

Joint position paper on the EU's policy and regulatory approach to cocoa

Human rights and environmental due diligence

18 October 2021



Summary

Consistently with the position [we announced in 2019](#), the signatories to this position paper believe that the introduction of mandatory EU-wide due diligence legislation can have a positive impact in driving the necessary transformation of the cocoa and chocolate sector. We therefore call on the European Commission to bring forward two pieces of legislation.

We call on DG Justice & Consumers to finalise proposals for human rights and environmental due diligence across companies' entire operations and supply chains. The legislation should require companies to work with their suppliers and supply-chain partners in producer countries to identify, address and report on risks in their supply chains rather than abandon or avoid high-risk sources of cocoa. The criteria underlying the due diligence obligation should aim to ensure respect for the laws of the producer country, human and labour rights, including the right to an adequate standard of living, rights of land tenure and access, and environmental sustainability.

We also call on DG Environment to come forward with proposals for due diligence legislation to minimise the risk of deforestation associated with cocoa products placed on the EU market, and to extend this to include forest degradation and ecosystem harm.

Both pieces of legislation should be implemented as uniformly as possible across the EU, avoiding a patchwork of different member-state approaches, and should cover companies irrespective of their size – this is fundamental in the cocoa and chocolate sector to avoid distortion and maximise impact, given its fragmentation. They should be enforced by government agencies with sufficient powers and

resources, and contain dissuasive penalties and access to remedies, in order to help drive real change in the sector.

We believe that all companies in the cocoa sector must implement such due diligence obligations; they are well-placed to generate and protect social and environmental benefits through due diligence efforts.

For the legislation to be fully effective it needs to be coupled with the strengthening of the enabling environment for sustainable cocoa farming on the ground, and we therefore also call on the European Commission to pursue the establishment of bilateral partnership agreements between the EU and cocoa-producing countries.

1 Introduction: EU-wide legislation on human rights and environmental due diligence

The ultimate aim of the signatories to this position paper is to achieve a fully sustainable cocoa supply chain that allows cocoa farmers to enjoy living incomes and reduces and eventually eliminates human rights abuses, including child labour, and environmental degradation.

A crucial element of an EU strategy to achieve this aim is the introduction of mandatory EU-wide due diligence legislation, covering the cocoa sector – as we argued in our [first joint position paper](#) on the EU's policy and regulatory approach to cocoa, in December 2019.

We believe that this is necessary in order to achieve sector-wide change; to create a level playing field and consistency for companies operating in the sector; to identify the actions necessary to tackle unsustainable practices; and to hold companies accountable for failure to conduct due diligence in their supply chain, consistent with international standards, to identify, address and report on risks to human rights and the environment. Addressing human rights and environmental risks includes preventing and mitigating potential adverse impacts and remediating actual adverse impacts when companies cause or contribute to them.

We are confident that such legislation has the potential to benefit producer countries by reinforcing their efforts to establish a sustainable cocoa sector for the long term. If the legislation is well designed, it should ensure that the burdens of adjustment are shared fairly throughout the supply chain and cocoa farmers are not left to bear additional costs without sufficient support. The legislation should also contribute to achieving a living income for cocoa farmers, an essential means of establishing a sustainable cocoa sector.

The obligations should apply both to companies registered or operating in the EU and to those placing cocoa, cocoa products and chocolate (among other commodities) on the EU market. Companies will be required to assess and where necessary improve their purchasing practices and to work with their subsidiaries, joint ventures and suppliers in producer countries to identify, address and report on any human rights and environmental risks along their supply chains rather than abandon or avoid high-risk sources of cocoa.

We believe that the effectiveness of such due diligence legislation will be limited unless it is coupled with the strengthening of the enabling environment required to make progress on sustainable cocoa farming within cocoa-producing countries. Accordingly, we believe that it is essential for the EU to pursue the establishment of long-term partnership agreements with the governments of cocoa-producing countries, ensuring that all relevant stakeholders are involved, including local community representatives, farmers, industry, and civil society. We have set out our position on this approach in detail in our [joint position paper on partnership agreements](#), published in June 2021.

We welcome the two processes currently under way within the European Commission to introduce legislative proposals for due diligence. We hope to see the legislative initiative on sustainable corporate governance, including corporate due diligence, co-led by DG Justice & Consumers and DG Internal Market, introduce a general obligation on companies to conduct human rights and environmental due diligence across their entire operations and supply chains, while allowing the prioritisation of the most severe risks to people and the environment. Similarly, we believe that the assessment of demand-side measures for minimising the risk of deforestation and forest degradation associated with products placed on the EU market, led by DG Environment, should lead to legislation introducing an obligation of due diligence with regard to forests and other ecosystems.

We outline below the elements that we believe need to be included in each piece of legislation in order to ensure effective due diligence in the cocoa supply chain.

2 Cross-sectoral human rights and environmental due diligence legislation

2.1 Criteria

The due diligence obligation outlined in the cross-sectoral human rights and environmental due diligence legislation should be rooted in existing international frameworks, including in particular the UN Guiding Principles on Business and Human Rights, and should be in alignment with the OECD Guidelines for Multinational Enterprises, the OECD Due Diligence Guidance for Responsible Business Conduct and the OECD-FAO Guidance for Responsible Agricultural Supply Chains.

The UN Guiding Principles are based on the three pillars of the 'Protect, Respect and Remedy' Framework:

1. The state's duty to protect human rights, including the duty to protect against human rights abuses by third parties, including business enterprises.
2. The corporate responsibility to respect human rights.
3. Greater access by victims to effective remedy, both judicial and non-judicial.

While the UN Guiding Principles focus on human and labour rights, the EU legislation should deal in addition with other factors associated with unsustainable cocoa production, including environmental harms such as deforestation, and other aspects of responsible business practice, as highlighted, for example, in the OECD Due Diligence Guidance for Responsible Business Conduct. We therefore propose that the due diligence obligation should aim to ensure:

- A. Legality in the country of origin. Respect for the laws of the producer country, including in particular laws relating to: human rights; forced labour and child labour; employment conditions, such as working hours and health and safety conditions; communities' rights of ownership and access to land; environmental protection, including in particular the protection of forests and other ecosystems; and business transparency and the avoidance of any form of bribery, corruption or fraudulent practices.
- B. Human rights. Respect for internationally recognised human rights, as expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified, as well as their mandatory interpretations: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and the principles concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work. This includes explicit respect for the right to an adequate standard of living as a fundamental human right: a 'living income', to be understood as a precondition to access other human rights.
- C. Social and labour rights. Respect for international labour standards, including freedom of association and the right to collective bargaining, including for migrant workers; the elimination of all forms of forced or compulsory labour; the effective reduction and ultimate abolition of child labour and forced labour; the elimination of discrimination in respect of employment and occupation; and the right to just and favourable remuneration.
- D. Land tenure and access. Consistently with the principles in the Voluntary Guidelines on the Responsible Governance of Tenure, the UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169 on Indigenous and Tribal Peoples, and other relevant documents, respect for local communities' and indigenous peoples' community and land tenure rights in all forms, whether they are public, private, communal, collective, indigenous, women's or customary rights, and the procedural right to give or withhold their free, prior and informed consent.
- E. Environmental sustainability. Respect for high standards of environmental sustainability, particularly relating to the protection of forests and other ecosystems, the responsible use of chemicals and pesticides, and respect for procedural environment rights such as the rights of access to information, participation and access to justice in environmental matters and the right to give or withhold free, prior and informed consent.

2.2 Implementation

The UN Guiding Principles on Business and Human Rights and the OECD's Due Diligence Guidance for Responsible Business Conduct describe the steps involved in implementing a due diligence obligation. Companies are required to:

1. Embed responsible business conduct into their policies and management systems.
2. Identify and assess the risks of actual and potential adverse impacts associated with the enterprise's operations, products or services.
3. Cease, prevent and mitigate adverse impacts.
4. Track implementation and results.
5. Communicate how impacts are addressed.

6. Provide for or cooperate in remediation when appropriate.

The due diligence legislation should be based on these steps of a due diligence process. Since the mix of risks of adverse human rights and environmental impacts, and the socio-political framework surrounding them, varies between sectors, we believe that the legislation should be accompanied by sector-specific guidance, at least for the cocoa sector. This will assist companies in the sector to meet their due diligence obligations through a common approach. It should build, where appropriate, on existing approaches adopted by many companies in the cocoa sector for responsible business conduct and the avoidance of adverse human rights and environmental impacts. (Useful lessons can be learned from the Child Labour Guidance Tool created jointly by the ILO and International Organisation of Employers, which explains how companies can fulfil the due diligence obligations of the UN Guiding Principles with respect to child labour. The OECD-FAO Guidance for Responsible Agricultural Supply Chains also contains helpful guidance.)

We recognise the valuable role that national and international standards, including those in certification schemes, and other voluntary initiatives, can play in assisting companies, including those in the cocoa sector, to ensure that they meet these obligations. Adherence to a standard by itself, however, is not a substitute for an effective system of due diligence.

Implementing the due diligence obligation should not be a tick-box exercise; it should, rather, stimulate a continuous process of improvement in addressing human rights and environmental risks. We recognise that, as the UN Guiding Principles themselves acknowledge, even with the best policies and processes in place, companies may not be able to prevent all negative human rights and environmental impacts straight away. For example, any requirement based on an assumption that agricultural supply chains linked to smallholder farms in producer countries could instantly be made completely free of family child labour, and which would seek to sanction companies, states or farmers where that is not the case, would simply penalise those farmers and their families and drive the issue back underground.

The legislation should therefore require companies to demonstrate that they are taking effective steps, through a risk-based approach, to prevent, identify, address, mitigate and remediate potential and actual negative impacts associated with a failure to address the criteria listed above in Section 2.1, based on the severity of the actual or potential harm to people and the environment, both in their own activities and in their business relationships throughout the supply chain, including in their subsidiaries, joint ventures and suppliers, depending on their involvement (see further in Section 2.4).

The legislation should also specify the importance of meaningful stakeholder engagement in carrying out due diligence: an ongoing process of interaction and dialogue between a company and its actually or potentially affected stakeholders that enables the company to hear, understand and respond to their interests and concerns, including through collaborative approaches.

As noted above, for the due diligence legislation to be fully effective it needs to be coupled with the strengthening of the enabling environment required to make progress on sustainable cocoa farming within cocoa-producing countries; this underlines the need for the kind of partnership agreements between the EU and cocoa-producing countries we discuss in our [accompanying paper](#).

2.3 Scope

As recognised in the UN Guiding Principles, the responsibility to respect human rights applies to all companies regardless of their size, sector, operational context, ownership or structure. Nevertheless, the scale and complexity of the means through which companies meet that responsibility may vary according to these factors and with the severity of the adverse impacts. Accordingly, the human rights and environmental due diligence legislation should apply to all companies registered or operating in the EU regardless of their legal form or size, including state-owned enterprises.

We recognise that smaller companies may possess simpler supply chains. We do not believe, however, that these companies should be exempted from the due diligence obligation. In a very fragmented end market, the inclusion of smaller players is critical to establish a level playing field and to ensure that all companies do their part and work closer together to improve the sustainability of the cocoa sector.

2.4 Compliance and enforcement

As outlined in Section 2.2, conducting appropriate due diligence should encourage companies to disclose issues and risks in their supply chains, and to demonstrate the steps they are taking to address them (in cooperation with other stakeholders in the supply chain), rather than encouraging companies simply to abandon or avoid high-risk sources of cocoa in order to manage an increased risk of litigation.

Accordingly, and consistently with the UN Guiding Principles, companies should be expected to take appropriate action depending on their involvement in adverse impacts, and to work together with affected stakeholders, including farmers, local communities and governments:

- If a company has caused or may cause an adverse impact, it should cease, prevent or mitigate the impact and remediate any harm if the impact has occurred.
- If a company has contributed or may contribute to an adverse impact, it should cease, prevent or mitigate its own contribution to the impact, and use or increase its leverage with other parties to prevent or mitigate it. It should also contribute to remediating the harm if the impact has occurred, to the extent of its contribution.
- If a company has not caused or contributed to an adverse impact, but its operations, products or services may be linked to an impact through a business relationship, it should use or increase its leverage with other parties, including suppliers, to seek to prevent or mitigate the 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 and company-based mechanisms.

Operational-level grievance mechanisms that are accessible to stakeholders should therefore be established at company level, as described by the UN Guiding Principles, to help to provide early-stage resolution of problems. In practice, some companies in the cocoa sector already possess

elements of such systems, particularly where child labour is detected. 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.

The legislation should also require member states to fulfil the provisions of the UN Guiding Principles whereby states must take appropriate steps to ensure those affected by abuses have access to effective remedy through judicial, administrative, legislative and other appropriate means, including provisions for civil liability.

As noted in our recently published [paper on partnership agreements](#), 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.

Companies should be required to publish annual reports describing the design of their due diligence systems, including their procedures for risk analysis, risk mitigation and remediation measures, as well as information on their implementation and findings.

The legislation should provide for penalties should companies fail to establish and maintain a reasonable due diligence process, or to comply with their reporting obligations, or to knowingly make false or misleading statements in their reporting. Penalties specified in the legislation should be proportionate and dissuasive, in order to help ensure that the due diligence obligations drive real change in the sector.

The legislation should also include a requirement on companies to subject their due diligence systems to independent third-party verification (through mechanisms that respect the audit principles of independence, competence and accountability, as set out in the OECD Due Diligence Guidance), thereby encouraging them to develop adequate systems.

The legislation will need to be enforced, and its implementation monitored, by member-state government agencies with appropriate mandates, guidance mechanisms, resources and expertise to evaluate the design, adequacy and implementation of company due diligence systems, 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.

3 Market-related due diligence legislation for commodities and products associated with deforestation and harm to ecosystems

3.1 Obligations

In addition to the cross-sectoral human rights and environmental due diligence discussed above, due diligence legislation placing obligations on all companies placing specified agricultural commodities on the EU market at risk of deforestation or harm to ecosystems, including cocoa, cocoa products and chocolate, would be a powerful tool to ensure that minimum standards to prevent deforestation and harm to ecosystems are met throughout the cocoa supply chain. We look forward to the imminent publication of the legislative proposal drawn up by DG Environment.

This would differ from the general obligation to conduct human rights and environmental due diligence (outlined in Section 2) in resting on sustainability criteria that commodities and products should meet before companies place them on the market. A company's due diligence process must be capable of showing compliance with all the criteria underlying this obligation rather than assuming that these issues are addressed over time through a risk-based approach (the 'continuous process of improvement').

Such an obligation must therefore rest on criteria that are clear and verifiable. While the DG Environment process refers only to deforestation, we believe there is a case for a wider range of criteria, and also that alignment should be sought with definitions and criteria (including those relating to deforestation, human rights, and the rights of indigenous peoples and local communities) from existing international and human rights instruments, as well as broadly endorsed supply-chain initiatives, like the Accountability Framework Initiative. We therefore propose the following:

- A. Forests and other ecosystems. Respect for the protection of forests and ecosystems, including a prohibition on sourcing from land obtained via the conversion of natural forests or other natural ecosystems which, at a cut-off date to be determined (that is science-based, justifiable, implementable in practice and in line with EU international commitments) had the status of natural forest or natural ecosystem; or from natural forests and natural ecosystems undergoing degradation, also with a cut-off date to be determined.
- B. Land rights. Respect for international and national laws relating to the rights of ownership, tenure and access to land, including rights of tree tenure for local and indigenous communities, and the right to give or withhold free, prior and informed consent.

Where possible, independent means of verification should be used to underpin this requirement; examples include the extent of deforestation, verifiable through satellite imaging, or infringement of land rights, verifiable through community monitoring. Companies should be allowed to use a combination of tools to show compliance with the above-mentioned criteria.

If the legislation includes a prohibition on cocoa, cocoa products and chocolate being placed on the EU market unless they meet certain criteria, these criteria must be independently verifiable; the experience of the EU Timber Regulation shows the difficulty of basing a prohibition on criteria that cannot be reliably verified.

The EU should provide assistance with verification, including through assessments of source areas covering both the extent and risk of deforestation and harm to ecosystems and the adequacy of the

policy and governance framework. For any system of risk benchmarking proposed alongside the due diligence legislation, it is important that it both captures country-level risk and accounts for the fact that landscapes, ecosystems and sources within a country can face differing levels of deforestation and human rights risks. If risk-based systems are used, they should help to incentivise and support effective public policies in producer countries, not encourage companies to abandon suppliers who are taking meaningful steps to prevent, mitigate and remediate negative impacts.

It will be important to ensure that compliance with the legislation avoids unintended consequences, such as food crops being cleared to make way for cocoa cultivation, with forest then being cleared to replace the lost food production (indirect land use change). Careful monitoring of impacts will be required.

As with the cross-sectoral human rights and environmental due diligence legislation, this legislation will only be fully effective if it is accompanied by the strengthening of the enabling environment required to make progress on sustainable cocoa farming within cocoa-producing countries. This underlines yet again the need for the kind of partnership agreements between the EU and cocoa-producing countries we discuss in our [accompanying paper](#).

3.2 Scope

As we recommend for the cross-sectoral human rights and environmental due diligence legislation, this market-related due diligence should apply to all companies placing cocoa, cocoa products and chocolate (among other commodities) on the EU market, including those that import, process and sell cocoa, cocoa products and chocolate. The legislation should apply to companies regardless of where they are based or registered or their legal form or size, including state-owned enterprises.

We recognise that smaller companies may possess simpler supply chains. We do not believe, however, that these companies should be exempted from the due diligence obligation. In a very fragmented end market, the inclusion of smaller players is critical to establish a level playing field and to ensure that all companies do their part and work closer together to improve the sustainability of the cocoa sector.

3.3 Enforcement

Also as we recommend for the cross-sectoral human rights and environmental due diligence legislation, this market-related due diligence legislation will need to be enforced, and its implementation monitored, by member-state government agencies with appropriate mandates, guidance mechanisms, resources and expertise to evaluate the design, adequacy and implementation of company due diligence systems, based on company and independent audit reports, investigations by the enforcement agencies and other sources of information. Penalties specified in the legislation should be proportionate and dissuasive, in order to help ensure that the due diligence obligations drive real change in the sector. The legislation should also provide for access to remedy for stakeholders negatively affected by violations of the regulation, including via judicial and non-judicial means.

The legislation should include the same reporting obligations that we discuss above in Section 2.4. It should also provide for a 'substantiated concerns' route through which concerns over infringements of the legislation can be raised directly with member-state enforcement agencies.

The EU should provide guidance and examples of best practice in enforcement of the legislation, and ensure, to the greatest extent possible, that levels of enforcement do not vary excessively across member states. 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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