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Consultation Document Proposal for an Initiative on Sustainable Corporate Governance

Fields marked with * are mandatory.

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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
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- ○ Swedish

* Surname

Goebbels

* 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

Eva

* Email (this won't be published)

goebbels@nvb.nl

* Organisation name

255 character(s) maximum

The Dutch Banking Association

* 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.

51894741860-19

* Country of origin

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

Afghanistan	Djibouti	Libya	Saint Martin
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Albania	Dominican Republic	Lithuania	Saint Vincent and the Grenadines
Algeria	Ecuador	Luxembourg	Samoa
American Samoa	Egypt	Macau	San Marino
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Angola	Equatorial Guinea	Malawi	Saudi Arabia
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Belarus	Georgia	Mongolia	South Sudan
Belgium	Germany	Montenegro	Spain
Belize	Ghana	Montserrat	Sri Lanka
Benin	Gibraltar	Morocco	Sudan
Bermuda	Greece	Mozambique	Suriname
Bhutan	Greenland	Myanmar /Burma	Svalbard and Jan Mayen
Bolivia	Grenada	Namibia	Sweden
Bonaire Saint Eustatius and Saba	Guadeloupe	Nauru	Switzerland
Bosnia and Herzegovina	Guam	Nepal	Syria
Botswana	Guatemala	Netherlands	Taiwan
Bouvet Island	Guernsey	New Caledonia	Tajikistan
Brazil	Guinea	New Zealand	Tanzania
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British Virgin Islands	Guyana	Niger	The Gambia
Brunei	Haiti	Nigeria	Timor-Leste
Bulgaria	Heard Island and McDonald Islands	Niue	Togo
Burkina Faso	Honduras	Norfolk Island	Tokelau
Burundi	Hong Kong	Northern Mariana Islands	Tonga
Cambodia	Hungary	North Korea	Trinidad and Tobago
Cameroon	Iceland	North Macedonia	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
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India
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Iran
Iraq
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Latvia
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Rwanda
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Saint Helena Ascension and Tristan da Cunha

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- Liberia
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* 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

If other, please specify:

On behalf of the members of the Dutch Banking Association

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?

- [x] 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:

We agree that companies should follow a holistic approach, however, we underline that financial institutions and listed companies are already subject to more stringent requirements in terms of governance supervision and accountability. Listed companies must comply with corporate governance codes (such as the Dutch Corporate Governance Code) and financial institutions must comply also with the provisions defined by the EU Capital Requirements Directive and Regulation and ECB Guide to fit and proper assessments (suitability) of members of boards of directors and senior positions in the significant credit institutions.

If there would be new obligations at EU level, they should:
- Be for the company, not the (individual) board members or the corporate officers in charge of the day-to-day operations (e.g. the CEO);
- Be for all topics and not one topic such as sustainability singled out;
- Be in line with the current framework for fit and proper testing by the supervisors;
- Be in line with international commitments;
- Be proportionate;
- Be an obligation of means (and not an obligation of result);
- Provide legal certainty with clear definitions, and
- Take into account the specific situation and needs of SMEs.

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:

We are supportive of legislation in this area, and we believe that a balanced, well designed and implemented EU legal framework is preferred over national legislation as:
- A broader, larger and more international group of companies performing due diligence, will enhance the impact of due diligence;
- The impact will also be increased if companies can focus on the most salient issues, while not having to spend time looking for and dealing with national differences with respect to due diligence;
- An EU wide approach takes out unjust (cost) advantage of laggards from inside the EU (benefitting from weaker national legislation), as well as from abroad; non-EU companies active on the EU market;
- An EU legal due diligence definition does however create legal uncertainty when codifying high level / generic (OECD Guidelines for Multinational Enterprises / UN Guiding Principles on Business and Human Rights) norms to be applied on specific cases. This concern needs to be addressed appropriately.

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)?

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

Question 3a. Drawbacks
Please indicate which among the following possible risks/drawbacks linked to the introduction of an EU due diligence duty are more important for you (tick the box /multiple choice)?

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

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

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

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

	Relevant	Not relevant	I do not know/I do not take position
the interests of shareholders	◉	○	○
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:

Please see below.

other interests, please specify:

[Clarification of the aforementioned interests]

The topics, the NVB ticked as 'Relevant': the interests of shareholders, employees and customers and other interests. The interests of shareholders, employees and customers are relevant and have to be taken into account by Dutch banks, as Dutch law already provides shareholders the right to appoint and dismiss board members, provides works councils the right to be informed or consulted on certain topics and also sets out a duty of care towards customers. The (Dutch) financial sector plays an important gatekeeper role aimed at the prevention of fraud, terrorist financing and money laundering. In addition for the option 'other interests' the NVB would like to bring forward that it actively contributes to financial education in the classroom at primary schools.

On the other topics, the NVB ticked 'I do not take position'. All topics could be relevant in the context of stakeholder dialogue, but this should not be confused with prescriptive legislation at the level of the board regarding their duty of care. It should be stressed that this a general assessment. It is up to each company to identify the interests that are relevant for each specific situation and circumstance of that company and decide the best ways to deal with these interests. Dutch corporate governance rules already set requirements regarding including interests of stakeholders. Given the existing legislation and the major differences in size, business, activities, (location of) supply chain etc. of each company, it is not necessary to set a new general legal standard at EU level. Due to the complex nature of the issues, we don't foresee that it will create more impact rather the opposite: a de-risking effect.

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

Please explain:

We see the importance of Responsible Business Conduct and the role that companies and banks can play. Banks exert influence through their customers. This is a challenging task, but we believe that with a 'smart mix' of binding and non-binding measures from an ecosystem approach with various actors that this is possible. The consultation of stakeholders is an important element but should be done in a proportionate way and limited to relevant stakeholders. Considering the large variety of possible stakeholders, we should avoid a "one size fits all approach", there is no need for a legislative obligation and certainly not at board level. Flexibility should be allowed as to the means used to achieve general duties (i.e. in order to take into account a high level principle such as environmental protection, there is no need to introduce a legal obligation to identify the stakeholders).

A legal requirement to balance interests as part of the responsibility of the director, will undoubtedly lead to scenario's which are currently unchartered territory for companies / directors. We believe that advancing human rights in the supply chain of companies can be realized with other measures than legal duties of care for company directors. A due diligence obligation with clear requirements and definitions embedded in law would help to advance RBC. The obligation should rest on the company, not on its directors to avoid de-risking and divesting from challenging supply chains rather than seeking to improve adverse impacts.

We agree that companies should follow a holistic approach when it comes to governance structures, as already required by for example the Dutch Corporate Governance Code. The voluntary codes works well as appropriate norms have already been laid down in national codes, As such, we see much added value for RBC in a legislative proposal on mandatory due diligence. While we support the importance of sustainability,

we feel this consultation overemphasizes the domain of directors duties as the right place to propose regulatory change.
If there would nonetheless be new obligations at EU level, they should:
- Be for the company, not the (individual) board members;
- Be for all topics and not one topic such as sustainability singled out;
- Be in line with international commitments;
- Be in line with the current framework for fit and proper testing by the supervisors;
- Be proportionate;
- Create legal certainty, and
- Take into account the specific situation and needs of SMEs.

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

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

Please explain:

The question asks for requirements aimed at corporate directors. As set out in our answer to Q6, we support requirements at company level, but do not think such new legal requirements should start with an obligation for the directors (including the liability and potential de-risking that derives from that). We are supportive of setting up adequate procedures regarding human rights and environmental impacts. This is the responsibility of the company, so we believe that not so much directors should be required by law but the company itself. Therefore, we believe that directors liability should not be anchored in this way. The UN Guiding Principles on Business and Human Rights also contain important elements on governance, and how policies and due diligences processes should be embedded in the organization. Taking these elements into account in the mandatory due diligence regulation may go a long way in reaching the stated goals.

The form of the intervention may also need to differ per goal. Whereas due diligence requirements (at company level) may be suitable to identify human rights risks on affected stakeholders, the contribution of companies to the realization of the Paris Climate Agreement may be advanced by requirements that set measurable, science-based emission targets. As the range, number and salience of issues companies may be connected to varies, the intervention should allow companies to prioritize and manage these issues in accordance with their size and situation. The OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights provide relevant guidance in this regard.

Companies should have a discretion in identifying relevant stakeholders and contextualise their ESG risk management practices in terms of concrete ESG issues and stakeholders identified.

As:
-the notion of taking a holistic view is already embedded in local corporate governance codes (see our answer to Q1);
- companies differ materially in size, maturity, business model, business sector, countries and contexts they operate in;
- companies are already required to report on sustainability aspects pursuant to existing and pending legislation and frameworks such as NFRD, SFRD, TCFD, ISO etc.

There should be not be a legal obligation on achieving specific targets or identifying specific stakeholders in the domain of directors duties.

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:

It is difficult to give a single answer to a de facto multiple question that puts together different elements. The question asks for requirements aimed at corporate directors. As set out in our answer to Q6 and Q7, we support due diligence requirements at company level, but do not think such new legal requirements should start with an obligation for the directors (including the liability and potential de-risking that derives from that). A legal requirement to balance interests will undoubtedly lead to scenario's which are currently unchartered territory for companies / directors. A scenario in which a company (or its directors) is alleged of not having properly balanced interests does therefore not lend itself for adversarial enforcement / liability. See for more detail Q6 and Q7.

Furthermore, we have to highlight that the formulation of the question is based on certain assumptions. It appears to have in particular listed companies in mind and we disagree with those premises. Also in our experience as an investor, we want to state clearly that it is not an adequate generalisation that shareholders have short-term interests only, as the question directly implies. One type of shareholder does not exist (some are focused on the long term others on the short term).

Corporate directors increasingly take into consideration the interests of various stakeholders and society at large. We do not support separating the interest of shareholders and society, because they are interlinked, and shareholders are very much part of a society.

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?

The main risk is associated to legal certainty concerning the directors' and officers' legal liability. Some of the issues that could fall under the duty of care are indeed of an undetermined nature and could then unfairly expand the scope of the directors' and executive officers' legal liability. It is unreasonable to expect that these latter are held liable for something they do not fully control. Indeed, RBC topics are continuously evolving which could lead to legal uncertainty. Furthermore, different actors may claim to both represent certain 'stakeholder interests' but differ on the required action. Hence, directors' and executive officers should not be held liable (for instance, palm oil, wind turbines can be considered to have beneficial or negative environmental outcomes according to different stakeholders). A proportionate approach should be found. Moreover, the duty of care should not lead to excessive burdens for companies, especially when it comes to the identification of their stakeholders' interests. See also for more risks as elaborated upon under question 6.

The criteria for evaluating the directors' responsibility should be clear and not be discretionary (see also our answer to the previous question).

How could these possible risks be mitigated? Please explain.

These risks might be better resolved by due diligence legislation that is closely aligned with the UN Guiding Principles on Business and Human Rights than by new obligations in the domain of director duties. If nonetheless an obligation is introduced, it should be an efforts-based obligation, not an obligation to reach certain results. There should be no criminal sanctions, nor vicarious liability.

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

In our experience both of investor and investee we can confirm that integrating properly the stakeholder interests in the directors' decision is strategically important and that it is positively evaluated by the shareholders.

Furthermore, several corporate governance codes provide for the consideration of wider stakeholder interests as part of directors' oversight role; e.g. Italy, the Netherlands, Germany. Investors are great supporters of best practices principles as also provided by the codes.

Some shareholders request financial institutions to measure and manage the climate risk in their lending portfolio's. An appropriate (science-based) response (and transparency thereof) has clearly been demonstrated to be much appreciated by both sustainable as well as mainstream investors.

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
- [x] I agree to some extent

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

Please explain:

While we understand that a number of companies may not have strategic orientation on ESG risks yet, we believe that saying that “companies - often - do not have a strategic orientation […]” may create a bias in the replies.

We want to underline that the financial sector has already in place sectorial oversight and rules on this issue and that any action taken by the EU pursuant to this consultation should avoid overlapping and excessive burden.

Also, both as investors and investee, we do agree that the proper integration of ESG risks, impacts and opportunities is beneficial and should be part of the company’s strategy. In our experience, we have observed that such approach is already embedded into the strategy of many financial institutions/issuers.

Sustainability matters (risks, impacts as well as opportunities) should be included in the company´s strategy, but this should not become a legal obligation as the situations and the companies differ too much for such general obligation.

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:

The fact that there are few litigations should not be interpreted to mean that law is not effective. On the contrary, it could mean that it is well respected.

Yes we are aware of these cases, see below, however no legal action resulting from breaches of directors´ duty of care:
- negotiations with the unions to establish digital disconnection for employees, furlough outplacements and remote working conditions;

- shareholder rights in Spain to ask for a specific item to be included in the AGM agenda or to vote for the dismissal of administrators.

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:

The outcomes have been mixed, sometimes finding in favour of minority shareholders and sometimes not, each being specific to the circumstances of the case.

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:

In our experience, existing information and consultation channels for engaging with stakeholders work well and are an important practice that allow a positive and constructive relation between company and stakeholders.

Stakeholders already benefit from mechanisms of protection and can claim company's liability through traditional processes. Existing mechanisms set the right balance and avoid interference for the company.

It should also be noted that the EU directives on whistle-blowers’ protection and collective redress will help companies in preventing and mitigating the risks.

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.

We are against new definitions, as this will create inconsistencies and double work for companies that already apply for example the OECD Guidelines for Multinational Enterprises (‘OECD Guidelines’), whilst taking notice of the fact that the OECD Guidelines have never been meant for legislative purposes. Therefore, it is important to align with the OECD Guidelines and adjust it to proportionality what is reasonable to expect from a company when it becomes a legal obligation. For example human rights due diligence duty should not effectively result in companies being precluded from accepting any residual risks altogether: these are part and parcel of the global challenges we face and the role companies can play in addressing those.

In our view, it is crucial that the right balance is struck between adequate standards regarding due diligence procedures on the one hand, and on the other hand the continued ability to helping local economies in the context of reduction of climate change adverse effects, reduction of poverty, and improved living standards. If the intended measures drive European companies to shy away from risky markets in view of (perceived) increased risks in their home country and associated increased costs, then the overarching aim will inevitably suffer.

If this concept is translated into hard law, we would recommend that:
- Such legislation needs to complement the voluntary multi-stakeholder initiatives and not replace them;
- The consequences should be limited to cases where a company has ‘caused’ or ‘contributed to’ an impact in line with the UNGP Framework;
- The material norm of what constitutes a violation of human rights etc should be clear as due diligence only has very limited added value if it is not clear what you should look for (what action exactly is allowed and what is not);
- The law must be clear whether the proposed mechanism has an voluntary responsible business character or a legal character:
  - The character of a Responsible Business Conduct (RBC) process is voluntary and co-operative. Legal processes are mandatory, antagonistic, oriented towards establishing responsibility for past mistakes under the judicial processes. A judicial process requires clear material norms instead of the high level generic norms that the RBC is providing;
  - A legal process demands a clear distinction between the elements that are RBC based and the elements that are legal in character. Make sure that whatever ‘remains’ a RBC issue it will not be elevated to the status of law still happens, in order that identifying situations of linkage and use leverage can be done in an individual manner;
  - A legal process demands a different formulation of the applicable norms and

standards, as well as procedural guarantees (such as the right of appeal), especially if there are serious consequences such as directors liability;
- The law should clarify to what extent a company can rely on other parties in its supply chain, if such parties are subject to the same due diligence obligation;
- The law should clarify to what extent a company can rely on consultants or other ESG rating agencies providers when performing its due diligence obligations. And to what extent these service providers will also be bound by the law/ enforcement mechanism;
- The law should clarify what the obligation of a company towards a sovereign is (as sovereigns are not subject to the OECD Guidelines, but companies are. As companies will not have leverage over sovereigns, nor a good view of all the activities of the sovereign and the impact of the goods or services provided by the company thereon. It should therefore be clear that this is outside the scope of the due diligence obligation);
- The law should clarify what the obligation of the government is (especially towards countries with endemic issues and systematic risks that cannot be solved by a company, but where a government or the EU has more leverage);
- It should be made clear what the role of other parties in the supply chain is, if such parties are subject to the same due diligence obligation.

The definition of supply chain is too broad, unless the consequences are limited to cases where a company has 'caused' or 'contributed to' an impact. Challenges will arise when working with different terms. It is therefore important that the scope is clearly defined and consequences are limited to cases where a company has 'caused' or 'contributed to' an impact.

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.

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

- Option 2. “Minimum process and definitions approach”: The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.
- Option 3. “Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues”. This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.
- Option 4 “Sector-specific approach”: The EU should continue focusing on adopting due diligence requirements for key sectors only.
- Option 5 "Thematic approach": The EU should focus on certain key themes only, such as for example slavery or child labour.
- None of the above, please specify

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

> The chosen approach should not cause conflict or overlap with existing sector based initiatives, such as the requirements towards the financial sector to manage and report in the area of sustainability (ECB and the possible initiatives of the EBA, taxonomy, SFRD etc). The NFRD should be supporting the reporting element of the due diligence.

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.

See our answer at Q 14 for our preferred approach and the issues that should at least be dealt with to cater for legal certainty.

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
- [x] Other, please specify

Other, please specify:

Option 2 is not ticked. We believe we should support a generic due diligence obligation (as described under option 1), but leave it to the political arena to identify specific areas and requirements.

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
- [x] SMEs should be excluded with some exceptions (e.g. most risky sectors or other)
- [x] Micro and small sized enterprises (less than 50 people employed) should be excluded
- [x] 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

Any new due diligence requirements should be aimed at larger companies, which can be expected to have the organizational capacity to work with these relatively complex requirements (e.g. companies covered by the NFRD). The legislation should clarify what the obligation is of companies that are subject to the due diligence requirements, with respect to the supply chain of companies it deals with that are not in scope of the requirements because it is too small. If the (large) company in scope still has to perform due diligence on the (small) company out of scope, it will most likely mean that the large company (via contractual requirements) will still enforce the requirements on the small company. If such effect is undesired, it should be clearly taken out of scope.

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?

- (x) 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.

We believe that any:
- activity in the EU; and
- establishment of third-country companies in the EU

should be subject to the same obligations and enforcement as applied to any (activities of an) EU company.

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

Same obligations and same enforcement (if any) as EU companies.

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?

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

Please explain:

There should be a clear obligation for the EU / states to use their leverage to address issues abroad. It would not be fair to ask companies to address endemic risks in certain countries (bribery, land title issues, working conditions) without a role for governments. The government task cannot simply be put on the shoulders of companies only as this would not solve the issue. It requires an ecosystem approach. Furthermore there should be checks on implementation level across the EU to ensure level playing field and there should be no additional national legislation.

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:

Due diligence is essentially a Responsible Business Conduct (RBC) process. RBC is by its nature voluntary and co-operative. Introducing enforcement of legal standards and norms, however, means a more legalistic approach. In our view legalistic approaches that are focused on establishing liability in tort law are mandatory, antagonistic and primarily oriented towards establishing responsibility for past mistakes under the judicial processes.

A legal process requires a different type of rule than a RBC process: more precise, better defined and with an introduction of adequate procedural guarantees. A legal due diligence definition would, however, create legal uncertainty when codifying high level / generic (OECD Guidelines for Multinational Enterprises / UN Guiding Principles on Business and Human Rights) norms to be applied to specific cases. This concern needs to be addressed appropriately by setting clear material norms. The lines between a non-judicial and a judicial process should not be blurred. The characters of the two processes are clearly different. A legalistic attitude should be avoided in a RBC process.

As such we suggest to clearly split the two processes; making a clear division between voluntary RBC processes and enforcement by law if and when there is jurisdiction and a violation of a sufficiently specific rule of law.

The national authority could contribute by interpreting obligations (to be applied consistently throughout the EU). The role of such authority should be tailored in the way RBC processes should be monitored, namely forward looking. It should be possible to designate an independent third party explicitly accredited for verifying due diligence information published by undertakings.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.

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

Please explain.

Engagement with stakeholders is important and that is why companies already have established ways to do so. It should be up to each company, however, to define the scope of its stakeholders and decide the best way to organize the dialogue. This process will ensure a dialogue with the most relevant stakeholders where companies operate.

Employees occupy a specific and fundamental position in the company which justifies important rights of information and consultation. There is no definition behind “stakeholders” and no reasonable definition can be found that would fit each the specificity of each company's environment. Thus, we believe that any legal consequences attached to this notion would be highly problematic and potentially dangerous for companies. Companies usually identify the most relevant stakeholders and then prioritize their actions to prevent and, if needed, mitigate the risks.

Finally, it is impossible to prescribe or prioritise in a legislation the interests of all the stakeholders, especially in sectors where companies have thousands of stakeholders.

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:

Sector based stakeholder engagement (such as the Dutch RBC approach) could be seen as a best practice.

Question 21: Remuneration of directors

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

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

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

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

Remuneration is a matter between the company's owners and its management, and we don't support any regulatory proposals that would interfere with it. SRD and the Sustainable Finance Disclosure Regulation ('SFDR") have just increased transparency and shareholders' possibilities to influence a company's remuneration policy, so there's no need for action in this space.

As stated above, NVB is aware that this questionnaire is not addressed specifically to financial institutions. However, as the remuneration of directors in the banking sector is already strictly regulated both at a European Union level and at a national level, the answer to this question must take into consideration such provisions. Primarily, it should be noted that, pursuant to such regulation, in principle, variable remuneration may be awarded only to executive directors (indeed, the award of variable remuneration to non-executive members of the board of directors is exceptional and is subject to specific limitations: e.g. where variable remuneration is awarded in instruments, it is mandatory to set a retention period until the end of the mandate). It is also worth noting that in certain companies, only the CEO is qualified as an executive director. Additionally, it is relevant to highlight that such regulation provides strict and numerous requirements, which are also intended to ensure that remuneration is aligned to the long-term interests and objectives of the company. Among the requirements, the banking regulation sets (with reference to so-called "risk takers", which also include directors) a mandatory minimum portion of variable remuneration that must be awarded in financial instruments which are subject to a retention period: the use of financial instruments is, indeed, considered instrumental to ensure the alignment between the management's remuneration and the company's performance in time.

In light of the above, the options listed above are not applicable to companies of the banking sector as they concern aspects which are already regulated (and the applicable regulation, as highlighted, ensures the alignment of remuneration with the long-term interests and objectives of the company) and they would therefore overlap with the strict and numerous requirements which are already set. For instance, the banking regulation already provides (with reference to the remuneration of "risk takers" which – as mentioned – include directors):
- the obligation to set retention periods for variable remuneration paid in financial instruments (in addition to the mandatory deferral of the payment of part of variable remuneration);
- the requirement that variable remuneration be also linked to non-financial performance criteria;
- strict rules on the structure and types of remuneration (e.g. the provision of a cap to variable remuneration; the obligation to pay a specific part of remuneration in financial instruments; the application of deferral and retention mechanisms, etc.).

Additionally, it should be noted that some of the options appear to be in contrast with the current requirements set for the banking sector (e.g. the option to regulate a maximum percentage of remuneration to be paid in shares appears in contrast with the obligation to award a minimum portion of variable remuneration in financial instruments provided for the banking sector).

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
- [x] Other option, please specify
- [ ] None of these are effective options

Please explain:

In our experience as an investor, we do not necessarily agree with the generalized premises that "Current level of expertise of boards of directors does not fully support a shift towards sustainability". Many boards already have certain levels of ESG expertise and we can confirm that ESG expertise is already requested and taken into consideration in the selection processes whenever possible and relevant. In the Netherlands the Dutch Central Bank already assesses the Dutch boards of the banks on sustainability. On the other hand, sometimes it is difficult to measure these kind of skills and may restrict (even too much) the selection process of members of the board of directors. For these reasons we do not think that setting a minimum number of members or a percentage of board directors with "relevant ESG expertise" can work well in practice: such expertise may be built over time, with regular trainings and self-assessment.

More generally speaking many sectors already have requirements of directors´ suitability. It is important that companies keep flexibility and freedom when choosing the board members they need to best undertaking their activity.

According to the current regulation the management body of a credit institution must be suitable in order to carry out its responsibilities and be composed in such a way that contributes to the effective management of the credit institution and balanced decision-making.

Many regulators see the need for enhancing the incorporation of ESG risks into institutions' business strategies and processes and proportionately incorporating them into their internal governance arrangements. This could be done by evaluating the long-term resilience of institutions' business models, setting ESG risk-related objectives, engaging with customers and considering the development of sustainable products. Adjusting the business strategy of an institution to incorporate ESG risks as drivers of prudential risks is considered as a progressive and long-term tool to mitigate the potential impact of ESG risks.

In the light of the above the ESG level of expertise of boards of directors is self-assessed over time considering the ambition, the business strategy, the business model, the risk appetite and the risk culture of the institution so actions to enhance directors' competence in this area could be built accordingly.

Question 23: Share buybacks

Corporate pay-outs to shareholders (in the form of both dividends and share buybacks) compared to the company's net income have increased from 20 to 60 % in the last 30 years in listed companies as an indicator of corporate short-termism. This arguably reduces the company's resources to make longer-term investments including into new technologies, resilience, sustainable business models and supply chains[19]. (A share buyback means that the company buys back its own shares, either directly from the open market or by offering shareholders the option to sell their shares to the company at a fixed price, as a result of which the number of outstanding shares is reduced, making each share worth a greater percentage of the company, thereby increasing both the price of the shares and the earnings per share.) EU law regulates the use of share-buybacks [Regulation 596/2014 on market abuse and Directive 77/91, second company law Directive].
In your view, should the EU take further action in this area?

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

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

-

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

No, mandatory due diligence should be sufficient and there is no need for changes in corporate governance.

Section V: Impacts of possible measures

Question 25: Impact of the spelling out of the content of directors' duty of care and of the due diligence duty on the company
Please estimate the impacts of a possible spelling out of the content of directors' duty of care as well as a due diligence duty compared to the current situation. In your understanding and own assessment, to what extent will the impacts/effects increase on a scale from 0-10? In addition, please quantify/estimate in quantitative terms (ideally as percentage of annual revenues) the increase of costs and benefits, if possible, in particular if your company already complies with such possible requirements.

Table

	Non-binding guidance. Rating 0-10	Introduction of these duties in binding law, cost and benefits linked to setting up /improving external impacts' identification and mitigation processes Rating 0 (lowest impact)-10 (highest impact) and quantitative data	Introduction of these duties in binding law, annual cost linked to the fulfilment of possible requirements aligned with science based targets (such as for example climate neutrality by 2050, net zero biodiversity loss, etc.) and possible reorganisation of supply chains Rating 0 (lowest impact)-10 (highest impact) and quantitative data
Administrative costs including costs related to new staff required to deal with new obligations			
Litigation costs			
Other costs including potential indirect costs linked to higher prices in the supply chain, costs 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:

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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).

Quantitative data is currently not available across all mentioned areas. Where it is available, it does appear to indicate a positive impact to some extent.

Contact

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