

JBCE FEEDBACK ON THE DRAFT EUROPEAN MODEL CLAUSES FOR THE CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE

The Japan Business Council in Europe (JBCE), representing companies of Japanese parentage operating in Europe, appreciates the efforts of the Responsible Contracting Project to standardize contractual clauses by the draft European Model Clauses in alignment with the requirements of the new EU Corporate Sustainability Due Diligence Directive (CSDDD). Contractual clauses between businesses are critical to ensure compliance with the CSDDD and model clauses will provide an important reference. In this context, there are three main points the model clauses should be drafted along.

- ❖ The model clauses need to **reflect risk-based approach** that the CSDDD has adopted focusing on how to deal with the salient risks.
- ❖ The model clauses need to **eliminate any ambiguity and uncertainty** about the obligations of buyers and suppliers.
- ❖ The model clauses need to **ensure the flexibility** to effectively conduct the due diligence considering the uniqueness of the relationship between the business partners and adjust to the situation at hand.

We believe it is strongly recommended to **keep contracts as concise as possible** and to **avoid unnecessary complexity**, particularly to enhance clarity and understanding.

Companies doing business in the EU face a range of obligations, such as data protection and cyber security. **As the number of applicable regulations increases, more and more elements are included in contracts**, which further complicates the drafting of contracts and makes compliance with contractual requirements even more difficult, particularly for smaller companies (including but not limited to SMEs).

We are concerned that **further tightening of contractual requirements will significantly reduce (particularly) smaller companies' ability to comply with contractual requirements**, and will, at the same time, **not achieve the goal of ensuring the protection of human rights and the environment**. One reason for this is that large companies might decide against business relationships with smaller companies, assuming that they will not be able to meet the stringent contractual requirements.

We deem it probable that large companies will prefer business relationships with large(r) companies, who, they suppose, will meet these requirements. As a consequence, smaller companies (including but not limited to SMEs) might lose potential business with large(r) companies and might not be able to compete with larger companies with large (sustainability,

compliance, procurement etc.) departments. The same applies to companies based outside of Europe, particularly in countries with a high risk of human rights violations. These companies' competitiveness might become severely damaged by exhaustive and stringent contractual requirements likewise, with potential negative effects on the economic and human rights situation in developing countries.

Therefore, we need **to consider carefully whether there are any topics which are already covered within broader contractual clauses adopted by companies** (e.g., pricing, ordering). In such cases, we should make it known that we can utilize such articles to effectively conduct due diligence, **rather than suggesting creating completely new clause which might induce the considerable administrative burden for companies**, particularly SMEs.

Additionally, if the model clauses are to be adjusted based on whether the direct business partner is SME or not, **there should be two different sets of model clauses, one of which is tailored for SMEs**, rather than providing single model clauses stipulating lots of exceptions for SMEs.

We have attached JBCE's detailed comments in the annex for your consideration. We have grouped our comments into five categories and coloured them separately; [Practicality], [Clarity], [Complexity], [Flexibility], [Uncertainty], and [Equity].

We hope that these points will be taken into account. Should you have any questions, please do not hesitate to contact us at any time. We are open to further discussion.

ABOUT JBCE

Founded in 1999, Japan Business Council in Europe (JBCE) is a leading European organization representing the interests of over 100 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.

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EU Transparency Register: [68368571120-55](https://ec.europa.eu/transparency/regexp1/index.cfm?do=entity.entity_details&entity_id=68368571120-55)

ANNEX			
Article	Clause	Original text	JBCE Comments
Article 1: Mutual Obligations with Respect to Due Diligence in Supply Chains	(b)Stakeholder engagement:	Buyer and Supplier must engage Stakeholders at each step of the HREDD process set out in Clause 1.1. Such Stakeholder engagement must be on-going, responsive, effective and conducted in a culturally appropriate format and in a manner that is free of manipulation, discrimination, interference, coercion, and intimidation.	<p>[Practicality]</p> <ul style="list-style-type: none"> • Most likely, potentially buyers would only participate in identified risk mitigation and prevention at the suppliers' site in case of only buyers find that supplier is a high-risk from their disk identification processes. <p>[Clarity]</p> <ul style="list-style-type: none"> • Regarding "culturally appropriate format" – What does this actually entail, different solutions per country?
	(c) Prevention action plan	Based on the identification of potential Adverse Impacts, Buyer and Supplier shall cooperate, in consultation with potentially adversely affected Stakeholders, to prepare and implement a prevention action plan (the Prevention Action Plan) to prevent or mitigate the potential Adverse Impact(s) within a reasonable time.	<p>[Practicality]</p> <p>Where there are several (or many) buyers or several (or many) business partners on the chain, <u>this will not be a very practical approach to require all the buyers to be involved in the making of prevention action plan.</u></p>
	(d)Obligation to provide information:	(ii) Buyer and Supplier each shall [yearly][twice a year][regularly, as agreed] provide reports on the implementation of their HREDD process(es).	<p>[Practicality]</p> <p>Does "provide reports" refer to public disclosure or the exchange of reports between parties?</p> <p>The latter option seems impractical, especially if the agreement is intended to apply to all suppliers. For large organizations with numerous customers and suppliers, requiring the</p>

			exchange of reports with each individual supplier or customer would create significant administrative challenges and may not be feasible on a broad scale.
	(e)Independent obligations:	For the avoidance of doubt, each party is independently responsible for upholding its HREDD Obligations under this Agreement, and a failure to do so by one party shall not relieve the other party of its HREDD Obligations.	<p>[Complexity]</p> <p>This clarification appears to add complexity to the contract and may make it more detailed than necessary, because one party may be faced with a situation where it cannot perform its HREDD Obligation without the cooperation of the other party.</p>
	(f)HREDD Contact Points:	[...] [The HREDD Contact Points shall collaborate with Stakeholders in order to identify a Stakeholder representative with whom to form a HREDD monitoring committee (“HREDD Monitoring Committee”) charged with monitoring, in an on-going and collaborative fashion, the implementation of the HREDD Obligations under this Agreement.]	<p>[Flexibility]</p> <p>Typically, a contact point in a transaction would be someone in regular communication with suppliers (e.g., a procurement manager), whereas those involved in stakeholder dialogues often have a less operational role (e.g., a sustainability manager). Therefore, it is important to note that a contact point may not necessarily participate in stakeholder dialogues. Furthermore, <u>we consider the decision on how to engage stakeholders be left to the contractual parties. While a committee might be a suitable solution for some companies, it may not be appropriate for all.</u></p>
1.3 Buyer’s Obligations to	(a)Responsible Purchasing Practices:	[...] [Buyer shall seek to obtain feedback from Supplier [through the HREDD Contact Point] on its purchasing practices [annually][twice a year].]	<p>[Practicality]</p> <p>Considering the number of suppliers a company may have, meeting this requirement could be challenging.</p>

Implement HREDD			Therefore, this obligation should be limited to high-risk cases only, where the need for strict oversight is most critical.
	(b)Reasonable Assistance:	If either party reasonably determines that Supplier requires assistance to meet the parties' respective HREDD Obligations, Buyer shall provide reasonable assistance to the extent that doing so is economically feasible and appropriate in light of the HREDD-related risks at issue. Reasonable assistance may include, among other things, financing and cost-sharing [to the extent legally permitted], assistance to secure financing, Supplier training, upgrading facilities, and strengthening management systems.	<p>[Uncertainty]</p> <p>This risk undermining contractual obligations and creating expectations or discussions around buyers contributing financially to help suppliers meet their obligations. <u>It may unfairly disadvantage suppliers with good practices, as they could be competing with others who offer lower prices, knowing that in case of issues, they might seek financial support to address problems later.</u> if we include this item, we should also include a mechanism that incentivise the suppliers to meet their own HREDD Obligations utilizing their own resources and capacity.</p>
	(c)Pricing:	(i)Buyer and Supplier shall collaborate to agree on a price that accommodates the costs associated with implementing HREDD and upholding responsible business conduct, including the payment of a Living Wage or a Living Income and health and safety costs. If the payment of a Living Wage or a Living Income is not immediately feasible, then Buyer and Supplier shall commit to a progressive pricing schedule to pay a Living Wage or Living Income within[_ months] [_years].	<p>[Uncertainty]</p> <p><u>This clause potentially overlaps with the clause that determines the price, which may cause uncertainty in the price agreement if one party claims breach of this clause.</u> In addition, <u>it will be difficult to implement and monitoring the compliance unless living wage is determined in an objective manner without any doubt (by referring to a reliable report publicly available).</u> Furthermore, in reality, it would be difficult for the suppliers to accept this clause, because</p>

			it may negatively impact the supplier's profit margins.
(d) Commercial Terms (Payment and Delivery):	Buyer shall collaborate with Supplier to agree on commercial terms, including payment, transfer of ownership and risk of loss, and delivery terms, that will support the parties' performance of their HREDD Obligations. [...]	[Complexity]	This article seems to just duplicates the obligation stipulated under CSDDD and increase the legal uncertainty whether the agreed commercial terms which had "sufficient" collaboration.
	Buyer and Supplier each agree not to vary the commercial terms of the Agreement unilaterally and to avoid retroactive changes to the commercial terms to the extent such changes would undermine the HREDD process.	[Complexity]	First, it is the general obligation of both parties to observe what was agreed in the contract and no need to duplicate it as a specific clause. Second, if we adopt this article, it should be clarified that the commercial terms can be retroactively changed in order to avoid or mitigate the serious and imminent risk in light of HREDD.
(e) Order Changes:	[...]Such action may consist of, for example, adjusting the price or the production timeline for the order. [No changes shall be made to an agreed order after production has begun]. [If the order change results in Buyer using ___% less of Supplier's capacity than originally [projected][agreed], Buyer shall pay Supplier for the unused capacity]	[Flexibility]	<u>The complimentary actions taken in connection to the order change can differ case-by-case</u> and decided not only by the consideration of HREDD. In addition, the unused capacity can be utilized for other purposes so the sole fact that the order change resulted in the release of the Supplier's capacity does not directly lead to the monetary compensation. Therefore, it would be reasonable to omit the example of the actions.
(f) Excused Non-Performance by Supplier:	[...] In such a situation, Supplier's performance shall be excused and it	[Uncertainty]	

		shall not be in default of its obligations under this Agreement.	This clause may be difficult for Buyer to accept, particularly as the term "a change of circumstances" is unclear.
	(g)Positive incentives:	[...] [Buyer shall seek to obtain feedback from Supplier [through the HREDD Contact Point] on the benchmarks [annually][twice a year].]	[Practicality] This requirement may be challenging for companies with a large number of suppliers to fulfil, and the timing should be left to their discretion.
		Where feasible given Buyer’s other commercial commitments and market demand, Supplier shall be rewarded for HREDD performance that meets or exceeds the benchmarks, for example by prolongation of contracts or assignment of new orders if Buyer needs to source Goods. When determining whether to continue or expand the commercial relationship, Buyer shall give weight to HREDD performance [equal] [as well as] to criteria such as quality, price, and timely delivery.	[Uncertainty] If a reward is intended, it should be clearly defined. The current wording leaves room for ambiguity, which may lead to numerous questions and potential disputes regarding the type and the level of reward.
1.4 Grievance Mechanism	(a)Operational- Level Grievance Mechanism (OLGM):	Buyer and Supplier shall actively communicate the existence of the OLGM[s] to Stakeholders.	[Uncertainty] The meaning of “actively communicate” should be further clarified.
		(i) [...] Stakeholders must be able to safely (and anonymously, if appropriate) report their concerns and grievances at a local level.	[Flexibility] Reporting “at a local level” is not necessary. Centralized Grievance Mechanism (reporting to single centralized point) should be allowed.
		(ii)Stakeholders bringing concerns and grievances through the OLGM[s] shall be entitled to appropriate follow-up and, if appropriate, to meet with the HREDD	[Flexibility] This clause does not necessarily align with the concept of the contract which

		Contact Points and other relevant Buyer and Supplier representative(s) to discuss the Adverse Impacts at issue and away forward for addressing such Impacts.	established rights and obligations between two parties. In addition, there would be more adequate people to deal with the concerns and grievances rather than the HREDD Contact Points and the representatives of Buyer and Supplier.
	(b)OLGM Reporting Requirements	[To the extent allowed by law,] [Buyer shall inform Supplier][Buyer and Supplier shall inform each other] about the functioning of the OLG M[s] by providing[annual] [semi-annual][monthly][] written reports, describing, at a minimum, the number and Internal nature of grievances received and processed over the reporting period, the extent of the consultations with Stakeholders, and all actions taken or planned to address such grievances.	[Flexibility] There should be certain flexibility how they inform this information (e.g., direct exchange of information, publishing the summary report on the website etc.).
Article 2: Remediating Actual Adverse Impacts and Corrective Action	(a)Corrective Action Plan:	If Supplier caused or jointly caused the actual Adverse Impact, Supplier shall, in consultation with adversely affected Stakeholders, prepare, share with Stakeholders, and implement a corrective action plan, the Corrective Action Plan, to remedy the actual Adverse Impact within a reasonable time. <u>In situations where Supplier did not cause or jointly cause the actual Adverse Impact, Supplier shall cooperate in implementing any Corrective Action Plan that Buyer may develop.</u>	[Practicality] In situations where Supplier did not cause or jointly cause the actual Adverse Impact, it would be Buyer or the suppliers further upstream who take the lead, so the clause should be amended accordingly.
	(c)Buyer obligations:	Regardless of whether Buyer jointly caused the actual Adverse Impact, it shall provide adequate assistance,	[Equity]

		including expertise, financial, and technical assistance to prepare and implement the Corrective Action Plan.	This reduces the Supplier's responsibility and diminishes their incentive to comply with contractual requirements. Such a contractual obligation (at least the financial assistance) should only apply where Buyer has caused or jointly contributed to the adverse impact.
Article 3: Remedies	3.1 Notice of Default, Cure Period, and Breach (b) Cooperating in Cure:	The parties shall cooperate in good faith to cure the HREDD Default.	[Complexity] This obligation could be sufficiently addressed by a general cooperation clause. An additional HREDD-specific cooperation clause does not appear to be necessary.
	3.2 Exercise of Interim Remedies in the Event of a HREDD Default (c) Rejection of Nonconforming Goods:	(c) Rejected Nonconforming Goods: Rejected Nonconforming Goods must be managed responsibly to avoid waste and, if the Nonconforming Goods are, in whole or in part, sold in another market if appropriate and authorized by the Buyer, the proceeds should be channeled to the adversely impacted Stakeholders or donated to a charity.	[Complexity] It does not appear necessary to regulate this contractually, since the goods not compliant with applicable law can be deemed as non-compliant with the contract.
	3.3 Remedies Limitations	Neither Buyer nor Supplier shall benefit from an Adverse Impact. If damages are owed that would result in a benefit to Buyer or Supplier, such amounts should go toward supporting the remediation set out in Article 1 on Grievance Mechanisms and Article 2 on Remediating Actual Adverse Impacts. A "benefit" means being put in a better position than if the Agreement had been	[Uncertainty] The definition of "benefit" is vague. In addition, it is not clear how the amount of "benefit" is verified by the parties. This creates significant room for discussion and could diminish the value of the contractual obligations.

		performed without an [actual] Adverse Impact.	
3.4 Indemnification and Comparative Fault	(a)Indemnification: <u>Unless it is an SME</u> , a party shall, in case of a breach of the HREDD Obligations, indemnify, defend and hold harmless the other party and its Representatives, affiliates, successors and assigns (collectively, “Indemnified Party”) against [any and all] losses, costs, and damages[,liabilities, deficiencies, claims, actions, judgments, settlements, interest, and costs or expenses associated with Nonconforming Goods, including, without limitation, the cost of storing, rejecting, returning, and exporting Nonconforming Goods, reasonable attorneys’ fees, and audit fees that would not have been incurred but for the breach.	[Equity] Even SMEs should not be exempted from the non-compliance with the contract due to breach of the HREDD Obligations.	
(b)Comparative Fault:	[...] If the parties[‘HREDD Contact Points] do not agree as to the degree of contribution, they will proceed to resolve the issue through the dispute resolution process set out in Article 5 (Dispute Resolution With Stakeholders).	[Flexibility] It should be left to the parties to decide how they wish to resolve their differences. This could also be tied to general contract performance, meaning that a separate dispute resolution mechanism may not be appropriate.	
3.5 Termination and Responsible Exit	(b)Responsible Exit: [...] If termination is pursued because of a violation of HREDD Obligations, the terminating party shall evaluate whether termination would either help to prevent additional Adverse Impacts or aggravate such Impacts. If termination would aggravate Adverse Impacts, then Buyer will consider not terminating.	[Complexity] It is reasonable to consider the potential aggravation of Adverse Impacts when terminating the contract. However, it is not the sole factor in the decision of the termination, and therefore it should be made clear that it does not contradict with other	

			clauses that stipulates the right of termination under the contract.
Article 4: Monitoring	4.2 Monitoring without notice	Buyer may carry out an inspection without notice if there is credible, reliable information that there are significant risks of Severe Adverse Impacts in Supplier's workplace(s).	<p>[Practicality]</p> <p>Normally it is unlikely that any party would agree to being audited without prior notice. Therefore, the severity of the suspected Adverse Impacts should be further elaborated in order to draw the concession from Supplier.</p>
	4.4 Costs of Monitoring	If Buyer exercises its monitoring rights under the Agreement and Supplier is an SME, Buyer shall bear the cost of the monitoring activities.	<p>[Equity]</p> <p>If the breach of HREDD Obligations is revealed after the monitoring, <u>the monitoring costs should be borne by Supplier at least partially even if Supplier is an SME.</u></p>
Article 5: Dispute Resolution with Stakeholders			<p>[Complexity]</p> <p>In line with what has been mentioned regarding other points, this clause is quite exhaustive, and its necessity is questionable. Furthermore, these provisions may also be connected to other issues with suppliers, which in turn complicates the general dispute resolution mechanism agreed upon between the parties.</p>