

Due Diligence and Civil Liability: Comments from multi-stakeholders

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Transcript of the intervention of Christian Ewert in the webinar on Corporate Due Diligence and Civil Liability organised by the Nova Centre on Business, Human Rights and the Environment with the support of the Portuguese Presidency of the Council of the European Union in partnership with the British Institute of International and Comparative Law, the Portuguese Ombudsman (Provedor de Justiça), the Teaching Business and Human Rights Forum, and NOVA 4 The Globe on the 28th of January 2021.

About the author: Christian Ewert is the President of amfori, the leading global business association for open and sustainable trade, bringing together over 2,400 retailers, importers, brands and associations from more than 44 countries. amfori's 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. Read more at www.amfori.org.

It is a pleasure to join today's webinar series on due diligence hosted by NOVA with the support of the Portuguese Presidency of the Council of the EU. I am honoured to share our viewpoint with so many experts from across the globe to discuss Human Rights Due Diligence, business responsibility and accountability.

I am here today on behalf of amfori, the leading business association for open and sustainable trade. We represent over 2.400 retailers, importers and brands.

Our members come from all corners of the world – from all industries, all sectors and in all sizes. 70% of our members are SMEs.

Supporting our members in their journey towards advancing supply chain due diligence is part of **amfori's DNA**. We do so by providing tools and services for continuous improvement anchored to international normative frameworks like the UNGPs.

When it comes to human rights due diligence, our member companies have significantly shaped the **principle of voluntary self-commitment over the past 20 years**.

Initiatives like the one proposed by the EU for the adoption of a harmonised due diligence legislation have the potential to bring cohesion to scattered efforts and a much needed level-playing field. amfori is very supportive of this process. We have actually **been the first business association to openly support action at EU level** for the adoption of a comprehensive approach to due diligence, including legislation.

What are the key ingredients to make this legislation both effective and workable?

To be effective, conducting human rights due diligence should **become the licence to operate in the EU**. That is, all companies operating in the EU should act diligently by identifying risks in their supply chain. This can be achieved by preventing, mitigating, and tracking these risks. Subsequently, companies should then communicate about them and take measures to remediate where appropriate.

For that to happen successfully, also a proper enforcement mechanism is essential since it would ensure that all companies play by the same rules.

But how do we make this legislation workable?

Back in April 2020, Commissioner Reynders clearly stated that this regulation will come with liability provisions, hoping that this would ensure effective implementation and set a real level-playing field.

What cannot be stressed enough is that **the liability dimension should not be seen as a silver bullet**.

What 20 years of experience has taught us is that due diligence is a journey, and not a short or simple one. We believe the EU should design its system in a pragmatic way that encourages businesses to **learn continuously** from their experience as well as best practice. Most importantly, legislation should create the conditions for business partners to work together

If used properly, amfori's tools and services can help companies demonstrate that they are doing their best to conduct due diligence properly and that they are managing their supply chains in a fair and sustainable manner.

This also means that **companies that did all that was reasonably expected should be exempted from liability**.

Giving companies enough time to implement future legal requirements remains essential. Companies will not be able to implement HRDD overnight, let alone to do so in a perfect fashion. amfori supports a **phased approach to implementation**, though in a time-bound fashion with clear deadlines in place.

The **principle of proportionality** is enshrined in the UNGPs. This principle should also apply to the degree of responsibility and potential liability in EU legislation. It could then be nuanced depending on whether a business caused, contributed to or was directly linked to adverse human rights impacts.

Although it is essential to discuss corporate accountability, we should also **acknowledge corporate efforts to respect human rights** even in situations where States fail to protect human rights.

Under the 1st pillar of the UNGPs, States would have the obligation to protect human rights, but we know that the situation differs from State to State. If national provisions and internationally recognized standards diverge, companies should be allowed to find a solution. This solution should strike a balance between legal compliance and sustainability concerns.

Last but not least, I cannot stress enough that introducing due diligence obligations and sanctions will not suffice to ensure that supply chains are transformed for the better. What is needed is a **smart mix of policy measures**, including capacity building, changes in public procurement, cohesive trade policies and incentives for companies that go the extra mile in terms of sustainability. With this range of measures, only then will there be a behavioural change.

Similarly, **voluntary commitments should keep on being promoted and incentivised**.

Businesses initiatives are what has driven sustainability over the past years. The mix of legal provisions and voluntary commitments is what we need to advance sustainability globally, achieve the SDGs and make our people and the planet prosper.

Thank you very much for your attention. It is a pleasure to speak to all of you today.

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