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Consultation Document Proposal for an Initiative on Sustainable Corporate Governance

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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

Gilotto

* 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

Marco

* Email (this won't be published)

mg@iogp.org

* Organisation name

255 character(s) maximum

International Association of Oil & Gas Producers (IOGP)

* 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.

3954187491-70

* Country of origin

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

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

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

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

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

Democratic Republic of the Congo

- Denmark
- Liberia
- Saint Kitts and Nevis
- Saint Lucia

* Publication privacy settings

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

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

☑ I agree with the personal data protection provisions

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

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

Consultation questions

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

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

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

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

- Yes, both in and outside the EU
- No

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

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

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

- Yes
- No

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

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

- Yes
- No

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

- Yes
- No

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

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

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

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

Please provide reasons for your answer:

We agree with the statement that stakeholders' interest should be taken into account by companies and directors, but disagree that this should be done at EU level in a legally binding way through directors' duties. Unfortunately, the limited possibilities of reply do not allow us to express this view in a selected response, so we have opted for 'do not know'.

The oil & gas industry is actively participating, together with investors and broader society, in the growing efforts to incorporate sustainability into companies' decision-making and supports the concept of sustainable corporate governance. Many of our member companies are already integrating sustainability issues like those mentioned in the question into their strategy.

Moreover the nature of oil & gas activities typically involves long-term projects and large investments over a 15-30 year period. For this reason, companies and their investors typically set long-term objectives.

In the energy industry, best practice documents on corporate social responsibility matters have been developed by industry organizations such as IOGP and its sister organization IPIECA (the international oil & gas industry association for environmental and social responsibility). Indeed, IPIECA was founded in 1974 with the aim of helping the oil & gas industry to improve social and environmental performance by developing, promoting and sharing best practices. Its member-led groups have published a variety of resources, including the Human Rights Training Tool as well as practical guides on integrating human rights into environmental, social and health impact assessment and conducting human rights due diligence, in line with the UN Guiding Principles and the OECD Guidelines. IOGP and IPIECA provide a forum for encouraging continuous improvement in industry performance in these areas.

At national level, many European countries include sustainable governance measures in their Corporate Governance codes, which already recommend that issuers integrate risk and opportunities relevant to the long-term sustainability of the company into their business strategy. Many national frameworks already provide rules on directors' duties and responsibilities intended to ensure that these evolve in line with the emerging best practices. Moreover, many Corporate Governance Codes already support legal provisions recommending the board to pursue long-term value creation and to consider also the interests of other stakeholders that are relevant for the company's business. Such an approach is already observable for instance in France, the UK, Italy, Belgium, Germany, and the Netherlands. Poland is also developing a new Corporate Governance Code to better integrate sustainability issues.

We wish to highlight though, in case new EU-level requirements are nevertheless taken forward, that the framing of Q1 to have “due regard” or “take into account” stakeholder interests alongside the financial interests of shareholders is consistent with consideration of different interests in the long-term management of the risks and opportunities facing the company. But this is not the same as “maximisation” of performance (in any one dimension, or overall) as described in the first answer option or a duty to “balance the interests of all stakeholders” as described in Q8, both of which are far more prescriptive and potentially counter-productive standards.

We further consider it would be unnecessary to apply any such EU-level requirements specifically to directors – a corporate requirement would be sufficient, and would avoid a range of potential concerns which would be raised by any attempt to apply the requirement to directors in their individual capacity (see further at Q9 response). It would also recognise the importance of allowing the various member states’ legal and company law systems to govern the implications for directors of a corporate obligation.

A more prescriptive approach to corporate or directors’ obligations could also undermine or conflict with corporate governance frameworks and voluntary good practice initiatives (per paragraphs above), which importantly allow flexibility for companies in how they address diverging interests.

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?

- (selected) 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:

A coordinated European approach between states is essential to ensure that companies are not subject to competing and duplicated requirements in different Member States. We therefore support ongoing discussion at EU level for harmonizing efforts.

Any new framework should:
- be risk-based following existing international frameworks such as the UN Guiding Principles on business and human rights (UNGPs), and OECD due diligence guidelines, and specific in which human rights should be covered. European companies operating worldwide already refer to these standards to conduct business in a responsible way and governments are also more familiar with those. The UNGPs, in particular, clearly delineate between the State duty to protect and the business responsibility to respect human rights. This division of responsibilities should be embedded in any future legislative initiative;
- be focused on a company's development and implementation of risk-based diligence processes;
- in line with the rule of law principles of legal certainty and clarity, avoid overly broad wording and clearly limit the scope of legally required due diligence system to activities within companies' control or where there is a direct contractual supplier relationship only (own activities, those of its controlled subsidiaries, first tier of suppliers);
- encourage improvement in company approaches over time and recognise the importance of encouraging efforts to address the root causes of human rights harms;
- reflect the dynamism in the concept of a 'smart mix' of measures – as described by the UNGPs - by states, which demands an ongoing interplay between new regulations, policy measures and support to voluntary efforts by business, with each strengthening the effect of the others to foster respect for human rights over time;
- be cross-industry and relevant to both SMEs and large businesses alike, whether publicly-, privately- of state-owned. This demands a pragmatic framework and flexibility in order to be applicable to different industries and business sizes, as there is no such thing as one size fits all;
- be accompanied by a reasonable scope of liability recognising the complexity of extended value chains. Companies should not be considered to be in breach of any rule or regulation for harm in their value chain or exposed to liability when they have taken reasonable due diligence measures; additionally, companies should be entitled, as one possible step, to comply with their due diligence duties by e.g. obtaining their contractors'/partners' respective statements of compliance;
-not reference climate change (GHG emissions), which as a global systemic issue does not lend itself to a due diligence exercise and is best addressed by other means. We support ambitious actions to reduce GHG emissions and we contribute to the development of a wide range of innovative technologies such as Carbon Capture and Storage (CCS) and low-carbon hydrogen. Measures to manage and reduce GHG emissions to achieve climate neutrality are regulated in the EU under other legislative elements of the EU Green Deal, and elsewhere under other countries' pursuit of their Nationally Determined Contributions (NDCs) and (in many cases) their national net zero ambitions. Therefore, a due diligence obligation relating to climate change presents significant difficulties for coherence with other policies and legislation that exist at the EU and national levels.
- not make companies responsible for how their products are used following sale. Due diligence in relation to use of products would be difficult to achieve and could effectively require companies to dictate the consumption practices of other companies and individuals, many of whom will be unknown to the company itself.
- establish proportionate granularity of due diligence requirements: due diligence assessments of severity and reporting obligations linked to due diligence should be corporate group or company-wide. They should not be country by country, subsidiary by subsidiary or activity by activity, which would be much less practical and risk duplicating or replacing existing local-level stakeholder engagement or communication and potentially undermine trust and confidentiality needed for collaboration and engagement to address concerns with business partners and other stakeholders.

EU legislation should be carefully framed to ensure that companies and their directors continue to have flexibility to determine their own strategy independently. This is likely to give rise to the most innovative and effective solutions taking into account the particular circumstances and risks related to each industry, each company and all groups of stakeholders.

It will be essential to ensure that legislation is compatible and does not give rise to unnecessary overlap with existing obligations.

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

- [ ] Ensuring that the company is aware of its adverse human rights, social and environmental impacts and risks related to human rights violations other social issues and the environment and that it is in a better position to mitigate these risks and impacts
- [ ] Contribute effectively to a more sustainable development, including in non-EU countries
- [x] Levelling the playing field, avoiding that some companies freeride on the efforts of others
- [ ] Increasing legal certainty about how companies should tackle their impacts, including in their value chain
- [ ] A non-negotiable standard would help companies increase their leverage in the value chain
- [x] Harmonisation to avoid fragmentation in the EU, as emerging national laws are different
- [ ] SMEs would have better chances to be part of EU supply chains
- [x] Other

Other, please specify:

These potential benefits would only materialise if the EU framework is practical and flexible, and avoids distorting longstanding legal and market frameworks.

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
- [ ] Penalisation of smaller companies with fewer resources
- [x] Competitive disadvantage vis-à-vis third country companies not subject to a similar duty
- [x] Responsibility for damages that the EU company cannot control

- [ ] Decreased attention to core corporate activities which might lead to increased turnover of employees and negative stock performance
- [ ] Difficulty for buyers to find suitable suppliers which may cause lock-in effects (e.g. exclusivity period/no shop clause) and have also negative impact on business performance of suppliers
- [x] Disengagement from risky markets, which might be detrimental for local economies
- [x] Other

Other, please specify:

Consideration needs to be given when framing the due diligence obligation and connected enforcement measures to the potential for negative legal risk-based consequences for investment in challenging countries or contexts where engagement by EU companies in those markets brings economic benefits and inclusive growth both for the EU and 3rd countries, thus supporting greater realisation of human rights and other positive social or environmental outcomes.

The EU needs to ensure it does not build or create regulatory incentives for companies to undertake large “tick-box” exercises that, while being costly and onerous, (i) may not lead to results on the ground or (ii) may even be counter-productive, shifting the focus from outcome driven to compliance driven. i.e. when requirements are not fit for purpose and risk based, the exercise can evolve into businesses focusing on ticking boxes to stay compliant, rather than focusing on what they may be able to do in practice to actually improve the situation on the ground.

It would be counterproductive for a European law to impose liability on EU companies for matters which are beyond their control, or which should normally be the responsibility of States or third parties. Adopting too extensive due diligence duty and related liability framework could discourage transparency and undermine the ability of companies to conduct a due diligence process oriented at preventing and mitigating risks (and opt for a tick-box exercise), especially in cases where the companies do not have the full ability to control /influence a specific behaviour.

We see benefits of adopting a proportionate approach when establishing the EU due diligence framework to ensure a level playing field while safeguarding competitiveness of companies based in lower-income EU Member States.

It is essential that the terms of the law should not require companies to divulge strategic information which could put European companies at a competitive disadvantage compared to non-European companies.

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

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

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

	Relevant	Not relevant	I do not know/I do not take position
the interests of shareholders	○	○	◉
the interests of employees	○	○	◉
the interests of employees in the company's supply chain	○	○	◉
the interests of customers	○	○	◉
the interests of persons and communities affected by the operations of the company	○	○	◉
the interests of persons and communities affected by the company's supply chain	○	○	◉
the interests of local and global natural environment, including climate	○	○	◉
the likely consequences of any decision in the long term (beyond 3-5 years)	○	○	◉
the interests of society, please specify	○	○	◉
other interests, please specify	○	○	◉

the interests of society, please specify:

other interests, please specify:

Interests of different stakeholders are sometimes contradictory. There are also differences in the nature of different interests identified above and how those might be expressed to a company. How material each of them may be to a company's long-term success and resilience may vary greatly from company to company in different circumstances. We have therefore chosen 'I do not know/I do not take a position' from the options above. Where they are potentially material, the company should find a way to give due regard to all of them.

Many investors already consider the long-term profitability of the company and therefore expect directors to take into account all the relevant interests for the company including social and environmental matters. For further details, please refer to our response to Q8, Q9, Q10 and Q11.

We strongly believe that companies should have the flexibility to decide (i) who their most relevant and potentially material stakeholder groups are; (ii) the most appropriate and proportionate way to communicate or engage with each group; and (iii) how to take into account the interests or views of each group. Companies are best placed to make these assessments.

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:

Interests of various stakeholders can diverge significantly. It is unnecessary and would be practically impossible to prescribe how such diverging interests should be balanced. A legal requirement to balance the interests of all stakeholders combined with risk of personal liability would create significant legal uncertainties.

We believe that, if any EU level requirement is introduced, it should be applied to companies themselves rather than to individual directors. In order to be workable and proportionate, such a requirement placed on companies would need to meet the following criteria:

• It is framed at a high level and governed by the principles of proportionality and materiality, so that the company can focus its identification exercise, risk and opportunity management on the issues and stakeholders it judges to be the most potentially material for the company over the long-term.

• It does not inadvertently drive a 'tick-box' process at the expense of quality engagement and prioritised risk management in the areas of most importance. (For example, it would be almost impossible for a company of any size to even identify EVERY stakeholder.)

• Companies are allowed to use their judgement and discretion in deciding how to best understand and engage with the interests of various stakeholders – for example, in determining who (if anyone) is/are best placed to "speak for" a particular stakeholder group.

A company's direct stakeholders – whether at corporate strategy or an individual project level – may cover a vast array of parties, ranging from employees to local communities, to NGOs, to business partners, to public authorities, to financial institutions, and investors. Indirect stakeholders may be an even broader group including those with indirect or induced economic interests in the project, those benefiting from tax revenues generated by the project, etc. EU legislation should not give rise to obligations which make impossible demands on companies to reconcile stakeholder interests, which additionally may evolve over time.

Any obligations in relation to dialogue with stakeholders should allow companies flexibility to implement such dialogue in the manner most appropriate to their activities.

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 Non-Financial Reporting Directive provides a mechanism for requiring disclosure by companies on their management of sustainability issues.

We do not support the EU going beyond this:
- to dictate how companies choose to meet requirements on their management of sustainability, which will vary enormously from company to company, sector to sector, and issue to issue. However, if an 'adequate procedures' obligation is established we support the express inclusion of a defence to liability for a company which has taken reasonable steps (such as due diligence) to meet that requirement; or
- to impose such requirements on individual directors.

In particular, the use of targets, aims or goals is simply one of the many legitimate ways a company may choose to help it safeguard the interests of various stakeholders, and may be more suited to some companies for some issues than for others – it is essential for proportionality and flexibility, that companies retain the ability to tailor their approach to the particular circumstances they face.

Mandating one particular approach – for example setting measurable (science-based) targets - is not appropriate given the unique characteristics of individual companies. Given the variety of size, activity and geographical scope of European companies, any EU initiative in this area should allow companies complete flexibility to decide whether and which procedures and targets are appropriate to their business. The establishment of fixed objectives quantified by legislation or by third parties would be perilous. Companies and specific industry sectors are best placed to consider both whether targets (which may include science-based targets, where they consider an appropriate methodology exists) are appropriate and to fix an appropriate methodology underpinning such targets.

Moreover most human rights and social issues and many health and environment impacts do not lend themselves to measurable, quantifiable key performance indicators (KPIs) and targets. Indeed, KPIs and targets could in many cases be counterproductive, because by focusing on one measurable parameter, other human interests could be overlooked.

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:

As noted in our response to Q1, this question introduces different terminology again ("balance the interests of all stakeholders") than that used in Q1 (to have "due regard for stakeholders' interests" / "take account of those interests in corporate decisions alongside financial interests of shareholders"), creating material lack of clarity.

Interests of various stakeholders can diverge significantly. It is unnecessary and would be practically impossible to prescribe how such diverging interests should be balanced. A legal requirement to balance the interests of all stakeholders combined with risk of personal liability would create significant legal uncertainties.

Moreover, we feel this question is not formulated in an appropriate manner as it implies that interests of shareholders and other stakeholders are inherently contradictory, which is not necessarily true. This question seems to refer to the recent Commission study on directors' duties and sustainable corporate governance. The study claims that there is undue short-termism in corporate decision-making and presents several policy proposals to address this. In our view, the evidence relating to short-termism presented in the study is insufficient and therefore the findings are erroneous. A comparison between shareholder payouts and investments in capital expenditure and R&D in listed companies is simply not sufficient for such a conclusion. The basic function of the capital markets is to allocate risk capital. Risk capital is also needed for funding of innovations and investments in sustainable growth. Payouts to shareholders are an indication that the markets are functioning properly. A significant proportion of payouts to shareholders is reinvested to capital markets, including to those companies in need of new risk capital. Moreover, the findings of the study deviate from the findings of the reports of ESMA, EBA and EIOPA published in December 2019 on undue short-termism in the securities, banking and insurance sectors respectively. As these reports did not highlight any major corporate governance related issues which would merit rewriting of rules relating to directors' duties and liability, the findings of the study should not be taken for granted.

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 purpose of a company is often linked to the promotion of shareholder value (the so-called shareholder primacy norm). Directors of a company are required to act in the best interest of the company. In carrying out this duty, directors are accountable to shareholders. In our view, there is no inherent contradiction between the interests of shareholders and the objective to promote sustainability. Companies acting in sustainable manner often perform better in the long term than their less sustainable peers. It is thus in the interest of shareholders that directors of a company take stakeholders' interests into account in their decision-making. Since different stakeholder groups' interests can nonetheless in some instances be contradictory, a legal requirement to balance the interests of all stakeholders' interests combined with risk of personal liability would create significant legal uncertainties. Such a requirement might also lead to a higher level of compensation to directors, as potential directors would seek compensation for the personal risks they are exposed to, which might not be practically nor economically acceptable.

A legal requirement to balance the interests of all stakeholders' would also distort the clarity of the chain of accountability as directors' accountability towards shareholders would be reduced. While this would likely give rise to more uncertainty it might, paradoxically make it more (not less) difficult for any one group of stakeholders to hold directors to account. Such an obligation would also make it more difficult to align the interests of directors with the interests of the company and could negatively affect the value creation of the company.

Moreover, this proposal could interfere with the functioning and purpose of capital markets. We believe that Europe needs better functioning and more integrated capital markets. Investments required by the objectives of the Green Deal and the EU climate target will be more difficult to fund without well-functioning capital markets. If inappropriately prescriptive requirements were implemented, European companies could become less attractive as investment targets, increasing the cost of capital for European companies and decreasing the availability of risk capital.

How could these possible risks be mitigated? Please explain.

Focus any obligation to have due regard to stakeholders' interests on the company rather than on individual directors, and frame that obligation in line with the criteria and comments set out above in answer to Qs 1, 6, 7 and 8.

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

Our members integrate stakeholders' interests into their decision-making process and receive positive feedback from shareholders for doing so. For example, a number of IOGP members have voluntarily established their objectives to reduce GHG emissions. This voluntary approach is consistent with long-term shareholder value and reflects society's ambition to reach the Paris Agreement goals. Any EU approach needs to enable companies to continue to maintain their investor proposition in this way.

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

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

Please explain:

We disagree with the premise of this question (that companies today invariably lack a strategic orientation on sustainability risks, impacts and opportunities), but support the view that sustainability considerations should be integrated into a company's governance processes.

We disagree with the premise, because many companies already have a strategic orientation on sustainability risks, impacts and opportunities, recognising that companies acting in a sustainable manner often perform better in the long term than their less sustainable peers. Similarly, many investors are looking at the long-term profitability of the company and therefore expect directors to take into account sustainability risks impacts and opportunities. Companies are thus acutely aware of the importance of taking into account human rights and environmental issues and the need to retain their "social license to operate".

It is essential that any EU law remains flexible enough to allow companies to define their own strategy, in accordance with their activities and geographical context, giving due regard to stakeholders' interests.

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:

We are not aware of any case where certain stakeholders or groups acted to enforce the directors' duty of care on behalf of the company. However, a limited volume of litigation should not be interpreted to mean the law and other mechanisms of holding directors and companies to account are not effective.

Directors have a legal duty of care to act in the interests of the company. We strongly disagree with the idea of extending this duty to stakeholders as this would undermine the basic premise of company law in this area. A legal requirement to balance the interests of all stakeholders combined with risk of personal liability would create significant legal uncertainties. Any obligation with respect to giving due regard to the interests of stakeholders should therefore be held by the company itself and not by the directors either individually or collectively.

Where companies have such an obligation, Member State laws may provide for appropriate means of enforcement, for example by company regulators. If the obligation is created by EU law, then under the usual principles of EU law, measures and penalties for infringement of the obligation put in place by Member States would need to be effective, proportionate and dissuasive. No additional enforcement mechanisms should be created by the EU.

In any event, it is important to recognise the current effectiveness of shareholder stewardship on non-financial matters including the interests of a range of wider stakeholders. Companies in our industry are frequently interacting with investors and with investor groups such as Climate Action 100+ or the Institutional Investors Group on Climate Change (IIGCC). We are aware of numerous examples under existing corporate governance laws, of constructive engagement by investors with companies on environmental, social and governance (ESG) issues. Such engagement is often co-ordinated by such investor groups, and overall, there is clear evidence that such engagement can create shareholder value. We believe this demonstrates there are existing appropriate mechanisms for stakeholders to move forward certain issues.

What is more, there is increasing momentum behind such engagement on a voluntary basis, without the need for EU legislation to create enforcement mechanisms. For example, an increasing number of investors are becoming signatories to the UN Principles for Responsible Investment (UN PRI), which includes the principle of active ownership or stewardship.

Additionally, any overly onerous obligation on individuals such as directors of European companies could have the potentially damaging effect of discouraging progressive and highly qualified individuals from taking up directorships of companies. Particularly in this area of corporate sustainable development, it is essential that companies can attract open-minded individuals to drive companies' strategy forward in this area.

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

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

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

Please explain your answer:

Recognising that obligations on the company will also affect the responsibilities of directors under the various member states' legal and company law systems without the need for additional duties on directors, we do not believe that any further action is needed.

If the EU were, however, to create such an expanded duty of care for directors, we strongly disagree with the idea that stakeholders should be given a role in the enforcement of directors' duty of care. It is a core principle of company law that directors have a legal duty of care to act in the interests of the company. A legal requirement to balance the interests of all stakeholders combined with risk of personal liability would create significant legal uncertainties and distort the clarity of the chain of accountability as directors' accountability towards shareholders would be reduced. While this would likely give rise to more uncertainty it might, paradoxically make it more (not less) difficult for any one group of stakeholders to hold directors to account.

Moreover, this proposal could interfere with the functioning and purpose of capital markets. We believe that Europe needs better functioning and more integrated capital markets. Investments required by the objectives of the Green Deal and the EU climate target will be more difficult to fund without well-functioning capital markets. If inappropriately prescriptive requirements or inappropriately wide enforcement rights were implemented, European companies could become less attractive as investment targets, increasing the cost of capital for European companies and decreasing the availability of risk capital.

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.

As a matter of principle, we support a harmonized approach to human rights due diligence at EU level, however, we strongly disagree with including any reference to climate change in the due diligence legislation.

IOGP supports the Paris Agreement goals and the EU's objective of climate neutrality by 2050 supported by adequate policies. Many companies in our industry have demonstrated their commitment to reduce emissions from their own operations and products. OGCI, for example, is a CEO-led initiative that aims to speed up the industry response to climate change by accelerating investments in innovative low carbon technologies, reducing methane and CO2 emissions. Additionally, our members comply with a range of energy and climate policies at the EU and national levels.

In any event, climate change is a global issue resulting from many facets of global economic activity. Measures to manage and reduce GHG emissions to achieve climate neutrality are regulated in the EU under other legislative elements of the EU Green Deal.

In relation to GHG emissions outside the EU, the Paris Agreement process requires signatory States to determine their own contribution and approach – through developing Nationally Determined Contributions (NDCs) and (in many cases) their national net zero ambitions – allowing them to identify the right balance for their circumstances between the need for action to reduce GHG emissions and, for example, use of natural resources in their jurisdiction and an appropriate pace of energy transition for their country (including balancing different potential short, medium and long-term human rights impacts to achieve a just transition). A due diligence obligation relating to climate change and supply chain presents significant difficulties for coherence with policy or legislative decisions by other States, indeed it would seem to instead ask EU private sector entities to second-guess those determinations in many cases, and with potentially limited (even negative) impact if non-EU companies, not subject to the same obligations, can simply step into the shoes of EU companies.

For these reasons, we strongly disagree with including any reference to climate change in the due diligence legislation.

EU due diligence measures should instead – in line with the UNGPs – be aimed at organizations identifying and preventing or mitigating risks of specific impacts to specific people (or environments) in specific operating contexts and accounting for the effectiveness of those actions. This would include, where relevant, factoring in external, systemic issues – such as vulnerability of communities potentially impacted by a project – when determining appropriate measures to prevent or mitigate risks related to such project.

As far as the definition of "business relationships" is concerned, the duty to implement a due diligence system should only cover company's activities and that of controlled entities and first tier suppliers, not the full supply chain, particularly if liability is attached to due diligence obligations as companies typically do not have control over, or contractual relationships with, the subcontractors of suppliers.

A requirement covering the entire supply chain would be an unreasonable or unmanageable burden. A typical company in the oil & gas industry for instance may have around 100 000 first tier suppliers. Each of those suppliers may have tens or even thousands of its own suppliers. The scale of the effort to try to implement concrete due diligence measures including training, audit and monitoring could force companies to veer away from a practical hands-on approach towards a “tick box” exercise, limiting its added value in terms of human rights’ improvements – or even proving counter-productive, if companies are driven away from their previous, voluntary and focused efforts in the areas of most risk.

Moreover, we would stress that any due diligence duty needs to allow for a focus on “salient human rights issues”. Companies should be required to carry out a risk mapping exercise to identify those issues, which may result in the most severe negative impact through the company’s activities or business relationships. We believe that for due diligence frameworks to be most effective, resources need to be focused on these most severe risks. This will maximise the impact of the law. Companies themselves (informed as appropriate by stakeholder engagement) are best placed to identify their salient issues which require priority actions and the law should be flexible enough to allow for and incentivise this.

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?

We support a “principle-based approach” which allows companies to identify salient issues and focus on putting in place concrete due diligence processes to address such issues. The duty under the law should not be a results-based obligation on companies to protect stakeholders against every human rights adverse impact, but should rather be an obligation of means to conduct reasonable due diligence process. Due diligence should be understood as company-wide process to identify, prevent, mitigate severe human rights risks and account for measures taken. For further details, please refer to our response to Q2.

If the “principle-based approach” were to be combined with another approach, our preference would be the “thematic approach”. Adopting a “principle-based approach” adapted to specific themes e.g. slavery and child labour, is the most effective way to tackle certain human rights issues. In support of such a principle-based and thematic approach, industries associations like IOGP and IPIECA are best placed to develop voluntary “sector-specific standards”. IOGP and IPIECA have over the years published a variety of resources, including the Human Rights Training Tool as well as practical guides on integrating human rights into environmental, social and health impact assessment and conducting human rights due diligence, in line with the UN Guiding Principles and the OECD Guidelines. IOGP and IPIECA provide a forum for encouraging continuous improvement in industry performance in these areas. On top of that, a thematic approach on climate change should not be developed (please refer to our response to Q14).

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.

The "principle based approach" should allow companies to identify severe issues and focus on process requirements. Due diligence should be understood as a company-wide process to identify, prevent, mitigate severe human rights risks and account for measures taken. The due diligence duty should not be a results-based obligation to protect stakeholders against human rights adverse impacts but should be an obligation to implement reasonable due diligence measures.

The key process requirements on which the due diligence duty is based should be specified in the legislation as clearly as possible to help ensure legal certainty and avoid excessive and costly litigation which could lead to conflicting interpretations. Additionally, it should not be contradictory to the concept of levelling the playing field. Moreover, we discourage the European Commission from producing complementary guidance where the OECD guidelines and the UNGPs already do so.

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)
- [ ] Micro and small sized enterprises (less than 50 people employed) should be excluded
- [ ] Micro-enterprises (less than 10 people employed) should be excluded
- [ ] SMEs should be subject to lighter requirements ("principles-based" or "minimum process and definitions" approaches as indicated in Question 15)
- [ ] SMEs should have lighter reporting requirements
- [x] 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

The same obligation should apply, but a principle based approach focusing on severe risks would allow SMEs, larger companies and public sector entities alike to have an adequate and proportionate administrative burden related to their due diligence duty. SMEs may be indirectly required to comply with some due diligence obligations, being part of the supply chain of large companies. To help the smallest companies (e.g. micro-enterprises) with the initial implementation, it may be appropriate to consider the provision of capacity-building support.

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.

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

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

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

Please explain:

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:

We agree there should be an enforcement mechanism but it does not follow that this needs to be prescribed at EU level. It could be left to Member States to determine, in accordance with their existing legal frameworks, which measures or penalties for infringement of the due diligence obligation are required to be effective, proportionate and dissuasive.

Enforcement of the due diligence obligation should relate to whether a company has put in place appropriate due diligence measures. Companies should be able to demonstrate that they have put in place appropriate due diligence measures in application of international recognized good practice, and that where a human rights impact has occurred despite such appropriate measures there are provisions for access to remedy.

Access to remedy can be facilitated through accessible and effective operational-level grievance procedures. Primary remedies may be best delivered on the ground close to operations through effective and appropriate grievance mechanisms. Requirements to have such grievance mechanisms should be clearly defined in the law.

As for the role of the courts (Civil and Criminal liability), due diligence legislation should not impose an absolute obligation (results-based obligation) on companies to prevent all violations of human rights irrespective of the circumstances, but an obligation of means, whereby companies are expected to conduct appropriate due diligence. Any liability connected with the due diligence obligation should be based on damages caused as a direct result of failure to put appropriate due diligence measures in place.

Any Civil liability (tort) should be based on usual civil law requirements: failure to put in place due diligence procedures in accordance with the law (or manifest insufficiency of such processes), damages occurred and a direct causal link between the two.

It would not be appropriate to impose criminal sanctions in relation to a failure to conduct due diligence as these should be reserved for intentional wrongdoings or gross negligence that has a direct link to a serious loss (death, injury, pollution…) that has been suffered, just like this is currently dealt with under national criminal laws. The legislation should not impose criminal sanctions where national laws do not actually provide for criminal sanctions in relation to alleged negligence in preventing a potential risk. It should be noted that, in the context of the French Law on the Duty of vigilance, the French Constitutional Court threw out provisions relating to sanction of a criminal nature. It considered that the terms of the law, such as “reasonable due diligence measures” and “appropriate actions to mitigate risks or prevent severe impacts”, and its perimeter (which includes the company as well as controlled enterprises and some of its suppliers) were too broad and concluded that it was not appropriate to impose criminal sanctions.

Injunctive relief should not allow a Court or competent authority to dictate the substance of legislative provisions or the detail of their implementation by a company. It could however be made available in the event corporations entirely fail to adopt the measures that are required by the law.

As far the role of a Competent Authority is concerned, companies should be required to report on the due diligence process they have in place. If a national Competent Authority is created under the law, its powers should be limited to verifying that such companies have due diligence processes in place (or that these are not manifestly deficient).

Competent authorities should not be empowered to act as quasi-courts settling disputes on human rights between companies and plaintiffs. Such powers should be reserved for national Courts. Moreover, the OECD National Contact Points already provide a non-judicial mechanism for dispute resolution.

Any proposal to modify EU legislation to introduce the option of bringing tort/negligence claims before European national courts for damages where the place of the event that gave rise to such damages occurred outside of the EU, should be strictly excluded. EU courts have neither the resources nor the authority to manage claims which should be properly brought before national courts outside Europe. Moreover, any such attempt to implement legislation with extra-territorial reach would undermine the EU’s efforts to avoid extraterritorial jurisdiction by sovereign states such as the US and China.

Lastly, extensive liability could create the potential for negative legal risk-based consequences on investment in challenging countries. In these contexts, engagement by EU companies usually brings economic benefits and inclusive growth both for the EU and 3rd countries, thus supporting greater realisation of human rights and other positive social or environmental outcomes.

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.

The oil & gas industry is aware of the growing expectations from investors and civil society to engage with stakeholders and integrate their interests into companies' decision-making. A company's direct stakeholders – whether at corporate strategy or an individual project level – cover a vast array of parties, ranging from employees to local communities, to NGOs, to business partners, to public authorities, to financial institutions and investors. Indirect stakeholders may be an even broader group including those with indirect or induced economic interests in the project, those benefiting from tax revenues generated by the project, etc. EU legislation should not give rise to obligations which make impossible demands on companies to reconcile stakeholder interests.

We strongly believe that companies should have the flexibility to decide (i) who their most relevant and potentially material stakeholder groups are; (ii) the most appropriate and proportionate way to communicate or engage with each group; and (iii) how to take into account the interests or views of each group. Companies are best placed to make these assessments.

Care should be taken to achieve the appropriate balance between confidentiality and transparency in order to foster open discussion.

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:

Companies are best placed to decide which mechanisms are the most appropriate to use in their specific circumstances and for specific stakeholders.

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:

IOGP members support long-term value creation with due regard to sustainability considerations. In fact, many of our members already link directors' variable remuneration to the company's sustainability targets or performance. Executive remuneration constitutes one of the major elements of corporate governance dialogue between institutional shareholders and investee companies. The inclusion of sustainability considerations into directors' variable remuneration is an area of focus for investors. For this reason, we disagree with the premise of this question which states that current executive remuneration schemes promotes a focus on short-term financial value maximisation. Moreover, the study on directors' duties on which this premise is based suffers from some serious methodological and analytical shortcomings, which have been highlighted by several stakeholders in their responses to the Inception Impact Assessment (IIA)

It is important for companies to have flexibility to choose the most appropriate way to promote sustainability in their executive pay schemes. Defining percentages of variable remuneration, determining in detail which ESG components should go into variable remuneration is very far-reaching and intrusive on the fundamental rights of private companies and, where applicable, the autonomy of collective bargaining (undertaken by trade unions). We are of the opinion that each individual company should be able to determine how best to align executive remuneration with its business model, the strategy and goals (also long-term ones) of the given company. There is no "one size fits all" approach to integrating ESG factors into remuneration policies.

Finally, it is important to remember that during the past few years there have been several initiatives that support the integration of sustainability into companies' decision-making. In line with better regulation principles, the legislator should allow the effects of new legislation to materialise before introducing new initiatives. The recent amendments to the Shareholders' Rights Directive encourage long-term engagement of shareholders and strengthened the link between the directors' remuneration and long-term interests and sustainability of the company.

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:

We do not feel that it would be appropriate for EU legislation to dictate to companies the selection criteria for their boards. All the proposals set out in the question above could require that "environmental, social and human rights expertise" could prevail over other forms of expertise which are also fundamental to the success of enterprises. It is the task of the specific company to assess the desirable balance of competences and skills in the board and its committees at any time since the optimal mix of competencies will change over time. There is no "one size fits all" to increase the sustainability expertise of the board. The objective should be that of creating a collective knowledge on sustainability and human rights issues on behalf of the company. Board members, for example, can be guided in their decision by a committee of sustainability experts. Understanding of the impact of sustainability matters on the long-term strategy of the company is therefore more important than sustainability technical knowledge.

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, we do not.

During the past few years there have been several initiatives that support the integration of sustainability into companies' decision-making processes. In line with the Better Regulation principles, the Commission should allow the effects of recently introduced legislation to materialise before proposing new initiatives. The recent amendments to the Shareholders' Rights Directive have encouraged long-term engagement of shareholders and strengthened the link between the directors' remuneration and long-term interests and sustainability of the company. Similarly, the EU Taxonomy will harmonise the way of determining what economic activities can be regarded as sustainable, and the sustainable finance disclosure regulation will enhance transparency of how financial market participants and financial advisers integrate sustainability risks in their processes. Additionally, the ongoing review of the Non-Financial Reporting Directive will likely lead to a more harmonised sustainability reporting. We believe it is important to understand the effects and implications of these far-reaching pieces of legislation before proposing new measures.

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:

IOGP is a trade association and therefore cannot quantify the impact of these measures on companies' operations. We nonetheless believe that in the case of due diligence the optimal option would reflect the dynamism in the concept of a 'smart mix' of measures – as described by the UNGPs - by states, which demands an ongoing interplay between new regulations, policy measures and support to voluntary efforts by business, with each strengthening the effect of the others to foster business respect for human rights over time. As indicated in our responses to Qs 2, 3 and Section III, our members support ongoing discussion at EU level for harmonizing efforts on a due diligence framework subject to the points made in those responses.

In relation to stakeholders' interests, as indicated in our responses to Q1 and section II we agree stakeholders' interests should be taken into account by companies and directors and support the approach already taken through many Member States Corporate Governance Codes, but strongly disagree with the EU creating a new or expanded directors' duty of care with respect to stakeholder interests.

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).

IOGP is a trade association and therefore cannot quantify the impact of the measures implemented by its members. However, we see the benefits of a 'smart mix' of measures – as described by the UNGPs - by states, which demands an ongoing interplay between new regulations, policy measures and support to voluntary efforts by business, with each strengthening the effect of the others to foster business respect for human rights over time.

We would like to reiterate our belief that an effective requirement (from the perspective of potentially affected parties and relevant stakeholders as well as the company) needs to allow for a focus on “salient human rights issues”. Companies themselves (informed as appropriate by stakeholder engagement) are best placed to identify their salient issues which require priority actions and the law should be flexible enough to allow for and incentivise this. A too prescriptive framework on due diligence brings the risk of creating a “tick-box” exercise approach to due diligence, which could discourage transparency and limit its added value in terms of human rights’ improvements.

On a concluding remark, we would like to thank the European Commission for the opportunity to respond to this public consultation on this important initiative. We have tried to respond to as many questions as possible. In some places we considered the formulation of the question (or available responses) included implicit assumptions or conclusions that do not seem accurate or necessarily hold true. Where this was the case, we have sought to explain it in our text responses.

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