

Input MVO Platform Initiative on Sustainable Corporate Governance

Below is the input of the MVO Platform for the consultation of the Initiative on Sustainable Corporate Governance. See pink text for our response.

Februari 2021

Section I: Need and objectives for EU intervention on sustainable corporate governance

Questions 1 and 2 below which seek views on the need and objectives for EU action have already largely been included in the public consultation on the Renewed Sustainable Finance Strategy earlier in 2020. The Commission is currently analysing those replies. In order to reach the broadest range of stakeholders possible, those questions are now again included in the present consultation also taking into account the two studies on due diligence requirements through the supply chain as well as directors' duties and sustainable corporate governance.

Question 1: Due regard for stakeholder interests', such as the interests of employees, customers, etc., is expected of companies. In recent years, interests have expanded to include issues such as human rights violations, environmental pollution and climate change. Do you think companies and their directors should take account of these interests in corporate decisions alongside financial interests of shareholders, beyond what is currently required by EU law?

- Yes, a more holistic approach should favour the maximisation of social, environmental, as well as economic/financial performance*
- Yes, as these issues are relevant to the financial performance of the company in the long term.
- No, companies and their directors should not take account of these sorts of interests.
- Do not know.

* Please provide reasons for your answer:

Companies can only play a positive role in advancing world-wide development if they do not have negative impacts on human rights, animal welfare, climate and the environment. So, there is an urgent need for all companies to make sure their business does not thrive because they do not pay fair prices, or because they pollute the environment, but that their business thrives because they respect all of these interests and thereby play a truly positive role in solving the major challenges of these times. All companies are responsible to ensure they prevent, mitigate and redress the adverse impacts of their activities.

Question 2: Human rights, social and environmental due diligence requires companies to put in place continuous processes to identify risks and adverse impacts on human rights, health and safety and environment and prevent, mitigate and account for such risks and impacts in their operations and through their value chain.

In the survey conducted in the context of the study on due diligence requirements through the supply chain, a broad range of respondents expressed their preference for a policy change, with an overall preference for establishing a mandatory duty at EU level.

Do you think that an EU legal framework for supply chain due diligence to address adverse impacts on human rights and environmental issues should be developed?

- Yes, an EU legal framework is needed*.
- No, it should be enough to focus on asking companies to follow existing guidelines and standards.
- No action is necessary.
- Do not know.

* Please explain:

All companies in Europe should do business with respect for human rights and the environment in its own operations, subsidiaries and global value chain, including supply and subcontracting chains. Voluntary measures alone have failed, as numerous studies have shown. A smart mix of policy measures including mandatory due diligence for all companies should be introduced.

The EU should also engage constructively in the negotiations for an ambitious UN Treaty on Business and Human Rights.

Considering that EU-based MNE's will probably implement this future EU legal framework for supply chain due diligence also for their products for the non-EU market, it will raise the sustainability standards worldwide.

Question 3: If you think that an EU legal framework should be developed, please indicate which among the following possible benefits of an EU due diligence duty is important for you (tick the box/multiple choice)?

- Ensuring that the company is aware of its adverse human rights, social and environmental impacts and risks related to human rights violations other social issues and the environment and that it is in a better position to mitigate these risks and impacts
- Contribute effectively to a more sustainable development, including in non- EU countries
- Levelling the playing field, avoiding that some companies freeride on the efforts of others
- Increasing legal certainty about how companies should tackle their impacts, including in their value chain
- A non-negotiable standard would help companies increase their leverage in the value chain
- Harmonisation to avoid fragmentation in the EU, as emerging national laws are different
- SMEs would have better chances to be part of EU supply chains
- Other

Other, please specify:

EU legislation should improve access to justice for victims and empower them and their representatives, including trade unions and NGOs, to fight against human rights abuses.

An EU law should furthermore benefit the advancement of:

- the right to form trade union and collective bargaining (ILO Conventions 87 and 98) and a living wage/ income which are seen as **enabling rights**, from which other rights can be realized.;
- tackling **climate change** which has negative impacts for human rights and the environment.
- reducing the negative impact of business activities throughout the chain on **vulnerable groups** such as children, indigenous peoples and people with disabilities;
- addressing the negative impact of businesses on **animal welfare**, as this is closely intertwined with the emergence of zoonotic diseases, antimicrobial resistance, climate change and loss of biodiversity;
- Advance **women's rights** as they are an important catalyst for development

Question 3a. Drawbacks

Please indicate which among the following possible risks/drawbacks linked to the introduction of an EU due diligence duty are more important for you (tick the box /multiple choice)?

- Increased administrative costs and procedural burden
- Penalisation of smaller companies with fewer resources
- Competitive disadvantage vis-à-vis third country companies not subject to a similar duty
- Responsibility for damages that the EU company cannot control
- Decreased attention to core corporate activities which might lead to increased turnover of employees and negative stock performance
- Difficulty for buyers to find suitable suppliers which may cause lock-in effects (e.g. exclusivity period/no shop clause) and have also negative impact on business performance of suppliers
- Disengagement from risky markets, which might be detrimental for local economies

- o Other

Other, please specify:

We believe none of the listed drawbacks apply, for the following reasons:

- Regarding administrative and procedural costs and burden, the OECD study “Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct” from June 2016 and the recent study “Study on due diligence requirements through the supply chain” from January 2020 speak against such concerns.
- Regarding the concern of penalization of smaller companies, if the principle of proportionality as enounced in Principle 14 of the UNGPs is considered in the new framework, smaller companies should not be unnecessarily burdened.
- Regarding the concern of competitive disadvantage, due to the size of the European market, most third-country competitors of European companies would likely need to adhere to the new framework anyway. For this it is important that the new framework specifically applies to all companies who do business in Europe, and not only to companies who are registered in Europe.
- Regarding the concern about responsibility for damages that the EU company cannot control, if the new framework is set up in a way that ensures the liability for damages is proportional to the level of control of the company, this risk can easily be averted.
- Regarding the concern about decreased attention to core corporate activities and negative stock performance, the OECD study “Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct” from June 2016 demonstrates that due diligence in fact correlates to positive impacts on stock performance and positive effects on human resources aspects.
- Regarding the concern about the difficulty for buyers to find suitable suppliers and related lock-in effects, this argument starts from the flawed assumption that suppliers always have high leverage on buyers, which various studies, including Oxfam’s “Ripe for Change” from 2018 on the supermarket sector demonstrates the situation often is quite the opposite. Even in those cases when the supply is concentrated and suppliers may have higher leverage, the new framework could specifically allow for and encourage buyers to collaborate and seek ways to increase their leverage to obtain compliance to the EU due diligence rules from suppliers.
- Regarding the concern of disengagement from risky markets, the EC “Study on due diligence requirements through the supply chain” from January 2020 shows that most companies are not in a position to restructure their business models in a way that would lead to disengagement. Furthermore, disengagement on grounds of sustainability issues is to date very rare.

Section II: Directors’ duty of care – stakeholders’ interests

In all Member States the current legal framework provides that a company director is required to act in the interest of the company (duty of care). However, in most Member States the law does not clearly define what this means. Lack of clarity arguably contributes to short-termism and to a narrow interpretation of the duty of care as requiring a focus predominantly on shareholders’ financial interests. It may also lead to a disregard of stakeholders’ interests, despite the fact that those stakeholders may also contribute to the long- term success, resilience and viability of the company.

Question 5. Which of the following interests do you see as relevant for the long- term success and resilience of the company?

	Relevant	Not relevant	I do not know/I do not take position
* the interests of shareholders	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* the interests of employees	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* the interests of employees in the company's supply chain	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* the interests of customers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* the interests of persons and communities affected by the operations of the company	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* the interests of persons and communities affected by the company's supply chain	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
*			

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the interests of local and global natural environment, including climate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* the likely consequences of any decision in the long term (beyond 3-5 years)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* the interests of society, please specify	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
* other interests, please specify	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

the interests of society, please specify:

Companies and markets in general thrive in prosperous and cohesive societies. There are numerous societal interests that have a profound effect on the company and the risks it is facing, including social conflict (which in extreme can take the form of a war), corruption, poverty, systemic abuse of human rights, the ability of people to pursue their happiness, political persecution, and general societal infrastructure. All of these interests may be also affected by the company's actions. While we can provide here a long list of examples of these interactions, it is perhaps not necessary in order to answer the question posed. The underlying point is that resilient and successful companies need to be aware of the context in which they do business.

Companies need to consider the triple context of economy, society and environment and their governing bodies need to take account of the legitimate and reasonable needs, interests and expectations of all material stakeholders in the execution of its duties in the best interests of the organisation over time.

However, it would be impossible and ineffective to enumerate the types of interests that companies' directors need to take into consideration. Such an approach has been tried in India, Brazil and - most relevantly- in the UK, but these reforms of company law have not had any documented impacts.

This is because such requirements are too vague to provide any meaningful guidance or ensure any accountability, and because the issues of concern depend on the business, societal and environmental context in which the company operates.

other interests, please specify:

The ability of the market to internalise the costs of social and environmental impacts and the ability of the business actors in a given area to take collective action to address systemic problems.

Question 6. Do you consider that corporate directors should be required by law to

- (1) identify the company's stakeholders and their interests,
- (2) to manage the risks for the company in relation to stakeholders and their interests, including on the long run
- (3) and to identify the opportunities arising from promoting stakeholders' interests?

* Please explain:

The duty of care that directors owe to the company already requires them in principle to address the abovementioned points, therefore a formalisation of such vaguely defined aspects of directors' duties will not likely have any effect on the directors. The strong pressures from outside company law and the lack of meaningful sustainability metrics mean that the problem of short-termism cannot be solved simply by requiring or permitting directors to have regard to sustainability and the company's long-term interest.

A more meaningful approach would be to clarify how the stakeholders' interests should be considered, both from the perspective of respect to legitimate interests of stakeholders, as well as from the perspective of the management of risks and opportunities. We feel it is important to note that the interest of external stakeholders of not being subjected to severely harmful effects caused by the company should take precedence over the interests of internal stakeholders. This is essential in ensuring that the agenda of internal stakeholders, who have proportionately much larger leverage on the business decisions, does not 'eclipse' the interests of the external stakeholders and society to avert severe harm.

This can be achieved by specifying directors' responsibilities with respect to

- a) overseeing and ensuring the quality of the materiality determination (as specified in the EU Non-Financial Reporting Framework) and due diligence processes (which should ideally be specified in the EU due diligence legislation); and
- b) determining the company's strategy to address the risks and impacts identified by these processes, that is including:
 - (i) material environmental and social risks and impacts to the company's business model, operations and supply chain, and
 - (ii) severe impacts to people and the planet identified by the company's environmental and human rights due diligence in accordance with its legal obligations.

This approach would provide clear guidance to directors on how to properly consider stakeholders interests from the perspective of the best interest of the company, which they are already expected to do in the framework of their existing duties, rather than imposing any new behavioural obligation or changes to the corporate governance system.

The purpose of such clarification is to ensure that the sustainability matters are duly considered at a strategic level, and that there is a transparency concerning their integration in the company's overall strategy that facilitates meaningful engagement of investors and stakeholders.

Question 7. Do you believe that corporate directors should be required by law to set up adequate procedures and where relevant, measurable (science –based) targets to ensure that possible risks and adverse impacts on stakeholders, ie. human rights, social, health and environmental impacts are identified, prevented and addressed?

- **I strongly agree**
- I agree to some extent
 - I disagree to some extent I strongly disagree
 - I do not know
 - I do not take position

* Please explain:

The upcoming initiative should consider how boards can address impacts and risks on a regular basis, supported by relevant committees (sustainability, audit, risk, remuneration), as well as the need for relevant expertise within and outside the board, thanks to ad hoc nominations of external board advisers or non-executive board members, regular updates from relevant senior management and training for board members and company executives.

Most importantly, the boards should be responsible for overseeing and ensuring the quality of the materiality determination and due diligence processes. To support the implementation of this duty, a non-executive committee, composed of independent experts as well as managers of the company and chaired by a designated non-executive director, should be set up and tasked with monitoring and reviewing the content and implementation of the sustainability strategy.

As part of their duty of care, directors should be required to integrate sustainability and due diligence matters in corporate strategy and business models and make sufficient resources available to management to carry out the due diligence duty of the company. As part of this integration, directors should be required to develop, disclose and implement, on behalf of the company, a forward-looking sustainability strategy and set measurable, specific, verifiable, time-bound targets based where appropriate on science-based methodology that effectively addresses:

A) severe impacts to people and the planet identified by the company's environmental and human rights due diligence in accordance with its legal obligations and

B) material environmental and social risks and impacts to the company's business model, operations and supply chain

Measurable targets for the mitigation of such risks and impacts are critical since targets and KPIs are indispensable for management of risks and impacts. If the risks or impacts meet the threshold of severity, they ought to be managed

Question 8. Do you believe that corporate directors should balance the interests of all stakeholders, instead of focusing on the short-term financial interests of shareholders, and that this should be clarified in legislation as part of directors' duty of care?

- **I strongly agree**
- I agree to some extent
 - I disagree to some extent I strongly disagree
 - I do not know
 - I do not take position

* Please provide an explanation or comment:

• It is imperative to distinguish the due diligence duty that the company has to the respect human rights and the environment and the duty of care that the directors have to the company itself. The directors' duty of care is owed to the company as a separate legal entity. Therefore, in principle, it already includes an obligation for directors to consider all matters and stakeholders interests. It should be clarified and reaffirmed in legislation that, in doing so, directors must ensure that the rights of

people and the planet are respected and upheld prior to any other business considerations, such as the interests of shareholders or other internal stakeholders, in accordance with the due diligence obligations of the company.

- As explained in a statement on corporate governance drafted by a group of senior academics in 2019 as a guidance for the European Commission on this very matter: “The underlying idea is that directors could potentially use their discretion under (some variant of) the business judgement rule that exists in every major jurisdiction, and that gives directors discretion to act in what they believe to be in the best interests of the company as a separate entity. In principle, this rule can accommodate either a long- or short-term approach. Hence, where directors pursue the goal of maximising short-term shareholder value, it is a product not of legal obligation, but of the pressures imposed on them by financial markets, activist shareholders, the threat of hostile takeover and/or stock-based compensation schemes. These strong pressures from outside company law mean the problem of short-termism cannot be solved simply by requiring or permitting directors to have regard to sustainability and the company’s long-term interest.”

- A further problem is that while short-term financial performance is expressed in clear numbers, the interests of other stakeholders and their effects on the company cannot be expressed in a similar quantifiable manner. In other words, these potentially conflicting interests are of a different fundamental quality, and therefore they cannot be simply balanced. The experience with the company law reforms in Brazil, India and the UK, which attempted by various means to codify the obligation of directors to balance multiple interests, shows that such an approach is not effective.

It is useful to confirm that the duty of care means that all legitimate interests and needs must be considered, and the interests of the providers of financial capital should not be unduly prioritised. However, to give it a practical effect the law should provide a clear minimum threshold for respecting legitimate interests of stakeholders. In this regard, the directors’ duty of care should provide that directors should ensure that the company

a) implements a robust due diligence to identify and address severe impacts to people and the planet linked to the company’s business model

b) puts in a place a strategy and clear targets to effectively address the identified impacts in accordance with the company’s legal obligations.

Failure to implement the strategy should be considered a breach of executive directors’ duty of good faith (where deliberate) or duty of care (where accidental), and could be enforced by the shareholders by derivative action where the failure causes long-term harm to the company. Non-executive directors should have a duty of care to monitor the implementation of the strategy. A national regulatory body should be empowered to bring proceedings against the executive directors where non-implementation has caused serious harm to third parties or unlawful harm to the environment

Question 9: Which risks do you see, if any, should the directors’ duty of care be spelled out in law as described in question 8?

As explained above, if the duty of care is spelled out in the law as proposed in question 8, it would not have any practical effect. Most importantly, it wouldn’t provide any clear guidance or benchmark how the interests of the stakeholders need to be considered beyond the consideration of the short-term financial risks facing the company. As such it would not be enforceable.

* How could these possible risks be mitigated? Please explain.

Instead of a broad mandate to balance the interests of stakeholders, the legal definition of duty of care should

1. Confirm that its primary objective is to ensure long-term success of the company, and that in doing so directors must take into account all legitimate stakeholders interests and needs instead of prioritising the interests of providers of financial capital; and

2. Specify that it is an obligation of directors to ensure the implementation by the company of a robust due diligence to identify and address severe impacts to people and the planet linked to the company's business model; and to put in a place a strategy supported by targets to address such impacts in accordance with the company's legal obligations.

Where directors widely integrate stakeholder interest into their decisions already today, did this gather support from shareholders as well? Please explain.

There is a growing movement of investors that are highly supportive of companies' engagement with stakeholders' interests, as well as of stronger public policies in this regard. This includes for example the UN Principles for Responsible Investment, or the Investors Alliance for Human Rights, as well as, broadly speaking the Sustainable Investors Forum(s).

Question 10. As companies often do not have a strategic orientation on sustainability risks, impacts and opportunities, as referred to in question 6 and 7, do you believe that such considerations should be integrated into the company's strategy, decisions and oversight within the company?

- I strongly agree
- I agree to some extent
 - I disagree to some extent I strongly disagree
 - I do not know
 - I do not take position

* Please explain:

Addressing the sustainability challenges often require changes to the company's business model, strategy and financial planning. Therefore, it is critical that the company's strategy and targets with respect to such risks, impacts and opportunities is an integral part of the overall corporate strategy, and is decided on and monitored by the governing body of the company.

Enforcement of directors' duty of care

Today, enforcement of directors' duty of care is largely limited to possible intervention by the board of directors, the supervisory board (where such a separate board exists) and the general meeting of shareholders. This has arguably contributed to a narrow understanding of the duty of care according to which directors are required to act predominantly in the short-term financial interests of shareholders. In addition, currently, action to enforce directors' duties is rare in all Member States.

* Question 11. Are you aware of cases where certain stakeholders or groups (such as shareholders representing a certain percentage of voting rights, employees, civil society organisations or others) acted to enforce the directors' duty of care on behalf of the company? How many cases? In which Member States? Which stakeholders? What was the outcome?

Please describe examples:

The answer to this question requires a comprehensive mapping of derivative actions by shareholders across the EU jurisdictions. Such actions are relatively rare.

Furthermore, as far as we know, the directors' duty of care can be enforced on behalf of the company only by shareholders or by the organs of the company.

In addition, it would be useful to examine the practice of the Dutch Enterprise Chamber which has far-reaching powers of intervention in the internal affairs of companies, including nullification of corporate resolutions, suspension, dismissal or appointment of directors, and other remedies including dissolution.

Question 12. What was the effect of such enforcement rights/actions? Did it give rise to case law/ was it followed by other cases? If not, why?
Please describe:

Question 13. Do you consider that stakeholders, such as for example employees, the environment or people affected by the operations of the company as represented by civil society organisations should be given a role in the enforcement of directors' duty of care?

- 0 I strongly agree
- I agree to some extent
 - I disagree to some extent I strongly disagree
 - I do not know
- I do not take position

* Please explain your answer:

Question 13a: In case you consider that stakeholders should be involved in the enforcement of the duty of care, please explain which stakeholders should play a role in your view and how.

See above.

Employees and their representatives should be empowered to bring an action for enforcement of the directors' duty of care where the failure would cause harm to the company.

Stakeholders should be empowered to bring an action for enforcement of the directors' duty of care where the failure would cause serious harm to them or to the interests they represent (such as the environment).

A national regulatory body could be empowered to take an enforcement action on behalf of the stakeholders interests in cases of serious harm to third parties or unlawful harm to the environment.

Section III: Due diligence duty

For the purposes of this consultation, "due diligence duty" refers to a legal requirement for companies to establish and implement adequate processes with a view to prevent, mitigate and account for human rights (including labour rights and working conditions), health and environmental impacts, including relating to climate change, both in the company's own operations and in the company's the supply chain. "Supply chain" is understood within the broad definition of a company's "business relationships" and includes subsidiaries as well as suppliers and subcontractors. The company is expected to make reasonable efforts for example with respect to identifying suppliers and subcontractors. Furthermore, due diligence is inherently risk-based, proportionate and context specific. This implies that the extent of implementing actions should depend on the risks of adverse impacts the company is possibly causing, contributing to or should foresee.

Question 14: Please explain whether you agree with this definition and provide reasons for your answer.

We largely agree, but would like to stress due diligence is a continuous process where each step reinforces the other. The EU legal framework should furthermore closely align with the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for multinational enterprises, whilst recognising that the OECD Guidelines do not completely cover important and highly relevant RBC themes, such as climate change, gender, animal welfare and land rights.

The current definition is focused on the 'supply chain' and 'business relationships', and as such seems to overlook consumer interests. As per the OECD Guidelines for MNEs, consumer interests should also be included among the RBC issues / topics covered in due diligence. The definition should recognise that business activities can also result in adverse impacts to consumers, for example due to inappropriate advertising and marketing, injury from product use, and online abuse and exploitation.

Business practices affect the full spectrum of rights, including impacts across the workplace, marketplace, supply chain and wider community.

Furthermore, the new law needs to have a really clear definition of supply chain, and should specifically include entities that are not linked to a company through contracts but do contribute to the company's business. Where the definition mentions "causing, contributing to or should foresee", we would like to add "or linked to", in line with the UNGP framework.

Question 15: Please indicate your preference as regards the content of such possible corporate due diligence duty (tick the box, only one answer possible). Please note that all approaches are meant to rely on existing due diligence standards, such as the OECD guidance on due diligence or the UNGPs. Please note that Option 1, 2 and 3 are horizontal i. e. cross-sectorial and cross thematic, covering human rights, social and environmental matters. They are mutually exclusive. Option 4 and 5 are not horizontal, but theme or sector-specific approaches. Such theme specific or sectorial approaches can be combined with a horizontal approach (see question 15a). If you are in favour of a combination of a horizontal approach with a theme or sector specific approach, you are requested to choose one horizontal approach (Option 1, 2 or 3) in this question.

- Option 1. "Principles-based approach": A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These should be applicable across all sectors. This could be complemented by EU- level general or sector specific guidance or rules, where necessary
- Option 2. "Minimum process and definitions approach": The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.
- Option 3. "Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues". This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could also reflect EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.
- Option 4 "Sector-specific approach": The EU should continue focusing on adopting due diligence requirements for key sectors only.
- Option 5 "Thematic approach": The EU should focus on certain key themes only, such as for example slavery or child labour.
None of the above, please specify

* Please specify:

Question 15a: If you have chosen option 1, 2 or 3 in Question 15 and you are in favour of combining a horizontal approach with a theme or sector specific approach, please explain which horizontal approach should be combined with regulation of which theme or sector?

The EU directive should apply to all businesses, including multinational enterprises, regardless of their size and sector. Limitations in the scope of the EU directive would exclude many companies whose operations have significant actual or potential adverse impacts in the areas covered by due diligence obligations.

An EU directive should also remove obstacles to sector wide cooperation for sustainability and responsible business conduct.

Question 15b: Please provide explanations as regards your preferred option, including whether it would bring the necessary legal certainty and whether complementary guidance would also be necessary.

EU law must clearly establish that due diligence is a continuous, preventative, risk-based process through which all business enterprises must effectively identify and assess; cease, prevent and mitigate; track and monitor; and communicate and account for specific risks and actual and potential adverse impacts in their operations and along their global value chains and business relationships.

The due diligence duty must be focused on the risks and harms not to the enterprise itself but to human rights and the environment, and its extent must be determined by the likelihood and severity of the adverse impacts, and should be regularly re-assessed and adapted to ensure appropriateness and effectiveness. The effectiveness of due diligence is measured by the extent to which actual and potential harm is prevented and mitigated.

A rich body of legally binding international human rights and labour standards has long been developed, leaving no room for legal uncertainties. Although not as straight-forward as human rights standards, environmental standards - often addressed to states - can also be translated into concrete obligations for companies. When laying down due diligence requirements and stipulating corporate liability for harm, EU law should specify the protected environmental goods and the expected standard of business conduct in this regard. This would guide companies when they conduct due diligence, and administrative and judicial authorities when determining liability. Existing international due diligence standards already constitute a useful reference in this regard.

The “minimum process and definitions approach” described under Option 3 should be complemented with regulation that ensures the establishment of European and/or national supervisory bodies which are competent, independent, adequately resourced and competently staffed to monitor, investigate, sanction, advise, build capacity, set standards and harmonise DD policies and practices across the EU.

Already existing regulations on issues like labour rights or human rights in many geographies across the world demonstrate that legal certainty can easily be established if the regulations are sufficiently clear, specific and the enforcement is proportional and predictable.

Question 15c: If you ticked options 2) or 3) in Question 15 please indicate which areas should be covered in a possible due diligence requirement (tick the box, multiple choice)

- Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)
- Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups
- Climate change mitigation
- Public health; including antimicrobial resistance and the urgency to prevent new pandemics that originate from zoonotic diseases;
- Natural capital, including biodiversity loss; land degradation; ecosystems degradation, air, soil and water pollution (including through disposal of chemicals); efficient use of resources and raw materials; hazardous substances and waste
- Animal welfare, and its close relation with climate change, public health and the degradation of natural capital including biodiversity loss
- Other, please specify

Other, please specify:

Human Rights is much broader than just labour rights and working conditions. All internationally recognized human rights should be included.

Other topics: Climate Change adaptation and mitigation, living wage and tax matters.

Due diligence legislation should also acknowledge the fact that human rights, environmental and governance risks and impacts are not gender-neutral. **Companies should be encouraged to integrate the gender perspective into their due diligence processes, as well as other factors of discrimination:** many rights-holders face additional risks due to intersecting factors of discrimination based on their gender, ethnicity, race, caste, sexual orientation, disability, age, social status, migrant or refugee status, informal employment status, union involvement, exposure to conflict or violence, poverty, or other factors.

Question 15d: If you ticked option 2) in Question 15 and with a view to creating legal certainty, clarity and ensuring a level playing field, what definitions regarding adverse impacts should be set at EU level?

N/A

Question 15e: If you ticked option 3) in Question 15, and with a view to creating legal certainty, clarity and ensuring a level playing field, what substantial requirements regarding human rights, social and environmental performance (e.g. prohibited conducts, requirement of achieving a certain performance/target by a certain date for specific environmental issues, where relevant, etc.) should be set at EU level with respect to the issues mentioned in 15c?

The DD regulation should specifically require companies to embed DD in the policies and management practices of the business in order to ensure that the DD process is not merely a reactive approach to impacts, but primarily a proactive one. As such, the regulation should specifically prohibit companies from making use of unfair trading practices (for more on that see Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain), but also unfair, reckless and abusive conduct that can cause climate change or other harmful environmental impacts.

Question 15f: If you ticked option 4) in question 15, which sectors do you think the EU should focus on?

N/A

Question 15g: If you ticked option 5) in question 15, which themes do you think the EU should focus on?

N/A

Question 16: How could companies' - in particular smaller ones' - burden be reduced with respect to due diligence? Please indicate the most effective options (tick the box, multiple choice possible) This question is being asked in addition to question 48 of the Consultation on the Renewed Sustainable Finance Strategy, the answers to which the Commission is currently analysing.

- All SMEs[16] should be excluded
- SMEs should be excluded with some exceptions (e.g. most risky sectors or other)
- Micro and small sized enterprises (less than 50 people employed) should be excluded
- Micro-enterprises (less than 10 people employed) should be excluded SMEs should be subject to lighter requirements ("principles-based" or "minimum process and definitions" approaches as indicated in Question 15)
- SMEs should have lighter reporting requirements
- Capacity building support, including funding
- Detailed non-binding guidelines catering for the needs of SMEs in particular
- Toolbox/dedicated national helpdesk for companies to translate due diligence criteria into business practices
- Other option, please specify: The law should apply all enterprises, multinational, large companies and SME's operating in all sectors, including state owned enterprises, procurement services, letterbox companies, and all enterprises commercially active on the European market. The scale and complexity of the means through which enterprises meet the requirements under this law must be in accordance with the actual and potential negative impacts, market position and size of the company.**

None of these options should be pursued Please explain your choice, if necessary

We reject the view that due diligence should be seen as a “burden” for companies. Evidence such as the OECD study “Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct” from June 2016 demonstrate that there is a positive correlation between due diligence and company performance. Additionally, the EC “Study on due diligence requirements through the supply chain” from January 2020 shows that the costs for setting up DD processes is minimal in relation to business revenues, including for SMEs.

The responsibility for all companies, including SMEs to carry out due diligence is clearly articulated in both the UNGPs and the OECD Guidelines. SMEs can, just like large companies cause significant harm, regardless of their size. Furthermore, the OECD Due Diligence Guidance for Responsible Business Conduct from 2018 identifies several reasons why SMEs should not be exempted from DD responsibilities (see pag. 46), among which: greater flexibility than larger enterprises in policy making and implementation and less suppliers and likely less impacts to deal with. Additionally, SMEs traditionally have closer and longer-term relationships with suppliers, which sometimes enables them to better use their leverage than larger companies.

The UNGPs and the OECD Guidelines also articulate that the responsibility to carry out due diligence should be proportional to the context of the enterprise, including their size. Additionally, we support the view that developing specific guidelines, templates and providing individual and collective assistance to companies, including SMEs to meet their due diligence responsibilities can prove beneficial, as long as this is not done by diverting public funds that otherwise would have been used to tackle directly humanitarian and development projects. Instead, such support can be collectively organized by the business themselves, which it turn also has the benefit of fostering a climate of collaboration to increase leverage and tackle systemic issues that companies cannot resolve individually.

Question 17: In your view, should the due diligence rules apply also to certain third- country companies which are not established in the EU but carry out (certain) activities in the EU?

- Yes
- No
- I do not know

Question 17a: What link should be required to make these companies subject to those obligations and how (e.g. what activities should be in the EU, could it be linked to certain turnover generated in the EU, other)? Please specify.

Third country companies placing products on or/and providing services within the EU internal market should be subject to the same obligations as companies established in the EU. This enhances fair competition between EU and non-EU companies on the European market (i.e. the level playing field).

Including all companies that operate in whichever way in the EU, even if they are not European companies is essential in establishing a level playing field for all European companies and for achieving an as big positive impact as possible globally.

For reference, previous regulations with similar linkages: the EU Timber Regulation, the GDPR Regulation, UK Modern Slavery Act, the California Supply Chain Transparency Act and the Dutch *Wet Zorgplicht Kinderarbeid*.

Question 17b: Please also explain what kind of obligations could be imposed on these companies and how they would be enforced.

These companies must also be obliged to respect human rights and the environment, in their own operations, subsidiaries, business relationships and global value chain, including supply and subcontracting chains. These companies must also be liable in case of/for any human rights and environmental abuses, including workers and trade union rights abuses in their operations or value chains, (without prejudice to other subcontracting and supply chain liability frameworks). Governments must set up robust enforcement mechanisms, with effective sanctions, to ensure that these companies also obey the law.

Question 18: Should the EU due diligence duty be accompanied by other measures to foster more level playing field between EU and third country companies?

- Yes
- No
- I do not know

Please explain:

The due diligence duty of third country companies should be accompanied by broadening jurisdiction of EU Member States courts.

To create a level playing field globally, the EU should also engage constructively in negotiations for an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises. This treaty should include enhanced provisions on access to justice for victims in third countries, including on jurisdiction, applicable law, rights of victims and liability.

EU trade policy should also contribute to ensure the respect of human rights, including workers and trade union rights, and of social and environmental objectives in companies' activities and in their business relationships and value chains. It should inter alia contribute to ensure that effective due diligence policies are implemented by companies and that comparable legislation on due diligence is introduced in third countries.

The EU public bodies (EC, EP, etc.) should review their public procurement procedures to include due diligence processes for all their suppliers

Question 19: Enforcement of the due diligence duty

Question 19a: If a mandatory due diligence duty is to be introduced, it should be accompanied by an enforcement mechanism to make it effective. In your view, which of the following mechanisms would be the most appropriate one(s) to enforce the possible obligation (tick the box, multiple choice)?

- Judicial enforcement with liability and compensation in case of harm caused by not fulfilling the due diligence obligations
- Supervision by competent national authorities based on complaints (and/or reporting, where relevant) about non-compliance with setting up and implementing due diligence measures, etc. with effective sanctions (such as for example fines)
- Supervision by competent national authorities (option 2) with a mechanism of EU cooperation/coordination to ensure consistency throughout the EU Other, please specify

Please provide explanation:

There should be four ways of supervision and enforcement:

1. There should be a competent, independent, adequately resourced and staffed national regulator checking compliance with the law. When an enterprise fails to comply with the due diligence obligation the regulator can support the enterprise and stimulate progress. If the enterprise remains in non-compliance the regulator may impose sanctions and fines escalating up to a maximum fine and penalties directed at of the responsible directors and board members for failure to comply with the law (the latter would imply repeated breach of due diligence obligations would be included under criminal law). At the same time, regulators should be able to give companies the opportunity to improve and correct non-compliance when deemed appropriate and beneficial to the situation of stakeholders;
2. Under the law, victims and other stakeholders should be able to take companies to court for not fulfilling their due diligence obligations to seek compensations for harm done;
3. If a complaint is filed on non-compliance with the due diligence obligation resulting in potential damage for victims, mediation can be requested. This could be the National Contact Points;
4. Exclusion of public procurement or positive incentives e.g. more points for procurement/ participation in trade missions, etc.;

The primary enforcement mechanism will be through the regulator, which is tasked with informative/preventative, constructive/enabling, monitoring and enforcement roles in its supervision of compliance with the law.

The enforcement of the EU due diligence duty should be accompanied by strict due diligence rules for public procurement or commercial incentives applied by all the EU public bodies.

Question 19b: In case you have experience with cases or Court proceedings in which the liability of a European company was at stake with respect to human rights or environmental harm caused by its subsidiary or supply chain partner located in a third country, did you encounter or do you have information about difficulties to get access to remedy that have arisen?

- Yes
- No

In case you answered yes, please indicate what type of difficulties you have encountered or have information about:

The weakness of current EU law in allowing victims of corporate harm effective access to remedy and justice, and to hold parent companies liable.

1- Under current law, parent companies are unlikely to be held liable for the activities of their subsidiaries. Parent companies argue that claims should be taken against their subsidiary in their home country and that EU courts should not take on human rights violations that happen outside the EU.

2-Victims have a limited ability to uncover the information that is necessary to show a parent company's control over the subsidiary and to therefore establish the parent company's liability. The corporate structure and layers of subsidiaries make it difficult for the victims to hold the parent company liable, since this involves 'piercing of the veil.'

3-EU law currently dictates that cases must be considered under the law of the country where the damage occurred.

4-No obligation for companies to exercise adequate environmental and human rights due diligence.

Please also refer to:

European Union Agency for Fundamental Rights (FRA), [Improving access to remedy in the area of business and human rights at the EU level](#), April 2017 ,

European Union Agency for Fundamental Rights (FRA), [Business and Human Rights – Access to Remedy](#), October 2020.

Directorate General for External Policies, [Access to legal remedies for victims of corporate human rights abuses in third countries](#), February 2019

If you encountered difficulties, how and in which context do you consider they could (should) be addressed?

1-EU laws should include provisions which make companies liable for harm they, or a company they control or have the ability to control, have, by acts or omissions, caused or contributed to.

2- New EU laws could reverse this burden of proof. Companies should a priori be considered to have control or influence over a subsidiary or other companies in their global value chains and to have the possibility of exercising, or actually exercises, control or decisive influence in the business relationship.

3 It is important for EU courts to have the power to apply the law that will be most protective of human rights and the environment.

4 Require companies to exercise adequate environmental and human rights due diligence. A company must be required to prove it had undertaken effective due diligence.

Section IV: Other elements of sustainable corporate governance

Question 20: Stakeholder engagement

Better involvement of stakeholders (such as for example employees, civil society organisations representing the interests of the environment, affected people or communities) in defining how stakeholder interests and sustainability are included into the corporate strategy and in the implementation of the company's due diligence processes could contribute to boards and companies fulfilling these duties more effectively.

Question 20a: Do you believe that the EU should require directors to establish and apply mechanisms or, where they already exist for employees for example, use existing information and consultation channels for engaging with stakeholders in this area?

- I strongly agree**
- I agree to some extent
- I disagree to some extent I strongly disagree
- I do not know
- I do not take position

* Please explain.

Question 20b: If you agree, which stakeholders should be represented? Please explain.

All internal and external stakeholders, including those from local communities which are also rights holders in terms of corporate impact.

Engagement processes should aim to understand how existing contexts and/or vulnerabilities may create disproportionate impacts for certain groups including indigenous peoples and communities, forest communities, coastal communities, lower-caste communities and other minority groups, migrant workers, homeworkers, temporary workers, women and children, among others. Special attention should also be paid to implementing a gender-based approach to ensure the safe and equal participation of women in decision-making processes.

It is essential that the stakeholders are engaged at the level at which the effects of the economic activity may occur or are occurring. A few examples of stakeholders to be included: employees of the company and of the business partners of the company, trade unions, local community members, indigenous communities, forest communities, lower-caste representatives; migrant workers and representatives, human rights and environmental defenders, women and women's organizations, faith groups and organizations, NGOs (local, regional and international), community leaders, local authorities, experts on human rights and the environment, etc.

On a special note: Children are often overlooked as stakeholders.¹ Children are usually less well placed to advocate for their own interests and may be silenced within their households or communities. Unless dedicated efforts are made to reach out to them – or to child rights advocates, the organizations or individuals who are in close contact with children or who have the expertise to provide information on children's rights in a particular context – children may be at risk of exclusion from companies' stakeholder engagement processes.

¹ https://www.unicef.org/csr/css/Stakeholder_Engagement_on_Childrens_Rights_021014.pdf

Engaging child rights stakeholders can strengthen a company's human rights processes and broader sustainability practices – not only to better understand specific child rights risks and opportunities, but to obtain a range of perspectives on their broad human rights impact.²

Question 20c: What are best practices for such mechanisms today? Which mechanisms should in your view be promoted at EU level? (tick the box, multiple choice)

All the potentially and actually affected rights- and other stakeholders should be engaged at the level where the impacts are occurring (or may occur) and cyclically as part of the due diligence process.

Some examples of good practices:

- ensuring employee representation in corporate boards and requiring an employee representation statements part of the company's non-financial public statements
- Human Rights and Environmental Impact Assessments (for more on these, see: <https://www.humanrights.dk/business/tools/human-rights-impact-assessment-guidance-toolbox>)
- Community-Based Human Rights Impact Assessments (for more on these, see: <https://policy-practice.oxfamamerica.org/work/private-sector-engagement/community-based-human-rights-impact-assessment-initiative/>)

Targeted meetings with specific groups of stakeholders may be appropriate to ensure meaningful engagement with those who are differently or disproportionately affected, or who may face barriers to involvement in other processes, for example women, people with disabilities, lower-caste communities, minorities and other groups potentially marginalised within the wider population. Where on-the-ground engagement is credibly unfeasible, for example due to severe limitations on freedoms and security risks, companies should ensure that the views of local stakeholders are meaningfully captured through credible representatives and consultations with experts. To be meaningful, engagement measures should be carried out in a manner appropriate to the context, for example by taking account of language, literacy levels, channels for communication, direct engagement with stakeholders, etc.

² For most companies, treating children as a key stakeholder group or understanding how they are impacted by business operations will not require consulting with children directly. Rather, clarity around child rights impacts can often be obtained from adults who have close contact with children or expertise in children's rights. However, adults do not always have sufficient insight into children's daily lives to be able to provide comprehensive or fully accurate information into a company's assessment process. Disaggregating children's perspectives from the community or household level is important because they may be silenced within the family or their views not solicited or understood because of their age or gender. Direct consultation with children always requires prior engagement with other child rights stakeholders and experts who have an understanding of child rights issues. These resources can help companies identify facilitators who have the training and background to apply child protection standards during direct consultations with children.

	Is best practice	Should be promoted at EU level
Advisory body	<input type="radio"/>	<input type="radio"/>

2

Stakeholder general meeting	<input type="radio"/>	<input type="radio"/>
Complaint mechanism as part of due diligence	<input type="radio"/>	<input type="radio"/>
Other, please specify	<input type="radio"/>	<input type="radio"/>

Other, please specify:

Question 21: Remuneration of directors

Current executive remuneration schemes, in particular share-based remuneration and variable performance criteria, promote focus on short-term financial value maximisation [17] (Study on directors' duties and sustainable corporate governance).

Please rank the following options in terms of their effectiveness to contribute to countering remuneration incentivising short-term focus in your view.

This question is being asked in addition to questions 40 and 41 of the Consultation on the Renewed Sustainable Finance Strategy the answers to which the Commission is currently analysing. Ranking 1-7 (1: least efficient, 7: most efficient)

XXX

Restricting executive directors' ability to sell the shares they receive as pay for a certain period (e.g. requiring shares to be held for a certain period after they were granted, after a share buy-back by the company)	
Regulating the maximum percentage of share-based remuneration in the total remuneration of directors	
Regulating or limiting possible types of variable remuneration of directors (e.g. only shares but not share options)	
Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the	

variable remuneration	
Mandatory proportion of variable remuneration linked to non-financial performance criteria	
Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration	

Taking into account workforce remuneration and related policies when setting director remuneration	
Other option, please specify	
None of these options should be pursued, please explain	

Please explain:

XXX

Question 22: Enhancing sustainability expertise in the board

Current level of expertise of boards of directors does not fully support a shift towards sustainability, so action to enhance directors' competence in this area could be envisaged [18] (Study on directors' duties and sustainable corporate governance).

Please indicate which of these options are in your view effective to achieve this objective (tick the box, multiple choice).

- Requirement for companies to consider environmental, social and/or human rights expertise in the directors' nomination and selection process
- Requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise
- Requirement for companies to have at least one director with relevant environmental, social and/or human rights expertise
- Requirement for the board to regularly assess its level of expertise on environmental, social and/or human rights matters and take appropriate follow-up, including regular trainings
- Other option, please specify

None of these are effective options Please explain:

XXX

Question 23: Share buybacks

Corporate pay-outs to shareholders (in the form of both dividends and share buybacks) compared to the company's net income have increased from 20 to 60 % in the last 30 years in listed companies as an indicator of corporate short-termism. This arguably reduces the company's resources to make longer-term investments including into new technologies, resilience, sustainable business models and

supply chains[19]. (A share buyback means that the company buys back its own shares, either directly from the open market or by offering shareholders the option to sell their shares to the company at a fixed price, as a result of which the number of outstanding shares is reduced, making each share worth a greater percentage of the company, thereby increasing both the price of the shares and the earnings per share.) EU law regulates the use of share-buybacks [Regulation 596/2014 on market abuse and Directive 77/91, second company law Directive]. In your view, should the EU take further action in this area?

- I strongly agree
- I agree to some extent
- I disagree to some extent I strongly disagree
- I do not know
- I do not take position

Question 23a: If you agree, what measure could be taken?

XXX

Question 24: Do you consider that any other measure should be taken at EU level to foster more sustainable corporate governance?
If so, please specify:

To obtain a better degree of sustainable corporate governance it is essential that the corporate director's duties are synchronized and linked to the due diligence duties of the company. As such, the implementation of both these responsibilities should be part of the scope of EU and national supervisory bodies which are competent, independent, adequately resourced and competently staffed to monitor, investigate, sanction, advise, build capacity, set standards and harmonise due diligence and corporate director's policies and practices across the EU.

Section V: Impacts of possible measures

Question 25: Impact of the spelling out of the content of directors' duty of care and of the due diligence duty on the company Please estimate the impacts of a possible spelling out of the content of directors' duty of care as well as a due diligence duty compared to the current situation. In your understanding and own assessment, to what extent will the impacts/effects increase on a scale from 0-10? In addition, please quantify/estimate in quantitative terms (ideally as percentage of annual revenues) the increase of costs and benefits, if possible, in particular if your company already complies with such possible requirements.

XXX

Question 26: Estimation of impacts on stakeholders and the environment

A clarified duty of care and the due diligence duty would be expected to have positive impacts on stakeholders and the environment, including in the supply chain. According to your own understanding and assessment, if your company complies with such requirements or conducts due diligence already, please quantify / estimate in quantitative terms the positive or negative impact annually since the introduction of the policy, by using examples such as:

- Improvements on health and safety of workers in the supply chain, such as reduction of the number of accidents at work, other improvement on working conditions, better wages, eradicating child labour, etc.
- Benefits for the environment through more efficient use of resources, recycling of waste, reduction in greenhouse gas emissions, reduced pollution, reduction in the use of hazardous material, etc.
- Improvements in the respect of human rights, including those of local communities along the supply chain
- Positive/negative impact on consumers
- Positive/negative impact on trade
- Positive/negative impact on the economy (EU/third country).

XXX