

Position paper on Corporate Sustainability Due Diligence

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Introduction

The European Cocoa Association welcomes the proposed Directive on Corporate Sustainability Due Diligence. Despite the positive results achieved so far in enhancing the sustainability of the cocoa value chain, we duly recognise that voluntary measures - which are de facto limited in scope - cannot alone cover and solve all the identified risks and will not achieve the full scope of policy reforms required in the cocoa sector.

In the spirit of the United Nations Guiding Principles, 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 identify and prevent any and all adverse impacts. This is even more the case for the cocoa sector, which is mainly composed of millions of smallholders (worldwide, about 95% of cocoa is grown on small farms ranging from 2-6 ha).

Scope

The European Cocoa Association believes that due diligence should be conducted by all actors in the value chain, regardless of their size, turnover, operational context, ownership (state-owned enterprises and state entities engaging in public procurement) and not be limited to only a small fraction of EU and non-EU companies operating on the EU market if it is to deliver a level playing field and foster sustainable business behaviour throughout global value chains.

The European Cocoa Association therefore proposes to widen the scope of the Directive by aligning it with the scope of the Corporate Sustainability Reporting Directive (CSRD). In addition, for *all* EU and non-EU companies - including SMEs - placing a product on the EU market for the first time or providing services, due diligence obligations should apply systematically irrespective of the capacity.

Contractual cascading / contractual model clauses

The European Cocoa Association believes that contractual model clauses, when used, should be applied with the utmost care as conducting due diligence must not become a box ticking exercise for companies further away from the origin. For this reason, the European Cocoa Association recommends third-party auditing of these clauses and the validity of the information provided by the supplying party under such a contract.

Sector-specific guidelines

The European Cocoa Association has repeatedly called for sector-specific guidelines. As the proposed Directive is horizontal in nature, it is essential that guidelines provide clarity and thereby certainty to the various entities along the cocoa value chain. For example, the precise meaning of the definition of 'established business relationship' may vary depending on sector and market structure.

In addition, the extent of stakeholder consultation will need to be strictly defined in order for companies to carry out sufficient actions under Articles 6-8 of the proposed Directive.

Sector-specific guidelines should also address the compatibility of industry initiatives and collaborations, such as the Child Labour Monitoring and Remediation Systems (CLMRS), with the requirements set out by the proposed Directive.

Furthermore, the guidelines should provide for credible, dependable and standardised verification measures assessing that the actions undertaken meet the criteria for appropriate due diligence as prescribed by the proposed Directive.

Enforcement and civil liability

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 incentivise 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 penalties or vexatious litigation.

The European Cocoa Association takes note of the inclusion of civil liability of companies in the Commission's proposal. The Members of the European Cocoa Association respect (local) rules and regulations and agree that there should be a possibility for those who have been

demonstrably wronged as a result of a company's failure to comply with its due diligence obligations in Articles 7 and 8 to receive damages.

At the same time, the legislation should ensure that the provisions on civil liability do not expose companies to vexatious litigation, which would in turn lead to detrimental reputational impacts, even if in the end the court decision would be in favour of the defendant.

In addition, exposure to vexatious litigation could have the undesirable effect that companies would decide to stop sourcing from certain countries, rather than doing the effort of identifying and addressing adverse impacts with regard to such sourcing channels.

The European Cocoa Association therefore suggests that the provisions on civil liability should only be applicable if and to the extent that the competent supervisory authorities in the Member States have established that a company has not complied with its due diligence obligations laid down in Articles 7 and 8. Through this, those negatively affected will have a streamlined procedure and legal basis for claiming damages, while companies would also be less vulnerable to unsubstantiated claims and the consequences thereof.

When assessing the extent and existence of civil liability, the national supervisory authorities should take into account, together with "company's efforts to comply with remedial actions, investments made, etc." the participation of a company in accompanying measures as described in Article 14, particularly industry programmes and multi-stakeholder initiatives.

Furthermore, the European Cocoa Association interprets the Commission's proposal on liability as excluding strict/objective liability and as largely excluding liability for damages caused by indirect business relationships. For the avoidance of doubt, the relevant provisions in the Commission's proposal could be further simplified and clarified.

In addition, the European Cocoa Association would welcome clarification on how the liability provisions would work in a group context whereby sustainability policies and strategies are typically defined at group level. In this specific context, the liability provisions should only apply at the level of the holding company, while Article 22.3 of the Commission's proposal seems to refer to a joint liability of a company with its subsidiaries.

Director's duties and liabilities

The European Cocoa Association takes note of the directors duties set forth in Article 25 and 26 of the Commission's proposal. With regard to the increased duty of care which requires directors to take into account the consequences of their decisions for sustainability matters, it

will be important that the company interest (as typically referred to in national corporate law) will be aligned with such sustainability interest.

Further, for the reasons set out above, the European Cocoa Association would welcome clarification in the Commission's proposal that - in case of a group context - the director duties and liabilities would apply at the level of the holding company rather than joint duties and liabilities of the directors of any individual group company or subsidiary.

In terms of enforcement, the Directive should ensure that when assessing the extent of the breach of directors' duties, the national supervisory authorities take into account the remedial actions taken by the company, similarly to the approach under civil liability provisions.

Uniform application

The Members of the European Cocoa Association believe that it is of fundamental importance for this Directive to be transposed and implemented as uniformly as possible. For this, it will be vital that the existing due diligence frameworks in EU Member States are sufficiently adapted to ensure a level playing field for companies operating in different EU Member States.

In this sense, the envisaged European Network of Supervisory Authorities should identify discrepancies between the different legal frameworks at Member State level and, in such cases, issue recommendations to the European Commission to address these divergences through the foreseen review of the Directive.

Enabling environment

For the proposed legislation to deliver optimal results, the provisions as proposed should be combined with strong and ambitious cooperation with producing countries. Companies rely on producing countries to strengthen their governance and thereby progressively create an enabling environment for sustainable cocoa production.

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

1. Achieve government mandated sector wide traceability and enhanced transparency
2. Through an effective farmer registration system that matches land titles and polygon mapping and is linked to the 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 forestry and

- agricultural policies, and enforce sustainable environmental practices in cocoa farming.
3. Strong agricultural policies, which must encompass 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.
 4. Support for farmer entrepreneurship through farmer aggregation and capacity building for farmers organisations, 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.
 5. Underpin the development and enforcement of appropriate national laws and policies,
 6. As well as sector regulations, address environmental protection and uphold human rights protection (focusing on deforestation, forest degradation, human rights and child labour). Particular focus should be given to the development of 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.
 7. 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 positive change in cocoa producing countries. Stronger advocacy and support from the EU are therefore needed to incentivise partner countries through trade preferences and development cooperation to develop, implement, and enforce relevant law and policies.

In line with the UNGPs and as stressed in the Wolters report, *"it is the responsibility of states and governments to protect human rights and the environment"*.¹ Hence, the EU must consider as a priority the negotiation of partnership agreements with producing countries, coupled with the necessary significant financial incentives, to ensure consistency between EU Human rights and Environmental Due Diligence legislation and existing local legislation or standards (such as the African Regional Standard for Sustainable Cocoa (ARS)).

¹ [Report with recommendations to the Commission on corporate due diligence and corporate accountability, A9-0018/2021, European Parliament, 11 February 2021.](#)

Partnership agreements will help address the underlying causes of human rights and environmental violations on the ground. This implies, and requires, that a framework for actions and commitments - including time-bound deliverables – should be clearly defined as soon as possible and its implementation actively monitored and accompanied by a sanction mechanism for any delays.
