

Consultation Document Proposal for an Initiative on Sustainable Corporate Governance

Fields marked with * are mandatory.

Disclaimer

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

The views reflected on this consultation paper provide an indication on the approach the Commission services may take but do not constitute a final policy position or a formal proposal by the European Commission.

Please note that in order to ensure a fair and transparent consultation process only responses received through the online questionnaire will be taken into account and included in the report summarising the responses.

Introduction

Political context

The Commission's political guidelines set the ambition of Europe becoming the world's first climate-neutral continent by 2050 and foresee strong focus on delivering on the UN Sustainable Development Goals[1], which requires changing the way in which we produce and consume. Building on the political guidelines, in its Communication on the European Green Deal[2] (adopted in December 2019) and on A Strong Social Europe for Just Transition[3] (adopted in January 2020) the Commission committed to tackling climate and environmental-related challenges and set the ambition to upgrade Europe's social market economy.

The European Green Deal sets out that "sustainability should be further embedded into the corporate governance framework, as many companies still focus too much on short-term financial performance compared to their long-term development and sustainability aspects."

Sustainability in corporate governance encompasses encouraging businesses to frame decisions in terms of their environmental (including climate, biodiversity), social, human and economic impact, as well as in terms of the company's development in the longer term (beyond 3-5 years), rather than focusing on short-term gains.

As a follow-up to the European Green Deal, the Commission has announced a sustainable corporate governance initiative for 2021, and the initiative was listed among the deliverables of the Action Plan on a Circular Economy[4], the Biodiversity strategy[5] and the Farm to Fork strategy[6]. This initiative would build on the results of the analytical and consultative work carried out under Action 10 of the Commission's 2018 Action Plan on Financing Sustainable Growth and would also be part of the Renewed Sustainable Finance

Strategy.

The recent Communication “Europe's moment: Repair and Prepare for the Next Generation” (Recovery Plan)^[7] (adopted in May 2020) also confirms the Commission’s intention to put forward such an initiative with the objective to “ensure environmental and social interests are fully embedded into business strategies”. This stands in the context of competitive sustainability contributing to the COVID-19 recovery and to the long-term development of companies. Relevant objectives are strengthening corporate resilience, improving predictability and management of risks, dependencies and disruptions including in the supply chains, with the ultimate aim for the EU economy to build back stronger.

This initiative is listed in the Commission Work program for 2021 ^[8].

EU action in the area of sustainable corporate governance will complement the objectives of the upcoming Action Plan for the implementation of the European Pillar of Social Rights, to ensure that the transitions towards climate-neutrality and digitalisation are socially sustainable. It will also strengthen the EU’s voice at the global scene and would contribute to the respect of human rights, including labour rights– and corporate social responsibility criteria throughout the value chains of European companies – an objective identified in the joint Communication of the Commission and the High Representative on the Global EU response to COVID-19^[9].

This initiative is complementary to the review of the Non-Financial Reporting Directive (NFRD, Directive 2014/95/EU^[10]) which currently requires large public-interest companies to disclose to the public certain information on how they are affected by non-financial issues, as well as on the company’s own impacts on society and the environment. The NFRD also requires companies to report on their social and environmental policies and due diligence processes if they have them, or otherwise explain why they do not have any (comply or explain approach). Whilst the NFRD is based on incentives “to report”, the sustainable corporate governance initiative aims to introduce duties “to do”. Such concrete actions would therefore contribute to avoiding “greenwashing” and reaching the objectives of the on-going review of the NFRD too, in particular the aim of enhancing the reliability of information disclosed under the NFRD by ensuring that the reporting obligation is underpinned by adequate corporate and director duties, and the aim of mitigating systemic risks in the financial sector. Reporting to the public on the application of sustainability in corporate governance and on the fulfilment of directors’ and corporate duties would enable stakeholders to monitor compliance with these duties, thereby helping ensure that companies are accountable for how they mitigate their adverse environmental and social impacts.

The initiative would build upon relevant international standards on business and human rights and responsible business conduct, such as the United Nations’ Guiding Principles on Businesses and Human Rights and the OECD Guidelines for Multinational Enterprises and its Due Diligence Guidance for Responsible Business Conduct.

As regards environmental harm linked to deforestation, the Commission is also conducting a fitness check of the EU Timber Regulation and an impact assessment.

Finally, Covid-19 has put small and medium sized companies under financial pressure, partly due to increased delay in the payments from their larger clients. This raises the importance of the role of board members of companies to duly take into account the interests of employees, including those in the supply chains as well as the interests of persons and suppliers affected by their operations. Further support

measures for SMEs also require careful consideration.

Results of two studies conducted for the Commission

To integrate properly sustainability within corporate strategies and decisions, the High-Level Expert Group on Sustainable Finance^[11] recommended in 2018 that the EU clarifies corporate board members' duties so that stakeholder interests are properly considered. Furthermore, they recommended for the EU to require that directors adopt a sustainability strategy with proper targets, have sufficient expertise in sustainability, and to improve regulation on remuneration.

In its 2018 Action Plan on Financing Sustainable Growth^[12] the Commission announced that it would carry out analytical and consultative work on the possible need to legislate in this area.

The Commission has been looking at further obstacles that hinder the transition to an environmentally and socially sustainable economy, and at the possible root causes thereof in corporate governance regulation and practices. As part of this work, two studies have been conducted which show market failures and favour acting at the EU level.

The *study on directors' duties and sustainable corporate governance* ^[13] evidences that there is a trend in the last 30 years for listed companies within the EU to focus on short-term benefits of shareholders rather than on the long-term interests of the company. Data indicate an upward trend in shareholder pay-outs, which increased from 20% to 60% of net income while the ratio of investment (capital expenditure) and R&D spending to net income has declined by 45% and 38% respectively. The study argues that sustainability is too often overlooked by short-term financial motives and that to some extent, corporate short-termism finds its root causes in regulatory frameworks and market practices. Against these findings, the study argues that EU policy intervention is required to lengthen the time horizon in corporate decision-making and promote a corporate governance more conducive to sustainability. To achieve this, it spells out three specific objectives of any future EU intervention: strengthening the role of directors in pursuing their company's long-term interest by dispelling current misconceptions in relation to their duties, which lead them to prioritise short-term financial performance over the long-term interest of the company; improving directors' accountability towards integrating sustainability into corporate strategy and decision-making; and promoting corporate governance practices that contribute to company sustainability, by addressing relevant unfavourable practices (e.g. in the area of board remuneration, board composition, stakeholder involvement).

The *study on due diligence requirements through the supply chain*^[14] focuses on due diligence processes to address adverse sustainability impacts, such as climate change, environmental, human rights (including labour rights) harm in companies' own operations and in their value chain, by identifying and preventing relevant risks and mitigating negative impacts. The study shows that in a large sample of mostly big companies participating in the study survey, only one in three businesses claim to undertake due diligence which takes into account all human rights and environmental impacts. Therefore voluntary initiatives, even when backed by transparency do not sufficiently incentivise good practice. The study shows wide stakeholder support, including from frontrunner businesses, for mandatory EU due diligence. 70% of businesses responding to the survey conducted for the study agreed that EU regulation might provide benefits for business, including legal certainty, level playing field and protection in case of litigation. The study shows that a number of EU Member States have adopted legislation or are considering action in this field. A potential patchwork of national legislation may jeopardise the single market and increase costs for

businesses. A cross-sectoral regulatory measure, at EU level, was preferred to sector specific frameworks.

Objectives of this public consultation

This public consultation aims to collect the views of stakeholders with regard to a possible Sustainable Corporate Governance Initiative. It builds on data collected in particular in the two studies mentioned above and on their conclusions, as well as on the feedback received in the public consultation on the Renewed Sustainable Finance Strategy[15]. It includes questions to allow the widest possible range of stakeholders to provide their views on relevant aspects of sustainable corporate governance.

About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* Surname

Clauwaert

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Stefan

* Email (this won't be published)

sclauwaert@etuc.org

* Organisation name

255 character(s) maximum

European Trade Union Confederation (ETUC)

* Organisation size

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

Transparency register number

255 character(s) maximum

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

06698681039-26

* Country of origin

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

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Democratic
Republic of the
Congo

Denmark

Liberia

Saint Kitts and
Nevis

Saint Lucia

* Publication privacy settings

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

Anonymous

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

Public

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

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

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

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

Consultation questions

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

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

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

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

- Yes, both in and outside the EU
- No

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

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

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

- Yes
- No

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

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

- Yes
- No

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

- Yes
- No

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

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

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

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

Please provide reasons for your answer:

Any initiative should establish ambitious due diligence obligations for companies in line with the high social and environmental standards and objectives of the European Union, as well as with the aim to promote and ensure sustainable development and social dialogue. It should focus on effective prevention of human rights violations and negative impacts of business operations, including global operations of companies established or operating in the EU, and on effective controls, sanctions and remedies. Any initiative should build upon and include the most ambitious elements of the different international instruments and standards, as well as effective solutions developed in EU legislative instruments and national frameworks.

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:

Currently there are no general, overarching and binding obligations at EU level for companies to comply with due diligence mechanisms for their activities and their supply and subcontracting chains (and other business relationships). Only very limited instruments encourage them to do so. As it stands, the current legal framework does not prevent violations of human rights.

The reliance on a voluntary framework to promote business respect for human rights has furthermore proven insufficient and ineffective for workers, society and businesses. National action plans on business and human rights for responsible business conduct which implement OECD guidelines on multinationals and OECD guidance for business conducts reveal the limits of the voluntary approach (see e.g. Adelphi, System, focus right and EY (2020), Monitoring des Umsetzungsstandes der im Nationalen Aktionsplan Wirtschaft und Menschenrechte 2016–2020 beschriebenen menschenrechtlichen Sorgfaltspflicht von Unternehmen Abschlussbericht). This leads to a patchwork of measures that do not provide for legal certainty and legal predictability. It prevents Member States and public institutions, citizens and workers, and businesses to rely on a robust due diligence framework. The unbalanced and piecemeal take-up of voluntary schemes creates unfair competition at European and global level. The current framework leads to a race to the bottom in terms of human rights and environmental and social standards. It raises public expectations without providing the enabling framework for proper enforcement. Furthermore, it provides no stable grounds for investors to evaluate and to compare companies' sustainability and due diligence processes.

There is a clear need to remedy the absence of legally binding obligations upon businesses to comply with human rights and to overcome the lack of effective oversight and means to properly enforce measures to be implemented by companies in this area.

So, companies must be obliged to respect human rights and the environment, in their own operations, subsidiaries and global value chain, including supply and subcontracting chains. The respect of due diligence process should also be a criterion for investments. This is the reason why the EU needs to table an EU binding legislation on corporate due diligence. In particular:

- Companies must comply with human rights, including trade union and labour rights, and environmental due diligence obligations.
- Due diligence processes must ensure respect for human rights, which include workers' and trade union rights, including for example Freedom of Association and Collective Bargaining.

The EU should also engage constructively in the negotiations for an ambitious UN Treaty on Business and Human Rights.

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

- Ensuring that the company is aware of its adverse human rights, social and environmental impacts and risks related to human rights violations other social issues and the environment and that it is in a better position to mitigate these risks and impacts



Contribute effectively to a more sustainable development, including in non-EU countries

- Levelling the playing field, avoiding that some companies freeride on the efforts of others
- Increasing legal certainty about how companies should tackle their impacts, including in their value chain
- A non-negotiable standard would help companies increase their leverage in the value chain
- Harmonisation to avoid fragmentation in the EU, as emerging national laws are different
- SMEs would have better chances to be part of EU supply chains
- Other

Other, please specify:

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

Involvement of trade unions' and workers representatives, via negotiation, information, consultation and participation) in the whole due diligence process contributes to the promotion of the social dialogue and democracy at work which are enshrined by the international and European (human rights) standards.

Moreover, trade unions are best placed to identify the social risks since they have a specific expertise of the company, a specific overview of the sectors/geographical areas and they have good knowledge of the global supply chain via their TU transnational network. In particular:

- Trade unions should have the right to negotiate with the company the due diligence process at the different levels.
- Workers' representatives should be informed and consulted in the different steps of the due diligence process.
- Early alert mechanisms should be developed in partnership with the trade union in the companies concerned.
- Stakeholders should be informed, consulted and involved as well in the due diligence process.
- Due diligence processes must ensure respect for indigenous peoples' and local communities' rights (in particular the right to Free, Prior and Informed Consent).

Question 3a. Drawbacks

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

- Increased administrative costs and procedural burden
- Penalisation of smaller companies with fewer resources

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

Other, please specify:

None of the above.

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

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

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

	Relevant	Not relevant	I do not know/I do not take position
the interests of shareholders	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees in the company's supply chain	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of customers	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of persons and communities affected by the operations of the company	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of persons and communities affected by the company's supply chain	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of local and global natural environment, including climate	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

the likely consequences of any decision in the long term (beyond 3-5 years)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of society, please specify	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
other interests, please specify	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

the interests of society, please specify:

The interest of "local authorities" (collectivités territoriales) e.g. in January 2020 the mayors of 14 cities (and NGOs) sued Total before the judge for failing to comply with its duty of vigilance. They claimed for Total to be ordered "to take the necessary measures to drastically reduce its greenhouse gas emissions, in accordance with the requirements of the French Duty of vigilance Law of 27 March 2017.

other interests, please specify:

Company stakeholders should always include trade unions / worker's representatives. Some companies sometimes would rather discuss these issues with NGOs than with trade unions and the importance of trade unions should not be undermined.

Consumers can be stimulated to "violation free" products and products that have been produced with full respect of human rights.

Question 6. Do you consider that corporate directors should be required by law to (1) identify the company's stakeholders and their interests, (2) to manage the risks for the company in relation to stakeholders and their interests, including on the long run (3) and to identify the opportunities arising from promoting stakeholders' interests?

	I strongly agree	I agree to some extent	I disagree to some extent	I strongly disagree	I do not know	I do not take position
Identification of the company's stakeholders and their interests	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Management of the risks for the company in relation to stakeholders and their interests, including on the long run	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Identification of the opportunities arising from promoting stakeholders' interests	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please explain:

Corporate law and corporate governance must be aligned with the company's contribution to the achievement of the Sustainability Goals 2030 (SDG) and climate agreements (Paris agreement).

The rights of shareholders have been strengthened with regard to remuneration policy by the Shareholders Rights Directive II. Likewise, it is important to also strengthen the information and consultation rights (e.g. (European) works council rights) for trade union and workers' representatives..

As a constituent part of the company, trade unions and workers' representatives have a specific interest and a specific role to play. Indeed, they have a specific expertise of the company, a specific overview of the sector and geographical areas where subsidiaries are established and they can have good knowledge of the global supply chain on the basis of their trade union transnational networks.

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

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

Please explain:

The ETUC is of the opinion that a EU mandatory framework should include a set of obligations, in particular:

a) Companies should map, identify and assess actual and potential adverse impacts of their operations – including both their activities and their business relationships, their purchasing practices (in particular along the whole supply and subcontracting chains) – on the above-mentioned areas. The assessment should take into consideration the protection of workers as well as all the areas of business activities and be based on an evaluation of at least the sectoral, geographic, product, service and enterprise-based risk factors.

b) Companies should act upon the findings. They should cease any operations, including in their business relationships, which are causing or contributing to adverse impacts that cannot be prevented. Companies should develop, publish and implement a due diligence plan to prevent any potential risks and the materialisation of negative impacts or violation of human rights in their activities and business relationships (in their whole supply and subcontracting chains) but also to ensure proper monitoring and control. The plan should include concrete actions and follow-ups with specific objectives and timetables. It should provide for procedures to regularly assess the situation of companies whose operations are linked with the main company because of its business relationship. The directive should contain provisions that encourages high-level corporate responsibility, including directors' liability, for addressing the identified actual and potential violations and negative impacts through the due diligence plan. Companies should ensure adequate budget allocations and oversight to guarantee the implementation of the plan and the respect and enforcement of their obligations.

c) The directive should require companies to verify effective and transparent tracking and monitoring of the implementation of their due diligence plans. Such verification should be based on qualitative and quantitative indicators and internal and external feedbacks. Companies should provide an assessment of the effectiveness of the due diligence plans, including their implementation, the actions undertaken and any negative impacts which have materialised, and periodically review them based on the findings. This assessment should be provided to the public authority responsible for monitoring the respect of the directive's obligations for an objective oversight of the quality of the assessment.

d) Due diligence plans should include the establishment of an early alert mechanism to collect reports of existing and potential human rights, including trade union and labour rights, and social and environmental standards violations and negative impacts about the abovementioned matters, as well as for any violation of the due diligence obligations and plan.

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

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

Last but not least, companies should recognize and respect the importance of negotiations with trade unions on this topic as well as the involvement of workers' representatives at every stage of the process through information and consultation.

Question 8. Do you believe that corporate directors should balance the interests of all stakeholders, instead of focusing on the short-term financial interests of shareholders, and that this should be clarified in legislation as part of directors' duty of care?

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

Please provide an explanation or comment:

Companies are dependent on and cannot function without workers and the communities they are located in. Workers are not simply 'factors of production' that are hired per contract, rather they make firm-specific

investments in skills, help companies innovate and improve production processes and make sacrifices when times are tough. Communities provide infrastructure and a skilled workforce. Workers and communities are dependent upon the long-term survival of companies; the loss of jobs and tax revenue that frequently occurs when companies are taken over or reorganized can be devastating for workers and their communities. Numerous studies demonstrate that companies sacrifice long-term investments in order to fulfill short-term demands and expectations from short-term oriented investors.

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

Question 9. Which risks do you see, if any, should the directors' duty of care be spelled out in law as described in question 8?

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

How could these possible risks be mitigated? Please explain.

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

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

A considerable body of research on Board-Level Employee Representation (BLER) shows that the integration of workers' interests in corporate governance does not have an overall negative impact on share value and has positive effects on both operative and sustainability performance. Scholz/Vitols (2019) (<https://journals.sagepub.com/doi/10.1177/0959680119830566>) review the literature on German co-determination and show that companies with co-determination have better sustainability practices.

A study by Rapp/Wolff (2019) (https://www.boeckler.de/pdf/p_study_hbs_424.pdf) shows that the share price of co-determined companies in Germany was less volatile during and that the investment rates of these companies recovered more quickly after the financial crisis of 2008/9 than was the case for companies without co-determination.

Various years of ETUC/ETUI's annual Benchmarking Working Europe (<https://www.etui.org/publications/benchmarking-working-europe-2020>) reports on research by the European Trade Union Institute, which shows that European companies with workers in the board have better performance along a range of sustainability indicators, including not only 'people' but also 'planet' (i.e. environmental) dimensions. Companies with co-determination are also less likely to follow 'aggressive' tax practices than companies without co-determination (Eulerich/Fligge 2020) (https://www.boeckler.de/pdf/p_mbf_report_2020_62.pdf). See also Waddington, J. and Cochon (2015) A. Board Level Employee Representation in Europe. Priorities, Power and Articulation (<https://www.etui.org/publications/books/board-level-employee-representation-in->

europe).

According to the report of the Impact Committee in charge of the evaluation of the PACTE law (French Law for growth and transformation of companies on 22 May 2019), several academic studies tend to show that the presence of employees in the board actually improves the performance of the company. Reference can also be made to reports on quality of working life, e.g. La qualité de vie au travail: un levier de compétitivité, Émilie Bourdu, Marie-Madeleine Péretié, which also shows that a quality workplace enhances productivity.

Question 10. As companies often do not have a strategic orientation on sustainability risks, impacts and opportunities, as referred to in question 6 and 7, do you believe that such considerations should be integrated into the company's strategy, decisions and oversight within the company?

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

Please explain:

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

Enforcement of directors' duty of care

Today, enforcement of directors' duty of care is largely limited to possible intervention by the board of directors, the supervisory board (where such a separate board exists) and the general meeting of shareholders. This has arguably contributed to a narrow understanding of the duty of care according to which directors are required to act predominantly in the short-term financial interests of shareholders. In addition, currently, action to enforce directors' duties is rare in all Member States.

Question 11. Are you aware of cases where certain stakeholders or groups (such as shareholders representing a certain percentage of voting rights, employees, civil

society organisations or others) acted to enforce the directors' duty of care on behalf of the company? How many cases? In which Member States? Which stakeholders? What was the outcome?

Please describe examples:

ETUC is aware about 3 cases involving trade unions:

- Total Ouganda vs. Amis de la Terre, Survie and others : the CFDT intervened on appeal to support the NGOs claim to recognize the competence of the civil tribunal in the context of litigation concerning the elaboration of the vigilance plan and its implementation (that is to say where no harms occur). In first instance, the "tribunal judiciaire" (which is the common tribunal) ruled it has no competence to deal with this case, sending the case to the commercial Tribunal (where no professional judges sit but peers from companies or merchants). Whereas when a harm occurs, the "tribunal judiciaire" has jurisdiction. The case is now going to the highest civil court (Cour de cassation) because the Court of appeal confirmed the judgment of first instance.
- Teleperformance vs. Sherpa, UniGlobalUnion: Despite numerous alerts from UNI Global Union, Teleperformance did not publish a vigilance plan in its annual report in 2018 and merely published a two-page plan in 2019, without even involving the trade unions. No effort has been made to identify and prevent the risks of violations of workers' rights in its subsidiaries abroad. On the basis of the French Duty of vigilance Law, UNI has given notice Teleperformance to comply with its obligations in July 2019.
- XPO Logistics vs. ITF : ITF, ETF, and several national trade unions (such as French TU like CFDT and CGT) haven't given notice XPO Logistics Europe to comply with its obligations set by the French Duty of vigilance Law in October 2019. Indeed, the vigilance plan of the European subsidiary is incomplete and does not reflect the real situation of outsourced workers. Moreover, no Trade union has been involved in the process.

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:

- Total Ouganda vs. Amis de la Terre, Survie and others : In first instance, the "tribunal judiciaire" (which is the common tribunal) ruled it has no competence to deal with this case, sending the case to the commercial Tribunal (where no professional judges sit but peers from companies or merchants). Whereas when a harm occurs, the "tribunal judiciaire" has jurisdiction. The case is now going to the highest civil court (Cour de cassation) because the Court of appeal confirmed the judgment of first instance.
- For Teleperformance and XPO Logistics case, companies are still in breach of the French law.

Question 13. Do you consider that stakeholders, such as for example employees, the environment or people affected by the operations of the company as represented by civil society organisations should be given a role in the enforcement of directors' duty of care?

- I strongly agree
- I agree to some extent
- I disagree to some extent
-

- I strongly disagree
- I do not know
- I do not take position

Please explain your answer:

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

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

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

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

f) Social dialogue practices, and trade union rights, notably the right to organise, to bargain collectively and the right to strike, must be protected and enforced also in the supply chain or subcontracting chains, including for non-standard employment relations.

Section III: Due diligence duty

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

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

Yes, ETUC agrees with this definition (even if many elements are missing). This definition coincides very well with the personal and material scope the EU initiative should cover and which is also based on and in line with the relevant international and European human rights and DD instruments.

Adequate process/vigilance plans should not only be established and implemented but they also need to be published. This is of outmost importance to make stakeholders aware of it and to make them involved in the process/monitoring.

However, it is worth stressing the definition should align its wording with international due diligence standards. Prior to ceasing, preventing, mitigating and accounting for human rights, health and environmental impacts, companies should first be obliged to effectively identify and assess any actual or potential adverse human rights, social, health and environmental impacts.

Furthermore, the “due diligence duty” should include a remediation duty, that is, the obligation to actively engage in the remediation of adverse impacts where companies cause or contribute to harm by way of actions or omissions, or, where a company has not caused or contributed to the harm but its operations, products or services are directly linked to it, the obligation to exercise or increase its leverage over those responsible to help ensure that remediation is provided.

Moreover, the “due diligence duty” should cover the company’s global value chain, which includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the company’s own products or services, or (b) receive products or services from the company. It should also include for instance investors. Supply chains and value chains are similar terms that refer to the entire production chain. However, while “supply chain” may be used to specifically refer to the production and distribution of a commodity, “value chain” includes the whole set of interrelated activities by which a company adds value to an article.

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

- Option 1. “Principles-based approach”: A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These should be applicable across all sectors. This could be complemented by EU-level general or sector specific guidance or rules, where necessary
- Option 2. “Minimum process and definitions approach”: The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.
- Option 3. “Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues”. This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate

neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.

- Option 4 “Sector-specific approach”: The EU should continue focusing on adopting due diligence requirements for key sectors only.
- Option 5 "Thematic approach": The EU should focus on certain key themes only, such as for example slavery or child labour.
- None of the above, please specify

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

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

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

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

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

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

authorities when determining liability. Existing international due diligence standards already constitute a useful reference in this regard.

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

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

Other, please specify:

The material scope of the EU directive should cover all human rights, including workers' and trade union rights. This includes, amongst others, freedom of association and the right to collective bargaining and collective action, information, consultation and board-level representation rights, decent working conditions, occupational health and safety, fair wages, social security coverage, etc.
Due diligence obligations should also cover social, health and environmental impacts, as well as anti-corruption, corporate governance and tax matters.

Question 15d: If you ticked option 2) in Question 15 and with a view to creating legal certainty, clarity and ensuring a level playing field, what definitions regarding adverse impacts should be set at EU level?

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

The Company Law must be changed together with other legislations to ensure more economic democracy at work and more social rights in the single market (industrial democracy). Participation rights must be

properly enforced, with dissuasive penalties for non-compliance, like the enforcement of the competition rules.

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

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

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

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

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

Please explain your choice, if necessary

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

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

- Yes
- No
- I do not know

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

Third country companies placing products on or/and providing services within the EU internal market should be subject to the same obligations as companies established in the EU, as it for instance already the case for different EU secondly laws, such as the GDPR, which apply also to third country companies.

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

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

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

- Yes
- No
- I do not know

Please explain:

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

To create a level playing field globally, the EU should also engage constructively in negotiations for an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises. This treaty should include enhanced provisions on access to justice for victims in third countries, including on jurisdiction, applicable law, rights of victims and liability.

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

Due diligence alone is not enough to ensure respect of labour rights in third countries. EU trade agreements should include binding and enforceable labour clauses with the possibility to impose sanctions where violations are demonstrated. Violations of labour rights covered by an agreement must be open to prosecution under its dispute procedure irrespective of whether they are directly related to commercial exchanges.

Public procurement and public funding in the EU should be available to companies from third countries only in case they apply due diligence requirements comparable to those established in a directive. This should lead to guaranteeing labour protections with a zero-tolerance approach to violation of workers and trade unions rights.

Question 19: Enforcement of the due diligence duty

Question 19a: If a mandatory due diligence duty is to be introduced, it should be accompanied by an enforcement mechanism to make it effective. In your view, which of the following mechanisms would be the most appropriate one(s) to enforce the possible obligation (tick the box, multiple choice)?

- Judicial enforcement with liability and compensation in case of harm caused by not fulfilling the due diligence obligations
- Supervision by competent national authorities based on complaints (and/or reporting, where relevant) about non-compliance with setting up and implementing due diligence measures, etc. with effective sanctions (such as for example fines)
- Supervision by competent national authorities (option 2) with a mechanism of EU cooperation/coordination to ensure consistency throughout the EU
- Other, please specify

Please provide explanation:

For ETUC, access to justice and liability, in case of violations of human rights, including trade union and labour rights and social and environmental standards violations as well as of negative impacts of companies' operations, effective remedies should be available for victims, including trade unions and other interested third parties. Considering the challenges and obstacles that victims often face in the access to justice in third

countries where European companies' operations take place, the possibility of access to justice in the Member State where the company is established (or where it is conducts business activities) should be ensured. It should therefore be possible to submit claims against companies which are established or conduct activities or have otherwise a link with a Member State in that Member State' jurisdiction. This possibility is already foreseen by the French corporate duty of vigilance law of 27 March 2017. A specific liability framework, including – where appropriate depending on the legal system and the violation – criminal liability, must be introduced for cases where companies fail to respect their due diligence obligations to their fullest extent and human rights, social and environmental standards violations or adverse impacts of companies' operations occur, including in their supply and subcontracting chains. The burden of proof regarding the full respect of companies' obligations and the link with the damages occurred shall rest with the company and not with the victims. Measures to facilitate access to justice for victims should include appropriate support schemes. Interim proceedings should allow the halting of operations violating human rights, social and environmental standards. The trade unions should be allowed to represent the victims. Furthermore, public monitoring will indeed be necessary. Member states should ensure that one or more national public authorities (including for example labour inspectorate or health and safety inspectorate) have the responsibility to monitor the respect of companies' obligations included in the directive. The authority shall have the necessary resources and expertise to carry out controls, also ex officio and checks based on risk assessments, information received from whistle-blowers and complaints. It should work in close cooperation with and ensure the active participation of social partners. This national authority should involve trade unions and could be shaped for example as the French NCPs (and other NCPs), which are tripartite. The European Labour Authority shall facilitate and enhance cooperation between the member states when it comes to the enforcement of due diligence. OECD contact points should play a role as well in case companies do not respect their obligations. In addition, in sectors of high human risk violation, industry-specific solutions could be developed in cooperation with trade unions.

And finally, the EU directive should establish proportionate, effective and dissuasive sanctions for any violations by companies of their obligations. Sanctions should include exclusion from public procurement and public funding, as well as financial sanctions in proportion with companies' turnover and remediation. Member States should introduce positive incentives to promote an ambitious approach by companies towards sustainable economic operations, including in their supply and subcontracting chains.

In particular, EU legislation must ensure that 1) EU companies are liable for harms committed at home or abroad in their direct operations or by operations in their global value chains, 2) liability is imposed for harms caused or contributed to by EU companies in their global value chains, as well as for failure to conduct adequate due diligence and 3) there is no impact on other subcontracting and supply chain liability frameworks established at national, European and international level (e.g. joint and several liability in subcontracting chains).

Governments must set up robust enforcement mechanisms, with effective administrative sanctions, and competent authorities must have the mandate to investigate potential infringements and impose sufficiently dissuasive and proportional sanctions on them.

Victims of corporate abuses must have access to courts - in their own country and in the country where the parent or lead company is based or operates. In particular, the EU law should 1) allow victims from third countries to choose whether to use the law of the home or host state when bringing a case against a company, 2) put an end to placing the burden on victims and require companies to disclose any relevant evidence lying in their control, 3) ensure that victims have enough time to bring claims for damages before EU courts, and 4) ensure that trade unions and NGOs can bring collective actions on behalf of victims.

Question 19b: In case you have experience with cases or Court proceedings in which the liability of a European company was at stake with respect to human

rights or environmental harm caused by its subsidiary or supply chain partner located in a third country, did you encounter or do you have information about difficulties to get access to remedy that have arisen?

- Yes
- No

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

Victims of corporate abuse 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 the court decided to apply Pakistani law, as this was where the harm occurred, and dismissed the action, deciding that according to Pakistani law the statute of limitation 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. Victims of Shell's irresponsible business conduct sued the company before Dutch courts, but claimants have faced endless legal barriers, challenges and uncertainty. They still have not won justice. The story has exposed the weakness of current EU law in allowing victims of corporate harm effective access to remedy and justice. In current law, parent companies like Shell are unlikely to be held 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, without prejudice to other liability frameworks for supply or subcontracting chains.

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. Reference could be made to the Rome II Regulation (Regulation No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations) determines the law applicable to the dispute according to the nature of the damage. In the case of environmental damage, Article 7 of this Rome II Regulation leaves an option to the victim, who can choose between the law of the country in which the damage occurs and the law of the event giving rise to the damage occurred. Such a solution should therefore be extended to the due diligence obligations.

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.

EU legislation should also provide that victims have the right to make collective complaints and that workers as victims are able to be represented by a trade union. By obliging companies to have transparency throughout the chain, it will also be easier for victims to claim compensation for damage produced elsewhere in the value chain.

Section IV: Other elements of sustainable corporate governance

Question 20: Stakeholder engagement

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

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

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

Please explain.

As mentioned above, there is extensive research (<https://www.mitbestimmung.de/html/mbix-120.html>) showing that companies with worker representatives in the board have better performance along a range of sustainability dimensions (workforce skills and development, diversity, environment, etc.). Research by the European Trade Union Institute also shows that companies with European Works Councils also have better sustainability performance (Benchmarking Working Europe 2016, <https://www.etui.org/publications/books/benchmarking-working-europe-2016>). Finally, countries with higher scores on the ETUI's European Participation Index (<https://europeanparticipationindex.eu/>) have performed better on all of the Europe 2020 headline indicators. Worker information, consultation and participation thus contribute to the achievement of sustainability goals and should be supported, as called for in the ETUC's demand for an EU framework Directive on information, consultation and participation. Mandatory involvement of worker representatives and trade unions in sustainability reporting should be specified in a revised Non-Financial Reporting Directive and in due diligence in a directive on mandatory human rights due diligence and responsible business conduct.

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

Workers are the key 'internal' stakeholders in a company and should be involved through trade unions, works councils, European works councils and board level representatives.

As a constituent part of the company, trade unions and workers' representatives have a specific interests and a singular role to play. Indeed, they have a specific expertise of the company, a specific overview of the sector and geographical areas where subsidiaries are established and they can have good knowledge of the global supply chain on the basis of their TU transnational network.

Other stakeholders (community, advocacy organizations for affected populations, environment) also play an important role in identifying and monitoring key impacts of companies and should also have a voice vis-à-vis management, for example through specific stakeholder advisory bodies or a stakeholder general meeting.

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

	Is best practice	Should be promoted at EU level
Advisory body	<input type="radio"/>	<input checked="" type="radio"/>
Stakeholder general meeting	<input type="radio"/>	<input checked="" type="radio"/>
Complaint mechanism as part of due diligence	<input type="radio"/>	<input checked="" type="radio"/>
Other, please specify	<input type="radio"/>	<input checked="" type="radio"/>

Other, please specify:

Employee participation (works councils, trade union, Board level employee representation, European Works Councils, SE works councils, etc) have proven to be effective mechanisms for promoting sustainable corporate governance and sustainability and should be promoted. It should be noted that advisory bodies and stakeholder general meetings are useful mechanisms for supporting stakeholder engagement. However,

they do not substitute for the forms of employee participation just mentioned in the previous sentence, and thus should not be used to justify any reduction in the importance or strength of employee participation. The ETUC recognises the need to establish EU minimum standards for workers' board level representation rights for EU company forms and for companies making use of EU company law instruments enabling company mobility.

Moreover, the Global Framework Agreements, if negotiated and signed by trade unions on international, European and/or national level, can be a relevant model for implementing due diligence obligations:

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

Question 21: Remuneration of directors

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

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

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

Restricting executive directors' ability to sell the shares they receive as pay for a certain period (e.g. requiring shares to be held for a certain period after they were granted, after a share buy-back by the company)	
Regulating the maximum percentage of share-based remuneration in the total remuneration of directors	
Regulating or limiting possible types of variable remuneration of directors (e.g. only shares but not share options)	
	

<p>Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration</p>	
<p>Mandatory proportion of variable remuneration linked to non-financial performance criteria</p>	
<p>Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration</p>	
<p>Taking into account workforce remuneration and related policies when setting director remuneration</p>	
<p>Other option, please specify</p>	
<p>None of these options should be pursued, please explain</p>	

Please explain:

Financial incentives play a major role in influencing director behavior, and the heavy use of stock-market oriented remuneration schemes like stock options have contributed to the short-term orientation of companies. A major shift in executive remuneration schemes away from share-based components to elements directly linked to the workforce (e.g. a maximum CEO-to-worker pay ratio, reduction in workplace accidents) and sustainability goals (e.g. meeting of targets for CO2 reduction) is needed. Legislation should require such a reorientation in executive remuneration and the disclosure of how this remuneration is tied to the achievement of sustainability goals.

Question 22: Enhancing sustainability expertise in the board

Current level of expertise of boards of directors does not fully support a shift towards sustainability, so action to enhance directors' competence in this area could be envisaged [18] (Study on directors' duties and sustainable corporate governance).

Please indicate which of these options are in your view effective to achieve this objective (tick the box, multiple choice).

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

Please explain:

The ETUC agrees that the degree of competence of company boards in environmental, social and human rights expertise needs to be improved. As mentioned above, research shows that companies with workers in the board perform better on all major sustainability dimensions (workforce development and health and safety, human rights, environment, etc.). The most effective measure to increase competence in social and human rights matters is to expand worker participation, as worker representatives have a high level of competence in these matters. At a minimum, the competencies of boards on environmental matters should also be assessed, and where a deficit exists, the deficit should be addressed.

Question 23: Share buybacks

Corporate pay-outs to shareholders (in the form of both dividends and share buybacks) compared to the company's net income have increased from 20 to 60 % in the last 30 years in listed companies as an indicator of corporate short-termism. This arguably reduces the company's resources to make longer-term investments including into new technologies, resilience, sustainable business models and supply chains[19]. (A share buyback means that the company buys back its own shares, either directly from the open market or by offering shareholders the option

to sell their shares to the company at a fixed price, as a result of which the number of outstanding shares is reduced, making each share worth a greater percentage of the company, thereby increasing both the price of the shares and the earnings per share.) EU law regulates the use of share-buybacks [Regulation 596/2014 on market abuse and Directive 77/91, second company law Directive].

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

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

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

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

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

If so, please specify:

A number of measures have already been mentioned above. Worker participation rights should be expanded, non-financial reporting should provide relevant and meaningful information on company impacts, sustainability strategies and the achievement of sustainability targets, "loyalty shares" (i.e. lower taxes or higher dividends for long-term shareholders) should be encouraged, and a financial transactions tax should be implemented throughout the EU and ideally on the international level. Clear criteria for the social criterion mandated in the financial taxonomy should be clearly defined and enforced (see e.g. Vitols, S and N Kluge (2011) *The Sustainable Company: a new approach to Corporate Governance*. Brussels: ETUI; <https://www.etui.org/publications/books/the-sustainable-company-a-new-approach-to-corporate-governance>).

Section V: Impacts of possible measures

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

Please estimate the impacts of a possible spelling out of the content of directors' duty of care as well as a due diligence duty compared to the current situation. In your understanding and own assessment, to what extent will the impacts/effects increase on a scale from 0-10? In addition, please quantify/estimate in

quantitative terms (ideally as percentage of annual revenues) the increase of costs and benefits, if possible, in particular if your company already complies with such possible requirements.

Table

	Non-binding guidance. Rating 0-10	Introduction of these duties in binding law, cost and benefits linked to setting up /improving external impacts' identification and mitigation processes Rating 0 (lowest impact)-10 (highest impact) and quantitative data	Introduction of these duties in binding law, annual cost linked to the fulfilment of possible requirements aligned with science based targets (such as for example climate neutrality by 2050, net zero biodiversity loss, etc.) and possible reorganisation of supply chains Rating 0 (lowest impact)-10 (highest impact) and quantitative data
Administrative costs including costs related to new staff required to deal with new obligations			
Litigation costs			
Other costs including potential indirect costs linked to higher prices in the supply chain, costs linked to drawbacks as explained in question 3, other than administrative and litigation costs, etc. Please specify.			
Better performance stemming from increased employee loyalty, better employee performance, resource efficiency			

Competitiveness advantages stemming from new customers, customer loyalty, sustainable technologies or other opportunities			
Better risk management and resilience			
Innovation and improved productivity			
Better environmental and social performance and more reliable reporting attracting investors			
Other impact, please specify			

Please explain:

The European Commission's study on due diligence requirements through the supply chain shows that the additional costs, as percentages of companies' revenues, would be relatively low (less than 1%).

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).

ETUC can not provide any quantitative elements for the moment, Trade unions and workers representatives' are rarely involved in the elaboration/implementation of the vigilance plan, it is also an issue that requires specific training of trade unions and on which concrete trade union practices must be developed.

Contact

just-cleg@ec.europa.eu

