Contribution ID: 1dd51a87-1837-488b-8979-8f9c1ab51707
Date: 08/02/2021 15:34:28

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 prejudge 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 (selected)
- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* Surname

Lema

* 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

Sylvie

* Email (this won't be published)

europe@afep.com

* Organisation name

255 character(s) maximum

AFEP (French Association of Large Companies)

* 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.

953933297-85

* Country of origin

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

- Afghanistan
- Åland Islands
- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Djibouti
- Dominica
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France (selected)
- French Guiana
- French Polynesia
- Libya
- Liechtenstein
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Saint Martin
- Saint Pierre and Miquelon
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South

- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
-

French Southern and Antarctic Lands

- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
-

- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
-

Sandwich Islands

- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
-

Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d’Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
-

India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho

Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
-

Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

Democratic Republic of the Congo

Saint Kitts and Nevis

- Denmark
- Liberia
- 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:

This question does not appear to be appropriately framed as it relies on the wrong assumption that Board of Directors does not take into account ESG issues. In addition, it does not give the possibility to express views regarding the preferred option between hard law or soft law nor the appropriate level of law making (EU or Member States).

We agree that companies and directors should have due regards for stakeholders' interests but do not support any new legally binding obligation in this respect.

In France, Boards of Directors have been taking into account social and environmental aspects of companies' activities in order to promote long-term value creation and this since well before the adoption of the Pacte law in 2019. Indeed, the Pacte law enshrined a practice which had de facto existed before, without seeking to define what the company interest ("intérêt social") was, leaving it to case law.

The concept of "intérêt social" has never been defined by law because the relevance of its practical application lies in its great flexibility, which makes it resistant to any pre-established criteria. The factors allowing to judge whether a decision would be contrary to the social interest depend on the changing characteristics of the activity and environment of each company.

In order to maintain the flexibility essential to its implementation, the Pacte law did not provide for a rigid definition, but rather introduced the concept of intérêt social in the civil and commercial code. Consequently, an obligation of means (and not of result) has been added to the commercial and civil code laying down that the company should be managed in the company's interest, taking into account the social and environmental impacts of its activities.

As regards the debate regarding stakeholders' interests versus shareholders' interests, we believe that the definition of the company interest which was given by the Viénot report in 1995 remains true and up to date: "The social interest can be defined as the best interests of the corporation itself, considered as an economic agent, pursuing its own purposes, separated from those of its shareholders, employees, creditors suppliers and customers, but which correspond to their general common interest, which is to ensure the prosperity and continuity of the business".

However, there is no need for a definition at EU level because company law should leave enough flexibility to adapt itself to the complex environment companies face in their daily operations.

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?

- (x) 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:

Afep is in favour of a European legislative framework which would avoid a legislative patchwork effect in the EU and ensure coherence amongst national initiatives. Such new framework should meet the following conditions:
- The EU legislative framework should aim at creating a fair level playing field, in particular when defining the scope which has to cover non-EU undertakings providing goods or services in the EU.
- The topics covered by the EU legislative framework should be clearly circumscribed to human rights risks, including social issues, and environmental local risks directly caused by activities on their surrounding environment, without making any reference to systemic global issues such as climate change or global biodiversity loss.
- The precise content of due diligence requirements should be clearly defined to avoid legal uncertainty.
- The scope of the requirements should not cover the entire value chain. It should be circumscribed to the companies' sphere of control, ie their own operations, those of the companies they control and their first-tier suppliers and contractors. Imposing requirements beyond companies' sphere of control would lead to a mere tick-boxing exercise where companies' actions would focus on compliance rather than directing resources on areas where they are needed in priority (ie where the companies have identified the most salient issues).
- The requirement to publish a due diligence strategy should be proportionate and compatible with the preservation of commercial secrets.
- Corporate strategy is and must remain a prerogative of the Board of Directors. Companies should be given flexibility as to whether and how they involve external stakeholders in the process.
- The supervision system put in place should be efficient and avoid administrative burden.
- The core principles regarding liability should be preserved: liability lies with the party who has caused damage.
- Extra-judicial remedies, proactive/voluntary solutions and grievance mechanisms can play an effective role and should be prioritised.

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
- [x] 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
- [x] 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
- [x] Other

Other, please specify:

Large French companies are already aware of possible social and environmental impacts of their activities. We believe that it is unlikely that a new EU framework alone would considerably change the situation in poorly governed third countries, as this should be part of a smart mix of measures and require the cooperation of EU and non-EU governments and other stakeholders. The duty of States to protect human rights (along with the responsibility of businesses to respect them) should not be overlooked. European companies alone cannot solve all problems arising from failing States in which protective laws are either inexistent or not applied. An EU legislation on sustainable corporate governance and its effective implementation will therefore principally allow to create a level playing field within the EU and avoid fragmentation due to diverging national laws.

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)?

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

Competitive disadvantage vis-à-vis third country companies not subject to a similar duty

- [x] 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
- [x] Disengagement from risky markets, which might be detrimental for local economies
- [x] Other

Other, please specify:

Third countries with low or inexistent local protective laws could be disincentivised by an EU due diligence requirement which would shift the onus from local companies to subsidiaries of EU companies or EU parent companies. They could refrain from imposing higher environmental and social standards on domestic-owned companies, considering that the EU companies will be held liable and pay for damages caused by local companies when they are conducting business with EU companies.

For this reason, the EU should adopt a holistic approach relying on Member States (rather than companies only), including trade policy tools. In particular, EU templates for the Trade and Sustainable Development (TSD) chapters under bilateral Free Trade Agreements should be upgraded and enforced to make sure that EU trading partners improve responsible business conduct and CSR practices by their domestic companies and foreign-invested companies. Dispute settlement mechanisms and sanctions in the event of non-compliance with TSD chapters of FTAs should be introduced, subject to a competitiveness edge test.

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	●	○	○
the interests of employees	●	○	○

the interests of employees in the company's supply chain	○	○	◉
the interests of customers	◉	○	○
the interests of persons and communities affected by the operations of the company	○	○	◉
the interests of persons and communities affected by the company's supply chain	○	○	◉
the interests of local and global natural environment, including climate	○	○	◉
the likely consequences of any decision in the long term (beyond 3-5 years)	○	○	◉
the interests of society, please specify	○	◉	○
other interests, please specify	○	◉	○

the interests of society, please specify:

other interests, please specify:

This question lists categories of stakeholders and interests which are of a different nature, i.e. (i) stakeholders who are core partners of the company (such as shareholders, employees, customers), (ii) external stakeholders with whom the company might engage on a case-by-case basis according to the company's due diligence strategy, and (iii) the interests of unidentifiable stakeholders, including the civil society at large, which is a rather vague concept with a much more remote link to the individual company, or the global environment. As regards "the likely consequences of any decision in the long-term", this item is the essential driver of a company's sustainability policy, resulting precisely from a company's risk assessment and consultations with its stakeholders. It does not fit into the given list of "interests".
The core objective of a company is to make business, in a sustainable way, allowing it to pursue its activity not only in a short-term perspective, but also in the long run. In order to achieve this objective, it needs first of all the support of its shareholders, employees and clients. These categories of stakeholders increasingly expect companies to consider all the relevant interests, including those relating to environmental and social sustainability. It is therefore in the interest of companies to consider all the interests listed in the question, therefore all the above-mentioned stakeholders are important and their points of view may be legitimate and relevant.
However, the relevance of the listed interests might vary over time, depending on the circumstances and the company's activities and geographical context. These interests are also sometimes contradictory. Therefore, companies should have the flexibility to decide which stakeholders groups are the most relevant and how to take into account the interests expressed by these groups on a case-by-case basis.

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)		
Management of the risks for the company in relation to stakeholders and their interests, including on the long run				(x)		
Identification of the opportunities arising from promoting stakeholders' interests				(x)		

Please explain:

First of all, we would like to highlight that stakeholder consultation is a good practice. Most Afep member companies have established different forms of stakeholder dialogue. However, this dialogue is not necessarily conducted at board level and is carried out on a voluntary basis.

Regarding the identification of company's stakeholders, large companies are perfectly aware that they can only grow if they take into account the ecosystem in which they operate, and which is made up of many different stakeholders. This is why most companies identify their key stakeholders and conduct dialogue with up to hundreds of them on a continuous or on an ad-hoc basis in order to compare their expectations with the company's strategy (materiality analysis). There are as many ways of identifying stakeholder interests as there are companies (local vs. centralised identification, thematic vs. generic identification…). Considering the large variety of possible stakeholders, a new legal obligation would not be appropriate to capture the variety of corporate contexts and relevant stakeholders. In particular, it would not be appropriate to impose such a requirement at board level and to expose directors to a risk of personal liability.

Regarding the management of the risks and opportunities in relation to stakeholders, we recall that the first mission of the Board is to determine the strategy of the company, taking into account the risks it is confronted with and the opportunities it has identified. Integrating and reporting on risks factors are key components of corporate stewardship and have already been included in EU legislation for a long time. In accordance with the Accounting directive, the management report shall include "a fair review of the development and the performance of the undertaking's business and of its position, together with a description of the principal risks and uncertainties that it faces". The NFRD has notably extended the scope of this risk assessment by requiring companies to publish a non-financial statement which is, in France, part of the management report and therefore falls under the responsibility of the Board of Directors. As a consequence, we consider that the framework regarding the integration of sustainability risks, impacts and opportunities is already in place and efficient. This framework will certainly be strengthened following the review of NFRD and overlapping legislation should therefore be avoided. In any event, flexibility is essential to allow companies to manage risks and opportunities in relation of their stakeholders, based on their own

operational and geographical contexts.

We would also like to highlight the role of corporate governance codes, and the role of the French code in particular. The Afep-Medef code states that “the Board of Directors endeavours to promote long term value creation by the company by considering the social and environmental aspects of its activities. It regularly reviews, in relation to the strategy it has defined, the opportunities and risks, such as financial, legal, operational, social and environmental risks as well the measures taken accordingly. To this end the Board of Directors receives all the information needed to carry out its tasks, notably form the executive officers”. Voluntary initiatives offer the needed flexibility on these matters and should not be replaced by overly rigid, one-size-fits-all legal requirements.

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:

It is not up to the Board of Directors, which is not a permanent body, to set up procedures or targets to ensure that sustainability-related risks are identified, prevented, and addressed. It is a task for management which has to fulfill this duty by developing a risk map allowing for the identification, assessment and prioritisation of sustainability-related risks. The role of the Board of Directors is to review these risks, as well the measures taken accordingly, based on the strategy it has defined. It should also be recalled that the Board’s duty is not only to address sustainability-related risks, but all kinds of risks. Directors should not bear any new legal obligation in this respect nor face personal liability.

Regarding targets, many large companies have set up ambitious targets on ESG issues (eg. regarding gender diversity, the reduction of CO2 emissions or waste). However, the choice and timeline of such targets should remain at their discretion. Some issues also do not lend themselves to quantifiable targets, such as human rights, and a legal requirement to set up measurable targets could lead to overlook such matters in order to focus on compliance. Good practice within the non-financial statement is to disclose voluntary targets, the dedicated resources for their implementation and the methodologies allowing to take into account uncertainties linked to different scenarios. It would therefore be more appropriate to address this issue on the occasion of the revision of NFRD.

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
- (x) I strongly disagree
- I do not know
- I do not take position

Please provide an explanation or comment:

This question does not appear to be appropriately framed. It is based on the assumption that Boards of Directors do not take into account stakeholders' interests and that financial interests are necessarily short-term, while stakeholders have precisely long-term interests. However, short-term and long-term are not conflicting by definition, nor are the interests of the shareholders and other stakeholders. During a crisis, if short-term issues are not addressed, the company will not survive which will obviously be detrimental to the long-term perspective. For instance, in the context of the first Covid lockdown, Boards had to work closely with the management focusing on immediate issues such as protecting the balance sheet, taking care of the employees, securing the supply chain, monitoring the stock price, protecting against the increase of cyber risks… Depending on circumstances, short term interests may be more acute and should not always be associated to shareholders' financial interests exclusively. Overall, flexibility is essential for companies to identify and manage short-term and long-term interests in the more appropriate way for the company's long-term sustainability.

In addition, "balancing the interests" is a rather unclear concept. Many decisions may benefit some stakeholders, but harm others. If a company decides to shut down a polluting plant, this decision will be beneficial for the environment and for investors keen on financing "green" activities, but it will be detrimental to the employees working on the production site. It is a typical example of how difficult it is for companies to take decisions and strike the right balance. A legal obligation to "balance the interest of all stakeholders", as suggested in this question, would lead to dilemmas and stalemate. Such a legal requirement would place unreasonable obligations on companies to reconcile conflicting interests, and any liability attached to such requirement would lead to legal uncertainty. Even more so, such a requirement imposed on directors would face them with significant risk of personal liability and might discourage skilled and progressive individuals to take up directorships in companies.

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?

Interests of shareholders, employees, suppliers, clients, and other stakeholders can be contradictory and cannot be always put on an equal footing. Boards of Directors need a compass. It is a long-standing principle in corporate law that the compass is the notion of company interest, which cannot be defined as the sum of the interests of different stakeholders. Such a definition would expose companies and their shareholders to the following risks:

• Situation of stalemate for management because it is frequently confronted with contradicting interests; which would be the criteria allowing it to prioritise one interest compared to another? The company officer

will be paralysed in their decision-making process;
• Complexification of the decision-making process as all Board decisions will have to be documented in order to be able to justify the reason for prioritising one interest over another;
• Disinvestment by shareholders who would fear that their interests would be diluted by the interest of too many other stakeholders with conflicting agendas;
• Risk of litigation: the legal obligation for the company's governing bodies to take into account the often-contradictory interests of stakeholders would fuel a plethora of litigations;
• Risk of personal liability faced by individual directors could deter skilled and progressive individuals from taking up directorships or lead to higher remunerations to compensate such personal risks, which might not be economically nor socially acceptable;
• In fine, the risk of judicial interference in management decisions as the judge would substitute his judgement of how the interests in question should be weighed.

How could these possible risks be mitigated? Please explain.

These possible risks could be mitigated through refraining from focusing any legal requirement to have due regard for stakeholders' interests on directors rather than on the company, and from setting up at EU level a definition of duty of care or "company interest" which has to remain flexible.

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

We would like to emphasize that Board of Directors necessarily integrate stakeholder interests in their decision-making process.
From an investor point of view, ESG has become an increasing priority and, particularly in Europe, a key consideration in asset allocation. Institutional investors are integrating ESG issues into their investment policy-making and decision-making. The most significant development in this area was the launch of the Principles for Responsible Investment (PRI) in 2006, which gather today more than 3000 signatories from the financial community.
From a shareholders' point of view, especially those who invest in the long term, a company with a sound governance is a company that does care about its ecosystem - its employees, its suppliers, its environment in the literal and ecological sense. Indeed, a company which invests in ESG will reap benefits as it will attract best talents, retain consumers, gain in efficiency and, above all, be better protected from the exposure to various risks. Companies have noticed an acceleration, in the past few years, of such awareness.

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:

We disagree with the assumption underpinning this question and do not think that any further action is necessary in this respect. Indeed, many companies already have a strategic orientation on sustainability risks, impacts and opportunities. As mentioned in Question 9, it is in the interest of companies to act in a sustainable manner, both because that allows them to perform better on the long term and because it is increasingly a priority among shareholders. Moreover, the non-financial reporting directive lays down rules according to which companies are required to disclose relevant and material information on policies, outcomes and risks concerning environmental aspects, social and employee-related matters, respect for human rights, anti-corruption and bribery issues and diversity on the board of directors. As this information is disclosed in the management report, which is a report of the board of directors, it is already integrated into the company's strategy, decisions, and oversight.

Enforcement of directors' duty of care

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

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

Question 12. What was the effect of such enforcement rights/actions? Did it give rise to case law/ was it followed by other cases? If not, why?
Please describe:

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

- I strongly agree
- (selected)

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:

It is not easy to respond to this question for various reasons:
The notion of directors' duty of care is unknown in French law, which uses the notion of company interest instead, in order to determine if the Board of Directors has acted in the best interest of the company as a whole.
Second, all stakeholders cannot be put on equal footing. For instance, employees are already playing an active role as they are involved in the decision-making process through representatives appointed at board level.
Apart for employees and shareholders, we do not think other stakeholders should be given a specific role.

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.

According to French law, employees already play a role as they are, through their representatives nominated at Board level, involved in the decision-making process.
In addition, we can also mention the role of shareholders who can table resolutions if they detain a certain percentage of capital. These resolutions may also cover ESG issues such as climate change, provided that they do not lead the AGM to interfere with the role and functions of the Board of Directors which has the sole power to set out the strategy.

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.

Large French companies, who apply the French Law on the Duty of Vigilance adopted in 2017, agree with and are committed to applying the core definition of due diligence according to OECD guidance and UNGP. The latter have a very broad scope, as far as the themes covered by due diligence are concerned and as far as the definition of a company's "business relationship" is concerned.

While this broad scope is appropriate for a soft law approach, it is much more problematic when it is transformed into hard law obligations coupled with civil liability. Considering the purpose of this consultation and its hard law perspective, Afep disagrees with two aspects of the proposed definition:

- The definition of supply chain cannot reasonably cover all suppliers and subcontractors as this would easily amount to hundreds of thousands of players to include. Mandatory due diligence should focus on the first tier of the supply chains (direct subcontractors or providers) where co-contractors are effectively able to exercise leverage through the contractual relationship. Regarding any further obligation down the supply chain, clarity should be given as to how companies should take measures to exercise leverage as it is practically impossible for undertakings to control every single part of the entire supply chain.
- The issue of climate change is a global environmental risk resulting from a multitude of actors, wherever they are located. It is also a cumulative phenomenon over time as CO2 emissions remain for about one century before being disintegrated. In this view, it is not possible to attribute responsibility for climate change to one single operator. At global level, the Paris Agreement sets up responsibility for reducing greenhouse gases (GHG) emissions to States which are parties to the Agreement. Given this specificity of global effect, it is not possible to define due diligence on climate change for a specific company. The issue of climate change should therefore be addressed in a different, appropriate legislative framework, such as other elements of the EU Green Deal.

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.
- [x] None of the above, please specify

Please specify:

Afep proposes an approach which would be somewhere in between option 1 and option 2. Large French companies agree that the due diligence obligation should be cross-sectoral and based on key process requirements. In addition, they believe that mandatory due diligence should focus on very specific and clearly defined human rights and environmental risks.

• Due diligence should be understood as the process to identify, prevent and mitigate adverse impacts and account for measures taken.

• Due diligence requirements should only cover the most severe risks (salient issues) to allow companies to allocate resources on those risks that require priority actions and avoid inefficient, compliance-oriented measures. Companies are best placed to identify which risks are the most severe and should be able to exercise discretion in this respect.

• Due diligence requirements should be company-wide, rather than country by country or project by project. The latter levels of granularity would indeed place an unreasonable administrative burden on companies. In addition, if reporting obligations are associated to due diligence requirements, any excessively

granular requirements would likely generate information that is either not relevant for stakeholders or not comparable.
• Human rights risks, including social issues, should be defined by reference to the Charter of Fundamental Rights of the European Union (CFR), to UNGP, i.e. rights expressed in the International Bill of Human Rights coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. Such definitions shall be easily readable and unequivocal.
• Environmental local risks are those caused by activities directly on their surrounding environment. They are not caused by other operators in other geographic settlement. Those risks should cover air and water pollution, deforestation, and the sustainable use of natural resources and direct impacts on biodiversity.
• Climate change is a global environmental risk as it is resulting from a multitude of actors, wherever they are located. It is also a cumulative phenomenon over time as CO2 emissions remain for about one century before being disintegrated. In this view, it is not possible to attribute responsibility for climate change to one single operator. At global level, the UN Paris Agreement Climate Protocol sets up responsibility for reducing greenhouse gases (GHG) emissions to States which are parties to the Agreement. Given this specificity of global effect, it is not possible to define due diligence on climate change for a specific company.
• The issue of climate change should therefore be addressed in a different, appropriate legislative framework. The revision of the Non-financial Reporting Directive is a good opportunity to discuss and elaborate how strategic information on climate change should be disclosed and integrated in the non-financial statement. Companies are committed to make their best efforts to reduce GHG emissions to limit collectively, together with all other GHG emitters, the temperature increase at the level mentioned in the Paris Agreement.
• The EU should consider a separate legislative initiative concerning the fight against Bribery. National legislations, within or outside the EU (e.g., the US FCPA, the UK Bribery Act, the French Sapin 2 Law), have adopted ambitious and extraterritorial provisions to fight corruption. As corruption requires zero tolerance, the undertaking must promote and disseminate a culture of anti-corruption compliance by establishing the prevention and detection of corruption at a prioritisation level. A separate framework is justified because of the specificities of the issue which require to put in place dedicated means. It may be noted that France and the UK have adopted separate legislations governing due diligence in relation to supply chains on the one hand and the fight against corruption on the other hand.
The EU needs a harmonised framework with an extraterritorial scope (like GDPR) to avoid fragmentation, comparable to the rules adopted by some of our major trade partners. This would also be an important political signal from the EU to other trade partners that active or passive corruption will not be tolerated.

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

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

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

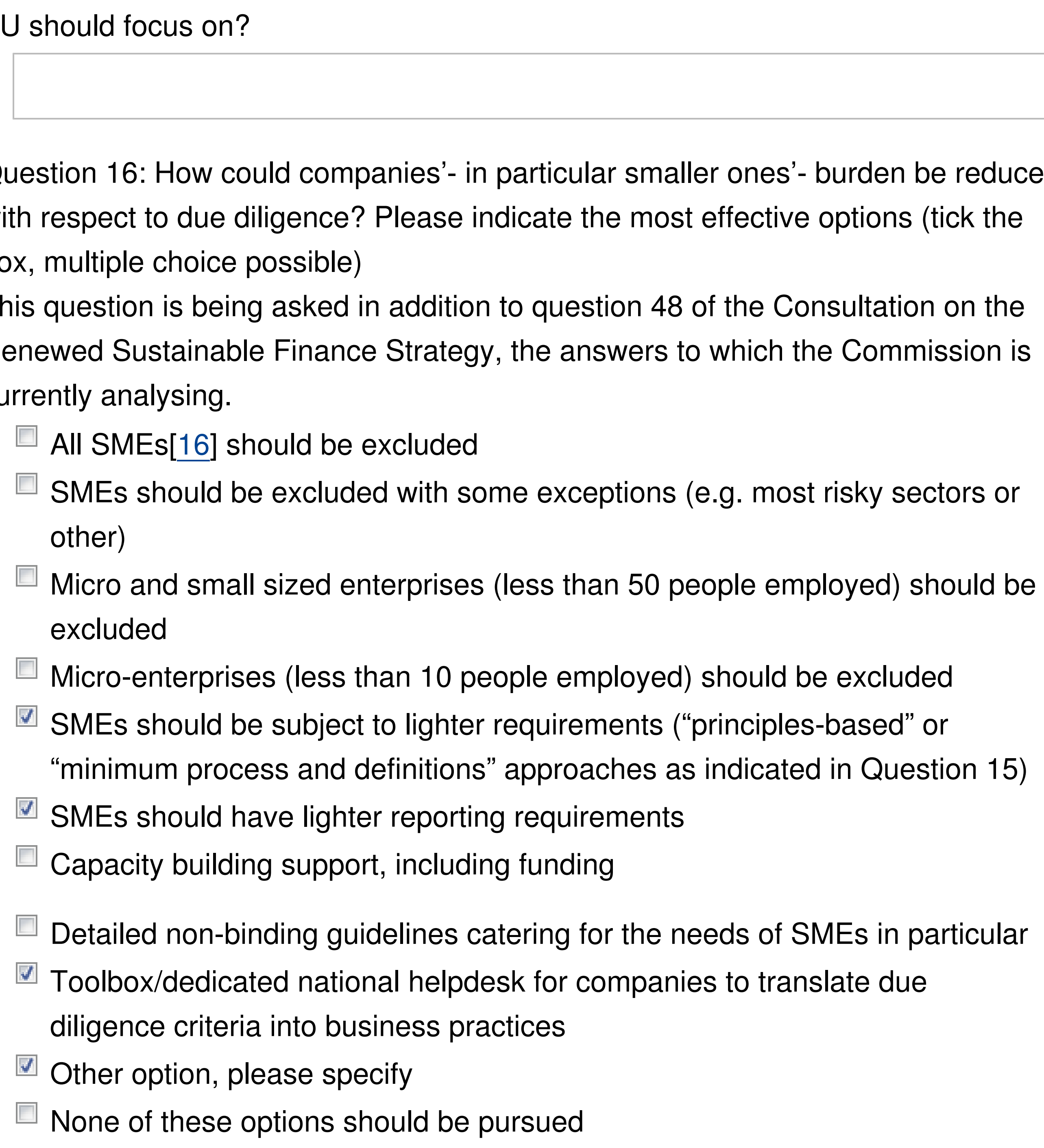
- ☐ Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)
- ☐ Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups
- ☐ Climate change mitigation
- ☐ Natural capital, including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

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

> Although Afep did not tick option 2 but a mix of option 1 and 2 in Question 15, large French companies would like to point out that the coherence with Regulation EU 2019/2088 (Sustainable Finance Disclosure Regulation) is paramount. Indeed, the ESAs will shortly deliver Regulatory Technical Standards (RTS) with regard to the content, methodologies and presentation of sustainability related disclosures by financial market participants. The RTS will relate among others to the description of principal adverse impacts on sustainability factors. If investors are required to report on different adverse impacts regarding sustainability factors from issuers, the confusion will be complete. This has to be avoided by streamlining definitions between the different sustainability-related EU pieces of legislation.

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

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



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

Question 16: How could companies'- in particular smaller ones'- burden be reduced with respect to due diligence? Please indicate the most effective options (tick the box, multiple choice possible)
This question is being asked in addition to question 48 of the Consultation on the Renewed Sustainable Finance Strategy, the answers to which the Commission is currently analysing.

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

Please explain your choice, if necessary

It is important to underline that responsible business conduct is expected from all undertakings, "regardless of their ownership structure" (OECD Due Diligence Guidance, p. 9), while taking into account the administrative burden. According to Principle 4 of the UN Guiding Principles on Business and Human Rights (UNGP), States "should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies". The concept of "undertaking" referred to in the European directive on due diligence should thus encompass, just as in competition law, "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed". Public authorities should stand as an example in fostering sustainable value chains The adoption of the European directive on due diligence offers a unique opportunity to tackle this issue, by applying due diligence requirements also to contracting authorities within the meaning of the Directive 2014/24/EU on public procurement.

SMEs should be in principle included in the due diligence obligation because their larger EU business relations, subject to the due diligence obligation themselves, will have to pass on these obligations to their suppliers and sub-contractors, whatever their size, in order to exercise their own due diligence. It is therefore important to include SME in the EU framework right from the beginning although obviously the substantial and reporting requirements should be lighter to avoid too heavy an administrative burden for them. However, to help them be in line with expectations they will have to respond to, it will be necessary to put in place national helpdesks and other appropriate toolboxes.

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.

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

As explained in our answer to question 17a, non-EU companies operating in the EU should have precisely the same obligations as EU companies. Otherwise, the fair level playing field would not be achieved. As regards enforcement, the lack of transparency would inevitably lead to “name and shame” by market participants, consumers, NGOs and other stakeholders. Market pressure would probably be considerable on companies refusing to abide by the rules. In addition, compliance with due diligence obligations by non-EU companies could be obtained through upgraded Trade and Sustainable Development (TSD) Chapters in trade agreements between the EU and its trading partners (see our response to question 18).

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?

- (selected) Yes
- No
- I do not know

Please explain:

The EU should adopt a holistic approach acknowledging the role of Member States, including through trade policy tools. In particular, EU templates for the Trade and Sustainable Development (TSD) chapters under

bilateral Free Trade Agreements should be upgraded and enforced to make sure that EU trading partners improve responsible business conduct and CSR practices by their domestic companies and foreign-invested companies. Dispute settlement mechanisms and sanctions in the event of non-compliance with TSD chapters of FTAs should be introduced, subject to a competitiveness edge test.

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
- [x] Other, please specify

Please provide explanation:

From a practical point of view, as the legislative framework is likely to cover a large number of undertakings, it is difficult to see how national authorities, even the most staffed ones, may supervise, in an effective way, all companies subject to the due diligence requirements. As an alternative, we advocate for the possibility to designate an independent third party explicitly accredited for verifying due diligence information published by undertakings. Its powers should be limited to such verifications and it should not act as a quasi-court. This would be a coherent addition to the verification of non-financial statements, already required in some EU Members States and envisaged by the Commission in the context of the revision of NFRD. A rigorous process of accreditation of these independent third parties by one of the signatories of the European Accreditation Multilateral Agreement (EAMLA), could be put in place in order to guarantee the quality, legitimacy and credibility of such verification.
If an enforcement mechanism were to be introduced to accompany the due diligence duty, it should be left to Member States to define it and associated penalties. In addition, due diligence requirements should not be results-based but process-based. Companies should indeed not face liability for damage if they have put reasonable due diligence measures in place. Any enforcement mechanism should therefore expressly include a defence to liability in that sense.
Civil liability should be based on usual civil law principles, requiring a damage, a failure to put in place reasonable due diligence measures, and a causal link between the two. Criminal sanctions would be disproportionate and should not be imposed as a result of a failure to adopt and implement due diligence processes. In this respect, Afep wishes to emphasize that in the context of the French law on the Duty of Vigilance, the French Constitutional Court considered, in view of the terms of the law and its perimeter, that it was not appropriate to impose criminal sanctions.
Access to remedy should be primarily provided locally, near the operations, through accessible and efficient

grievance mechanisms. Foreign nationals should not be able to bring claims against companies before European courts in relation to acts which occurred abroad. Jurisdiction rules should remain unchanged in this respect.

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

- ○ Yes
- ◉ No

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

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

Section IV: Other elements of sustainable corporate governance

Question 20: Stakeholder engagement

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

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

- ○ I strongly agree
- ○ I agree to some extent
- ○ I disagree to some extent
- ◉ I strongly disagree
- ○ I do not know

○ I do not take position

Please explain.

Stakeholders' consultation is good practice and should be encouraged. A mandatory obligation would risk being overly rigid and not adapted to every corporate context. Depending on the sector, organisation, size, and challenges it is facing, the company should be free to adapt its consultation methodology and strategy. Such discretion is essential to ensure that stakeholder engagement is meaningful in the company's operational context, rather than a mere tick-boxing exercise. An overly rigid requirement to engage with a pre-defined list of stakeholders groups would even be counterproductive as it would not allow the company to focus on the most relevant stakeholders, with the most material interests.

It is up to the company to find the best and most appropriate way of conducting stakeholder consultations (centralised vs. decentralised; annual vs ongoing; problem-based workshops vs. strategic consultative committees;) and to find the right balance in identifying and managing stakeholders and interests that are the most relevant for the company.

When a company decides to set up a stakeholders committee, which is distinct from a Board committee, it should be free to choose its composition, remit, organisation and the frequency of the meetings. In order to foster open dialogue, confidentiality rules should also be designed with particular attention.

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

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

	Is best practice	Should be promoted at EU level
Advisory body	○	○
Stakeholder general meeting	○	○
Complaint mechanism as part of due diligence	○	○
Other, please specify	●	○

Other, please specify:

It is up to the company to decide which mechanism is suitable for the stakeholders with whom it engages.

As best practice, we would like to highlight two useful tools:

• Operational grievance mechanisms at company level which are an important and efficient means to detect negative impacts at an early stage. They should be established according to the effectiveness criteria set out in Principle 31 of UNGP and should provide for anonymous complaints. Reporting obligations in

relation to grievance mechanisms could cover information on overall categories of concerns raised e.g. discrimination, safety issues etc. while avoiding disclosure of information related to individual complaints which has to be kept confidential in order to safeguard confidentiality for victims.

- The OECD National Contact Points (NCP) who offer a unique State-based non-judicial grievance mechanism which help resolve issues that can arise if the OECD Guidelines are not observed. NCPs are often more efficient than lengthy judicial procedures. They contribute to improving access to remedy for victims of business-related rights violations, especially in cross-border transactions where judicial systems may fail.

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)

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

	☆
Mandatory proportion of variable remuneration linked to non-financial performance criteria	☆☆☆☆☆☆☆
Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration	☆☆☆☆☆☆☆
Taking into account workforce remuneration and related policies when setting director remuneration	☆☆☆☆☆☆☆
Other option, please specify	☆☆☆☆☆☆☆
None of these options should be pursued, please explain	★★★★★★★

Please explain:

The Shareholder Rights Directive already provides for transparency measures on all components of directors' remuneration which have to be disclosed in the remuneration policy and the remuneration report, both submitted to a "say on pay" vote. In addition, the Afep-Medef Code has set up supplementary rules for the Board of Directors, when determining the compensation of executive officers which are, to some extent, aligned with the proposed options. Therefore, we do not support any other prescriptive rules as the principles set above are, in our view, better dealt with through soft law which avoids the one-size-fits-all approach and allows for flexibility. Indeed, due to the wide diversity of corporations, formal and identical structure of directors' compensation should not be imposed to all Board of Directors.
Regarding each of the following options, we illustrate our previous comment:

- Restricting executive directors' ability to sell the shares they receive as pay for a certain period: in

addition to provisions included in the commercial code, the Corporate Governance Code (CGC) already states that Board of Directors defines a minimum number of registered shares that the company officers must retain through to the end of their term of office. This decision is reviewed at least on each extension of their term of office. The board may base its decisions on various references (the annual compensation; a defined number of shares…) ;

• Regulating the maximum percentage of share-based remuneration in the total remuneration of directors : it is not possible to define a maximum percentage that should be suitable for all companies, which depends of their size, the sector in which they operate. That is why the code states that "each component of the compensation must be clearly substantiated and correspond to the corporate interest"

• Regulating or limiting possible types of variable remuneration of directors : provided the component of the remuneration and the rationale for it has to be explained in the remuneration policy, there is no reason for limiting the possibility to use any type of variable remuneration.

• Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration : the SRD requires that listed companies include in the remuneration policy the financial and non-financial performance criteria for the award of the variable remuneration, including, where appropriate, criteria relating to corporate social responsibility. This provision is supplemented by the CGC which recommends that one or more criteria related to social and environmental responsibility be incorporated in the compensation in order to improve performance and competitiveness over the medium and long term. In practice, listed companies disclose a large range of non-financial performance criteria such as gender diversity and equality, prevention of work-related accidents, reduction of greenhouse gas emissions, preservation of natural resources… This being said, it should be up to the company to decide which performance qualitative or quantitative criteria is best suited to achieve its sustainable strategy and for which proportion it should weight in the variable remuneration according to the said strategy. Relevant information is disclosed in the remuneration policy and the remuneration report gives explanation on how these criteria have been applied and whether the individual targets have been met.

• Mandatory proportion of variable remuneration linked to non-financial performance criteria : the variable remuneration has to be aligned with the strategy as a whole which include sustainability targets. It would not make sense to impose such proportion.

• Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration: this should be left to corporate governance codes as this might not be relevant for all companies.

• Taking into account workforce remuneration and related policies when setting director remuneration : the SRD II already requires to inform on the annual change of remuneration, of the performance of the company and of average remuneration of employees over at least the five most recent financial years.

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
- [x] None of these are effective options

Please explain:

We disagree with the assumption, derived from the EY study, that Directors lack expertise on sustainable issues. This subject raises the following question : how to measure such expertise ? Does it imply a diploma, a specific training ?

In our view, Directors do not need to be experts in climate change or human rights, as they can always learn from internal expertise of employees and collective knowledge of the board, but they have to be committed on these issues. They have to be convinced that environmental and social aspects of the company's activity have to be part of the strategy, and that they need to be regularly reviewed in relation to the defined strategy, the opportunities and risks, as well the measures taken accordingly by the management. They should also check whether they receive adequate information from the management on these issues.

Therefore, the provision of our CG Code remains true when detailing the essential qualities that all directors are expected to possess: sound judgment, in particular of situations strategies and people; a capacity to anticipate in order to identify risks and strategic issues; integrity, regularity of attendance, active participation and involvement.

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
- (x) I strongly disagree
- I do not know
- I do not take position

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

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

We consider that the EU legislative proposal outlining measures to improve gender balance among directors should be adopted in order to break the glass ceiling and provide for a level playing field in Europe.

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 liked 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).

Contact

just-cleg@ec.europa.eu