

GLOBAL CSR – Submission to the EU Commission in relation to ‘mandatory due diligence’

Confer: <https://ec.europa.eu/eusurvey/runner/Autumn2020publicconsultationsustainablecorporategovernance?surveylanguage=en>

29. January 2021

GLOBAL CSR has more than 20 years practical experience in advising businesses, investors and governments on Business & Human Rights. Since 2011 we have assisted 50+ businesses to implement the UNGPs; i.e. developing Policy commitments / implementing human rights due diligence processes, both internally and vis á vis business relationships / establishing grievance mechanisms; all in alignment with the UNGPs.

We fully endorse the intention of the EU Commission to establish mandatory human rights and environmental (and possibly economic) due diligence requirements in the EU region.

Having perused the questions and the preparatory work of the EU Commission carefully, we are, however, concerned that such regulation will not become fully aligned with the definitions and approaches outlined in the UNGPs. Applied misinterpretations could lead to obstacles for the establishment of a global level playing field and the scaling up of ‘respect for human rights’.

In light of these concerns, we seek to state more elaborate comments to the questions that the EU Commission pose in their public consultation. The core recommendation for the EU Commission is to fully align with the content of the UNGPs.

Where our concerns relate to the TERMINOLOGY or to the CONCEPTS applied by the EU Commission in the questions, we highlight this. Our response to multiple choices is indicated with a yellow colour.

Our comments are made public before the deadline of submissions on February 8th, 2021 and we explicitly allow anyone to copy, paste and submit similar comments, should you agree to our concerns and comments.

On behalf of the GLOBAL CSR team

Sune Skadegaard Thorsen
Partner/CEO/Attorney at Law
GLOBAL CSR

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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.*

Comments Q1:

The 'Principles-based' approach to Corporate Social Responsibility (CSR) - and as applied by the EU since 2012 - is different from the 'Stakeholder-based' approach that dominated the discourse of CSR, first up to the UN Global Compact (2000), and eventually more importantly up to the UN Guiding Principles on Business and Human Rights (the UNGPs in 2011); the 'Principles-based' approach focuses the formerly vaguely defined concept of 'stakeholders' to those stakeholders that may experience that the business risks causing or contributing to adverse impacts on their human rights. As corporate lawyers with expertise in corporate governance, we would hope that the EU Commission work to either reduce the present, very broad and impractical 'stakeholder theory' under corporate governance theory, by limiting the concept of stakeholders to adversely impacted stakeholders; or - all together - develop a 'Principles-based' corporate governance theory, applying the notion that Directors, under their duty of care, need to ensure that the business manages risks of adverse impacts on internationally agreed principles for sustainable development (i.e. human rights (including labour rights)/the environment (including climate change and biodiversity)/Anti-corruption).

TERMINOLOGY: By using the term 'human rights violations' in the question, the EU Commission deviates from the concepts defined by the UNGPs; businesses - no matter where they operate or what they do - are at risk of having adverse impacts on human rights (and the environment); all risks should be dealt with, and only, when necessary, addressing some impacts - termed 'severe' (scale/scope/remediability) - can be prioritized (confer UNGPs Principle 24). In our experience in establishing human rights due diligence processes with companies in the EU, we have not once encountered a business entity that needed to apply the 'exemption' to adverse impacts that the business was at risk of causing or contributing to; whereas all the businesses would need to apply the exemption, when establishing the (distinct) management processes that would address adverse impacts in their value chain (towards all business relationships - i.e. both suppliers and customers/distributors).

According to the UNGPs, businesses can only be seen to 'violate' human rights (considering that only states are directly bound by human rights law) in case of 'gross abuses'; confer UNGPs Principle 23 (c). We have found it important to maintain a strict application of the defined terminology, thereby ensuring that business leaders become comfortable with the "know (your impacts) and show (how you address them)" paradigm evolving with the UNGPs; in contrast to the "name and shame" paradigm that dominated the conceptualisation before 2011 - and to which the term 'corporate violations of human rights' were attached.

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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.

Comments Q2:

NOT for "supply chain due diligence" - BUT for "due diligence" (see also below under TERMINOLOGY). With this change: A legal framework is not only needed, but required, under international human rights law and in alignment with the authoritative interpretation hereof, granted by the UNGPs in Pillar I - 'the State Duty to Protect'. States shall regulate businesses within their territory to 'respect human rights'; i.e. to establish a management system that meets the minimum thresholds outlined by Pillar II in the UNGPs - the corporate responsibility to respect human rights (i.e. Policy commitment/human rights due diligence/access to remedy). It has now taken 10 years to act on this duty. It could be questioned why the EU Commission act on 'due diligence' only - and not mandating the establishment of the full management system.

Also, maintaining that respecting international principles for sustainable development is voluntary, will never result in any significant change from the corporate sector, apart from a few business leaders. The vision of the UNGPs - to scale up respect for human rights - depends on States meeting their duties. The 'smart mix' envisioned by the innovative UN instrument, the UNGPs, will miss one of two ingredients.

TERMINOLOGY:

Throughout the questionnaire the EU Commission use the term 'social' next to human rights and environment. We strongly recommend discharging the use of this un-defined term. In the preparatory work on the directive on Non-financial Reporting all the examples mentioned under 'social' were also human rights, as contained in the International Bill of Human Rights; confer UNGPs Foundational Principle 12. In this question, the Commission in the first sentence reference 'social' and in second 'health and safety' next to 'human rights', thereby further confusing an appropriate understanding of human rights, considering that 'the right to safe and healthy working conditions' is explicitly mentioned in the ICESCR art. 7.

The question reads: "... and prevent, mitigate and account for such risks and impacts in their operations and through their value chain" and "EU legal framework for supply chain due diligence to address adverse impacts on human rights and environmental issues" - THIS illustrates one of the largest challenges that we have for the preparatory work:

We wonder why human rights due diligence is still (by politicians / various preparatory works) primarily seen as a supply chain activity when in the EU; The UNGPs are clear - due diligence is distinct from legal compliance and all companies no matter where they operate have potential and actual adverse impacts on

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human rights. Should EU based companies be exempt from conducting and documenting regular operational-level human rights impact assessments (due diligence), as required by the UNGPs, for their own entities in Europe? If the EU maintains the position that human rights impact assessments are not relevant for EU based entities, it should be obvious that the initiative will not enable 'scaling up' of respect for human rights, and most certainly not 'a level playing field'. All regions and countries in the world would accede to the notion that companies within their jurisdiction are properly regulated; in particular within the areas covered by human rights, the environment and anti-corruption. Will the EU maintain a position, where human rights and environmental due diligence is merely considered a supply chain (and not internally or vis á vis other European business relationships) activity, it should be obvious that other parts of the world will perceive the initiative as an additional trade barrier - and rightly so. Meeting the due diligence requirements under the UNGPs require that companies conduct regular operational-level human rights impact assessments in their own operations in Europe - for where they may cause or contribute to adverse impacts on human rights (environment/anti-corruption). In addition, companies need - as expected by the UNGPs - to 'seek' to prevent or mitigate adverse impact with business relationships (full value chain). The minimum will be to require from the company's business relationships to meet the standard as well (i.e. policy commitment / to conduct human rights due diligence (i.e. regular operational-level impact assessments in all entities)/access to remedy through effective grievance mechanisms) and to ensure that when severe impacts occur in the value chain, the company should use or build leverage to make the causing or contributing unit stop the impact and prevent or mitigate re-occurrence. In other words, it should never be the responsibility of an EU company to prevent or mitigate (and account for how) risks of causing or contributing to adverse impacts for all other entities in the company's value chain. That would be impossible, and obviously go against the entire foundation of John Ruggie's work - 'principled pragmatism' - as we would apply it in practice to companies.

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*

Comments Q3:

To scale up respect for human rights.

TERMINOLOGY: See comments under Q1 and Q2 - in particular the use of the terms 'human rights violations' - and 'social' and 'social issues', but also the reference to 'supply chains'.

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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**

Comments Q3a:

If the EU sticks to the definitions and requirements outlined by the UNGPs, we see no challenges - if the EU decides to make 'due diligence' requirements a supply chain management exercise all the drawbacks will apply without any advantages.

There is no question 4

Question 5 is merely ticking boxes

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>I strongly agree</i>	<i>I agree to some extent</i>	<i>I disagree to some extent</i>	<i>I strongly disagree</i>	<i>I do not know</i>	<i>I do not take position</i>
<i>Identification of the company’s stakeholders and their interests</i>			x			
<i>Management of the risks for the company in relation to stakeholders and their interests, including on the long run</i>	x					
<i>Identification of the opportunities arising from promoting stakeholders’ interests</i>			x			

Comments Q6:

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A legal requirement should merely address the minimum outlined by what was internationally agreed on (UNGPs/OECD) - whatever strategic objectives a company would pursue should remain voluntary - and not driven by randomly identified stakeholders (see also comment to Q1). However, directors should be mandated to ensure that the company, through proper due diligence processes, identify and manage risks of adverse impacts on all (relevant) stakeholders - the first option - identification of stakeholders - happens through the due diligence process.

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

Comments Q7:

TERMINOLOGY: Please note that the terms 'social' / 'health' are redundant next to human rights - see comment under Q1 and the right to health (ICESCR art. 12)

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

Comments Q8

Not 'all stakeholders', but stakeholders that are at risk of experiencing adverse impacts - please see comments under Q1 and Q6.

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?

First comments Q9

That the legislator does not demonstrate adequate understanding of and alignment with the UNGPs; and lack of legal certainty. We would advise to construct "directors' duty of care" in very close alignment with the UNGPs, which would fit well with the primary objective of 'mandatory due diligence'.

Question 9 – second –

How could these possible risks be mitigated? Please explain.

Second comments Q9

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Align very closely with the UNGPs / (OECD Guidelines) (please note that various guidelines - both the one on due diligence and in particular sector guidelines - are not fully aligned with the UNGPs)

Question 9 – third –

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

Third comments Q9

Few shareholders appreciate the 'stakeholder theory' in corporate governance or a 'stakeholder approach' to responsible business conduct - for good reasons - see discussion under Q1

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

Comments Q10

The UNGPs require a governance system to continuously address risks of adverse impacts. The opportunity side (strategic CSR or Creating shared value) is voluntary and should not be mandated.

Questions 11 – 13a

No comments

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.

Comments Q14

We disagree.

Lack of alignment with the UNGPs leads to following misconceptions:

CONCEPTS:

““Supply chain” is understood within the broad definition of a company's “business relationships” and includes subsidiaries as well as suppliers and subcontractors.”

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(COMMENT: According to the UNGPs all businesses are responsible for impacts in their full value chain, i.e. for impacts 'caused' or 'contributed to' by business relationships. A subsidiary can and should not in this respect be considered a business relationship, but part of the company itself. Suppliers and subcontractors would, under the UNGPs definition, be considered part of the company's upstream value chain. However, the responsibility under the UNGPs is not limited to such business relationships, but extends also to entities in the downstream value chain (e.g. customers, distribution chain). In December 2013 GLOBAL CSR described this responsibility in a guide for civil society ("Constructive Campaigning") using the example of adverse impacts in a pharmaceutical company's distribution chain) - see: https://globalcsr.net/wp-content/uploads/2019/02/Constructive_Campaigning_ICJ.pdf. Relationships with public entities are also included. We strongly advise the Commission to make use of the definitions provided for by the UNGPs/OECD.

CONCEPTS:

"The company is expected to make reasonable efforts for example with respect to identifying suppliers and subcontractors."

(COMMENT: We discourage, that the EU Commission promotes a situation where companies are supposed to identify suppliers and subcontractors (in particular beyond tier one) as part of meeting their 'obligation' under responsible business conduct, i.e. mandatory due diligence. The identities of entities in businesses value chains are and should be considered confidential. Most smaller, but indeed also larger businesses, may experience that if they become mandated - under the name of RBC/CSR - to disclose the names of entities in their supply chain (and if in alignment with the UNGPs their full value chain) they may risk to have their business disrupted very quickly. Competitors can easily (mis)use such information to undermine the business by placing larger and/or more profitable orders with key suppliers OR customers may (mis)use the information to skip the additional costs of intermediaries taking over the direct link to such suppliers, or when investing in the vertical value chain. It should also be noted that the mere identification of entities in the value chains, does not bring about responsible business conduct in such value chains; actually, it takes away resources and focus from proper implementation of the UNGPs. We have noted some, very large, companies follow the trend in some jurisdictions to abide by the pressure from civil society to start mapping their full value chains. The head of Coca Cola's efforts on responsible business conduct at some point made the remark that his "great-great-grandchildren would experience the day that Coca Cola had mapped their full value chain". The UNGPs require that a company, as part of its due diligence efforts, requires from its business relationships that they - similar to the company itself - implement the UNGPs. In addition, companies have to act (use leverage or, if inadequate, build leverage) when the companies experience severe impacts anywhere in their value chains; this is termed 'known severe impacts'. If applied as intended, we will all experience a rapid growth of responsible business conduct throughout the value chains (the ripple effect); if, however, the EU Commission intends to pursue the avenue (primarily promoted by the Dutch government and civil society - an approach that also found its way into guidance documents under the OECD) of interpreting due diligence under the UNGPs to contain a requirement to identify suppliers and subcontractors in several tiers, implementation will meet a lot of resistance - and for good reasons.

CONCEPTS:

"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."

(COMMENT: We advise the EU Commission to apply the definitions in the UNGPs. The question affirms that implementing actions (must be to prevent or mitigate) 'depend' on the risks identified; and this can of course not be disputed. Where "should foresee" comes into the equation is more difficult to understand. We would suggest not to come up with additional definitions to those used by the UNGPs. Foreseeability and causality will undoubtedly become part of discussions, when discussing any possible liability (civil or criminal) for concrete adverse impacts in the future; however, at this point those definitions need not to be in place beyond the levels already established under criminal and/or torts law in the various jurisdictions within the EU.

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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

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?

Comments 15a

We are not in favour of combining with theme or sector specific approaches; in fact, we believe that such combination can easily undermine implementation efforts in full alignment with the UNGPs, at this point of time. We wish to highlight one of many concerns in relation to 'thematic' and 'sector' approaches respectively:

1. Focussing due diligence requirements on one or a couple of 'themes' (i.e. human rights - e.g. the right not to be subjected to forced labour (confer ICCPR art. 8) or to exploitative child labour (confer ICESCR art. 10)) should be considered in contradiction with the state commitments made with the Vienna Declaration (all rights shall be considered of equal value, interdependent, interrelated and indivisible).

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2. Sector specific approaches carry the risk that companies in various sectors limit their internal human rights due diligence to encompass whatever few rights would be highlighted in such sector specific guidance; or are indeed misled to interpret 'due diligence' to encompass for example the mapping of units in all tiers of the company's supply chain (confer as an example OECD guidance to the apparel sector).

If all companies were to carry out operational-level impact assessments; and - as part of their accountability as defined by the UNGPs - would document and communicate these to impacted stakeholders and business relationships (and now to a government agency), patterns of risks of severe impacts would soon emerge and enable guidance documents highlighting good practices in preventing or mitigating such risks of severe impacts, that, for some impacted rights, are given for some sectors; e.g. the right to adequate food and its fair distribution (for the food sector); the right to health (e.g. for the food, chemical and pharmaceutical sector); the right to privacy, freedom of information, freedom of expression (e.g. for the ICT sector), and the right to education (e.g. for the learning industry). However, as mentioned, early attempts to define such impacted rights may lead to flawed human rights due diligence as companies in the industry do not take into account risks of adverse impacts on all human rights from the International Bill of Human Rights (confer UNGPs Foundational Principle 12 - noting that the IBHR contains also the core labour rights from the ILO Declaration).

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.

Comments 15b

See answer above. A strong focus in full alignment with the UNGPs (for human rights due diligence) and the OECD Guidelines (for environmental and anti-corruption due diligence) would definitely enable the necessary legal certainty - however, the derivations from the definitions and concepts in the UNGPs, represented in this questionnaire and in some preparatory work, will - if upheld - make it very difficult to bring about legal certainty without extensive complementary guidance - and will definitely disable a global level playing field.

If full alignment with the UNGPs were to be achieved, complementary guidance - also as anticipated the UNGPs themselves - would be commendable; as an example, confer the guidance to SMEs, that GLOBAL CSR prepared for the EU Commission in 2013: see <https://globalcsr.net/sme-guides/>

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:**

Comments Q15c

We strongly recommend to align fully with the UNGPs in terms of 'social sustainability' - in relation to this please note that "interests of local communities, indigenous peoples' rights, and rights of vulnerable

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groups" all are covered by human rights as defined through the reference to the International Bill of Human Rights (UNGPs Principle 12); as are the four core labour rights and "occupational health and safety" = the right to safe and healthy working conditions - "decent wages" = the right to a living wage - "working hours" = the right to rest, leisure and paid holidays.

As for "natural capital", we would prefer the term 'Environmental impacts' that would cover risks, not only to the mentioned areas, but also to the climate (i.e. emissions to air); ozone depleting substances and animal welfare.

If the OECD Guidelines will be used as the reference point for the requirement to manage risks of environmental impacts, we would strongly suggest including in the due diligence requirement risks to economic sustainability - i.e. risks of significant impacts in the areas covered by anti-corruption; extortion, fraud, tax and anti-competition (as referenced by the OECD Guidelines).

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?

Comments Q15d

Make sure to use the definition applied by the UNGPs to human rights impacts + risks of significant adverse impacts, when it comes to impacts on environmental and economic sustainability. If the EU starts to tamper with the definitions provided for by the UNGPs this will make a global level playing impossible to achieve.

Question 15e-g (N/A)

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

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

- All SMEs [16] should be excluded
- SMEs should be excluded with some exceptions (e.g. most risky sectors or other)
- Micro and small sized enterprises (less than 50 people employed) should be excluded
- Micro-enterprises (less than 10 people employed) should be excluded
- SMEs should be subject to lighter requirements (“principles-based” or “minimum process and definitions” approaches as indicated in Question 15)
- SMEs should have lighter reporting requirements
- Capacity building support, including funding
- Detailed non-binding guidelines catering for the needs of SMEs in particular
- Toolbox/dedicated national helpdesk for companies to translate due diligence criteria into business practices
- Other option, please specify
- None of these options should be pursued

Please explain your choice, if necessary

Comments Q16

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Again, the UNGPs already described how to deal with this issue; and the EU has already developed guidance on the UNGPs to SMEs in Europe - confer <https://globalcsr.net/sme-guides/>

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.

Comments Q17a

All business activities carried out in the EU should be covered by proper due diligence (regular operational-level impact assessments); similar to the requirements to EU based companies. However, this will require that the EU strictly follows the definitions and processes described by the UNGPs/OECD Guidelines and does not deviate from this; e.g. by deciding that human rights due diligence is merely relevant vis á vis suppliers (and possibly only suppliers outside the EU); or by stating that human rights due diligence should be carried against European human rights instruments instead of the International Bill of Human Rights, as defined by the UNGPs; or by claiming that human rights due diligence requires businesses to map their value chains; etc..

Also, it shall be noted, that it is a minimum requirement under human rights due diligence, that companies require from their business relationships to meet the global minimum standard for responsible business conduct (and that they - as part of meeting the standards requirements - pass such requirement on to their business relationships). If all EU businesses will now become mandated to implement the UNGPs / OECD Guidelines they will - as part of such due diligence obligation - have to require implementation by business relationships. Hence, based on the global level playing field (the UNGPs) scaling up of respect for human rights will rapidly become a global phenomenon; and regulation in other regions of the world will follow suit.

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

Comments Q17b

Similar obligations to those posed on EU based companies - i.e. to conduct regular operational-level impact assessments for the activity; and document this (as expected by the UNGPs). Any agency monitoring if EU based companies live up to their obligation could also be charged with monitoring foreign companies' activities within the EU on responsible business conduct.

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

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Please explain:

Comments Q18

Ensure strict adherence to the definitions and concepts as defined by the UNGPs

Capacity development

Collaboration through foreign services sharing practices and experiences

Assistance/guidance for both the EU based companies and foreign companies (considering also translation of tools and guidance)

Sharing of best practices

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 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:

Comments Q19a

Judicial enforcement will automatically happen; it will rarely be the case that a company becomes liable for compensation in case of harm 'caused by not fulfilling the due diligence obligations' (beyond the cases where fines from a competent authority are disputed and taken to court - in which case there may not be any 'harm', but merely lack of implementation of proper due diligence). The scenarios would be that the company causes or contributes to actual adverse impacts, that also amount to a violation of a given national law. In this case, the proper judicial entity would - when determining a fine or the size of compensation - take into account whether the company, despite proper due diligence, experienced to have caused or contributed to the impact. Please be reminded, that the UNGPs are very clear - human rights due diligence is distinct from legal compliance. This is one of the characteristics of human rights due diligence that makes the standard applicable to all jurisdiction regardless of the legal environment.

The direct supervision of implementation is, in addition, needed. We have seen very different models and outcomes of the implementation of the non-judicial grievance mechanisms implemented under the OECD Guidelines (National Contact Points); hence the need for a proper supervision through the EU will most likely be needed.

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

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- No

In case you answered yes, please indicate what type of difficulties you have encountered or have information about:

Comments Q19b

There is a host of challenges in the event that the EU Commission would like to introduce extraterritorial reach for legal address of certain types of impacts. We would not recommend extraterritorial reach as the first step when introducing mandatory due diligence for EU based business activities. This said, the EU could engage in endeavours to come up with solutions to the vast legal complexity of extraterritorial reach / liability; to name a few in addition to the mere fact that the 'impact type' needs careful definition (normal impacts / severe impacts / gross impacts): Piercing the corporate veil / forum non conveniens / providing evidence / legal aid / etc. At present, it should not be the objective of legislation on mandatory due diligence to find solutions to the host of issues that would require EU harmonization in order to establish extraterritorial reach in case of a company 'causing or contributing to' (certain) adverse impacts abroad. In this body of work it shall be noted that the UNGPs are very clear in defining that companies should not provide for access to remedy, when they are merely linked to adverse impacts (although civil society organisations may lobby for liability in such situations).

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

Comments Q19b - second

Outside the scope of mandatory due diligence requirements (for now)

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.

Comments Q20

It is already part of proper due diligence processes; communication requirements under the UNGPs and the establishment of grievance mechanisms to engage potentially impacted stakeholders. This reflection of the 'stakeholder-based approach' to CSR is not necessary under an obligation to implement the UNGPs for EU companies; see also answer under Q1.

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Our expertise was less relevant for Questions 21-24

Question 25 (with Comments)

Question 25: Impact of the spelling out of the content of directors’ duty of care and of the due diligence duty on the company

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

Table

	Non-binding guidance. Rating 0-10	Introduction of these duties in binding law, cost and benefits linked to setting up/improving external impacts’ identification and mitigation processes Rating 0 (lowest impact)-10 (highest impact) and quantitative data	Introduction of these duties in binding law, annual cost linked to the fulfilment of possible requirements aligned with science-based targets (such as for example climate neutrality by 2050, net zero biodiversity loss, etc.) and possible reorganisation of supply chains Rating 0 (lowest impact)-10 (highest impact) and quantitative data
Administrative costs including costs related to new staff required to deal with new obligations		3 - it is not that difficult to implement and maintain - and it will positively impact employee retention	10 - please DO NOT indicate 'reorganisation of supply chains' as a result - unless the EU Commission - against the WTO rules expect that legal measures will lead to more 'local trade'. As for mandatory 'strategic CSR' interventions we suggest that the EU take one step at a time - science based targets are primarily relevant for environmental impacts and - apart from managing potential adverse impacts - should not become part of 'mandatory due diligence'.
Litigation costs		0 - it must be expected to lower litigation costs as impacts are diligently	D0

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		dealt with before they become transgressions of any national laws in the areas covered by human rights/environmental/economic due diligence.	
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.		0 - provided that the UNGPs are used as a genuine global level playing field - costs will - for all participants in the value chain become the same and proportional to size.	do
Better performance stemming from increased employee loyalty, better employee performance, resource efficiency	10		do
Competitiveness advantages stemming from new customers, customer loyalty, sustainable technologies or other opportunities		10 and falling to 0 over time when all companies implement	do
Better risk management and resilience		10 - that is the purpose of due diligence	do
Innovation and improved productivity		8 - likely impact	do
Better environmental and social performance and more reliable reporting attracting investors	10		do
Other impact, please specify			

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

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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).*

Comments Q26

For the company itself: The first immediate output by putting in place UNGPs/OECD Guidelines aligned human rights/environmental/economic due diligence is to get a full overview of the company's risks to sustainable development and to collect - in a structured manner - descriptions of the core elements of already existing actions to prevent or mitigate adverse impacts; thereby also improving corporate performance; where no actions exist in relation to risks, where actions can be improved and - in general - to establish quantitative and/or qualitative indicators to measure effectiveness of such actions. The latter, in general, ensures that the company can manage these core elements of sustainable development (you cannot manage what you do not measure).

In addition, the collaboration with business relationships (hereunder suppliers) becomes much more productive and based on mutual trust, compared to earlier understandings of supply chain management that were largely based on mistrust and control (monitoring and auditing). Now, we expect from all our business relationships that they implement the UNGPs/OECD - i.e. that they can send their policy commitment within one year and their operational-level impact assessment with 2 years, from when they first meet the requirement; that they can document that they require the same from their business relationships and that they pass information on how the impacts are managed up or down the chain as soon as a severe impact occurs. We are of course, in the spirit of collaboration, ready to share our policy commitment and our latest operational-level impact assessment to cover any concerns they may have in being in a business relationship with us, or merely to inspire our business relationships on how to conduct and document operational-level impact assessment (what level of information would we expect them to describe).