

Consultation for an Initiative on Sustainable Corporate Governance
IDSN answer - FINAL

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

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

Yes, a more holistic approach should favour the maximisation of social, environmental, as well as economic/financial performance.

Yes, as these issues are relevant to the financial performance of the company in the long term.

No, companies and their directors should not take account of these sorts of interests.

Do not know.

Please provide reasons for your answer:

- The International Dalit Solidarity Network (IDSN) was founded in March 2000 to advocate for Dalit human rights and to raise awareness of Dalit issues nationally and internationally. IDSN is a network of international human rights groups, development agencies, national Dalit solidarity networks from Europe, and national platforms in caste-affected countries.
- There are an estimated 260 million Dalits worldwide, often born into an 'untouchable' status, in highly stratified caste systems. Caste systems are found in South Asia, in communities migrated from South Asia across the globe and in other caste-stratified countries in particular in Japan, parts of Africa and diaspora communities in the UK and US.
- Caste-based discrimination involves massive violations of civil, political, economic, social, and cultural rights and divide people into unequal and hierarchical social groups. Those at the bottom are considered inferior, 'impure' and 'polluting' to other caste groups, are often forced to do the most dirty and hazardous jobs and may be subjected to forced and bonded labour.
- Companies and their directors should take environmental, social and governance issues into account and it is critical that legislative and regulatory provisions require this.
- On the one hand, globalisation has created governance gaps that make it impossible to ensure respect for human rights and the environment, by relying solely on the capacity of local societies and public authorities. This is evident in the context of widespread abuse of human rights and environmental harm in the global value chains of European companies.
- Despite growing awareness of the elements of responsible business conduct, companies have not fundamentally changed the way they do business. As documented by the endorsement of the UN Guiding Principles, there is no disagreement about whether companies should be responsible for addressing their global impacts on people and the planet. The question that needs to be resolved is rather how such responsibility should be reflected in law.

- On the other hand, the question whether companies should maximise their social and environmental performance should also be considered. The impact of sustainability matters and stakeholders' interests on the company is difficult to capture in short-term metrics, which complicates their integration in governance processes and engagements.
- The law should clarify the responsibilities of directors to oversee and ensure quality of the implementation of the due diligence and materiality determination processes, and to adopt, disclose and ensure implementation of a forward-looking and discrimination free sustainability strategy and targets based on the findings of these processes.
- Significant changes to the dominant economic and business model, based on infinite growth and prioritising short-term profits and shareholder value, are urgently needed. Companies need to elevate and protect the interests of all stakeholders to develop a more balanced approach where the interests of key groups - including employees, supply chain workers, affected communities including Dalits and other lower-caste groups, indigenous peoples and human rights, environmental and land defenders - are meaningfully taken into account.

Question 2: Human rights, social and environmental due diligence requires companies to put in place continuous processes to identify risks and adverse impacts on human rights, health and safety and environment and prevent, mitigate and account for such risks and impacts in their operations and through their value chain.

In the survey conducted in the context of the study on due diligence requirements through the supply chain, a broad range of respondents expressed their preference for a policy change, with an overall preference for establishing a mandatory duty at EU level.

Do you think that an EU legal framework for supply chain due diligence to address adverse impacts on human rights and environmental issues should be developed?

Yes, an EU legal framework is needed.

No, it should be enough to focus on asking companies to follow existing guidelines and standards.

No action is necessary.

Do not know.

Please explain:

- Voluntary measures on human rights, social and environmental due diligence have failed to significantly change the way companies operate on the ground, manage their social, Human Rights or environmental impacts and provide remedy to victims.
- In the [EC study on due diligence requirements through the supply chain](#), only a minority of business respondents stated they conducted some form of due diligence.
- Studies commissioned by the [German](#) and Dutch governments, and by the [Danish Institute for Human Rights](#), reached the same conclusions of a low uptake of due diligence processes by companies when done on a voluntary basis.
- The assessments and benchmarks of the implementation of due diligence by companies point consistently to the fact that only 20% of companies (typically, large companies that are required to report on due diligence according to the EU Non-Financial Reporting Directive) claim to carry out due diligence ([Alliance for Corporate Transparency](#), [Corporate Human Rights Benchmark](#)).
- The number of companies that meet basic quality criteria for due diligence is even lower (e.g. only 3.6% companies report any information on the effectiveness of the policies adopted to address their identified human rights risk, according to the [Alliance for Corporate Transparency research](#)). Furthermore, in the absence of enforcement mechanisms, even those few companies

that undertake adequate due diligence have no obligation to take sufficient steps to address the problems identified.

- A growing number of Member States are making progress in developing legally binding corporate human rights due diligence frameworks based on international standards.
- A legal framework for environmental and human rights due diligence must be established at the EU level to ensure that the same rules apply to all companies in Europe. An EU-wide legislation applicable to all business enterprises domiciled or based in the EU, or active on the EU market, will help prevent and mitigate human rights abuses and environmental harms while ensuring a level playing field and a coherent legal framework within the EU.
- Action at EU level is necessary to ensure the contribution of business to the Treaty objectives of sustainability (Article 3(5) and Article 21(2)(d) and (f) TEU) and to promote a high level of environmental protection. The principles of environmental integration (Article 11 TFEU) and of consistency (Article 7 TFEU) also reinforce the necessity of EU action.
- This mandatory EU legal framework should establish a robust, enforceable due diligence standard for businesses to prevent and address their negative human rights and environmental impacts in their operations and throughout their global value chains as caste-based discrimination is often happening at the lowest tiers of the value chain, with Dalit workers being invisible.
- In addition, in view of the failure of voluntary initiatives, it should create effective accountability for the harms to people and the planet to drive positive systemic changes around the world by providing access to justice and ultimately remedy for all victims.

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

Ensuring that the company is aware of its adverse human rights, social and environmental impacts and risks related to human rights violations other social issues and the environment and that it is in a better position to mitigate these risks and impacts

Contribute effectively to a more sustainable development, including in non-EU countries

Levelling the playing field, avoiding that some companies freeride on the efforts of others

Increasing legal certainty about how companies should tackle their impacts, including in their value chain

A non-negotiable standard would help companies increase their leverage in the value chain

Harmonisation to avoid fragmentation in the EU, as emerging national laws are different

SMEs would have better chances to be part of EU supply chains

Other

Other, please specify:

- In addition to the above, an important benefit of an EU due diligence duty would be that it would enable and support remedy for victims of human rights abuses or environmental harm in and outside the EU.
- An EU due diligence duty requires active engagement in remediation of adverse impacts where business enterprises cause or contribute to harm by way of actions or omissions.
- Moreover, a due diligence legislation should allow victims, in and outside the EU, to hold enterprises civilly liable for harm before EU courts.

- Such legal liability provisions coupled with effective enforcement mechanisms will create an important opportunity for access to remedy for victims and affected communities, and make sure that companies can be properly held to account.
- **In particular, it would allow a systematic assessment of all risks including those linked to power imbalances such as caste-based discrimination in caste-affected countries** as even though caste discrimination is outlawed in affected countries, a lack of implementation of legislation and caste-bias within justice systems leaves Dalits largely unprotected.
- Caste discrimination is the result of socially embedded caste systems that divide people into unequal and hierarchical social groups. Those in the lowest of castes, known as Dalits in South Asia, are often considered “impure” and “untouchable”, and may face practices of segregation and restrictions in most aspects of life, including where they can live, who they can marry and what work they can or must undertake. A person’s caste may mean that he or she is forced to undertake the most dirty and hazardous jobs and they are in effect subject to modern slavery. Due to widespread exclusion, Dalits have limited access to resources, education, services, and development, keeping many in severe poverty and making them particularly vulnerable to child labour, bonded and forced labour and trafficking.
- Dalits constitute the vast majority of workers subjected to forced and bonded labour in South Asia, and the majority of child labourers. The use of violence, intimidation, sexual harassment, caste-based bullying, and social and economic restrictions is not uncommon when Dalits attempt to claim their rights to equal treatment and equal opportunities in private, public, or work-related spheres.
- Other potential benefits of an EU due diligence duty may include:
 - the EU setting a strong example to other markets and regulators;
 - improved resilience of companies and economies in the face of crises, particularly, in the face of supply chain shocks ([the OECD has stressed](#) the need for improved supply chain due diligence as a response to the COVID-19 crisis, which would contribute to “a faster and stronger recovery while making the economy more resilient to future crises”);
 - first-mover advantage for EU companies, being the first to start adapting to due diligence requirements that are beginning to be discussed in other parts of the world;
 - alleviation of pressure on governments in production countries to deregulate in order to attract foreign companies and investors;
 - increased power and leverage of companies and stakeholders throughout the value chain;
 - allowing shareholders, investors, and business partners to reflect due diligence implementation in their economic decisions;
 - and improved implementation of the European Green Deal, which, without due diligence legislation, may incentivise outsourcing and externalising adverse impacts to third countries.

Question 3a. Drawbacks

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

Increased administrative costs and procedural burden

Penalisation of smaller companies with fewer resources

- Competitive disadvantage vis-à-vis third country companies not subject to a similar duty
- Responsibility for damages that the EU company cannot control
- Decreased attention to core corporate activities which might lead to increased turnover of employees and negative stock performance
- Difficulty for buyers to find suitable suppliers which may cause lock-in effects (e.g., exclusivity period/no shop clause) and have also negative impact on business performance of suppliers
- Disengagement from risky markets, which might be detrimental for local economies**
- Other**

Other, please specify:

- We believe many of the above-mentioned risks are common yet unfounded claims against due diligence legislation, rarely supported by evidence. Well-designed due diligence legislation, with requirements in line with the UN Guiding Principles and complementary approaches, could successfully mitigate any of these risks.
 - Regarding **the alleged risk of penalisation of smaller companies with fewer resources**, it is worth noting that, as stressed by international standards on human rights due diligence, **the means through which SMEs will be expected to meet their responsibility to respect human rights and the environment would be proportional to human rights and environmental, risk, but also among other factors, their size**. For SMEs, the type of policies and processes expected would be according to their capacity, following the Commentary to UNGP Principle 14. Studies of the compliance costs of a variety of due diligence regimes do not identify a disproportionate economic burden for SMEs. In fact, the cost of compliance is typically related to the size of the enterprise and the Commission's study on due diligence requirements through the supply chain shows that, the additional recurrent company-level costs, as percentages of companies' revenues, amount to less than 0.14% for SMEs.
 - Regarding **the alleged risk of responsibility for damages that the EU company cannot control**, it must be said that, under well-established legal principles governing civil liability, generally, liability would only apply if a link between the harm and the company's actions or omissions could be established. Therefore, **liability would normally be determined in accordance with the level of control or influence of the company over the relevant subsidiary or business partner**. It is also important to highlight that liability for harm would apply for a breach of the duty of care owed by EU companies. Companies would thus not be held liable if they can prove they took all due care to avoid the harm in question or that the harm would have occurred even if all due care had been taken.
- Regarding **the alleged risk of disengagement from risky markets**, which might be detrimental for local economies, it is worth stressing that:
 - As per international due diligence standards, disengagement should only be considered as a last resort after all other steps have been exhausted, as outlined in UN Guiding Principle 19, which notes that business enterprises should only consider ceasing relationships where options for leverage to prevent or mitigate negative impacts have been exhausted or leverage is insufficient. A similar approach is elaborated upon in the OECD Due Diligence Guidance (3.2.h). **A hands-off approach where a company simply disengages without taking further measures would not be in line with these standards** (see SOMO papers on responsible disengagement, [2016](#), [2020](#)).
 - Due diligence legislation would, therefore, prevent irresponsible disengagement from happening by compelling companies to evaluate all possible options for alternatives to disengagement to consider the potential adverse impact associated with a decision to disengage, and by holding them liable in case of irresponsible disengagement.

- As stated in the [EC study on due diligence requirements through the supply chain](#), in practice, **it is unlikely that companies would be in a position to restructure their global business model in such a significant way for the purpose of withdrawing from production countries**. Similarly, the literature has shown that companies rarely terminate their business relationships based exclusively on social or human rights-related concerns.
- A potential drawback (if not explicitly addressed in the legislation) is the risk that, if poorly implemented, **parent and lead companies end up passing the additional costs of compliance with due diligence requirements to their suppliers and subcontractors**, and ultimately to the most vulnerable parts of the value chains, without adapting own purchasing practices. Power relations between multinational buyers/retailers and suppliers/producers in production countries are asymmetric and characterized by downward pressures on prices. These power imbalances are likely to influence who bears the cost of compliance with due diligence requirements. Suppliers are often pressured to produce cheaply - without additional resources, they struggle to meet social and environmental requirements. Complementary action is therefore required to address these power imbalances and ensure a more equitable distribution of costs and benefits in global value chains, including by reforming corporate governance and ensuring transparency (see [FTAO report on Making Human Rights Due Diligence Frameworks Work for Small Farmers and Workers](#), 2020).

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

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

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

the interests of society, please specify:

- There is historical evidence that an excessive focus on the short-term interests of shareholders, has had detrimental effects on the ways in which companies approach and integrate the interests of other stakeholders as well as focus on the company's long-term success. The EC study outlined this articulation: while shareholders pay-outs in Europe were rapidly increasing over the period 1992-2018, these strategic choices were made at the expense of funding investment in climate transition and closing pay gaps. The report also highlights the connections between shareholder primacy, corporate short-termism, and lack of actions towards more environmentally sustainable

companies – a conclusion that finds an echo in a recent report by the Alliance for Corporate Transparency analysing the non-financial reporting of 1,000 EU companies, as less than 5% of the companies had a climate target aligned with the objectives of the Paris Agreement.

- Companies and markets in general thrive in prosperous and cohesive societies. There are numerous societal interests that have a profound effect on the company and the risks it is facing, including social conflict (which in extreme can take the form of a war), corruption, poverty, systemic abuse of human and labour rights, including caste-based discrimination, shrinking space for civil society to operate, political persecution, and general societal infrastructure. It is further noted that these interests may be also affected by the company's actions.
- Caste discrimination permeates every aspect of society, including the business sphere. Due to the systemic nature of caste discrimination, it is highly likely that workplaces or supply chains are affected by it unless special measures are put in place. Companies' obligations relate to the prevention of discrimination both within their own operations in caste-affected countries, and among their suppliers.
- While many businesses have a 'zero tolerance' policy in relation to modern slavery, child labour and worker exploitation, the problems associated with caste-based discrimination may arise in different forms in caste-affected countries, and it may be difficult to identify the root causes. Audits rarely uncover workers affected by caste discrimination, as child labourers and forced or bonded (debt slaves) labourers may be hidden. Similarly, auditors and reviewers employed by companies are often unaware of the issue, making it impossible to detect.
- The collective interests of the company's stakeholders are also relevant as part of the 'interests of society'. However, efforts to enumerate the types of interests that company directors need to take into consideration have had little impact because the issues of concern depend on the business, societal and environmental context in which the company operates. However, companies' long-term resilience cannot be dissociated from the interests of a range of stakeholders and the natural environment, including climate.

other interests, please specify:

- **The interests of suppliers:** for supply chains to be fair, resilient, and sustainable, companies need to develop partnerships with suppliers, based on long-term commitments, based on a mutual benefit approach, and taking into account the constraints and needs of suppliers. In that context, companies can develop with their suppliers long-term improvement processes and include related costs linked to the prevention of human and labour rights abuses in their buying price. These improvements would cover, among others, providing safe and hygienic working and housing conditions, providing permanent contracts, paying living wages and ensuring that working hours are not excessive, all elements affecting workers in general but Dalits in particular.
- **The ability of the market to internalise the costs** of social and environmental impacts.
- **The ability of the business actors in a given area to take collective action** to address systemic problems.

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
--	------------------	------------------------	---------------------------	---------------------	---------------	------------------------

Identifica- tion of the company's stakehold- ers and their inter- ests	<input checked="" type="checkbox"/>	<input type="checkbox"/>				
Manage- ment of the risks for the company in relation to stakehold- ers and their inter- ests, including on the long run	<input checked="" type="checkbox"/>	<input type="checkbox"/>				
Identifica- tion of the opportuni- ties arising from promoting stakehold- ers' inter- ests	<input checked="" type="checkbox"/>	<input type="checkbox"/>				

Please explain:

- It is imperative to clarify between the due diligence duty that the company has to respect human rights and the environment and the duty of care that the directors have to the company itself.
- The current duty of care born by directors has not led to proper corporate identification and due consideration of impacts on people and the planet and related risk management. Therefore, there is an urgent need to clarify that directors should, as part of their duties, align the overarching duty of care with the requirement for the company to respect human rights and the environment.

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

I strongly agree

I agree to some extent

I disagree to some extent

I strongly disagree

I do not know

I do not take position

Please explain:

- The upcoming initiative should consider the role that directors must play to ensure that the corporate due diligence obligations are embedded throughout the corporate operations and strategies. This will allow companies to address impacts and risks on a regular basis.
- Therefore, it should be clarified that **the company is responsible for carrying out due diligence, as part of its operations, throughout the value chain and that directors should be responsible for overseeing the implementation of the due diligence processes by the company and for ensuring that the company takes appropriate actions.**
- As part of their duty of care, directors should be required to develop, disclose and implement, on behalf of the company, a forward-looking corporate strategy that integrates sustainability matters - including, where necessary, progressive transformation of their business model to ensure compatibility with human and labour rights and environmental standards -, and set measurable, specific, verifiable, time-bound targets and plans and milestones to achieve them based where appropriate on science-based methodology. Directors must set such targets, in particular, where effective management of risks and impacts have implications for the company's overall strategy, business model and financial planning. In the frame of caste-based discrimination, it is essential that companies develop KPIs and verification measures to help track prevalence of discriminatory behaviour in order to monitor discrimination against socially excluded groups and any changes in working conditions.
- Examples of indicators to guide Directors in this process can be found in the [Dalit Discrimination Check online tool](#) developed by IDSN in cooperation with the Danish Institute for Human Rights
- Broader advice on how to tackle caste-based discrimination through due-diligence can be found in the [ETI Base Code Guidance: Caste in Global Supply Chain](#), co-written with IDSN.

Question 8. Do you believe that corporate directors should balance the interests of all stakeholders, instead of focusing on the short-term financial interests of shareholders, and that this should be clarified in legislation as part of directors' duty of care?

I strongly agree

I agree to some extent

I disagree to some extent

I strongly disagree

I do not know

I do not take position

Please provide an explanation or comment:

- It is imperative to distinguish the due diligence duty that the company has to the respect human and labour rights and the environment and the duty of care that the directors have to the company itself. The directors' duty of care is owed to the company as a separate legal entity. **Therefore, in principle, it already includes an obligation for directors to consider all matters and**

stakeholders interests. It should be clarified and reaffirmed in legislation that, in doing so, directors should balance the interests of all stakeholders, ensuring that no stakeholders are harmed, at least in accordance with the due diligence obligations of the company.

- As explained in a statement on corporate governance drafted by a group of senior academics as a guidance for the European Commission on this very matter: “The underlying idea is that directors could potentially use their discretion under (some variant of) the business judgement rule that exists in every major jurisdiction, and that gives directors discretion to act in what they believe to be in the best interests of the company as a separate entity. In principle, this rule can accommodate either a long- or short-term approach. Hence, where directors pursue the goal of maximising short-term shareholder value, it is a product not of legal obligation, but of the pressures imposed on them by financial markets, activist shareholders, the threat of hostile takeover and/or stock-based compensation schemes. **These strong pressures from outside company law mean the problem of short-termism cannot be solved simply by requiring or permitting directors to have regard to sustainability and the company’s long-term interest.”**
- A further problem is that while short-term financial performance is expressed in clear numbers, the interests of other stakeholders and their effects on the company cannot be expressed in a similar quantifiable manner. In other words, these potentially conflicting interests are of a different fundamental quality, and therefore they cannot be simply balanced. Therefore, **the obligation concerning respect for stakeholders’ interests must be firmly rooted in corporate due diligence obligations, over which the directors should exercise oversight.**

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?

N/A

How could these possible risks be mitigated? Please explain.

Instead of a broad mandate to balance the interests of stakeholders, the legal definition of duty of care should:

- Confirm that its primary objective is to ensure long-term success of the company while taking into account its impact on people and the environment including the climate, and that in doing so directors must take into consideration all legitimate stakeholders’ interests and needs, instead of prioritising the interests of providers of financial capital; and
- Specify that it is an obligation of directors to ensure that the company implements a robust due diligence to identify and address adverse impacts to people and the planet linked to the company’s business model, including its operations throughout its value chain; and to put in place a strategy supported by targets to address such impacts in accordance with the company’s legal obligations.

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

- There is a growing movement of investors that are highly supportive of companies’ engagement with stakeholders’ interests, as well as of stronger public policies in this regard. This includes for example the UN Principles for Responsible Investment, or the Investors Alliance for Human Rights, as well as, broadly speaking the Sustainable Investors Forum(s).

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:

- Addressing the sustainability challenges may require changes to the company's business model, strategy, and financial planning. Therefore, it is critical that the company's strategy and targets with respect to such risks, impacts and opportunities is considered as part of the overall corporate strategy and is decided on and monitored by the governing body of the company. Some companies already implement such an approach.

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:

N/A

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:

N/A

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

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

Please explain your answer:

N/A

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.

N/A

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.

- IDSN partly agrees with this definition. It should be clarified that **the due diligence duty’s ultimate goal must be to respect human rights, environment and good governance in a company’s operations, global value chains and within their business relationships** (due diligence is the strategy mandated to achieve that goal).
- It is also worth stressing the definition should align its wording with international due diligence standards.
 - Prior to ceasing, preventing, mitigating, and accounting for human rights, health and environmental impacts, **companies should first be obliged to effectively identify and assess any actual or potential adverse human rights, environmental and governance impacts** which they may cause, contribute to, or be directly linked to, both through their own activities, and as a result of their business relationships.
 - Companies should also **track and monitor** the implementation and effectiveness of the adopted measures. This includes the collection of relevant data specific to the risk(s), such as data disaggregated by supplier and gender. The results of these tracking and monitoring processes must be used to inform possible changes to the global business operations and human rights and environmental due diligence process.
- We agree **due diligence must be a risk based, proportionate and commensurate approach**. Companies should thus map out their entire global value chain, the human rights, and environmental risks at each level of their value chain and prioritize due diligence processes **depending on the risks and the specific circumstances**, particularly their sector of activity, the size and length of their supply chain, and the size of their company. For companies sourcing in South Asia, this implies that they should inform themselves on the nature and manifestations of caste-based discrimination and thus include these specific risks systematically in their assessment.
- Moreover, **the “due diligence duty” should cover the company’s’ global value chain**, which includes entities with which it has a direct or indirect business relationship.
- The due diligence process should include identifying, assessing, and addressing the risks companies have caused, contributed to, or directly linked to **as a result of their business models and purchasing and recruitment practices** in their value chains.
- In line with this, the due diligence duty must not be limited to top tiers of supply/value chains. As outlined above, most business respondents to the EC study which undertake human rights due diligence only address first-tier suppliers, i.e., direct suppliers, and not the whole supply chain, while only 16% cover the entire value chain. This is a glaring gap in companies’ due diligence implementation and suggests that most companies are failing to adequately address forced and child labour in their supply chains. Forced and child labour is evidenced to be present in all tiers of supply chains – yet is often most hidden in lower tiers of supply chains, including in semi-formal and informal working such as homeworkers, and in raw materials.

- Research has shown that the majority of those trapped in modern slavery, including child labourers, forced and bonded labourers and those engaged in hazardous work, are from the lowest castes or indigenous communities in caste-affected countries. Dalits constitute the vast majority of workers subjected to forced labour in South Asia, and the majority of child labourers.
- Long and opaque supply chains allow exploitation to thrive, while [obscuring](#) which companies have the responsibility and leverage to redress them – workers at all stages of the supply chain should know the ultimate buyer of the goods of which they are contributing to the production/manufacture. A failure for companies to meaningfully undertake due diligence on lower tiers of supply chains and include all forms of work schemes such as agency workers and homeworkers within the due diligence process, will limit progress to effectively addressing the global prevalence of forced labour in supply chains.
- At the end of the definition, it could be clarified that, in all instances, due diligence is a **continuous and gradual process** and companies should exercise their leverage and meaningfully engage with their suppliers and business partners to support them in improving their practices.
- Lastly, while not strictly part of the definition, it could be clarified that **due diligence must enable and support the provision of remedy**. The obligation to respect human rights and the environment requires active engagement in the remediation of adverse impacts where companies cause or contribute to harm by way of actions or omissions, or, where a company has not caused or contributed to the harm, but its operations, products or services are directly linked to it, the obligation to exercise or increase its leverage over those responsible to help ensure that remediation is provided.

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

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

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

Option 3. “Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues”. This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental

sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.

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

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

None of the above, please specify

Please specify:

-

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

- The legislation should be applied broadly to all business entities active on the European Single Market across all sectors and cover human rights, including labour rights, and environmental issues, including climate change.
- However, it should allow for additional measures or specifications for specific sectors, products, or activities, especially when they pose high human rights and environmental risk, including a high risk of forced and bonded labour and child labour (a non-exhaustive list of sector examples includes garment, carpet weaving, leather, stone and minerals, agriculture, construction, mining, and cleaning services, among others). Any sector-specific legislation should supplement, but not limit, the development and implementation of the proposed general legislation. Analogy can be found in the OECD system, where both a general guidance and sector specific guidance complement each other. Sector specific guidance's such as the [ETI Base Code Guidance on Caste in Global Supply chains](#) help companies with tailored and relevant guidance for responsible business conduct.

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.

- Option 3 is our preferred option as this would create legal certainty and a level playing field for companies as to the necessary processes to be put in place and impacts to be covered by the due diligence duty.
- A rich body of legally binding international human rights and labour standards has long been developed, leaving no room for legal uncertainties.
- Human rights and the environment are deeply linked and interconnected. Human rights cannot be enjoyed without a safe, clean, and healthy environment, and sustainable environmental governance cannot exist without the establishment of and respect for human rights. It is therefore crucial that internationally recognized human rights are covered by the future legislation. But environmental damage can also occur without it also constituting a clear violation of human rights, or without entailing direct harm to human beings. It is important that the due diligence obligations also cover all potential or actual adverse impacts on the environment, including those that do not directly affect humans or human rights [see below question 15e].

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

Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)

Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups

Climate change mitigation

Natural capital, including biodiversity loss; land degradation; ecosystems degradation, air, soil, and water pollution (including through disposal of chemicals); efficient use of resources and raw materials; hazardous substances and waste

Other, please specify

Other, please specify:

- The material scope of the EU directive should cover all human rights, including workers' and trade union rights; social, health and environmental standards; as well as good governance international standards.
- In caste affected countries (South-Asia in particular), the working conditions and interests of the most vulnerable workers – and Dalits in particular must be taken into consideration systematically as part of the assessment of how vulnerable groups are affected by a company business model (including purchasing and recruitment practices) and operations.

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?

N/A

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?

- The effectiveness of the due diligence duty will very much depend on the robustness of the criteria and 'performance standards' against which the due diligence should be conducted.
- Regarding human and labour rights, due diligence legislation should at least cover all **internationally recognized standards**, understood, at a minimum, as those expressed in
 - the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights
 - customary international law,
 - International Humanitarian Law,
 - international human rights instruments on the rights of persons belonging to particularly vulnerable groups or communities (including the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Convention on the Rights of Persons with Disabilities, the United Nations Declaration on the Rights of Indigenous Peoples, the Declaration on

the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities) and

- the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work, as well as those recognised in the ILO Convention on freedom of association and the effective recognition of the right to collective bargaining, the ILO Convention on forced labour including its 2014 Protocol, the ILO Convention on the abolition of forced labour, the ILO Convention on the worst forms of child labour, the ILO Convention on the elimination of discrimination in respect of employment and occupation and ILO Convention on equal remuneration; and other rights recognised in a number of ILO Conventions, such as freedom of association, minimum age, occupational safety and health, living wages, indigenous and tribal peoples' rights, including free, prior and informed consent (ILO Convention on indigenous and tribal peoples), and
- the rights recognised in the African Charter of Human and Peoples' Rights, the American Convention on Human Rights, the European Convention on Human Rights, the European Social Charter, the Charter of Fundamental Rights of the European Union, and
- national constitutions and laws recognising or implementing human rights, including in South Asia, all laws protecting Dalits against discrimination such as:
 - The Scheduled Caste/ Scheduled Tribes (Prevention of Atrocities) Act – 1989 and the Bonded Labour System (Abolition) Act, 1976 (especially Sections 2 and 4) in India.
 - The Caste-based Discrimination and Untouchability (Offence and Punishment) Act (2011) and The National Plan of Action against Human Trafficking (2011) in Nepal.
 - Various protective laws In [Bangladesh](#) and in [Pakistan](#), but despite these attempts at legislation, they ultimately fail due to a lack of political or judicial will to implement them.
- Due diligence legislation should also take into account the fact that human rights, environmental and governance risks and impacts are not gender neutral. **Companies should be encouraged to integrate the gender perspective into their due diligence processes.**
- **Due diligence must also take into account other grounds of discrimination:** many rights-holders face additional risks due to intersecting factors of discrimination based on their gender, ethnicity, race, caste, sexual orientation, disability, age, social status, migrant or refugee status, informal employment status, union involvement, exposure to conflict or violence, poverty, or other factors.
- **Due diligence processes should in particular assess the root factors contributing to the lowest castes being particularly at risk of slavery** such as:
 - Many low caste workers, particularly Dalits, live in poverty as their opportunities to change their circumstances are reduced by deeply engrained discrimination. They are typically paying off debts (sometimes inherited) or receiving unacceptably low wages.
 - A certain type of work may have been prescribed to their caste for centuries and it is socially unacceptable for them to seek alternative work. If they do, they may face serious repercussions, including violence, damage to their property, and social and economic restrictions.
 - Caste bias within law enforcement and the judiciary in caste-affected countries persists, and those enslaved by dominant caste land or business owners have little or no recourse to justice and lack opportunities to escape their bondage.

- Many of the lowest castes are less educated and less aware of their rights due to centuries of oppression, discrimination, and lack of access to basic services.
- Social, cultural, and economic exclusion result in a lack of opportunities, meaning that Dalits are at higher risk of human trafficking.

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

Please explain your choice, if necessary

- **From international standards (UN Guiding Principles on Business & Human Rights, OECD Guidelines for Multinational Enterprises), it is very clear that due diligence is the obligation of all companies.** All business enterprises, regardless of size, should conduct human rights and environmental due diligence. SMEs, too, can cause, contribute to, and be directly linked to severe human rights and environmental impacts. While their operations are smaller, SMEs also have a direct responsibility to respect human rights and the environment.
- However, as stressed by the aforementioned international standards, **the means through which companies will be expected to meet their responsibility to respect human rights and the environment should be commensurate to the severity of the risks.** For SMEs, the type of policies and processes expected would be according to their capacity, following the Commentary to Principle 14 of the UN Guiding Principles on Business & Human Rights. Their degree of leverage over

their business relationships would also be considered in determining their responsibility (although it should not be relevant to considering whether they should identify all risks, carry out due diligence and exercise any leverage they may have). Furthermore, if deemed necessary to guarantee a satisfactory uptake of due diligence obligations by SMEs, a “phase-in” approach for SMEs could be developed. Such additional time period for compliance should be as limited as possible though to avoid a weakening of the legislation and its company scope.

- **Studies of the compliance costs of a variety of due diligence regimes do not identify a disproportionate economic burden for SMEs.** Rather the cost of compliance is typically related to the size of the enterprise. Moreover, the Commission’s study on due diligence requirements through the supply chain shows that, even for SMEs, the costs of carrying out mandatory supply chain due diligence appears to be relatively low compared to the company’s revenue. The additional recurrent company-level costs, as percentages of companies’ revenues, amount to less than 0.14% for SMEs.
- Many SMEs active in the garment or food sectors for instance are already conducting due diligence, evidence to the fact that companies of all sizes can conduct it.
- SMEs may, depending on the nature of their business, not generate and encounter as many risks to human rights and the environment as larger businesses do, by virtue of the simple fact that their value chains are smaller. SMEs tend to have fewer suppliers and customers, which enables deeper and better-quality relationships. For this reason, **not only is it often more feasible for SMEs to map the businesses in their supply chains, but it is also easier and more desirable to get to know them.** SMEs also tend to spend more time selecting business partners that share their values and match their standards and prefer longer-term relationships. These stronger relationships allow greater scope to integrate human rights and environmental issues.
- Increasingly, empirical evidence is revealing that companies with responsible business conduct policies and practices, such as due diligence, are more resilient, stronger, and better performing businesses. **Companies that know their supply chains and actively identify and mitigate their risks generally perform better overall.** Therefore, **while capacity building support, including funding, could be considered to foster compliance with due diligence standards, it is however incorrect to only conceptualize due diligence as a burden on companies,** as the evidence reveals its potential as a beneficial and valuable standard of conduct.

Question 17: In your view, should the due diligence rules apply also to certain third country companies which are not established in the EU but carry out (certain) activities in the EU?

Yes

No

I do not know

Question 17a: What link should be required to make these companies subject to those obligations and how (e.g., what activities should be in the EU, could it be linked to certain turnover generated in the EU, other)? Please specify.

- The obligation should apply to companies operating in the internal market (selling products or services, conducting activities). The link could therefore be **the presence on the internal market for products or services.** Many non-EU companies, for example, export products to the EU internal market which have a high risk of forced labour or other forms of labour exploitation.
- Useful definitions of scope can be found in:

- Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (**Timber Regulation**):
 - Article 2(b): “‘placing on the market’ means the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge. It also includes the supply by means of distance communication as defined in Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. The supply on the internal market of timber products derived from timber or timber products already placed on the internal market shall not constitute ‘placing on the market’.”
- Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (**General Data Protection Regulation**):
 - Article 3: “(1) This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not. (2) This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring of their behaviour as far as their behaviour takes place within the Union. (3) This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.”
- Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain is also a strong precedent for extra-territorial obligations for companies based outside of the EU. It shows it is possible to impose and enforce obligations irrespective of whether a company is established inside or outside of the single market.

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

- These companies must also be obliged to respect human rights and the environment, in their own operations, subsidiaries, business relationships and global value chains, and to undertake human rights and environmental due diligence for the products, services and activities that are placed or undertaken in the EU internal market.
- These companies must also be liable for any human rights abuses and environmental harm in their operations or value chains (without prejudice to other subcontracting and supply chain liability frameworks).
- Governments must set up robust enforcement mechanisms, with effective sanctions, to ensure that these companies also obey the law.

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:

- To create a level playing field globally, the EU should step up its efforts for the adoption of a **UN binding treaty to regulate the activities of transnational corporations and other business enterprises** and ask for a dedicate mandate to negotiate this treaty, **which should reaffirm the primacy of international human rights law over other international legal instruments**, outline human rights and environmental due diligence obligations for businesses and ensure the provision of effective and fair access to justice for **affected individuals and communities**.
- Establish a tracing mechanism for goods produced through severe human rights abuses, including inter alia forced or child labour, and examine options to prevent **the import and placing onto the market of these goods** in scenarios where such measures are evaluated to be in the interest of the affected workers. Such measures should be viewed as complementary to due diligence and should not replace, or distract from, the responsibility of businesses to conduct due diligence throughout their value chain.
- **Amend the Union Customs Code and the Trade Secrets Directive** so that customs data and supply chain information are not considered confidential and should be publicly disclosed **and amend customs-related regulations** to ensure that all companies that import goods into the EU disclose to EU customs authorities relevant information, including the name and address of the manufacturer.
- Generalising the banning and regulation of unfair trading practices, as well as taking additional steps to regulate purchasing practices of companies. The Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain could provide with a useful starting point.
- When conducting commercial transactions with businesses or providing supportive services to businesses such as export credits, the EU and Member States must ensure that businesses are respecting human rights and the environment, for example through their **procurement criteria**.
- Ensure **trade defence instruments and screening of foreign direct investment (FDI)** encompass human rights considerations.
- Ensure that the review of the **Generalised Scheme of Preferences (GSP)** rules contribute to improving the monitoring processes, enhance transparency and provide for a formal enforcement and compliance mechanism.
- Ensure **EU development policy** aims to strengthen capacities to establish and effectively implement due diligence requirements, including through **donor funding for producer governments**, and to **NGOs, trade unions and other groups** to use due diligence legislation to hold companies to account.
- **Enhance the human rights protection, monitoring and enforcement, in free trade agreements (FTAs) and investment protection agreements (IPAs)** having specific regard to State obligations to protect human rights including against irresponsible conduct of businesses, tools to ensure the investors respect human rights, enforcement mechanisms and access to remedy.

- FTAs should contribute to **ensure that effective due diligence policies are implemented by businesses and that comparable legislation on due diligence and access to remedy is introduced in third countries.**
 - **A comprehensive chapter on human rights should be inserted in Trade and Sustainable Development (TSD) chapters** including clauses that reaffirm the obligations of States parties to protect human rights, as set in international law, and this including by regulating businesses and by providing effective access to remedy and justice.
 - TSD chapters should recognise the obligations of States and the responsibilities of corporations and investors under the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, **requiring the provisions of the agreement to be read in consistency with these instruments.**
- IPAs should foresee that the investor must respect international human rights standards and national law as far as in conformity with international human rights law for the full duration of the investment. Victims of human rights and environmental harm must have access to remedy.

Question 19: Enforcement of the due diligence duty

Question 19a: If a mandatory due diligence duty is to be introduced, it should be accompanied by an enforcement mechanism to make it effective. In your view, which of the following mechanisms would be the most appropriate one(s) to enforce the possible obligation (tick the box, multiple choice)?

Judicial enforcement with liability and compensation in case of harm caused by not fulfilling the due diligence obligations

Supervision by competent national authorities based on complaints (and/or reporting, where relevant) about non-compliance with setting up and implementing due diligence measures, etc. with effective sanctions (such as for example fines)

Supervision by competent national authorities (option 2) with a mechanism of EU cooperation/coordination to ensure consistency throughout the EU

Other, please specify

Please provide explanation:

- Due diligence legislation should introduce a twofold enforcement regime:
 - Legal liability at least for human rights and environmental harms that a business enterprise, or any company that they control or have the ability to control has caused or contributed to. 'Control' should be determined according to the factual circumstances. It may also result through the exercise of power in a business relationship. It may include a situation of economic dependence.
 - Equally, grounds for liability must be established on the basis of failure to carry out adequate due diligence.
- Due diligence should not automatically absolve a company (as implied in the first of the three options offered as a response to this question) from liability for causing, contributing to, or failing to prevent human rights abuses or environmental harm.
- Judicial enforcement of DD standards and adjudication following allegations of harm is essential for holding companies accountable and ensuring that victims have access to an effective remedy for these harms.

- To ensure that victims have meaningful access to remedy, the burden of proof should be reversed in proceedings against business enterprises.
- The limitation period for bringing legal actions must also be adapted to be reasonable and sufficient, taking into account the particularities of transnational litigation.
- As a complement to judicial enforcement mechanism, competent national authorities (CAs) should be established in Member States. CAs should be empowered to perform a dual function of monitoring disclosure and DD performance, and initiating investigations where there is reason to believe that a company has breached its DD obligations. CAs should initiate investigations both on their own initiative and based on complaints by affected parties. Organisations with a legitimate interest in representing victims should also have the right to submit complaints in the interest of those victims.
- Breaches should give rise to administrative liability and CAs should be empowered to impose proportionate and dissuasive sanctions in such cases (infringements shall be subject to administrative fines at least up to 4% of the total worldwide annual turnover of the preceding financial year, as provided for data protection infringements in the GDPR). However, administrative liability, while a necessary complement, in no way substitutes for civil and criminal liability mechanisms.
- CAs should be independent from government ministries, particularly those that promote business interests in order to ensure their impartiality and prevent conflicts of interest. CAs must also be adequately resourced through financial support and staff with appropriate training and expertise.
- The legislation should also establish an EU-level body with monitoring, advisory, capacity-building, and standard-setting functions. This body should monitor CA performance to ensure consistent, robust practices across Member States. It should also support the greater harmonization of approaches, including through the development of standards and guidance for CAs to help them in their evaluation and investigation tasks, and of guidance for companies to conduct due diligence.
- Any monitoring bodies established - judicial and non-judicial - should have clear mechanisms for stakeholders' involvement.
- Finally, to safeguard opportunities for access to remedy for victims, any new enforcement and liability measures should be introduced without prejudice to other liability regimes which impose stricter or alternative grounds of liability.

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:

- Victims of corporate abuse frequently face many obstacles (legal, procedural, and practical) in attempting to hold European companies liable for the harm caused by their subsidiaries or supply chain partners located in a third country.
- Unfortunately, mostly due to the invisibility of their sufferings, no case of Dalit discrimination has made it up to a Court case in Europe to our knowledge.

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

- Barriers to justice have prevented victims, from obtaining remedy.
- EU laws and rules on jurisdiction should allow for the liability of parent and lead companies in the EU for harm caused by their subsidiaries or value chain partners located in a third country.
- The obligations arising from the instrument on Sustainable Corporate Governance upon companies should be applicable in judicial proceedings, even in case the harm occurred in third states. The instrument should therefore be considered mandatorily overriding.
- Victims seeking justice have a limited ability to uncover the information that is necessary to establish a parent or lead company's liability. Victims should not have to take on the burden of proving the EU parent or lead company's alleged failure and its connection to the harm they suffered, but rather the EU parent or lead company should be required to prove it took all due care.
- EU law currently dictates that cases must be considered under the law of the country where the damage occurred. In seeking the right to claim compensation, victims should be able to rely on EU law.
- EU legislation should also provide for reasonable time limitations for bringing legal actions in order to allow foreign victims sufficient time to file a lawsuit in EU courts.
- Finally, to safeguard opportunities for access to remedy for victims, any new enforcement and liability measures should be introduced without prejudice to other liability regimes which impose stricter or alternative grounds of liability.

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.

- Meaningful stakeholder engagement must be integral to the development and implementation of
 - corporate strategies;
 - human rights due diligence processes, across all stages of due diligence including identification and assessment of human rights risks, as well as determination of the appropriate actions and the monitoring and evaluation of their effectiveness, reflecting the ongoing and continuous nature of human rights and environmental due diligence; and
 - adequate systems for enabling access to remedy, providing remedy, and compensating for loss and damages, including through grievance mechanisms.
- Stakeholder engagement allows businesses to understand perspectives of those who may be affected by their decisions and operations, and, in critical decisions, ensure that victims of human rights abuses have the decisive voice in determining the appropriate response of a company which has discovered that it has caused or contributed to, or its activities are directly linked to, human rights abuses.
- The process of corporate strategy development should create clear opportunities for stakeholder engagement. This allows businesses to incorporate concerns and input from affected stakeholders into strategic planning and to improve performance on broader sustainability objectives. In some sectors, stakeholder engagement may need to take place at project-level.
- Stakeholder engagement is critical for ensuring effective due diligence. **Companies should engage affected stakeholders in the implementation of the due diligence on an ongoing basis.** Specifically, companies should be required to consult affected stakeholders for the purpose of identifying and assessing human rights and environmental impacts, determining appropriate prevention, mitigation, and remediation actions, and evaluating their effectiveness. Effective identification of and engagement with stakeholders better prepares businesses to avoid conflicts with local communities, and provide effective remedy for harms, when required.
- To ensure that stakeholder engagement is meaningful, it must involve all relevant stakeholders. These should be identified through public outreach, impact assessments and direct engagement

with local actors, addressing specifically lower caste communities that might otherwise be excluded by caste biased reactions of the upper caste section of local communities. Where there are existing channels and structures for engagement, these could be used, providing they are efficient and representative.

- Businesses should also be forthcoming with information whenever possible. This will facilitate information sharing and gathering a range of input and perspectives. This should be done freely and without threats of reprisals or harm. Information shared by the business should include its plans, details on how it is managing potential and actual negative impacts and reporting on the outcomes of its efforts.
- Stakeholder engagement should provide affected - and potentially affected - groups with the opportunity to be actively involved in the design, implementation and evaluation of business projects and operations. It allows businesses to understand perspectives of those who may be affected by their decisions and activities and work towards the design of sustainable prevention and mitigation approaches. It also allows businesses to benefit from local knowledge and experience.
- All mechanisms for stakeholder engagement must seek to address the power imbalance between the company and the affected persons or groups and between affected groups themselves and in particular should assess the status of the most vulnerable and socially excluded workers such as Dalits.
- Engagement processes should aim to understand how existing contexts and/or vulnerabilities may create disproportionate impacts for certain groups including indigenous peoples and communities, forest communities, coastal communities, lower-caste communities and other minority groups, migrant workers, homeworkers, temporary workers, women, and children, among others. Special attention should also be paid to implementing a gender-based approach to ensure the safe and equal participation of women in decision-making processes.
- Where indigenous peoples and communities may be affected, businesses must be required to respect their customary rights to land and natural resources, as well as other applicable rights such as the right to self-determination, and to ensure whether the state party in which the activity takes place fulfilled its duty and ensured international standards on principles of free, prior, and informed consent (FPIC).

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

- All persons or groups that are affected and potentially affected stakeholders, in all stages of the due diligence process - from the identification of risks to determination of appropriate actions, to monitoring and evaluating the effectiveness of the company's actions to prevent, mitigate and remedy the impacts - should be represented.
- This includes a range of persons and other actors who are credible proxies, such as: workers (permanent ones but also agency workers, homeworkers, temporary workers and seasonal workers; employees' representatives; trade unions; NGOs and grassroots organisations; community members; indigenous and tribal peoples; affected local communities; forest communities; human rights, land and environmental defenders; women and women's organisations; community leaders; lower-caste representatives; migrant workers and representatives; faith-based organisations; and local authorities.
- Relevant experts on human rights, environment, climate, or other subject matter areas should form part of the stakeholder engagement process.
- A good example of on how to tackle Dalit discrimination can be found in the case study on how TATA established its Tata Affirmative Action Programme (TAAP) in 2007, following a company-wide survey to assess the caste composition of the organisation's workforce across all Tata companies and trusts. Having researched the issue in depth, the TATA group found that it would not

be possible to counter discrimination without directly addressing caste. Following the caste survey, TATA set out to improve equal opportunities and overcome historic prejudices by launching an ambitious programme of affirmative action (whereby an employer makes a significant effort to hire, train and promote employees of previously excluded groups), together with supplier diversity initiatives. Beyond screening its companies for existing caste biases in hiring and promotion, TATA also took positive discrimination measures for Dalit and Adivasi candidates, and providing extra training. TATA's initiatives to help ensure supplier diversity emphasised the importance of supporting Dalit and Adivasi entrepreneurship and promoting the use of companies run by Dalits or Adivasis as suppliers. As a result, substantial sections of the business are now outsourced to Dalit-run companies. Additionally, TATA now [offers training](#) to Dalit entrepreneurs. TATA has also focused its corporate responsibility activities on supporting education for Dalits and Adivasis, offering thousands of scholarships and other education initiatives. These measures have seen TATA take a leading position in India in terms of combating caste-based discrimination in its operations. Following TATA's example, several [other major Indian companies](#), including the Forbes Marshall Group, Godrej Consumer Products Limited, Infosys Technologies, Crompton Greaves and Moder, have launched affirmative action or supplier diversity policies aimed at [diversifying their workforce](#).

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

Other, please specify:

- Employees should be represented in the Board of directors of large companies directly and partake in all strategic decisions. Furthermore, **employees' representatives should be engaged in the process of development and monitoring of the company's sustainability strategy, including the due diligence process.** To this end, a company's formal non-financial reporting should include a statement from the employees' representatives on their engagement, and their views on the quality and implementation of the strategy, including the targets. This engagement is separate from the engagement of employees as affected stakeholders.
- **Engagement of affected stakeholders in the design and evaluation of due diligence remedial (rather than complaint) mechanisms** is considered as good practice by international standards developed to support implementation of the corporate responsibility to respect human rights outlined in the UN Guiding Principles on Business and Human Rights.
- In addition, **affected stakeholders should be engaged at all stages of the due diligence process**, as explained in the answers to the questions above. This concerns the identification and assessment of human rights risks, as well as determination of the appropriate actions and the monitoring and evaluation of their effectiveness. The remedy/complaint mechanism may be one of the appropriate actions, depending on the circumstances. Stakeholder advisory bodies or general meetings can be a good practice, in particular, operational contexts, but not necessarily in all situations.

- **The due diligence process should be used to identify risks in stakeholder engagement for certain groups, and identify additional measures required to mitigate these risks.** Targeted meetings with specific groups of stakeholders may be appropriate to ensure meaningful engagement with those who are differently or disproportionately affected, or who may face barriers to involvement in other processes, for example women, people with disabilities, lower-caste communities, minorities, and other groups potentially marginalised within the wider population. Where on-the-ground engagement is credibly unfeasible, for example due to severe limitations on freedoms and security risks, companies should ensure that the views of local stakeholders are meaningfully captured through credible representatives and consultations with experts. To be meaningful, engagement measures should be carried out in a manner appropriate to the context, for example by taking account of language, literacy levels, channels for communication, direct engagement with stakeholders, etc.
- For example, in cases where the local community is being divided among opponent to the company operations and supporters (often those having obtained employment from the same company), it is important to engage with both groups. In the same manner, workers' representatives and trade unions may not always be willing to address caste-based discrimination if mostly managed and dominated by upper caste representatives. As such it is important to map any trade unions recognised in associated factories to determine their capacity and position on tackling caste discrimination, including how this can be translated into workplace education activities.

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 (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)	2
Regulating the maximum percentage of share-based remuneration in the total remuneration of directors	3
Regulating or limiting possible types of variable remuneration of directors (e.g. only shares but not share options)	1
Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration	4
Mandatory proportion of variable remuneration linked to non-financial performance criteria	5
Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration	6
Taking into account workforce remuneration and related policies when setting director remuneration	7

Other option, please specify	
None of these options should be pursued, please explain	

Please explain:

- CEO to worker wage gap, and its recent evolution, undermines social cohesion. A cap of 1:20, known as the Drucker principle, could have beneficial effects. It should also be noted that there is no empirical evidence that whenever and wherever this has been enacted (the French public sector is an example), it has had negative consequences on firms' performances.

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 (Study on directors' duties and sustainable corporate governance).

Please indicate which of these options are in your view effective to achieve this objective (tick the box, multiple choice).

Requirement for companies to consider environmental, social and/or human rights expertise in the directors' nomination and selection process

Requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise

Requirement for companies to have at least one director with relevant environmental, social and/or human rights expertise

Requirement for the board to regularly assess its level of expertise on environmental, social and/or human rights matters and take appropriate follow-up, including regular trainings

Other option, please specify

None of these are effective options

Please explain:

- The Board should **set up a non-executive committee, composed of a combination of independent experts and top managers, chaired by a designated non-executive director, and tasked with monitoring and reviewing the content and implementation of the company's sustainability strategy**. The experts should have expertise relevant to the main sustainability challenges facing the company. The managers involved in the committee should include CEO and CFO.
- The committee should transparently report on the matters discussed, and the recommendations.
- The purpose of the committee would be to provide critical input for both the non-executive and executive directors' duty of care with respect to sustainability matters.
- In addition, **the Board, as a collective organ, should have internal expertise on sustainability matters**. The number of directors and the types of the expertise should, however, be determined according to the nature and diversity of sustainability challenges facing the company, rather than the legislation. As part of their duty of care regarding the oversight over the company's sustainability strategy and due diligence, as well as for the purpose of setting up and deciding on the composition of the sustainability committee (described above), the directors should evaluate the adequacy of their expertise.

- There is also historical evidence that a lack of diversity in boards can have detrimental effects: it has been identified as a major reason for the inadequate actions of financial institutions that led to the financial crisis of 2008. Homogeneity fostered “group thinking” where risks were not identified and managed adequately by boards. Analysing root causes and regulatory failures, many actors from industry associations to trade unions identified the need for greater diversity, not just in terms of gender or race but also in terms of experience and backgrounds. This was even [acknowledged in a parliamentary hearing by the Association of Financial Mutuals](#). In this respect, [the Walker Review officially commissioned by the UK government pointed out](#) that “the pressure for conformity on boards can be strong, generating corresponding difficulty for an individual board member who wishes to challenge group thinking”. Therefore, it is important to ensure that a significant share of board members have special expertise in social, environmental, and human rights matters, including feminist and anti-racist approaches, in order to achieve real impact on companies’ decisions.
- Over ten years have passed since the crisis but diversity on boards as not reached adequate levels, neither in terms of background nor gender nor race nor expertise, although consensus on the urgency was high both in political and corporate circles. Voluntary approaches have failed. In order to avoid repeating the mistakes of the past, policy interventions are needed, requiring firms to increase diversity on boards in terms of gender, race, background, and the above-mentioned fields of expertise, developing and implementing a clear strategy how they will achieve that in an effective way.

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. (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?

N/A

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:

- Employees' representatives and long-term committed shareholders should be given stronger rights in the decisions concerning the takeover bids.
- Employees' representatives in large public companies should be given voting rights at the company's AGM.
- Gender parity on boards needs to be mandated: efforts to reform corporate governance by the European Commission cannot be dissociated from the necessity to put an end to this long-standing imbalance. Quotas introduced in France in 2011 have proven to be effective.
- Examine trade options to ban the import of goods produced through severe human rights abuses, including inter alia forced or child labour, in scenarios where such measures are considered to be in the interest of the affected workers and enable remediation for harm. Such trade options should be viewed as complementary to human rights due diligence and should not replace, or distract from, the responsibility over the buyers and importers of products to conduct due diligence to address risks and impacts - as would be imposed by the introduction of mandatory human rights and environmental due diligence legislation - working closely with suppliers to do so in contexts where this is credible and feasible, including to examine the impact of buyers' own purchasing practices on labour violations.
- Generalising the banning and regulation of unfair trading practices, as well as taking additional steps to regulate purchasing practices of companies. The Directive 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain could provide with a useful starting point.
- Ensure EU development policy complements the positive impact of human rights due diligence, including considering donor funding for producer governments to encourage improved implementation and respect of human rights, environmental and good governance standards, and to NGOs, trade unions and other groups to use due diligence legislation to hold companies to account, including the development of grassroots and worker-driven models.
- Include human rights due diligence requirements in EU public procurement, funding, and credit systems. Companies failing to respect their due diligence obligations should be excluded from accessing such schemes.

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.

	Non-binding guidance. Rating 0-10	Introduction of these duties in binding law, cost and benefits linked to setting up /improving external impacts' identification and mitigation processes. Rating 0 (lowest impact)-10 (highest impact) and quantitative data	Introduction of these duties in binding law, annual cost linked to the fulfilment of possible requirements aligned with science-based targets (such as for example climate neutrality by 2050, net zero biodiversity loss, etc.) and possible reorganisation of supply chains. Rating 0 (lowest impact)-10 (highest impact) and quantitative data
Administrative costs including costs related to new staff required to deal with new obligations			
Litigation costs			
Other costs including potential indirect. costs linked to higher prices in the supply chain, costs linked to drawbacks as explained in question 3, other than administrative and litigation costs, etc. Please specify.			
Better performance stemming from in-			

creased employee loyalty, better employee performance, resource efficiency			
Competitiveness advantages stemming from new customers, customer loyalty, sustainable technologies or other opportunities			
Better risk management and resilience			
Innovation and improved productivity			
Better environmental and social performance and more reliable reporting attracting investors			
Other impact, please specify			

Please explain:

-

Question 26: Estimation of impacts on stakeholders and the environment

A clarified duty of care and the due diligence duty would be expected to have positive impacts on stakeholders and the environment, including in the supply chain. According to your own understanding and assessment, if your company complies with such requirements or conducts due diligence already, please quantify / estimate in quantitative terms the positive or negative impact annually since the introduction of the policy, by using examples such as:

- Improvements on health and safety of workers in the supply chain, such as reduction of the number of accidents at work, other improvement on working conditions, better wages, eradicating child labour, etc.
- Benefits for the environment through more efficient use of resources, recycling of waste, reduction in greenhouse gas emissions, reduced pollution, reduction in the use of hazardous material, etc.
- Improvements in the respect of human rights, including those of local communities along the supply chain
- Positive/negative impact on consumers
- Positive/negative impact on trade
- Positive/negative impact on the economy (EU/third country).

- Incorporating a mandatory duty of care and due diligence duty would have considerable potential positive effects. These include:

- Reductions in harassment, threatening and killing of human rights, land, and environmental defenders by holding companies accountable for the harms they caused or contributed to or are linked to, thus fighting impunity at local and international level.
 - Creation of long-term and trust relationships using meaningful stakeholder engagement processes and specific risk assessment and response methodologies. These should form part of due diligence processes.
 - Safer and more decent working conditions for supply chain workers including those in non-EU countries including health and safety, living wages and decent terms of employment. In particular, due diligence would require companies to respond to sector specific risks such as heavy use of toxic chemicals or dangerous working sites and risks facing vulnerable groups, such as migrant workers, lower-caste workers, homeworkers, temporary workers, illiterate workers, children, and women.
 - Reductions in incidents of labour exploitation, worker-paid recruitment fees, debt bondage, human trafficking, other forms of forced labour, and child labour. Targeted interventions as part of due diligence to increase capacity and awareness along supply chains will improve respect for international human and labour rights standards and address root causes in affected communities (including poverty, gender and caste-discrimination and lack of education). Further, the due diligence process will drive companies to identify and address the impact of their own business models and practices - such as purchasing practices, short-lead times, unregulated subcontracting, and restrictions on freedom of association- in driving or enable negative impacts on human rights and the environment.
 - Reductions in land grabs and violation of the customary and other land rights of indigenous peoples and local communities in host countries, through recognition and respect for collective customary land rights collective and other legitimate tenure rights, including applying the principle of free prior and informed consent.
 - Improvements in environmental impact of business operations including inter alia through the reduction of deforestation, use of pollutants and emission of greenhouse gases. This will follow assessments and action on the company's environmental and climate-related risks and impacts. Optimisation should include transitions to cleaner forms of energy, more sustainable materials, circular economy models and responsible waste disposal.
- There is evidence of targeted action by businesses on each of these issues leading to some improvement in living and working conditions on the ground. Adherence to proposed due diligence requirements would have strong positive impacts on a range of stakeholders. These include workers in business operations and value chains, local communities in operating countries and human rights, land, and environmental defenders. Such positive impacts would drive progress towards the achievement of the Sustainable Development Goals, including SDG 8.7 on Decent Work - progress on which has been severely threatened due to the impacts of Covid-19. It would also have a strong positive effect on the environment and climate at a time when urgent action is needed from all actors, including companies. The Commission is therefore urged to implement a strong due diligence duty to apply to companies across all sectors, in respect of negative human rights and environmental impacts.