

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

Thiele

* 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

Malene

* Email (this won't be published)

mth@danskerhverv.dk

* Organisation name

255 character(s) maximum

Danish Chamber of Commerce

* 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.

0330934426-12

* Country of origin

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

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Saint Lucia

* Publication privacy settings

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

Anonymous

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 All other personal details (name, organisation name and size, transparency register number) will not be published.

Public

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

I agree with the [personal data protection provisions](#)

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

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

Consultation questions

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

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

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

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

- Yes, both in and outside the EU
- No

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

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

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

- Yes
- No

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

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

- Yes
- No

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

- Yes
- No

Section I: Need and objectives for EU intervention on sustainable corporate governance

Questions 1 and 2 below which seek views on the need and objectives for EU action have already largely been included in the public consultation on the Renewed Sustainable Finance Strategy earlier in 2020. The Commission is currently analysing those replies. In order to reach the broadest range of stakeholders possible, those questions are now again included in the present consultation also taking into account the two studies on due diligence requirements through the supply chain as well as directors' duties and sustainable corporate governance.

Question 1: Due regard for stakeholder interests', such as the interests of employees, customers, etc., is expected of companies. In recent years, interests have expanded to include issues such as human rights violations, environmental pollution and climate change. Do you think companies and their directors should take account of these interests in corporate decisions alongside financial interests of shareholders, beyond what is currently required by EU law?

- Yes, a more holistic approach should favour the maximisation of social, environmental, as well as economic/financial performance.
- Yes, as these issues are relevant to the financial performance of the company in the long term.
- No, companies and their directors should not take account of these sorts of interests.
- Do not know.

Please provide reasons for your answer:

The Danish Chamber of Commerce finds that Danish companies to a large extent already are managed with due regard to the legitimate interests of a number of other parties interested in or affected by company activities, such as customers, employees and other stakeholders, with whom the company must have a mutually beneficial relationship in order to ensure a license to operate.

The study on directors' duties and sustainable corporate governance presents a situation where companies only operate after own interests, assuming that this is something separate from all other interests. This is not the case.

The Danish Chamber of Commerce strongly recommends that a new impact assessment is carried out, based on peer review and proper assessment of the economic consequences, beyond the sole reliance on the E&Y study.

The Danish Chamber of Commerce recommends that the rules for good corporate governance continue to be 'soft law', and where relevant, according to the follow-or-explain principle. The changes proposed by the Commission are contrary to the principle of subsidiarity.

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:

The Danish Chamber of Commerce supports an EU level playing field on Due Diligence, because of the situation where many member states are introducing national legislation, the sum of which complicates trade and hampers the inner market. Compared to a multitude of national legislation within the EU, a common EU legal framework is to be preferred. Despite this initial support for harmonized legislation, a number of concerns must also be addressed, among others but not exclusively:

- The potential competitive distorting effects on SMEs
- Recognition of the sphere of influence for companies, especially companies at the end of multiple and complex global supply chains
- Ensuring certainty for companies in terms of liability – this should be process-oriented, not results-oriented.

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

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

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

the interests of society, please specify:

The question seems designed in a way so the Commission can claim stakeholder support for its upcoming legislative initiative. There is difference between which interests are relevant for companies to take into account and whether the EU should change the entire regulatory corporate governance system of the Member States.

Company interest is managed best with due regard to the legitimate interests of a number of other parties interested in or affected by company activities, such as customers, employees and other stakeholders, with whom the entity must have mutually beneficial relationship for a license to operate. The specific interest depends on the specific company. The Danish Chamber of Commerce does not see a need to regulate this.

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

Please explain:

The Danish Chamber of Commerce recognizes the need for companies to work strategically on sustainability and community issues as pointed out by the Commission. However, this field should not be regulated in such detail and with such specificity as suggested. This will create unnecessary administrative complications and obstacles for European companies, rather than supporting them in actually doing this.

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:

While being supportive of an EU harmonized due diligence requirement, we disagree that the EU should interfere with Member States' regulation on directors' duties. Already today, if the company as a legal entity has an obligation to do something, the board members and executive management can become personally liable according to MS legislation. This will depend on the concrete circumstances, e.g. the degree of negligence and the individual circumstances of each director. It is not appropriate to short-circuit such concrete and individual factors aimed at ensuring fairness, by introducing collective responsibility per se. The circumstances under which there will be personal liability could also be linked to general principles of liability in the Member States, making the proposal controversial also in relation to the subsidiarity principle.

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:

The Danish Chamber of Commerce finds this question to be very biased. We do not agree with the postulate that companies solely focus on the short term financial interests of shareholders. It is neither true of directors' duties in Member States' legislation, nor of how companies function in practice. In support of this point this we refer to the many critical responses in the Road Map consultation.

In the Nordic countries, directors' duties and company purpose are not subject to inflexible statutory provisions but rely on broad principles. We prefer the inclusive flexibility that this offers and do not want to trade it for statutory provisions.

Furthermore, we see the mechanisms of the Taxonomy Directive, the revised Strategy for Sustainable Investments and the NFRD as drivers of increased attention of corporate directors' to these issues. The effects of these initiatives should be taken into consideration by the Commission.

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?

Equal consideration of the interests of all stakeholders should not be the ultimate objective for businesses, particularly considering that the interests of stakeholders are often contradictory. It seems arbitrary to give personal liability for something which is very ambiguous. Business decisions are taken under uncertainty and asymmetric information where there is doubt about what the consequences will be and what would be best in line with the interests of the company, especially in the long run. Unlimited and diffuse director liability where directors by law are required to balance the interests of its stakeholders will inevitably lead to stakeholder conflicts, deadlocks and endless litigation. Moreover, it will lead to risk aversion and less entrepreneurship ultimately reducing EU growth, employment, innovation and competitiveness. Paradoxically, it will also reduce investors' incentive to provide risk capital to companies, including first movers and others who need risk capital to invest in the sustainable transition. The proposal will therefore work against its very purpose of supporting a sustainable transition in society.

How could these possible risks be mitigated? Please explain.

This should not be regulated as proposed by the Commission.

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

In the Nordic countries, we have legal systems, high governance ratings and low levels of corruption. We recommend that the Commission draw inspiration from the Nordic model of corporate governance.

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:

Again, we first need to point out the biases of this question. The Danish Chamber of Commerce does not agree with the assumption that companies operate without orientation towards sustainability risk. Companies as of today are not, as suggested, operated without regard to founders, shareholders, or other stakeholders. We would like to draw the attention to the overall critique of the empirical evidence of the EY Study, as put forward by Copenhagen Business School: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F594592>

There are many methodological errors that make the study unsuitable as the basis of regulatory initiatives.

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:

N/A

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:

N/A

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:

A change in stakeholder governance as suggested here will not only undermine the existing decision-making structure of the companies, it will also violate companies' fundamental right to govern themselves through their internal organs by granting outsiders a statutory right to enforce directors' duty of care towards the company. It would create risk of endless litigation, hinder timely and effective decision-making and create risk-averse companies.

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

Section III: Due diligence duty

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

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

The Danish Chamber of Commerce agrees that due diligence is inherently risk-based, proportionate and context specific.

'Reasonable efforts'

A more detailed definition of 'reasonable efforts' is necessary to take into account that some companies are a final tier in multiple and complex supply chains, which deal with a multiplicity of actors throughout the world, and the degree to which they can exert influence over these actors varies. This makes it necessary to clearly consider proportionality in this context. The Danish Chamber of Commerce suggests a definition of 'reasonable efforts' as 'efforts within the sphere of influence of the company'.

'Business relationships'

The Danish Chamber of Commerce recommends that business relationships are limited to include tier one suppliers. This indicates a certain scope of influence, whereas supply chain relationships without contractual relations are outside of the sphere of influence of the company. It is therefore important to clearly define "business relationships" within the supply chain as being relations where companies are directly connected (tier one), through a contractual relationship.

Question 15: Please indicate your preference as regards the content of such possible corporate due diligence duty (tick the box, only one answer possible). Please note that all approaches are meant to rely on existing due diligence standards, such as the OECD guidance on due diligence or the UNGPs. Please note that Option 1, 2 and 3 are horizontal i. e. cross-sectorial and cross thematic, covering human rights, social and environmental matters. They are mutually exclusive. Option 4 and 5 are not horizontal, but theme or sector-specific approaches. Such theme specific or sectorial approaches can be combined with a horizontal approach (see question 15a). If you are in favour of a combination of a horizontal approach with a theme or sector specific approach, you are requested to choose one horizontal approach (Option 1, 2 or 3) in this question.

- Option 1. "Principles-based approach": A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These should be applicable across all sectors. This could be complemented by EU-level general or sector specific guidance or rules, where necessary
- Option 2. "Minimum process and definitions approach": The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors.

Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.

- Option 3. “Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues”. This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.
- Option 4 “Sector-specific approach”: The EU should continue focusing on adopting due diligence requirements for key sectors only.
- Option 5 "Thematic approach": The EU should focus on certain key themes only, such as for example slavery or child labour.
- None of the above, please specify

Question 15a: If you have chosen option 1, 2 or 3 in Question 15 and you are in favour of combining a horizontal approach with a theme or sector specific approach, please explain which horizontal approach should be combined with regulation of which theme or sector?

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 principle-based approach will ensure that the requirements are adaptable to various sectors. Many companies are serving and selling into different sectors and it will be practically impossible for them to differentiate their efforts and programs according to sectors. It is important that any EU measure has the flexibility needed by companies and the potential of soft law should not be forgotten. Whether in complying with mandatory requirements or in their own actions, companies should be able to devise solutions which fit their size, sector, operating markets and business model and allow them to identify where the material risk of

adverse impacts, e.g. on human rights or the environment is highest and to focus their efforts and resources here. We support development of complementary guidance. In addition, the Danish Chamber of Commerce stresses that mandatory Due Diligence regulation should be aligned with other regulatory initiatives, for instance the review of the Non-Financial Reporting Directive as well as the demands in the EU taxonomy for sustainable activities, both of which require companies to report on environmental and social performance indicators.

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

Even though SME's might not be directly encompassed by the Due Diligence obligation they will be indirectly affected by the legislation through the Due Diligence queries and demands from customers and partners in the value chain. Given their size, usually SMEs cannot exercise the same leverage and influence in the value chain as big companies. Also, SMEs have resource constraints. A possible mandatory approach will therefore impose bigger burdens on SMEs relative to large companies. Any EU measure needs to take this into account and requirements should be scaled according to the size of the company. Alongside harmonized, proportionate standards, there remains a key need for capacity-building and dedicated resources.

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.

Many European companies are part of global supply chains and engage in business operations outside of the EU. It is therefore key that any legislative framework in the EU takes an international perspective in order not to compromise the competitiveness of European companies and avoid losing global market shares to companies that are not met by the same requirements and are not upholding the same standards. Therefore, third country companies operating within the European internal market should be required to comply with the regulation on the same legal basis as European companies. Thus, the same rules as well as the same exceptions (e.g. for SMEs) should apply.

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

The same obligations and enforcement should be imposed to third-country companies operating within the European internal market.

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:

Many European companies are part of highly complex global supply chains with thousands of suppliers. Root causes of e.g. human rights breaches in third countries are often local governments' lack of law enforcement of national law or international conventions, and therefore must also be addressed domestically. For example, whereas European countries at large have relatively well-functioning labor markets with organized industrial relations, this is not the case in all countries outside of the EU. The UNGPs clearly delineate between the state responsibility to protect and the business responsibility to respect human rights. Therefore, in third countries where industrial relations do not provide sufficiently well-structured labor markets or enforcement of environmental standards, the EU and Member States should make an effort to strengthen these local conditions and close governance gaps in the country in question, e.g. better enforcement of ILO conventions and adherence to international guidelines for responsible business conduct.

It is also important to re-emphasize the importance of ensuring consistency in approach between EU Member States.

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:

It is important for a level playing field that the due diligence enforcement is implemented equally across all member states.

The Commission should seek to create business incentives and a race to the top through business-to-business alignment, common reporting databases, allowing decisions to be made on disclosure and performance (rather than judicial enforcement).

When it comes to legal liability, companies should be liable for failing to maintain a due diligence process. The Danish Chamber of Commerce recommends process-responsibility over results-responsibility, due to legal certainty.

In terms of supervision by national authorities, the Danish Chamber of Commerce suggests that the OECD National Contact Points are appointed to this task.

Question 19b: In case you have experience with cases or Court proceedings in which the liability of a European company was at stake with respect to human rights or environmental harm caused by its subsidiary or supply chain partner located in a third country, did you encounter or do you have information about difficulties to get access to remedy that have arisen?

- Yes
- No

In case you answered yes, please indicate what type of difficulties you have encountered or have information about:

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

Section IV: Other elements of sustainable corporate governance

Question 20: Stakeholder engagement

Better involvement of stakeholders (such as for example employees, civil society organisations representing the interests of the environment, affected people or communities) in defining how stakeholder interests and sustainability are included into the corporate strategy and in the implementation of the company's due diligence processes could contribute to boards and companies fulfilling these duties more effectively.

Question 20a: Do you believe that the EU should require directors to establish and apply mechanisms or, where they already exist for employees for example, use existing information and consultation channels for engaging with stakeholders in this area?

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

Please explain.

The Danish Chamber of Commerce recognizes the need for companies to work strategically on sustainability and community issues, as pointed out by the Commission. It is already the case that, for any business to operate effectively, it must consult with a broad range of stakeholders in the definition and execution of business strategy. Most businesses recognize this. Furthermore, this field should not be regulated in such detail and with such specificity as suggested. Instead, there should be laws in place that penalize causing violations of human rights, and there should be market mechanisms in place that reward proactive measures. Additional director requirements in this area could add significantly to the burdens of business with little value added to business or stakeholders. In addition, in some instances, directors of EU legal

entities are subject to decisions made by parent companies outside of the EU with little local decision-making powers.

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

Question 20c: What are best practices for such mechanisms today? Which mechanisms should in your view be promoted at EU level? (tick the box, multiple choice)

	Is best practice	Should be promoted at EU level
Advisory body	<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 checked="" type="radio"/>

Other, please specify:









The Danish Chamber of Commerce finds it should be up to the company itself to define the stakeholders that are relevant to exactly that company and how to best include the stakeholders in dialogue, decisions and complaint mechanisms. The details of how it takes place should be determined by the company itself. Such flexibility increases chances of real impact. As recommended by the UN Guiding Principles on Business and Human Rights, companies should undertake an assessment of what salient/material risks exist in their value chain, define processes to mitigate those risks and to remedy them when they occur. By focusing on salient risks, businesses will be able to focus on addressing the most impactful risks in their value chains. It is important that businesses have flexibility in this area so that they are able to make the best decisions for their own individual circumstances whereas specific regulatory requirements might inhibit this flexibility.



Question 21: Remuneration of directors

Current executive remuneration schemes, in particular share-based remuneration and variable performance criteria, promote focus on short-term financial value maximisation [17] (Study on directors' duties and sustainable corporate governance).

Please rank the following options in terms of their effectiveness to contribute to countering remuneration incentivising short-term focus in your view.

This question is being asked in addition to questions 40 and 41 of the Consultation on the Renewed Sustainable Finance Strategy the answers to which the Commission is currently analysing. Ranking 1-7 (1: least efficient, 7: most efficient)

<p>Restricting executive directors' ability to sell the shares they receive as pay for a certain period (e.g. requiring shares to be held for a certain period after they were granted, after a share buy-back by the company)</p>	
<p>Regulating the maximum percentage of share-based remuneration in the total remuneration of directors</p>	
<p>Regulating or limiting possible types of variable remuneration of directors (e.g. only shares but not share options)</p>	
<p>Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration</p>	
<p>Mandatory proportion of variable remuneration linked to non-financial performance criteria</p>	
<p>Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration</p>	
<p>Taking into account workforce remuneration and related policies when setting director remuneration</p>	
	

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

Please explain:

Director remuneration options to incentivize a long-term focus on the health of the business can be recommended by the Commission but should not be required. Businesses operate within a complex ecosystem that includes shifting governance structures, rapidly changing environmental challenges and, as the recent pandemic has shown, unpredictable events. Given this context, it is impossible to build a long-term remuneration structure that can adequately and fairly embrace all factors. The Danish Chamber of Commerce expects that the mounting pressure from investors (given for instance the Disclosure Directive and EU Taxonomy) is likely to be a more effective mechanism for governance of remuneration of directors than regulatory compliance. Similarly, why does the Commission not mention the recent legislation passed with the revised Shareholders Rights Directive (SRD II)? The Danish Chamber of Commerce advises against proposal of new legislation in this field, until we see relevant, recently passed new regulation come fully into effect.

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:

Environmental, social and human rights matters are complex. It is important that boards regularly assess their own level of expertise such matters and take appropriate follow-up action. This is however a task of the specific company, not the regulator. The Danish Chamber of Commerce does not find the evidence convincing that current level of expertise of boards of directors does not support a shift towards sustainability.

The optimal mix of competencies will change over time for all companies. Moreover, not all relevant competencies can practically be represented in the board. That would require board sizes that are too big to function. This is not a problem in practice because boards, off course, also draw on competencies outside the board.

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:

The Danish Chamber of Commerce is inclined to point out the unacceptable biases in the design of the question. What if respondents think performance, competitiveness, innovation, productivity or attracting investors will be hampered? Such views are not given consideration because the questions design only allow respondents to account for positive effects.

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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