

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



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1 A strategy for sustainable cocoa production

Cocoa is an important source of income and employment for rural populations, particularly for small-scale farmers who grow most of the world's cocoa. Nevertheless, most cocoa growers live in poverty, and the cocoa poverty trap has led to the widespread use of child labour and other human rights problems. In addition, cocoa is a major driver of deforestation, particularly in Côte d'Ivoire and Ghana, which between them account for about two-thirds of global production. In both countries, none of these issues can be addressed without strong government support in establishing and enforcing a supportive legal environment.

This situation remains despite some progress with a multitude of initiatives over past decades – including certification schemes and voluntary corporate sourcing initiatives and the Harkin-Engel Protocol aiming to end child labour. In general, these initiatives have failed adequately to involve all actors in the supply chain, including in particular producer and consumer-country governments, and the full array of companies, many of them SMEs, in consumer countries.

As by far the largest importer and consumer of cocoa in the world – the majority of it from West Africa – the EU has a greater ability than any other consumer market to drive change in the cocoa sector, and a clear duty and opportunity to take responsibility and demonstrate leadership, including through legislative action to address these issues. Our ultimate aim is a fully sustainable cocoa supply chain that delivers living incomes to cocoa farmers and reduces and eventually eliminates human rights abuses, including child labour, and environmental degradation.

In achieving these aims we stress the importance of bilateral dialogue between the EU and partner governments in West Africa to explore the mutual benefits of addressing human rights and environmental practices in the cocoa supply chain. We believe that the EU should pursue partnership with the governments of cocoa-producing countries, industry and civil society in order to agree multi-stakeholder frameworks for action, with clear recognition of the responsibilities of different actors in the creation of a sustainable cocoa supply chain.

In particular, as essential parts of the overall strategy, the EU should:

- Aim to negotiate bilateral agreements with cocoa origin governments to create the frameworks necessary to achieve this aim, and provide financial support to those governments to do so.
- Establish a regulatory and policy framework within the EU to encourage sustainable cocoa production, support consumer trust and help sustain market demand for cocoa from West Africa over the long term.

This is consistent with the views of EU citizens, as indicated in an EU-wide opinion poll in May 2019, which found that 87 per cent agreed that 'new laws are needed to ensure the products sold in European Union countries do not contribute to global deforestation'.

2 Encouraging sustainable cocoa production: the case for EU due diligence regulation

An essential component of the regulatory and policy framework designed to secure the long-term sustainability of the cocoa supply chain is an EU regulation placing a due diligence obligation on all companies that place cocoa or cocoa products on the EU market.

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 remove unsustainable practices; and to hold all actors accountable for any failure to apply due diligence in their supply chain, consistent with international standards, to identify and address adverse impacts on human rights and the environment. It would benefit producer countries by reinforcing their efforts to improve governance and establish a sustainable cocoa sector for the long term.

An EU-wide regulation would have benefits for companies in the cocoa supply chain, providing a common framework through which they can show how they are seeking to identify and mitigate human rights and environmental risks. It would eliminate free riders and close loopholes, ensuring a level playing field for all companies. In addition, predictability and consistency with a single EU jurisdictional approach – rather than with many different systems at member-state level – would significantly increase legal certainty for companies and enhance the possibility to act at scale and in a consistent manner among different actors of the supply chain.

Due diligence approaches are increasingly a feature of legislation within the EU and its member states. Examples include the commodity-specific approach of the EU Timber Regulation ((EU)995/2010) and Conflict Minerals Regulation ((EU)2017/821) and the broader corporate due diligence obligation of the French *Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Due diligence of corporations and main contractors) law of 2017 and the Dutch Child Labour Due Diligence Act of 2019. We outline below the elements that we believe would need to be included – whatever the form of the legislation – in order to ensure effective due diligence in the cocoa supply chain.

3 The due diligence obligation

The due diligence obligation should be rooted in the UN Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011. The Guiding Principles are based on the three pillars of the 'Protect, Respect and Remedy' Framework:

1. States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms.
2. The role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights.
3. The need for rights and obligations to be matched to appropriate and effective remedies when breached.

As well as human rights, the regulation should deal with the other negative characteristics associated with cocoa production, including deforestation and weaknesses in governance and law enforcement. We therefore propose that the due diligence obligation should aim to ensure:

1. 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; rights of ownership and access to land; and environmental protection, including in particular the protection of forests. Where the standards in international law exceed those in national laws, companies will seek to meet the spirit of the international standard.
2. Respect for internationally recognized human rights, including the ILO core conventions, and respect for land rights consistent with the principles in the Voluntary Guidelines on the Responsible Governance of Tenure.
3. Respect for high standards of environmental sustainability, particularly relating to the protection of forests, such as a prohibition on deforestation, the protection of high conservation value and high carbon stock forests, and requirements for new planting.

The due diligence expectations should be based on the UN Guiding Principles on Business and Human Rights. Other potential sources such as the OECD-FAO Guidance for Responsible Agricultural Supply Chains and the national frameworks for action agreed under the Cocoa and Forests Initiative could provide additional guidance.

4 Implementing the due diligence obligation

The OECD's Due Diligence Guidance for Responsible Business Conduct has described 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 regulation, and accompanying guidance, should set out how these requirements should be applied to the cocoa sector. A helpful model is provided by the Child Labour Guidance Tool created jointly by the ILO and International Organisation of Employers (IOE), which explains how companies can fulfil the due diligence obligations of the UN Guiding Principles with respect to child labour.

If the legislation features a non-sector-specific approach to corporate due diligence (like the French *Devoir de vigilance* law), specific guidance for cocoa supply chains should be developed to accompany it.

In accordance with the elements listed above, the regulation should require companies to provide for or cooperate with remediation mechanisms when appropriate, based on their connection to the impact; as described in the OECD Guidelines 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 mechanisms. In practice, some companies in the cocoa sector already possess elements of such systems, particularly where child labour is detected.

The application of the due diligence system 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 them simply to abandon or avoid high-risk sources of cocoa. The absence or lack of a legally compliant company due diligence system should carry legal consequences which should be proportionate and dissuasive; this will help ensure that the due diligence system drives real change in the sector.

The regulation should also include a requirement on companies to subject their due diligence systems to independent third-party audit, through mechanisms that respect the audit principles of independence, competence and accountability, set out in the OECD Due Diligence Guidance, thereby encouraging them to develop adequate systems of due diligence. (Such an obligation is included in the EU Conflict Minerals Regulation.)

5 Reporting obligation

In addition to the core due diligence obligation outlined above, 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, and information on implementation and outcomes. Various models for such reporting already exist; for example, a reporting obligation is included in the EU Conflict Minerals Regulation and the French *Devoir de vigilance* law.

6 Scope of the regulation

The regulation should apply to all companies placing cocoa and cocoa products on the EU market, including those that import, process and sell cocoa and cocoa products. The regulation should apply to companies regardless of where they are based or registered or their legal form or size.

While all companies should play their part in establishing due diligence throughout the supply chain, we recognise that smaller companies are likely to possess much simpler supply chains and are less likely to be the initial importers of cocoa beans to the EU market. We do not believe, however, that they should be exempted from the due diligence obligation. In a very fragmented end market, the inclusion of smaller players is key to both large-scale impact and consumer trust.

In order to fulfil their due diligence obligation, companies placing cocoa and cocoa products on the EU market would benefit from information about the conditions and location of production throughout the supply chain, down to the cocoa farm level. In practice, therefore, this is likely to require the introduction of national traceability systems for cocoa beans in producer countries. We note that the producer-country signatories to the Cocoa and Forests Initiative have already committed themselves to introducing such national traceability systems. The EU should help to support the development of such national traceability systems, as part of the framework agreements discussed below.

If a commodity-specific approach is adopted for legislation (as in the EU Timber and Conflict Minerals Regulations), we recognise the drawbacks in legislating commodity by commodity. It should be possible to legislate instead for a list of named commodities, with implementation phased by commodity, perhaps starting with cocoa.

7 Partnerships with producer governments for sustainable cocoa

We recognise that, in isolation, a due diligence system will only be effective if it is coupled with a wider EU strategy that creates the enabling environment required to make progress on sustainable cocoa farming within cocoa-producing countries.

Therefore, as a prerequisite for the effectiveness of any due diligence system and legislation in creating impact on the ground in cocoa-producing countries, the EU will need to negotiate framework agreements with the governments of relevant cocoa-producing countries, including time-bound deliverables where appropriate, focusing on:

- Land and forest governance: including defining and clarifying the land and tree tenure rights of cocoa farmers, consistent with international good practice, and increasing participation in, and the transparency of, decisions over land use, cocoa production and forest protection.
- Law enforcement: improving the capacity of enforcement agencies and the judicial system to enforce existing laws.
- Traceability: introducing a mandatory national traceability system for cocoa beans from all origins.

- **Child labour:** strengthening the ability of government to protect children and improve their access to good-quality education, health care, clean water and better nutrition.
- **Forced labour and trafficking:** strengthening the ability of government to protect children and adults, including vulnerable migrant populations.
- **Deforestation:** supporting the implementation of the Cocoa and Forests Initiative commitments in Côte d'Ivoire and Ghana (and in other cocoa-producing countries where relevant), in order to prevent over-production, including ending the growing of cocoa in protected forest areas, ensuring legal protection for trees and forests outside protected areas and encouraging the uptake of agroforestry techniques.
- **Land use planning and inter-ministerial coordination:** encouraging the development of national land-use planning systems to clarify which areas are for cocoa production and which for forest protection, and improving coordination between the agriculture and forest ministries to ensure a set of coherent aims.
- **Agricultural policy:** encouraging the development of long-term national cocoa sector policies that include objectives beyond simply production levels, supporting cocoa farmers to improve productivity on existing farm land and diversify their farms, and offering farmers opportunities other than cocoa production.
- **Monitoring:** systems for tracking the impacts of the steps taken on those most vulnerable, especially the smallholder farmers who supply most of the world's cocoa.

The agreements should also cover the provision of technical and capacity-building assistance from the EU in implementing these measures.

8 Timeline

The need for action is urgent. We welcome the publication, in July 2019, of the Communication on Stepping up EU Action to Protect and Restore the World's Forests, and in particular its commitment to 'assess additional demand-side regulatory and non-regulatory measures to ensure a level playing field and a common understanding of deforestation-free supply chains, in order to increase supply chain transparency and minimise the risk of deforestation and forest degradation associated with commodity imports in the EU'.

In line with this commitment, we call on the EU to begin a consultative process around our proposals for an EU-wide due diligence regulation within its first hundred days, aiming for a draft regulation to be published no later than the end of 2020.

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