

Consultation Document Proposal for an Initiative on Sustainable Corporate Governance

Fields marked with * are mandatory.

Disclaimer

This document is a working document of the Commission services for consultation and does not prejudice the final decision that the Commission may take.

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
- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* Surname

WALCZAK

* 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

Natalia

* Email (this won't be published)

n.walczak@etf-europe.org

* Organisation name

255 character(s) maximum

European Transport Workers' Federation (together with International Transport Workers' Federation)

* Organisation size

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

Transparency register number

255 character(s) maximum

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

92545571128-74

* Country of origin

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

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Democratic
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Congo

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Liberia

Saint Kitts and
Nevis

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:

The model of corporate governance based on shareholder value and control proved to be detrimental to social, environmental and also economic sustainability. Shareholders are interested in quick gains - the average holding period of stock has reached new low during 2020, to under 6 months.

94 % of workers producing goods and providing services to the largest global multinationals are not directly employed. Instead, multinationals operate through contractual relationships within a non-transparent network of suppliers. This makes them immune from legal accountability, as there is often no legal cause for action when violations occur in supplying companies. At the same time, workers are also often impeded from seeking justice against local companies, which are often under-resourced, thus making them effectively judgment-proof.

Moreover, multinationals tend to prefer business relationships in countries with low wages, weak labour laws and ineffective judicial systems. Trade unions fighting to improve conditions in these countries are up against foreign chambers of commerce blocking minimum living wages or regulations designed to ensure safe and secure work.

Workers that are caught in such arrangements experience significant downward pressure to work in precarious working conditions and for low wages, and are often left without any safety net in case of lay-offs. At the same time companies at the top of the supply chain, while benefiting from this externalisation of environmental and social costs, as well as from breaches of human rights (including workers' and labour rights), are absolved from any responsibility. In addition to being ethically wrong it also gives these companies an unfair competitive advantage towards a small group of well-intended undertakings that duly implement sustainable practices across their supply chain.

Introduction of a holistic approach into corporate governance will help stopping the race to the bottom in supply chains that we are currently experiencing.

With regard to the material scope, the sustainable corporate governance mechanism should cover all human rights stemming from international and European instruments, including workers' rights. The EU initiative should focus on effective prevention of human rights violations and negative impacts of business operations, including global operations of companies established or operating in the EU, and on effective controls, sanctions and remedies.

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

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

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

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

Please explain:

National action plans on business and human rights for responsible business conduct which implement OECD guidelines on multinationals and OECD guidance for business conducts reveal the limits of the voluntary approach. Existing voluntary CSR schemes, codes of conduct, etc have failed to reach its environmental and social objectives, are not legally enforceable and lack accountability or legal predictability. It is not uncommon that the voluntary schemes are treated as a PR exercise to improve a company's image. Additionally, multiple studies show that without mandatory due diligence only a minority of companies conduct due diligence, and most of them do not cover their entire supply chain. The complexity of global supply chains requires a comprehensive response from multiple private sector actors to prevent environmental harm and human rights abuses. ETF and ITF note that many companies are only applying their environmental and social standards to at best the first tier of their supply chains. In relation to the transport sector, this means that the conditions of significant groups of workers including delivery drivers, warehouse staff and agency workers as well as crews involved in shipping are not adequately addressed. As mentioned in the answer to question 1., current state of play promotes unfair competition at European and global level. In order to introduce level playing field and harmonised accountability, guaranteeing access to justice and remedy mechanisms, it is therefore essential to create an EU legal framework.

In General Comment No. 24 of 2017 concerning the application of the International Covenant on Economic, Social and Cultural Rights to business activities, the Committee on Economic, Social and Cultural Rights held that the duty of the State to protect human rights "extends to any business entities over which States parties may exercise control, in accordance with the Charter of the United Nations and applicable international law. Consistent with the admissible scope of jurisdiction under general international law, States may seek to regulate corporations that are domiciled in their territory and/or jurisdiction: this includes corporations incorporated under their laws, or which have their statutory seat, central administration or principal place of business on their national Territory." Legislative action by the European Commission would help EU member States meet this extended duty to protect human rights in global supply chains.

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

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

Other, please specify:

EU legislation would also, and most importantly, empower victims and their representatives, including trade unions and NGOs, to fight against human rights abuses. It should ensure the right for trade unions to bargain collectively, the full involvement of workers' representatives in the whole due diligence process, as well as the consultation (and, where applicable, consent) of all relevant stakeholders. In particular:

- Trade unions should have the right to negotiate with the company the due diligence process at the different levels.
- Workers' representatives should be informed and consulted in the different steps of the due diligence process.
- Early alert mechanisms should be developed in partnership with the trade union in the companies concerned. UN Special Representative John Ruggie recognised that human rights due diligence is not a one off exercise but rather an "ongoing" process (UN Guiding Principles on Business and Human rights , Guiding Principle 17(c)). Employees are uniquely placed to understand the actual impacts of business practices on a day to day basis. Effective union representation, negotiations and participation of employees in shaping corporate decisions and policies can help in identifying risks and preventing human rights abuses from occurring.
- Stakeholders should be informed, consulted and involved as well in the due diligence process.
- Due diligence processes must ensure respect for indigenous peoples' and local communities' rights (in particular the right to Free, Prior and Informed Consent).

Question 3a. Drawbacks

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

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

Other, please specify:

There are no drawbacks.

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

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

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

	Relevant	Not relevant	I do not know/I do not take position
the interests of shareholders	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees in the company's supply chain	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of customers	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

the interests of persons and communities affected by the operations of the company	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of persons and communities affected by the company's supply chain	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of local and global natural environment, including climate	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the likely consequences of any decision in the long term (beyond 3-5 years)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of society, please specify	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
other interests, please specify	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

other interests, please specify:

The interests of shareholders are relevant to a certain extent, but current corporate decision-making gives too much weight to them. It is important that this is corrected through a much more balanced definition of Directors' duty of care.

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	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Management of the risks for the company in relation to stakeholders and their interests, including on the long run	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Identification of the opportunities arising from promoting stakeholders' interests	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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:

The EU mandatory framework should include a set of obligations, in particular:

- a) Companies should map, identify and assess actual and potential adverse impacts of their operations – including both their activities and their business relationships, their purchasing practices (in particular along the whole supply and subcontracting chains) – on the above-mentioned areas. The assessment should take into consideration the protection of workers as well as all the areas of business activities and be based on an evaluation of at least the sectoral, geographic, product, service and enterprise-based risk factors.
- b) Companies should act upon the findings. They should cease any operations, including in their business relationships, which are causing or contributing to adverse impacts that cannot be prevented.
- c) Companies should develop, publish and implement a due diligence plan to prevent any potential risks and the materialisation of negative impacts or violation of human rights in their activities and business relationships (in their whole supply and subcontracting chains) but also to ensure proper monitoring and control. The plan should include concrete actions and follow-ups with specific objectives and timetables. It should provide for procedures to regularly assess the situation of companies whose operations are linked with the main company because of its business relationship. The EU initiative should contain provisions that encourages high-level corporate responsibility, including directors' liability, for addressing the identified actual and potential violations and negative impacts through the due diligence plan. Companies should ensure adequate budget allocations and oversight to guarantee the implementation of the plan and the respect and enforcement of their obligations.
- d) The framework should require companies to verify effective and transparent tracking and monitoring of the implementation of their due diligence plans. Such verification should be based on qualitative and quantitative indicators and internal and external feedbacks. Companies should provide an assessment of the effectiveness of the due diligence plans, including their implementation, the actions undertaken and any negative impacts which have materialised, and periodically review them based on the findings. This assessment should be provided to the public authority responsible for monitoring the respect of the directive's obligations for an objective oversight of the quality of the assessment.
- e) Due diligence plans should include the establishment of an early alert mechanism to collect reports of existing and potential human rights and social and environmental standards violations and negative impacts about the above-mentioned matters, as well as for any violation of the due diligence obligations and plan. Effective operational-level grievance mechanisms are critical to conducting human rights due diligence. They support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. Moreover, these mechanisms can

make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.

Legislative provisions on the establishment of operational-level grievance mechanisms should be built on the effectiveness criteria laid out in Principle 31 of the UNGPs and the recommendations of the OHCHR Accountability and Remedy Project III.

f) The EU initiative should require companies to publish an annual, specific and comprehensive public report on the verifiable progress of their due diligence plans and obligations, on the actions undertaken about both their operations and business relationships and on any violations or negative impacts which have materialised. The reports should provide enough information to evaluate the adequacy of the companies' plans and actions compared to the actual and potential negative impacts of their operations. The extent of reporting should be proportionate to companies' activities' potential and actual risks and impacts and corresponding due diligence processes. In designing the reporting framework, the initiative should pay due consideration to the existing legal framework for the reporting of non-financial information, which should be revised – according to long-standing trade union demands.

g) The framework should also require companies to embed responsible and sustainable business conduct principles and considerations into their management systems and their business models.

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:

Companies are dependent on and cannot function without workers and the communities they are located in. Workers are not simply 'factors of production' that are hired per contract, rather they make firm-specific investments in skills, help companies innovate and improve production processes and make sacrifices when times are tough. Communities provide infrastructure and a skilled workforce. Workers and communities are dependent upon the long-term survival of companies; the loss of jobs and tax revenue that frequently occurs when companies are taken over or reorganized can be devastating for workers and their communities. Numerous studies demonstrate that companies sacrifice long-term investments in order to fulfill short-term demands and expectations from short-term oriented investors.

A clarification in legislation that directors' duties are not obligated to first and foremost satisfy shareholders' demands ('shareholder primacy'), but rather that directors are obligated to workers and their communities on at least an equal footing with shareholders, would be one measure which would help counter the destructive pressures for short-term financial returns by investors.

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?

A directors' duty of care is one helpful measure for mitigating short-termism, however, this measure alone is not sufficient. The key risk is that legislative action will not go further than defining directors' duties to stakeholders, but will not address other causes of short-termism.

How could these possible risks be mitigated? Please explain.

Legislative action should not stop with defining directors' duties to shareholders, but rather should address other causes of short-termism. These should include: a financial transactions tax and 'loyalty shares' to discourage short-term speculative trading by investors such as activist and high-frequency hedge funds; strengthening of workers' rights to information, consultation and participation; disincentives for equity-oriented and incentives for sustainability-oriented remuneration of top management; and an improvement in transparency and sustainability through a revision of the Non-financial Reporting Directive.

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

A considerable body of research on Board-Level Employee Representation (BLER) shows that the integration of workers' interests in corporate governance does not have an overall negative impact on share value and has positive effects on both operative and sustainability performance. The review of the literature on German co-determination and show that companies with co-determination have better sustainability practices. The share price of co-determined companies in Germany was less volatile during and that the investment rates of these companies recovered more quickly after the financial crisis of 2008/9 than was the case for companies without co-determination. The research by the European Trade Union Institute shows that European companies with workers in the board have better performance along a range of sustainability indicators, including not only 'people' but also 'planet' (i.e. environmental) dimensions. Companies with co-determination are also less likely to follow 'aggressive' tax practices than companies without co-determination.

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:

An understanding of the sustainability risks, impacts and opportunities companies face and the development of a sustainability strategy with clear targets is key both to the long-term survival of companies and to the achievement of European and international targets and commitments, such as the Paris Agreement and the EU Green New Deal. The EU goal carbon neutrality by 2050 will require a massive transformation of production, service delivery, transportation, housing and many other facets of the economy and society. Companies will not be able to succeed and these international targets will not be met if sustainability strategies are not integrated into the core of businesses' overall strategies and business models.

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:

1. On 1 October 2019, the Global Union Family (coalition of trade unions representing XPO workers from FR, UK, US, BE, ES, IT, assisted by International Transport Workers' Federation (ITF) and ETF) served formal notice on XPO Logistics Europe under the French Corporate Duty of Vigilance Law. The Global Family demanded XPO to fulfill its obligations – including conducting a thorough mapping of its supply chain and consultation with unions regarding how it was identifying and ranking risks. The company responded only with a defensive statement that they believe they adequately fulfill their obligations.
2. From 2013 European trade unions from BE, NL, DE, SE, supported by the ITF, have been highlighting social dumping present in IKEA's logistics chain. IKEA's practice has been to accord their transport orders to the cheapest bidder, without any attention to the compliance with the EU regulations concerning posting of workers, driving and rest time, social contributions, cabotage rules. In 2017 IKEA entered into talks with ITF to address the issue.
3. Dutch NGO Both Ends has brought in September 2020 a legal action in the court in Rotterdam on behalf of fishers in South Sulawesi (Indonesia) against Boskalis, a Dutch dredging company. Boskalis activities - extracting sand off the Sulawesi coast - impacted local fishing grounds, with a decline in catch of up to 80% for some of the fishing communities and erosion of the coast. In the past the company refused to provide information on environmental impact assessment or to enter into dialogue with local fishers.

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:

1. XPO decline to meet unions, ignoring all offers of union assistance and collaboration to help them fulfill their obligations, as well as all questions asked seeking reassurances about measures taken under the law. The Global Union Family is nevertheless continuing its efforts to hold XPO accountable for failing to fulfill its duty of care that leads to multiple abuses: OHS breaches leading to deaths in workplace, exploitation of sub-contracted Eastern European drivers, missclassification of workers in Spain and Italy, race and gender-based discrimination, union busting.

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:

Although fully agreeing with the necessity of giving a role to stakeholders in the enforcement, it has to be stressed that it will also be necessary to ensure that this role is given to genuine representatives of workers, environment or people affected by the operations of the company and not to so-called "yellow" organisations /representatives set up and/or financed by the companies thereby undermining the prerogatives of trade unions/recognized organisations/representatives. As for the representation of workers this means that such role is only for genuine trade unions and cannot be given to yellow trade unions and/or so-called associations of persons/employees.

Meaningful stakeholder engagement is an important element for the entire due diligence process. The OECD Due Diligence Guidance for Responsible Business Conduct specifies that meaningful stakeholder engagement must be characterized by two-way communication and depend on good faith. Companies should be required to elicit the views of those likely to be affected by their decisions. It is important to engage potentially impacted stakeholders and rights holders prior to taking any decisions that may impact them. This involves the timely provision of all information needed by the potentially impacted stakeholders and rights holders to be able to make an informed decision as to how the decision of the enterprise could affect their interests. It also means there is follow-through on implementation of agreed commitments, ensuring that adverse impacts to impacted and potentially impacted stakeholders and rights holders are addressed including through provision of remedies when enterprises have caused or contributed to the impact(s). Ongoing engagement means that stakeholder engagement activities continue throughout the lifecycle of an operation or activity and are not a one-off endeavour. This is particularly important when it comes to the rights of workers who are a part of the company's operations and activities and may therefore at any moment be impacted negatively.

Industrial relations are a form of stakeholder engagement that guarantee an ongoing engagement between companies and trade unions. Companies should therefore partner with or enter directly into agreements with trade unions in order to facilitate worker involvement in the design and implementation of due diligence processes, the implementation of standards on workers' rights and the raising of grievances.

At the same time, it should be made clear that the rights to freedom of association and collective bargaining are rights in themselves that the company is required to respect and conduct due diligence on. Meaningful stakeholder engagement on due diligence does not replace the company's obligation to respect the choice of workers to form trade unions and to engage in good faith collective bargaining over terms of employment and working conditions.

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.

The relevant international (UN, ILO) and European (Council of Europe, OECD,...) human rights/ due diligence instruments recognise the necessary role that trade unions, workers and their legitimate representatives, should play in the definition and implementation of companies' due diligence initiatives. The directive should fully recognise the role of workers as the most central actors in companies. Without prejudice to existing information, consultation and participation legislation, but building on strong collective rights of workers, the directive should include the following elements:

- a) The right for trade unions at the relevant level, as defined by trade unions, to negotiate with the company the due diligence process that should be introduced.
- b) Mandatory involvement of trade unions and workers' representatives should be guaranteed in an effective manner and at an early stage in the identification of the actual and potential adverse impacts, as well as in the elaboration of the due diligence plan, in its implementation and enforcement, its periodic assessment and review.
- c) An early alert mechanism should be developed and managed in partnership with the trade union organisations in the companies concerned.
- d) Mandatory workers' information and consultation rights should be fully respected regarding the definition of the due diligence plan and its implementation, at national, European and global level, including through the involvement of the European Works Councils. The information should be timely and sufficient to support the active and efficient involvement in the process. Workers' representatives in company boards should be fully involved as well in the different steps of the due diligence process.
- e) The directive should ensure that trade unions and workers' representatives of companies in the supply and subcontracting chains are also involved in the identification and assessment of the actual and potential negative impacts, in the definition and implementation of the due diligence plan and in the early alert mechanism. It is imperative that the directive provides trade unions with the resources and capacity to intervene and act on all stages of the process.
- f) Social dialogue practices, and trade union rights, notably the right to organise, to bargain collectively and the right to strike, must be protected and enforced also in the supply chain or subcontracting chains, including for non-standard employment relations.

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.

ETF and ITF agree with this definition. This definition coincides very well with the personal and material scope the EU initiative should cover and which is also based on and in line with the relevant international and European human rights and due diligence instruments.

However, it is worth stressing the definition should align its wording with international due diligence standards. Prior to ceasing, preventing, mitigating and accounting for human rights, health and environmental impacts, companies should first be obliged to effectively identify and assess any actual or potential adverse human rights, social, health and environmental impacts. Furthermore, the “due diligence duty” should include a remediation duty, that is, the obligation to actively engage in the remediation of adverse impacts where companies cause or contribute to harm by way of actions or omissions, or, where a company has not caused or contributed to the harm but its operations, products or services are directly linked to it, the obligation to exercise or increase its leverage over those responsible to help ensure that remediation is provided.

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 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 whole 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?

As a general rule, the EU initiative should all apply to businesses including multinationals, independently of their sizes, active in any sector. For example the finance sector must be covered. It is essential that financial management and investment decisions should reinforce the due diligence obligations placed on company directors in relation to the environment and human rights, rather than undermining or conflicting with these objectives. Limitations in the scope of the EU framework could, if they were implemented, exclude from the

scope many companies whose operations have significant actual or potential impacts in the areas covered by due diligence obligations. For these reasons, the personal scope of the directive should cover all companies, including SMEs, as well as public sector organisations, which are established (seat, headquarters or principal place of business) or active in the European Union, regardless of their legal forms. Where relevant and necessary, thematic or sectoral regulations adapting and/or complementing the 'horizontal initiative' in a manner which will take note of the specific needs for the theme/sector concerned could/should be adopted.

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

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

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

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

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

- Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)
- Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups
- Climate change mitigation
- 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

Other, please specify:

The material scope of the EU directive should cover all human rights, including workers' and trade union rights. This includes, amongst others, freedom of association and the right to collective bargaining and collective action, information, consultation and board-level representation rights, decent working conditions, occupational health and safety, fair wages, social security coverage, etc.

In view of the challenges to guarantee these rights in the informal economy and with regard to workers in insecure or disguised employment relationships, the ILO Centenary Declaration for the Future of Work has called on governments, workers and employers to ensure adequate protection for all workers. In this regard, the Centenary Declaration highlights the importance of the employment relationship as a means of providing certainty and legal protection to workers. To ensure respect for the human rights of all workers, companies should therefore refrain from business practices that perpetrate disguised or insecure employment within their own operations as well as their business activities.

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?

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
- 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

It has to be stressed that any initiative concerning due diligenceshould apply to all businesses including multinationals, independently of their sizes, active in any sector. Limitations in the scope of the EU directive could, if they were implemented, exclude from the application of the directive many companies whose operations have significant actual or potential impacts in the areas covered by due diligence obligations. For these reasons, the personal scope of the directive should cover all companies, including SMEs, as well as public sector organisations, which are established (seat, headquarters or principal place of business) or active in the European Union, regardless of their legal forms.

The UNGPs make it clear that while policies and processes will necessarily have to vary in complexity depending on the size of the business enterprise, all companies are required to carry out human rights due diligence. The size and structure of a business enterprise should only affect the modalities of implementation of due diligence. This is particularly relevant when it comes to micro-, small-and medium-size enterprises, which should be provided with additional capacity support and implementation guidelines. Moreover, their reporting requirements should correspond to the size of their operations and activities.

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

- Yes

- No
- I do not know

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

Third country companies placing products on or/and providing services within the EU internal market should be subject to the same obligations as companies established in the EU. This should explicitly include the provision of financial services. This consistency is needed to ensure a level playing field and provide confidence to EU citizens regarding the social and environmental impacts of the products and services that they use

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

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

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

- Yes
- No
- I do not know

Please explain:

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

To create a level playing field globally, the EU and its MS should actively engage in ongoing discussions at the ILO on regulating decent work in global supply chains. This treaty should include enhanced provisions on access to justice for victims in third countries, including on jurisdiction, applicable law, rights of victims and liability.

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

Due diligence alone is not enough to ensure respect of labour rights in third countries. EU trade agreements should include binding and enforceable labour clauses with the possibility to impose sanctions where violations are demonstrated. Violations of labour rights covered by an agreement must be open to

prosecution under its dispute procedure irrespective of whether they are directly related to commercial exchanges.

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:

In case of violations of human rights and social and environmental standards as well as of negative impacts of companies' operations, effective remedies should be available to victims, including trade unions and other interested third parties. Considering the challenges that victims often face in the access to justice in third countries where EU companies' operations take place, they should have access to justice in a MS where the company is established or where it conducts activities or have otherwise a link to. This possibility is already foreseen by the French Duty of Vigilance Law.

A specific liability framework, including – where appropriate depending on the legal system and the violation – criminal liability, must be introduced for cases where companies fail to respect their due diligence obligations to their fullest extent and human rights, social and environmental standards violations or adverse impacts of companies' operations occur, including in their supply and subcontracting chains. Measures to facilitate access to justice for victims should include appropriate support schemes. Interim proceedings should allow the halting of operations violating human rights, social and environmental standards.

Furthermore, public monitoring is necessary. MSs should ensure that one or more public authorities (including for example labour inspectorate or health and safety inspectorate) have the responsibility to monitor the respect of companies' obligations included in the framework. The authority shall have the necessary resources and expertise to carry out controls, also ex officio and checks based on risk assessments, information received from whistle-blowers and complaints. It should work in close cooperation with and ensure the active participation of social partners. ELA shall facilitate and enhance enforcement cooperation between the MSs. OECD contact points should play a role as well in case companies do not respect their obligations. In addition, in sectors of high human risk violation, industry-specific solutions could be developed in cooperation with trade unions.

The EU initiative should establish proportionate, effective and dissuasive sanctions for any violations by companies of their obligations. Sanctions should include exclusion from public procurement and public funding, as well as financial sanctions in proportion with companies' turnover and remediation. It should

incentivise companies to comply with the obligations and to prevent negative impacts of their activities. MSs should introduce positive incentives to promote sustainable economic operations, including in their supply and subcontracting chains.

Companies must be liable in case of/for any human rights and environmental abuses, including workers and trade union rights abuses in their operations or value chains, (without prejudice to other subcontracting and supply chain liability frameworks). In particular:

- Liability must be imposed for harms caused or contributed to by EU companies in their global value chains, as well as for failure to conduct adequate due diligence
- In any case, EU legislation shall not impact on other subcontracting and supply chain liability frameworks established at national, EU and international level (e.g. joint and several liability in subcontracting chains)
- Companies' duty of care and due diligence are two separate and complementary duties. Companies shall not be able to escape liability by arguing that they have respected due diligence obligations

Governments must set up robust enforcement mechanisms, with effective administrative sanctions, to ensure that companies obey the law. In particular:

- Competent authorities must have the mandate to investigate potential infringements and impose sufficiently dissuasive and proportional sanctions on them
- Competent authorities should also have competence to oversee the activities of private auditors providing services to companies in support of their due diligence practices. Private auditors should only be licensed if they comply with integrity standards (to be adopted in implementing guidelines) and should be held to account for negligent practices.

The court procedures must be fairer for victims. In particular the law must

- allow victims from 3rd countries to choose whether to use the law of the home or host state when bringing a case
- put an end to placing the burden of proof on victims. Instead, it must require companies to disclose any relevant evidence in their control, particularly regarding their connection to the harm and their due diligence process
- require companies to disclose the names, locations, and other information of their global subsidiaries, suppliers and business partners. Global supply chain transparency directly improves victims' ability to access remedy
- ensure that victims have enough time to bring claims for damages before EU courts
- ensure that trade unions and NGOs can bring collective actions on behalf of victims

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.

As mentioned above, there is extensive research showing that companies with worker representatives in the board have better performance along a range of sustainability dimensions (workforce skills and development, diversity, environment, etc.). Research by the European Trade Union Institute also shows that companies with European Works Councils also have better sustainability performance (Benchmarking Working Europe 2016). Finally, countries with higher scores on the ETUI's European Participation Index have performed better on all of the Europe 2020 headline indicators. Worker information, consultation and participation thus contribute to the achievement of sustainability goals and should be supported, as called for in the ETUC's demand for an EU framework Directive on information, consultation and participation. Mandatory involvement of worker representatives and trade unions in sustainability reporting should be specified in a revised Non-Financial Reporting Directive and in due diligence in a directive on mandatory human rights due diligence and responsible business conduct.

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

Workers are the key 'internal' stakeholders in a company and should be involved through trade unions, works councils, European works councils and board level representatives. Other stakeholders (community, advocacy organizations for affected populations, environment) also play an important role in identifying and monitoring key impacts of companies and should also have a voice vis-à-vis management, for example through specific stakeholder advisory bodies or a stakeholder general meeting

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

Other, please specify:

Employee participation (works councils, trade union, Board level employee representation, European Works Councils, SE works councils, etc) have proven to be effective mechanisms for promoting sustainable corporate governance and sustainability and should be promoted. It should be noted that advisory bodies and stakeholder general meetings are useful mechanisms for supporting stakeholder engagement. However, they do not substitute for the forms of employee participation just mentioned in the previous sentence, and thus should not be used to justify any reduction in the importance or strength of employee participation. Moreover, the Global Framework Agreements, if negotiated and signed by trade unions on international, European and/or national level, can be a relevant model for implementing due diligence obligations:









- for the reporting of information from the local level to the global level during the assessment of the application of the agreement and to enable risks to be identified;
- The dispute settlement mechanism may be a model for implementing the alert mechanism;
- the joint body monitoring GFA may be a model for monitoring process/vigilance plans.



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)

<p>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)</p>	
<p>Regulating the maximum percentage of share-based remuneration in the total remuneration of directors</p>	
<p>Regulating or limiting possible types of variable remuneration of directors (e.g. only shares but not share options)</p>	
<p>Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration</p>	
<p>Mandatory proportion of variable remuneration linked to non-financial performance criteria</p>	
<p>Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration</p>	
<p>Taking into account workforce remuneration and related policies when setting director remuneration</p>	
	

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).

- Requirement for companies to consider environmental, social and/or human rights expertise in the directors' nomination and selection process
- Requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise
- Requirement for companies to have at least one director with relevant environmental, social and/or human rights expertise
- Requirement for the board to regularly assess its level of expertise on environmental, social and/or human rights matters and take appropriate follow-up, including regular trainings
- Other option, please specify
- None of these are effective options

Please explain:

The degree of competence of company boards in environmental, social and human rights expertise needs to be improved. As mentioned above, research shows that companies with workers in the board perform better on all major sustainability dimensions (workforce development and health and safety, human rights, environment, etc.). The most effective measure to increase competence in social and human rights matters

is to expand worker participation, as worker representatives have a high level of competence in these matters. At a minimum, the competencies of boards on environmental matters should also be assessed, and where a deficit exists, the deficit should be addressed.

Question 23: Share buybacks

Corporate pay-outs to shareholders (in the form of both dividends and share buybacks) compared to the company's net income have increased from 20 to 60 % in the last 30 years in listed companies as an indicator of corporate short-termism. This arguably reduces the company's resources to make longer-term investments including into new technologies, resilience, sustainable business models and supply chains[19]. (A share buyback means that the company buys back its own shares, either directly from the open market or by offering shareholders the option to sell their shares to the company at a fixed price, as a result of which the number of outstanding shares is reduced, making each share worth a greater percentage of the company, thereby increasing both the price of the shares and the earnings per share.) EU law regulates the use of share-buybacks [Regulation 596/2014 on market abuse and Directive 77/91, second company law Directive].

In your view, should the EU take further action in this area?

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

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

The massive increase in the percentage of profits paid out to shareholders through share buybacks and dividends has increased company debt ratios (thereby increasing the probability of insolvency) and reduced the amount of financial resources available to companies for capital and R&D investments. Particularly disturbing is the continuance of payouts to shareholders when companies are receiving public subsidies and massively reducing the workforce. Measures should be implemented to limit dividend payouts and share buybacks if companies are getting public subsidies and if their credit rating is too low (e.g. a non-investment grade or "junk bond" rating).

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:

A number of measures have already been mentioned above. Worker participation rights should be expanded, non-financial reporting should provide relevant and meaningful information on company impacts, sustainability strategies and the achievement of sustainability targets, “loyalty shares” (i.e. lower taxes or higher dividends for long-term shareholders) should be encouraged, and a financial transactions tax should be implemented throughout the EU and ideally on the international level. Clear criteria for the social criterion mandated in the financial taxonomy should be clearly defined and enforced.

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 linked 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).

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