

Response from the Council of Bars and Law societies of Europe (CCBE) to the Commission Consultation on Sustainable Corporate Governance

24/03/2020

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 incentivize 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 jeopardize 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.

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:

CCBE: The CCBE welcomes the approach that companies and their directors should take into account stakeholder interests in corporate decisions alongside financial interests of shareholders more than is currently the case. On the other hand, of course, shareholder interests cannot be ignored. Shareholders bring capital to companies and run the risk of losing their investment if things go wrong. The support of shareholders will always be critical for the existence and development of companies. Therefore, shareholders' interest remains a crucial component of the interest of a company. But companies do not exist in a vacuum: on the one hand, they exist and prosper in a natural (sea, land, air, biodiversity) and social (employees, contractors, local communities etc.) environment; on the other hand, when things go wrong and the shareholders refuse to inject new capital to resolve the failure, the social and natural environment must sometimes absorb unlimited consequences of corporate failure (e.g. humanitarian or environmental disasters caused by corporate activities and financial crisis). Therefore, adequate consideration for the needs and expectations of this environment is not only crucial for society as a whole, but also crucial for a company. Nowadays, climate change, pollution, loss of biodiversity and social imbalances are concerns of such a critical importance for the future of humanity that companies, due to their considerable impact on environmental and social issues, must embed these interests in their management.

Having said that we find it difficult to answer this question without having a clear understanding of what it is meant by stakeholders' interests. A clear definition of the term "stakeholders" should be made. The question is also very imprecise: does "alongside" mean they have to be at the same level of shareholder interest, or does it mean something different? On this, we can note that every member state deals with this issue in a slightly different way. However, we consider it to be important that the "corporate citizen" is taking responsibility to ensure sustainable business, taking into account a sustainable balance of natural as well as social environment. Nevertheless, in order to provide a level playing field, we believe that clear and transparent regulation on a European and/or national level will be necessary and simple trust in the "corporate citizen" will not be sufficient.

Just for the sake of safeguarding the democratic legitimation and in light of e.g. the important and valuable role NGOs play in the present discussion, we wish to emphasize that any such regulation should be created under the Treaties' agreed principles taking into account that the EU may not sub delegate its authority granted by the Treaties to any third entity.

Finally, and most importantly, we have to request a clarification that any future legislative proposal, specifically in respect of any regulations regarding supply chains, does not apply to lawyers and law firms, but of course only when acting in their core area of providing legal advice and legal representation. The Council of European Bars and Law Societies (CCBE) defends the independence of lawyers and the effective respect of such a principle which can be sometimes undermined, even unintentionally. Independent lawyers are indispensable in order to comply with the right contained in Article 47(2) of the European Charter of Fundamental Rights that every person can be advised, defended and represented by a lawyer of their choice. Indeed, lawyers are excluded from UNGP principles when they act in the core of their legal profession, i.e. when they represent clients before courts or authorities or when they provide legal advice or opinion work for a client. In respect of such activities, lawyers act as an instrument of justice and are not businesses in the meaning of the UNGP. This mirrors the corresponding exemption in the AML context - lawyers are specifically exempt from the obligation to report suspicious transactions where they do representation, legal advice or opinion work. This is of course different with those aspects of the work of a law firm that are ancillary to the aforesaid legal work e.g. employment and working conditions of personnel, purchase of material etc., where the UNGP principles apply. As regards the aforesaid auxiliary activities distinctions are of course needed to be made, depending on the factual circumstances e.g. as far as small individual practices are concerned.

Such fundamental rights are at risk if lawyers and law firms were to be bound by any regulations of supply chains or any other legislations planned or envisaged as a consequence of this consultation *but only when acting in their core area of legal advice, legal opinion and legal (including forensic) representation*: a lawyer or law firm cannot be held responsible for the conduct of its client and if so, this will outlaw the Rule of Law.

The right of clients to legal confidentiality is another intrinsic element of the Rule of Law. If due diligence obligations were imposed in the supply chain and law firms were covered by them when acting in their core area of legal advice and legal (including forensic) representation, the duty of confidentiality would no longer be guaranteed. Moreover, a control of the compliance with such obligations by the law firm would also not be compatible with the confidentiality obligations of lawyers.

* 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:

CCBE: A well-balanced EU legal framework, which takes into account the size of the company concerned will definitely help to facilitate a common understanding and will of course contribute to the benefits of the single market.

In addition, we believe that as a first step using the reporting obligation and standardizing the requirement against which companies must report would be a good approach and imposing “hard law” rules rather as a last resort. And on this, work is being done to standardize and improve the information that is reported. We support this approach and think priority should be given to this.

In addition, if we also consider this from the perspective of directors of companies, who would be required to establish and implement these processes, they will need clear guidelines, so that we can also know that all companies are doing the same.

* 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

CCBE:

As to the last point, SMEs will only have better chances to be part of EU supply chains in case obligations with respect to sustainable corporate governance will not to be too burdensome. Therefore, any envisaged legislation should take into account the proportion of size of the company and the relevant obligations imposed on that size of company.

*** 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, please specify:

CCBE: These are definitely the major risks and drawbacks to be accounted for and none of them are less important than the other. This question has to be revisited once concrete proposals with respect to a legislation on sustainable corporate governance are introduced.

It must be pointed out that if the standard for any due diligence duty is not clear, it will be impossible for directors and companies to know whether they have met the requirement or not.

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="checkbox"/>	<input type="checkbox"/>	
* the interests of employees	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
* the interests of employees in the company's supply chain	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
* the interests of customers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
* the interests of persons and communities affected by the operations of the company	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
* the interests of persons and communities affected by the company's supply chain	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
the interests of local and global natural environment, including climate	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
* the likely consequences of any decision in the long term (beyond 3-5 years)	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
* the interests of society, please specify	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
* other interests, please specify	<input type="checkbox"/>	<input type="checkbox"/>	

the interests of society, please specify:

Other interests, please specify:

The interests of many groups related to a company may be important when considering its long-term prospects. However, one company is likely to differ from another company as to which interests are relevant to the company's long-term success.

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

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

Please explain:

CCBE: A diligently acting corporate director has primarily to act in accordance with the applicable laws and - depending on the structure of the company - based on shareholders and – or advisory board, supervisory board or other board resolutions

It would be helpful if companies would report to shareholders and the public which groups they have identified as their important stakeholders and how they believe their interests contribute to the long-term success and resilience of the company and how the company will contribute to the long-term interests of society. This would also help shareholders to obtain more information to understand what the directors are doing at a high level.

It also depends on the type of companies. For listed companies, this can be of interest, but not so much for a small family-owned business, for example, where the shareholders are already likely to know this information and the impact on society might be negligible.

* 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, i.e. 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:

CCBE: We believe that the response to this question depends on the targets that would be applied. We can base our response once we find out what factors the targets depend on.

While companies may be able to identify the possible risks (presumably only those that are likely to have a material impact on the business and/or on society) and may be able to address those risks, they may not be able to prevent them entirely. There is a big difference between asking directors to have procedures to try and identify risks, and from asking them to prevent those risks. We need to define the standards, and make sure the standards are sufficiently detailed that the directors can tell if they are meeting the standards. And we need to make sure that the standards are proportionate.

This also raises the question of the timeframe over which this should be addressed. For example, an oil company may want to transition to an alternative company over time, but this may take many years. It should be defined what an obligation to prevent possible risks mean and what the company has to do and over what timescale.

Many decisions directors take may have an adverse effect on some stakeholders, but be advantageous for other stakeholders e.g. where a company closes a factory and makes employees redundant in one location and opens a new factory at a different location and hires new employees there. Such decisions may contribute to making the company's business sustainable and resilient in the long-term, even though some stakeholder interests are, arguably not protected. There have to be clear and transparent rules according to which criteria such decisions will be allowed.

In the meantime, there are already duties or mechanisms in place for companies to prevent and measure risks such as risk management systems, internal controlling system etc. These systems should be taken into account, when creating new rules.

* 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:

CCBE: Giving the interests of stakeholders more weight than they currently have, is of crucial importance for the future of our planet. The problems lie in the details.

Stakeholders may have different interests from shareholders; one group of stakeholders is likely to have different interests from another group of stakeholders. Even within the same group of stakeholders (e.g. employees), employees in one country or at one location may have different interests from those in another country or at another location etc. It is not possible to promote the interests of all stakeholders all of the time. Even if this were possible, it would not necessarily lead to the company being successful in the long-term and sustainable. We believe that directors should focus on creating long-term sustainable businesses while at the same time be aware of the consequences of their businesses for society as a whole. Different member states express the duty of care in different ways. We suggest that an obligation on directors to report to shareholders what the directors have done in the past year to promote the long-term success of the company and how they have taken account of the interests of key stakeholders would be a good first step to lead to companies being sustainable in the longer term and being beneficial also for reaching overarching goals.

* 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? [See our response below.](#)

* How could these possible risks be mitigated? Please explain.

CCBE: A clear and concise wording in EU legislation could mitigate these risks, but only based upon a common understanding and definition of corporate interest (clarifying to what extent does such concept integrate shareholders' and stakeholders' interests). The stakeholders vary from one company to another and, therefore, a general definition is difficult. Directors should report to shareholders (and large companies also to the public)

about the pursuit of the long-term success of the company (risks and opportunities) and how they have taken account of the interests of key stakeholders.

We suggest a duty on directors to report to shareholders (and in large companies also to the public) what the directors have done in the past year to promote the long-term success of the company and how they have taken account of the interests of key stakeholders.

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

CCBE: It is a common phenomenon that shareholders in listed companies support directors' initiatives to integrate sustainability and stakeholders' interests into their strategy. However, such shareholders do not always achieve a majority.

* 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:

CCBE: It is a fact that non-financial reporting (legally applicable to public interest entities since 2017) creates an impulse towards a strategic approach of sustainability risks, impacts and opportunities. The NFRD offers an instrument to foster integration of such approach into the company's strategy, decisions and oversight. See also our responses under questions 6 and 7.

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:

CCBE: The European wide acting Women-On-Board initiative has been successful in requesting a women quota for boards of stock exchange companies, respectively larger companies. Although it is not related to the enforcing of directors' duty of care, it has however contributed to a better and more diverse Board of Directors.

* 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:

CCBE: The initiative of the Women-On-Board initiative led in many European countries to a legally binding women quota for boards of stock exchange companies respectively larger companies.

* 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:

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

Section III: Due diligence duty

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

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

CCBE: The definition of “Supply chain” must be clarified: it includes suppliers and service providers but not clients (and customers in general), who are not “suppliers”. The proposed definition which includes any “business relationship” of companies relates to the so-called “Value chain”, which is a broader concept and implies not only suppliers, but also the activity of customers (in relation to lawyers these are the clients) to which a product or service is delivered.

In the event that the regulation will not only apply to suppliers, but to the “Value chain” including customers / clients, we are of the opinion that lawyers and law firms should not be considered as normal service providers in the supply chain and should be excluded from any obligation to provide information under a supply chain regulation about their clients *whenever they are acting in the core of their legal profession for the provision of legal advice, opinion, representation and legal services in general*. It is indispensable that the right for every person to have access, representation and advice by a lawyer of their choice under art. 47(2) of the European Charter of Fundamental Rights is preserved and this can only happen if lawyers can efficiently meet their obligation of confidentiality towards their clients. Indeed, lawyers are excluded from UNGP principles when they act in the core of their legal profession, i.e. when they represent clients before courts or authorities or when they do legal advice or opinion work for a client. In respect of such activity lawyers act as instrument of justice and are not businesses in the meaning of the UNGP. This mirrors the corresponding exemption in the AML context - lawyers are specifically exempt from the obligation to report suspicious transactions where they do representation, legal advice or opinion work. This is of course different with those aspects of the work of a law firm that are ancillary to the aforesaid legal work e.g. employment and working conditions of personnel, purchase of material etc., where the UNGP principles apply. As regards the aforesaid auxiliary activities distinctions are of course needed to be made, depending on the factual circumstances e.g. as far as small individual practices are concerned.

As far as other companies (other than law firms) are concerned, we believe there would need to be clear standards by which a company could determine if it has met a due diligence duty and determine whether its implementing actions are sufficient or not. It is also important to clearly define the limits of the due diligence obligations to avoid inappropriate intrusion in the business of suppliers or service providers and generate disproportionate burden on SME’s.

Please see also our reply to questions 1 and 2.

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

- Option 1. “Principles-based approach”: A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These should be applicable across all sectors. This could be complemented by EU- level general or sector specific guidance or rules, where necessary

Option 2. “Minimum process and definitions approach”: The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.

Option 3. “Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues”. This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.

Option 4 “Sector-specific approach”: The EU should continue focusing on adopting due diligence requirements for key sectors only.

Option 5 "Thematic approach": The EU should focus on certain key themes only, such as for example slavery or child labour.

None of the above, please specify

* Please specify:

CCBE:

Due diligence processes regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact originated in a company or in its value chain are part of the internal control system of a company, and this is closely linked to corporate governance issues. So far corporate governance issues have most of the time been regulated on a principle-based approach which has the advantage to facilitate its incorporation in different cultures and approaches.

It is important that any standards to be used are clear and would allow a company to determine if it has met a requirement or not.

Some of the due diligence standards suggested are not suitable to be used as the basis for a legally enforceable obligation. The OECD Due Diligence Guidance for Responsible Business Conduct explains that its objective is to provide practical support to enterprises on the implementation of the OECD Guidelines for Multinational Enterprises. It states that it provides enterprises with the flexibility to adapt the characteristics, specific measures and processes of due diligence to their own circumstances and that enterprises should use the Guidance as a framework for developing and strengthening their own tailored due diligence systems and processes. It says that the practical actions suggested are not meant to represent an exhaustive “tick box” list for due diligence and that not every practical action will be appropriate for every situation.

The legal profession, respectively lawyers, should definitely be excluded from applying any such due diligence standards when consulting/representing their clients, hence when acting in the core of their legal profession (please see the respective more analytical comments under Questions 1 and 14). See also our response to Question 2.

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

Other, please specify:

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

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

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

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

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

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

All SMEs[16] should be excluded

SMEs should be excluded with some exceptions (e.g. most risky sectors or other)

Micro and small sized enterprises (less than 50 people employed) should be excluded

Micro-enterprises (less than 10 people employed) should be excluded SMEs should be subject to lighter requirements (“principles-based” or “minimum process and definitions” approaches as indicated in Question 15) SMEs should have lighter reporting requirements

Capacity building support, including funding

Detailed non-binding guidelines catering for the needs of SMEs in particular
Toolbox/dedicated national helpdesk for companies to translate due diligence criteria into business practices

Other option, please specify

None of these options should be pursued

Please explain your choice, if necessary

CCBE: We do not have a response, as the question is imprecise. We can however note that this raises the question of whether smaller companies should have proportionate requirements placed on them. This mainly depends on how any obligation is phrased as to whether it will be burdensome on SMEs and micro companies. We note that an SME could have a complicated supply chain and a large listed company may not have a complicated supply chain. Generally speaking, the larger the company, the more likely it is to have resources available to it to meet any duty placed on it. Therefore, without knowing how the rules will be and their cost, it is rather difficult to reply at this stage.

A distinction among companies where these rules would apply should also be based on the nature of the services they provide.

We believe that SMEs being part of the supply chain of larger companies which are required to carry out their due diligence throughout their supply chain, should definitely be protected, not only from legal, but also from contractual requirements. Indeed, large companies that are subject to the statutory due diligence requirements might “contractualize” these requirements (or even higher standards) in their dealings with the SMEs that are part of the supply chain. It would not suffice to exclude SMEs from such statutory requirements in order to address this concern. Further protection against contractual requirements is needed and this could be achieved if the law provides for a clear allocation of the due diligence efforts throughout the supply chain between large companies and their suppliers. However, it is difficult to be more precise on this without first knowing the proposed rules.

* 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.

CCBE: Turnover in the EU, offering its products or services in the EU.

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

CCBE: It should basically be the same obligations as for companies established in the EU.

* 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:

CCBE: We understand the concern that if the above measures are introduced for EU companies, they may be at a disadvantage if not also applied to companies doing business in the EU.

However, we are not sure if this is a matter for company law or rather to be dealt with by other areas of law (for example competition law rules which also have an extraterritorial effect).

We also wonder what remedies would apply if a third country company has activities in the EU but has not met the due diligence requirements. Could there also be an obligation on EU companies dealing with non-EU companies to check what due diligence requirements apply to them? They may be subject to similar requirements (or have adopted them voluntarily) under another regime. If this is the case, should this be enough?

However, if any measures are to be considered we believe that severe infringements connected with major impact on humans or the environment may account for distinct measures. Such measures could be the termination/repayment of funds or exclusion from EU public procurement.

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:

CCBE: A judicial enforcement allows control and post examination of maybe undue obligations and safeguards a due fulfilment of mandatory obligations the best. On the other hand, supervision by competent national authorities with the mechanism of EU cooperation and coordination will of course add to consistency and harmonization throughout the EU.

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.

CCBE: We can find some benefit with this approach, although it is not necessarily the case that a group of stakeholders will be interested in the company's sustainability rather than their own short-term interests. Representatives of stakeholders being active in that sense should however justify their opinions and should therefore have to report on their opinions.

If this is to be introduced, it should be clear that the purpose of the engagement is to help the directors promote the long-term sustainability of the company's business and the interests of society as a whole. We also suggest that the company should report in its annual report or corporate governance statement what it has done and whether it thinks this has contributed to improving the company's sustainability and the interests of society as a whole.

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

* As set out above, each company should have to determine which it regards as its key stakeholders for every year (as these may change from time to time).

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
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Advisory body	<input type="radio"/>	<input type="radio"/>
Stakeholder general meeting	<input type="radio"/>	<input type="radio"/>
Complaint mechanism as part of due diligence	<input type="radio"/>	<input type="radio"/>
Other, please specify	<input type="radio"/>	<input type="radio"/>

Other, please specify:

CCBE: The answer as to what is the best practice may vary from one company to another and from time to time. Each company should, within certain limits, be able to choose the mechanism that it thinks is best for it and explain why it thinks that is most appropriate for it.







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)	<input type="radio"/> <input type="radio"/> <input type="radio"/> <input type="radio"/> <input type="radio"/>
Regulating the maximum percentage of share-based remuneration in the total remuneration of directors	<input type="radio"/> <input type="radio"/> <input type="radio"/> <input type="radio"/> <input type="radio"/>

<p>Regulating or limiting possible types of variable remuneration of directors (e.g. only shares but not share options)</p>	
<p>Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration</p>	
<p>Mandatory proportion of variable remuneration linked to non-financial performance criteria</p>	
<p>Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration</p>	
<p>Taking into account workforce remuneration and related policies when setting director remuneration</p>	
<p>Other option, please specify</p>	

None of these options should be pursued, please explain	
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Please explain:

CCBE: There are different opinions about whether the EU should go into the details of how to set a remuneration package. There are already pressures by investors to encourage companies to include non-financial KPIs in the remuneration practices of listed companies, and thus not only financial ones, but this might not be sufficient. It can be problematic to prescribe the approach a company should adopt, but it might be helpful to require companies to explain how they think their remuneration practices contribute to sustainability.

The EU could require listed companies to provide shareholders with a “say on sustainability” in the same way as the say on pay is required. Shareholders’ Rights Directive 2 already requests listed companies to provide shareholders with a say on remuneration policy and requests remuneration policy to incentivise long-term profitability of the company. As a matter of practice, many of the listed companies nowadays incorporate in such policy sustainability criteria.

*** 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

Please explain:

CCBE: Expertise relating to environmental, social and/or human rights matters should be present in large companies, alongside other expertise, which may be just as important, or more important to a company's long term sustainable success. As a first step we suggest an initiative which requires a listed company to explain in its annual report what skills and experience the board as a whole has and whether the company considers these are sufficient to contribute to the long-term sustainable success of the company. Should this prove insufficient, further steps should be taken.

* Question 23: 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?

CCBE: There is academic research that suggests that buybacks do not lead to short-termism (which we assume is the Commission's concern although we do not have enough background information to fully understand why the reference to "buybacks" is here). Before taking any measures in this respect, further research on the consequences of buybacks should be undertaken.

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:

CCBE: The role of corporate governance codes could be examined. A combination of corporate governance codes and better corporate reporting could be a first step before interfering with directors' duties. These codes need to be consistently reviewed and updated. One benefit of such corporate governance codes is that you do not need all of the member states to agree on it, so you can have an impact more quickly. This will thus bring a more flexible approach and could be refined every couple of years more easily. We also believe that stewardship codes, under which asset owners and asset managers commit to engaging with listed companies, could be very useful in changing perceptions.

The question as stated also implies an intervention at EU level to foster more sustainable corporate governance. However, sustainability is a multi-dimensional issue which triggers many questions: Does the EU have the competency under the treaty to act on it? If it is done at the Member state level, should it be done by the legislature or corporate governance codes? Codes have the advantage of flexibility at the member state level.

Fostering sustainable corporate governance is also a question of corporate culture. Carbon tax, environmental, human rights and social regulations must regulate sustainability not only for companies, but also more broadly for any enterprises and citizens.

Finally, the EU could require listed companies to provide shareholders with a "say on sustainability" in the same way as the say on pay is required. This could be coupled with an obligation on the company to report on whether it considers its business is sustainable over a period e.g. of at least 5 years and what it sees as the principal risks and challenges to its sustainability over this period.

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.			

<p>Better performance stemming from increased employee loyalty, better employee performance, resource efficiency</p>			
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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:

CCBE: Based on the outlined intentions of any planned legislation in this area in this consultation document, it is at this point in time not possible for us to identify consequences.

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).

CCBE: N/A (as the CCBE is not a company)