

Consultation for an Initiative on Sustainable Corporate Governance

Fern response

Section I: Need and objectives for EU intervention on 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:

There is growing evidence of the human rights abuses and environmental harm caused by corporate behavior. The initial response of increased voluntary corporate engagement with the aim of improving business conduct and the adoption of the UN Guiding principles has not led to changes in company behaviour, and people and the environment continue to be negatively affected. There is no disagreement that the well-being and protection of our society and the planet needs to be put before short term profit and the illusion of infinite growth.

Human rights abuses and environmental harms have occurred in host, producer and manufacturing countries which are often marked by poor governance, corruption and conflict. Addressing corporate accountability cannot solely rely on capacities of local communities and public authorities. Companies including the financial sector should be held accountable for human rights abuses and environmental harm in the global value chains of European companies.

Companies and their directors should take environmental, social and governance issues into account and it is critical that European legislative and regulatory provisions require this. An EU legislation should oversee and ensure the quality of the implementation of the due diligence and materiality determination processes.

Companies need to elevate and protect the interests of all stakeholders. These include employees, supply chain workers, affected peoples including forest communities, Indigenous Peoples and defenders of human rights, the environment and land.

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:

Voluntary measures to improve corporate business conduct in the field of human rights, social and environmental due diligence and business conduct failed to significantly end corporate injustices and are [not fit for purpose](#). Evidence of corporate abuse and irreversible harm around the globe and studies revealing the weak integration of due diligence processes in voluntary corporate business conduct highlight the need for binding rules obliging companies to change behaviour on the ground and why it is important to hold them legally accountable.

As a major global trading block, the EU has the responsibility for using its power to set ambitious standards for the protection of people and the planet and contributions to positive systemic change. A growing number of EU Member States are making progress in developing legally binding corporate human rights due diligence frameworks based on international standards.

A legal framework for environmental and human rights due diligence must be established at the EU level to ensure that the same rules apply to all EU companies including in the financial sector. An EU-wide legislation applicable to all business enterprises domiciled or based in the EU, or active on the EU market, will help prevent and mitigate human rights abuses and environmental harm while ensuring a level playing field and a coherent legal framework within the EU. A mandatory EU legal framework should establish a robust, enforceable due diligence standard for businesses to prevent and address their negative human rights and environmental impacts in their operations and global value chains. It should foresee access to remedy for victims of human rights and environmental harm located in and outside the EU including Indigenous Peoples and local forest communities. Special attention should be given to women who are often victims of corporate abuse.

This should be [complementary to a forest risk commodity, product based EU legislation](#) as suggested in the [European Parliament's INL report of MEP Delara Burckhart](#) which [calls for an ambitious forest specific due diligence regulation](#) applying to all companies including the financial sector. This should also include an adequate liability & redress mechanism.

EU Action will contribute to the Treaty objectives of sustainability (Article 3(5) and Article 21(2)(d) and (f) TEU)) to promote a high level of environmental protection. The principles of environmental integration (Article 11 TFEU) and of consistency (Article 7 TFEU) also reinforce the necessity of EU action.

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

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

Other, please specify:

A due diligence legislation should allow all victims of human rights and environmental harm, in and outside the EU, including most vulnerable groups such as Indigenous Peoples, local communities and women, to have access to legal remedies and hold enterprises liable for harm before EU courts.

The EU legal framework should include a legal liability for both: (1) breaches of due diligence requirements; and (2) human rights and environmental harms. It should ensure that it supports access to remedy for victims in and outside of the EU.

Legal liability provisions should be coupled with effective enforcement mechanisms.

An EU due diligence duty requires active engagement in remediation of adverse impacts where business enterprises cause or contribute to harm by way of actions or omissions.

Other benefits of an EU due diligence duty may include:

- the EU setting a strong example to other consumer markets, regulators and the domestic market;
- first-mover advantage for EU companies, being the first to start adapting to due diligence requirements instigating discussions in other countries and opening dialogue with producer countries about root causes of corporate abuse, redress and corporate accountability.
- improved legal security resulting in positive effects for the entire business environment and a lower risk of conflict;
- stronger recovery while making the economy more resilient to future crises;
- alleviation of pressure on governments in producer countries to deregulate in order to attract foreign companies and investors;
- motivate producer countries to improve governance and protect human and environmental rights and develop new legal frameworks;
- allowing shareholders, investors and business partners to reflect due diligence implementation in their economic decisions;

- improved implementation of the European Green Deal, the EU consensus for Development, and commitments regarding halting deforestation (see EC Communication 2019) which, without due diligence legislation, may incentivise outsourcing and externalising adverse impacts to third countries.

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:

Most of the above-mentioned risks are unfounded claims against due diligence legislation, rarely supported by evidence. Robust and enforceable due diligence legislation, in line with the UN Guiding Principles could successfully mitigate any of these risks.

Disengagements from risky markets impacting negatively on local SMEs may affect local economies. It may push local economies out of the market or push them towards other consumer markets ultimately without any positive effect for local people and the environment.

For SMEs, the type of policies and processes expected would vary according to their capacity, following the Commentary to Principle 14 of the UN Guiding Principles on Business & Human Rights. Studies of the compliance costs of a variety of due diligence regimes do not identify a disproportionate economic burden for SMEs. Compliance cost is typically related to the size of the enterprise. Costs of carrying out mandatory supply chain due diligence appears even for SMEs to be relatively low compared to the company's revenue. SME would therefore not be penalised by due diligence legislation, as long as the legal framework follows international standards. Such risks would materialise if the EU legal framework introduces a rigid, procedural obligation based on the misunderstanding that such an approach would be beneficial to companies, or with the intention of shielding companies from any liability.

Regarding **the risk of disengagement from risky markets**, which might be detrimental for local economies, it is worth stressing that:

disengagement should only be considered as a last resort after all other steps have been exhausted, as outlined in UN Guiding Principle 19, which notes that business enterprises should only consider ceasing relationships where options for leverage to prevent or mitigate negative impacts have been exhausted or leverage is insufficient. A similar approach is elaborated upon in the OECD Due Diligence Guidance (3.2.h). **A hands-off approach where a company simply disengages without taking further measures would not be in line with these standards** (see SOMO papers on responsible disengagement, [2016](#), [2020](#)).

Due diligence legislation would prevent irresponsible disengagement from happening by compelling companies to evaluate all possible options for alternatives to disengagement to consider the potential adverse impact associated with a decision to disengage, and by holding them liable in cases of irresponsible disengagement.

As stated in the [EC study on due diligence requirements through the supply chain](#), in practice, **it is unlikely that companies would be in a position to restructure their global business model in such a significant way for the purpose of withdrawing from production countries**. Similarly, the literature has shown that companies rarely terminate their business relationships based exclusively on social or human rights-related concerns. Exceptions include, for example, companies' disengagement from contexts with state-imposed forced labour (e.g. Uzbekistan and the Xinjiang Uyghur Autonomous Region), due to the lack of leverage to change the practice, the severity of the abuses, and, therefore, the need to disengage in line with the UN Guiding Principles. Nevertheless, this potential risk should not be discounted, which is why EU legislation should be accompanied by other measures, including partnerships and efforts to improve corporate accountability standards globally.

A potential drawback (if not explicitly addressed in the legislation) is the risk that, if poorly implemented, **parent and lead companies may end up passing the additional costs of compliance with due diligence requirements to their suppliers and subcontractors**, and ultimately to the most vulnerable parts of the value chains, without adapting their own purchasing practices. Power relations between multinational buyers/retailers and suppliers/producers in production countries are asymmetric and characterised by downward pressures on prices. These power imbalances are likely to influence who bears the cost of compliance with due diligence requirements. Suppliers are often pressured to produce cheaply - without additional resources, they struggle to meet social and environmental requirements. Complementary action is therefore required to address these power imbalances and ensure a more equitable distribution of costs and benefits in global value chains, including by reforming corporate governance and ensuring transparency (see [FTAO report on Making Human Rights Due Diligence Frameworks Work for Small Farmers and Workers](#), 2020).

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

[OPTIONAL] Question 5. Which of the following interests do you see as relevant for the longterm success and resilience of the company?

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

the interests of society, please specify:

Overwhelming evidence shows that prioritising short-term profit and servicing the interests of shareholders, has had detrimental effects on the company's long-term success.

Companies and markets in general thrive in prosperous, cohesive and non-conflictual societies. There are numerous societal interests that have a profound effect on the company and the risks it is facing, including social conflict (which in extreme can take the form of a war), corruption, poverty, systemic abuse of human rights, shrinking space for civil society to operate, the ability of people to pursue happiness, political persecution, a healthy environment for workers and their families and general societal infrastructure. It is further noted that these interests may be also affected by the company's actions.

The collective interests of the company's stakeholders are relevant as part of the 'interests of society' including vulnerable groups such as Indigenous Peoples, forest communities and women.

Companies' long-term resilience cannot be dissociated from the interests of a range of stakeholders and the natural environment, including forests and the climate.

other interests, please specify:

The interests of producer countries and respective host societies: for supply chains to be fair, resilient and sustainable, companies need to develop inclusive partnerships with producer countries, based on long-term commitments, a mutual benefit approach, and the constraints and needs of suppliers. All relevant stakeholders in supply countries including workers, Indigenous Peoples, local communities, women, and SMEs in producer countries need to be consulted and involved in partnership dialogues with the EU as corporate conduct also impacts host societies.

[OPTIONAL] 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	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Management of the risks for the company in relation to stakeholders and their interests, including on the long run	X	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Identification of the opportunities arising from promoting stakeholders’ interests	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	X

Please explain:

It is imperative to clarify the difference between the due diligence duty that the company has to respect human rights and the environment and the duty of care that the directors have to the company itself.

The current duty of care that directors have has not led to corporate conduct that protects people and the planet or adequate risk management. There is an urgent need to clarify that directors should, as part of their duties, align the overarching duty of care with the requirement for the company to respect and protect human rights and the environment.

To ensure that this aspect of their duty of care is implemented by corporate boards, the law must clarify **how stakeholders’ interests should be considered**, both from the perspective of **respect to legitimate interests** of stakeholders, as well as from the perspective of the **management of risks** and opportunities. The level to

which the organisation must take stakeholder's interests into account must be clarified. In particular the responsibility to consult and engage with stakeholders including Indigenous Peoples, forest communities and women must be embedded throughout the corporate structure, and not rest solely with the board of directors. Indeed, the responsibility to consult and engage with stakeholders will form part of the corporate's due diligence duty and operational responsibilities. In this regard, in addition and to support such corporate duty, it should be clarified that directors are responsible, as part of their duties, to provide oversight over the quality of the company's due diligence, and ensure that its results are integrated in the corporate strategy.

Sustainability matters should be adequately considered at a strategic level. Transparency concerning their integration in the company's overall strategy is required to allow meaningful engagement of stakeholders.

Question 7. Do you believe that corporate directors should be required by law to set up adequate procedures and where relevant, measurable (science –based) targets to ensure that possible risks and adverse impacts on stakeholders, ie. human rights, social, health and environmental impacts are identified, prevented and addressed?

I strongly agree

I agree to some extent

I disagree to some extent

I strongly disagree

I do not know

I do not take position

Please explain:

- Directors must ensure that the corporate due diligence obligations are embedded throughout their corporate operations and strategies. This will allow companies to address impacts and risks on a regular basis and effectively.
- It should be clarified that the company is accountable for carrying out due diligence, as part of its operations, throughout the entire value chain. Directors should be responsible for overseeing the implementation of the due diligence processes by the company and for ensuring that the company takes appropriate actions.
- As part of their duty of care, directors should also facilitate access to information and develop, disclose and implement, on behalf of the company, a forward-looking corporate strategy that integrates sustainability matters - including, where necessary, progressive transformation of their business model to ensure compatibility with human rights and environmental standards -, and set measurable, specific, verifiable, time-bound targets and plans and milestones to achieve them based, where appropriate, on science-based methodology. Directors must set such targets, in particular, where effective management of risks and impacts have implications for the company's overall strategy, business model, financial planning and reporting. The bigger risks and impacts are, the greater is the need for directors' level decision on strategies, targets and implementation.

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 due diligence duty that the company has to respect human rights and the environment need to be distinguished from the duty of care that the directors have to the company itself. The directors' duty of care is owed to the company as a separate legal entity. Therefore, in principle, it already includes an obligation for directors to consider all matters and stakeholders interests. It should be clarified and reaffirmed in legislation that, in doing so, directors should balance the interests of all stakeholders, ensuring that no stakeholders are harmed, at least in accordance with the due diligence obligations of the company.

As explained in a statement on corporate governance drafted by a group of senior academics as a guidance for the European Commission on this very matter: "The underlying idea is that directors could potentially use their discretion under (some variant of) the business judgement rule that exists in every major jurisdiction, and that gives directors discretion to act in what they believe to be the best interests of the company as a separate entity. In principle, this rule can accommodate either a long- or short-term approach. Hence, where directors pursue the goal of maximising short-term shareholder value, it is a product not of legal obligation, but of the pressures imposed on them by financial markets, activist shareholders, the threat of hostile takeover and/or stock-based compensation schemes. These strong pressures from outside company law mean the problem of short-termism cannot be solved simply by requiring or permitting directors to have regard to sustainability and the company's long-term interest."

A further problem is that while short-term financial performance is expressed in clear numbers, the interests of other stakeholders and their effects on the company cannot be expressed in a similar quantifiable manner. In other words, these potentially conflicting interests are of a different fundamental quality, and therefore they cannot be simply balanced. The experience with the company law reforms in Brazil, India and the UK, which attempted by various means to codify the obligation of directors to balance multiple interests, shows that such an approach is not effective. Therefore, the obligation concerning respect for stakeholders' interests must be firmly rooted in corporate due diligence obligations, over which the directors should exercise oversight, as explained in our answers to the previous questions.

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?

N/A

How could these possible risks be mitigated? Please explain.

Instead of a broad mandate to balance the interests of stakeholders, the legal definition of duty of care should:

- Confirm that its primary objective is to ensure the long-term success of the company while taking into account its impact on people and the environment including forests and the climate, and that in doing so directors must take into consideration all legitimate stakeholders’ interests and needs instead of prioritising the interests of providers of financial capital; and
- Specify that it is an obligation of directors to ensure that the company implements robust due diligence to identify and address adverse impacts to people and the planet linked to the company’s business model, including its operations throughout its value chain; and to put in place a strategy supported by targets to address such impacts in accordance with the company’s legal obligations.

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 movement of investors that are highly supportive of companies’ engagement with stakeholders’ interests, as well as of stronger public policies in this regard. This includes for example the UN Principles for Responsible Investment, or the Investors Alliance for Human Rights, as well as, broadly speaking the Sustainable Investors Forum(s).

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:

Addressing the sustainability challenges may require changes to the company’s business model, strategy and financial planning. Therefore, it is critical that the company’s strategy and targets with respect to such risks, impacts and opportunities is considered as part of the overall corporate strategy, and is decided on and monitored by the governing body of the company. Some companies already implement such an approach.

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:

N/A

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.

N/A

Section III: Due diligence duty

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

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

We partly agree with this definition.

Firstly, it should be clarified that **the due diligence duty’s ultimate goal must be to respect human rights, the environment and good governance in a company’s own operations and global value chains**

The definition should align its wording with international due diligence standards.

- Be extended to require companies to consider the adverse impacts it is directly linked to through its business relationships (in addition to the risks of adverse impacts a company causes or contributes to). This could be in in the context of its operations, products or services. Prior to ceasing, preventing, mitigating and accounting for human rights, health and environmental impacts, **companies should first be obliged to effectively identify and assess any actual or potential adverse human rights, environmental and governance impacts** which they may cause, contribute to or be directly linked to both through their own activities and as a result of their business relationships.
- Due diligence should be an ongoing process rather than a single incident. Companies should also **track and monitor** the implementation and effectiveness of the adopted measures. This includes the collection of relevant data specific to the risk(s), such as data disaggregated by supplier and gender. The results of these tracking and monitoring processes must be used to inform possible changes to the global business operations and human rights and environmental due diligence process.

We agree due diligence must be a risk based and proportionate approach. Companies should thus map out their global value chain, the human rights and environmental risks at each level of their value chain, and prioritise due diligence processes depending on the risks. Companies should take **proportionate and commensurate measures to the severity of the risks and the specific circumstances**, particularly their sector of activity, the size and length of their supply chain, and the size of the undertaking.

Moreover, **the “due diligence duty” should cover the company’s’ global value chain**, which includes entities with which it has a direct or indirect business relationship (understood as all types of business relationships of the enterprise – suppliers, franchisees, licensees, joint ventures, investors, clients, contractors, customers, consultants, financial, legal and other advisers, and any other non-State or State entities linked to its business operations, products or services; as per the OECD Due Diligence Guidance for Responsible Business Conduct, p.10) and which either (a) supply products or services that contribute to the company’s own products or services, or (b) receive products or services from the company. Supply chains and value chains are similar terms that refer to the entire production chain. However, **while “supply chain” may be used to specifically refer to the production and distribution of a commodity, “value chain” includes the set of interrelated activities by which a company adds value to an article.**

At the end of the definition, it could be clarified that, in all instances, due diligence is a **continuous and gradual process** and companies should exercise their leverage and meaningfully engage with their suppliers and business partners to support them in improving their practices.

Lastly, while not strictly part of the definition, it could be clarified that **due diligence must enable and support the provision of remedy**. The obligation to respect human rights and the environment requires active engagement in the remediation of adverse impacts where companies cause or contribute to harm by way of actions or omissions, or, where a company has not caused or contributed to the harm but its operations, products or services are directly linked to it, the obligation to exercise or increase its leverage over those responsible to help ensure that remediation is provided.

[OPTIONAL] 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

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None of the above, please specify

Please specify:

-

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

The due diligence duty should be both cross-sectoral and cross-thematic, covering human rights including labour rights, environmental issues and climate change.

In addition,

- It must require action on the part of companies to identify, assess, prevent, mitigate and remedy their negative impacts.
- Companies undertaking activities with high environmental, human, social and governance risks, as well as those operating in high-risk sectors or contexts including where there is a high risk of conflict including conflict related to land tenure, corruption or organised crime should be required to take additional steps, proportionate to those risks.
- For higher risks, companies should therefore be given further guidance on the implementation of the due diligence duty, including on additional requirements, criteria and definitions.
- Guidance for companies should be developed in consultation with stakeholders including Indigenous Peoples, local communities and women.

The legislation should be applied broadly to all business entities active on the European Single Market across all sectors including the financial sector and cover human rights, including labour rights, and environmental issues, including climate change.

However, it should allow for additional measures or specifications for specific sectors, products or activities, especially when they pose high human rights and environmental risk. Any sector-specific legislation should supplement, but not limit, the development and implementation of the proposed general legislation. Analogies can be found in the OECD system, where both a general guidance and sector specific guidance complement each other. Sector specific guidance helps companies determine how to implement the general regulation within the context of the sector in which they operate. It may also impose additional obligations in cases where the sector poses a particularly high risk. An example of a sector-specific regulation which would be complementary to this “horizontal” one is the regulatory proposal on deforestation currently being developed by DG Environment. We believe both the DG Environment regulation and this broader due diligence regulation must co-exist as separate legal instruments. The DG Environment instrument should, for example, impose a strict market access requirement in which companies importing forest & ecosystem risk commodities (FERCs) should have to demonstrate the product has not caused deforestation, ecosystem degradation or human rights abuses. This market access requirement would go above & beyond the general due diligence requirement created by the DG Justice-led regulation.

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

Option 3 is our preferred option as this would create legal certainty and a level playing field for companies as to the necessary processes to be put in place and impacts to be covered by the due diligence duty.

A rich body of legally binding international human rights and labour standards has long been developed, leaving no room for legal uncertainties.

Human rights and the environment are deeply linked and interconnected. Human rights cannot be enjoyed without a safe, clean and healthy environment, and sustainable environmental governance cannot exist without the establishment of and respect for human rights. It is therefore crucial that internationally recognised human rights are covered by the future legislation. But environmental damage can also occur without it also constituting a clear violation of human rights, or without entailing direct harm to humans beings. It is important that the due diligence obligations also cover all potential or actual adverse impacts on the environment, including those that do not directly affect humans or human rights [see below question 15e].

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

- Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)**
- Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups**
- Climate change mitigation**
- Natural capital, including biodiversity loss; land degradation; ecosystems degradation, air, soil and water pollution (including through disposal of chemicals); efficient use of resources and raw materials; hazardous substances and waste**
- Other, please specify**

Other, please specify:

The material scope of the EU directive should cover all human rights, including workers' and trade union rights; community tenure rights; social, health and environmental standards; as well as good governance international standards.

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?

The effectiveness of the due diligence duty will very much depend on the robustness of the criteria and 'performance standards' against which due diligence should be conducted as well as on the quality of the enforcement.

Regarding human and labour rights, due diligence legislation should at least cover all **internationally recognised standards**, understood, at a minimum, as those expressed in:

- the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights
- customary international law,
- International Humanitarian Law,
- international human rights instruments on the rights of persons belonging to particularly vulnerable groups or communities (including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities, the United Nations Declaration on the Rights of Indigenous Peoples, the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities) and
- the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work, as well as those recognised in the ILO Convention on freedom of association and the effective recognition of the right to collective bargaining, the ILO Convention on forced labour, the ILO Convention on the abolition of forced labour, the ILO Convention on the worst forms of child labour, the ILO Convention on the elimination of discrimination in respect of employment and occupation and ILO Convention on equal remuneration; and other rights recognised in a number of ILO Conventions, such as freedom of association, minimum age, occupational safety and health, living wages, indigenous and tribal peoples' rights, including free, prior and informed consent (ILO Convention on indigenous and tribal peoples), and
- the rights recognised in the African Charter of Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights, the European Social Charter, the Charter of Fundamental Rights of the European Union, and
- national constitutions and laws recognising or implementing human rights.

Due diligence legislation should also take into account the fact that human rights, environmental and governance risks and impacts are not gender-neutral. **Companies should be encouraged to integrate the gender perspective into their due diligence processes, as well as other factors of discrimination**: many rights-holders face additional risks due to intersecting factors of discrimination based on their gender, ethnicity, race, caste, sexual orientation, disability, age, social status, migrant or refugee status, informal employment status, union involvement, exposure to conflict or violence, poverty, or other factors.

With regard to **environmental due diligence**, there is no comprehensive body of internationally recognised agreements that regulate the protection of the environment comprehensively. While it would still be convenient to include a reference to those in place (following the same logic as for internationally recognised human and labour rights), environmental impacts must be defined in a broad manner so as to fill the big gaps in international and European environmental law. "Environmental impacts" should thus cover any violation of internationally recognized environmental standards, as well as any adverse impact on the environment or on the right to a healthy environment. Environmental impacts should include, but not be limited to, climate change, air, soil and water pollution, production of waste, deforestation, loss in biodiversity, and greenhouse

emissions. At a bare minimum, environmental due diligence should be conducted against explicit criteria that should be based on the environmental objectives mentioned in article 9 of the Taxonomy Regulation (i.e. (a) climate change mitigation; (b) climate change adaptation; (c) the sustainable use and protection of water and marine resources; (d) the transition to a circular economy; (e) pollution prevention and control; (f) the protection and restoration of biodiversity and ecosystems.

Even when addressed to states, environmental standards can be translated into concrete obligations for companies. In this regard, there are two important principle of international and national environmental law that should serve as a basis: the principles of prevention and precaution. The steps of the OECD Guidelines Chapter VI requiring corporates to perform and environmental due diligence process provide a useful basis.

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 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

From international standards (UN Guiding Principles on Business & Human Rights, OECD Guidelines for Multinational Enterprises), it is very clear that due diligence is the obligation of “all “companies. All business enterprises, regardless of size, should conduct human rights and environmental due diligence. SMEs, too, can cause, contribute to and be directly linked to severe human rights and environmental impacts. While their operations are smaller, SMEs also have a direct responsibility to respect human rights and the environment.

However, as stressed by the aforementioned international standards, **the means through which companies will be expected to meet their responsibility to respect human rights and the environment should be commensurate to the severity of the risks.** For SMEs, the type of policies and processes expected would be according to their capacity, following the Commentary to Principle 14 of the UN Guiding Principles on Business & Human Rights. Their degree of leverage over their business relationships would also be considered in determining their responsibility (although it should not be relevant to considering whether they should identify all risks, carry out due diligence and exercise any leverage they may have). Furthermore, if deemed necessary to guarantee a satisfactory uptake of due diligence obligations by SMEs, a “phase-in” approach for SMEs could be developed. Such additional time period for compliance should be as limited as possible though to avoid a weakening of the legislation and its company scope.

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

Many SMEs active in the garment or food sectors for instance are already conducting due diligence, evidence to the fact that companies of all sizes can conduct it.

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

Increasingly, empirical evidence is revealing that companies with responsible business conduct policies and practices, such as due diligence, are more resilient, stronger and better performing businesses. **Companies that know their supply chains and actively identify and mitigate their risks generally perform better overall.** Therefore, **while capacity building support, including funding, could be considered as a way to foster compliance with due diligence standards, it is however incorrect to only conceptualize due diligence as a burden on companies,** as the evidence reveals its potential as a beneficial and valuable standard of conduct.

For SMEs in specific sectors capacity of SMEs may be weak and needs to be reinforced. Additional and complementary capacity building support may be required for these SMEs.

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

Yes

No

I do not know

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

The obligation should apply to companies operating in the internal market (selling products or services, conducting activities). The link could therefore be **the presence on the internal market for products or services**.

Useful definitions of scope can be found in:

- Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (**Timber Regulation**):

Article 2(b): “‘placing on the market’ means the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge.

- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (**General Data Protection Regulation**):

Article 3: “(1) This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. (2) This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union. (3) This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.”

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

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

These companies must also be obliged to respect human rights and the environment, in their own operations, subsidiaries, business relationships and global value chains, and to undertake human rights and environmental due diligence for the products, services and activities that are placed or undertaken in the EU internal market.

These companies must also be liable for any human rights abuses and environmental harm in their operations or value chains (without prejudice to other subcontracting and supply chain liability frameworks).

Governments must set up robust enforcement mechanisms, with effective sanctions, to ensure that these companies also obey the law and provide redress and reparations in case of human rights abuse or environmental harm.

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:

To create a level playing field globally, the EU should step up its efforts for the adoption of a **UN binding treaty to regulate the activities of transnational corporations and other business enterprises** and ask for a dedicate mandate to negotiate this treaty, **which should reaffirm the primacy of international human rights law over other international legal instruments**, outline human rights and environmental due diligence obligations for businesses and ensure the provision of effective and fair access to justice for **affected individuals and communities**.

Establish a **tracing mechanism** for goods produced through severe human rights abuses, including inter alia forced or child labour, and examine options to prevent **the import and placing onto the market of these goods** in scenarios where such measures are evaluated to be in the interest of the affected workers. Such measures should be viewed as complementary to due diligence and should not replace, or distract from, the responsibility of businesses to conduct due diligence throughout their value chain.

Amend the Union Customs Code and the Trade Secrets Directive so that customs data and supply chain information are not considered confidential and should be publicly disclosed **and amend customs-related regulations** to ensure that all companies that import goods into the EU disclose to EU customs authorities relevant information, including the name and address of the manufacturer.

Generalising the banning and regulation of unfair trading practices, as well as taking additional steps to regulate purchasing practices of companies. The Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain could provide with a useful starting point.

When conducting commercial transactions with businesses or providing supportive services to businesses such as export credits, the EU and Member States must ensure that businesses are respecting human rights and the environment, for example through their **procurement criteria**.

Ensure **trade defence instruments and screening of foreign direct investment (FDI)** encompass human rights considerations.

Ensure that the review of the **Generalised Scheme of Preferences (GSP)** rules contribute to improving the monitoring processes, enhance transparency and provide for a formal enforcement and compliance mechanism.

Ensure **EU development policy** aims to strengthen capacities to establish and effectively implement due diligence requirements, including through **donor funding for producer governments**, and to **NGOs, trade unions and other groups** to use due diligence legislation to hold companies to account.

Enhance the human rights protection, monitoring and enforcement, in free trade agreements (FTAs) and investment protection agreements (IPAs) having specific regard to State obligations to protect human rights including against irresponsible conduct of businesses, tools to ensure the investors respect human rights, enforcement mechanisms and access to remedy.

Introduce a hierarchy principle stipulating that nothing in FTAs and IPAs may prejudice effective implementation of international environmental, labour, and human rights agreements.

FTAs should contribute to **ensure that effective due diligence policies are implemented by businesses and that comparable legislation on due diligence and access to remedy is introduced in third countries.**

A comprehensive chapter on human rights should be inserted in Trade and Sustainable Development (TSD) chapters including clauses that reaffirm the obligations of States parties to protect human rights, as set in international law, and this including by regulating businesses and by providing effective access to remedy and justice.

TSD chapters should also include enforceable provisions requiring protection of forests and ecosystems, and making this a condition for market access.

TSD chapters should recognise the obligations of States and the responsibilities of corporations and investors under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, **requiring the provisions of the agreement to be read in consistency with these instruments.**

IPAs should foresee that the investor must respect international human rights standards and national law as far as in conformity with international human rights law for the full duration of the investment. Victims of human rights and environmental harm must have access to remedy.

Question 19: Enforcement of the due diligence duty

[OPTIONAL] 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:

Due diligence legislation should introduce a twofold enforcement regime:

- Legal liability at least for human rights and environmental harms that a business enterprise, or any company that they control or have the ability to control has caused or contributed to. 'Control' should be determined according to the factual circumstances. It may also result through the exercise of power in a business relationship. It may include a situation of economic dependence.
- Equally, grounds for liability must be established on the basis of failure to carry out adequate due diligence.

Due diligence should not automatically absolve a company (as implied in the first of the three options offered as a response to this question) from liability for causing, contributing to or failing to prevent human rights abuses or environmental harm.

Judicial enforcement of DD standards and adjudication following allegations of harm is essential for holding companies accountable and ensuring that victims including indigenous peoples, local communities and women have meaningful access to an effective remedy for these harms.

To ensure that victims have meaningful access to remedy, the burden of proof should be reversed in proceedings against business enterprises.

The limitation period for bringing legal actions must also be adapted to be reasonable and sufficient, taking into account the particularities of transnational litigation.

As a complement to judicial enforcement mechanism, competent national authorities (CAs) should be established in Member States. CAs should be empowered to perform a dual function of monitoring disclosure and DD performance, and initiating investigations where there is reason to believe that a company has breached its DD obligations. CAs should initiate investigations both on their own initiative and on the basis of complaints by affected parties. Organisations with a legitimate interest in representing victims should also have the right to submit complaints in the interest of those victims.

Breaches should give rise to administrative liability and CAs should be empowered to impose proportionate and dissuasive sanctions in such cases (infringements shall be subject to administrative fines at least up to 4% of the total worldwide annual turnover of the preceding financial year, as provided for data protection infringements in the GDPR). However, administrative liability, while a necessary complement, in no way substitutes for civil and criminal liability mechanisms.

CAs should be independent from government ministries, particularly those that promote business interests in order to ensure their impartiality and prevent conflicts of interest. CAs must also be adequately resourced through financial support and staff with appropriate training and expertise.

The legislation should also be accompanied by clear guidance. An EU-level body should be established with monitoring, advisory, coaching, capacity-building and standard-setting functions. This body should monitor CA performance to ensure consistent, robust practices across Member States. It should also support the greater harmonization of approaches, including through the development of standards and guidance for CAs to help them in their evaluation and investigation tasks, and of guidance for companies to conduct due diligence.

Any monitoring bodies established - judicial and non-judicial - should have clear mechanisms for stakeholders 'consultation and participation.

Finally, to safeguard opportunities for access to remedy for victims, any new enforcement and liability measures should be introduced without prejudice to other liability regimes which impose stricter or alternative grounds of liability.

[OPTIONAL] 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:

Victims of corporate abuse and environmental harm frequently face many obstacles (legal, procedural and practical) in attempting to hold European companies liable for the harm caused by their subsidiaries or supply chain partners located in a third country.

- The **Boliden case** is a good example of this. In the 1980s, Boliden paid Promel to export industrial waste to Chile, where Promel disposed of it without removing the arsenic. This caused awful health effects, including cancers and neurological disorders, for people living near the site. In 2013 victims took legal action against Boliden in the Swedish courts arguing that Boliden had breached a duty to ensure that the sludge was appropriately processed by Promel, but eventually lost their case. In March 2019, after the claimants appealed, the court decided to apply Swedish law and dismissed the appeal on the basis: that the claim for damages had been filed too late and the cause of action was time-barred. Boliden has not faced legal consequences for this negligence.
- The **KiK case** led to a similar outcome. On 11 September 2012, 258 workers died and hundreds were seriously injured when a fire broke out in the Ali Enterprise garment factory in Karachi, Pakistan. Due to lax fire safety measures, workers were at first unaware of and then trapped by the fire. At the time, the factory was producing jeans for its main client, German retailer KiK. Victims sought justice in the German courts, but Pakistani law applied, as this was where the harm occurred, and dismissed the action, deciding that according to Pakistani law, the statute of limitation (one year - an impossible period for normal torts, let alone transnational tort cases) had expired and the claimants were too late to seek justice.
- The **Shell case** is further proof of said obstacles. Shell is ravaging the Niger Delta through its decades-long quest for oil. Pollution caused by the activities of its subsidiary SPDC is having a devastating effect on both the ecosystem and people living in this area. Claimants faced many obstacles in holding SPDC liable before the Nigerian courts, linked to the under-development and reported lack of independence of the justice system. Victims then sued Shell before Dutch courts, but the district court rejected the claims on the grounds that there was no general duty of care on parent companies toward their subsidiaries. While the court of appeal stated that the existence of such duty of care could not be totally ruled out, victims still have not won justice. The absence of a clear legal duty of care, the concurrence of several parent companies and the difficulty in interpreting Nigerian law (applicable as per

Rome II) makes it unlikely to hold parent companies like Shell liable for the activities of their subsidiaries.

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

Barriers to justice have prevented victims, like those in the Boliden, KIK and Shell cases, from obtaining remedy.

EU laws and rules on jurisdiction should allow for the liability of parent and lead companies in the EU for harm caused by their subsidiaries or value chain partners located in a third country.

The obligations arising from the instrument on Sustainable Corporate Governance upon companies should be applicable in judicial proceedings, even in case the harm occurred in third states. The instrument should therefore be considered mandatory overriding.

Victims seeking justice have a limited ability to uncover the information that is necessary to establish a parent or lead company's liability. Victims should not have to take on the burden of proving the EU parent or lead company's alleged failure and its connection to the harm they suffered, but rather the EU parent or lead company should be required to prove it took all due care.

EU law currently dictates that cases must be considered under the law of the country where the damage occurred. In seeking the right to claim compensation, victims should be able to rely on EU law.

EU legislation should also provide for reasonable time limitations for bringing legal actions in order to allow foreign victims sufficient time to file a lawsuit in EU courts.

Finally, to safeguard opportunities for access to remedy for victims, any new enforcement and liability measures should be introduced without prejudice to other liability regimes which impose stricter or alternative grounds of liability.

Section IV: Other elements of sustainable corporate governance

Question 20: Stakeholder engagement

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

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

I strongly agree

I agree to some extent

I disagree to some extent

I strongly disagree

I do not know

I do not take position

Please explain.

Meaningful stakeholder engagement must in accordance with the FPIC (free prior and informed consent) principles be integral to the development and implementation of

- corporate strategies
- human rights due diligence processes, across all stages including identification and assessment of human rights risks, as well as determination of the appropriate actions and the monitoring and evaluation of their effectiveness;
- adequate systems for enabling access to information to remedy, providing remedy and compensating for loss and damages.

Stakeholder engagement allows businesses to understand perspectives of those who may be affected by their decisions and operations, and, in critical decisions, ensure that victims of human rights abuses have the decisive voice in determining the appropriate response of a company which has discovered that it has caused or contributed to, or its activities are directly linked to, human rights abuses.

The process of corporate strategy development should create clear opportunities for stakeholder engagement. This allows businesses to incorporate concerns and input from affected stakeholders into strategic planning and to improve performance on broader sustainability objectives.

Stakeholder engagement is critical for ensuring effective due diligence. **Companies should engage relevant stakeholders including particular vulnerable groups such as Ips in the development of and implementation of the due diligence.** Specifically, companies should be required to consult (potentially) affected stakeholders for the purpose of identifying and assessing human rights & environmental impacts. Effective identification of

and engagement with stakeholders better prepares businesses to avoid conflicts with local communities, and provide effective remedy for harms, when required.

To ensure that stakeholder engagement is meaningful, it must involve all relevant stakeholders. These should be identified through public outreach, impact assessments and direct engagement with local actors.

To reflect the ongoing and continuous nature of human rights due diligence, there should be multiple opportunities for engagement on an ongoing basis, especially with key stakeholder groups.

Ensuring adequate access to information is as well a key element of stakeholder engagement. Businesses should also make key information publicly accessible and reach out proactively with information whenever possible. This will facilitate information sharing and gathering a range of input and perspectives. This should be done freely and without threats of reprisals or harm. Information shared by the business should include its plans, details on how it is managing potential and actual negative impacts and reporting on the outcomes of its efforts.

Stakeholder engagement should provide affected - and potentially affected - groups with the opportunity to be actively involved in the design, implementation and evaluation of business projects and operations. It allows businesses to understand perspectives of those who may be affected by their decisions and activities and work towards the design of sustainable prevention and mitigation approaches. It also allows businesses to benefit from local knowledge and experience.

All mechanisms for stakeholder engagement must seek to address the power imbalance between the company and the affected persons or groups and between affected groups themselves.

Engagement processes should aim to understand how existing contexts and/or vulnerabilities may create disproportionate impacts for certain groups including indigenous peoples and communities, forest communities, coastal communities, lower-caste communities and other minority groups, migrant workers, homeworkers, temporary workers, women and children, among others. Special attention should also be paid to implementing a gender-based approach to ensure the safe and equal participation of women in decision-making processes.

Where indigenous peoples and communities may be affected, businesses must be required to respect their customary rights to land and natural resources, as well as other applicable rights such as the right to self-determination, and to ensure whether the state party in which the activity takes place fulfilled its duty and ensured international standards on principles of free, prior and informed consent (FPIC). FPIC requires that indigenous peoples and communities are given the opportunity to duly consider and approve or reject projects before they begin as well as during its execution. Companies should not undertake any project affecting lands customarily owned by indigenous peoples or other analogous communities with collective customary rights without such consent. Companies should also be required to publish their policy on indigenous peoples and other communities with customary tenure and natural resource rights, including the steps they take to ensure tenure rights are respected and their approach to FPIC.

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

All persons or groups that are affected and potentially affected stakeholders, in all stages of the due diligence process - from the identification of risks to determination of appropriate actions, to monitoring and evaluating the effectiveness of the company's actions to prevent, mitigate and remedy the impacts - should be represented.

This includes a range of persons and other actors who are credible proxies, such as: workers; employees' representatives; trade unions; NGOs and grassroot organisations; community members; indigenous and tribal peoples; affected local communities; forest communities; human rights, land and environmental defenders;

women and women’s organisations; community leaders; lower-caste representatives; migrant workers and representatives; faith-based organisations; and local authorities.

Relevant experts on human rights, environment, climate or other subject matter areas should form part of the stakeholder engagement process.

[OPTIONAL] 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="checkbox"/>	<input type="checkbox"/>
Stakeholder general meeting	<input type="checkbox"/>	<input type="checkbox"/>
Complaint mechanism as part of due diligence	<input type="checkbox"/>	X
Other, please specify	<input type="checkbox"/>	X

Other, please specify:

Employees should be represented in the Board of directors of large companies directly, and partake in all strategic decisions. Furthermore, **employees’ representatives should be engaged in the process of development and monitoring of the company’s sustainability strategy, including the due diligence process.** To this end, a company’s formal non-financial reporting should include a statement from the employees’ representatives on their engagement, and their views on the quality and implementation of the strategy, including the targets. This engagement is separate from the engagement of employees as affected stakeholders.

Engagement of affected stakeholders in the design and evaluation of due diligence remedial (rather than complaint) mechanisms is considered as good practice by international standards developed to support implementation of the corporate responsibility to respect human rights outlined in the UN Guiding Principles on Business and Human Rights.

In addition, **affected stakeholders should be engaged at all stages of the due diligence process**, as explained in the answers to the questions above. This concerns the identification and assessment of human rights risks, as well as determination of the appropriate actions and the monitoring and evaluation of their effectiveness. The remedy/complaint mechanism may be one of the appropriate actions, depending on the circumstances. Stakeholder advisory bodies or general meetings can be a good practice, in particular, operational contexts, but not necessarily in all situations.

The due diligence process should be used to identify risks in stakeholder engagement for certain groups, and identify additional measures required to mitigate these risks. Targeted meetings with specific groups of stakeholders may be appropriate to ensure meaningful engagement with those who are differently or disproportionately affected, or who may face barriers to involvement in other processes, for example women, people with disabilities, lower-caste communities, minorities and other groups potentially marginalised within the wider population. Where on-the-ground engagement is credibly unfeasible, for example due to severe limitations on freedoms and security risks, companies should ensure that the views of local stakeholders are meaningfully captured through credible representatives and consultations with experts. To be meaningful, engagement measures should be carried out in a manner appropriate to the context, for example by taking account of language, literacy levels, channels for communication, direct engagement with stakeholders, etc.

[OPTIONAL] Question 21: Remuneration of directors
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Current executive remuneration schemes, in particular share-based remuneration and variable performance criteria, promote focus on short-term financial value maximisation (Study on directors' duties and sustainable corporate governance).

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

This question is being asked in addition to questions 40 and 41 of the Consultation on the Renewed Sustainable Finance Strategy the answers to which the Commission is currently analysing.

Ranking 1-7 (1: least efficient, 7: most efficient)

Restricting executive directors' ability to sell the shares they receive as pay for a certain period (e.g. requiring shares to be held for a certain period after they were granted, after a share buy-back by the company)	2
Regulating the maximum percentage of share-based remuneration in the total remuneration of directors	3
Regulating or limiting possible types of variable remuneration of directors (e.g. only shares but not share options)	1
Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration	4
Mandatory proportion of variable remuneration linked to non-financial performance criteria	5
Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration	6
Taking into account workforce remuneration and related policies when setting director remuneration	7
Other option, please specify	
None of these options should be pursued, please explain	

Please explain:

CEO to worker wage gap, and its recent evolution, undermines social cohesion. A cap of 1:20, known as the Drucker principle, could have beneficial effects. It should also be noted that there is no empirical evidence that whenever and wherever this has been enacted (the French public sector is an example), it has had negative consequences on firms' performances.

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 (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 **set up a non-executive committee, composed of a combination of independent experts and top managers, chaired by a designated non-executive director, and tasked with monitoring and reviewing the content and implementation of the company's sustainability strategy.** The experts should have expertise relevant to the main sustainability challenges facing the company. The managers involved in the committee should include CEO and CFO.

The committee should transparently report on the matters discussed, and the recommendations.

The purpose of the committee would be to provide critical input for both the non-executive and executive directors' duty of care with respect to sustainability matters.

In addition, **the Board, as a collective organ, should have internal expertise on sustainability matters.** The number of directors and the types of the expertise should, however, be determined according to the nature and diversity of sustainability challenges facing the company, rather than the legislation. As part of their duty of care with regard to the oversight over the company's sustainability strategy and due diligence, as well as for the purpose of setting up and deciding on the composition of the sustainability committee (described above), the directors should evaluate the adequacy of their expertise.

There is also historical evidence that a lack of diversity in boards can have detrimental effects: it has been identified as a major reason for the inadequate actions of financial institutions that led to the financial crisis of 2008. Homogeneity fostered "group thinking" where risks were not identified and managed adequately by boards. Analysing root causes and regulatory failures, many actors from industry associations to trade unions identified the need for greater diversity, not just in terms of gender or race but also in terms of experience and backgrounds. This was even [acknowledged in a parliamentary hearing by the Association of Financial Mutuals](#). In this respect, [the Walker Review officially commissioned by the UK government pointed out](#) that "the pressure for conformity on boards can be strong, generating corresponding difficulty for an individual board member who wishes to challenge group thinking". Therefore, it is important to ensure that a significant share of board members have special expertise in social, environmental and human rights matters, including feminist and anti-racist approaches, in order to achieve real impact on companies' decisions.

Over ten years have passed since the crisis but diversity on boards as not reached adequate levels, neither in terms of background nor gender nor race nor expertise, although consensus on the urgency was high both in political and corporate circles. Voluntary approaches have failed. In order to avoid repeating the mistakes of the past, policy interventions are needed, requiring firms to increase diversity on boards in terms of gender, race, background and the above-mentioned fields of expertise, developing and implementing a clear strategy how they will achieve that in an effective way.

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. (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

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

N/A

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

If so, please specify:

As a major importer of deforestation the EU engaged to stepping up action to protect forests in supply chains of forest risk commodities. In this respect, in addition to the overall human rights and environmental due diligence legislation, the EU should adopt an ambitious due diligence regulation addressing forests and community and tenure rights specifically.

Employees' representatives and long-term committed shareholders should be given stronger rights in the decisions concerning the takeover bids.

Employees' representatives in large public companies should be given voting rights at the company's AGM.

Gender parity on boards needs to be mandated: efforts to reform corporate governance by the European Commission cannot be dissociated from the necessity to put an end to this long-standing imbalance. Quotas introduced in France in 2011 have proven to be effective.

Examine trade options to ban the import of goods produced through severe human rights abuses, including inter alia forced or child labour, in scenarios where such measures are considered to be in the interest of the affected workers and enable remediation for harm. Such trade options should be viewed as complementary to human rights due diligence and should not replace, or distract from, the responsibility over the buyers and importers of products to conduct due diligence to address risks and impacts - as would be imposed by the introduction of mandatory human rights and environmental due diligence legislation - working closely with suppliers to do so in contexts where this is credible and feasible, including to examine the impact of buyers' own purchasing practices on labour violations.

Generalising the banning and regulation of unfair trading practices, as well as taking additional steps to regulate purchasing practices of companies. The Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain could provide with a usefull starting point.

Ensure EU development policy complements the positive impact of human rights due diligence, including considering donor funding for producer governments to encourage improved implementation and respect of human and environmental rights, improved governance including transparency and securing land tenure and to NGOs, trade unions, indigenous peoples and other groups to use due diligence legislation to hold companies to account, including the development of grassroots and worker-driven models.

Include human rights and environmental due diligence requirements in EU public procurement, funding and credit systems. Companies failing to respect their due diligence obligations should be excluded from accessing such schemes.

Section V: Impacts of possible measures

[OPTIONAL] 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.

	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).

Incorporating a mandatory duty of care and due diligence duty would have considerable potential positive effects. These include:

- Reductions in harassment, threatening and killing of human rights, land and environmental defenders by holding companies accountable for the harms they caused or contributed to or are linked to, thus fighting impunity at local and international level.

- Creation of long-term and trust relationships through the use of meaningful stakeholder engagement processes and specific risk assessment and response methodologies. These should both form part of due diligence processes.
- Safer and more decent working conditions for supply chain workers including those in non-EU countries including health and safety, living wages and decent terms of employment. In particular, due diligence would require companies to respond to sector specific risks such as heavy use of toxic chemicals or dangerous working sites and risks facing vulnerable groups, such as migrant workers, lower-caste workers, homeworkers, temporary workers, illiterate workers, children and women.
- Reductions in incidents of labour exploitation, worker-paid recruitment fees, debt bondage, human trafficking, other forms of forced labour, and child labour. Targeted interventions as part of due diligence to increase capacity and awareness along supply chains will improve respect for international human and labour rights standards and address root causes in affected communities (including poverty, gender and caste-discrimination and lack of education). Further, the due diligence process will drive companies to identify and address the impact of their own business models and practices - such as purchasing practices, short-lead times, unregulated subcontracting, and restrictions on freedom of association- in driving or enable negative impacts on human rights and the environment.
- Reductions in land grabs and violation of the customary and other land rights of indigenous peoples and local communities in host countries, through recognition and respect for collective customary land rights collective and other legitimate tenure rights, including applying the principle of free prior and informed consent.
- Improvements in environmental impact of business operations including inter alia through the reduction of deforestation, use of pollutants and emission of greenhouse gases. This will follow assessments and action on the company's environmental and climate-related risks and impacts. Optimisation should include transitions to cleaner forms of energy, more sustainable materials, circular economy models and responsible waste disposal.

There is evidence of targeted action by businesses on each of these issues leading to some improvement in living and working conditions on the ground. Adherence to proposed due diligence requirements would have strong positive impacts on a range of stakeholders. These include workers in business operations and value chains, local communities in operating countries and human rights, land and environmental defenders. Such positive impacts would drive progress towards the achievement of the Sustainable Development Goals, including SDG 8.7 on Decent Work - progress on which has been severely threatened due to the impacts of Covid-19. It would also have a strong positive effect on the environment and climate at a time when urgent action is needed from all actors, including companies. The Commission is therefore urged to implement a strong due diligence duty to apply to companies across all sectors, in respect of negative human rights and environmental impacts.