

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
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- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- German
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- Hungarian
- Irish
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- Latvian
- Lithuanian
- Maltese
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- Portuguese
- Romanian
- Slovak
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- Spanish
- Swedish

* Surname

Holly

* 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

Gabrielle

* Email (this won't be published)

gaho@humanrights.dk

* Organisation name

255 character(s) maximum

Danish Institute for Human Rights

* 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.

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* Country of origin

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

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Congo

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* 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:

A directors duty to have regard to the interests of a broad range of stakeholders would be welcomed. However, a directors duty alone is insufficient to ensure that a company identifies and addresses its human rights impacts, and facilitates access to effective remedy to rightsholders who are impacted by the activities of a company. A mandatory due diligence obligation on the company to identify and address human rights and environmental impacts with a focus on rightsholders is required which complements and aligns with any proposed obligation on directors. Businesses can have a significant impact on the interests of a broader range of stakeholders beyond those with a financial interest in the financial performance of a company, such as shareholders. Such stakeholders include workers and worker organisations, customers, suppliers, and local communities impacted by business activities, such as indigenous peoples. The responsibility of business to a broader set of stakeholders is gaining acceptance amongst the business community, including by the US Business Roundtable which released a statement in 2019 signed by 181 CEOs seeking to redefine the purpose of a corporation to align with a stakeholder model. Companies and their directors should have due regard for stakeholder interests', including on issues such as human rights violations, environmental pollution and climate change. Businesses can have a significant impact on:

- the enjoyment of human rights as acknowledged in the UN Guiding Principles on Business and Human Rights (UNGPs), the OECD Guidelines for Multinational Enterprises (OECD Guidelines), and numerous EU initiatives, including the due diligence disclosure requirements in the Non-Financial Reporting Directive (2014/95/EU), the EU Timber Regulation (995/2010), the EU Conflict Minerals Regulation (2017/821) and public procurement directives; and
- the environment and climate change as recognised in the UN Framework Principles on Human Rights and the Environment, by reports of the UN Special Rapporteur on human rights and the environment, and elements of EU climate action and the European Green Deal.

The core fiduciary duties owed by directors are a duty of care, requiring a director to act with diligence, and a duty of loyalty, including with respect to avoiding conflicts of interest between the interests of the company and the interests of a director. Legal regimes articulate these obligations differently and typically impose other specific obligations on company directors, all of which are generally owed to the shareholders of a company.

The model of "enlightened shareholder value" under which a company owes obligations to its shareholders with some consideration of other stakeholders found in section 172 of the UK Companies Act, shares some

similarities with the proposed corporate governance reforms being considered as part of the Sustainable Corporate Governance Initiative. The impact of s172 is therefore instructive when considering whether and how reforms to directors duties should be developed at the EU level. Section 172 requires a director to act in a way “most likely to promote the success of the company for the benefit of its members as a whole” taking into account, inter alia, the “impact of the company’s operations on the community and the environment”, the “interests of the company’s employees”, “the need to foster relationships with suppliers, customers and others” and “the likely consequences of any decision in the long term”. Directors have an obligation to consider the interests of other stakeholders in discharging their obligation to act in a way that promotes the success of the company and benefits its members. However, there are significant challenges in enforcing this obligation. These include the lack of an objective standard in assessing whether a director has taken a decision in compliance with s172, which instead involves the application of a subjective test. Further, although there may be limited circumstances in which a company officer could be personally liable to an employee for damage flowing from a breach of a directors duty, in general there is no clear mechanism by which affected stakeholders can seek a remedy for a breach of the obligations in s172. Section 172 has been in force since 2006. However, there is little evidence that the requirement to take into account the interests of a broader range of stakeholders or long-term decision making has had a significant impact on the sustainability or human rights performance of UK companies. Rather, research has found serious deficiencies in respect for human rights by UK companies and serious ongoing violations. If a directors duty of the kind contemplated is to be effective, it should require directors to ensure that the company is undertaking human rights due diligence in line with a mandatory due diligence obligation on the company and be accompanied by an appropriate enforcement mechanism.

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:

An EU level framework for mandatory due diligence should be developed to identify, address and remediate adverse human rights and environmental impacts. The due diligence process should be a continuous process to identify risks and adverse impacts on human rights, including health and safety and environment

and prevent, mitigate and account for such risks and impacts in their operations and through their value chain. It is important to note that human rights abuses can and do occur within operations and value chains within the EU, as well as third countries. An EU level framework for mandatory due diligence should highlight that due diligence is applicable throughout the value chain, whether within the EU or in a third country, and that it covers services as well as goods.

An EU level framework for mandatory due diligence should build on relevant international standards on business and human rights and responsible business conduct, such as the UNGPs and the OECD Guidelines and OECD Due Diligence Guidance for Responsible Business Conduct (OECD Due Diligence Guidance). Such an approach would reinforce and support the commitments made by 15 EU member states to corporate human rights due diligence contained in their national action plans on business and human rights (NAPs) (see globalnaps.org, a resource on NAPs maintained by the DIHR).

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:

A well designed, EU legal framework which includes a mandatory human rights and environmental due diligence obligation on companies would be an important step towards ensuring that companies operating in the EU or providing goods and services to the EU single market are aware of their adverse human rights, social and environmental impacts and risks related to human rights other social issues and the environment and that they are in a better position to prevent and mitigate those risks and impacts, and remediate where necessary. It is clear from the DG JUST study on due diligence requirements through the supply chain that voluntary measures alone are insufficient to adequately regulate the human rights and environmental impacts of businesses. This is supported by the findings of a number of other studies including Corporate

Human Rights Benchmark, Alliance for Corporate Transparency as well as studies commissioned by the German and Dutch governments, the Danish Institute for Human Rights, and Trinity College Dublin, which showed a low uptake of human rights due diligence processes by companies when done on a voluntary basis. The UNGPs call for a smart mix of measures to regulate business impacts on human rights, which includes both voluntary and mandatory measures at the national and international level. At present, the mandatory component of the smart mix is under-developed. An EU level measure which imposes mandatory requirement on companies to undertake due diligence would be a significant contribution to the smart mix of measures. In recognition of the important role of the private sector in the realisation of the 2030 Agenda for Sustainable Development, such an initiative would contribute to sustainable development, including in non-EU countries. One of the most important contributions businesses can make towards the SDGs is to undertake human rights and environmental due diligence. A horizontal, cross-sectoral measure applicable to all companies would also have the benefit of facilitating a level playing field and signaling to non-EU businesses the standard of conduct expected of businesses operating in, headquartered in, and/or supplying to the EU. An EU level measure would increase legal certainty for companies who are currently operating in a fragmented regulatory landscape. A measure which includes an effective sanctions and remedy mechanism would also provide a valuable avenue for redress to those who have suffered harm as a result of corporate human rights abuses or environmental degradation, a significant challenge under the present legal landscape and would serve as a means to implement the recommendations from the UN OHCHR Accountability and Remedy Project: Improving accountability and access to remedy in cases of business involvement in human rights abuses.

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:

The potential drawbacks listed above are not all material, can all be managed in the context of a well-designed mandatory due diligence measure and should not keep the EU from moving forward with the

initiative.

- **Increased administrative costs and procedural burden:** There may be up-front costs and burden for businesses establishing due diligence measures. However, as the EC study on due diligence in the supply chain has found, the costs of carrying out supply chain due diligence are relatively low compared to the company's revenue. Not undertaking due diligence means a business is not addressing the risk of human rights abuses and environmental harm. In addition to costs and burdens for the victims, these risks may bring costs and burdens for businesses related to: i) reputational costs; ii) legal costs (including incurring liability for human rights harms); and iii) financial (eg, costs associated with delays in contract delivery, remediating harms, or divestment on grounds of ESG criteria). If addressed effectively, some of these may become opportunities. A business that takes effective steps to respect the human rights of workers may be viewed more favourably by customers and investors, which can more than offset any up-front costs.
- **Penalisation of smaller companies:** The responsibility to conduct due diligence is the same for all businesses, regardless of size. However, as the UNGPs note, what is expected of businesses to meet this obligation varies depending on their size. As a result, implementing due diligence in an SME context is most often much less resource intensive than the same endeavor in an MNE context. A due diligence duty, properly implemented with support from the state, should not be a disproportionate burden for SMEs. As noted in the response to Q16, the additional recurrent company-level costs, as percentages of company revenue, amount to less than 0.08% for SMEs.
- **Competitive disadvantage:** A horizontal, cross sectoral measure applicable to all businesses will facilitate a level playing field. Requiring third country companies who provide goods and services on the single market to comply with the same obligations as EU companies will mean that EU companies will not be at a competitive disadvantage. By imposing a mandatory due diligence requirement, companies trading with or supplying EU companies will be encouraged to undertake due diligence by their EU business partners, thereby driving change in non-EU companies as well.
- **Responsibility for damages:** While much depends on the design of the measure, liability is normally determined in accordance with the level of control or influence of the company over the relevant subsidiary or business partner. Undertaking adequate due diligence can operate as a defence enabling companies to prove they took all due care to avoid the harm in question or that the harm would have occurred even if all due care had been taken. See also the response to Q19.
- **Decreased attention to core corporate activities:** The OECD study "Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct" (June 2016), which analysed the compliance costs of due diligence mechanisms and the economic benefits for businesses of responsible business conduct, found positive outcomes from comprehensive due diligence, including: outperformance in stock price, increased returns, reduced volatility, improved investor satisfaction, increased ability to attract and retain talent, reduced turnover, recruitment and training costs, and improved reputation. The DIHR study, "Doing Well by Doing Right?" (Nov 2020) also found that there is a basis for a business case for respecting human rights.
- **Difficulty for buyers to find suitable suppliers:** As clearly underlined in the UNGPs and the OECD Due Diligence Guidance, due diligence should be progressively realised. The aim of including human rights and environmental due diligence requirements within procurement is not to exclude potential suppliers, but to effectively encourage suppliers to continuously increase respect for human rights. An EU Regulation should be expected to drive a market push in this direction, making human rights due diligence a relevant parameter.
- **Disengagement from risky markets:** Disengagement should be the last step. Before resorting to disengagement, a business can turn to other measures such as dialogue or stopping work and suspension of a contract or supplier in the risky market. Subsequent steps can include an investigation and, if human rights abuses are found, a requirement for a formal process to remedy human rights abuses and prevent reoccurrence, including through the development of an action plan. The EU can also mitigate the potential for disengagement by supporting partner countries through development cooperation to address systemic human rights and business issues and promote respect for human rights by third country businesses.

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 checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
other interests, please specify	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

the interests of society, please specify:

Companies impact on a broad range of stakeholders through their operations and business relationships, not only those who have an interest in the financial performance of the company. This includes the interests of workers, employees of their suppliers, customers, people and communities affected by the company's operations and supply chain (including vulnerable groups, human rights defenders and indigenous peoples), society as a whole, the environment and the longer-term effects of its decision making. The interests of other stakeholders, such as civil society groups and trade unions are also relevant. Company directors should be required to balance all of these interests, instead of focusing on the short-term financial interests of shareholders. Directors should be obliged to take into account sustainability risks, impacts and opportunities in company strategy, decision making and oversight. However, existing materiality assessments which assess risks to the company are insufficient to identify and address a company's human rights impacts. Any proposed measure should require directors to have regard to the interests of relevant stakeholders and prioritise the risk of negative impacts to rightsholders, rather than risks to the company.

other interests, please specify:

It is important to also consider the interests of worker organisations such as trade unions, customers /consumers and end-users as well as the interests of vulnerable groups, human rights defenders and indigenous peoples.

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:

Sustainability matters should be considered by directors at a strategic management level, however this should be built on a process of due diligence with due regard to stakeholder interests that is embedded at all levels of the company. Any directors duty should be distinct from but complementary to an obligation imposed on the company to conduct human rights and environmental due diligence. Please also refer to the response to Question 1 of this consultation.

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:

Directors should be subject to a legally-binding obligation to develop, disclose and implement action plans which identify and address adverse human rights and environmental impacts connected to the company's business model, operations and supply chain using a methodology aligned with the process of due diligence set out in the UNGPs. Human rights impacts should be identified and assessed having regard to the International Bill of Rights and the core ILO conventions, as well as other international human rights law instruments. Science-based targets are relevant to the environmental and climate related agendas, however on human rights there can still be measurable principles-based targets and metrics. Work on this in the context of the EU Sustainable Finance Disclosure Regulation (2019/2088) and Social taxonomy should be consulted as to maximise synergy between measures.

Directors' duties are one way in which company directors can be held accountable for the negative impacts of a company. However, the problems of short-termism and undue focus on maximisation of shareholder value targeted by the Sustainable Corporate Governance initiative cannot be addressed solely by imposing a requirement on directors to have regard to sustainability and the company's long-term interest. In addition to directors duties, any legal framework operationalising the Initiative must include a mandatory obligation on the company to undertake due diligence.

Please also refer to the response to Q1.

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:

Please refer to the response to Question 1 of this consultation.

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 legally binding obligation on directors to take these stakeholder interests into account and set up adequate procedures to ensure that potential adverse effects on such stakeholders are identified, prevented, addressed and remediated would be welcome. However, an obligation on the part of directors to manage risks to the company that may arise in relation to stakeholders and their interests could potentially conflict with an obligation on the company to undertake human rights due diligence, through which a company identifies and addresses risks to rightsholders rather than risks to the company. Any directors' duty should oblige directors to ensure that the company undertakes a process of meaningful human rights due diligence which assesses the impacts that the company has on relevant rightsholders and prioritises action to address those impacts in accordance with the principle of severity which, consistent with the approach set out in the UNGPs, requires companies to assess the scale, scope and irredeemable character of an impact.

How could these possible risks be mitigated? Please explain.

Any directors' duty with respect to stakeholder interests should be designed with careful regard to the requirements of the mandatory due diligence obligation in order to avoid any such conflict.

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:

Sustainability and respect for human rights should be a core part of a company's strategic orientation. Adequately addressing these issues may require changes to the company's business model, strategy and financial planning. Therefore, it is critical that the company's strategy and targets with respect to such risks, impacts and opportunities is considered as part of the overall corporate strategy, and is decided on, signed off and monitored by the governing body of the company.

Enforcement of directors' duty of care

Today, enforcement of directors' duty of care is largely limited to possible intervention by the board of directors, the supervisory board (where such a separate board exists) and the general meeting of

shareholders. This has arguably contributed to a narrow understanding of the duty of care according to which directors are required to act predominantly in the short-term financial interests of shareholders. In addition, currently, action to enforce directors' duties is rare in all Member States.

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

Please describe examples:

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:

Please refer to the response at Q1 which outlined the model of "enlightened shareholder value" set out in 172 of the UK Companies Act which requires directors to take into account stakeholder interests which remaining ultimately accountable to shareholders. One explanation for the lack of significant impact of that section since its enactment in 2006 is the lack of enforcement mechanism. If a new or augmented directors duty is to be considered as part of this measure, a mechanism which gives standing to affected stakeholders to enforce the requirements of such a duty by reference to an objective standard should be considered.

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.

Standing could be given to civil society groups or affected stakeholders to bring an enforcement action. Such an enforcement action could be modelled on a shareholder derivative action commonly available in company law (see for example UK Companies Act 2006, Part 11; Australian Corporations Act 2001 part 2F.1A; and equivalent common law mechanisms) pursuant to which a shareholder may apply to the court to intervene and take action on behalf of the company where they consider that a director has breached their duties, including where a director has made a decision which puts the company at risk of violating a law, which could include a violation of a prospective due diligence duty. The threshold for bringing a stakeholder derivative action modelled on the shareholder derivative action could include requirements that the relevant stakeholder is acting in good faith, that the action sought in the intervention is in the best interests of the company, and that it would be unlikely that the company could take the action sought itself without intervention.

Section III: Due diligence duty

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

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

The definition of “due diligence duty” in the Consultation is stated to refer to a legal requirement on companies to “establish and implement adequate processes with a view to prevent, mitigate and account for human rights, health and environmental impacts”. The DIHR is of the view that the definition should more closely align with the UNGPs, OECD MNE Guidelines and OECD Due Diligence Guidance and require companies to: “identify and assess actual and potential adverse impacts; cease, prevent and mitigate adverse impacts; track implementation and results; communicate how impacts are addressed; and provide for or cooperate in remediation”.

In particular, an obligation to provide for or cooperate in remediation is missing from the definition proposed by the consultation. Access to effective remedy is a critical part of accountability and realisation of the human rights of rightsholders impacted by the acts of a company. The role of the company in facilitating access to remedy should be recognised in the defined due diligence duty.

Further, the definition of “supply chain” is stated to be “understood within the broad definition of a company’s ‘business relationships’ and includes subsidiaries as well as suppliers and subcontractors”. The inclusion of subsidiaries within the definition of supply chain does not accord with a common understanding of the term and accordingly has the potential to create ambiguities – although a subsidiary may be in a supplier relationship with a parent company, this is not always the case. We are of the view that subsidiaries should

be treated separately in the definition of due diligence rather than included in the definition of “supply chain”. Consistent with the approach in the UNGPs, companies should be required to avoid causing or contributing to adverse human rights impacts through their own activities and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services through their business relationships, regardless of whether the company has contributed to such an impact. This should require a company to undertake due diligence in the company’s own operations, including its subsidiaries and related entities and in the company’s whole value chain, acknowledging that for some businesses the risk of the most severe impacts may be upstream rather than downstream in the value chain.

The Consultation states that the definition 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”. Consistent with the approach in the UNGPs, severity of the impact should be the main parameter on which companies should prioritise action in relation to human rights and environmental risks alongside the specific circumstances of the company, particularly their sector of activity, the size and complexity of the value chain, and the size of the undertaking. While a requirement that implementing actions that have regard to impacts that are foreseeable would in some cases capture impacts to which a company is directly linked, the concepts are not synonymous. To align with the UNGPs, companies should be required to undertake due diligence which assesses impacts to which a company is directly linked. This means that the due diligence duty is likely to be broader in scope than the scope of any civil liability for harms caused or contributed to by the company through the application of ordinary tort principles. This is consistent with the approach taken in the UNGPs, which maintain that the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement.

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

Please specify:

The DIHR has selected “none of the above” because of concerns that each of the models proposed could lead to a checkbox compliance approach. Any due diligence requirement must be designed with a view to achieving the ultimate objective of ensuring respect for human rights by business. Any mandatory due diligence requirement should conform to the requirements in existing frameworks including the UNGPs, the OECD Guidelines for Multinational Enterprises and the OECD Due Diligence Guidance. Aligned with those frameworks, the following minimum requirements should be featured as part of any proposed mandatory due diligence duty:

- Businesses should, at a minimum, respect the human rights expressed in the International Bill of Human Rights, incl. the Universal Declaration on Human Rights, the core UN human rights conventions, and the ILO core labour standards which relate to forced labour, child labour, freedom of association and collective bargaining, and discrimination (UNGP 18). Businesses should be expected to adhere to additional human rights standards relevant in their circumstances.
- The due diligence obligation should therefore include all internationally recognised human rights

(including civil and political rights, fundamental labour rights and human rights at work connected to occupational health and safety, decent wages and working hours; economic social and cultural rights as well as rights of specific groups, such as women and girls, indigenous peoples, people with disabilities etc.); environment and climate change impacts;

- Any due diligence duty should be horizontal, cross-sectoral and cross-thematic, consistent with the approach in the UNGPs, pursuant to which all companies, regardless of size or sector have a responsibility to respect human rights. An approach which applies only to particular sectors or issues is limiting, adding an additional administrative burden, particularly for businesses which operate across sectors which may have an adverse effect on meaningful engagement with the due diligence obligation. Such an approach also contributes to the risk of fragmentation.
- A broad due diligence obligation could be accompanied by thematic or sector specific guidance which clarify the obligations of companies operating in specific sectors. A similar approach has been taken by the OECD in preparing due diligence guidance for high-risk sectors or issues including extractives, apparel, agriculture, finance, sourcing of minerals from conflict-affected and high-risk areas and child labour which supplement and clarify the overarching responsibilities set out in the OECD Guidelines for Multinational Enterprises;
- Consistent with the approach set out in the UNGPs, the due diligence obligation should apply to all companies providing goods or services to the single market or otherwise being taken to be doing business within the EU. Provision for SMEs should be made in accordance with the approach proposed to consultation question 16;
- Human rights and a safe, clean, healthy and sustainable environment are interdependent, as highlighted in the UN Framework Principles on Human Rights and the Environment, as well as by various UN Human Rights treaty bodies and regional courts. Environmental harms such as air and water pollution, climate change, loss of biodiversity and deforestation are recognised as impacting on the enjoyment of human rights and should be included in the due diligence obligation;
- Risks to rights-holders should be central to all due diligence processes, whether in respect of human rights harms or environmental harms;
- Any due diligence measure should be accompanied by an appropriate enforcement mechanism which includes oversight and monitoring by an adequately resourced supervisory body with powers of investigation and enforcement supported by a civil liability mechanism (see further the response to consultation question 19)

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?

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.

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

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

According to the ILO, MSMEs – a large portion of which are informal enterprises – represent about 70% of total employment worldwide and even more in low and middle-income countries. SMEs can have a severe impact on the enjoyment of human rights. Depending on the nature of the business, SMEs may not have the same human rights impacts as larger companies, however they may still negatively impact on human rights of workers in the shape of low pay, poor working conditions, a lack of social security and disproportional adverse effects on women. It is therefore important that they be included within the scope of any proposed measure.

Capturing SMEs in the regulation would not impose an undue burden. The DG JUST study on due diligence requirements through the supply chain found that 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 0.08% for SMEs.

Requiring SMEs submitted to comply with the due diligence obligation could help them to live up to standards that will be expected by large business with which they have business relationship.

The UNGPs make it clear that the responsibility to respect human rights is shared by all businesses, regardless of size or sector. The means through which a business enterprise meets its responsibility to respect human rights will however be proportionate to its size and nature of its operations. A mandatory measure should build on and reinforce such an approach. A "phase in" approach could be considered which

allows an additional lead time for SMEs to comply with a due diligence requirement which could include lighter requirements in the first phase, as well as support in the form of capacity building, guidance and toolboxes or helpdesks.

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 UNGPs, which were endorsed unanimously by the United Nations Human Rights Council, are applicable to all companies, regardless of geography. Accordingly, companies both within and outside the EU already have a responsibility to respect human rights, in some cases supported by other initiatives such as through National Action Plans on Business and Human Rights. The obligation to undertake due diligence should apply to third country companies in respect of business done in whole or in part in the EU including through the provision of goods and services to the single market. An example can be found in respect of the EU Timber Regulation which creates jurisdictional nexus by virtue of 'placing on the market' meaning the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge. Finally, post implementation of mandatory human rights and environmental due diligence in the EU, it might be relevant to draw inspiration from the International Platform on Sustainable Finance, that provides an international platform to promote EU's sustainable finance efforts including the Taxonomy. A similar platform could be an option to support international uptake and harmonisation around mandating corporate due diligence on human rights and the environment.

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

Companies should be obliged to establish and maintain a due diligence process for preventing, mitigating and accounting human rights impacts consistent with the UNGPs. A similar obligation can be found in the EU Timber Regulation, which contains an overarching prohibition on placing illegally harvested timber or timber products derived from such timber on the market. Operators are required to exercise due diligence when placing timber or timber products on the market. This requires them to use a "due diligence system" which is to be maintained and regularly evaluated. Companies may base their due diligence system on existing supervision systems under national legislation and any voluntary chain of custody mechanism which fulfil the requirements of the Regulation. The placing of products, services or the undertaking of activities which do not respect the due diligence requirement can be enforced through Trade Defence Instruments, which contain reference to environmental and social standards.

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 EU should examine whether trade agreements, measures relating to EU market access and other international cooperation agreements and initiatives may be used to further promote respect for human rights in the context of business and facilitate a level playing field.

EU development policy can be leveraged to promote respect for human rights by business in third countries, including by funding NGOs through the grant modality to monitor and engage with business; by requiring businesses in receipt of private sector support to respect human rights; and by leveraging the business and human rights agenda through the provision of budget support to third country states.

In line with the EU's 2015 Trade for All and 2017 Aid for Trade strategies, trade instruments can be an effective tool to promote respect for human rights by business and implementation of UN human rights conventions as well as the ILO Core Conventions. The Commission and the ILO have a longstanding partnership on supporting EU trading partner countries jointly to improve the application of the ILO Fundamental Conventions, including through the Trade for Decent Work Project.

Through GSP+, countries who have ratified and effectively implemented 27 international conventions on human rights, labour rights, environmental preservation and good governance can gain preferential EU market access. When coupled with continuous engagement with the local authorities through dialogue, projects and EU Delegation contacts, GSP+ is another tool that should be leveraged to promote responsible business conduct aligned with sustainable development and generate a level playing field.

The EU has included commitments to promote responsible business conduct into all its recently-concluded free trade agreements. The sustainable development chapters and specific responsible business conduct commitments provide a basis for engagement on respect for human rights by third country businesses. From 2009, New Generation Agreements signed by the EU include dedicated chapters on Trade and Sustainable Development. In these chapters, the EU and its partner countries commit to respecting a number of international conventions for labour standards and environmental preservation. The EU should monitor and facilitate compliance with binding and enforceable obligations and take steps when commitments are not met, including sanctions. The EU should adequately fund the studies to inform these trade agreements and to follow up on the obligations and enforcement measures contained within the agreements.

The EU should further support actions in connection with other EU Regulations linked to EU market access which touch on human rights, including the EU's Conflict Minerals Regulation.

In addition, the EU can take steps to ensure that public procurement mechanisms include procurement criteria requiring companies to respect human rights and the environment, and favour suppliers that have human rights and due diligence processes.

The EU should also secure a mandate to engage with the process for adopting a binding treaty to regulate the activities of transnational corporations and other business enterprises in relation to human rights.

Finally, the EU's sustainable finance policies might also help to drive a market push for respect for human rights by companies including outside of the EU. However, if this is to happen, it is key that the inclusion of human rights aspects in the Sustainable Finance Disclosure Regulation (2019/2088) as well as in the continuous work on the taxonomy, including in the context of a social taxonomy, ensures maximum alignment with the UNGPs and thereby avoids administrative burdens and patchwork regulation issues.

Each of these levers contributes to the smart mix of measures envisaged by the UNGPs to ensure respect for human rights by business. Any requirements regarding sustainable governance should be linked to the

EU's trade strategy, including measures which regulate access to the single market, so that the two modalities can mutually reinforce requirements for responsible business conduct.

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:

As the DG JUST study on due diligence requirements through the supply chain and other studies referenced above have shown, voluntary measures are insufficient to ensure respect for human rights in global value chains. In order for a mandatory due diligence measure to be effective it must be accompanied by enforcement mechanisms. This should take the form of regulatory oversight by national competent authorities who are empowered and adequately resourced to respond to complaints, and direct mechanisms for stakeholders to seek remedy for adverse impacts including judicial enforcement with liability and compensation for harms caused by a failure to undertake due diligence.

Access to remedy for affected rightsholders remains a significant challenge. While litigation should be a mechanism of last resort, providing a pathway to civil liability through judicial mechanisms is a critical component to the discharge of this obligation, adding force to other softer mechanisms which may be used to encourage companies to engage in meaningful due diligence.

The potential for businesses to be legally liable for human rights or environmental harms through civil claims is not new. Developing jurisprudence in the UK, Canada, US and various European jurisdictions creates a tangible legal risk that a company may be liable for harms caused by a failure to undertake adequate due diligence or prevent a human rights harm. As well as providing a much-needed avenue to remedy for affected rightsholders, setting clear parameters in a mandatory measure for when a company may be liable for harms caused by a failure to conduct due diligence could provide welcome clarification for businesses currently at risk of liability exposure. While some jurisdictions, primarily those which are founded on UK common law, have developed a body of case law which allows for the possibility of civil liability for business related human rights harms, this is not the case across all EU jurisdictions, nor farther afield. A mandatory measure which clarifies avenues to civil liability can further facilitate a level playing field by creating a set of common conditions for liability to attach.

Under the UNGPs, the responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement. Accordingly, the scope of potential liability for harm may not necessarily be

coextensive with the scope of the due diligence obligation. Where a due diligence obligation is cast in broad terms aligning with the terms of the UNGPs, covering all companies, sectors and penetrating the entirety of the value chain, there is the potential for the due diligence obligation to be far more extensive than the scope of the liability mechanism.

According to the UNGPs, in practical terms, “conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them”. Although the process of due diligence can be a means of mitigating legal risk, conducting human rights due diligence should not be an automatic defence to liability. Rather, the adequacy, the appropriateness of the due diligence conducted by companies should be considered. Regimes which have incorporated a form of due diligence defence such as the UK Bribery Act have included such a reasonableness requirement. Other considerations, such as the kind of harm and the company’s involvement, the availability of other avenues to remedy and overarching policy objectives of the regulation are also relevant. As the UNGPs note, “business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.” It is critical that any mandatory measure encourage meaningful engagement with the process of due diligence in order to mitigate risk of involvement in adverse human rights impacts and thereby legal risk.

The availability of a due diligence defence could provide a powerful incentive for companies to implement adequate due diligence measures and have a positive preventative effect. However, the standard by which such diligence efforts are assessed must be meaningful engagement and a genuine attempt to identify, mitigate, and address human rights risks in the spirit of the UNGPs, rather than a superficial box-ticking exercise. Under the UNGPs the responsibility to undertake human rights due diligence is applicable to all companies. Any liability measure should reinforce this expectation by encouraging all companies, not only those at the top of the value chain, to undertake meaningful due diligence. However, judicial remedy alone is not sufficient. Compliance with any mandatory due diligence obligation should be monitored by an adequately resourced supervisory body with powers of investigation and enforcement.

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:

Claimants seeking accountability and remedy in the form of a claim described in the question face a range of procedural and substantive hurdles, such as those outlined in the recent report from the Fundamental Rights Agency “Business and Human Rights – Access to Remedy” (October 2020). These range from: challenges evidencing a claim, including limited mechanisms for prospective claimants to seek disclosure from a potential defendant in order to properly evidence their claim and gathering evidence in third countries; jurisdictional challenges which require prospective claimants to establish a sufficient nexus to an EU jurisdiction in order to have access to a court; conflict of laws challenges including the application of restrictive forum non conveniens rules and rules determining the applicable law; challenges concerning the limitation of actions where a claim could potentially be live in a European court but the law of the third country prescribes a restrictive limitation period – see for example *Jabir v Kik*; costs challenges which result

in a claimant being effectively barred from bringing a claim due to the prohibitive expense of litigation and “loser pays” costs rules; and challenges concerning the availability of class action claims.

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

- Clarifying and expanding the basis for establishing jurisdiction of an EU court and the application of a less restrictive forum non conveniens rule of the kind used in Australia which provides that a claim should be heard unless the jurisdiction is a “clearly inappropriate forum”: see *Voth v Manildra Four Mills*.
- Implementing a mechanism for pre-action disclosure which allows claimants to access documents and information required in order to bring a claim.
- Establishing mechanisms by which claimants can overcome costs challenges, including allowing firms to take on claims on a contingency basis and potentially providing costs support for public interest claimants.
- Implementation of an EU wide class action regime with an opt out mechanism which would facilitate collective redress for business and human rights claims.

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.

Meaningful stakeholder consultation is a critical component of human rights due diligence as set out in the UNGPs. Stakeholder engagement enables businesses to understand perspectives of those who may be affected by their decisions and operations and is essential if a company is to adequately identify and address its human rights impacts with a focus on risks to rightsholders, rather than risks to the company. Effective

identification of and engagement with rightsholders better prepares businesses to avoid conflicts with workers, local communities and other groups, and provide effective remedy for harms, when required. Businesses should embed stakeholder consultation across all levels of the business and use different modes of engagement to help prevent harm, mitigate risks of negative impacts on those people, communities and the environment, and devise adequate systems for compensating for loss or damage. Relatedly, existing stakeholder engagement practices, e.g. related to materiality assessments, might not be fully aligned with the stakeholder requirement of the UNGPs. A measure should make explicit that stakeholder engagement should not just be about identifying stakeholder interests, but also about identifying potential and actual human rights risks and developing relevant mitigating actions.

In order to facilitate effective consultation, companies should be prepared to be forthcoming and disclose relevant information to potentially affected stakeholders. This should include its plans, details on how it is managing potential and actual negative impacts and reporting on the outcomes of its efforts.

All mechanisms for stakeholder engagement must seek to address the power imbalance between the company and the affected persons or groups. Engagement processes should aim to understand how existing vulnerabilities may create disproportionate impacts for certain groups including indigenous peoples and communities, forest communities, coastal communities, migrant workers and women. Special attention should also be paid to implementing a gender-based approach when appropriate.

Where indigenous peoples and communities may be affected, businesses must be required to adhere to international standards on principles of free, prior and informed consent (FPIC). Consultations should be undertaken in good faith in accordance with appropriate procedures, in particular, through indigenous peoples' representative institutions. Indigenous peoples should be free to participate at all levels of decision making and FPIC should be obtained before adopting any measures which may affect them.

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

All persons or groups that are, or could potentially be, directly or indirectly affected by the business' project or operations should be represented. This includes a range of persons and other actors who are credible proxies, such as: workers; trade unions; NGOs; community members; indigenous peoples and communities; forest communities; human rights, land and environmental defenders; women and women's organisations; community leaders; faith-based organisations; and local authorities. Relevant experts on human rights, environment, climate or other subject matter areas should form part of the stakeholder engagement process.

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





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).

- 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:

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?

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

If so, please specify:

Section V: Impacts of possible measures

Question 25: Impact of the spelling out of the content of directors' duty of care and of the due diligence duty on the company

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

Table

	Non-binding guidance. Rating 0-10	Introduction of these duties in binding law, cost and benefits linked to setting up /improving external impacts' identification and mitigation processes Rating 0 (lowest impact)-10 (highest impact) and quantitative data	Introduction of these duties in binding law, annual cost linked to the fulfilment of possible requirements aligned with science based targets (such as for example climate neutrality by 2050, net zero biodiversity loss, etc.) and possible reorganisation of supply chains Rating 0 (lowest impact)-10 (highest impact) and quantitative data
Administrative costs including costs related to new staff required to deal with new obligations			
Litigation costs			
Other costs including potential indirect costs linked to higher prices in the supply chain, costs 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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