

CAOBISCO POSITION PAPER ON DUE DILIGENCE EU SUSTAINABLE CORPORATE GOVERNANCE INITIATIVE

CAOBISCO is the Association of the Chocolate, Biscuits & Confectionery Industries of Europe. With 15 National Associations and eight Direct Member Companies, we represent more than 13,000 European chocolate, biscuits and confectionery manufacturing companies, 99% of which are SMEs. The sector is a large employer and a major player in the European economy, with over 400 000 direct employees and an annual turnover of almost €70 billion.

- ❖ The EU Chocolate, Biscuits and Confectionery Industries are committed to ensuring that their products are manufactured **responsibly and to the highest standards, minimising environmental impact and respecting the human rights of those in their value chains.**
- ❖ Many of CAOBISCO members have **private initiatives** that empower farmers and their communities to improve their income, become more productive and climate-resilient, protect the environment, combat deforestation, and respect human rights in the supply chain. **However, these initiatives need to be accompanied by due diligence systems in order to identify and address social and environmental risks and impacts, seeking greater transparency along the supply chain.**
- ❖ Therefore, CAOBISCO welcomes the European Commission's intention to put forward a proposal for a **mandatory due diligence legislation as part of their Sustainable Corporate Governance initiative.**
- ❖ CAOBISCO members support an **EU-wide due diligence approach that is aligned with the UN Guiding Principles on Business and Human Rights (UNGP), and with the OECD-FAO Guidance for Responsible Agricultural Supply Chains.**
- ❖ The legislation should take into account **the issue of proportionality of requirements, depending on the size of the company, its risk of being involved in severe human rights impacts, as well as the appropriate action it is expected to take depending on its involvement in an impact.**
- ❖ This legislation should be developed as part of a **"smart mix" of mutually reinforcing measures that foster business respect for human rights, such as trade preferences and development policies.**
- ❖ The EU and Member States **should exert direct leverage and support enabling environments** to advance better human rights outcomes in their relationships with partner countries.
- ❖ This position paper provides **CAOBISCO's recommendations for the European Commission's legislative proposal on due diligence**, as part of the Sustainable Corporate Governance initiative.

1. Scope of the legislation

Mandatory due diligence legislation should align with the UNGPs in setting a standard of conduct for companies. This means that companies should be expected to demonstrate that they are taking reasonable steps to prevent and address human rights and environmental impacts that they are or could be involved with through their own activities or their business relationships across the value chain. It also means that, as the UNGPs themselves recognise, even with the best policies and processes, companies may not be able to prevent all impacts. Legislation should therefore encourage ongoing improvement in company approaches over time and recognise the importance of encouraging efforts to address the root causes of human rights and environmental harms.

The due diligence legislation should be horizontal in its approach, covering all commodities and sectors. The EU should define a minimum set of requirements with regard to the necessary processes and where necessary, complement these with sector specific guidance, in order to ensure consistency in transposition into national laws.

To create a level playing field, all companies operating within the EU, aside from micro-enterprises (less than 10 employees), should be covered by the legislation. SMEs should be subject to lighter requirements and be provided with capacity building support, including funding, so as to meet their obligations. Finally, state-owned enterprises, as well as State entities engaging in public procurement, should also be required to implement due diligence. The legislation should allow for appropriate ramp-up periods, to allow sufficient, but not excessive, time within which companies can establish or strengthen due diligence processes and systems.

The Commission should provide additional guidance on how the due diligence obligations should be applied, with particular regard to the issue of proportionality depending on the size of the company and the risk of it being involved in severe human rights impacts. It should also create a toolbox, based on existing guidance, to help companies translate due diligence criteria into business practices.

All companies operating within the Single Market, regardless of where they are established, should be within the scope of the proposed legislation. The obligation and enforcement of the due diligence legislation should apply to all companies, both EU and non-EU companies, in the same way.

2. Alignment with UN Guiding Principles on due diligence duty

It is crucial that the EU legislative framework for due diligence aligns and refers to the UN Guiding Principles (UNGPs), which EU companies are committed to apply in their operations as part of their responsible business conduct.

To create legal certainty, clarity and ensure a level playing field, the requirements of Guiding Principle 17 of the UNGP in particular must be defined in the EU legislative framework:

“In order to identify, prevent, mitigate, and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating, and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- a. Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.

- b. Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.
- c. Should be ongoing, recognising that the human rights risks may change over time as the business enterprise's operations and operating context evolve."¹

Additionally, and consistent with the UNGPs, companies should be expected to take appropriate action depending on their involvement in an impact as follows:

- If a company has caused or may cause an adverse human rights or environmental impact, it should be expected to prevent or mitigate the impact and provide for or cooperate in their remediation through legitimate processes
- If a company has contributed or may contribute to an adverse human rights or environmental impact, it should be expected to prevent or mitigate its own contribution to the impact and use or increase its leverage with other parties to prevent or mitigate it.
- If a company has not caused or contributed to an adverse human rights or environmental impact, but may have its operations, products or services linked to an impact through a business relationship, it should be expected to use or increase its leverage with other parties, including suppliers, to seek to prevent or mitigate the impact.²

Certification schemes, if carried out credibly, should be considered one of the tools company use to fulfil human rights and environmental due diligence requirements.

Where businesses prioritise their due diligence efforts, they should do so on a risk-based approach in regard to potential harm to people or the environment. Legislation should allow for such prioritisation.

3. EU due diligence legislation as part of a smart policy mix

Mandatory due diligence legislation should be developed as part of a smart mix of measures by States – mandatory and voluntary, national, and international. States should use mutually reinforcing policy tools to not only require but also incentivize and support businesses to respect human rights. This means that States should complement any new mandatory due diligence measures with approaches that foster business respect for human rights, such as trade preferences and development policies. States should also be required to implement human rights due diligence in their own public procurement approaches. In addition, the EU and Member States should exert direct leverage and support enabling environments to advance better human rights outcomes in their relationships with partner countries.

Mandatory due diligence legislation should not be in contradiction with the local regulatory framework. A multilateral engagement by the EU with partner countries is key to strengthen the rule of law and enable the State to fully realise their “duty to protect”, ensuring relevant laws and policies are in place, implemented and enforced.

It is crucial that the EU engages in dialogue with the respective origin countries to create the right framework of agreement needed to drive change. From a bilateral perspective, Voluntary Partnership Agreement (VPAs) and the integration of environmental, social, and governance (ESG) clauses within

¹ United Nations, Guiding Principles on Business and Human Rights, New York and Geneva, 2011

² United Nations, Guiding Principles on Business and Human Rights, New York and Geneva, 2011

the existing Economic Partnership Agreements can be effective tools to encourage governments in Third Countries to align with EU policy. The EU can also leverage its trade policy by strengthening the dedicated chapters on sustainable development within its trade agreements.

On a multilateral level, the EU should leverage its engagement with international organisations such as the UN, the OECD and the WTO to address environmental and human rights concerns in global supply chains.

CAOBISCO welcomes initiatives such as the Cocoa Talks, part of the EU's Sustainable Cocoa Initiative, which provide a platform for stakeholders to engage and collectively work together to address deforestation, child labour and living incomes in the cocoa supply chains.

4. Enforcement of due diligence

In line with UNGPs, companies' scope of the responsibility to respect human rights should cover a company's entire value chain, including both its own activities as well as all its business relationships with suppliers. However, as per the UNGPs, the responsibility to respect human rights is distinct from issues of legal liability and enforcement.

Appropriate mandatory due diligence legislation should incentivize companies to disclose the issues and risks they face along their value chain and to take action to mitigate and address them, by ensuring that such disclosure will not expose them to an increased risk of litigation. Lawsuits and disproportionate sanctions may also divert resources from effective and impactful actions to defending litigation.

Any sanctions included in the legislation should focus on failures to comply with the due diligence obligations and related reporting requirements, ensuring that these sanctions work to enable (and do not hinder) impactful and effective actions by business actors with an enhanced awareness of their responsibility to respect human rights and the environment. One valid option is, in some specific cases, to sanction repeated wrongdoings with failure to take corrective action.

Other accountability measures should be considered to incentivize companies to carry out human rights' due diligence across the full scope of their activities and value chains and be transparent about their progress and the challenges they face³. Conducting appropriate human rights and environmental due diligence should help business enterprises show that they took every reasonable step to avoid involvement with an alleged human rights and environmental abuse and address the risk of legal claims against them.

In addition, Member States should assign competent authorities with the resources, mandate, and expertise to provide guidance, monitor uptake and help develop human rights due diligence as a predictable standard of conduct. The European Commission will also have a critical role to play in ensuring harmonisation of the implementation of the legislation across Member States.

³ *Accountability as part of Mandatory Human Rights Due Diligence: Three Key Considerations for Business*, Shift, October 2020