



EUROPEAN FEDERATION OF THE TRADE IN DRIED FRUIT & EDIBLE NUTS • PROCESSED FRUIT & VEGETABLES • PROCESSED FISHERY PRODUCTS • SPICES • HONEY

FRUCOM Feedback on proposed Directive on Corporate Sustainability Due Diligence

Overview

- FRUCOM welcomes the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, published on 23 February 2022.
- FRUCOM supports the principle of introducing an EU due diligence legal framework and believes it important for companies to consider their impact on issues like human rights and the environment in their long-term decision making.
- FRUCOM strongly encourages the European Commission to focus on, and promote, proven voluntary approaches and incentives for compliance with due diligence obligations that will encourage private sector uptake and compliance with due diligence obligations.
- FRUCOM believes that the proposed Directive on Corporate Sustainability Due Diligence presents three important drawbacks:
Firstly, the lack of a clear definition for companies with indirect established business relationships will result in compliance challenges and risks for the supply chain and discourage business relationship with smaller companies.
Secondly, the proposed Directive will not result in a level playing field for due diligence obligations in the EU, in relation to EU and non-EU falling within the scope of the proposed Directive.
Thirdly, the objective of harmonising due diligence obligations and compliance in the EU is undermined by the lack of standard EU compliance instruments or tools which can be used by companies wishing to demonstrate they meet the due diligence obligations outlined in the directive.
- FRUCOM strongly recommends that the European Commission, Parliament, and Council, consider remedial actions in relation to the three drawbacks listed above, to ensure that the proposed Directive does not encourage the withdrawal of micro, small and medium sized companies from operating in global supply chains that are unavoidably and invariably complex, and does not place European companies at a disadvantage relative to international companies.
- FRUCOM considers that civil liability against companies as proposed in the Directive is highly problematic given the unmitigable risk presented through the inclusion of harm stemming from indirect business relationships within the scope of the due diligence obligation.
- FRUCOM believes that the proposed Directive should go further in enabling and supporting partnerships and cooperation with third countries, including through appropriate smart regulation that could account for companies or supply chains operating in countries or regions where there is proven compliance with the standards and rules corresponding with due diligence obligations set out by the Directive.

FRUCOM represents European Union importers, and growers, processors, and traders, of edible nuts, dried and processed fruit and vegetables, and processed fish and seafood.

Many of these products are either not produced in the EU or the production volume is not sufficient to meet the market demand, hence the need for imports. Sourcing is global, from both developed and developing countries.

FRUCOM welcomes the opportunity to provide feedback on the proposed Directive on Corporate Sustainability Due Diligence.



1. UNCLEAR DEFINITION OF INDIRECT ESTABLISHED BUSINESS RELATIONSHIP

The proposed Directive defines the scope of the application of the due diligence obligation to EU and non-EU companies that are either large or medium sized but operating in high impact sectors. Although small companies are not explicitly included in the proposed scope, the proposed Directive states that **the due diligence obligation “will apply to the company's own operations, their subsidiaries, and their value chains (direct and indirect established business relationships).”**

According to the proposed Directive (recital number 20 of the Preamble), “[I]f the direct business relationship of a company is established, then all linked indirect business relationships should also be considered as established regarding that company.” The proposed Directive fails to clearly define what would be considered as a link in this context; does it concern a linkage with respect to the supply of a specified good or service, or does it concern *any* linkage, including outside the scope of the supply of a specified good or service.

Given that the due diligence obligation applies to a company's indirect established business relationship, the unclear definition of an indirect business relationship potentially exposes a company to a disproportionate and unmitigable risk of civil liability for harm caused through an indirect established business relationship, even where such harm has no material connection to the business conducted by company.

The agri-food sector is characterised by fragmented and disperse supply chains. Such a lack of clarity could discourage the engagement of companies with smaller suppliers, who may not have the capacity to conduct due diligence checks in relation to all their business relationships. Small and medium sized companies are the backbone of the EU agri-food sector, creating hundreds of thousands of jobs and sustaining livelihoods in the EU and beyond.

FRUCOM would strongly welcome a proposed Directive which results in greater clarity and certainty for companies through:

- **A positive definition of what is meant by direct and indirect business relationships within the enacting terms of the Directive, with clearly defined criteria.**
- **A clarification of the scope of established indirect business relationships to only include conditions where the link of an indirect business relationship to an established direct business relationship is deemed material or has a material bearing on the business conducted by the company in question or on its relationship with its direct.**

2. UNLEVEL PLAYING FIELD BETWEEN EU AND NON-EU COMPANIES

Under the proposed Directive, it is foreseen that for third country or non-EU companies to whom the proposed Directive applies, will be regulated either by the competent supervisory authority of the Member State in which the company has a branch, or where the company generated most of its net turnover in the EU in the financial year preceding the last financial year before the date when the proposed Directive applies to the company.

Additionally, third country or non-EU companies can make a request to change the competent supervisory authority under which they fall, on the basis that the company has a change in circumstances leading to it generating most of its turnover in the Union in a different Member State.

In the case of EU companies, their competent supervisory authority will always be that of the Member State in which they have their registered office.

This approach would create a two tier system which allows non-EU companies to essentially forum shop based on whether they choose to be overseen by the competent supervisory authority based in a Member

State where the company has a branch (and the non-EU company is able to choose to place its branch(es) in the country with more favourable due diligence laws), or on the basis of the Member State where the company may not have a branch but where it generates most of its net turnover.

EU companies are unable to select a more favourable competent supervisory authority, and this would place them at a significant disadvantage compared to non-EU companies. This would undermine the level playing field in the EU's single market, between EU and non-EU companies, and would also encourage some Member States to aim for the lowest possible

FRUCOM would strongly welcome that the competent supervisory authority for non-EU companies is always where that company generates its highest net turnover in any financial year. Highest turnover, irrespective of which Member State the branch of the company is in, establishes the strongest relationship in terms of that company's value chain and constitutes the location (in the EU), where there is the greatest relationship between the due diligence obligation and the activities of the company.

3. NO HARMONISATION OF COMPLIANCE INSTRUMENTS AND TOOLS

One of the stated objectives of the proposed Directive is to prevent the fragmentation of the single market in relation to due diligence obligations, by “harmonising the requirements for companies to carry out due diligence in their own operation, subsidiaries and value chains.”

Whereas the proposed Directive sets out harmonised requirements, this alone is not enough to prevent fragmentation of the single market if the effect of the proposed Directive results in complete divergence across Member States as far as the mechanism by which the due diligence requirements are demonstrated and fulfilled. This means that the burden (in terms of resources, time, and capacity) for demonstrating compliance could be higher or lower depending on which Member State an individual company falls under.

A fragmented and disharmonised regulatory environment discourages micro, small, and medium sized companies that may have limited resources, from voluntarily undertaking to participate in the process of enhanced due diligence.

Furthermore, the lack of common instruments and tools makes it more challenging to engage in cooperation and partnerships with third countries on due diligence, as third countries would have 27 different regulatory approaches to contend with. Additionally, providing incentives for companies to improve their supply chain due diligence is more challenging where there are no common instruments or tools to demonstrate compliance.

Finally, common instruments and tools would also counter the argument that the proposed Directive will serve interest of consultants and service providers working in due diligence, at the expense of the time and resources of small companies wishing themselves to conduct their own due diligence compliance.

FRUCOM would strongly welcome that the European Commission issues delegated acts to further help harmonise and streamline compliance procedures relating to due diligence obligations.

This could include the publication and use of templates that companies can use, or the development of appropriate digital solutions (as with the portals developed by the European Commission for the purpose of certain customs operations).

Such tools or instruments would promote a harmonised, standard approach across the single market for companies of different sizes to check, implement, adopt, demonstrate, and communicate their relevant due diligence compliance.