

**European Coffee Federation Position Paper on the European Commission's
Proposal for a Directive on Corporate Sustainability Due Diligence
(May 2022)**

The European Coffee Federation (ECF) supports the European Commission's proposal for a Directive on Corporate Sustainability Due Diligence for companies to identify and mitigate risks linked to human rights or environmental adverse impacts in their own operations and supply chains.

ECF and its Members are committed to minimising and preventing adverse impacts on human rights and the environment in their own operations and value chains, while preserving their competitiveness on the EU single market. We consider the proposal for an EU Directive as an important step toward the development and promotion of more socially and environmentally sustainable and responsible value chains, sustainable sourcing approaches and the prevention of loss of biodiversity and natural resources.

While we expect the European Parliament and the Council to provide further clarity on certain aspects of the EU Directive, ECF and its Members stand ready to offer our sector-specific knowledge and experience to contribute to the achievement of the EU Directive's objectives and to ensure it is made operational in practice.

ECF and its Members welcome the European Commission's proposal for an EU Directive on Corporate Sustainability Due Diligence. In moving forward with the design of the EU Directive proposal, we call on policymakers to take into account the following priorities for the European coffee sector:

1. Ensure alignment with the existing EU provisions and the international standards
2. Mandate a proportionate and risk-based due diligence approach
3. Re-frame the scope of due diligence to the value chain, while clarifying appropriate action expected by companies
4. Set an appropriate role for contractual assurances and audit/verification processes, while promoting other instruments
5. Ensure a harmonised approach on sanctions and a proportionate civil liability regime
6. Strengthen stakeholder engagement throughout the due diligence process
7. Strengthen bilateral engagement and partnerships between the EU and third Countries
8. Assure an on-time publication of guidelines and model contract clauses
9. Clarify certain key concepts



1. Ensure Alignment with the Existing EU Provisions and the International Standards

Aligning with existing EU policies and international standards should help to avoid a divergence of due diligence requirements across EU Member States that would otherwise undermine legal certainty and the creation of a level playing field for companies. Consistency with the existing policy provisions should be ensured to avoid any duplication of due diligence procedures, especially in relation to the Corporate Sustainability Reporting Directive (CSRD) and the European Commission Proposal for a Regulation to Minimise the Risk of Deforestation and Forest Degradation Associated with Products Placed on the EU Market. Moreover, the EU supply chain due diligence obligations and scope of the due diligence duty should be defined in line with recognised international standards, and in alignment with the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises, and the OECD Guidance on Responsible Business Conduct.

2. Mandate a Proportionate and Risk-Based Due Diligence Approach

ECF and its Members believe that a clear methodology and criteria should be defined to assess and recognise supply chain due diligence processes. These should be flexible enough to be tailored to a company's circumstances, promoting the inclusion of due diligence processes in their risk-management system, and guaranteeing the adequacy of that system. Observance of due diligence requirements should be expected from every company, but those requirements should be proportionate to the capabilities and the risk exposure of a company's supply chain. It is therefore essential – in particular for SMEs – that an EU approach provides tailored financial and practical support to create the right incentives for company commitments. This would also contribute to minimising the risk of disengagement from vulnerable suppliers who, due to their limited negotiation power, would otherwise bear disproportionate obligations and costs, facing severe implications on their competitiveness.

Therefore, a risk-based due diligence approach should i) encourage companies operating in high-risk sectors to work jointly on actions to decrease the level of risk and ii) ensure that companies are not dissuaded (e.g. by disproportionate penalties, risk of litigation) from engaging in high-risk areas where it is actually most crucial to address root causes of human rights and/or environmental impacts.

3. Re-Frame the Scope of Due Diligence to the Value Chain, while Clarifying Appropriate Action Expected by Companies

A re-framing of the EU Directive's scope of due diligence is needed to ensure that companies can appropriately account for impacts in more remote parts of the value chain, where they are often more severe, and undertake collaborative action to address their root causes. The scope of due diligence should cover a company's own operations, subsidiaries, as well as all its business relationships throughout the value chain, allowing companies to prioritise their efforts based on the severity of the actual or potential harm to people and the environment, rather than on the nature of the business relationship.

In line with UNGP19, appropriate action should vary according to whether the company causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship. To be able to identify the latter case, a risk-based mechanism that helps to clearly identify the degree of an obligation to act should be introduced. Accordingly, *substantiated knowledge* of a high-level risk of adverse impacts in value chains should increase the degree of an obligation to act (e.g. like the concept of 'substantiated knowledge' in the German Supply Chain Act¹). In line with this, the extent of a company's leverage in addressing the adverse impact must also be considered.

4. Set an Appropriate Role for Contractual Assurances and Audit/Verification Processes, while Promoting Other Instruments

Requiring mainly contract assurances and audit/verification processes as due diligence obligations curtails the freedom of companies to choose from a greater variety of tools to comply with their obligations and potentially increases the risk that companies simply shift their obligations upstream. While this should be avoided, the wording of the Directive should be adapted and require companies to use these tools to provide leverage with business partners to deliver on their attributable human rights and environmental commitments throughout the supply chain, and drive continuous improvement within their respective spheres of influence.

In this context, companies should be encouraged to supplement contractual assurances/verification processes with other risk-based due diligence instruments, such as trainings, codes of ethics and conduct, organisational models ensuring responsible sourcing and procurement practices, verifiable control and monitoring systems, human rights and environmental strategies, social audits and certification schemes. The recognition of other tools should consequently also be reflected in clauses currently linked to contractual assurances, such as the Civil Liability clause.

¹ <https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html>



5. Ensure a Harmonised Approach on Sanctions and a Proportionate Civil Liability Regime

We encourage harmonisation of sanctions and misconduct provisions related to due diligence for the EU Member States to avoid any potential fragmentation that could create loopholes for companies, thus incentivising them to relocate where the regulatory framework appears more convenient. A gradual verification or audit approach would also reduce the potential risk that shell companies would be established as SME traders to evade the due diligence requirements or diverge to other markets.

With regard to civil liability, as it stands in the Directive, the scope of the due diligence duty appears the same as the one for civil liability. The concept of civil liability should be limited to 'actual' adverse impacts and linked to the condition that a company falling under the scope has evidently caused these actual adverse impacts and failed to adopt appropriate measures (considered as own and directly attributable misconduct). Liability due to a third party's conduct should be excluded, as third parties are independent from the company and should not be included in the sphere of a company's liability. Framing the civil liability regime in this way will ensure that companies are not held liable for actions of third parties, which would expose companies to high risks of litigation and discourage them from disclosing the risks in their value chain, and thus to take action to mitigate and address them. In light of this reasoning, only complaints submitted by persons who are *demonstrably* affected or have *reasonable grounds* for believing they are affected should be deemed admissible.

6. Strengthen Stakeholder Engagement Throughout the Due Diligence Process

The proposed Directive should attribute even more focus on engagement with affected stakeholders. The EU approach should take into consideration the interests of stakeholders, assess the coherence of existing commitments, initiatives, and best practices, as well as find the right balance to promote companies' efforts and engagement towards responsible business conduct. It is essential to recognise that all actors along the coffee supply chain are responsible for contributing to its sustainability. Meaningful engagement with affected stakeholders and legitimate value chain representatives (including producing countries, civil society representatives, international trade and industry organisations), with a strong focus on indigenous peoples and local communities as well as smallholders should occur throughout the due diligence process.



7. Strengthen Bilateral Engagement and Partnerships Between the EU and Third Countries

Mandatory due diligence legislation at the EU level must be complemented by a “smart mix” of measures, including strengthened external engagement by the European Commission with third Countries, aiming to ensure that relevant national laws and policies are effectively implemented and enforced, with a view to enable the state to fully realise its ‘duty to protect’ as per the UNGPs. Partnerships could be considered as complementary tools for the implementation of the Directive and set an enabling environment for sustainable production of agricultural raw materials, and should therefore be implemented to address the root causes of adverse impacts on human rights and the environment. These measures should then be accompanied by training programmes, risk analysis and multistakeholder initiatives.

The production of coffee as an agricultural product happens predominantly in the informal sector, where structural and socioeconomic problems are usually one of the main causes of human rights violations and breaches of environmental obligations. The proposal at present is not sufficiently considering the lack of resources and the socio-economic and structural contexts in which certain stakeholders like smallholder coffee farmers operate. A comprehensive assessment conducted in continuous consultation with producing countries would enable a distinction between company-induced impacts and socio-economic causes. Thereby, risks of misinterpreting this with non-compliance with the due diligence requirements, especially by stakeholders with less resources, can be reduced.

8. Assure an On-Time Publication of Guidelines and Model Contract Clauses

Specific guidelines and model contractual clauses should be published on time and specific guidelines should especially specify i) how to conduct environmental due diligence, ii) complaints procedure (Art.9), iii) data protection and data processing in cases of non-compliance to ensure coherence with local laws. Companies need to know what evidence they must present to demonstrate that they exercised due care and what is considered *legitimate concern* regarding adverse human rights impacts environmental impacts. The model contractual clauses (Art. 12), guidelines (Art. 13) and accompanying measures (Art. 14) should be issued at least one year prior to the Directive’s entry into force to give Member States as well as companies sufficient time to adapt. In addition, a framework for corrective action (Art 8.) should be provided, with identification of the corresponding stakeholders and the entity of damages or financial compensation.

9. Clarify Key Concepts

ECF and its Members call for clarification of certain terms mentioned in the proposed Directive in parallel with the need for specific guidelines to follow in the implementation of due diligence measures in their value chains. The current framing and certain definitions (or lack of them) in the proposed EU Directive leave too much room for interpretation which might lead to unintended consequences. Specifically, clarification is needed on the following concepts:

- **Established business relationship** (Art. 3) and **value chain** (Art. 3 (g)). These concepts are relevant to determine which suppliers and business partners are in the scope of a companies' due diligence obligations. To measure their impact throughout their entire value chain, companies will need more clarity on the extent of their responsibility and the concept of *established business relationships* that seems to underpin the depth of the due diligence obligation, defining the degree of influence a company can exert. Such a concept should be defined taking into consideration not only the length, but also the consistency and relevance of the relationship. Covering indirect business relationships as 'established relationships' to which the duty of due diligence is applied is problematic as this direct link is lacking. Thus, indirect business relationships should not be covered by the established business relationship concept.
- **Appropriate measures** (Art. 6,7,8,22) and **appropriate resources** (Art. 6) are not defined per se in the definitions part of the Directive. This should be provided along with an express mentioning of a direct evident link of the company in terms of influence and direct contribution to or causing of the actual adverse impact. For example, the specific business relationship and the company's directly attributable influence. Such a link should be determined on a case-by-case basis, acknowledging that appropriate measures might not always work as a guarantee to prevent adverse impacts from occurring.
- **Public support** (Art. 24). In the context of global crises such as the current COVID-19 pandemic or the war in Ukraine, achieving the due diligence goals might temporarily not be feasible for companies already under distress. Precise mechanisms of public support such as short time working compensations or subsidies on energy supplies should be granted to all companies regardless of their compliance with the due diligence requirements due to force majeure.
- **Director's duty of care** (Art. 25). This provision lacks specification: It is in directors' interest to have clarity and legal certainty regarding their duties of care. While the principle-based approach of Art. 25 (Directors' duty of care) and Art. 26 (Setting up and overseeing due diligence) on directors' duty of care is useful, clearer indications are needed. Providing clarification for the tools and standards that will be put into place to support companies assessing their

sustainability decisions is needed as Art. 25 may still prove difficult to put in practice. References to, and consistency with, the EU Taxonomy and the CSRD, need to be more precise.

- **International stock exchange.** For the majority of coffee companies, international stock exchanges represent a major part of coffee buying. Clarification should be provided regarding the expectations towards handling of raw materials from stock exchange markets where traceability is technically impossible.
- **Turnover-criterion for third-country companies.** Such criterion alone is not sufficiently calibrated to establish a degree of comparability between EU and non-EU companies. The risk is to lead to an extension of the scope to third-country SMEs, since a third-country SME that generates a turnover in the EU of more than EUR 150 million or more than EUR 40 million in one of the risk sectors will be covered. There is the need for a second criterion or threshold that ensures a certain degree of comparability in terms of resources and organisational capacity, such as number of employees.
- **Certification schemes and verification systems.** The role of certification or verification schemes is not yet well defined. An equivalence mechanism and clear criteria should be established to facilitate an understanding under what circumstances multi-stakeholder initiatives, private sector certification and verification schemes will be accepted.

The European Coffee Federation (ECF) is the representative organisation for the European coffee trade and industry, speaking for over 700 companies ranging from SMEs to internationally operating companies, representing approximately 35% of the world coffee trade volume. ECF offers its members a forum for exchange, identifying industry-wide issues of common interest in the areas of food safety, sustainability and international trade.