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

* Surname

Blasikiewicz

* 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

Blazej

* Email (this won't be published)

b.blasikiewicz@ebf.eu

* Organisation name

255 character(s) maximum

European Banking Federation

* 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.

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* Country of origin

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

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

	French Southern and Antarctic Lands		Sandwich Islands
Barbados	Gabon	Monaco	South Korea
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
British Indian Ocean Territory	Guinea-Bissau	Nicaragua	Thailand
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
Curaçao
Cyprus
Czechia

India
Indonesia
Iran
Iraq
Ireland
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Kuwait
Kyrgyzstan
Laos
Latvia
Lebanon
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Norway
Oman
Pakistan
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Panama
Papua New Guinea
Paraguay
Peru
Philippines
Pitcairn Islands
Poland
Portugal
Puerto Rico
Qatar
Réunion
Romania
Russia
Rwanda
Saint Barthélemy
Saint Helena Ascension and Tristan da Cunha

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

Democratic Republic of the Congo

Saint Kitts and Nevis

- Denmark
- Liberia
- Saint Lucia

* Publication privacy settings

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

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

☑ I agree with the personal data protection provisions

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

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

Consultation questions

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

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

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

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

- Yes, both in and outside the EU
- No

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

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

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

- Yes
- No

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

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

- Yes
- No

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

- Yes
- No

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

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

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

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

Please provide reasons for your answer:

This question is biased as it relies on the wrong assumption that Board of Directors does not take into account ESG issues.

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 or the one of Borsa Italiana) 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.

However, there is no need for a definition at EU level of Board members and directors' obligations, as company law should leave enough flexibility to adapt itself to its environment.

We therefore believe that it would not be necessary at this point for the EC to propose new legal obligations. However, if the Commission was to propose new legal 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 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:

There are plenty of international guidelines and norms, as well as sector specific self-regulation, to which companies already adhere to. We do not believe that a legal due diligence definition would bring anything new to the substance for the banking sector, which is already more regulated than any other sector. It must be considered an appropriate balance between legal certainty for companies on the one hand and enforce responsibility in supply chains on the other, because problems are usually contextual, and responsibility is difficult to locate to any one actor.

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, instead of having to devote efforts to deal 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.

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
- [ ] 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)?

- [x] Increased administrative costs and procedural burden
- [x] Penalisation of smaller companies with fewer resources
- [x] Competitive disadvantage vis-à-vis third country companies not subject to a similar duty
- [x] Responsibility for damages that the EU company cannot control
- [ ] Decreased attention to core corporate activities which might lead to increased turnover of employees and negative stock performance
- [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	X		
the interests of employees	X		
the interests of employees in the company's supply chain			X
the interests of customers	X		
the interests of persons and communities affected by the operations of the company			X
the interests of persons and communities affected by the company's supply chain			X
the interests of local and global natural environment, including climate			X
the likely consequences of any decision in the long term (beyond 3-5 years)			X
the interests of society, please specify			X
other interests, please specify			X

the interests of society, please specify:

other interests, please specify:

The EBF ticked "I do not take position" because some of the proposed interests are too vague, thus we cannot assess their consequences and impacts. For those where we indicated that they are relevant, it should be stressed that this is a general assessment. It is up to each company to identify the interests that are relevant for the specific situation and circumstances of that company and decide the best ways to deal with these interests. Dutch Corporate governance rules already set requirements regarding interests to be taken into account. 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 of interests to take into account for a company.

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:

First of all, from a company law general point of view, the role of the board is mainly to provide oversight on duties and should not be prescribed by law how to perform them.
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).

Furthermore, EBF members in their capacity as investors, confirm that it is important for companies to know who their stakeholders are and, therefore, to "identify" them (without prioritizing one above the other), while also identifying related risks and opportunities, as well as conflicting issues among the different stakeholder categories.

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:

Given that some of these factors could affect the long-term sustainability of the company, the Board should have proper oversight over them. However, it should not result in a legal obligation on processes and targets.
- Risk management – also of ESG issues – is a function of the executive management.
- Risk oversight (which would exclude defining processes and targets) – also of ESG issues – is a function of board directors.

Risk management and oversight are already adequately embedded into national Corporate Governance principles and supervisory expectations relating to risk management of banks/actors of the financial industry (for example ECB Guide on climate-related and environmental risk).

It should be left to companies to identify relevant stakeholders and contextualize their ESG risk management practices in terms of concrete ESG issues and stakeholders identified, as well as to decide on the most appropriate governance arrangements, procedures and targets based on the sector, industry, business models and other specific facts and circumstances.

In fact, introducing such a legal obligation would be very perilous.

Furthermore, we would like to recall that in terms of climate, companies are already facing a very exhaustive reporting framework (European sustainable finance package, TCFD, ISO, etc). The diversity of situations and degrees of maturity should be considered. It would also be necessary to ensure methodological consistency with other existing obligations or under discussion.

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:

We disagree with the frame of the question n.8, assuming indirectly that corporate directors are only focusing on the short-term financial interests of shareholders.

We have to highlight that the formulation of the question looks biased to us and we do not agree with the premises. In particular, also in our experience of investor, we want to state clearly that it is wrong to generalise saying that shareholders have short-term interests, as the question directly imply – that is indeed the trend that is intended to be eradicated by SRD II, which encourages the long-term involvement of the shareholders.

It is very difficult to give a single answer to a de facto multiple question that put together different elements. Members of the board and corporate executive officers take into consideration the interests of society at large. This serves the long-term interest of shareholders and company, which in our mind is the key objective of a company. We do not support separating the interest of shareholders and society, because they are interlinked, and shareholders are very much part of a society.

That being said, we want to underline that in our experience, members of the board and corporate executive officers take into consideration the interests of stakeholders within their oversight role. It should be reminded that achieving a balance of all stakeholders' interests (however broad they may be) is impossible for a company and that it could lead to an interference in the company's business and management.

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 board of directors' and corporate executive officers' legal liability. Some of the issues that could fall under the duty of care are indeed of an undetermined nature and could then dangerously expand the scope of board of the directors' and corporate executive officers' legal liability. But these latter cannot be held liable for something they do not fully control. Indeed, ESG topics are continuously evolving and subject to strong hazard which could lead to legal uncertainty. Board of directors' and corporate executive officers should hence not be held liable (for instance, 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.

As already explained in the previous answer, the criteria for evaluating the board of directors' and corporate executive officers' responsibility are to be clear and not too discretionary. This would not be the case should the duty of care be spelled out in law, according to the above proposal. The proposed approach entails the risk of significantly increasing the level of responsibility of board of directors and corporate executive officers without being sure of the burdens of such responsibility that would be defined by the single judge. Moreover, it would be very difficult to determine what is the damage suffered by the stakeholders and the relevant entity.

Moreover, there should be no legal interference in corporate governance, the wide discretion to weigh shareholder and non-shareholder interests, and thus the voluntary nature of ESG measures. The Board should have discretion to maintain a balance between shareholders interests and those of other stakeholder groups. As expressed in Q.8 the Board must act in the interest of shareholders, even though they will take into account the interests of other stakeholders.

How could these possible risks be mitigated? Please explain.

It would not be appropriate to impose liability for members of the Board on this topic.

These possible risks could be mitigated through refraining from setting up at EU level a definition of duty of care or "company interest" which has to remain flexible. We suggest a differentiated approach that take into consideration companies' specificities. An approach based on guidance and principles may prove effective when dealing with listed companies).

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

In EBF members 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.

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:

While we understand that a number of companies may not have yet strategic orientation on ESG risks, 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. In particular, the EBA is currently working on defining the framework by which to integrate ESG risks into risk management and supervision, and the ECB has just issued new guidelines on the supervisory expectations on climate and environmental risks. We therefore think that it is really important that any potential new initiative takes due consideration of the work already in place/underway, so that new measures are properly aligned, respond to the right objectives and do not add further complexity to the work undertaken on climate/sustainability.

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, but legislative measures are not the right way to promote this. In our experience, we have observed that such approach is already embedded into the strategy of many 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, that means 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:

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 works well and is 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 do not support the development of new definitions, as this will create inconsistencies and double work for companies that already apply the OECD Guidelines. We encourage the Commission to remain consistent with the definitions and concept of due diligence as set out in the 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 Guidelines and adjust it to proportionality what is reasonable to expect from a company when it becomes a legal obligation.

If this concept is translated into hard law:
- 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;
- 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 an RBC process is voluntary, co-operative, future oriented. Legal processes are mandatory, antagonistic, oriented towards establishing responsibility for past mistakes);
- 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 what 'remains' a RBC issue and is not elevated to status of law still happens, like identifying situations of linkage and use leverage;
- 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 as they are the primary duty bearer of for instance human rights (see UNGP's duty to respect). This is especially the case towards countries with endemic issues, that cannot be solved by a company, but where a government or the EU has more leverage);
- other parties in its supply chain, 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. Problems 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, and also limited to the relationships specifically included in the contract between the signing parties.

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.

- (x) 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.

If any duties are introduced, they should be principle-based so that there is flexibility for different sectors and different legal status or sized companies to apply the rules according to what works best in their situation.

Minimum process and definitions approach should ensure an appropriate combination of flexibility with a consistent framework across countries and sectors.

Please refer to our answer at Q14 for 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
- ☐ 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)
- [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
- [x] 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 non-European company marketing products and services in the EU should be subject to all obligations/enforcement applied to any EU company, from a certain threshold, in order to ensure shared value and a level playing field.

It could be considered that the directive applies to as long as the consolidated turnover of this company in the EU exceeds a certain threshold to be determined. A declaration system to the European Commission (ie a new Department of the DG Trade) might be contemplated.

On top of that, the consolidated turnover of the foreign entity in the world might be used by the European Commission to obtain information from the entity on the consolidated turnover of this company in the EU (in a confidential way) and how the entity complies to the European law.

We are not in favour of an alternative criteria such as the number of employees in the group based in the EU, with a threshold: these criteria would present a risk of job losses in Europe; on top of that, digital companies or FINTECH do not necessarily employ many employees in the EU.

If the form of extraterritoriality or its triggering criterion is poorly calibrated, it could likely deter the supply of goods or services in the European Union or level playing field.

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

Obligations of information, reporting and transparency should be imposed on these companies. It should be an obligation of means and not impose an obligation of results.

To be noticed: the more demanding the EU legislation, the more difficult it will be to apply the directive to non-European companies (especially if the European Directive is applied to all the services and products offered in the world by the non-European entity) and the more it will reduce the attractiveness of European markets for goods, services and capital.

Also, European companies should not be subject to more strict requirements than their competitors operating in the Single Market (level playing field).

European companies should also benefit from a degree of flexibility in adapting these obligations to the specifics of the sector where they operate.

With regard to the enforcement of a European 'duty of care' scheme, it would be preferable to avoid implementation at the level of each Member State. It could be envisaged to entrust the responsibility to a new department of the European Commission's DG Trade. In its role as guardian of the treaties, the European Commission appears to be the institution most able to guarantee respect for the rights guaranteed by European law in third countries. The European Commission will need to be provided with sufficient resources. We trust that the Commission should be able to issue an order to comply.

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. Government tasks cannot simply be put on the shoulders of companies. Checks on implementation level across EU to ensure level playing field; 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 voluntary, co-operative, future oriented. If you introduce enforcement, you enter a more legal approach. Legal processes are mandatory, antagonistic, oriented towards establishing responsibility for past mistakes.

A legal process requires a different type of rule than a RBC process: more precise, better procedural guarantees. The lines between a non-judicial and a judicial process should not be blurred. The characters of the two processes are clearly different. A legal 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 (forward looking) and regular court proceedings if and when there is jurisdiction and a violation of a clear enough rule.

A national authority could help in 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
- (•) 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.

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 due to the specificity of each company's environment. Thus, we believe that any legal consequences attached to this notion would be highly problematic and 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	○	○

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:

Legal provision or soft law already covers most of these proposals.

We do not see the need to take action in this matter by regulating it, as we believe that remuneration should be analyzed case by case between the company's owners and its management. Besides, we have a new requirement by SHRD that has just increased transparency and shareholders' possibilities to influence a company's remuneration policy."

As stated above, EBF 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, CRD V, 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:

Many sectors already have requirements of directors´ suitability, both individually and collectively. It is important that companies keep flexibility and freedom when choosing the board members they need to best undertaking their activity. It should be reminded that it is the board collective level of expertise that matters and individual expertise in any aspect should not be required to be part of the board.

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.

Furthermore, in our experience of 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 are already requested and taken into consideration in the selection processes whenever possible and relevant. On the other hand, sometimes it is difficult to measure this 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.

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:

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	1	6	10
Litigation costs	1	8	8
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.	0 (higher prices in supply chain)	4 (higher prices in supply chain)	6 (higher prices in supply chain)
Better performance stemming from increased employee loyalty, better employee performance, resource efficiency	5	4	4

Competitiveness advantages stemming from new customers, customer loyalty, sustainable technologies or other opportunities	5	2	2
Better risk management and resilience	4	7	8
Innovation and improved productivity	4	3	2
Better environmental and social performance and more reliable reporting attracting investors	3	5	5
Other impact, please specify			

Please explain:

Question 26: Estimation of impacts on stakeholders and the environment
A clarified duty of care and the due diligence duty would be expected to have positive impacts on stakeholders and the environment, including in the supply chain. According to your own understanding and assessment, if your company complies with such requirements or conducts due diligence already, please quantify / estimate in quantitative terms the positive or negative impact annually since the introduction of the policy, by using examples such as:
- Improvements on health and safety of workers in the supply chain, such as reduction of the number of accidents at work, other improvement on working conditions, better wages, eradicating child labour, etc.
- Benefits for the environment through more efficient use of resources, recycling of waste, reduction in greenhouse gas emissions, reduced pollution, reduction in the use of hazardous material, etc.
- Improvements in the respect of human rights, including those of local communities along the supply chain
- Positive/negative impact on consumers
- Positive/negative impact on trade
- Positive/negative impact on the economy (EU/third country).

While it is difficult to estimate the quantitative impact we recognize that a clarified duty of care and the due diligence duty would be expected to have positive impacts 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.

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