

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

MÄHÖNEN

* 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

Jukka

* Email (this won't be published)

jukka.mahonen@jus.uio.no

* Organisation name

255 character(s) maximum

Research Group Companies, Markets and Sustainability at the University of Oslo

* 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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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:

Although we wouldn't formulate it as 'maximisation' of performance, a more holistic approach is indeed needed. We do not see this as something that should be done alongside or instead of financial interests of shareholders, but rather as a core element of promoting the interests of the company by mitigating the corporate and financial risks of unsustainability and through that also contribute to a sustainable future. Nor do we see a holistic approach as a balancing act or bargaining between the private interests of various 'stakeholders', but rather as creating a good regulatory framework for sustainable value creation within planetary boundaries. Further, we see the holistic approach as not limited to companies but including all undertakings, as a minimum those without personal liability of its members.

Sustainable value creation is an emerging concept in corporate law and corporate governance, increasingly included in European corporate governance codes. For such a concept to be a meaningful contribution towards a sustainable future, it should draw on sustainability science and reflect the multifaceted and interconnected environmental, social, cultural, economic and governance aspects of a sustainable development. Translated into the governance of business, this encompasses issues such as fair treatment of employees as well as of workers and local communities across global value chains, with respect for international human rights and core ILO conventions as a minimum, ensuring a 'living wage' and safe working conditions. This further entails supporting democratic political processes and as a minimum not undermining these through engaging in corporate capture of regulatory processes. It also entails contributing to the economic basis of the societies in which the business interacts by not engaging in so-called aggressive tax planning and outright evasion.

Positioning sustainable value creation within planetary boundaries (or the ecological limits of our planet, as they are referred to in the EU 7th Environmental Action Programme) brings to the forefront, firstly, that there are ecological limits (conversely, that being perceived as 'environmentally friendly' while not respecting those limits is inadequate). Secondly, it highlights the complex interactions between planet-level environmental processes, recognizing for example that climate change, however topical (and difficult to mitigate), is only one aspect of the convergence of crises we are heading towards. Thirdly, it continuously reminds us that state-of-the-art natural science must inform our decisions on a work-in-progress-basis, which also means drawing on the precautionary principle.

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:

Mandatory sustainability due diligence on EU level is required to give the European businesses the level playing field and legal certainty that they require. Individual initiatives by Member States can be inspiring examples and also stimulate a coherent EU action, and initiatives such as the French vigilance law are for that reason laudable. However, national initiatives also bring with them challenges including questions of scope and of legal certainty for businesses with cross-border operations and activities, and may lead to a regulatory competition between the Member States, to the detriment of their businesses.

Today business is met with a plethora of various requirements through a fragmented picture of some sector-based EU requirements, some requirements (usually thematic) in national legislation in the various countries they operate or are registered, and through influential international guidance such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises. Business, which frequently operates across national borders, often using a group, network or chain of undertakings in several countries, has a difficult task in figuring out the various requirements and expectations. Sustainability-oriented businesses have to compete with business that does not take the various requirements seriously, creating a highlight uneven playing field.

To ensure the contribution of business to a sustainable future, action on EU level is necessary.

Mandatory sustainability due diligence is also crucial for business itself, to mitigate the business and financial risks of unsustainability. The recommendations of the Financial Stability Board's Task Force on Climate-Related Financial Disclosure have done much to contribute to awareness of potential financial impacts of climate-related risks and opportunities, although this is not followed up by business in a sufficient manner. Further, a broader approach is called for. Climate change, albeit a crucial issue, is just one of the identified planetary boundaries. Biodiversity loss, natural resource use and the release of novel entities are examples of other environmental categories that should be included in assessments of financial and

business risks. Risks concerning social aspects should be encompassed, including human rights violations, lack of decent work, corruption and tax evasion. All of these bring with them financial and business risks.

An illustration of the risks of unsustainability is liability risks: the increase in lawsuits by states, individuals, non-governmental organisations and other businesses against corporations, including parent corporations, for environmental or social harm allegedly caused by their subsidiaries, and against lead corporations for negative environmental or social impacts in their global value chains, shows that the liability risk of unsustainability is materialising. While many cases are rejected for procedural reasons, often based on underdeveloped international private law rules, and many lost, some are likely to be won, and the sheer multitude of cases makes them a risk to be reckoned with. Mandatory sustainability due diligence will provide a tool for business to mitigate that risk.

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:

Mitigating the risks of unsustainability, including the extreme legal uncertainty about potential lawsuits for harms across the global value chains is a crucial benefit of mandatory sustainability due diligence. The international trend of lawsuits against companies and states for environmental and human rights harms are indications of the growing lack of acceptance of status quo. The response from business, inter alia to the study on diligence undertaken for the European Commission (L. Smit et al., 2020), shows that business increasingly is positive about legislative reforms that can give business a level playing field in the transition to sustainability.

Mandatory sustainability due diligence for small and medium-sized enterprises (SMEs) would provide this legal certainty also for them. Conversely, excluding undertakings under a certain threshold would mean taking opportunities away from SMEs, which constitute a significant part especially of the European economy, of which they constitute 99 per cent. We elaborate on this under the relevant question concerning SMEs (see our response to Question 16).

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:

Although some of the mentioned potential risks are relevant, such as the possible competitive disadvantage in competition with third country companies, these can easily be mitigated by well thought through legislation. The risks by not doing anything are much larger than these possible disadvantages. As often leading businesses in their sector, European undertakings can also set an example for their competitors as well act as a power of change in the local economies they operate. This is much easier to do if there is a clear European regulatory framework mandating a sustainability due diligence across European-led global value chains.

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

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

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

	Relevant	Not relevant	I do not know/I do not take position
the interests of shareholders	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees in the company's supply chain	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of customers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of persons and communities affected by the operations of the company	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of persons and communities affected by the company's supply chain	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of local and global natural environment, including climate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
the likely consequences of any decision in the long term (beyond 3-5 years)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of society, please specify	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
other interests, please specify	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

other interests, please specify:

In our opinion, the question is not appropriately formulated. Of course, the interests of society in achieving a sustainable future are also the interests of business (in recognition of the fundamental financial and business risks of unsustainability) and a number of the mentioned interests could be ticked as relevant interests to the success and resilience of business in general. However, which interests are relevant for the individual company (or more broadly: the undertaking) in a specific context will depend on the company and the context, and for that reason prioritisations cannot be made ex ante, and if they are made, they may very well have a detrimental effect. Which interests are relevant in any specific context is something the board must ascertain, not based on some kind of balancing model, but based on a thorough analysis of the sector and market the company is involved in. Mandatory sustainability due diligence is key to acquiring the information the board needs to ascertain this.

What we should aim for is a holistic approach that does not attempt to balance the private interests of specific 'stakeholders' or 'interests', but that promotes sustainable value creation within planetary boundaries. Naming specific stakeholder groups misses the point and may lead to these being prioritized to the detriment of more vulnerable and less influential groups as well as to the environment.

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 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 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 type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please explain:

This question is also not appropriately formulated. Asking or mandating that the companies name specific stakeholder groups misses the point and may lead to these being prioritized to the detriment of more vulnerable and less influential groups as well as to the environment.

What we should aim for is a holistic approach that does not attempt to balance the private interests of specific 'stakeholders' and 'interests', but that promotes sustainable value creation within planetary boundaries. The later could be expressed in general terms, and then the definition of how to do this for the individual company must be decided by the board. Mandatory sustainability due diligence is key to acquiring the information the board needs to ascertain this and through specifying the environmental, social and governance aspects to be included, can also make clear to the board which aspects that must be investigated.

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:

On the terminology: we do not think 'stakeholders' is the appropriate term here, and we prefer the expression 'research based' rather than science-based, as sustainability research draws on more than natural science.

That being said, a systematic analysis of the risks of unsustainability should indeed be the core of the due diligence duties. On practical level this includes also analysis using applicable regulatory frameworks on human rights, workers' rights, as well as health and environmental regulations. However, legal compliance is not enough. The standards for due diligence should be set higher, encompassing the global impacts of the business activities and promoting sustainable value creation within planetary boundaries. In the Green Deal communication, the Commission writes appropriately: 'As the world's largest single market, the EU can set standards that apply across global value chains'. Mandatory sustainability due diligence is crucial to achieve this, striking an appropriate balance between being principles-based enough to allow for individual assessments across various types of undertakings and sectors and across time, while being firm and specific enough on the environmental, social and governance issues that must be encompassed in the due diligence.

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:

This question also is based on misleading dichotomies. It is not a question of private interests of shareholders vs (other) stakeholders nor of short-termism vs long-termism. The key duty of the board is to promote the interests of the company, and that requires consideration of impact of business activities on the environment and humanity. Some of these impacts are short-term and some are long-term, as are the actions of the business to mitigate the negative impacts of its activities and to enhance the positive.

A misconception has developed, that the duty of the board is to maximise returns to shareholders, through a complex mix of perceived market signals and economic incentives, informed by path-dependent corporate governance assumptions and postulates from legal-economic theories. This is what in literature is referred to as the shareholder primacy drive (or as 'radical' shareholder primacy) and should be distinguished from the legal norm of shareholder value (also denoted 'traditional' shareholder primacy). Shareholder value is the legal norm notably in the UK, where it is expressed in the 'enlightened shareholder value' variant (section

172 of the Companies Act), expressly stating other interests that the board should have regard when promoting the interests of the company, which there is specified to be for the benefits of its shareholders as a whole.

The definition of the interests of the company, as a matter of company law, varies across European countries, from the monistic, concentrating on the economic interest, with more or less emphasis on the shareholders, to the pluralistic, including a variety of other involved or affected parties. There is also variation between different legal forms widely used in Europe, such as cooperatives. Company legislation rarely expressly stipulates what is included in the interests of the company (or the undertaking). The interpretation is thereby left to the boards, and in light, inter alia, of the business judgment rule (which exists in some form or other in all jurisdictions, albeit not necessarily employing that terminology), the question of whether the board has interpreted their duty correctly rarely comes to a head in case law.

No company law system insists on boards focusing only on returns for shareholders to the exclusion of all other interests and impacts, and certainly not generally requiring shareholder returns be maximised. In addition to the obvious point that jurisdictions expect boards to ensure legal compliance, company law provides – across this spectrum – a large latitude to the board and by extension the management to shape business in a sustainable manner. However, as is also evident from the state of unsustainability we are in, boards in aggregate do not predominantly choose sustainability-enhancing options even within the realm of the business case, let alone challenge the outer boundaries of the scope to pursue profit in a sustainable manner by going beyond the business case.

A full harmonisation of the definition of the interests of the company in EU company law is not called for (nor is it likely to be politically acceptable, considering the variety of approaches across EU jurisdictions). What should be clarified, to set the record straight, is that the duty of the board is indeed to promote the interests of the company (or more broadly the undertaking), and further that this should be done in a way that creates sustainable value within planetary boundaries. Developing the understanding of what the interests of the specific company within this framework entails in a specific instance lies with the board to define, within the scope of legislation, articles of association, and existing contracts and commitments.

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?

Introducing a requirement to balance the interests of all 'stakeholders', risks firstly promoting a power struggle between strong or vocal groups of 'stakeholders', which may be to the detriment of vulnerable groups affected by the business of the company and of the environment. Secondly, it may undermine the independent role of the board, to the detriment also to the company, and thirdly, it may make it very difficult to assess whether the board is fulfilling its duties (leading back to the first problem of the power struggle between various groups of 'stakeholders'). Rather, it should be clarified that the board should have both a duty and a right to take a holistic approach to promoting the interests of the company (or more broadly the undertaking) in a way that creates sustainable value within planetary boundaries.

How could these possible risks be mitigated? Please explain.

The risks identified above could be mitigated by not introducing a 'balancing of stakeholders' duty, but rather clarifying that the duty of the board is to promote the interest of the company and that that should be done in a way that creates sustainable value within planetary boundaries. A well-defined mandatory sustainability

due diligence regime will be a key tool for the board to identify and mitigate the risks of unsustainability that the specific business is involved in, and provide also a basis for a clear assessment of whether the board is undertaking its duty.

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

There is a growing demand from shareholders to the businesses they invest in to raise the level of ambition and action in terms of mitigating climate change and otherwise contributing to a sustainable future. Especially large institutional investors are seeking to incorporate, with the support of recent EU regulation, environmental, social and governance metrics into their capital allocation and 'stewardship' decisions. Albeit this is still more talk than action and hampered by the lack of reliable and relevant information from businesses, there is a shift towards sustainable finance. There is also greater recognition that undertakings that commit to addressing the financial risks of unsustainability stand to realise greater business opportunities in the future also for the benefit for their shareholders. Mandatory sustainability due diligence is key here to achieving the relevance and reliability of information from businesses, which currently is the missing link for sustainable finance, and to give sustainability-oriented investors and investees the level playing that they are asking for.

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:

Yes, this is crucial to mitigate business and financial risks of unsustainability and ensure the contribution of business to a sustainable future. To promote the interests of the company in a way that creates sustainable value within planetary boundaries, sustainability must be integrated into the strategies of the company, under the leadership of the board, which also must assess the business model of the company including its global value chains and make necessary adjustments. Mandatory sustainability due diligence is a key tool and it must be clearly prescribed as a duty for the board to follow up on.

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:

Though we see the dichotomy shareholders vs stakeholders as false (see our response to Question 8), we see the importance of involvement of the affected parties in the business decision-making processes as appropriate, notably through the mandatory sustainability due diligence. Proper and transparent integration of their interests will enable them to monitor how the board exercises its duty of care and ensure compliance. Affected parties should also be given access to remedies should the board not fulfil its duties.

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

We consider involvement of all affected parties, also across global value chains of European undertakings, in the enforcement of board duties as valuable. The affected parties should have the possibility of bringing complaints in before courts and supervisory authorities on violations of the board duties, without obstacles created by procedural or substantive law.

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.

Firstly, the due diligence duty should be defined as sustainability due diligence, encompassing all environmental, social and governance aspects of sustainable value creation within planetary boundaries. These should be defined drawing on international and EU law, on sustainability research, and on the international accepted due diligence guidance, notably in the UNGPs and the OECD Guidelines for Multinational Enterprises (the latter embellished on in the OECD Due Diligence Guidance for Responsible Business).

Secondly, we see the due diligence duty as more holistic, not covering only the business supply chain but also its finance and demand chains, so the whole value chain in a life-cycle based approach. As important as suppliers of commodities are the suppliers of finance, including the shareholders, as well as the impact of the business activities on buyers and those who the buyers’ activities affect. The Commission Circular Economy Action Plan, as one of the main blocks of the European Green Deal, emphasizes the need to make sustainable products as the norm in the EU, by securing the sustainability of the entire life cycle of commodities, starting from design to manufacturing and including consumption and re-consumption. As an important part of circular economy can be mentioned right to repair initiatives, targeted against leading undertakings in consumer commodities sectors trying to prevent right to repair and reuse their products.

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:

We chose 1) as we see it is as important that sustainability due diligence is framed in EU company law within a principles-based approach of sustainable value creation within planetary boundaries, and with specific determination of the full range of sustainability aspects – environmental, social and governance – as pointed out above (our response to question 14). This should be complemented by guidance, which we suggest should be mandatory guidance, revised regularly, through an open participatory process, integrating expertise and affected communities.

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?

N/A

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

The mandatory sustainability due diligence and the guidance as outlined above would be specific enough to provide legal certainty for the company (the undertaking) as to how the due diligence is to be carried out and the EU rules should also set out how the results of the due diligence is to be followed up. This should as a minimum set out that identified lack of legal compliance should be rectified immediately and for other identified sustainability impacts and risks, an ambitious continuous improvement process should be drawn up under the leadership of the board, including qualitative and quantitative Key Performance Indicators where appropriate. It should also provide for external verification that the due diligence process is undertaken as outlined, and annual reporting on this should be audited. Together this would provide a good basis for legal certainty for the board that it is following this up as it should and a level playing field in the sense that it would know that other companies (undertakings) would be subject to the same rules.

Further, such a process would provide legal certainty for the company (undertaking) as concerns its sustainability impacts, mitigating effectively the risks of unsustainability. As Smit and Bright point out in their paper 'The concept of a "safe harbour" and mandatory human rights due diligence' (2020), it is important that due diligence does not act as a safe harbour, i.e. that affected parties cannot file a lawsuit against the company or its board, nor must it devolve into a box-ticking exercise. However, compliance with a thoughtfully formulated mandatory sustainability due diligence regime as suggested here, would serve as a defence for the company (undertaking) and its board. This will increase the legal certainty for European business, while providing better access to justice for affected workers and communities.

It would also provide the level playing field sustainability-oriented businesses are asking for, giving them the competitive advantage and promoting the development of sustainable business models with all its positive impacts for European society and economy, with knock-on effects for third countries.

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?

N/A

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

N/A

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

N/A

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

N/A

Question 16: How could companies' - in particular smaller ones' - burden be reduced with respect to due diligence? Please indicate the most effective options (tick the box, multiple choice possible)

This question is being asked in addition to question 48 of the Consultation on the Renewed Sustainable Finance Strategy, the answers to which the Commission is currently analysing.

- All SMEs[16] should be excluded
- SMEs should be excluded with some exceptions (e.g. most risky sectors or other)
- Micro and small sized enterprises (less than 50 people employed) should be excluded
- Micro-enterprises (less than 10 people employed) should be excluded
- SMEs should be subject to lighter requirements ("principles-based" or "minimum process and definitions" approaches as indicated in Question 15)
- SMEs should have lighter reporting requirements
- Capacity building support, including funding
- Detailed non-binding guidelines catering for the needs of SMEs in particular
- Toolbox/dedicated national helpdesk for companies to translate due diligence criteria into business practices
- Other option, please specify
- None of these options should be pursued

Please explain your choice, if necessary

Excluding SMEs would be detrimental for three reasons. Conversely, SMEs can easily and to their advantage be included.

Large businesses are often organised across a network of small, medium-sized and large legal entities, whether through corporate groups or various types of other networks and platforms, or contractually including through value chains. We should avoid further a fragmentation of responsibility across such business enterprises. For a parent company or lead company its business enterprise as a whole will be encompassed through mandatory due diligence. The role of smaller legal entities in a corporate group, for example, will then be to contribute to the sustainability due diligence of the parent company. The same applies to members in a value network, as subcontractors, providing information to the controlling entity in the network. This is comparable to what controlled entities do in the context of consolidated management reports, but it is wider, and not so vulnerable to decoupling activities to escape liabilities. With its regulatory weaknesses, the approach of consolidation is not sufficient to capture all types of control across business enterprises, and we do therefore not wish to promote such formal distinctions either. Rather, by making the duties applicable to all business entities, we expect those that are working together, whatever the formal connection, will contribute to facilitating the sustainability due diligence, and give a basis for meaningful sustainability reporting. This would also bring a more level playing field between European lead companies

and non-European lead companies that do business in the EEA area through their subsidiaries and contractual parties. Excluding SMEs would also exclude regulation of non-European SMEs in the EEA.

Mandatory sustainability due diligence also for SMEs would provide legal certainty also for them as well as their contractual parties. Conversely, excluding undertakings under a certain threshold would mean taking opportunities away from SMEs, which constitute a significant part especially of the European economy, of which they constitute 99 per cent. Due to their vast number, a majority of importers and exporters in the EU are SMEs. Achieving a 'Just Transition' in Europe entails channelling the potential of entrepreneurship across Member States. SMEs must then be included with sufficient resources dedicated to facilitating the transition of all of European business to sustainability. That is how European businesses, including the smallest of them, can thrive in the market and promote sustainable production and consumption, both private and public.

Excluding SMEs would disincentivise SME-driven innovations for sustainability. In its Reflection Paper on harnessing globalization, the European Commission emphasised the quality of goods and services as the competitive edge of exporting European SMEs that count over 80 per cent of European exporting firms in numbers. The societal importance of SMEs for Europe is crucial too: they employ the most of European workers and contribute to local economies through their supply chains and tax payments.

Including SMEs can be done by scaling the requirements and channelling EU resources to them. To enable SMEs' sustainable business models, the rules proposed should be proportionate to the scale and complexity of the activities of the undertaking ('scalability'). Scalability does not mean exemptions of the rules proposed but a general rule of simplified procedures in both due diligence and reporting. As an inspiration and as a working example for the scalability rule can be used Article 26(5) of the Auditing Directive. To enable full compliance, SMEs in both national and global value chains have the right to require the information necessary to fulfil the duties set to them from the controlling or lead undertaking of the value chain, whether it is a company law based parent company or contract based lead undertaking.

To support SMEs, a SME Resource, consisting of an Advisory Hub and an Advisory Portal should be established to provide resources and advice to SMEs fulfilling their due diligence and reporting duties. The Commission proposed in the European Green Deal Investment Plan to strengthen InvestEU with an Advisory Hub to support the identification, preparation, development, structuring, procuring and implementation of sustainable investment projects, and a free, online user-friendly InvestEU Portal for EU businesses, financial intermediaries and project promoters. Similarly, the SME Resource added to InvestEU could provide a single point of entry for a comprehensive service to SMEs when they seek help in fulfilling their duties. The SME Resource could be connected to the Commission proposed InvestEU Advisory Hub for a specific help for SMEs seeking finance for their sustainable initiatives.

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.

To create a level playing field the rules should first apply all undertakings in Europe, also those in control of third country companies. Secondly, they should also be applied to foreign companies doing business directly in EEA states, and thirdly, to foreign companies selling products and services within the EEA without a direct presence there.

In the Green Deal communication, the Commission writes: 'As the world's largest single market, the EU can set standards that apply across global value chains'. This applies not only through international standards but indirectly through its regulation of European business. To facilitate the transition of European business to sustainability, measures should be put into place to protect European businesses in the transition period. This would have the added advantage of preventing unsustainable products from coming into the European market.

The mandatory due diligence requirements should indeed firstly apply to all companies with any kind of presence on the European market, notably through selling goods or services. This scope is comparable to that which exists in other EU legislation (for example the Timber Regulation).

Further, building on what is done in the Eco-Design Directive, an access to market requirement for products could mirror the mandatory sustainability due diligence in companies. In its Circular Economy Action Plan, the European Commission commits to establish a sustainable product policy. A requirement of documentation for a sustainability due diligence undertaken for the products (rather than the whole third country company) that a company wishes to sell on the European market would be possible way forward.

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

See above.

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 aim to achieve policy coherence for sustainability both internally in the EU and its role as a global actor. This includes ensuring coherence between mandatory sustainability due diligence rules in company law, on the one hand, and in accounting law and financial market law, procurement rules, product rules, and trade and investment rules and policies, on the other.

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:

This issue concerns a harmonisation of procedural, including international private law rules, and possibly also substantive rules for claims from affected parties, which may range from company law and contractual legal bases to tort-based claims. With the international trend of lawsuits against parent and lead companies and decision-makers in them, a harmonisation and codification of the procedural and substantive rules for such claims could provide more legal certainty to both affected parties as well as undertakings.

In a study undertaken for the European Parliament's Sub-Committee on Human Rights in February 2019, recommendations are made to revise European procedural rules to make it easier and clear in which cases alleged victims of human rights violations may be brought against European parent companies. We suggest a broader revision, clarifying that cases may be brought also against European lead undertakings of global value chains. We propose that this is linked to the duty to undertake a sustainability due diligence, which should be a duty for the undertaking – and to make it effective and ensure follow-up – a duty for the board. If the sustainability due diligence has not been carried out in accordance with EU law and harm has occurred, there should be a presumption of liability for the undertaking and its board members. Conversely, if due diligence has been carried out and assured by external experts as proposed as a duty, this may serve as a defence for the undertaking and its board. This will increase the legal certainty for European business, while providing better access to justice for affected workers and communities.

National company registries could also very easily be given an enforcement rule by making submission of due diligence documents be a prerequisite for the continued validity of the registration of an undertaking. A new European regulatory body, in cooperation with the Member States' national regulatory bodies as company registries and financial supervisory authorities (or new supervisory bodies also on Member State level) could be set into place to ensure public enforcement of European company law in general, in collaboration with relevant national supervisory authorities. We envisage the new European body as a member of the European Supervisory Agencies together with the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurances and Occupational Pensions Authority (EIOPA). It could for example be called the European Supervisory Authority of Business (ESAB). This new supervisory authority should be able to bring public interest proceedings against undertakings that are not following up their EU company law duties as implemented national legislative acts. As indicated, this this supervisory authority should have the competence to enforce the full scope of EU

company law duties, which would fill a gap in the supervisory system. As a minimum the supervisory authority should be given the mandate of enforcing the duties we propose here. Affected parties, also across global value chains of European undertakings, should have the possibility of bringing complaints in before the supervisory authority. The new European supervisory authority should have the right to require information and documentation from European undertakings, make public statements and issues fines to non-compliant undertakings. This would provide a channel for dealing with complaints from, for example, workers in global value chains of European undertakings, without them having to resort to a lawsuit against the European undertaking.

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:

We have not been involved ourselves in such cases, but as is well-known there is a large body of such cases. There is a rich body of literature about these cases and websites dedicated to giving updated overviews of these cases and their outcomes.

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

N/A

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 an element of the mandatory sustainability due diligence, boards should be obliged to ensure mechanisms to promote consultative processes for engagement with local communities, including indigenous peoples affected by the operations and activities of their business and inclusion of all affected groups and persons, whether workers, subcontractors, or local or national interest groups and community representatives in due diligence scrutiny.

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

The boards should evaluate which groups of affected parties are most relevant to include in the due diligence process of the business of the undertaking. Typically they include workers in the undertaking and in undertakings in the value chain it leads as well as local communities. Specific attention should be given to communities of indigenous peoples and other vulnerable local communities or people. Also contractual parties as subcontractors, workers and entrepreneurs in the value chain as well as non-governmental organisations should be included in open and participatory processes in the due diligence.

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)

<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</p>	

setting director remuneration	
Other option, please specify	
None of these options should be pursued, please explain	

Please explain:

Remuneration of board members and senior management should be directly connected to the mandatory sustainability due diligence. The European regulation on remuneration (especially Article 9a of the Shareholders' Rights Directive), does not provide sufficient guidance (speaking generally about the 'company's business strategy and long-term interests and sustainability'). The language of the provision should be revised to be clearly linked to language to be used describing board duties to promote the interest of the company in a way that creates sustainable value within planetary boundaries, and to the key tool in this context: the mandatory sustainability due diligence. Remuneration should be connected with an ambitious improvement process following up on impacts and risks identified through the sustainability due diligence, and which are documented and verified.

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 board should always ensure that the decisions made by the board and otherwise in the company are based on sufficient research-based expertise, which entails both the continuous assessment for the board of its own expertise and ensuring that senior management and other key personnel have the sufficient expertise. Both will need to be a continuous process, integrating new knowledge as research evolves, as legislation is revised and as best practice standards are developed. Setting out clearly that the duty of the whole board is to promote the interests of the company in a way that creates sustainable value within planetary boundaries and with mandatory sustainability due diligence as a key tool, should in itself highlight the necessity of sufficient expertise in the board and in the company as a whole. It is therefore probably not necessary to adopt such a requirement on EU level. If regulation or guidance is considered, it is crucial that this concerns sustainability as a research-based concept, encompassing environmental, social and governance issues.

Question 23: Share buybacks

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

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

- 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?

If it is clarified that the core role of the board is to secure the interests of the company in a way that creates sustainable value within planetary boundaries, with the mandatory sustainability due diligence sufficiently specified, the decisions of the board should be in line with this. It should then not be necessary to regulate in more detail how the board should deal with considerations as those of purchasing the company's own shares, which may be well justified in some contexts. It is more important to strengthen the role and position of the board generally.

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

If so, please specify:

To strengthen sustainable corporate governance, it is important that a policy coherence approach is taken, so that the proposed new rules fit with and if necessary are complemented by further reform of with other EU policy areas, including sustainable finance, sustainability reporting, circular economy, sustainable public procurement, and the regulation of SMEs and digitalization, and for example, reform of aquaculture and agriculture (notably through Farm to Fork). The reform should be comprehensive, not based on silo or sector based thinking.

To achieve sustainable corporate governance and at the same time realise the potential of other sustainability-oriented initiatives, including the reform of the NFRD, it is crucial that the proposed rules are placed where they belong: in the core of company law. An appropriate place would be the Company Law Directive of 2017, the scope of which should be broadened to cover all business undertakings. The rules should draw on a research-based concept of sustainability.

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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