

## **CAOBISCO POSITION PAPER ON DUE DILIGENCE EU SUSTAINABLE CORPORATE GOVERNANCE INITIATIVE**

CAOBISCO is the Association of the Chocolate, Biscuits & Confectionery Industries of Europe. We represent more than 13,000 European chocolate, biscuits and confectionery manufacturing companies, 99% of which are SMEs. The sector is a major player in the European economy, with over 250, 000 direct employees and an annual turnover of almost €60 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 (UNGPs), and with the OECD-FAO Guidance for Responsible Agricultural Supply Chains.**
- ❖ The legislation should address companies of all sizes, while taking 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

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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, particularly in their supply chain. 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

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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.”<sup>1</sup>

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.

Certification schemes, if carried out credibly, should be considered one of the tools companies use to contribute to meeting 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, in accordance with the UNGPs. Legislation should allow for such prioritisation.

Commodities from EU member states should be excluded in most cases, as the EU provides efficient legislation for the protection of human rights in its member states. Creating a “whitelist” of countries could be helpful. Additionally, the EU should provide public information about risk assessments and high-risk Third Countries.

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

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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 and reward companies with better human rights practices in their own public procurement approaches. In addition, the EU and Member States should exert direct leverage, including development funding and trade preferences,

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<sup>1</sup> United Nations, Guiding Principles on Business and Human Rights, New York and Geneva, 2011

to 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 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**

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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.

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 reflecting a failure to take corrective action.

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy.<sup>2</sup>

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. Excessive lawsuits and disproportionate sanctions may also divert resources from effective and impactful actions to defending litigation. Administrative bodies and law have an important role to play in enforcing the legislation and ensuring a level playing field, and coordination and consistency across national enforcement bodies in the EU can help make their efforts more effective.

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<sup>2</sup> United Nations, Guiding Principles on Business and Human Rights, New York and Geneva, 2011

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 face<sup>3</sup>. 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.

The EU should also consider promoting a strong legal system and law enforcement in producer countries so as to improve the capacity of enforcement agencies, judicial systems and legal practitioners, and support the independence of the judiciary, to enforce existing laws and prosecute illegal activities locally.

We have outlined in section two, 'Alignment with UN Guiding Principles on due diligence duty', how companies should be expected to take appropriate action depending on their involvement in an impact. In order to fulfil these obligations, the legislation should require companies to provide for or cooperate with remediation mechanisms when appropriate, based on their connection to the impacts. As described in the UN Guiding Principles and OECD Due Diligence Guidance for Responsible Business Conduct, these provide routes through which impacted stakeholders, rights-holders and their representatives can bring complaints to the attention of companies and seek to have them addressed through a variety of non-judicial and judicial, state, collective and company-based mechanisms.

To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders, to help to provide early-stage resolution of problems. Recourse to a mutually acceptable external expert or body, independent of companies, should also be permitted and accessible whether or not stakeholders have pursued their case through company-level mechanisms.<sup>4</sup>

When addressing company grievance mechanisms and remedy, EU legislation should reflect the UNGPs, which call for companies to provide remedy when they cause or contribute to impacts, but not when they are directly linked to impacts. This UNGPs framing suggests that companies should not be responsible to have in place grievance mechanisms for their extended supply chains.

Member States should assign competent authorities with the resources, mandate, and expertise to evaluate the design, adequacy and implementation of the company due diligence systems, including company-level grievance mechanisms, based on company and independent audit reports, investigations by the enforcement agencies and other sources of information.

The EU should provide guidance and examples of best practice in enforcement of the legislation, and ensure, to the greatest extent possible, that the interpretation and enforcement of the legislation is consistent between member states. Sector-specific guidance (potentially through implementing regulations) would be helpful in this respect. The EU should establish a framework for member state enforcement agencies to collaborate with each other and with equivalent enforcement agencies outside the EU.

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

<sup>4</sup> United Nations, *Guiding Principles on Business and Human Rights*, New York and Geneva, 2011