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Consultation Document Proposal for an Initiative on Sustainable Corporate Governance

Fields marked with * are mandatory.

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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
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- ○ Portuguese
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- ○ Slovak
- ○ Slovenian
- ○ Spanish
- ○ Swedish

* Surname

Gaita

* I am giving my contribution as

- ○ Academic/research institution
- ○ 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

Elena

* Email (this won't be published)

egaita@transparency.org

* Organisation name

255 character(s) maximum

Transparency International EU (TI EU)

* Organisation size

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

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- Australia
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- Egypt
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- 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
British Virgin Islands	Guyana	Niger	The Gambia
Brunei	Haiti	Nigeria	Timor-Leste
Bulgaria	Heard Island and McDonald Islands	Niue	Togo
Burkina Faso	Honduras	Norfolk Island	Tokelau
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Cambodia	Hungary	North Korea	Trinidad and Tobago
Cameroon	Iceland	North Macedonia	Tunisia

Canada
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Central African Republic
Chad
Chile
China
Christmas Island
Clipperton
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Colombia
Comoros
Congo
Cook Islands
Costa Rica
Côte d’Ivoire
Croatia
Cuba
Curaçao
Cyprus
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India
Indonesia
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Romania
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- 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** (selected)
  Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

[x] 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?

- (x) 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?

- (x) 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 and their directors should take environmental, social and governance issues into account and it is critical that legislative and regulatory provisions require this.
Multinationals operating across the world have gained unprecedented power and influence, affecting the lives of the communities and the environment in which they operate. This impact has not always been positive, with countless instances of corporations exploiting weak and poorly enforced regulation with devastating effects on people and the planet, often gone unpunished.

Globalisation has created governance gaps that make it impossible to ensure respect of human rights and the environment, by relying solely on the capacity of local societies and public authorities. Despite growing awareness of the elements of responsible business conduct, companies have not fundamentally changed the way they do business. As documented by the endorsement of the UN Guiding Principles, there is no disagreement about whether companies should be responsible for addressing their global impact on people and the planet. The question that needs to be resolved is rather how such responsibility should be reflected in law.

Moreover, the question whether companies should maximise their social and environmental performance should also be considered. The impact of sustainability issues and stakeholders' interests on the company is difficult to capture in short-term metrics, which complicates their integration in governance processes and engagements. Rather than impose new behavioural obligations or change corporate governance systems, the law should clarify the responsibilities of directors to oversee, and ensure the quality of, the implementation of the due diligence and materiality determination processes. It should also clarify how to adopt, disclose and ensure implementation of a forward-looking sustainability strategy and targets based on the findings of these processes. Significant changes to the dominant economic and business model, which is based on infinite growth and prioritising short-term profits and shareholder value, are urgently needed.
Companies need to elevate and protect the interests of all stakeholders to develop a more balanced approach where the interests of key groups - including employees, supply chain workers, affected communities, indigenous peoples and human rights, environmental and land defenders - are meaningfully taken into account.

Lastly, it is by now clear that there is a strong business case for corporate transparency and respect for sustainability issues. It secures and maintains the trust of consumers, investors and employees, as well as improves companies' reputation and enhances competitive advantage.

The current COVID-19 pandemic heightens the need for urgent action, as corruption thrives during times of crisis. As governments around the globe take unprecedented steps to counter the crisis, the ambitious response of EU leaders should respect principles of transparency and accountability. The economic impact of the crisis will be huge and European governments need to provide strong financial support to businesses and workers, now and in the near future. Now more than ever, it is imperative to ensure that companies receiving bailouts and financial support from European governments engage in responsible business conduct and take appropriate steps to identify, prevent and mitigate any adverse impact caused by their business 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?

- (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:

The development of such a legal framework at EU level is needed more than ever. Despite past attempts, the EU still lacks a robust regulatory framework to make companies more accountable with regard to the risks and impact of their business activities as well as the due diligence systems in place to counter those risks. Voluntary measures have failed to significantly change the way companies manage their impact and provide remedy to victims.

As an example, the German NAP for Business and Human Rights was adopted in December 2016 as a voluntary action plan for corporations. In June 2018, the National
CSR Forum of Germany's Federal Government adopted the Berlin CSR Consensus on
corporate responsibility in supply and value chains, a policy document intended to guide companies by describing the requirements for responsible and sustainable management of value chains. Nevertheless, as shown by the EC study on due diligence requirements through the supply chain, only a minority of business

respondents stated they conducted some form of due diligence. Studies commissioned by the German and Dutch governments, and by the Danish Institute for Human Rights, reached the same conclusions of a low uptake of due diligence processes by companies when done on a voluntary basis.

The assessments and benchmarks of the implementation of due diligence by companies point consistently to the fact that only 20% of companies claim to carry out due diligence (Alliance for Corporate Transparency). The number of companies that meet basic quality criteria for due diligence is even lower. A legal framework for corporate due diligence must be established at the EU level to ensure that the same rules apply to all companies in the EEA.

Moreover, such legislation will also be a positive development for businesses. Large corporations operating in many EU Member States still face a highly fragmented regulatory environment, in which each country sets its own requirements concerning the extent to which companies should monitor their value chain. This fragmentation makes it difficult for them to navigate the internal market and is a source of legal uncertainty. EU-wide legislation will ensure a level playing field and a coherent legal framework . Unless harmonisation proceeds at EU level, Member States acting individually will be reluctant to impose robust obligations on the companies operating under their jurisdiction, as this may be seen as imposing a competitive disadvantage in the internal market. The result of EU inaction in this area will be, at best, a fragmented space with strong divergences among Member States. At worst, it will delay progress in this area, and increase the exposure of EU-based companies to foreign legislation, such as the United States Foreign Corrupt Practices Act (more details below in the answer to question 17b), which increasingly may fill in the void.

The envisaged legislation calls for mandatory corporate due diligence on human rights and environmental degradation, which we fully support. However, legislation can be circumvented by corrupt practices, unless these are effectively prevented and sanctioned. Therefore, anti-corruption due diligence should be an integral part of the proposed legislation and should be accompanied by deterrent sanctions and effective cooperation between Member States in the area of prosecution.

Moreover, corruption is often the most important enabling factor behind human rights abuses and environmental degradation caused by business activity. Corporate abuse is usually facilitated by a lack of institutional capacity to monitor and enforce existing legal and policy frameworks, low transparency and accountability, low or non-existent civil society inclusion, and overall weak governance. Systemic and endemic corruption violates core human rights principles and steals funds away from the public purse, reducing governments' capacity to mitigate environmental impact and protect fundamental rights. It also facilitates an environment in which other human rights abuses can occur with impunity.

The introduction of EU human rights and environmental due diligence provides a unique opportunity to strengthen companies' compliance programmes, in order to address corruption in corporate groups or in supply chains. Beyond the opportunity, there is a logical link between the two: because corruption undermines the rule of law and the effective enforcement of legislation implementing human rights, labour rights and environmental rights, a due diligence process not including the issue of corruption would be incomplete and, thus, weaker. Finally, there is a strong similarity between the tools and processes to be put in place for human rights due diligence and those generally included in corporate compliance programmes.

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)?

- [x]

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

- [x] Contribute effectively to a more sustainable development, including in non-EU countries
- [x] Levelling the playing field, avoiding that some companies freeride on the efforts of others
- [x] Increasing legal certainty about how companies should tackle their impacts, including in their value chain
- [x] 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
- [x] SMEs would have better chances to be part of EU supply chains
- [x] Other

Other, please specify:

Other potential benefits of an EU due diligence duty may include:

- the EU setting example to other markets and regulators;
- improved resilience of companies and economies in the face of crises, particularly, in the face of supply chain shocks (the OECD has stressed the need for improved supply chain due diligence as a response to the COVID-19 crisis, which would contribute to “a faster and stronger recovery while making the economy more resilient to future crises”);
- alleviation of pressure on governments in production countries to deregulate in order to attract foreign companies and investors;
- increased power and leverage of stakeholders throughout the value chain;
- allowing shareholders, investors and business partners to take on board due diligence implementation in their economic decisions;
- improved implementation of the European Green Deal, which, without due diligence legislation, may incentivise outsourcing and externalising adverse impact to third countries;
- clear guidance and explicit inclusion of corruption prevention strengthening each of the benefits listed above and helping SMEs to improve the level playing field;
- and initial EU support for developing and implementing digitized tools to monitor suppliers’ credibility regarding due diligence.

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
- [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:

SMEs might need support in the form of standardised digital tools in order to help them with the due diligence process.

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	○	○	○
the interests of employees	○	○	○
the interests of employees in the company's supply chain	○	○	○
the interests of customers	○	○	○
the interests of persons and communities affected by the operations of the company	○	○	○

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

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:

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:

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:

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?

How could these possible risks be mitigated? Please explain.

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

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:

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:

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.

We partly agree with the definition of "due diligence duty". The definition should align its wording with international due diligence standards, such as the OECD Guidelines for Multinational Enterprises (MNEs) and the OECD Guidance on Responsible Business Conduct (RBC).

As set out by the OECD, 'due diligence' means acting with reasonable care and investigating an issue before making a decision. In other words, it is an on-going, proactive and reactive process through which companies put in place systems and processes to make sure they are able to identify, manage and report on risks in their supply chain'

However, according to the OECD's guidance, due diligence addresses actual adverse impact or potential adverse impact (risks) not only in relation to human rights and environmental impact, but also in relation to bribery and corruption. The OECD Guidelines for MNEs chapters provide detailed provisions on the type of conduct recommended for each RBC issue. The likelihood of adverse impacts increases in situations where an enterprise's behaviour or the circumstances associated with their supply chains or business relationships are not consistent with the recommendations in the OECD Guidelines for MNEs.

The European Commission endorsed the OECD's due diligence standards and must be consistent with them when launching its own corporate due diligence legislation by expanding its scope to corruption and governance impact. This would also be consistent with existing and complementary EU legislation, such as the Non-Financial Reporting Directive.

For many enterprises, the term "risk" means primarily risks to the enterprise – financial risk, market risk, operational risk, reputational risk, etc. Enterprises are concerned with their position in the market vis-à-vis their competitors, their image and long-term existence, so when they look at risks, it is typically risks to themselves. The Guidelines however refer to the likelihood of adverse impact on people, the environment and society that enterprises cause, contribute to, or to which they are directly linked. In other words, it is an outward-facing approach to risk. Enterprises can identify risks on RBC issues by looking for divergences between what is recommended in the OECD Guidelines for MNEs on the one hand, and the circumstances associated with their operations, supply chains or business relationships on the other.

Moreover, the "due diligence duty" should cover the company's' global value chain, which includes entities with which it has a direct or indirect business relationship (understood as all types of business relationships of the enterprise – suppliers, franchisees, licensees, joint ventures, investors, clients, contractors, customers, consultants, financial, legal and other advisers, and any other non-State or State entities linked to its business operations, products or services; as per the OECD Due Diligence Guidance for Responsible Business Conduct) and which either (a) supply products or services that contribute to the company's own products or services, or (b) receive products or services from the company. Supply chains and value chains are similar terms that refer to the entire production chain. However, while "supply chain" may be used to specifically refer to the production and distribution of a commodity, "value chain" includes the set of interrelated activities by which a company adds value to an article.

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?

The legislation should be applied broadly to all business entities across all sectors and cover human rights, environmental and corruption issues. However, it should allow for additional measures for specific sectors, products or activities (see more details on this below in the answer to question 15c). Any subsequent sector-specific legislation should supplement, but not limit, the development and implementation of the proposed general legislation.

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.

Option 2 is our preferred option as this would create legal certainty and a level playing field for companies as to the necessary processes to be put in place and impacts to be covered by the due diligence duty. A rich body of legally binding international standards has long been developed, leaving no room for legal uncertainties.

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)
- [x] Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups
- [x] Climate change mitigation
- [x] 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
- [x] Other, please specify

Other, please specify:

As mentioned above, we call for the inclusion of corruption within the scope of this legislation, in addition to human rights and environmental due diligence. Too often corruption is treated as a "victimless" crime, including in the context of large-scale cross-border business corruption. This is far from the case. The linkages between corruption and human rights abuses suggest that there should be more policy coherence in the two fields with regard to both prevention and enforcement.

It has been well documented that corruption by private sector entities contributes to and exacerbates human rights violations and that there is a need for greater policy coherence between anti-corruption efforts on one hand and the business human rights agenda on the other. Business corruption can come in various guises, from bribery to trading in influence to money laundering. As documented in Transparency International's 2020 Exporting Corruption report, enforcement cases related to foreign bribery alone reveal that business corruption can be found in a wide range of sectors and processes, including among others the results of government procurement and licensing procedures, regulatory and legislative outcomes, the actions of law enforcement bodies and courts, and even the integrity of elections.

Human rights and environmental impact may result from a range of corrupt activities and behaviours by private sector actors. Corrupt procurement of defective material may cause injury. Bribes paid by businesses or by producers in their supply chains to evade compliance with safeguards and regulations, including environmental regulations, may have a harmful impact on large groups of people. Bribes to secure a licence to mine can have a consequent negative impact on local communities. Through undue influence on public officials, companies may be permitted to distribute harmful products to consumers; to construct and use unsafe buildings; and to systematically exploit workers, including the use of slave labour. One of the most well-known examples of corporate corruption being linked to large-scale human rights disasters is the Rana Plaza factory collapse in 2013.

The human rights impact may be indirect but no less harmful when business corruption diverts public finances, skews procurement processes towards unqualified firms, and distorts government decision-making. Companies may also use opaque campaign contributions, conflicts of interest and revolving doors to influence legislative and regulatory processes in ways leading to adverse human rights impact. Where unscrupulous businesses are able to exercise undue influence over public policy decisions, they may use that influence to induce officials to commit serious human rights violations in their interests.

In the most serious cases, business corruption enables or results in the commission of atrocity crimes, which can amount to crimes against humanity, for example, where companies pay bribes to repressive regimes to gain use of land. In addition, businesses that enable, aid or abet the laundering of proceeds of corruption can indirectly contribute to negative human rights impact.

These abuses can contravene almost all of the fundamental rights listed in the Universal Declaration of Human Rights and related documents. Apart from direct individual impact, they often have large-scale indirect impact, by depriving states of the resources needed to provide crucial public services and programmes that give effect to economic, social and cultural rights, including access to health and education, and services to strengthen the institutions that uphold civil and political rights.

Moreover, the upcoming EU draft legislation should address high-risk corruption-prone sectors where there are frequently adverse human rights impact through treatment of workers, host communities and the environment. These include the following secors:

- Extractive sector
- Public procurement and concessions
- Land acquisition
- Defence sector.

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?

The definitions at EU level should be closely aligned with the authoritative international standards in this field, i.e. the international bill of rights (UDHR, ICCPR, ICESCR) and the respective core ILO conventions. Furthermore, the Principles of the UNGPs should be reflected in the definitions used in EU legislation. It is of utmost importance that the EU uses internationally recognised definitions, particularly in the context of global supply chains (in countries that do not respect human rights, but have nevertheless signed the ICCPR and ICESCR).

With regard to anti-corruption specifically, definitions from the United Nations Convention against Corruption (UNCAC), OECD, Council of Europe/GRECO, and Moneyval Committee should be used.

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.

- [ ] 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

- [x] Capacity building support, including funding
- [ ] Detailed non-binding guidelines catering for the needs of SMEs in particular
- [x] 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

It would not be useful to exclude SMEs per se. There are some SMEs (or rather micro enterprises) with fewer than ten employees, which may potentially have a devastating impact on human rights in certain sectors. The number of employees of a given company, therefore, is not a relevant criterion to establish due diligence duties. However, the legislation should foresee additional support for SMEs, as most of them do not have sufficient capacity to deal with due diligence requirements in-house.

Moreover, from international standards (UN Guiding Principles on Business & Human Rights, OECD Guidelines for Multinational Enterprises), it is very clear that due diligence is the obligation of all companies. All business enterprises, regardless of size, should conduct human rights and environmental due diligence. However, as stressed by these international standards, the means through which companies will be expected to meet their responsibility to respect human rights and the environment should be commensurate to the severity of the risks. For SMEs, the type of policies and processes expected would be according to their capacity. Their degree of leverage over their business relationships would also be considered in determining their responsibility (although it should not be relevant to considering whether they should identify all risks, carry out due diligence and exercise any leverage they may have).

Studies of the compliance costs of a variety of due diligence regimes do not identify a disproportionate economic burden for SMEs. Rather the cost of compliance is typically related to the size of the enterprise. Moreover, the Commission's study on due diligence requirements through the supply chain shows that, even for SMEs, the costs of carrying out mandatory supply chain due diligence appears to be relatively low compared to the company's revenue. The additional recurrent company-level costs, as percentages of companies' revenues, amount to less than 0.14% for SMEs.

SMEs typically do not generate and encounter as many risks as larger businesses do, by virtue of the simple fact that their value chains are smaller. SMEs tend to have fewer suppliers and customers, which enables deeper and better-quality relationships. For this reason, not only is it often more feasible for SMEs to map the businesses in their supply chains, it is also easier and more desirable to get to know them. SMEs also tend to spend more time selecting business partners that share their values and match their standards, and have a preference for longer-term relationships. These stronger relationships allow greater scope to integrate human rights and environmental issues.

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.

The same obligation should apply to all companies operating in the internal market (selling products or services, conducting activities). The link should therefore be the presence on the internal market, i.e. selling products or services of any kind to customers within the EU.

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 anti-corruption standards, human rights and the environment, in their own operations, subsidiaries, business relationships and global value chains, and to undertake human rights due diligence for the products, services and activities that are placed or undertaken in the EU internal market.
These companies must also be liable for any harm caused by their operations or in their 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.

Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain is a strong precedent for extraterritorial obligations for companies based outside of the EU. It shows it is possible to impose and enforce obligations irrespective of whether a company is established inside or outside of the single market.

With regard to extraterritorial reach in anti-corruption legislation, two strong precedents are the UK's Bribery Act of 2010 and the US Foreign Corrupt Practices Act (FCPA) of 1977. In the former case, although in principle British courts shall have jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership (s 12), this "close connection" requirement does not apply to the offence of section 7: a commercial organisation can be liable for conduct amounting to a section 1 or 6 offence on the part of a person who is neither a UK national or resident in the UK, nor a body incorporated or formed in the UK, provided only the organisation that benefited from the bribery (or on behalf of which bribery was committed) is incorporated or formed in the UK, or carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed).

Similarly, in the latter case, the FCPA has an extraterritorial reach: it can target illegal activities (bribery of foreign officials) outside the United States, provided there is a link to the United States, even where the said activities would be considered legal in the jurisdiction where they take place. The link to the United States may result from the fact that corporate entity is registered with the US Securities and Exchange Commission (SEC), is incorporated in the United States, or "either directly or through an agent, engage in any act in furtherance of a corrupt payment (or an offer, promise, or authorisation to pay) while in the territory of the United States". In recent years, the interpretation of these provisions has been significantly extended by the US Department of Justice: the link to the United States is considered sufficient when communications devices are used that present such a link (including, for instance, email exchanges going through a US internet service provider). Being prosecuted under the FCPA can have very serious consequences for the corporations concerned.

The absence of a robust and unified legislative framework against corruption in the EU results in a situation where foreign legislation with extraterritorial reach, such as the FCPA, de facto is preempting the field. The US legislation has as a matter of fact regularly targeted European companies, in part because of the lack of an adequate European legislation in this area. For all these reasons, it would seem important to ensure that companies operating in the EU adopt robust corporate compliance programmes, protecting them from the risk of being liable under the FCPA.

Indeed, this is one the main reasons why a recent report co-authored by B. Cazeneuve, a former French Prime Minister, and professor A. Gaudemet, recommended that the EU adopt a strong anti-corruption policy, in particular "to protect the interests of European businesses around the world, by rebalancing the EU's relationship with the United States of America and other world powers". The Cazeneuve-Gaudemet report concluded that "the lack of a robust EU anti-corruption policy to date has probably helped to promote the extraterritorial enforcement of foreign legislation, particularly the US Foreign Corrupt Practices Act, with regard to European businesses; over the last decade, the largest penalties imposed on the basis of this law have predominantly been imposed on European businesses".

EU investment and trade agreements should include clauses referring to the new legislation and to sanctions that might apply (e.g. duties or import bans) in case of severe or recurring violations.

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:

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:

The Commission's legislative proposal should impose on companies operating within the EU to ensure that all the other entities to which they are connected by an investment nexus comply with human rights. A duty to adopt preventive measures against corruption, in the form of a corporate compliance programme, should be part of the due diligence obligations imposed on companies operating in the EU. This would ensure that corporate compliance programmes are included as a component of the systems that companies put in place in order to monitor their subsidiaries and business partners, to prevent the occurrence of human rights, labour rights or environmental rights violations in the corporate group or in supply chains.

The duty to put in place solid corporate compliance programmes as part of a broader due diligence obligation is preventive in nature. As such this duty should be distinct from and complementary to the imposition of liability (whether civil, administrative or criminal), in situations where a company is found to have practiced corruption or to have been complicit in, or knowingly benefited from, corruption practiced by others, even where a corporate compliance programme was in place. The robustness of a corporate compliance programme may be taken into account. However, even a company which has applied due diligence by putting in place a robust compliance programme, should not be immune from legal liability if it appears that the preventive efforts have failed. This is also the approach recommended under the UNGPs, which clearly suggest that the company's duty of care is not absorbed by a company discharging its due diligence obligations.

Thus, while they may be seen as complementary, the two duties should be kept separate: the preventative duty to take all necessary measures to avoid corruption does not absorb the duty to compensate or to be held liable if corruption does take place. It should be the role of courts, when faced with prosecution or with legal claims from victims, to assess on a case by case basis whether the company could have been expected to do more to prevent corruption from occurring. The risk, otherwise, is that due diligence will become a sophisticated "box-ticking" exercise: the incentive would be for the company to do the minimum required to comply with the requirements of due diligence, but not to be proactive beyond that minimum.

Therefore, the inclusion of provisions related to the duty to prevent corruption in the mandatory human rights due diligence legislation proposed by the Commission should not delay progress on other initiatives to build an effective EU-wide anti-corruption framework. In accordance with article 83 of the TEU, the EU may adopt directives in order to establish minimum rules on the offence of corruption. The classification of corruption among this category of so-called "euro-crimes" is justified by its often transnational dimension and by its links to organized crime. EU law has not yet adopted harmonisation measures in this area. A proposal for a directive specifically on combating corruption would help to fill this gap.

EU legislation already indirectly addresses the role of companies in preventing corruption in corporate groups and supply chains through its 2014 Non-Financial Reporting Directive (NFRD). However, this Directive does not impose on companies a duty to take certain actions, such as a requirement to adopt a due diligence plan on human rights or social or environmental impact, nor does it require the setting up of a robust corporate compliance programme to address the risk of corruption. Instead, the NFRD relies on a 'comply or explain' approach, according to which companies may decide not to disclose their policies, and simply provide an explanation for not doing so. Moreover, it does not link the requirement to disclose non-financial information to the establishment of a new duty of care. In particular, it does not state that, in the absence of the adoption of certain policies to prevent risks, the company may be held liable for any impact that might have been prevented by the adoption of such policies. Therefore, although the Non-Financial Reporting Directive was an important initial step towards encouraging companies operating in the EU to prevent corruption in the corporate group and throughout the supply chain by adopting a strong corporate compliance programme, this remains an unfinished task.

It is important that enforcement of this legislation is harmonised among EU Member States. Therefore, an EU coordination mechanism is needed to ensure consistency.

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.

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

Civil society organizations, trade unions, work councils, and sector initiatives.

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	○	○

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:

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).

- [x] Requirement for companies to consider environmental, social and/or human rights expertise in the directors' nomination and selection process
- [x] Requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise
- [x] Requirement for companies to have at least one director with relevant environmental, social and/or human rights expertise
- [x] 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:

There should be mandatory capacity-building and training opportunities for all directors who do not have a sufficient background/knowledge on sustainability issues.

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?

- (x) 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?

> Limit share buy backs to a certain ratio with additional sustainability investments such as climate friendly technologies and human rights capacity-building in supply chains.

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:

> As highlighted several times throughout this submission, we call for the inclusion of corruption within the scope of the upcoming EU legislation on corporate due diligence.
> There is a broad common basis of international conventions, agreements and commitments to build upon, which the EU and its member states are party to, and which all address the importance of international anti-corruption efforts. The EU and the G20 member states within the EU have committed to more than 60 anti-corruption measures in G20 declarations. For the past decade, the OECD Guidelines for Multinational Enterprises have recognised the importance of anti-corruption alongside human rights, environmental protection and employee rights, and should serve as guidance for EU regulation.
>
> When it comes to implementation of due diligence, the risk of human rights abuses and environmental violations can vary among sectors. The risk of corruption, however, is simply commensurate with the potential savings and gains achievable by corrupt practices. The due diligence measures for anti-corruption are common to all sectors. They are already widely built into the risk assessment schemes of corporations in international trade and are well understood - not least because they protect the corporations themselves

from corruption. Moreover, there is no difference between anti-corruption due diligence concerning “risks to the business” and “risks to humans”.

In particular, we call on the EC for the inclusion of the following ambitious measures on anti-corruption due diligence, which would lead to a strong control environment:

1. A competitive procurement process required for all sourcing needs.
2. Involvement of procurement professionals / department for onboarding all new suppliers.
3. A zero-tolerance approach to supplier gifts.
4. An anti-corruption code of conduct for all suppliers.
5. Ensuring all suppliers are contracted, including audit and termination rights related to anti-corruption.
6. A rotational programme in companies’ procurement organisation.
7. A rotational programme in key supplier relationships (c.f. statutory audit firms).
8. Anti-corruption training for procurement staff.
9. Anti-corruption training for supplier staff.
10. Enhanced mitigation activities targeted towards suppliers in high-risk sectors and countries.
11. Risk-based due diligence on all suppliers, including beneficial ownership and requirement that due diligence is completed, and any red flags are mitigated before relationship is established
12. Unannounced, spot third-party audits for high-risk suppliers.
13. Organisationally viewable award criteria, bidding information and judgement criteria.
14. Publication of high-level data on incidents and sanctions related to suppliers.
15. Disclosure of companies’ strategic suppliers.

The analogies between corruption on the one hand, and human, labour or environmental rights on the other hand, justify that they be considered together as complementary components of due diligence broadly conceived. There is, however, a difference between the two when it comes to the enforcement mechanisms necessary to make the due diligence duty effective: whereas the victims are generally easily identifiable where human, labour or environmental rights are adversely impacted, corruption often only affects victims indirectly, insofar as it may lead to certain laws or regulations being circumvented or underenforced. Corruption of course has impacts on victims: individuals and communities are adversely impacted when the legal protections they should benefit from are left unenforced without being aware of the reasons.

This may be important to take into account in the design of the systems put in place in order to prevent such risks. Indeed, while some tools have been proven especially effective in corporate compliance programmes to prevent corruption (financial auditing, whistleblowers’ protection, the possibility to provide information to a compliance officer anonymously or confidentially), other tools may be less effective when they rely primarily or exclusively on complaints filed by victims. As such, if a due diligence system is put in place to address the full range of corporate risks it would be inappropriate to place too much reliance on the initiative of victims to ensure the effectiveness of compliance
programmes. The imposition of a duty of care towards victims of corruption may be useful, especially if it is accompanied by a provision concerning the burden of proof that allows to shift the burden on the company's shoulders, since it is the company that shall hold the relevant information. This would also be in line with the requirements of the 1999 Council of Europe's Civil Law Convention on Corruption.

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

just-cleg@ec.europa.eu