

European Cocoa Association position paper on Due Diligence

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Sustainability is an integral part within the business strategies of the European Cocoa Association (ECA) members. Sustainability initiatives taken in producing countries include the implementation of a due diligence process in order to address human rights as well as minimize environmental damage. Similarly, companies regularly publish progress reports covering the activities taken in their supply chains.

Despite the positive results achieved so far, we duly recognize that voluntary measures alone cannot solve all the identified risks and will not achieve the full scope of policy reforms required in the cocoa sector. Therefore, we strongly believe that a mandatory EU Due Diligence legislative framework, combined with a broader “smart mix of measures”, is a necessary and positive step forward. It should contribute to a level playing field among companies importing into the EU market and drive the demand for sustainably sourced raw materials and processed products. However, for Due Diligence to be fully effective, it has to be coupled with the creation of the enabling environment that is required to make progress on sustainable cocoa farming in producing countries.

Indeed, we believe that the future legislation on Due Diligence will need as a priority to clearly define its requirements (respect for human rights, the environment and good governance), its scope (undertakings operating on the EU internal market) as well as its enforcement and responsibilities imposed by the legislation on the various parties.

ECA Members believe that an EU Due Diligence legislation will bring added value to the functioning of the cocoa supply chain if the following principles are appropriately included and subsequently acted upon:

1) A level playing field among companies importing into the EU market

The Due Diligence requirements should apply to all actors in the supply chain, independently of their size, turnover, operational context, ownership (State-owned enterprises and State entities engaging in public procurement) and not only to companies first placing cocoa and cocoa derived products on the EU market.

In addition, the legislation should also apply to non-EU companies placing products or providing services in the single market.

2) Horizontal approach

The Due diligence legislation should be cross-sectorial, covering all commodities and sectors. A clear “standard of conduct” should be complemented by sector-specific due-diligence guidelines to facilitate the transposition into national laws, allow comparability between companies, and take into account the specificity and complexity of the cocoa sector.

3) Clear obligations and duties must be defined to ensure equitable enforcement

Setting up a harmonized and predictable EU-wide framework (defining the scope, definitions, criteria, transparency requirements, indicators and underlying methodologies, reporting

process, verification of actions, grievance and complaints mechanisms) for its implementation by companies and government authorities is highly required.

The lack of national mandated traceability and farmer registration, as well as the high number of intermediaries must be reflected in sector-specific due-diligence guidelines.

Member States' competent authorities must be provided with the correct mandate, financial and human resources, and expertise to monitor compliance, investigate if needed and help develop due diligence as a predictable standard. In this regard, the establishment of National Contact Points to give support, training and guidance should be considered. Equally, the publication of risk assessment of countries would be helpful to companies sourcing - from high, medium, and low risk areas.

Lastly, the European Commission will have a critical role to play in ensuring consistency, transparency, and harmonized implementation across the Member States. In this regard, competent authorities must also monitor progress made by producing countries in ensuring accountability for improving standards and in creating an enabling environment. For example, monitoring systems should be established to assess the impacts of the policy changes and enforcement measures while ensuring that any unintended negative consequences are avoided.

4) Alignment with the UN Guiding Principles of Business and Human Rights (UNGPs) and the OECD Guidelines

The EU should consider the three UNGPs pillars - Protect, Respect and Remedy:

1. The State duty to respect, protect and fulfil human rights
2. The Corporate Responsibility to comply with applicable laws and respect Human Rights
3. The need for rights and obligations to be matched to appropriate and effective remedies when breached

The legislation should also align with UNGPs due diligence in setting a standard of conduct, meaning that companies should be able to demonstrate that they are taking reasonable steps in identifying, preventing, mitigating, and remedying any actual or potential adverse human rights and environmental impacts based on their own activities or within the operations of those with whom they have a direct business relationship. More precisely, companies are expected to embed respect for core human rights and the environment into their corporate governance and communication strategies, undertake due diligence processes and implement effective grievance mechanisms.

In the spirit of the UNGPs, the Due Diligence framework should be based on an obligation of means, rather than an obligation of results. In particular, due diligence should be seen as a continuous, dynamic process of improvement to progressively strengthen and deepen responsible actions - based on ongoing risk-assessments and impact-oriented approaches - to better prevent and address human rights and environmental harms. It should also be acknowledged that despite best efforts it may not be possible to discover and prevent all impacts.

Flexibility and proportionality criteria should be included. This will allow companies to adapt their Due Diligence strategy to the contexts they are operating in or sourcing from and to the perceived severity of the risks.

In addition, the EU Due Diligence legislation should be complemented by an appropriate set of incentives measures to encourage companies to develop a robust Due Diligence system and to enable producing countries to improve standards.

Lastly, the legislation should allow for a sufficient transition period for companies to strengthen their due diligence processes and systems.

5) Adequate Enforcement provisions

The new legislation should clearly define an appropriate means of verification of Due diligence activities. We call for credible, dependable and standardized verification measures and guidelines assessing that the actions undertaken meet the criteria for appropriate Due diligence.

Responsibility must be shared by all actors in the supply chain independent of their direct or indirect role in securing cocoa products on EU single market. However, the duty to respect human rights must be distinguished from matters of legal liability and enforcement.

Generating legal certainty is an essential element of new legislation. Any enforcement measures should be process-oriented and recognize that even with the most elaborate policies and process in place, economic actors may not be able to prevent all risks and impacts. Consequently, companies should be responsible for failure to establish and maintain an effective Due Diligence process, or for knowingly making false or misleading statements in their reports.

In order to follow the spirit of the UNGPs, which focus primarily on the transparency of processes and reporting, the due diligence legislation should be crafted in a way to incentivize companies to disclose the issues and risks they face along their supply chain, by ensuring that such disclosure will not expose them to an increased risk of litigation. Otherwise, human rights due diligence legislation might generate adverse effects, such as discouraging companies to commit to full transparency or forcing them to divert their activities away from high-risk areas or countries out of worry of excessive penalties or excessive litigation.

Any enforcement measures included in the legislation should focus on proven failures to comply with the due diligence obligations and related reporting requirements, ensuring that these measures work to enable impactful and effective action by economic operators with an enhanced awareness of their responsibility to respect human rights and the environment.

Conducting proper human rights and environmental due diligence should help economic actors demonstrate that they have taken all reasonable steps to avoid involvement with alleged human rights and environmental abuse and address the risk of legal claims against them.

6) Holistic approach on cocoa sustainability

A collaborative framework, and a 'smart mix of measures' that is based on commitments from the different public and private stakeholders (Governments of cocoa producing countries,

farmers' organizations, industry, the EU authorities, International Organizations and civil society) is the recommended approach to build a robust Due Diligence system across the value chain. All measures under consideration - from trade to development aid - should be embedded in a mix of coordinated actions to reflect policy coherence objectives at EU level.

7) A stronger enabling environment in cocoa origin countries

Companies rely on producing countries to strengthen their governance and thereby progressively create an enabling environment to implement due diligence systems.

To create such an enabling environment across the whole cocoa sector and underpin the effectiveness of the upcoming Due Diligence legislation, the following five overarching principles must be considered as priority:

1. Achieve government mandated sector wide traceability and enhanced transparency through an effective farmer registration system that matches land titles and polygon mapping and is linked to verification of minimal standards that uphold environmental sustainability, particularly forest protection. To this end, review, develop and implement land tenure policies which are compliant with national forest and agricultural policies, and encourage sustainable environmental practices in cocoa farming.
2. Strong agricultural policies, which should encompass a better coordination between national production targets and global demand for cocoa, as well as a clear approach and roadmap on ensuring alternative livelihoods for farmers not meeting the requirements to achieve a living income in cocoa farming or who are farming in protected forest areas.
3. Support for farmer entrepreneurship through farmer aggregation and capacity building for farmers organizations, access to training, including financial literacy, loans for inputs and services. Further support should be given to crop diversification, farm measurement and the promotion of additional income generating activities.
4. Underpin the development and enforcement of appropriate national laws and policies, as well as sector regulations, addressing environmental protection and upholding human rights protection (focusing on deforestation, forest degradation, human rights and child labor). Particular focus on developing a robust farming-free policy regarding protected forests/national parks, with all legal exemptions registered with the appropriate government authorities, as well as a mitigation plan of its adverse social impact.
5. Ensure coordination of the African Regional Standard (ARS) with the EU regulatory framework on environmental and human rights due diligence.

Local enforcement of existing regulations in origin countries is key to achieve a positive change in cocoa origin countries. A stronger advocacy and support from the EU is therefore needed to ensure countries implement, enforce and develop relevant law and policies.

As outlined in the recently adopted MEP Lara Wolters report¹, Due Diligence will be effective under the condition that States and governments fully commit to addressing the issues that fall

¹ "While it is the duty of undertakings to respect human rights and the environment, it is the responsibility of States and governments to protect human rights and the environment, and this responsibility should not be transferred to private actors". European Resolution of 10 March 2021 with recommendations to the Commission on Corporate Due Diligence and Corporate accountability.

within their sovereign responsibility. Hence, the EU must consider as a priority the negotiation of partnership agreements with producing countries, coupled with financial incentives, to ensure consistency between EU Human rights and Environmental Due Diligence legislation and existing local legislations or standards (such as the African Regional Standard for Sustainable Cocoa (ARS)).

Partnership agreements will help address the underlying causes of human rights and environmental violations on the ground. This implies that the framework for actions and commitments - including time-bound deliverables - are clearly defined beforehand.

Progress in producing country level should also result in delivery of rewards - potentially through favorable trade and market access in the EU - for cocoa produced under the conditions defined in the partnership agreement.

Conclusion

To achieve sector-wide change, all actors involved in the supply chain must conduct due diligence in their operations, while the framework of actions and responsibilities between State and companies must be clearly defined. Shared responsibilities and effective enforcement are key conditions to ensure the effectiveness of the future Due Diligence legislation.

The EU Due Diligence mandatory legislation should be cross-sectorial and apply to all companies placing cocoa and cocoa derived products on the EU market. The Due diligence obligations should not be restricted to the first placers (e.g., importer of record) on the EU market but should apply in an equitable fashion throughout the supply chain.

We call on the EU to clearly define a minimum set of requirements with regard to the necessary processes and where needed, complement these with sector specific guidelines.

To facilitate the implementation of the Due Diligence requirements, the EU and producing countries must conclude partnership agreements to ensure that the five above mentioned overarching principles, for creating an enabling environment across the whole cocoa sector, will be reached.

The European Cocoa Association (ECA) is a trade association representing the European cocoa sector and regrouping major companies involved in the cocoa bean trade and processing, in warehousing and related logistical activities in Europe.

Together, ECA Members represent two-thirds of Europe's cocoa beans grinding, half of Europe's industrial chocolate production and 40 % of the world production of cocoa liquor, butter and powder.

ECA also serves as a senior management-level discussion forum for the broad spectrum of companies directly or indirectly related to the cocoa chain.