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Consultation Document Proposal for an Initiative on Sustainable Corporate Governance

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The views reflected on this consultation paper provide an indication on the approach the Commission services may take but do not constitute a final policy position or a formal proposal by the European Commission.
Please note that in order to ensure a fair and transparent consultation process only responses received through the online questionnaire will be taken into account and included in the report summarising the responses.

Introduction

Political context

The Commission's political guidelines set the ambition of Europe becoming the world's first climate-neutral continent by 2050 and foresee strong focus on delivering on the UN Sustainable Development Goals[1], which requires changing the way in which we produce and consume. Building on the political guidelines, in its Communication on the European Green Deal[2] (adopted in December 2019) and on A Strong Social Europe for Just Transition[3] (adopted in January 2020) the Commission committed to tackling climate and environmental-related challenges and set the ambition to upgrade Europe's social market economy.

The European Green Deal sets out that "sustainability should be further embedded into the corporate governance framework, as many companies still focus too much on short-term financial performance compared to their long-term development and sustainability aspects."

Sustainability in corporate governance encompasses encouraging businesses to frame decisions in terms of their environmental (including climate, biodiversity), social, human and economic impact, as well as in terms of the company's development in the longer term (beyond 3-5 years), rather than focusing on short-term gains.

As a follow-up to the European Green Deal, the Commission has announced a sustainable corporate governance initiative for 2021, and the initiative was listed among the deliverables of the Action Plan on a Circular Economy[4], the Biodiversity strategy[5] and the Farm to Fork strategy[6]. This initiative would build on the results of the analytical and consultative work carried out under Action 10 of the Commission's 2018 Action Plan on Financing Sustainable Growth and would also be part of the Renewed Sustainable Finance

Strategy.

The recent Communication “Europe's moment: Repair and Prepare for the Next Generation” (Recovery Plan)[7] (adopted in May 2020) also confirms the Commission’s intention to put forward such an initiative with the objective to “ensure environmental and social interests are fully embedded into business strategies”. This stands in the context of competitive sustainability contributing to the COVID-19 recovery and to the long-term development of companies. Relevant objectives are strengthening corporate resilience, improving predictability and management of risks, dependencies and disruptions including in the supply chains, with the ultimate aim for the EU economy to build back stronger.

This initiative is listed in the Commission Work program for 2021 [8].

EU action in the area of sustainable corporate governance will complement the objectives of the upcoming Action Plan for the implementation of the European Pillar of Social Rights, to ensure that the transitions towards climate-neutrality and digitalisation are socially sustainable. It will also strengthen the EU’s voice at the global scene and would contribute to the respect of human rights, including labour rights– and corporate social responsibility criteria throughout the value chains of European companies – an objective identified in the joint Communication of the Commission and the High Representative on the Global EU response to COVID-19[9].

This initiative is complementary to the review of the Non-Financial Reporting Directive (NFRD, Directive 2014/95/EU[10]) which currently requires large public-interest companies to disclose to the public certain information on how they are affected by non-financial issues, as well as on the company’s own impacts on society and the environment. The NFRD also requires companies to report on their social and environmental policies and due diligence processes if they have them, or otherwise explain why they do not have any (comply or explain approach). Whilst the NFRD is based on incentives “to report”, the sustainable corporate governance initiative aims to introduce duties “to do”. Such concrete actions would therefore contribute to avoiding “greenwashing” and reaching the objectives of the on-going review of the NFRD too, in particular the aim of enhancing the reliability of information disclosed under the NFRD by ensuring that the reporting obligation is underpinned by adequate corporate and director duties, and the aim of mitigating systemic risks in the financial sector. Reporting to the public on the application of sustainability in corporate governance and on the fulfilment of directors’ and corporate duties would enable stakeholders to monitor compliance with these duties, thereby helping ensure that companies are accountable for how they mitigate their adverse environmental and social impacts.

The initiative would build upon relevant international standards on business and human rights and responsible business conduct, such as the United Nations’ Guiding Principles on Businesses and Human Rights and the OECD Guidelines for Multinational Enterprises and its Due Diligence Guidance for Responsible Business Conduct.

As regards environmental harm linked to deforestation, the Commission is also conducting a fitness check of the EU Timber Regulation and an impact assessment.

Finally, Covid-19 has put small and medium sized companies under financial pressure, partly due to increased delay in the payments from their larger clients. This raises the importance of the role of board members of companies to duly take into account the interests of employees, including those in the supply chains as well as the interests of persons and suppliers affected by their operations. Further support measures for SMEs also require careful consideration.

Results of two studies conducted for the Commission

To integrate properly sustainability within corporate strategies and decisions, the High-Level Expert Group on Sustainable Finance[11] recommended in 2018 that the EU clarifies corporate board members´ duties so that stakeholder interests are properly considered. Furthermore, they recommended for the EU to require that directors adopt a sustainability strategy with proper targets, have sufficient expertise in sustainability, and to improve regulation on remuneration.

In its 2018 Action Plan on Financing Sustainable Growth[12] the Commission announced that it would carry out analytical and consultative work on the possible need to legislate in this area.

The Commission has been looking at further obstacles that hinder the transition to an environmentally and socially sustainable economy, and at the possible root causes thereof in corporate governance regulation and practices. As part of this work, two studies have been conducted which show market failures and favour acting at the EU level.

The *study on directors' duties and sustainable corporate governance* [13] evidences that there is a trend in the last 30 years for listed companies within the EU to focus on short-term benefits of shareholders rather than on the long-term interests of the company. Data indicate an upward trend in shareholder pay-outs, which increased from 20% to 60% of net income while the ratio of investment (capital expenditure) and R&D spending to net income has declined by 45% and 38% respectively. The study argues that sustainability is too often overlooked by short-term financial motives and that to some extent, corporate short-termism finds its root causes in regulatory frameworks and market practices. Against these findings, the study argues that EU policy intervention is required to lengthen the time horizon in corporate decision-making and promote a corporate governance more conducive to sustainability. To achieve this, it spells out three specific objectives of any future EU intervention: strengthening the role of directors in pursuing their company's long-term interest by dispelling current misconceptions in relation to their duties, which lead them to prioritise short-term financial performance over the long-term interest of the company; improving directors' accountability towards integrating sustainability into corporate strategy and decision-making; and promoting corporate governance practices that contribute to company sustainability, by addressing relevant unfavourable practices (e.g. in the area of board remuneration, board composition, stakeholder involvement).

The *study on due diligence requirements* through the supply chain[14] focuses on due diligence processes to address adverse sustainability impacts, such as climate change, environmental, human rights (including labour rights) harm in companies' own operations and in their value chain, by identifying and preventing relevant risks and mitigating negative impacts. The study shows that in a large sample of mostly big companies participating in the study survey, only one in three businesses claim to undertake due diligence which takes into account all human rights and environmental impacts. Therefore voluntary initiatives, even when backed by transparency do not sufficiently incentivise good practice. The study shows wide stakeholder support, including from frontrunner businesses, for mandatory EU due diligence. 70% of businesses responding to the survey conducted for the study agreed that EU regulation might provide benefits for business, including legal certainty, level playing field and protection in case of litigation. The study shows that a number of EU Member States have adopted legislation or are considering action in this field. A potential patchwork of national legislation may jeopardise the single market and increase costs for businesses. A cross-sectoral regulatory measure, at EU level, was preferred to sector specific frameworks.

Objectives of this public consultation

This public consultation aims to collect the views of stakeholders with regard to a possible Sustainable Corporate Governance Initiative. It builds on data collected in particular in the two studies mentioned above and on their conclusions, as well as on the feedback received in the public consultation on the Renewed Sustainable Finance Strategy[15]. It includes questions to allow the widest possible range of stakeholders to provide their views on relevant aspects of sustainable corporate governance.

About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English (selected)
- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
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- Romanian
- Slovak
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* Surname

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* I am giving my contribution as

- ( ) Academic/research institution
- (x) Business association
- ( ) Company/business organisation
- ( ) Consumer organisation
- ( ) EU citizen
- ( ) Environmental organisation
- ( ) Non-EU citizen
- ( ) Non-governmental organisation (NGO)
- ( ) Public authority
- ( ) Trade union
- ( ) Other

* First name

Info

* Email (this won't be published)

info@europeanissuers.eu

* Organisation name

255 character(s) maximum

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* Organisation size

- (x) Micro (1 to 9 employees)
- ( ) Small (10 to 49 employees)
- ( ) Medium (50 to 249 employees)
- ( ) Large (250 or more)

Transparency register number

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Check if your organisation is on the [transparency register](). It's a voluntary database for organisations seeking to influence EU decision-making.

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* Country of origin

Please add your country of origin, or that of your organisation.

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- Andorra
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- Anguilla
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- Bangladesh
- Djibouti
- Dominica
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
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- Libya
- Liechtenstein
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- Macau
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- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Saint Martin
- Saint Pierre and Miquelon
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South

	French Southern and Antarctic Lands		Sandwich Islands
Barbados	Gabon	Monaco	South Korea
Belarus	Georgia	Mongolia	South Sudan
Belgium	Germany	Montenegro	Spain
Belize	Ghana	Montserrat	Sri Lanka
Benin	Gibraltar	Morocco	Sudan
Bermuda	Greece	Mozambique	Suriname
Bhutan	Greenland	Myanmar /Burma	Svalbard and Jan Mayen
Bolivia	Grenada	Namibia	Sweden
Bonaire Saint Eustatius and Saba	Guadeloupe	Nauru	Switzerland
Bosnia and Herzegovina	Guam	Nepal	Syria
Botswana	Guatemala	Netherlands	Taiwan
Bouvet Island	Guernsey	New Caledonia	Tajikistan
Brazil	Guinea	New Zealand	Tanzania
British Indian Ocean Territory	Guinea-Bissau	Nicaragua	Thailand
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Brunei	Haiti	Nigeria	Timor-Leste
Bulgaria	Heard Island and McDonald Islands	Niue	Togo
Burkina Faso	Honduras	Norfolk Island	Tokelau
Burundi	Hong Kong	Northern Mariana Islands	Tonga
Cambodia	Hungary	North Korea	Trinidad and Tobago
Cameroon	Iceland	North Macedonia	Tunisia

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- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d’Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia

- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Jordan
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- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
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- Oman
- Pakistan
- Palau
- Palestine
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- Philippines
- Pitcairn Islands
- Poland
- Portugal
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- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha

- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

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- Denmark
- Liberia
- Saint Lucia

* Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- **Anonymous**
  Only your contribution, country of origin and the respondent type profile that you selected will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.
- **Public**
  Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

☑ I agree with the personal data protection provisions

If you replied that you answer on behalf of a business, please specify the type of business:

- institutional investor, asset manager
- other financial sector player (e.g. an analyst, rating agency, data and research provider)
- auditor
- other

Consultation questions

If you are responding on behalf of a large company, please indicate how large is the company:

- Large company with 1000 or more people employed
- Large company with less than 1000 but at least 250 people employed

If you are responding on behalf of a company, is your company listed on the stock-exchange?

- Yes, in the EU
- Yes, outside the EU

- Yes, both in and outside the EU
- No

If you are responding on behalf of a company, does your company have experience in implementing due diligence systems?

- Yes, as legal obligation
- Yes, as voluntary measure
- No

If resident or established/registered in an EU Member State, do you carry out (part of) your activity in several EU Member States?

- Yes
- No

If resident or established/ registered in a third country (i.e. in a country that is not a member of the European Union), please specify your country:

If resident or established registered in a third country, do you carry out (part of) your activity in the EU?

- Yes
- No

If resident or established registered in a third country, are you part of the supply chain of an EU company?

- Yes
- No

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:

This question is biased as it relies on the wrong assumption that Board of Directors do not take into account ESG issues; and the predefined answers are also biased as they do not allow dissenting on a need of new EU legislation without dissenting at the same time on the fact that companies should take account of those sort of interests.

As regards the debate regarding stakeholder versus shareholder interests, in most national legal frameworks, definitions of the company interest are "open" and are generally supplemented by case law to allow for a better consideration of long-term view and other interests such as human rights, environment and climate change. For instance, this is the case with the Pacte law in France which did not intent to define what the company interest is but added to the commercial and civil code that the company should be managed considering the social and environmental impacts of its activities.

The same approaches have been developed in national corporate governance codes, which already support legal provisions recommending the board to pursue long-term value creation and to consider other interests relevant to the company business.

Companies are already integrating sustainable governance, which they decline in their strategy in different ways: increased dialogue with stakeholders, CSR risks apprehended at the board level, CSR criteria included in executive compensation. Therefore, EuropeanIssuers considers that there is no need for a definition at EU level of the company interest. The diversity of companies and sectors in which they operate is ill-suited to prescriptive and uniform rules that may hinder the development of good practices.

A strong evolution in companies' practice is underway: this proves that the current legal framework already embraces this change and that there is no real need to provide for an EU legal definition of the company's interest.

If the EC were to take possible future steps on this issue, they should be aimed at supporting this evolution. For this purpose, we would like to underline some preliminary considerations:
• The EC action cannot be taken without a proper impact assessment analysis, which is still missing (the EY

report on “fiduciary duties” received significant and well-founded criticism, so that it is far to be considered an appropriate starting point for any policy proposal).
• Any action shall be weighted through the subsidiarity and proportionality principles enshrined in Article 5 of the TEU: in this light, we believe that Recommendations to Member States could better suit this goal rather than a Directive.
• Corporate Governance Codes’ custodians shall be better involved in the elaboration of a possible EU framework . This is particularly true when it comes to the corporate purpose and/or directors’ fiduciary duties that naturally evolve with the interaction of legal rules, case law, private ordering and best practices.

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?

- (x) 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:

- Such a framework should not be overly descriptive in order to leave flexibility to companies in setting up their bespoke risk mitigation processes. It should ensure legal certainty, by clearly defining the scope, the obligations and when it can be released from liability. In addition, in order for a legal framework to be effective it should be practical, tangible and realistic to implement. Current practices, based on international principles such as the UN Guiding Principles on Business and Human Rights, should be taken as a basis for future provisions.

- The EU framework should be proportionate and hence only address the contractual relationship between the company and the first tier supplier - instead of being mandatory along the entire supply chain - and should also take into consideration the real contractual and bargaining power of companies.

- The mandatory obligation should be constructed as an obligation of means and focus on the establishment of a “due-diligence system”, which encompasses measures and procedures that ensure the monitoring of the suppliers’ compliance with the company’s due diligence requirements, and the inclusion of the relative risks of suppliers’ non-compliance in their internal control and risk management system.

- It should focus on the most severe risks, with a risk-based approach, taking into account the fact that it is impossible to mitigate every single risk on the supply chains. Due diligence is an ongoing process which has to be improved over time focusing first on the most salient risks before analysing less important risks.

- Any EU legislative framework should be closely aligned with the International principles, such as UN Guiding Principles on Business and Human Rights, also to avoid the risk of fragmentation in the EU. European companies operating worldwide already refer to these standards to conduct business in a responsible way and it would provide legal certainty for companies as regards their obligations.

- In addition, the framework should not contradict sector specific rules already in place on the EU-level, such as the European regulation on conflict minerals. It should be coherent with already existing EU legislative acts addressing human rights. In this regard, the ongoing review of the non-financial reporting directive should be particularly taken into account.

- EU companies should moreover not be required to set up a due diligence process for suppliers solely based in the European Union.

- The future EU framework should also be applicable to non-EU companies operating within the EU to ensure a level playing field. Due to the importance of human rights and largely global value chains, we further advocate for multilateral solutions. Such a broad legal framework could be prepared by an EU initiative, which, as a pioneer, provides a strong impetus in order to then involve as many other states as possible.

- Last, the issue of liability needs to be addressed: the EU framework should not impinge on general principles of civil law. It could only require companies to make best efforts to avoid violations of human rights. It should also refrain from granting third parties (eg non-governmental organizations) a right to bring actions against the company or the management of a company before national courts.

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
- [x]

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
- [x] Other

Other, please specify:

If an EU legal framework were to be developed, it is paramount that it is fully aligned with internationally recognized principles of responsible business conduct, such as the OCDE Guidelines for Multinational Enterprises or the United Nations Guiding Principles on Business and Human Rights (UNGP). Any due diligence duty should also better clarify the different levels of involvement of the company in human rights adverse impacts (caused, contributed to and directly linked) provided in UNGPs and OECD Guidelines.
It should be avoided that the EU designs a due diligence obligation that is different from the guidelines and principles multinational companies apply, whether they operate within the EU or outside of the EU.

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)?

- [x] Increased administrative costs and procedural burden
- [x] Penalisation of smaller companies with fewer resources
- [x] Competitive disadvantage vis-à-vis third country companies not subject to a similar duty
- [x] 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
- [x] 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
- [x] Disengagement from risky markets, which might be detrimental for local economies
- [x] Other

Other, please specify:

European companies alone cannot solve all problems arising from failing States in which protective laws are either inexistent or not applied. An EU legislation, which shifts the onus from these third countries to EU companies, could disincentivise such weakly governed States to improve human rights and social standards on their territory. According to the need to base any EU obligation on internationally accepted standards (see answer to Q. 3), the EU should actively promote an international cooperation in the definition of the international framework and the active support of all relevant stakeholders (i.e. governments and other public entities).

Mandatory due diligence could also create a climate of distrust and defensive behaviours: the fear of being held liable with regard to their supply chains could lead EU companies to become very cautious to avoid legal risks rather than engage trustfully in useful dialogue and cooperation. Stakeholders around the world may be encouraged to seize the courts against EU companies, who are already applying high environmental and human rights standards, there may be a risk of abusive litigation and judicialization of the relationship with stakeholders.

Moreover, there might arise difficulties in the supply of certain products, for example, for the expansion of renewable energies because of problematic supply chains with regards to pv panels or raw materials.

With a sensible formulation of the law, we can avoid the points listed above. It should also be avoided that there is a trade-off between various sustainability goals, such as human rights and climate protection.

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	X		
the interests of employees	X		
the interests of employees in the company's supply chain			X
the interests of customers	X		
the interests of persons and communities affected by the operations of the company			X
the interests of persons and communities affected by the company's supply chain			X
the interests of local and global natural environment, including climate			X
the likely consequences of any decision in the long term (beyond 3-5 years)			X
the interests of society, please specify			X
other interests, please specify			X

the interests of society, please specify:

other interests, please specify:

Number of interests could be relevant for the success and resilience of a company, and the degree of relevance of those interests for a given company will depend on its specific activity, characteristics, and context. However, in our answer we have identified the bulk of interests which are essential for the survival of any company and, therefore, can be considered a common denominator of all of them.

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?

	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
Identification of the company´s stakeholders and their interests	○	○	○	●	○	○
Management of the risks for the company in relation to stakeholders and their interests, including on the long run	○	○	○	●	○	○
Identification of the opportunities arising from promoting stakeholders' interests	○	○	○	●	○	○

Please explain:

The management of those interests, and in particular the first and the third item (identification of stakeholder and of the opportunities) are pivotal choices of companies' business strategic plan, which is to be developed by each individual company, not imposed by law. Their choice reflects, in fact, one of the key drivers in the definition of the company's strategy and therefore needs to stay within company's discretion as part of the business freedom ensured by the national constitutional legal systems.

Moreover, issuers are perfectly aware that they can only grow if they consider the ecosystem in which they operate, and which is made up of many different stakeholders. This is why most companies identify their key stakeholders, case by case, and conduct dialogue with up to hundreds of them on a continuous or on an ad-hoc basis in order to compare their expectations with the company's strategy (materiality analysis). There are as many ways of identifying stakeholder interests as there are companies (local vs. centralised identification, thematic vs. generic identification…). Considering the large variety of possible stakeholders, which may differ from one company to another, there is no need for a legislative obligation and certainly not at board level.

Finally, regarding the management of the risks and opportunities in relation to stakeholders, we recall that the first mission of the Board (in the one tier system) is to determine the strategy of the company, taking into account the risks it is confronted with and the opportunities it has identified. Integrating and reporting on risks factors are key components of corporate stewardship and have already been included in EU legislation for a long time. In accordance with the Accounting directive, the management report shall include “a fair review of the development and the performance of the undertaking’s business and of its position, together with a description of the principal risks and uncertainties that it faces”. The NFRD has notably extended the scope of this risk assessment by requiring companies to publish a non-financial statement which is in many Member States part of the management report and therefore falls under the responsibility of the Board of Directors. As a consequence, we consider that the framework regarding the integration of sustainability risks, impacts and opportunities is already in place and efficient. This framework will certainly be strengthened following the review of NFRD and overlapping legislation should therefore be avoided.

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:

All these aspects are sufficiently covered by existing legal requirements (see answer to Q. 6.) and corporate governance codes.

Regarding targets, many large companies have set up ambitious targets on ESG issues (eg. regarding gender diversity, the reduction of CO2 emissions or waste). However, the choice and timeline of such targets should remain at their discretion. Good practice within the non-financial statement is to disclose voluntary targets, the dedicated resources for their implementation and the methodologies allowing to take into account uncertainties linked to different scenarios. It would therefore be more appropriate to address this issue on the occasion of the revision of NFRD.

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
- (selected) I strongly disagree
- I do not know
- I do not take position

Please provide an explanation or comment:

This question is biased and based on a simplistic approach which is not acceptable. Short-term and long-term are not conflicting by definition, and the long-term is a series of short terms. Moreover, in some cases, even favouring what could appear a short-term financial interest could ensure, in return, the long term financing of a company, which is fundamental for its own survival.

Moreover, short termism and long termism should not be pre-classified as shareholder centric (the first) and stakeholder centric (the second) because not always, and not all the shareholders' interests are necessarily short-terms, and not always and not all the stakeholder's interests, are necessarily long-term.

If a company decides to shut down a polluting plant, this decision will be beneficial for the environment and for investors keen on financing "green" activities (both long term interests), but it will be detrimental to the employees working on the production site (short term interest).

This is also a typical example of how difficult it is for companies to take decisions and strike the right balance.

Many decisions may benefit some stakeholders, but harm others. "Balancing the interests" is a rather unclear concept and any mandatory balance of interests is going to be rather confusing the company's decision making; inasmuch relevant interest of shareholders and stakeholder shall be considered and weighted in relation to the specific operation or decision.

A legal obligation to "balance the interest of all stakeholders", as suggested in this question, would lead to dilemmas and stalemate. In addition, it is totally impossible to balance the interest of all stakeholders including the ones which have a more remote link with the company.

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?

Interests of shareholders, employees, suppliers, clients, cannot be put on an equal footing. Such a definition would expose companies and their shareholders to the following risks:

• Complexification of the decision-making process as all Board decisions will have to be based on extensive research including sometimes scientific expertise, be documented in order to be able to justify the reason to prioritise one interest over another;
• Uncertainty regarding the impact on the business judgement rule which protects management concerning

entrepreneurial decisions. In most jurisdictions there is no liability towards the company, e.g. if a business decision turns out to be a failure, if management or directors have taken the decision on an informed basis without self-interest and with due care, or similar prerequisites. Courts would regularly not substitute such decision with their own notions of what is an appropriate business judgment vis a vis the company interest. But how will courts rule if the interest of a single Person had not been identified or a target from which the decision is derived from had not been "science-based" enough?
• Unlimited directors' liability, which can in turn have detrimental effects on directors aversion to take risks;
• Wide degree of uncertainty on company's decision-making process, which would lead to the risk of paralyzing the functioning of the board and management (besides introducing significant administrative burdens);
• These elements of uncertainty could have a negative impact on investment decisions, reducing investors' incentives to provide risk capital to investee companies and thus making companies access to capital even more problematic. A key issue to be considered, especially in the crisis emerged during the Covid-19 outbreak that is going to last – and potentially have even stronger effects – in the future of EU businesses' survival and growth;
• Risk of litigation: the legal obligation for the company's governing bodies not only to take into account but also balance the often-contradictory interests of stakeholders would fuel litigation;
• Decrease performance, competitiveness and attractiveness of European companies.

How could these possible risks be mitigated? Please explain.

These possible risks could be mitigated by refraining from setting up at EU level a definition of duty of care or "company interest" which have to remain flexible and by encouraging code of conduct.

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

Again, the question is biased and assumes that stakeholders other than shareholders necessarily act in the company's long-term interest, while shareholders, who allegedly favour short term priorities, reluctantly align with stakeholders' interests! In practice however, corporate governance does not work that way. Often, stakeholders and shareholders' interests in support of long term value creation align and assuming that both are in conflict is misguided . It will be up to directors, as part of their fiduciary duty to act in the company's long-term interest, to determine whether the stakeholders' long-term interests relate to the company's business strategy and how they may contribute to its long-term value enhancement. Inputs from both stakeholders and shareholders (and not only from stakeholders as the question implies) guarantees that only shareholders-stakeholders aligned interests are taken into consideration when determining the company's long-term goals.

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:

This question is once again biased as it is based on the false assumptions of the EY study.

The non-financial reporting directive lays down rules according to which companies are required to disclose relevant and material information on policies, outcomes and risks concerning environmental aspects, social and employee-related matters, respect for human rights, anti-corruption and bribery issues and diversity on the board of directors. As this information is disclosed in the management report, which is a report of the board of directors, it is already integrated into the company’s strategy, decisions, and oversight.

Moreover, corporate governance codes already recommend such a in integrated approach, recommending the due consideration of non-financial elements in the company strategy, risk management and remuneration policies.

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:

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?

- 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:

While EuropeanIssuers can agree on giving to certain stakeholders a role in the decision-making process (please, refer to our answers in Section IV), EuropeanIssuers totally disagrees in giving them a legitimation to act in justice. As companies are private entities highly regulated both in their internal organization (by civil and contractual laws which regulate the relation among its different bodies) and in their external action (through specific laws: environmental law, consumer law, labour law, which already ensure the protection of the legitimate interests).

The enforcement right is already entrusted to shareholders, who are in charge of acting in justice to protect the company’s interests in the long term: once we agree that also other interests, such as human rights, environment and climate change, are relevant to the financial performance of the company in the long term (see our answer to Q.1), it is therefore up to shareholder to act for the enforcement of directors’ duties.

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.

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.

The proposed definition is based on the very broad concept of due diligence according to OECD Guiding Principles and UNGP which EU companies are committed to apply in their operations as part of their responsible business conduct.

While this broad scope is appropriate for a soft law approach, it is much more problematic when it is transformed into hard law obligations coupled with civil liability. Considering the purpose of this consultation and its hard law perspective, EuropeanIssuers disagrees with two aspects of the proposed definition and proposes to specify the following:

- The definition needs to be specified making clear that the due diligence obligation is an obligation of means, not of result.

- The supply chain cannot reasonably cover all suppliers and subcontractors as this would easily amount to hundreds of thousands of players to include. Mandatory due diligence should focus on the first tier of the supply chains (direct subcontractors or providers) where co-contractors are effectively able to exercise leverage through the contractual relationship.

- The bargaining powers of companies should be taken into account because they are not always able to exercise leverage, for example when their suppliers are bigger than themselves or when they are in a position of monopoly.

- It should also be underlined that mandatory due diligence should focus on the supply chain upstream (direct subcontractors or providers) and not midstream (e.g., JV partners) or downstream (e.g., distributors, clients and consumers). Due diligence in relation to the use of products by clients would be difficult to achieve because it would require companies to dictate the consumption habits and practices of other companies and individuals. With regard to professional customers, it would generate overlapping obligations because the supplier would try to apply its own due diligence regarding the customer whereas the customer would apply its own due diligence regarding the supplier.

- The issue of climate change is a global environmental risk resulting from a multitude of actors, wherever they are located. It is also a cumulative phenomenon over time as CO2 emissions remain for about one century before being disintegrated. In this view, it is not possible to attribute responsibility for climate change to one single operator. At global level, the UN Paris Agreement Climate Protocol sets up responsibility for reducing greenhouse gases (GHG) emissions to States which are parties to the Agreement. Given this specificity of global effect, it is not possible to define due diligence on climate change for a specific company. The issue of climate change should therefore be addressed in a different, appropriate legislative 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 reflect also 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

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?

> First guidance could be developed with a focus on human rights to start with. A clear a focus on human rights should be the principle aim of any legislative proposal. There is a risk that if the proposal becomes too overarching in scope that human rights will become a secondary consideration, and this must be avoided.

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.

> The thematic approach has been chosen by many jurisdictions around the world, such as the UK, California or Australia who have adopted specific legislation to fight against modern slavery.
>
> EuropeanIssuers believes that it would be too ambitious to include all other social and environmental issues because they require specific rules. For instance, regarding social and labour standards, there are important differences around the world, with some countries refusing to guaranty the right for collective bargaining.

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)

- [x] 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
- [ ] 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
- [ ] Other, please specify

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?

Any EU legislative framework should be closely aligned with the international principles, such as UN Guiding Principles on Business and Human Rights, also to avoid the risk of fragmentation in the EU, as emerging national laws are already different. European companies operating worldwide already refer to these standards to conduct business in a responsible way and would provide legal certainty for companies as regards their obligations.

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?

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

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

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.

- [x] 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
- [ ] None of these options should be pursued

Please explain your choice, if necessary

> SMEs should be excluded for different reasons:
> - To ensure coherence with the internationally accepted standards: for instance, the OECD Due Diligence Guidance for Responsible Business Conduct refers only to multinational enterprises and multinational group. It would be inappropriate to extend same initiatives to SMEs. In this perspective, a strong proportionality approach is to be adopted, following what is provided for by the UN Guiding Principles on Business and Human Rights.
> - The impact of administrative and financial burden of conducting systematic due diligence would be too burdensome for SMEs.
> - However, SMEs may be anyway indirectly required to comply with some due diligence obligations, being part of the supply chain of the large companies.
>
> For this purpose, we suggest a gradual approach, which means to impose mandatory due diligence duty on larger companies and leave SMEs the possibility to opt-in to such a requirement.

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?

- (x) 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.

> The simplest criterion triggering a duty of care obligation for non-EU companies would be the turnover they generate with their products or services in the EU. This turnover could be similar to the one triggering the obligation for EU companies. There should be strict equality of treatment to avoid unfair competition within the EU.

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

Mandatory due diligence imposed only on EU undertakings would lead to a competitive disadvantage because competitors from outside the EU would continue to enter the EU market with products and services possibly not respecting social and environmental minimum standards. Therefore, any requirement that may be introduced at EU level should apply to undertakings based in the EU or outside. The obligations should be exactly the same.

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?

- (x) Yes
- ( ) No
- ( ) I do not know

Please explain:

An EU legislation alone will have no effect on non-EU undertakings competing with EU undertakings outside the EU. For this reason, the EU should adopt a holistic approach, including trade policy tools. In particular, EU templates for the Trade and Sustainable Development (TSD) chapters under bilateral Free Trade Agreements should be upgraded and enforced to make sure that EU trading partners improve responsible business conduct and CSR practices by their domestic companies and foreign-invested companies. Dispute settlement mechanisms and sanctions in the event of non-compliance with TSD chapters of FTAs should be introduced, subject to competitiveness edge test.

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)
- [x] 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:

The enforcement mechanism should regard only the “non-compliance” with the obligation of introducing a proper “due-diligence system”.

This is a very important point, as the introduction of mandatory due diligence provisions cannot introduce a sort of vicarious liability of the company for the damages that are caused by its suppliers, unless this damage has been intentionally caused by the company itself. Apart from this case, international guidelines (OECD, UNGP) are crystal clear stating that due diligence does not shift responsibilities, neither from governments to companies, nor from suppliers or subcontractors to the companies placing the order. Each State or company has its own responsibility for the action it takes and the adverse impacts it may have. The companies' duty of care should neither remove the liability of each local actor for its acts nor place the burden of liability on EU companies.

Therefore, we could consider the possibility of developing an enforcement mechanism in relation to "non-compliance" cases only, where the company, irrespective of the harm, has not put in place an adequate due-diligence system (administrative liability, with a sanctioning power of the national competent authority: e.g. fines). The enforcement mechanism should be entrusted to the supervision of the competent national authority (legal seat of the company).

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:

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

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.

Stakeholder consultation is good practice and should be encouraged. However, it is up to the company to find:
• the best and most appropriate way of conducting stakeholder consultations (centralised vs. decentralised; annual vs on going; problem-based workshops vs. strategic consultative committees;)
• the right balance as all stakeholders are not equally relevant for the company.
Considering the importance of developing a flexible approach, we believe that this issue should be tackled on corporate governance codes level.

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

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)

	Is best practice	Should be promoted at EU level
Advisory body	○	○
Stakeholder general meeting	○	○
Complaint mechanism as part of due diligence	○	○
Other, please specify	○	●

Other, please specify:

It is up to the company to decide which mechanism is suitable for the stakeholders with whom it is engaging :
These mechanisms could be:

- an advisory body whose composition or remits should stay at the discretion of the company;
- an operational grievance mechanism at company level which is an efficient means to detect negative impacts at an early stage;
- a whistle-blower procedure open not only to employees but also to stakeholders.

Considering the importance of developing a flexible approach, we believe that this issue should be tackled on corporate governance codes level.

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)

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:

The Shareholder Rights Directive already provides for transparency measures on all components of directors' remuneration which have to be disclosed in the remuneration policy and the remuneration report, both submitted to a "say on pay" vote. In addition, Corporate governance Codes have set up supplementary rules for the Board of Directors, when determining the compensation of executive officers which are, to some extent, aligned with the proposed options. Therefore, we do not support any other prescriptive rules as the principles set above are, in our view, better dealt with through soft law which avoids a one-size-fits-all approach and allows for flexibility. Indeed, due to the wide diversity of corporations, formal and identical structure of directors' compensation should not be imposed to all Board of Directors.

Regarding each of the following options, we illustrate our previous comment:
• Restricting executive directors' ability to sell the shares they receive as pay for a certain period: in most jurisdictions, either the law or the Corporate Governance Codes already state that Board of Directors define a minimum number of registered shares that the company officers must retain through to the end of their

term of office.

• Regulating the maximum percentage of share-based remuneration in the total remuneration of directors : it is not possible to define a maximum percentage suitable for all companies, which depends of the size, the sector in which they operate.

• Regulating or limiting possible types of variable remuneration of directors : provided the components of the remuneration and the rationale for them are explained in the remuneration policy, there is no reason for limiting the possibility to use any type of variable remuneration.

• Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration : the SRD requires that listed companies include in the remuneration policy the financial and non-financial performance criteria for the award of the variable remuneration, including, where appropriate, criteria relating to corporate social responsibility. These provisions are supplemented by the CGCs which recommend that one or more criteria related to social and environmental responsibility be incorporated in the compensation in order to improve performance and competitiveness over the medium and long term. In practice, listed companies disclose a large range of non-financial performance criteria such as gender diversity and equality, prevention of work-related accidents, reduction of greenhouse gas emissions, preservation of natural resources… This being said, it should be up to the company to decide which qualitative or quantitative performance criteria is best suited to achieve its sustainability strategy and for which proportion it should weight in the variable remuneration according to the said strategy. Relevant information is disclosed in the remuneration policy and the remuneration report gives explanation on how these criteria have been applied and whether the individual targets have been met.

• Mandatory proportion of variable remuneration linked to non-financial performance criteria : the variable remuneration has to be aligned with the strategy as a whole which include sustainability targets. It would not make sense to impose such a proportion.

• Requirement to include carbon emission reductions, where applicable, in the list of sustainability factors affecting directors' variable remuneration: this should be left to corporate governance codes and soft law as this might not be relevant for all companies. Moreover, the consideration of these parameters should be linked to their materiality in relation to company's strategy and business activity, and thus it shall be left upon company's decision.

• Taking into account workforce remuneration and related policies when setting director remuneration: the SRD II already requires to inform on the annual change of remuneration, of the performance of the company and of average remuneration of employees over at least the five most recent financial years.

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
- [x] None of these are effective options

Please explain:

This question is based on the false and biased assumption, derived from the EY study, that Directors lack expertise on sustainability issues. This subject raises the following question : how to measure such expertise ? Does it imply a diploma, a specific training?

In our view, Directors do not need to be experts in climate change or human rights but they have to be committed to these issues. They have to be convinced that environmental and social aspects of the company's activity have to be part of the strategy, and that they need to regularly review the defined strategy, the opportunities and risks, as well the measures taken accordingly by the management. They should also check whether they receive adequate information from the management on these issues.

As we agree that sustainability plays a role in the definition of company's strategy, risk management and remuneration policies, appropriate consideration of this issue is required to the whole board and could not be delegated to individual, CSR expert, directors.

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
- (x) I strongly disagree
- ( ) I do not know
- ( ) I do not take position

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

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:

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.

Table

	Non-binding guidance. Rating 0-10	Introduction of these duties in binding law, cost and benefits linked to setting up /improving external impacts' identification and mitigation processes Rating 0 (lowest impact)-10 (highest impact) and quantitative data	Introduction of these duties in binding law, annual cost linked to the fulfilment of possible requirements aligned with science based targets (such as for example climate neutrality by 2050, net zero biodiversity loss, etc.) and possible reorganisation of supply chains Rating 0 (lowest impact)-10 (highest impact) and quantitative data
Administrative costs including costs related to new staff required to deal with new obligations			
Litigation costs			
Other costs including potential indirect costs linked to higher prices in the supply chain, costs liked to drawbacks as explained in question 3, other than administrative and litigation costs, etc. Please specify.			
Better performance stemming from increased employee loyalty, better employee performance, resource efficiency			

Competitiveness advantages stemming from new customers, customer loyalty, sustainable technologies or other opportunities			
Better risk management and resilience			
Innovation and improved productivity			
Better environmental and social performance and more reliable reporting attracting investors			
Other impact, please specify			

Please explain:

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).

Contact

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