

# Solidaridad

**CHANGING GEAR; ACCELERATING INCLUSIVE AND SUSTAINABLE PRODUCTION THROUGH A NEW EUROPEAN REGULATORY FRAMEWORK.**

**POSITION PAPER - SOLIDARIDAD EUROPE**



*Soy farmers in Mozambique. © Solidaridad / Michel Boulogne*

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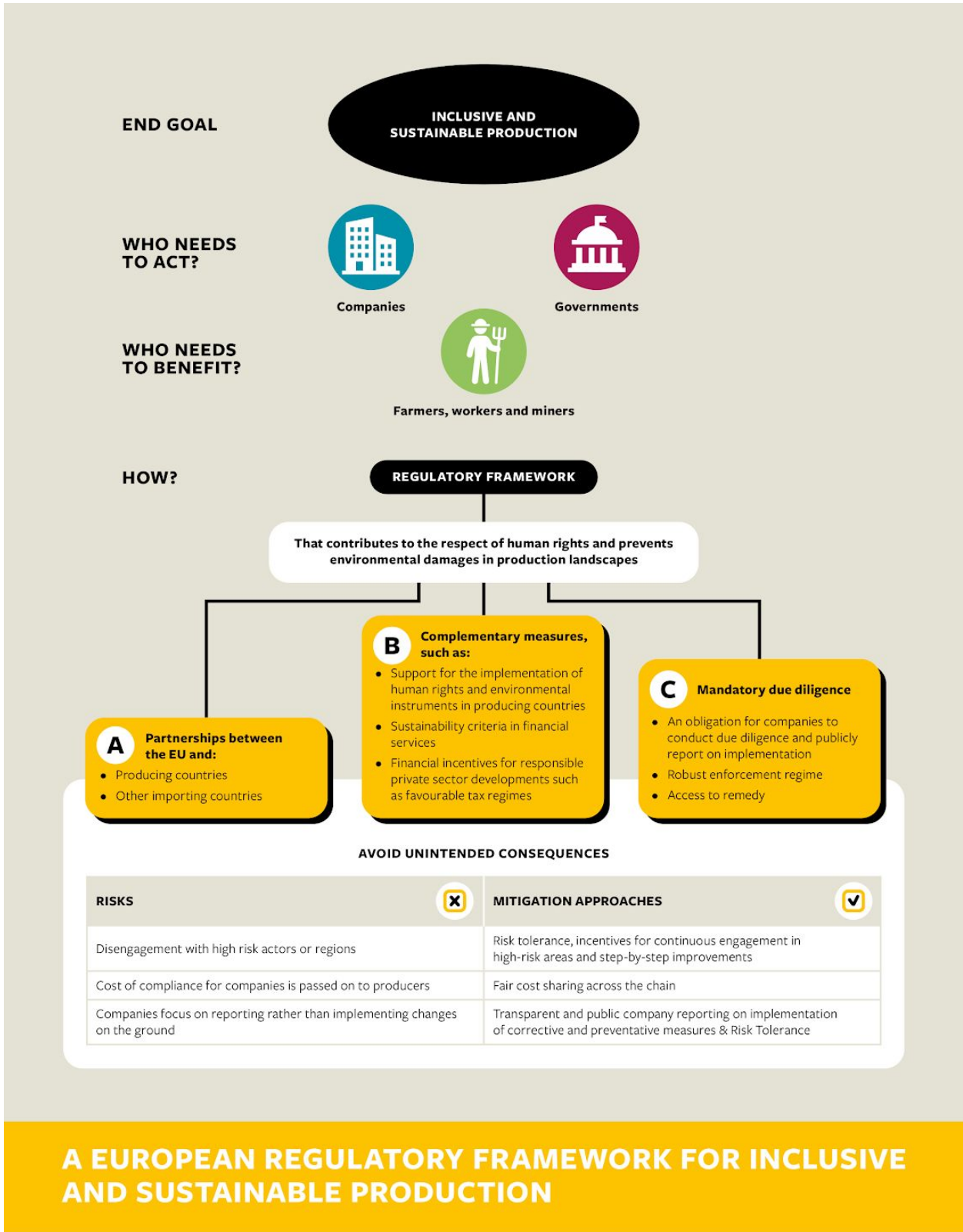
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**We can do more to support producers and sustainable production. This paper outlines Solidaridad's view on a new European regulatory framework that contributes to inclusive and sustainable production. Such a framework should include binding instruments at the European Union level and will result in;**

- **Intergovernmental partnerships driving sustainable production throughout all levels of the supply chain,**
- **Complementary measures to support producing countries in the Global South, and**
- **Mandatory due diligence obligations for business enterprises.**



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# 1. Conclusions and recommendations

## 1. We need a regulatory framework

According to Solidaridad, a new European regulatory framework to contribute to inclusive and sustainable production is needed. We are convinced that action should be taken in three key areas that can jointly form an effective and comprehensive regulatory framework:

- A. Partnerships with sustainability goals
- B. Complementary measures
- C. Mandatory due diligence

## 2. We must avoid unintended consequences

At the same time it is important that potential unintended consequences are considered and avoided, so that a regulatory framework does not deteriorate the already vulnerable situation of producers and other marginalized groups in the Global South. We have endeavoured to develop effective mitigation strategies for each of the risks identified. However, we encourage further analysis to identify other strong, innovative, and effective mitigation strategies and alternatives that avoid unintended negative consequences.

## 3. We must involve all partners

We recommend that continuous monitoring and risk assessments of potential impacts are part of the implementation strategy of a regulatory framework - paired with avenues for people, civil society organizations, smallholders, business enterprises, and governments to flag potential issues along the process. We believe that further critical analysis, design, and development of an EU regulatory framework should also provide multiple spaces for participation especially for those marginalized in the supply chains, as this will contribute to achieving positive and lasting changes on the ground.

## 4. We must keep the end goal in mind

Let us all remain very mindful of the ultimate goal throughout the entire process of developing partnerships, complementary measures and due diligence legislation in the EU. Any intervention should be guided by the urge to create a positive impact in producing landscapes in the Global South, resulting in improved livelihoods and respect for human rights for all farmers, miners, and workers and the environment.

## 2. Why a regulatory framework?

In the past, voluntary sustainability standards and initiatives played an important role in driving positive improvements in value chains, but these initiatives had limited potential to resolve some of the largest challenges we face, such as;

- child labour,
- forced labour,
- deforestation,
- land grabbing,
- pollution, etc.,

More importantly, voluntary standards did not always address root causes such as poverty and unequal distribution of power and value in supply chains. Moreover, voluntary sustainability standards and initiatives only covered a limited part of the production as not all business enterprises chose to use them.

An effective regulatory framework ensures a transition to a sustainable and inclusive economy that maximizes the benefits for all, but especially for producers and marginalized groups in supply chains in the Global South and improve their livelihoods. It is time to move the discussion beyond whether a regulatory framework is necessary onto how an effective framework should look.

In the future, we do not need to replace voluntary initiatives - but we must complement them with a mandatory approach. We must change gear and create a smart mix of tools.

### **Not just due diligence**

Governments, business enterprises, and civil society organizations are now discussing these mandatory approaches. In these discussions, many stakeholders are starting to embrace human rights and environmental due diligence legislation to address the structural issues in complex global supply chains. Yet, to date, there is limited research available suggesting that due diligence legislation alone enables business enterprises to properly identify risks in their supply chains, and address and prevent these risks in a thorough and meaningful way that results in a positive impact for producers<sup>1</sup> and/or the environment. Therefore, we need additional elements to ensure that any new human rights and environmental due diligence legislation will have a positive impact on producers and the environment.

Due diligence legislation for business enterprises is an important element of a regulatory framework, but definitely not the only element in the smart mix of measures that is needed to tackle the complex and systemic challenges in international supply chains. Governments in producing countries also play a crucial role and need to be supported through complementary measures and partnerships.

**A European Regulatory Framework**  
means any laws, regulations, directives, decisions and policies officially developed and approved by the EU.

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<sup>1</sup> In this position paper, the term producers encompasses farmers, workers and miners.

### 3. The 7 aims of a regulatory framework

Solidaridad has a global presence, and has been partnering with producers to build sustainable value chains for more than 50 years. In our view an effective and comprehensive regulatory framework should have these central aims:

1. **Act on different levels** including government, company and producer level **and include tailor-made strategies** at each level:
  - **Government level:** Contribute to the improvement of governance and law enforcement in producing and consuming countries. Protection of human rights and the environment should be institutionalised and embedded at all relevant governmental levels.
  - **Company level:** Respect for human rights and the environment should be institutionalised and embedded in the company operations and throughout their supply chains.
  - **Producer level:** Improve private and public policies to support producers in the Global South with better production practices, better inputs and services and a stronger market position in the value chain to improve their income and livelihoods.



*Soy farmers in Mozambique. © Solidaridad / Michel Boulogne*

2. **Encourage and support actors and governments in producing countries in the Global South** to address the root causes of the issues in value chains, including poverty and unequal distribution of value and power in supply chains. This is essential in order to ensure sustainable value chains with sufficient incomes (living wage, living income), inclusive participation of producers, and without deforestation or other environmentally harmful practices.
3. Support the development and implementation of national laws that foster sustainability, international human rights and environmental agreements **in producing countries of the Global South.**

4. **Raise the bar and the floor**; empower and incentivize frontrunner business enterprises that want to do better while also driving upwards those lagging behind on their sustainability performance.
5. Contribute to a **level playing field on a global scale** for business enterprises working in international value chains by avoiding a narrow focus on supply chains linked to Europe that centres around European consumption and/or European business enterprises exclusively.
6. Be based on **authoritative international guidelines and principles**, such as;
  - ❑ The United Nations (UN) Guiding Principles on Business and Human Rights (UNGPs),
  - ❑ The Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,
  - ❑ The UN Voluntary guidelines on the responsible governance of tenure of land, fisheries and forests (VGGT),
  - ❑ The OECD Due Diligence Guidance for Responsible Business Conduct, and
  - ❑ OECD sector-specific guidance instruments.
7. Contribute to achieving the **Sustainable Developments Goals** (SDGs). By ensuring a fair wage for workers and a fair price for the producers, a strong and effective regulatory framework will intrinsically contribute to;
  - ❑ Goal 1: No Poverty, and
  - ❑ Goal 12: Responsible Production and Consumption.

Moreover, other goals would also significantly benefit from the establishment of a comprehensive regulatory framework, specifically:

- ❑ Goal 2: Zero Hunger
- ❑ Goal 5: Gender equality
- ❑ Goal 6: Clean water and sanitation
- ❑ Goal 8: Decent Work and Economic Growth
- ❑ Goal 10: Reduced inequalities
- ❑ Goal 13: Climate Action
- ❑ Goal 15: Life on Land (ecosystems)
- ❑ Goal 16: Peace Justice and Strong Institutions



Left: Textiles workers in Ethiopia. © Solidaridad / © Annemarieke van den Broek

Right: MeruGreens factory, Kenya. © Solidaridad



## 4. Avoiding unintended consequences

Regulation to support sustainable trade is essential, but we must ensure it builds on the good work achieved so far. To avoid adverse repercussions, several potential unintended consequences should be taken into account in the design and implementation of any regulatory framework promoting inclusive and sustainable production.

The following table shows key potential risks<sup>2</sup> and provides thoughts on mitigation and prevention measures.

| RISK   | MITIGATION AND PREVENTION APPROACH  |
|--|---|
| <p><b>Regulation can lead to a <i>de facto</i> ban</b> for certain products in the EU market. This can reduce the potential for producers to generate livelihoods from certain products and commodities, as business enterprises may choose to <b>disengage with actors</b> or entire regions that are considered “high-risk,” leaving the producers behind.</p> | <p><b>Promote a trajectory of ongoing engagement</b> and continuous <b>step-by-step improvement</b>. Some soft law instruments already recognise the importance of this approach in practice. For example, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, encourages business enterprises to work with artisanal miners, without demanding perfection, but valuing good faith efforts to work and improve conditions on the ground.<sup>3</sup></p> <p><b>Promote an understanding outside the corporate world</b> of how complex the risks are that companies can encounter when conducting human rights and environmental due diligence. This includes the choice between disengagement and providing support for improvements (‘promote a certain degree of risk-tolerance’).</p> <p>Promote an understanding outside the corporate world of the <b>(potential) lack of leverage</b> of a business enterprise on production stages that are several steps removed from a direct relationship with the company, and of the <b>strategies for increasing (collective) leverage</b>.</p> |
| <p>Business enterprises may in practice become <b>less transparent</b>. Public reporting is an essential part of a business enterprise’s due diligence process. However, given the nature of the identified risks (environmental and human rights impacts ) some may fear</p>  | <p><b>Promote understanding</b> outside the corporate world of complexities and trade-offs. Focus on <b>continuous improvement</b> instead of the idea of risk-free supply chains.</p> <p>Provide for <b>mandatory disclosure</b> of a companies’ due diligence strategy that includes the risk mapping process and the methodology behind it.</p>  |

<sup>2</sup> See also research report, commissioned by the FTAO and Bread for the World, and produced by the University of Greenwich, on “[Making HRDD frameworks work for small farmers and workers in global supply chains](#)”

<sup>3</sup> Gillard Tyler (2015), Responsible gold also means supporting livelihoods of artisanal miners, [online] Available at <https://www.permanentrepresentations.nl/latest/news/2015/03/24/blog---responsible-gold-also-means-supporting-livelihoods-of-artisanal-miners>

|   |   |
|---|---|
| <p>reputational damage after disclosing their due diligence reports.</p>  | <p><b>Stakeholder participation</b> and consultation in this phase can also help mitigate the risk of under-reporting potential or existing impacts.</p>  |
| <p><b>Cost of compliance with regulation is passed down</b> to lower-tier suppliers, worsening the already vulnerable situation of producers.</p>   | <p><b>Fair cost-sharing</b> across the value chain and <b>clear definition of roles and levels of responsibilities</b> of each actor, including local and national governments, taking into account capacities and specific contexts.</p> <p><b>Meaningful inclusion of all stakeholders</b>, including smallholder farmers and workers throughout the due diligence process.</p>   |
| <p>There is a risk that business enterprises will <b>focus only on reporting , and not driving changes on the ground.</b> A strong focus on compliance may easily be translated into “box-ticking” exercises. Similarly, supply chain due diligence could be primarily considered a compliance risk, making it more likely to sit only within legal teams instead of embedding the concept of supply chain due diligence throughout all relevant functions in business enterprises.</p> | <p><b>Promote an understanding outside and inside the corporate world</b> of the complexities of the risks that <b>business enterprises</b> can encounter when conducting human rights and environmental due diligence. This includes the option of continuous improvement through engagement versus the option of disengagement (‘promote a certain degree of risk-tolerance’).</p> <p>Focus <b>monitoring efforts on impacts on the ground</b> and not only on reporting.</p> <p>Incentivize the need to <b>embed due diligence practices in the corporate culture</b> from the top of the business enterprises through all its functions and personnel.</p> <p>Ensure that legislation provides for <b>access to remedy to potential victims</b> through effective judicial mechanisms alongside grievance mechanisms such as labour tribunals, national contact points, human rights institutions, etc.</p> |
| <p>Supply chains <b>shift to other markets</b> with more lenient regulations.</p>   | <p><b>Incentivise and support engagement in high-risk areas</b>, through public procurement measures and subsidies by government agencies.</p> <p><b>Seek partnerships or alliances with other major non-European importing countries</b> of high-risk commodities with the aim of encouraging them to also raise the bar on sustainability.</p>  |
| <p>Risk of lowering existing standards as regulation may set a <b>low standard of sustainability</b>, or only require compliance with legal requirements in producing countries.</p>  | <p>Regulation should contribute <b>to legislative reform, strengthened governance, and effective enforcement</b> in key risk areas (i.e. land tenure, public participation, living income, etc.) in producing countries.</p>  |

|   |   |
|---|---|
|   | Regulation should <b>incentivize business enterprises to think beyond legal compliance</b> , for example by embracing standards that go beyond legality.  |
| <b>Workers and producers bear the brunt of suspended or withdrawn trade privileges.</b> E.g. layoffs, loss of access to formal markets potentially resulting in informal trade. | <b>Provide incentives and capacity building</b> after a first breach is detected in order to help bring the party back to compliance. Withdrawing trade privileges from a trade partner should be a last resort.  |
| <b>High costs of compliance</b> with regulation can lead to ineffective implementation.   | Ensure that <b>efficient low-cost options</b> for compliance and monitoring are available.  |
| Regulation could <b>reinforce the market power of those better positioned</b> to take advantage of the new rules.   | Provide for transparent and public participation in the legislative process to guarantee that <b>the interests of those marginalized in supply chains are represented.</b> This can help ensure that proposed measures are transformative by tackling the structural causes behind poverty and deforestation. |



A miner in the Yanaquihua Mine, Peru. © Solidaridad / Patricio Crooker



A miner sells gold in a shop in the Central Cerro Rico mining community, Peru. © Solidaridad / Patricio Crooker

## 5. Scope of a regulatory framework

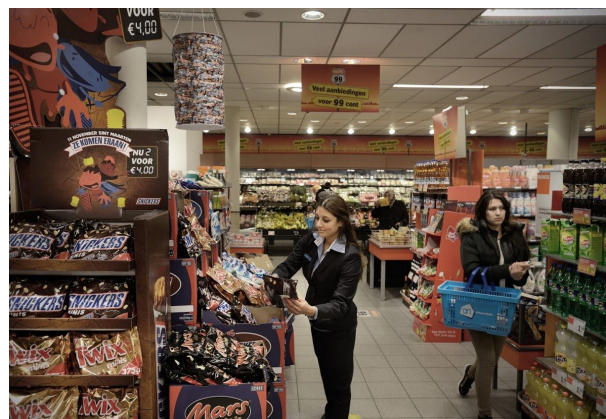
Inclusive and sustainable production cannot be realised unless the regulatory framework is fit for purpose. In particular, the framework must have sufficient scope to reflect the complex and dynamic nature of production chains. We recommend that the following areas are considered in the scope of the framework:

- At European Union level:** We support the development of a regulatory framework at EU level, to benefit from the combined influence of the member states and the prevailing political momentum for action. Ultimately, we need a global framework that is able to address transnational challenges, and EU regulation will serve as an important milestone toward this ambition.

- **A broad approach:** The framework should cover all business enterprises in Europe including multinationals and SMEs,<sup>4</sup> EU and public sector institutions in each member state, as well as the financial sector.
- **A Cross-sector approach complemented with sector-specific guidance:** A regulatory framework should not be commodity-specific. A cross-sectoral approach will ensure effective harmonisation, legal certainty, a level playing field, and allow for a non-negotiable minimum standard for business relationships throughout the supply chain.  
However, sector/commodity specific guidance and measures should be developed for - and in cooperation with - specific sectors. Sector guidance should provide more detailed instructions tailored to specific contexts or supply chains. The OECD has developed sector-specific due diligence guidance for the minerals, agriculture and garment and footwear supply chains, and good practice papers for the extractives and financial sectors, which could be helpful in developing such sector specific guidance for the EU.
- **Throughout the entire value chain:** The regulatory obligation to conduct human rights and environmental due diligence should apply to a business enterprises' entire supply chain. This includes a company's corporate structure, all controlled business enterprises, and its direct and indirect business relationships with other parties, including direct and indirect suppliers at all levels of their supply chain down to the first producer level (farming, raw material extraction). Definitions of *controlled companies*, *business relationships* or any other terms used in regulations should be broad enough to include subsidiaries, affiliates, agents, suppliers, subcontractors, importers, etc.
- **Enable risk-based approaches:** Legislation should enable companies to prioritize action by applying a risk-based approach with a view to go deeper and improve over time. Risks should be prioritized based on the severity and likelihood of the potential adverse impact on human rights and the environment.



Grains storage in Mozambique. © Solidaridad / Michel Boulogne



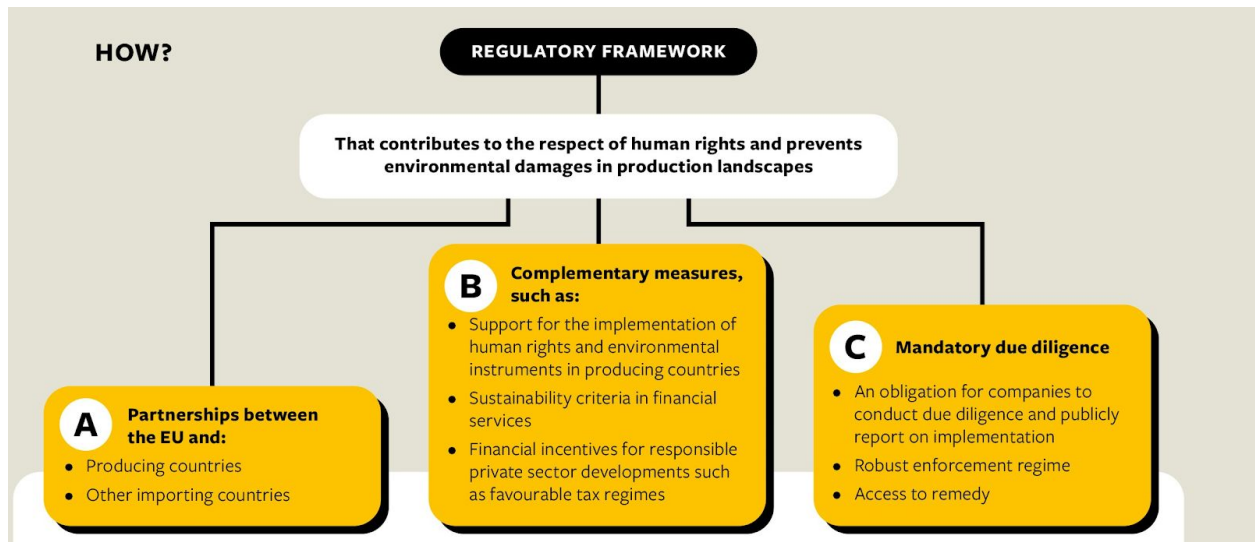
Chocolate stock in a supermarket, The Netherlands. © Kadir van Lohuizen / Noor

<sup>4</sup> For some arguments on the full inclusion of SMEs see: West F, (2019) SMEs and the Corporate Responsibility to Respect Human Rights, Busting the Myth that Bigger is Always Better, Shift [online] Available at: <https://www.shiftproject.org/resources/viewpoints/busting-myth-smes-corporate-responsibility-respect-human-rights/>

## 6. Content of a regulatory framework

The UNGPs have defined the “smart mix” of mandatory, voluntary, national and international measures that are needed to foster business respect for human rights. Our view is that an EU strategy should include an effective combination of measures that take into consideration their **complementarity** and **scalability**. We envision a smart mix that includes three fundamental pillars:

- A. Strong partnerships with sustainability goals
- B. Complementary measures
- C. Mandatory due diligence



**Three pillars of the smart mix**

**NB:** The following is not intended to be an exhaustive description of the full range of possible measures. We acknowledge that the complexity of the issue at hand requires continued innovative and out of the box thinking, and that further collaboration with stakeholders will yield additional measures.

## A. Partnerships with sustainability goals

We cannot address the root causes and barriers to inclusive and sustainable global value chains alone. Partnerships between the EU and both exporting and other importing countries, as well as innovative forms of engagement should be strengthened or established. We identify the following types of partnerships with different purposes:

- **Long term partnerships between the EU and producing countries** to support and contribute to improving governance, law enforcement, access to justice, and the implementation of fundamental human rights and the promotion of legislative reforms in key areas. Resources, capacity building, and knowledge sharing are key to foster long-term changes in value chains and should be central to such partnerships. The main focus should be the realisation of fundamental rights and structural issues such as living income, living wage, deforestation, land tenure, etc.
- **Partnerships or alliances with other major importing countries of high-risk commodities** (such as the US, China, Japan, Canada, India etc.) to jointly change gear and tackle major human rights abuses and environmental damages in global value chains. This aims to prevent leakage effects where unsustainable products shift to other market destinations outside the EU.
- **Legally binding agreements between EU and selected producing countries on specific products** to strengthen sustainable good practice. Solidaridad advocates for trade agreements that include sustainability requirements and as such contribute to strengthening governance, law enforcement, and legislative reforms in producing countries. The already existing Voluntary Partnership Agreements (VPAs)<sup>5</sup>, which are legally binding agreements between the EU and timber-producing countries outside the EU, can serve as a model. Within its provisions, VPA countries set up a national traceability system and an export licensing system (FLEGT Licenses) recognised by the EU to ensure the legality of the exported timber. This approach has been complemented by further legislation where non-VPA countries are subject to scrutiny and due diligence requirements. Key elements of this approach that should be replicated are;
  - Long-term capacity building,
  - Promotion of governance and law enforcement in producing countries, and
  - Creation of multi-stakeholder deliberative spaces in producing countries where national law & policy can be discussed and improved.
- **Trade and Sustainable Development Chapters (TSDC) in free trade agreements (FTAs)** to ensure consistency of approach. TSDCs provisions should govern the entire agreement and should include concrete and binding commitments for governments and investors to respect and support the implementation of international instruments on human rights and international environmental standards. They should be complemented with mechanisms of enforcement,

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<sup>5</sup> Provided in the Forest Law Enforcement, Governance and Trade Regulation

compliance and monitoring and avenues to provide access to remedy for affected individuals or communities.

## B. Complementary measures

In addition to mandatory due diligence and partnership elements, there should be complementary measures specifically designed to promote the use of sustainably produced products and further support governments and value chain actors. These include complementary measures to:

- Provide **public incentives for responsible private sector developments**. Examples include: subsidies, favourable tax regimes, export-credits, low-interest loans, and preferential participation in public procurement for social enterprises, start-ups, entrepreneurs and business enterprises that source sustainably. The EU and their member states should also take due account of the social and environmental impacts of public financial flows to the private sector and of their state-owned investment funds.
- Provide **finance for sustainable development**. Strengthen the criteria on sustainability for the provision of all financial services including direct and indirect finance.<sup>6</sup> Monitor a certain level of mandatory social, environmental, labour, and human rights standards for financial institutions and promote their alignment with SDG performance indicators without disincentivizing key investment in developing countries.
- Support the ratification and **implementation of international and regional human rights instruments** and **environmental agreements**. This can help raise the bar outside Europe and will facilitate the demands made to all actors to comply with the international standard throughout value chains. For example, the recent adoption of the Regional Agreement on Access to Information, Public Participation and Justice in environmental matters in Latin America and the Caribbean<sup>7</sup> provides a strong opportunity to support and enhance the new standard for environmental procedural rights in the region.
- Support the ongoing **treaty process on Business and Human Rights in the UN** and constructively engage in the negotiations. The open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OHCHR) is working on an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. The last revised draft was released in July 2019.<sup>8</sup> The EU Economic and Social Committee has already called on the European Commission and the European Council and the Member States to engage in the ongoing negotiation process.<sup>9</sup>
- **Strengthen existing dialogue mechanisms, to provide remedy for affected individuals and communities** such as the OECD's National Contact Points. This should take into account the

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<sup>6</sup> Direct financing refers to project finance or to any form of lending to a special purpose entity whereas indirect financing refers to general corporate lending.

<sup>7</sup> The Agreement is awaiting the required number of ratifications to enter into force. Available at [https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428\\_en.pdf](https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf)

<sup>8</sup> Available at :

[https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf)

<sup>9</sup> European Economic and Social Committee 11/12/2019 [online] available at (<https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/binding-un-treaty-business-and-human-rights-own-initiative-opinion>)

additional barriers that marginalized groups face when trying to access justice, and support Company-Union dialogue provided for by the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration). The EU should also open existing structures to provide access to remedy for affected individuals and communities. For example, the Investor-State Dispute Settlement (ISDS) mechanisms should be equally open to investment-affected people and communities, and therefore Free Trade Agreements should establish detailed investors' obligations to safeguard human rights and the environment in their investment interest.<sup>10</sup>

- Bilateral or multilateral agreements for the **prompt execution of foreign judgments** or awards and other forms of **judicial cooperation** are also relevant to provide access to remedy for affected individuals and communities.
- Analyse the need for **amendments and clarification of legislation** in the EU that might be impeding or conflicting with sustainability goals or private sector cooperation towards them. For example, EU competition law is often referred to as having a chilling effect on business collaboration in pursuit of sustainability outcomes, especially on issues such as low prices and incomes in the cocoa sector.<sup>11</sup> Also, corporate law could be revised to include and promote new and alternative models of corporate governance and ownership where workers, communities, and stakeholders play a central role in the business structure and decisions.<sup>12</sup>

## C. Mandatory due diligence

### What is due diligence?

Due diligence is an on-going, proactive and reactive reviewing process through which business enterprises can ensure that they respect human rights and do not contribute to environmental damage. As in the UNGPs, the due diligence in the OECD Guidelines is concerned with impacts on people and is a process through which business enterprises seek to identify, prevent, mitigate and account for how actual and potential adverse impacts are addressed. The purpose of due diligence is first and foremost to avoid causing or contributing to adverse impacts on people and the environment. This approach is essential as can be seen in the context of banking for example, where due diligence is generally concerned with identifying reputational, legal and financial risks to the bank, rather than preventing or mitigating damage from a client's operations on the environment, workers and communities.<sup>13</sup> The preventive and forward-looking nature of this responsibility is essential. Meaningful stakeholder engagement is a key component of due diligence, and is important throughout the due diligence process.

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<sup>10</sup> For innovative models to include investment-affected parties in investment arbitration. See e.g. Arcuri, A, & Montanaro, F. (2018). Justice for All? Protecting the Public Interest in Investment Treaties. *Boston College Law Review*, 59(8), 2791–2824. Retrieved from <http://hdl.handle.net/1765/113049>

<sup>11</sup> Brack, D (2019). Towards sustainable cocoa supply chains: Regulatory options for the EU pp. 7 [online]. Available at: <https://www.fern.org/fileadmin/uploads/fern/Documents/2019/Fern-sustainable-cocoa-supply-chains-report.pdf>

<sup>12</sup> Evans, A (2020). How to eradicate human rights abuses? Change the corporate model [online] Available at: <https://www.business-humanrights.org/en/how-to-eradicate-human-rights-abuses-change-the-corporate-model>, see also Fair Trade Advocacy, (2019). EU Competition Law and Sustainability in Food Systems, Addressing the Broken Links, Briefing Note, pp. [online]. Available at: <https://fairtrade-advocacy.org/wp-content/uploads/2019/04/FTAO-Briefing-note-Competition-Law-and-Sustainability-Addressing-the-Broken-Links.pdf>

<sup>13</sup> The OECD (2019), Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks ,implementing the OECD Guidelines for Multinational Enterprises, provides key recommendations for implementing due diligence in the financial sector. Pag, 14.



The UNGPs and OECD Guidance recognize that the responsibility to respect human rights is tied to impacts and not to how much influence a business enterprise has in a given context or relationship. They call on all businesses to work to prevent and address human rights and environmental harms in connection with their own operations and their value chain. Although the size of an enterprise can affect the nature and extent of due diligence, due diligence must be commensurate with the risk and not with the size of the enterprise.

The OECD Guidance recognizes room for collaboration in carrying out due diligence and suggests how multi-stakeholder and industry initiatives can be a means for this. However, participation in an initiative does not shift responsibility from the company to the initiative for adverse impacts that it causes, contributes to or to which it is linked. Sustainability initiatives, industry standards and certifications might be helpful tools in a company's due diligence process, but they do not replace due diligence.

Communicating information about the due diligence process is itself part of due diligence. Enterprises should account for how they identify and address actual or potential adverse impacts and should communicate accordingly. The OECD Guidance provides advice on what should be disclosed, to whom, when, why and how and acknowledges that disclosing information can be necessary to respect human rights, and considers ways of communicating to the extent possible while managing confidentiality concerns.

### **Key elements for due diligence legislation**

Due diligence legislation should be based on existing and authoritative instruments (soft law)<sup>14</sup>, credible existing sustainability standards and initiatives, and build on learnings from existing EU and national legislation such as the EU Timber Regulation, the EU Conflict Minerals regulation and some national initiatives such as the French Corporate Duty of Vigilance Law and the Dutch Child Labour Due Diligence Law.

EU and public sector institutions in each of the member states and the financial sector should also be covered by mandatory due diligence obligations. For example, government agencies should make sure that they procure goods from business enterprises that have conducted proper due diligence as this sends an important demand signal.

The financial sector should conduct due diligence to avoid causing or contributing to adverse impacts on human rights of producers and the environment through its business relationships. This includes avoiding lending or investing funds in projects and activities that can harm producers and natural ecosystems in the Global South and being vigilant throughout the entire life cycle of the clients relationship and exercising its leverage.<sup>15</sup>

Below we have outlined key elements that should be taken into account in setting up mandatory requirements for an integral, inclusive and effective legislation requiring business enterprises to conduct due diligence throughout their entire supply chain.

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<sup>14</sup> Such as the UNGPs, the OECD Due Diligence Guidelines for Multinational Enterprises and the OECD Guidance for Responsible Business Conduct.

<sup>15</sup> The OECD (2019), Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks, implementing the OECD Guidelines for Multinational Enterprises, provides key recommendations for implementing due diligence in the financial sector.

- Due Diligence should be a continuous process that requires business enterprises at a minimum to implement the following steps:
  - a) Embed responsible business conduct into policies and management systems,
  - b) Identify and assess actual and potential adverse impacts (risks) on human rights and the environment in operations, supply chains and business relationships and integrate a gender perspective throughout the entire process,<sup>16</sup>
  - c) Cease, prevent and mitigate adverse impacts,
  - d) Track implementation and results,
  - e) Communicate how impacts are addressed, and
  - f) Provide for or cooperate in remediation when appropriate.
  
- The due diligence requirements should include planning, development, implementation and monitoring at the following minimum:
  - **Identification of actual and potential impacts** on the environment and human rights of producers throughout all levels on their supply chain, including for example deforestation, child labour, forced labour, living income and living wage and the health and safety of producers. At the very minimum, direct reference should be made to the International Bill of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, and high standards of environmental sustainability that need to be clearly identified. Risk assessment should integrate gender considerations as women in supply chains face additional disadvantages and risks.
  
  - **Public communication about how a company is implementing due diligence in their organization and in their supply chain** to allow stakeholders to understand how the company carried out the different due diligence steps. This public reporting should describe:
    - the company's policy and management system,
    - their risk identification and prioritization approach,
    - the risk mitigation and prevention plans,
    - information about the implementation and results of these plans, and
    - information on the remedy of adverse impacts.

Such public reports will help to create the necessary understanding outside and inside the corporate world of the complexities and challenges business enterprises might face when conducting due diligence in international supply chains.
  
  - **Meaningful stakeholder participation**, especially on the identification of risks and possible measures to mitigate them.<sup>17</sup>
  
  - **Continuous improvement over time.** Due diligence helps businesses to learn from failures and blind spots, and to expand what is possible through innovative approaches and collaborations that increase the company's leverage to try to prevent harms. Collaboration

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<sup>16</sup> The Working Group on Business and Human Rights has developed a gender framework for the Guiding Principles, comprising a three-step cycle relevant to all three pillars: gender-responsive assessment, gender-transformative measures and gender transformative remedies available at:

<https://www.ohchr.org/Documents/Issues/Business/BookletGenderDimensionsGuidingPrinciples.pdf>

<sup>17</sup> Community-based human rights impact assessments have been proposed by some CSOs. See:

<https://policy-practice.oxfamamerica.org/work/private-sector-engagement/community-based-human-rights-impact-assessment-initiative/>

can be particularly critical where a business is confronted with systemic human rights abuses and environmental damages that it cannot fix alone.

- Measures to **guarantee the independence, transparency, and credibility of third-party reviews or audits** assessing the implementation and effectiveness of the due diligence process.
- Obligations on business enterprises **to periodically monitor and track the effectiveness of their due diligence plans and their implementation**. Assessments of the results should be based on reliable quantitative and qualitative indicators.
- **Operational-level grievance mechanisms paired with whistleblower protections** from the outset to address impacts on individual and community rights and to track the effectiveness of the due diligence policy. Principle 31 of the UNGPs<sup>18</sup> establishes the basic criteria to ensure their effectiveness in practice and can serve as the basis for grievance mechanisms.
- Mandatory due diligence legislation should mandate a robust enforcement regime that includes:
  - **Effective, proportionate, and dissuasive sanctions** for companies that fail to establish, and implement a complete and integral due diligence process. The system of sanctions can be progressive and not limited to fines (e.g. exclusion from public procurement) with supporting mechanisms in place to help bring business enterprises into compliance in specific cases.
  - **Legal avenues** to bring business enterprises into compliance if they fail to fulfil the obligations provided in the law. For example; not undertaking thorough and credible due diligence, or not contributing to remediation.
  - **Civil liability for damages** that a company could have avoided by conducting an effective, credible and thorough due diligence process. Simply conducting due diligence should not absolve a company from liability. Consider a provision for reversing the burden of proof for the affected individuals and communities and provide for remedies that go beyond monetary compensation to victims.

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<sup>18</sup> United Nations. (2011). Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework. (UNGP)