

**CAOBISCO POSITION PAPER ON THE EU PROPOSAL FOR A DIRECTIVE  
ON CORPORATE SUSTAINABILITY DUE DILIGENCE**

- ✦ The EU Chocolate, Biscuits and Confectionery Industries are committed to ensuring that their products are manufactured responsibly and to the highest standards, minimising environmental impacts and respecting the human rights of people in their value chains.
- ✦ Many CAOBISCO members have private initiatives that empower farmers and their communities to improve their income, become more productive and climate-resilient, while contributing to environmental protection, combatting deforestation, and respecting human rights in the supply chain. These initiatives need to be accompanied by harmonised due diligence systems to be able to assess, address and report on human rights and environmental risks in a more systemic way, seeking greater transparency and collaboration along supply chains to address them.
- ✦ CAOBISCO welcomes the objective of the European Commission’s Proposal for an EU Directive on Corporate Sustainability Due Diligence that aims to improve and harmonise the EU regulatory framework on company law and corporate governance.
- ✦ CAOBISCO members support an EU-wide due diligence approach that is aligned with the UN Guiding Principles on Business and Human Rights (UNGPs), with the OECD-FAO Guidance for Responsible Agricultural Supply Chains and with the objectives of the Paris Agreement.
- ✦ The EU Directive on Corporate Sustainability Due Diligence should provide legal certainty and a level playing field among all actors along the value chain. To achieve maximum efficiency, the EU Directive should aim at maximum harmonisation across Europe with regards to the due diligence requirements and enforcement aspects, including administrative sanctions.
- ✦ The EU Directive 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 and environmental impacts, as well as the appropriate actions it is expected to take depending on its involvement in an adverse impact.
- ✦ This EU directive should be developed as part of a “smart mix” of mutually reinforcing measures that foster human rights and environmental protection, including trade preferences and development policies, as well as provisions to address climate risks and climate impacts. The EU and Member States should exert direct leverage and support enabling environments to advance better on human rights and environmental protection outcomes in their relationships with third countries.
- ✦ This position paper provides **CAOBISCO’s first reaction and recommendations following the publication of the European Commission’s proposal for an EU Directive on Corporate Sustainability Due Diligence:**

## 1. Reframing the legislation on a risk-based approach, aligned with the UN Guiding principles on Business and Human Rights

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CAOBISCO welcomes the views expressed in the EU Directive's recitals that outline that, in order to achieve meaningful impact, the current focus of due diligence obligations should extend to the entire value chain of a company. Article 1 narrows the scope of integrating due diligence to a company's own operations, its subsidiaries and its 'established business relationships'. This new concept brings legal uncertainty as it is subject to interpretation.

CAOBISCO believes that due diligence processes should be established on a risk-based approach to ensure that the most severe adverse human and environmental impacts are tackled in companies' supply chains. The introduction of a risk-based approach would ensure alignment with the international framework, such as UNGPs, promoting a level playing field amongst companies.

The EU Directive should incentivise companies to develop and secure long-term business relationships along the value chain, which are essential to foster impactful collaborations to prevent and mitigate potential adverse impacts on human rights and the environment.

The EU Directive should align with the UNGPs in setting a legal basis for companies: companies should be expected to demonstrate that they are taking reasonable steps to prevent and address human rights and environmental risks and impacts that they are or could be involved with, through their own activities or business relationships across their value chain.

As the UNGPs themselves recognise under the official Office of the High Commissioner for Human Rights (OHCHR) commentary to UNGP 22, even with the best policies and processes, companies could not be able to prevent all impacts in their supply chain. The EU Directive should therefore keep encouraging ongoing and continuous improvement in company approaches over time and recognise the importance of industry efforts to address the root causes of human rights and environmental harms

## 2. Ensuring a level playing field in the single market

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In line with the EU Directive proposal, CAOBISCO believes the scope, features, and enforcement of due diligence obligations should be harmonised across EU Member States (Article 2 – Scope).

To achieve maximum efficiency and to avoid a fragmentation of requirements between Member States' national legal regimes, the EU Directive should mandate a maximum harmonisation approach with regard to the due diligence obligations it sets out within the single market. The EU Directive currently takes a minimum harmonisation approach, which will allow Member States to impose varying requirements on companies. Having differentiated requirements will create legal uncertainty and undermine the level playing field between companies. CAOBISCO is in favour of tightening the language in Article 1(2) to ensure the highest level of harmonisation possible across Member States with regard to the due diligence requirements.

The European Commission should also work to ensure the harmonisation of enforcement rules among Member States. This process should be accompanied by the development of guidelines to support the national enforcement authorities in reference to Article 14 – Accompanying Measures and Article 21 - European Network of Supervisory Authorities.

CAOBISCO recommends the creation of a toolbox for Member States to ensure coherence and complementarity with other legislative initiatives, such as the European Commission’s proposal for a Regulation on deforestation-free products.

The same maximum harmonisation approach should apply to sanctions. Allowing Member States to define their own set of sanctions might create an uneven playing field for companies operating across the EU single market and might encourage companies to relocate to Member States with lower penalties.

Sanctions should work to enable (and not to hinder) impactful and effective actions by business actors with an enhanced awareness of their responsibility to respect human rights and the environment. CAOBISCO therefore welcomes the requirement in Article 20(1) that sanctions should be “effective, proportionate and dissuasive” and that companies’ efforts should also be taken into consideration when determining the sanctions (Article 20(2)).

### 3. Civil liability and remediation approach

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In line with the UNGPs, the scope of Due Diligence should not be the same as the scope of legal liability. A company’s responsibility to respect human rights should cover its entire value chain, including its own activities as well as all its business relationships with suppliers. Compared to this scope of responsibility, CAOBISCO argues that the scope of liability should be narrower in order to ensure that companies are not exposed to an increased risk of litigation and/or abuse, and/or relocate their activities away from high-risk sourcing areas, as a result of their disclosure and actions to address the risks they face along their supply chain.

- CAOBISCO welcomes the objective of Article 22 on civil liability to support 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.
- CAOBISCO suggests that the provisions on civil liability should only be applicable if and to the extent that a Member State’s national supervisory authority or other public body has established that a company has not complied with its due diligence obligations – as laid down in Article 4<sup>1</sup>.
- Definitions under Article 22, such as ‘indirect partner’, ‘established business relationships’ and ‘adverse impact’, should be clarified to help resolve the unclear scope of the liability, and thereby avoid exposing companies to legal risks for harms beyond their control.
- Civil liability should be limited to severe adverse impacts caused by the company’s own activities or activities under companies’ control, which could have been prevented if the company had fully complied with the requirement to conduct human rights and environmental due diligence. This should clearly exclude third parties, such as suppliers.

Furthermore, the EU Directive should include minimum criteria defining which legal entities are entitled to bring legal complaints based on “direct interest in acting”. In this way, those negatively

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<sup>1</sup> Following the submission of a substantiated concern by a concerned party, company’s due diligence should be verified to assess whether the company’s due diligence is compliant or not. In case of non-compliance, the court will then analyse whether the faulty DD system led to the HR abuse and/or environmental harm.

affected would benefit from a streamlined procedure and legal basis for claiming damages, while companies would also be less vulnerable to unsubstantiated claims and the consequences thereof.

When addressing company grievance mechanisms and remediation, the EU Directive should reflect the UNGPs, in particular Principle 19, which calls for companies to provide remediation when they cause or contribute to impacts. In reference to Principle 29, Companies should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

#### **4. Support companies' implementation: need for sector-specific guidelines and toolbox**

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Due diligence requirements should be proportionate to the size of the company, amongst other criteria. The EU Directive should include provisions to support Small and Medium Enterprises (SMEs) directly - including SMEs from third countries covered by the EU Directive - and indirectly covered by its provisions, in building operational capacity - including funding - to comply with the new EU rules (Article 14 – Accompanying measures), and to meet fair, reasonable, non-discriminatory, and proportionate requirements if indirectly impacted by the EU Directive. The EU Directive should allow for appropriate ramp-up periods, to allow sufficient, but not excessive, time within which companies can establish or strengthen their due diligence processes and systems.

CAOBISCO welcomes additional guidance and examples of best practices to guide companies on how they should appropriately fulfil their Due Diligence obligations (Article 30 – Guidelines), via the development of sector-specific guidelines and/or commodity-specific guidance. These will also support, to some extent possible, the consistent interpretation and enforcement of the legislation across Member States. Sector-specific guidelines should give due consideration to the question of proportionality depending on the risks and impacts that occur in a company's supply chain. These should help companies integrate harmonised mitigation processes for adverse impacts and harmonised sustainability approaches into corporate governance and management systems.

Sector-specific guidelines would also be helpful to ensure consistency in transposition into national laws and clarity for companies operating with fragmented supply chains or indirectly involved in supply chains and would support compliance with Articles 7 and 8 on potential and adverse impacts. Therefore, guidelines should be developed as early as possible, at the latest within 6 months following the entry into force of the EU Directive.

Guidance should also be provided by the European Commission regarding meaningful engagement with affected or potentially affected stakeholders. Meaningful and continuous engagement with affected stakeholders, through ongoing process of interaction and dialogue is central to the due diligence process.

Guidelines should be used as a tool to encourage the participation of companies to accompanying measures as described in Article 14, particularly industry programmes and multi-stakeholder initiatives. This way companies could be incentivised to take additional preventive and remedial measures.

Credible and robust certification schemes and other voluntary standards – national and international –, if carried out credibly, should be further considered and recognised as compatible with the EU Directive's due diligence requirements.

## 5. Directors' duties

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CAOBISCO takes note of the directors' duties set forth in Articles 25 and 26, with regard to the increased duty of care which requires directors to take into account the consequences of their decisions on sustainability matters. It will be important that the company's interest (as typically referred to in national corporate law) is to be aligned with such sustainability objectives. In particular, CAOBISCO would argue in favour of allowing companies with different business entities in the EU to be able to refer to their global climate plan (aligned with Article 15 – Combating Climate Change) to demonstrate director's duties compliance (Article 25 (1)).

Furthermore, CAOBISCO would welcome clarifications in the EU Directive proposal that - in case of a group context - the director duties would apply at the level of the holding company rather than joint duties of the directors of any individual group company or subsidiary. In terms of enforcement, the EU 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.

## 6. Deploying smart mix measures and meaningful stakeholder engagement

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The EU Directive should be developed as part of a smart mix of mutually reinforcing policy tools that not only require but also incentivise and support companies to respect human rights and the environment. The EU should complement the new mandatory due diligence measures with approaches that foster business respect for human rights and environmental protection, such as trade preferences and development policies.

Member States should ensure that national supervisory authorities have the expertise to conduct compliance assessments. Member States should therefore assign national supervisory authorities (as per Article 17) 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.

CAOBISCO would also welcome further efforts to ensure complementarity of the Directive with other relevant EU initiatives, in particular with the EU Sustainability Reporting Directive (CSRD) proposal and the EC proposal for a Regulation on deforestation-free products.

CAOBISCO welcomes initiatives and other partnerships, such as the new Alliance for Sustainable Cocoa as next step of the Cocoa Talks and part of the EU's Sustainable Cocoa Initiative, to provide a platform for stakeholders to collectively work towards the eradication of deforestation and child labour, as well as the improvement of living incomes for cocoa farmers.

For the proposed EU Directive to deliver optimal results, the provisions should be combined with strong and ambitious cooperation with producing countries. The EU and Member States should exert direct leverage, including through development funding and trade preferences, to support enabling environments to advance on human rights and environmental outcomes in their relationships with other third countries. This enhanced cooperation should also focus on strengthening the legal system and law enforcement in third 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.

CAOBISCO believes that the EU should continue its dialogue with respective third 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.

CAOBISCO is the Association of the Chocolate, Biscuits & Confectionery Industries of Europe. We represent more than 12,000 European chocolate, biscuits, and confectionery manufacturing companies, 99% of which are SMEs. The sector is a major player in the European economy, with over 225, 000 direct employees and an annual turnover of over €42 billion.