectives of international treaties?
- Who would be entitled to lodge rightsholder claims?

Session 2: How businesses undertake environmental due diligence as part of their human rights due diligence approach

From a strategic perspective, EDD helps a business decide what to tackle, to what degree and how to resource for it. It requires significant gathering of information, both from outside and within the organization. The information is used to understand long-term trends and to ultimately refine a company's governance in a spirit of continuous improvement.

Due diligence as an assessment tool is very much linked to the notion of double materiality. Increasingly, companies are aware of the relevance of the entire value chain and therefore look at what happens across the entire spectrum of the business, both upstream and downstream. Life-cycle thinking is regarded as a valid tool to identify environmental hotspots, in that it allows to understand impacts throughout the lifecycle of products. Working with suppliers upstream is essential to understand what can be done to mitigate potential risks / impacts.

Extending the information gathering to multiple criteria beyond scope 1, 2 and 3 and including biodiversity, water use etc. helps to meet growing customers' demands. Water can be an issue from a supply chain perspective, and sustainable materials include considerations about where they are being sourced.

As regards long-term needs in the due diligence space, **all businesses put data front and center**. Companies will be expected to know everything about everything in their value chain. This means potentially not only information on performance metrics but also information on impacts and outcomes of using a certain material from a specific source. **Tools, standards and infrastructure for exchanging data will therefore be needed going forward**. Equally crucial will be the level of comparability of the data points, currently lacking, as well as guidance from regulators in terms of where to focus efforts and what to ask of suppliers.

Regarding additional challenges being experienced by businesses, visibility along the value chain continues to remain limited both upstream and downstream.

As far as similarities / differences between HRDD and EDD are concerned: while the two might be very similar from a strategic perspective (collecting information, assessing materiality, looking at long-term trends) they are very different from a tactical perspective. The convergence of the two, therefore, from a regulatory standpoint might be challenging.

One commonality between HRDD and EDD, however, is the relevance of capacity building, also with business partners. The two also appear to be very much interconnected the deeper you go into the supply chain.

Since a number of existing frameworks (internationally-backed standards such as the [OECD MNE Guidelines](#) and the [UNGPs](#)) and best practices (e.g. [amfori BEPI](#), [amfori BSCI](#), [RMI](#), [RLI](#), [RBA Code of Conduct](#), [EPEAT](#)) exist, it would make sense to **streamline those with the forthcoming legislation** to ensure a point of convergence with industry practices.

The [Science-Based Targets \(SBT\) initiative](#) is the golden standard when it comes to climate and performance expectations for operations.

Biodiversity is a key environmental issue, and there is no one-size-fits all approach on how to operationalise due diligence in this space; the key is to be pragmatic and to **engage in nature-positive actions that are locally meaningful**.

Importantly, anyone thinking about EDD should

- avoid no net loss / no positive impact requirements;
- recognize biodiversity uplift;
- encourage alignment with existing conservation goals;
- acknowledge that one single biodiversity metric is not feasible, and
- understand the conservation and operational context together, and not separately.

The [Wildlife Habitat Council \(WHC\) Conservation Certification](#) recognizes conservation programs on corporate lands of all types across a suite of habitat, species and education projects. Using a

flexible framework, WHC Certification allows corporate facilities of all types to design, implement and manage conservation activities customized to a location's needs and resources, providing value to both a corporate and conservation context.

Session 3: Key considerations for a legal environmental due diligence framework

This moderated discussion session started by reviewing the similarities and differences in EDD and HRDD. It was noted that EDD and HRDD could be paralleled in terms of strategy as both also serve to support a companies' future business interests. However, business participants' experience demonstrated that this varies depending on how the companies address these matters. For some companies there are robust ways to validate impacts on the environment while for others it is rather a grey area due to the diversity of environmental impacts, compared to HRDD where one code of conduct can address the expectations. HRDD and EDD often require different handling. EDD needs large amounts of data and scientific evidence as products and environmental standards are not the same everywhere. Complexity exists when navigating different standards and legislation.

Similarities identified were the need for education and capacity building, as well as the involvement of a broad scope of stakeholders to build due diligence processes and agree on prioritisation. It was also suggested that it was important to make different actors see the benefits of different environmental and social measurements for them, and to collaboratively act and work to identify and implement suitable solutions. In order to establish sustainable value chains, a holistic screening process for social, environmental and economic factors is required to identify the hotspots.

What is missing is a level playing field for providing predictability. While different EU Member States are preparing their own domestic laws, mandatory requirements must be the same for all across the EU, and a harmonised approach is crucially important. Also, companies cannot be

expected to have all the environmental expertise and they need to rely on a legal framework that they can comprehend and apply in practice.

HRDD vs EDD	
Similar	Different
<i>Both serve to support a companies' future business interests</i>	<i>Different legal frameworks and standards as a reference</i>
<i>Both require collecting information, assessing materiality, looking at long-term trends</i>	<i>HRDD is more mature in that there is an agreed reference framework (UNGPs, OECD), but EDD is catching up</i>
<i>Both require capacity building, including with business partners</i>	<i>Existing industry schemes can help with implementation of legal requirements</i>
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Closing Remarks

The discussion helped participants to understand better the challenges, opportunities and specificities of EDD. Both HRDD and EDD rely on properly designed legislation that is efficient, practical for business and delivers a true level playing field; economic operators should be consulted and involved in the design and implementation of international frameworks and legislation around due diligence. There is also a clear need for accompanying measures, as well as practical tools and guidance. Collaborative and public-private partnerships (PPP), as well as existing industry schemes are also an important part of the puzzle.

About AIM: [AIM \(Association des Industries de Marque\) is the European Brands Association](#), which represents manufacturers of branded consumer goods in Europe on key issues that affect their ability to design, distribute and market their brands. AIM comprises 2500 businesses ranging from SMEs to multinationals, directly or indirectly through its corporate and national association members. Our members are united in their purpose to build strong, evocative brands, placing the consumer at the heart of everything they do. AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come. Building sustainable and trusted brands drives the investment, creativity and innovation needed to meet and exceed consumer expectations.

About AmCham EU: [AmCham EU](#) speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and U.S. positions on business matters. Aggregate U.S. investment in Europe totalled more than €3 trillion in 2019, directly supports more than 4.8 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

About amfori: [amfori](#) is the leading global business association that promotes open and sustainable trade. We bring together over 2,400 retailers, importers, brands and associations from more than 40 countries. Our membership contains organisations of all sizes and all sectors with a combined turnover of more than one trillion euros. amfori's Mission is to enable each of its members to enhance human prosperity, use natural resources responsibly and drive open trade globally.

About Business Europe: [Business Europe](#) is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and actively campaigning on the issues that most influence their performance. We speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.

About FESI: Founded in 1960 [FESI, the Federation of the European Sporting Goods Industry](#), is the unique pre-competitive platform representing the interests of the sporting goods industry in Europe, advancing its members' priorities and promoting initiatives that benefit the sector, EU citizens and the society as a whole. FESI represents the interests of approximately 1.800 sporting goods manufacturers (85% of the European market) through its National Sporting Goods Industry Federations and its directly affiliated member companies. 70-75% of FESI's membership is made up of Small and Medium Sized Enterprises. In total, the European Sporting Goods Industry employs over 700.000 EU citizens and has an annual turnover of some 81 billion euro.

About JBCE: Founded in 1999, the Japan Business Council in Europe (JBCE) is a leading European organization representing the interests of about 90 multinational companies of Japanese parentage active in Europe. Our members operate across a wide range of sectors, including information and communication technology, electronics, chemicals, automotive, machinery, wholesale trade, precision instruments, pharmaceutical, textiles and glass products. For more information: <https://www.jbce.org>