

Statement of Position

of the BDSI's position on human rights due diligence in global supply chains

- ▶ In order to enforce compliance with the human rights due diligence arising from the UN Guiding Principles for Business and Human Rights right down to the countries of origin, a uniform strategy needs to be adopted by the EU Member States and greater political pressure must be exerted on the countries of origin.
- ▶ Voluntary Partnership Agreements (VPAs) with countries of origin, rather than trade agreements, represent the effective leverage required to implement European policy, since tariffs can be redistributed within global supply chains rather than serving to encourage governments to act.
- ▶ In planning further appropriate action, German public policy-makers must remember that confectionery sector companies are already strongly engaged in policy making concerning cocoa and palm oil production and that their engagement in this regard already far exceeds the average commitment level of the German industrial sector.
- ▶ When companies source certified sustainable raw materials whose standards require compliance with human rights and environmental due diligence, they must also be able to rely on the respective certification process. Especially small and medium-sized enterprises depend on the assurances given in these certificates.
- ▶ Effective human rights protection can only be achieved if companies operating locally are subject to a tiered system of responsibilities under which they are obligated at a responsibility level corresponding to their respective degree of influence. Especially small and medium-sized companies, lacking any direct influence at the start of the supply chain, are dependent on their suppliers.
- ▶ In order to be truly efficient and meet the practical requirements, the grievance mechanism needs to reflect the realities of the supply chain. Grievance mechanisms are to be set up primarily by the respective state in the third country concerned or are to be incorporated into existing public bodies. They cannot be set up alone by every individual company operating in Germany and in the EU or by individual sectors in Germany. This especially applies to the large number of companies that source and use raw materials already processed in the European Union.

In order to enforce compliance with the human rights due diligence arising from the UN Guiding Principles for Business and Human Rights right down to the countries of origin, a uniform strategy needs to be adopted by the EU Member States and greater political pressure must be exerted on the countries of origin.

In June 2011, the United Nations Human Rights Council adopted the “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”. The UN Guiding Principles presume that nations and the business world share this responsibility. According to the Guiding Principles, legal regulation is not mandatory. What is crucial is that they are implemented.

The general principles begin with¹:

“These Guiding Principles are grounded in recognition of:

- (a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
- (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
- (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

The UN Guiding Principles state that a combination (a so-called “smart mix”) of voluntary and mandatory measures is required to promote human rights due diligence processes in companies. The implementation of human rights due diligence is not mandatory under the UN Guiding Principles. In this regard it should be noted that numerous countries facing problems in terms of their human rights situation have signed the relevant international conventions. Business companies in Germany can only balance out government deficits to a limited extent. Frequently the key factor underlying the occurrence of breaches and their non-prosecution is the lack of a sufficiently assertive state structure with a correspondingly empowered local administration in the countries of origin.

Given the sheer scale of the issue, a European approach is needed. Individual and differing national regulations are not in the interest of the Single European Market and can at best pave the way for the European legislative process. The Association of the German Confectionery Industry (BDSI) therefore supports an EU-wide due diligence approach based on the UN Guiding Principles as well as a comprehensive EU strategy with the aim of creating the preconditions needed to make progress in establishing sustainable agriculture. National governments in the producing countries must enforce and strengthen their national labour laws.

The European Union must speak with one voice to support adherence to human rights in producing countries through political means. In the long term, a patchwork quilt of European laws, all lending different weight to the UN Guiding Principles and their implementation, is not conducive to achieving this goal. This would also be difficult for companies operating in Germany and the EU. After all, the application of differing national regulations is inconsistent with the idea of a Single European Market in which companies apply due diligence using the same criteria to identify and respond to human rights risks. A national regulation in Germany can therefore only be a transitional solution until a European agreement is reached.

¹ https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf

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A holistic approach is needed to achieve the respect and observance of human rights in supply chains. A possible European regulation, similar to the EU Timber Regulation, must be flanked by employing the instrument of VPAs. Funds for developing and building up infrastructure and education systems should be made available via VPAs and made contingent on the observance of human rights.

In protecting tropical timber, the EU is pursuing a holistic approach with its 2003 FLEGT (Forest Law Enforcement, Governance and Trade) Action Plan. Key components of the Action Plan are the EU Timber Regulation (Regulation (EU) No 995/2010), which legally regulates the due diligence obligations of companies in this area, and partnership agreements (trade agreements with timber exporting countries that help keep unlicensed timber out of the European Single Market). It is precisely such an approach that is also required to ensure the respect for and observance of human rights in global supply chains. We do not consider other instruments such as free trade agreements to be conducive to this goal. Tariff increases would not put pressure on decision-makers in the producing countries. Exporters would have to bear the additional costs. Stopping imports into the EU would likewise only place a bigger burden on the buyers and hit them harder than producing countries which could still switch to other buying countries. By contrast, buyers in the EU could face bottlenecks as soon as stocks are exhausted. European policy-makers must allow for the fact that the biggest investments in the manufacture of chocolate products are currently being made outside the EU and that tariff mechanisms based solely on EU trade are therefore not conducive to exerting strong pressure on the countries of origin.

In planning further appropriate action, German public policy-makers must remember that confectionery sector companies are already strongly engaged in policy making concerning cocoa and palm oil production and that their engagement in this regard already far exceeds the average commitment level of the German industrial sector.

The German confectionery industry continues to make every effort to ensure that its products are manufactured in a responsible manner and to the highest standards. In doing so it undertakes a host of measures to ensure that human rights are respected in the supply chain and that environmental impacts are minimised.

For example, the companies operating in Germany are engaged in various initiatives to ensure that the situation of farmers in the producing countries improves continuously. This is evidenced, firstly, by the high level of use of certified sustainable raw materials, such as cocoa and palm oil, which is above average compared against the rest of the industry, and, secondly, by the sector's numerous local activities.

Many German confectionery manufacturers have projects and programmes that enable farmers and their communities to improve their income, become more productive and more climate resilient, protect the environment and combat deforestation, and respect the rights of people in the supply chain. These types of initiatives also aim to achieve greater transparency throughout the supply chain,

with due diligence systems in place to identify and address social and environmental risks and impacts. In particular, German confectionery manufacturers are increasingly sourcing sustainably certified raw materials such as cocoa and palm oil.

When companies source certified sustainable raw materials whose standards require compliance with human rights and environmental due diligence, they must also be able to rely on the respective certification process. Especially small and medium-sized enterprises depend on the assurances given in these certificates.

The obligation to respect and observe human rights is enshrined in all major certification standards. In particular, companies that are not, or cannot be, active locally at the place of origin must be able to rely on this.

In this respect, the standards in the cocoa sector are exemplary. The sector's compliance with human rights due diligence is already supported by standards such as Fairtrade, Rainforest Alliance/Utz. These standards set out requirements focused on the respect and observance of human rights.

In particular, international standard ISO 34101 – 2 “Sustainable and Traceable Cocoa” (requirements for performance in respect of economic, social, and environmental aspects), published in May 2019, establishes requirements dedicated to the respect and observance of human rights. Requirement 6.1.5 explicitly calls for a human rights policy and due diligence process based on the UN Guiding Principles.

The BDSI believes that by meeting this requirement and all other stipulations mentioned in Chapter 6 of the standard it is sufficiently ensured that producers in the cocoa sector comply with the UN Guiding Principles in the cocoa supply chain. Here it is important that the ISO standard is generally applied. Since the ISO standard was not adopted until 2019, one cannot draw on experience from the past. Many of these elements are also to be legally enshrined in a regional West African standard for sustainable cocoa. In the area of combating child labour, the Child Labour Monitoring and Remediation System (CLMRS) in particular is an effective instrument for implementing the UN Guiding Principles. It was developed by the International Cocoa Initiative (ICI), is an integral part of many programmes managed by major manufacturers and suppliers to the cocoa and chocolate industry, and continues to expand.

Effective human rights protection can only be achieved if companies operating locally are subject to a tiered system of responsibilities under which they are obligated at a responsibility level corresponding to their respective degree of influence. Especially small and medium-sized companies, lacking any direct influence at the start of the supply chain, are dependent on their suppliers.

It must be ensured that companies shall be deemed to have already fulfilled their obligations under the UN Guiding Principles if they contractually oblige their upstream suppliers to comply with human rights due diligence and respond accordingly when breaches become known.

In accordance with the rule of law and the principle of proportionality, unforeseeable liability risks that companies face as a result of such risks not being controllable under the legal and political situation at local level must be avoided.

Human rights due diligence will vary in complexity, according to the UN Guidelines, depending on the size of the business enterprise in question, the risk of serious adverse human rights impacts, and the nature and context of its operations (Principle 17c)².

Hence in many cases it must be sufficient for the food manufacturer in Germany to contractually obligate its suppliers of raw materials or processed raw materials to meet the requirements of compliance with human rights due diligence. Otherwise the sourcing of raw materials, especially for medium-sized companies, will not be manageable in practice.

In accordance with the principle of subsidiarity, the respective upstream stage should, in principle, be the first to be made accountable. A system of graduated accountability is not uncommon in European law. Such a one is provided for in the General Food Law Regulation³, for example. Upstream suppliers operating in the producing countries are represented locally, are in direct contact with the farmers or their cooperatives, and can therefore act more quickly and in a more targeted manner. However, the transfer of accountability necessarily means that the companies must check the upstream suppliers accordingly and react immediately if they become aware of incidents.

It is disproportionate for companies to be held liable for human rights violations in their supply chains if they have no direct control over these supply chains. At the same time, however, they are called upon to establish appropriate measures and instruments to ensure that checks on human rights violations are in place.

In order to be truly efficient and meet the practical requirements, the grievance mechanism needs to reflect the realities of the supply chain. Grievance mechanisms are to be set up primarily by the respective state in the third country concerned or are to be incorporated into existing public bodies. They cannot be set up alone by every individual company operating in Germany and in the EU or by individual sectors in Germany. This especially applies to the large number of companies that source and use raw materials already processed in the European Union.

The UN Guiding Principles first of all require that states take appropriate measures to provide access to remedies for human rights violations (Principles 25–27), both in and out of court. The Principles therefore take into account that states, by virtue of their sovereign power, are best placed to provide access to remedies for human rights violations. The corresponding grievance mechanisms are therefore to be established by them.

² https://www.globalcompact.de/wAssets/docs/Menschenrechte/Publikationen/leitprinzipien_fuer_wirtschaft_und_menschenrechte.pdf

³ Verordnung (EG) Nr. 178/2002 des Europäischen Parlaments und des Rates vom 28.01.2002 zur Festlegung der allgemeinen Grundsätze und Anforderungen des Lebensmittelrechts, zur Errichtung der Europäischen Behörde für Lebensmittelsicherheit und zur Festlegung von Verfahren zur Lebensmittelsicherheit
<https://eur-lex.europa.eu/legal-content/DE/ALL/?uri=CELEX%3A32002R0178>

The fact that the Guiding Principles provide for non-governmental grievance mechanisms as a further option (Principles 28–31) imparts no contradictory meaning. In this regard the Guiding Principles provide for several options of non-governmental mechanisms. Companies can establish grievance mechanisms at the operational level (Principle 29). However, industry-wide and multi-stakeholder initiatives, as well as other initiatives, should also ensure that effective grievance mechanisms are available (Principle 30). The Guiding Principles presume that these non-governmental grievance mechanisms can be established, but do not have to be. For this to work in practice, these grievance mechanisms should not be implemented by individual companies or sectors but should instead be linked to existing institutions. A local grievance mechanism is much more helpful to those concerned than one that is set up in a distant third country. Using existing institutions will also serve to avoid the establishment of parallel structures.

Grievance options available at local level and in existing institutions also open up the opportunity for food manufacturers in Germany to impose the establishment of a grievance mechanism on upstream suppliers at operational level.

For more information on BDSI positions please visit
<https://www.bdsi.de/en/association/priorities/>

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The sector association:

The BDSI represents the economic interests of over 200 mostly medium-sized German confectionery companies. It is both a trade association and an employers' association. The German confectionery industry is the fourth-largest sector of the German food industry, accounting for around 10% of overall sales. It is particularly characterised by its strong focus on exports. Germany's confectionery manufacturers have an overall workforce of around 50,000 employees.