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Legislating for Impact

Three Recommendations to Make Human Rights and Environmental Due Diligence Work for Smallholders

Photo: Kyagalanyi Coffee

Introduction

Around the world, smallholder farmers play a substantial role in supplying global agricultural supply chains. Between 70 to 90% of global cocoa, coffee, rubber, tea, and cotton is produced by smallholders, and they also play an important role in the production of sugar cane and palm oil. While smallholders can be active drivers of sustainable development, the conditions for them to produce their goods in an economically, socially, and environmentally sustainable way are often lacking. As a result, smallholders rarely earn a living income, and when they hire workers, they often are unable to pay them a living wage. On top of that, their production activity is often linked to risks such as child labor and deforestation. For European businesses operating in global agricultural industries, this means that the risk is high that they will encounter or contribute to human rights violations and environmental damages in their value chains.

The European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability holds the potential to address some of these issues—as long as smallholders and their rights are included. As the European Commission prepares a legislative proposal for a sustainable corporate governance directive that includes mandatory human rights and environmental due diligence (HREDD), expected later this year, we support strong legislation requiring all companies to conduct HREDD throughout their entire value chain, including provisions for liability. Going further, through this paper, we aim to ensure that smallholders in global value chains are effectively included in the development and implementation of, and benefit from HREDD[2], through specifications in the body of the regulation and guidance to accompany the regulation.

The mandatory HREDD legislative proposal is a milestone opportunity to promote respect for human rights and the environment in global value chains. If the legislation and guidance are carefully designed and implemented, it can meaningfully improve the situation of smallholders around the world. Legislation should therefore be drafted in such a way that it prevents supply chain actors from becoming risk averse—which would result in shifts in value chains away from actors in vulnerable situations—and that it does not put up trade barriers in the form of additional costs and administrative burdens for smallholders. It is crucial that the costs of compliance to the legislation are not disproportionally carried by smallholders.

In this paper, we provide three recommendations for how the EU can effectively develop measures to include smallholders in the HREDD legislation:

1. ***Focus on living incomes, living wages, and responsible purchasing practices to reduce poverty***
   Legislation should acknowledge that poverty is a root cause of many of the sustainability issues in international value chains, such as child labor or deforestation, and explicitly refer to living wages and living incomes either as rights themselves or as preconditions for the fulfilment of basic human rights. It should also require that companies work towards a stepwise realization of these rights and promote responsible purchasing practices.

2. ***Encourage lasting trade relationships and continuous improvement***
   Legislation should ensure that the HREDD process encourages lasting trade relationships and is continuously improved upon.

3. ***Engage and actively collaborate with rights- holders to define and implement HREDD***
   Legislation should include provisions to ensure engagement and active collaboration with rightsholders, including smallholders, throughout the whole HREDD process, including in the identification, mitigation, and remediation of risks.

Lastly, it should be acknowledged that legislation is only one element in a smart mix of measures that the EU should pursue to promote respect for human rights and the environment. It is crucial that the EU supports producer countries through partnerships to ensure that private sector actions can make the maximum impact, for example, by building the capacity of governmental actors or by leveraging investments in the public sector. The development of accompanying measures, like the creation of multi-stakeholder partnerships for collective action, to ensure due diligence works for smallholders will be crucial. Such action, by channeling capacity building and financial support for smallholders, can ensure that the basic enablers for better incomes are in place.

Who is a smallholder?

The definition of a smallholder farmer can vary depending on the crop they grow or region where they are based. Generally speaking, those whose farms are smaller than two hectares are usually considered to be smallholder farmers. These farmers are responsible for producing a third of the world's food supply and play an important role in several global value chains[1].

Three recommendations to make HREDD legislation work for smallholders

1. FOCUS ON LIVING INCOMES, LIVING WAGES, AND RESPONSIBLE PURCHASING PRACTICES TO REDUCE POVERTY

The problem

A living income (or living wage for workers[3]) is defined as the net annual income required for a household in a particular place to afford a decent standard of living for all members of that household. As the Universal Declaration on Human Rights sets out in Article 25.1, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."[4] Despite this, most smallholders in agricultural value chains do not earn a living income with their produce, nor are they able to pay hired workers a living wage. Around 63% of the world's extreme poor work in agriculture, many of whom are smallholders that produce for global value chains[5].

According to the United Nations Guiding Principles on Business and Human Rights (UNGPs), when conducting HREDD, companies should prioritise the 'most severe' potential adverse impacts[6]. In the case of agribusiness value chains engaging smallholder agriculture, lack of access to living incomes for farmers may be the most salient risk[7]. It is also among the main issues highlighted by producer representatives, and yet, it is often overlooked by companies who tend to focus on the human rights that are easiest for them to address[8]. Furthermore, when it comes to achieving living incomes for smallholders, women are often not the ones managing the family income earned from crops[9,10], and when it comes to living wages, there is a persistent gender gap between men and women[11]. Poverty is also a contributing factor to many of the human rights and environmental risks in international value chains. For instance, children might be forced to work to support low household incomes; smallholders who employ workers are often unable to pay a living wage; and smallholders might resort to environmentally unsustainable practices such as deforestation or the use of cheaper, unapproved chemicals to increase farm size or productivity, and thereby, generate more income. While the risks are clear, to date, few companies operating in the agriculture industry have made target and time-bound commitments to work towards living incomes for the smallholders in their value chains[12].

Working towards a living income requires that companies address, among other things, their purchasing practices. The UNGPs state that businesses have a responsibility to effectively prevent, cease, or mitigate impacts from human rights infringements that they have caused or contributed to[16]. Purchasing practices play a big role in this as they can be a key factor in pushing smallholders even further into poverty. For example, the combination of unfavourable contract terms and greater downward pressure on prices in global value chains, can leave smallholders earning less than their cost of production and in no position to invest additional resources into HREDD requirements and consequential compliance of standards and procedures. The upcoming HREDD legislation provides an opportunity to address unfair purchasing practices and their consequences faced by smallholders by creating a level playing field for companies and making responsible practices the legal norm.

The essential role of good purchasing practices: a spotlight on the coffee industry

Research shows that in 8 of the 10 main coffee producing countries, coffee production provides an income at or below the poverty line[13]. As a result, farmers cannot purchase needed inputs nor make long-term investments in their farms. This makes their crops more prone to the risk of pests and diseases and increases their vulnerability to climate change impacts. In theory, sustainability requirements help address these issues and are beneficial for all actors. In practice, however, the costs associated with these requirements are not shared proportionately throughout the supply chain, with the burden falling mainly on farmers[14].

The International Coffee Organization (ICO) concludes that current low coffee price levels are mainly the result of overproduction. However, the organisation does note that market power on the buyer side can lead to unfavorable contract terms for upstream value chain actors such as farmers. Additionally, the ICO states that "in a competitive market with increasing costs, margins for value chain actors tend to be low" and "rising costs for processing, marketing, and distribution in consuming countries are among the key factors behind the decreasing farmers' share in the coffee retail price."[15]

Good purchasing practices in the coffee sector can play a role in ensuring that the costs of investing in sustainability are proportionally shared along the supply chain, and that smallholders and their families earn a living income.

Photo: Loes Heerink

Addressing the problem

To address living incomes and unfair purchasing practices in global value chains, HREDD legislation should:

- At least cover all internationally recognised human rights and explicitly refer to living wages and living incomes either as rights themselves or as preconditions for the fulfilment of other human rights.
- Require companies to develop a pathway that they can follow to achieve living incomes and wages for the farmers they source from, namely through:
  a) developing and publishing a target- and time-bound plan to close the gap between actual incomes and living incomes for the regions they source from
  b) using a credible benchmark to determine the local living income and publicly disclose the methodology used to establish it.
- Require that risk assessments identify potentially exploitative buying practices in the supply chain. As part of their obligation to cease, prevent, and mitigate human rights infringements and adverse impacts, companies would need to amend purchasing practices throughout their procurement cycle—from the early stages (sourcing and product development) to their interactions with suppliers (price negotiations, confirmation of technical standards, contractual terms, payment terms, and lead times).
- Suppliers, in turn, should be enabled to seek effective redress when buyers engage in unfair purchasing practices.
- Require a minimum threshold of intersectional gender responsiveness measures to be adhered to by companies in their due diligence processes.

Guidance should:

- Provide instructions to companies on how to engage with intermediate suppliers throughout the entire supply chain, as well as other business relationships, on living income.
- Share living income benchmarks that are already available and support the development of benchmarks for key commodities and geographies.
- Lay out the type of opportunities companies can pursue that support the increase of smallholder incomes, in line with development priorities of host governments. This could include the diversification of income-generating opportunities, local procurement, technology transfer, improvements in local infrastructure, better access to credit and markets, payments for environmental services, allocation of revenue, and more[17].
- Support companies to embed the respect for human rights and the environment in their purchasing practices. For example, by developing mandates for purchasing teams which allow them to balance price and ethical considerations.

2. ENCOURAGE LASTING TRADE RELATIONSHIPS AND CONTINUOUS IMPROVEMENT

The problem

Legislation should not solely focus on penalizing human rights violations in value chains, as companies can 'cut and run' from suppliers and shift their sourcing to less-risky countries or to larger suppliers that have more capacity to quickly adapt to new requirements. Instead, legislation should prevent buyers from forcing smallholders to either sell at lower prices to markets that are less regulated than the EU or lose market access altogether. Dropping or excluding smallholders from value chains would likely result in a drop in income for smallholders and a continuation of human rights violations and environmental issues. The upcoming legislation should clearly outline that a decision to disengage from a supplier is a last resort, only when an adverse impact cannot be prevented or mitigated and the leverage cannot be increased. Importantly, the decision should also always be made in the best interests of the smallholders[18].

Rather than a 'tick-the-box' exercise, HREDD must be applied as a process, one that results in ever-improving human rights and environmental standards. This type of strategy requires a shift to long-term purchasing commitments, with businesses—as set forth in paragraph 37 of the draft directive—first trying to address, solve, and remedy adverse impacts in close collaboration with their stakeholders, including governments, industry actors, NGOs, suppliers, and smallholders. Businesses that have the leverage to prevent or mitigate the adverse impact should exercise it, and businesses that do not have sufficient leverage should explore avenues to do so, for example, through collaboration with other business relationships. Building the capacity of smallholders—by either investing in programs that do so or by providing training through different types of stakeholders—can also increase leverage. When governments and businesses support smallholders to be agents in their own due diligence, they can assess their own risks related to international human rights norms, mitigate and monitor those risks in their own landscape, and be empowered through resources and training to participate in remediation when necessary.


Photo: Charlie Watson

Addressing the problem

To encourage lasting trade relationships and continuous improvement, HREDD legislation should:

- Recognise the complexity of addressing human rights violations when they are linked to structural economic, social, and cultural contexts and require companies to develop processes that clearly outline how they support suppliers throughout their supply chain to address root causes of human rights violations and environmental problems, rather than abandon or avoid high-risk sourcing areas.
- Require companies to use or increase their leverage to prevent or mitigate adverse impacts and only disengage from a supplier as a last resort and in a responsible manner. Impacted and potentially impacted stakeholders of disengagement, or their legitimate representatives, shall be consulted before reaching a decision. Any plans for disengagement will take into account credible information regarding what the impact of disengagement might be on the ground.

Guidance should:

- Advise companies on how to assess the severity of risks and the root causes of risks, including the lack of a living income.
- Advise companies on how to build trust and on how to support upstream suppliers and other stakeholders to improve their performance and empower them as agents in the HREDD process. This can be done through different means, including capacity building, technical guidance, experience-sharing, co-investment, and risk-sharing. Key Performance Indicators should also be provided for companies to measure concrete improvements.

3. ENGAGE AND ACTIVELY COLLABORATE WITH RIGHTS- HOLDERS TO DEFINE AND IMPLEMENT HREDD

The problem

Companies engaging in due diligence often do not prioritise the highest risks to rightsholders, but rather, those that affect their own interests[19]. Due diligence processes also rarely involve rightsholders or include their views in the outcomes of the process. However, inclusion of rightsholders in each step of the due diligence process is an essential step to guarantee that the risks that are most significant for smallholders are identified, mitigated, and remediated. Smallholders are also best placed to identify which risks are interlinked, such as the relation between living incomes and the gradual elimination of child labor.

Smallholders, due to their size and position at the beginning of global value chains (often several tiers away from the business placing the product on the EU market and responsible for conducting due diligence), will also face greater challenges in terms of their capacity to organise and respond to the standards of mandatory HREDD. Despite representing 43% of the agricultural labor force in the global south, women face challenges when it comes to owning land. In Sub-Saharan Africa, for instance, less than 15% of landholders are women[20]. Accordingly, they access only a fraction of the productive assets, inputs, training, and information compared to men and are in an especially vulnerable situation. Meaningful, gender-inclusive involvement of stakeholders in HREDD is key to ensure that companies provide the right support to their suppliers. Genuine stakeholder engagement is also a cornerstone of any decision making regarding responsible disengagement, as highlighted in the previous section[21].

Currently, there is no established process for organised smallholder representation—compared to the representation of workers through trade unions, for example—that ensures their representation in the HREDD framework. Nonetheless, direct engagement with smallholders, or representative organisations such as cooperatives, should be encouraged. It is crucial that in sectors and geographies where both smallholders operate with high human and environmental risks and companies encounter difficulties in engaging with smallholders directly, engagement between industry actors and smallholders is supported. In situations where direct engagement is not possible, businesses should consider alternatives such as consulting independent experts, human rights defenders, and civil society organisations representing rightsholders' interests. In all scenarios, the due diligence process should be transparent, and smallholder groups should have easy access to the data that are collected by companies as part of their supply chain due diligence process.

The upcoming mandatory HREDD legislation can ensure this by establishing a clear obligation for companies to genuinely engage with their stakeholders throughout the entire due diligence process. Legislation should also recognise that, especially in countries with limited civic space, those who fight against human rights violations and work to address root causes of human rights and environmental violations are often under pressure. Trade unions, civil society, and human rights and women's rights organisations might be harassed, intimidated, or even detained if they speak out on violations[22]. Therefore, procedures for stakeholders must ensure the physical and legal safety and protection of stakeholders.

Who is a stakeholder and rightsholder?

In the scope of legislation, 'stakeholders' or 'rightsholders' refer to individuals and groups of individuals whose rights or interests may be affected by the potential or actual adverse impacts on human rights and the environment posed by a company or its business relationships, as well as organisations legitimately representing their interests. These can include farmers, workers and their representatives, trade unions, civil society organisations defending human rights and the environment, local communities, women's organisations, children, indigenous peoples, and citizens' associations.

Addressing the problem

To engage and actively collaborate with rightsholders in the HREDD process, legislation should:

- Stipulate that risk prioritisation shall be informed by stakeholders' perspectives and that prioritisation decisions do not limit the scope of a comprehensive due diligence process.
- Require rightsholder engagement at every step of HREDD, recognising smallholders as a group in a vulnerable situation which should be given specific attention through an intersectional gender lens.
- Require companies to disclose how rightsholders' views are taken into account in their due diligence design and implementation.
- Recognise producer organisations as potential representatives of smallholders in shaping a company HREDD process.
- Require detailed and transparent reporting, including on the process of risk mapping and prioritisation and the measures and outcomes of those activities. Information should be freely accessible to stakeholders in a timely and meaningful manner.
- Include, protect, and empower those who fight against human rights violations and work to address root causes of human rights violations, such as trade unions, civil society, and human rights and women's rights organisations, so that they can participate in and monitor company HREDD processes.

Guidance should:

- Identify those sectors and geographies in which smallholders operate with high human and environmental risks and support engagement between industry and smallholders in these geographies.
- Elaborate on how to effectively select and involve stakeholders and rightsholders and their legitimate representatives in the due diligence process, with an emphasis on stakeholders facing greater barriers to participation, such as smallholder farmers and women in producer countries. The risks identified should be those to rightsholders and not merely to the financial interests of the company.
- Lay out how HREDD can be gender responsive and intersectional to include other factors such as ethnicity, religion, or personal beliefs at every step of the process.

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