

Conference “Responsibility towards society and the environment: businesses and their due diligence obligations”

Minutes of the Workshops

Workshop 3: How can companies be legally obliged to exercise environmental due diligence?

19 September 2019, 13:00 – 14:30

Moderators: Prof. Dr. Remo Klinger and Atty. David Krebs

Preparers of the minutes: Giverny Knezevic, Sara Nazari-Shafti

1.1 Keynote lecture (Atty. David Krebs, Geulen & Klinger Rechtsanwälte)

The keynote lecture dealt various approaches designing environmental due diligence obligations in domestic law with respect to transnational value chains. Since the scholarly and political discussion on the design of human rights due diligence obligations is already relatively well developed, it would be useful from a methodological point of view to examine to what extent the concepts developed for human rights issues can be transferred to environmental aspects. The core problem hereby is the legal definition of the substantive environmental standard of the due diligence procedure. The speaker presented four approaches that are conceivable in principle but are suitable to varying degrees (reference to international environmental agreements, reference to the environmental law of the “host state”, reference to the environmental law of the home state, formulation in the form of a general clause). Furthermore, the speaker dealt with the determination of the material scope of due diligence obligations with regard to the entire global value chain, the enforcement of due diligence and the question of sector-specific design.

1.2 Discussion

The subsequent discussion focused on the determination of the substantive environmental standard of due diligence, enforcement and the question of the regulatory level.

1.2.1 Determination of the substantive environmental standard of due diligence

- It was discussed to what extent a general clause-like formulation was compatible with the constitutional requirement of certainty. This question was one of the central difficulties of the design. Essential aspects for assessing the constitutional standard of certainty are, among other things, the complexity and diversity of the matter to be regulated. This is particularly high in the case of a general law that spans all sectors and entire global value chains. A final evaluation of the certainty requirements is, however, only possible under consideration of the legal consequences (enforcement mechanisms), since these are decisive for the intensity of intervention of the regulation, which must also be considered.
- With reference to national law, it was discussed to what extent the European BAT standards could also be used (“best available techniques”).

- ▶ It was discussed to what extent the material approaches of the EMAS Global Guide and the OECD Guidelines can be applied to the design of binding environmental due diligence.
- ▶ The possibility of anchoring due diligence in the duties of managing directors in corporate law was discussed.
- ▶ It was discussed to what extent regulatory approaches in the area of anti-corruption could be transferred to the environmental sector.
- ▶ It was considered problematic that environmental standards are characterised by a certain dynamism, which must be reflected in environmental due diligence.
- ▶ It was discussed to what extent environmental due diligence obligations extending to the entire value chain could create undesirable incentives (e.g. by artificially increasing the complexity of value chains in order to conceal actual influence).
- ▶ The problem was raised that European companies export pesticides to third countries which are banned under local law in the exporting home state due to their toxicity or which are at least subject to strict warning and labelling obligations. Under current law, this is difficult to address. As regards future law, however, a case constellation referencing national environmental standards of the home state could have an effect.

1.2.2 Enforcement

- ▶ It was discussed to what extent monetary incentive mechanisms within trade policy (customs duties and export subsidies) could be used to enforce environmental due diligence.
- ▶ The use of a resource tax as an enforcement mechanism was proposed.
- ▶ With regard to tortious liability for damages, the question of the applicable law (Art. 4 Rome II Regulation) and the necessity of creating an “overriding mandatory provision” (Art. 16 Rome II Regulation) were discussed. Furthermore, the practical hurdles of liability for damages were addressed (among other things difficulties of proof in particular with regard to breach of due diligence obligations and causality).
- ▶ The weaknesses of the liability solution were addressed. Liability should be supplemented by further mechanisms.
- ▶ It was discussed to what extent import bans can be considered as enforcement instruments of a national or European regulation.
- ▶ It was discussed to what extent the obligation for non-financial reporting introduced by the CSR Directive in the German commercial code (HGB) could be utilised for the enforcement of environmental due diligence.
- ▶ The importance of auditing services for due diligence that extends far into the value chain was discussed, as were the existing weaknesses and the need to regulate the auditing market.

1.2.3 Regulatory level

With regard to the regulatory level, a European level solution was found to be preferable in the long term from a legal and regulatory point of view. However, there is much to suggest introducing regulation at the national level in the short term.

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Umweltbundesamt
Wörlitzer Platz 1
06844 Dessau-Roßlau
Tel: +49 340-2103-0
Fax: +49 340-2103-2285
buergerservice@uba.de
Internet:
www.umweltbundesamt.de
[f/umweltbundesamt.de](https://www.facebook.com/umweltbundesamt.de)
[t/umweltbundesamt](https://twitter.com/umweltbundesamt)

Authors

Oeko Institut, e.V.
Schicklerstr. 5-7
10179 Berlin

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