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## CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE (CSDDD)

### POSITION PAPER AND COMMENTS

#### COCERAL, FEDIOL, FEFAC

**COCERAL, FEDIOL, and FEFAC** support the Directive's objective to combat adverse environmental and human rights impacts of business operations and welcome a proposal for mandatory due diligence across all sectors. To ensure that companies can contribute to sustainable development, **we call on the European Parliament and Council to ground the Proposal more strongly on existing international conventions, United Nations Guiding Principles on Business and Human Rights, and on OECD due diligence guidelines**, including guidance for Responsible Agricultural Supply Chains.

Companies' due diligence process should be based on a risk assessment which covers their direct and indirect upstream supply chain, and which prioritises the most salient and severe risks, while the **due diligence responsibility should be limited to company leverage applied to tier 1 suppliers**. Such due diligence should cover adverse impacts that companies 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. Whether company action to address such impacts is considered appropriate should vary depending on whether the company caused or contributed to the impact or whether the impact is directly linked to its operations. Furthermore, the extent of a company's leverage in addressing the adverse impact should also be considered.

**The Directive should make a distinction between a company's own actions (obligation of results) and the actions of others (obligation of means)**. As a general principle, civil liability should be based on whether a company has directly caused or contributed to the adverse impact or is directly associated with it. **Civil liability should therefore be limited to own operations and not extend to the actions of a legally distinct third party**. Beyond their own operations, companies should take appropriate measures to seek to prevent, and/or bring to an end, adverse impacts through their leverage applied to tier 1 suppliers.

Furthermore, it will be **crucial for the Commission to issue sector specific guidelines** for further clarity on which measures are appropriate and fit to the special circumstances and challenges in each sector.

**A level playing field should also be ensured through harmonised implementation** of the Directive across the EU. Any loopholes in this regard will undermine the effectiveness of the Directive in tackling adverse impacts.

Our comments below on the proposed provisions of the text aim to ensure that the Directive provides legal security and clarity of interpretation, ensures that efforts have a real impact in delinking supply chains from environmental and human rights adverse impacts, and builds on good practice and experience embodied in established UN and OECD guidelines.

## COCERAL, FEDIOL, FEAC COMMENTS ON THE PROPOSED CSDDD

Topic	Position	Justification
<b>Country partnerships</b>	Introduce a provision on country partnerships in an article to tackle the root causes of environmental and human rights damage/abuses.	Partnerships with producing countries are necessary to incentivise change, as violations may result from poor governance and low enforcement of rights and policies. Systemic improvements require the involvement of all stakeholders, including local community representatives, farmers, industry, and civil society.
<b>Definition of 'business relationship'</b>	The EU should align with the definition already provided by the United Nations Guiding Principles on Business and Human Rights (UNGPs) and OECD Guidelines for Multinational Enterprises. Namely, 'business relationship' should refer to relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services.	Aligning the EU Directive with the key international standards on sustainability due diligence adopted by the UN <sup>1</sup> , including on the definitions, helps ensure that companies contribute to sustainable development and allows for policy coherence. Lack of alignment may actually hinder efforts to prevent and address adverse impacts.
<b>Definition of 'established business relationship'</b>	The definition of 'established business relationship' should be defined more clearly and limited to direct contractual suppliers only (upstream, tier 1) and not throughout the entire value chain (upstream and downstream).	<p>This new and untested definition is too broad and operationally difficult to apply.</p> <p>The focus of the due diligence responsibility should instead be on prioritisation, where the most severe risks are addressed, and on company leverage. Companies have a highest impact through engagement with tier 1.</p> <p>There should be a distinction between 1) own acts of a company (cause and contribute to) where companies have an obligation to prevent, resulting in liability (obligation of result) and 2) acts of others (being directly linked to), where companies seek to prevent, and/or bring to an end, adverse impacts (obligation of means), resulting in responsibility to do what is reasonably possible, taking circumstances into account.</p>

<sup>1</sup> **United Nations Guiding Principles on Business and Human Rights:** *“The responsibility to respect human rights requires that business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.”*

<p><b>Definition of 'Value chain'</b></p>	<p>Replace 'value chain' with 'supply chain'</p>	<p>Value chains relate to the production of goods as well as the whole life cycle.</p> <p>Companies implementing due diligence are basing themselves on the OECD guidelines which extend voluntary commitments to their supply chain, while no to very limited experience exists regarding due diligence in the value chain. As an initial step the Directive should limit itself to the supply chain.</p> <p>Align with 'supply chain' as regulated under the German Act.</p>
<p><b>Definition 'appropriate measure'</b></p>	<p>The definition should be based on OECD Guidelines, incorporate essential sentences in the CSDDD recitals, and distinguish between own acts and act of others.</p> <p>The essential distinction between own acts of the company and acts of others should be incorporated, taking the language from the OECD guidelines.</p> <p>Further clarification is needed. Does it mean we can follow a risk-based approach for articles 6, 7, and 8 (i.e. prioritise the most salient risks)?</p> <p>Sector/agriculture specific guidelines should further clarify what counts as an 'appropriate measure'.</p>	<p>The definition is too wide and too vague. There should be a clear, systematic and complete set of criteria to define proportionality and prioritisation.</p> <p>When assessing risk, it is important for companies to focus on and address the salient risks (see UN/OECD guidelines), i.e., the most severe adverse impacts.</p> <p>The ability to implement the full due diligence process for millions of farmers in remote regions for companies in the scope is limited. Hence, sector specific guidelines should set criteria that take such specificities into account when determining when a measure is sufficiently appropriate.</p>
<p><b>Due Diligence Responsibility</b></p>	<p>UNGPs say "seek to prevent or mitigate..." But the EU text omits this in many places and only says "prevent or mitigate." Text should be edited in the many places this happens, so it is coherent with the UNGPs.</p>	<p>This is well established in the UN Guiding Principles (UNGP) on Business and Human Rights – the globally recognised framework. EU should ensure policy coherence with well-established global governance frameworks, like UNGPs.</p> <p>The downstream chain is unlimited in scope and time and would make the due diligence obligation unmanageable, adding substantial additional</p>

	Companies should not be held responsible for their customers' actions, and hence responsibility and liability should not extend to business relationships downstream.	burdens for business. This is an enormous extension compared to the existing practice with the OECD Guidelines as well as the respective German and French laws.
<b>Risk-based approach</b>	Companies' due diligence strategy and implementation should be risk-based and allow for prioritisation. Where it is not feasible to address all identified adverse impacts at the same time to the full extent, companies should be allowed to prioritise adverse human rights and environmental impacts.	<p>When assessing risk, prioritisation allows companies to focus on and address the salient risks (see UN/OECD guidelines), i.e., the most severe adverse impacts.</p> <p>This links back to the definition of appropriate measures. It will determine both the scope of the due diligence process to identify adverse impacts as well as the required action once adverse impacts have been detected.</p> <p>Graduation of appropriate measures depending on whether an adverse impact is due to the own acts of the company or the acts of others is essential</p>
<b>Civil liability</b>	<p>The civil liability provisions should be well defined and allow for secure and clear interpretation.</p> <p>While companies should monitor their entire upstream supply chain with a focus on salient risks as part of their due diligence responsibility, civil liability should not extend beyond tier 1 suppliers. Hence, there should be a distinction between responsibility and liability.</p> <p>Any text on liability should align with the UNGPs.</p>	<p>Clarity and security of interpretation would prevent the creation of a business environment based on "risk avoidance", which usually leads to disengagement instead of addressing risks.</p> <p>Furthermore, civil liability should be limited to tier 1, as the leverage over suppliers decreases with every tier.</p>
<b>SME inclusion in the scope</b>	SMEs should be included in the scope of the Directive, combined with guidance based on the UN Global Compact.	As noted by the <u>World Bank</u> , SMEs make up over 90% of the world's businesses, and over 50% of employment. Leaving SMEs outside the scope would render the Directive ineffective because the majority of the world's businesses would be exempted. The UNGPs also make clear that the Pillar 2 corporate responsibility to respect applies to all companies,

		<p>“regardless of their size, sector, location, ownership and structure.” [UNGPs “General Principles”].</p> <p>UN/OECD allows for a risk-based approach and does not ‘recognise’ the concept of ‘established business relationship’. The removal of this concept will allow the CSDDD to be more in line with the UN/OECD risk-based approach, which would then cover any company of any size (i.e. there is then no need to limit the scope with thresholds).</p> <p>Excluding SMEs also limits the Directive’s potential to create a truly level playing field at EU level.</p> <p>SMEs are already affected by the Directive as they are the business partners of large companies in the scope. By not including SMEs in the scope, they may face a wider range of administrative formats for showing compliance with the requirements of their larger business partners instead of one unique set and format of requirements as established by the Directive. Including SMEs in the scope would avoid this multiplication of the administrative burden.</p>
<b>Company support to SMEs</b>	Companies should not be obliged to cover SME cost for verifying compliance with the Directive through independent third-party verification.	In current certification schemes, each party is responsible for his own verification costs. Obliging larger companies to cover the verification costs of SMEs will likely discourage large companies from entering in or continuing business relationships with SMEs.
<b>Reassessment of business relationships</b>	Reassessment of business relationships should take place every 24 months rather than 12 months or when there is a significant change rather than periodically.	Reassessments of business relationships should be proportionate to the necessity of doing so. More frequent reassessments would lead to unnecessary administrative burden.
<b>Guidance about voluntary model contract clauses</b>	Guidance on voluntary model contract clauses should be adopted by the Commission, in consultation with Member States and stakeholders.	Voluntary model contract clauses are necessary to help companies comply with their due diligence obligations, especially in cases of limited leverage. Guidance would help guarantee a transparent and certain legal environment for all companies which are party to such contract clauses.
<b>Obligation to disclose business partners</b>	Member States must ensure that companies not be obliged to disclose their business partners that are complying with the obligations of the proposal.	<p>Disclosing business partners is sensitive commercial information. If the business partners are complying with the obligations of the proposal, there is no need to publicly identify them.</p> <p>Coherence with national data privacy laws, such as GDPR, should be sought.</p>

<b>Group level due diligence requirements</b>	Subsidiaries should be able to decide that parent fulfils obligations for them.	This avoids fragmentation of approaches within the group, helps identifying impacts across a group, and prevents a reoccurrence. Furthermore, it can increase negotiating leverage in the supply chain to obtain required changes.
<b>Guidelines for specific sectors</b>	We welcome the provision for the Commission to issue guidelines for specific sectors. Guidelines for agricultural commodity sourcing should take into account how to apply the full due diligence process for smallholder farmers scattered across the countryside in remote regions.	Supply chains of different sectors vary greatly in their functioning and specific challenges. To avoid a “one size fits all” approach, which could result in inappropriate guidance for certain sectors, we strongly urge for the Commission to adopt sector-specific guidelines. This will allow companies to address challenges in a targeted manner. Agriculture specific guidelines should take into account and find solutions to the specific challenge of applying due diligence to a high number of small farmers in remote regions in order to avoid their exclusion from supply chains into the EU.
<b>Guidelines for specific adverse impacts</b>	The Commission should issue guidelines for specific adverse impacts.	Guidelines for specific adverse impacts would contribute to a more secure and predictable legal environment for companies.
<b>Guidelines for assessing the fitness of industry schemes and multi-stakeholder initiatives</b>	The Commission should issue guidelines for assessing the fitness of industry schemes and multi-stakeholder initiatives.  The Directive should also recognise their role in supporting risk assessment and mitigation.	Industry schemes and multi-stakeholder initiatives are useful tools for supporting and showing compliance with the requirements of the directive, as they are developed by experts and through practical experience. To ensure that credible and reliable schemes are used as support, the Commission should provide guidelines on how to assess their fitness.
<b>Adverse impacts and Annexes</b>	Add interpretative guidance for companies, supervisors, and judges	The International conventions listed in the Annexes are primarily government to government commitments and not agreed with the private sector (B2B) in mind.  The Annex should be limited to those international conventions that can be directly applicable for companies with an extensive imprecation that provide reference for business, competent authorities and judges
<b>Level playing field for companies. Harmonization across EU.</b>	The EU network of supervisory authorities should supervise harmonisation at EU level	Contrary to what the draft suggests and in order to reach far-reaching EU wide harmonisation, the CSDDD should incorporate requirements for Member States that limit divergence and gold plating and/or key articles should be harmonised.

<p><b>Double recovery</b></p>	<p>The Directive should not allow for recoveries for a damage to be exacted multiple times.</p>	<p>Article 22 subsection 3 states that civil liability rules be “<i>without prejudice to the civil liability of its subsidiaries or of any direct and indirect business partners in the value chain</i>”. This implies that there can be multiple recoveries for the same damage, and that there can be liability against companies even when the suppliers in question have been held accountable in their own accord. This violates fundamental principles of fairness and contribution between defendants and further amplifies the tremendous uncertainty on liability for any party placing a product on the EU market.</p>
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We look forward to engaging with the European Parliament and Council of the EU to ensure a robust and legally clear Directive which will deliver on the ambition of preventing and mitigating human rights and environmental impacts in EU supply chains.