BUSINESSEUROPE

POSITION PAPER

4 February 2021

SUSTAINABLE CORPORATE GOVERNANCE AND DUE DILIGENCE

REPLY TO EUROPEAN COMMISSION PUBLIC CONSULTATION

I. INTRODUCTION

BUSINESSEUROPE is the leading advocate for growth and competitiveness at European level, standing up for companies across the continent and actively campaigning on the issues that most influence their performance. We speak for all-sized enterprises in 35 European countries whose national business federations are our direct members.

BUSINESSEUROPE has taken notice of the Public consultation on sustainable corporate governance[1] prepared by the European Commission (DG JUST) aiming to gather data and to collect the views of stakeholders with regard to possible initiatives on sustainable corporate governance and on due diligence.

BUSINESSEUROPE is happy to contribute to this debate that will have an impact on the way companies' function, relate to their stakeholders and operate in their supply chains.

BUSINESSEUROPE adopted messages on these issues in its reply to the consultation on a renewed sustainable finance that ran through Spring 2020[2]. This position paper builds on those messages and goes into more detail on some of the specific sections of the consultation.

[1] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance.

[2] https://www.businesseurope.eu/publications/renewed-sustainable-finance-strategy-businesseurope-reply-public-consultation

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II. KEY MESSAGES

On Sustainable Corporate Governance

- The **EU corporate governance framework has proven throughout the last two decades that it is able to adapt to the new challenges** thanks to a clever mix of well-balanced targeted rules, complemented by corporate governance codes and company practices.
- The Commission Roadmap and the current consultation point to **a radical rather than an evolutionary approach** (as it was so far) to European corporate governance. Call for action is based on a widely criticised Commission study with wrong assumptions and a flawed methodology leading to a **misleading (short-termism) picture of European companies**.
- **European Companies do take account diverse stakeholders' interests alongside the financial interests of their shareholders**; not only because this is an expectation placed on them, but because they see the value for doing so because of the financial position of the company as well as for the 'license to operate'.
- Far-reaching (and unjustified) legislative intervention around directors' duties and company stakeholders would **negatively affect the very core of how companies operate (anchored in our market economy model), would be conducive of deadlocks in decisions-making and foster endless litigation**. Companies would become more risk-averse and less entrepreneurial, and ultimately less attractive to capital.

On Due Diligence

- A European initiative on (mandatory) due diligence is expected soon, which **will have a critical impact on companies, on their operations and relationships** in supply chains they are engaged in, as well as on their competitiveness on the global stage.
- For large majority of EU companies, from all sectors and sizes, any future EU legislative framework should be **workable, proportionate and effective**. It **should not be a way to simply transfer state responsibilities on to companies**. *It needs to* ***take account of the needs of Small and medium-sized companies (SMEs).***
- Companies understand the importance of preventing and mitigating risks that can occur in the supply chains but **cannot be made responsible for any impacts/harm in the supply chain that are completely out of their control** (or for acts of other autonomous entities).
- Any future rules must be clear, applicable in practice andshould not lead to a legal patchwork **of possibly incompatible with or duplicating national legislative initiatives** (adding layers of rules on top of European obligations). Inspiration should be drawn from **internationally recognised standards** such as the UN Guiding Principles and the OECD Guiding Principles and applicable in practice.

III. REPLIES TO QUESTIONS IN THE PUBLIC CONSULTATION

On sustainable corporate governance

Question 1: Do you think companies and their directors should take account of (stakeholders) interests in corporate decisions alongside financial interests of shareholders, beyond what is currently required by EU law?

*We agree that **stakeholders' interests should be taken into account** by company directors. However, this is **already the case**, and it is sufficiently regulated by existing corporate governance frameworks in the Member States covering rules on directors' duties, corporate governance codes and company and market practices. Therefore, **there is no need for this matter to be further regulated at EU level.** Unfortunately, the limited possibilities of reply in question 1 push respondents either to reject the notion that stakeholders' interests should be considered or to agree with new EU rules on directors' duties.*

*Taking account all relevant stakeholders' interests, as determined by the company, is directly linked to the performance and interests of the company. Since many years, **companies have taken account diverse stakeholders' interests alongside the financial interests of shareholders**, not only because this is an expectation placed on them, but also because they see the value for the financial position of the company as well as for the 'license to operate', in doing so.*

*It is a **wrong assumption that companies exclusively prioritise shareholder value** or that shareholder value creation is contrary to companies having stakeholder-oriented approach in their daily business and strategies. A large range of legal experts, including the European Company Law Experts (ECLE) group,[3] have contested this assumption. Consideration for stakeholders' interests is often part of companies' CSR/sustainability practices, which by their voluntary nature go beyond what is required by law. Evidence shows that within companies there is more stakeholder awareness around these practices, even in SMEs[4].*

***Corporate governance codes** in many Member States (e.g. France, Germany, Finland, Netherlands, Belgium, Italy, Spain, Sweden) have already introduced recommendations promoting that companies further integrate a stakeholder-oriented perspective[5].*

*Nevertheless, changing **the entire legal system of corporate governance** in the Member States from a shareholder-oriented legal framework (i.e. the owners are the ultimate decision-*

[3]European Company Law Experts (ECLE) group at https://www.law.ox.ac.uk/business-law-blog/blog/2020/12/ec-corporate-governance-initiative-series-comment-european-company . See also a paper signed by more than 20 Nordic Law Professors also commenting on this assumption in the Commission Study on Directors Duties: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3709762. Also a paper from European Corporate Governance Institute (ECGI): https://ecgi.global/news/european-commission%E2%80%99s-sustainable-corporate-governance-report-critique

[4] For example, according to a recent poll carried by MEDEF among SMEs shows 72% of employees are aware of at least one CSR action carried out within their company, compared to 68% in 2019.

[5] The Italian Corporate Governance Code places specific emphasis on "sustainable success" as a key consideration in directors' decision-making, remuneration, performance objectives, etc.

makers) to a stakeholder-oriented legal framework (e.g. where stakeholders have legal rights related to the management of the business, to the implementation of business policies and strategies, to the enforcement of directors liability toward the company itself) will have negative consequences on the effective decision-making in companies. It will lead to deadlocks between stakeholders and probable endless lawsuits given that not all their interests are fully compatible with each other. Many decisions may benefit some stakeholders, but harm others. For example, if a company decides to shut down a polluting plant, this decision will be beneficial for the environment and for investors keen on financing "green" activities, but it will create complicated situations for the employees working on the production site, if reskilling/job search possibilities are not available. This is a typical example (as with other operations like restructuring, mergers or divisions) of how difficult it is for companies to take decisions and strike the right balance.

***Companies and their boards need to retain the flexibility** to balance those individual stakeholders' interests as, depending on the situation, these (interests) can often not be put on the same level nor are they sometimes compatible. Otherwise, it would lead to contradictory and ineffective approaches. **Legal requirements** in this area would potentially disrupt decision-making in boards. They would in turn make companies more risk-averse and less entrepreneurial, and ultimately would become less attractive to (risk) capital.*

Reply to question 1: Do not know.

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

Since many years, companies have taken account diverse stakeholders' interests alongside the financial interests of shareholders, not only because this is an expectation placed on them, but because they see the value also for the financial position of the company, in doing so.

All the interests listed in the table of question 5 are relevant for companies. Nevertheless, companies need to preserve the flexibility to determine not only the relevance of particular stakeholder groups to their business and how the latter interact with groups of different natures, but also the potential materiality of different stakeholder groups' interests to the company over the long-term. Companies cannot be requested to take all related stakeholder interests into account simultaneously and be legally responsible for the trade-off that necessarily has to be done between various - sometimes contradictory or incompatible - stakeholder interests.

Reply to question 5: I do not take a position.

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?

Companies do not need detailed legislation to see the self-interest in identifying the company´s relevant stakeholders and include their interests in the strategy and risk management of the company.

In order to remain competitive, companies need to act in a sustainable manner which ultimately is also in the interest of shareholders*. Directors are factoring this in by seeking to consider the different societal and stakeholder interests in corporate strategies and decisions. However,* ***depending on the industry, the location, the context, the type of business decision or topic, the consideration of different stakeholders might require different approaches****.*

Companies need to preserve their ***flexibility to determine not only the relevance of specific stakeholder groups to their business and how they interact with groups of different natures, but also the potential materiality of different stakeholder*** *groups' interests to the company over the short, medium and long-term. Directors' duties cannot be put on a checklist formula as assumed by the previous (consultation) question. On the contrary, they need the flexibility to identify in the present and in the long term which stakeholder interests it should consider in accordance with its activity, structure, nature and size.*

It is not reasonable to believe that companies can carry out an exhaustive overview of all their stakeholders' interests. ***There is no definition of "stakeholders" and no reasonable definition can be found*** *due to the specificity of each company's environment. We strongly believe that any legal consequences attached to this definition would be unreasonable and counterproductive.*

It should be recalled that ***many companies will have thousands of stakeholders*** *who are impacted directly or indirectly by their activities. How material each of them may be to a company's long-term success and resilience may vary greatly from company to company in different circumstances. The board is ultimately better placed to identify the necessary trade-offs and balance the different interests and risks.*

Where they are material to its strategy and performance, the company may see a benefit in having due regard to stakeholder interests and, where relevant, in communicating how they are relevant to pursue the companies' overall strategy, how they have been considered and how the company decision-making has benefited from this process. Many ***investors*** *already consider the long-term profitability of the company, as well as the companies' compliance with the Taxonomy Regulation, and thus expect directors to take into account all the relevant interests for the company including social and environmental matters. Companies are well-aware of these elements and therefore often make efforts in this direction.*

Reply to question 6: **I strongly disagree.**

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?

The whole formulation of question 8 is biased and builds on the findings of a ***recent Commission study on directors' duties***[6] ***which has received substantial criticism in the past months.***[7]

The study plays on the ***wrong assumption that European listed companies are driven by short-termism*** *and at the same time do not take account society's and stakeholders' interest. This basic assumption drives the whole study, including the methodology and the choice of sources, leading to a highly* ***misleading picture of European companies*** *and too far-reaching recommendations.*

The study ***defines "short-termism" in a simplistic way*** *as the ratio between, on one hand, a company's pay-outs in terms of dividends and share buy-backs and, on the other hand, the company's net income. Its findings have been challenged by law professors across Europe and from the US*[8]*. Pay-out ratios cannot be used as a measure for short-termism. On the contrary, pay-outs are a crucial part of one of the cornerstones of economic policy in most EU countries, namely the mechanism requiring capital to be allocated from companies without profitable investment alternatives to companies with profitable projects, thereby supporting an efficient capital allocation in society. The study wrongly uses Gross pay-out rate instead of Net pay-out rates. Moreover, as pointed out by Harvard professors, the study's second "evidence" of short-termism is misconstrued, to the extent that it assumes that CAPEX and R&D intensity of listed companies decreased in the EU in the years 1992 – 2018. In fact, it increased.*

UK based companies make up a big portion *(one third)* ***of the sample taken*** *in the Commission study*[9]***.*** *Not only do these companies fall outside future EU measures, but also they fall under a different legal corporate system and generally have a different ownership structure (more dispersed ownership model compared to continental Europe).*

National laws on directors' duties include a duty to take into consideration all foreseeable risks (including those pertaining to sustainability) and many national corporate governance codes have already introduced recommendations promoting that companies further integrate a stakeholder-oriented perspective. Consequently, sustainability is

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[6] Link to the Commission study here: https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en

[7] See, Comments by European Company Law Experts (ECLE) group at https://www.law.ox.ac.uk/business-law-blog/blog/2020/12/ec-corporate-governance-initiative-series-comment-european-company. See also a paper signed by more than 20 Nordic Law Professors also commenting on this assumption in the Commission Study on Directors Duties: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3709762. Also a paper from European Corporate Governance Institute (ECGI): https://ecgi.global/news/european-commission%E2%80%99s-sustainable-corporate-governance-report-critique

[8] Comments by Harvard Law School at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F594640 and from Law School of Columbia University at https://clsbluesky.law.columbia.edu/2020/11/09/the-european-commissions-sustainable-corporate-governance-report-a-critique/

[9] Ibid 5.

*already embedded in national company law (and corporate governance codes) and hence in companies' common practice**. It should not be for EU law to determine which interests should be taken into account and how to grade them**.*

Reply to question 8: I strongly disagree.

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? How to mitigate those risks?

The need for legislative intervention is not substantiated. Such intervention would be disproportionate as it would have a negative impact on several fundamental principles of our market economy model such as the freedom of enterprise and property (ownership) rights and would disrupt a long-standing and fine-tuned balance in national corporate governance systems. Directors only owe fiduciary duties to the company itself and not to third parties.

***EU legislative action would have considerable counterproductive effects** on different other levels:*

- ***Unlimited and diffuse director liability**, where directors are required by law to balance the interests of their stakeholders, will inevitably lead to stakeholder conflicts and deadlocks which in turn would weaken decision-making effectivity, leading to **risk aversion and less entrepreneurial behaviour**.*
- *These conflicts of interests could also **reduce investors' incentives to provide risk capital to companies**, including first movers and others who need risk capital to invest in the sustainable transition.*
- *By having the law determining that directors must take on board all stakeholders expectations, there is also a risk of making directors **(paradoxically) less accountable to anyone** because these expectations would be vague, contradictory and difficult to measure against any KPIs.*
- ***Evaluation of boards**, which is an important practice in listed companies, would also become very difficult, alongside holding board members accountable for poor results, financial or others.*
- *Impact on fundamental concepts of **ownership rights of shareholders**.*
- *Considerable administrative burden would be added, which would hamper and **slow down decision-making processes in European companies making them more vulnerable to competitors** (vis-à-vis those from outside the EU).*
- *Risk of **frivolous litigation**.*
- *Overly onerous and unprecise requirements on individuals, such as directors of European companies, would have the potentially damaging effect of **discouraging progressive and highly qualified individuals from taking up directorships of companies**. It would be difficult for insurers to offer board insurance products due to diffuse liability. Particularly, in sustainable corporate governance, it is essential that*

companies can attract open-minded, progressive individuals to drive companies' strategy forward in this area.

If anything, the Commission could consider offering a platform to share experiences and best practices (please note that some have been generated by BusinessEurope members[10]*) to help directors better identify and factor in the relevant interests (societal and stakeholders') into the strategies and decisions of companies.*

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?

The whole formulation of question 10 is biased and based on incorrect grounds:

First, it is claimed that companies often do not have a strategic orientation on sustainability risks, impacts and opportunities. We do not find this postulate proven. According to the survey referred to in the Commission study on director's duties (above mentioned), ***85,7% of companies declared to have a sustainability strategy already*** *(p. 34, fn. 125). Companies have this strategic orientation as they recognise that companies acting in a sustainable manner become more competitive. Similarly, many investors are looking at the long-term profitability of the company and at the companies' compliance with the Taxonomy Regulation, and therefore expect directors to take into account sustainability risks, impacts and opportunities.* ***Companies are thus acutely aware of the importance of taking into account human rights and environmental issues*** *and the need to retain their "social license to operate".*

Second, there is a huge difference between (1) the company deciding itself to include such considerations into its strategy, decisions and oversight, and (2) introducing legislation requiring such integration. And if legislation is introduced whether this should be (2a) national legislation or (2b) EU legislation. ***Giving the legislator (EU or national) a say on how strategies should be defined would go against our market economy model and the foundations of company law****. Many concerns are raised in this regard: How to define the company (foundation) contract and the responsibilities of shareholders? Is the core of the limited liability company and its purpose put into question? What would be the reasonable strategic orientation to follow by law? Where to draw the line between an orientation to serve a political ideology and sound economical and sustainable corporate decisions? Would not it be a risk that companies inadvertently become an extended arm of shifting political majorities? Where is the evidence for such a major intervention in national company law and corporate governance systems?*

Third, as mentioned above, many national corporate governance codes already require companies to implement a strategic orientation on sustainability risks, impacts and opportunities, in their own business strategy.

[10] For example, MEDEF Guide Comment dialoguer avec les parties prenantes : https://www.medef.com/uploads/media/node/0001/04/1bfc01fcce41314355f5e9c3ae6815a992f90715.pdf

Reply to question 10: I strongly disagree.

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?

We object to the introductory statement to question 11 that there is a narrow understanding of the duty of care according to which directors are required to act predominantly in the short-term financial interests of shareholders. This statement is not supported by evidence.

Directors owe a legal duty of care (fiduciary duty) to the company. It is not appropriate to require directors to have a legal duty of care to stakeholders. Any duty of care to stakeholders is and should be held by the company itself rather than by its directors.

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?

Any EU legislative initiative on corporate governance should not lead to personal legal liability for directors with respect to company's impacts on stakeholders. ***Directors only owe fiduciary duties to the company itself and not to third parties****, such as external stakeholders. Consequently, external stakeholders cannot be given a role in the enforcement of the fiduciary duties of directors. Any liabilities for failures in relation to a company's activities should be borne by the company itself and not by its directors. As for companies' liability towards stakeholders, the latter already have* ***mechanisms of protection and can claim company's liability through traditional mechanisms such as through tort law and contract law****.*

There is no need to create more mechanisms. It should also be noted that the EU directive on whistle-blowers' protection will help companies in preventing and mitigating the risks they undergo. The introduction of enforcement mechanisms where external stakeholders are given a role in the enforcement of directors' fiduciary duties (e.g. obtaining direct legal standing) would have a disruptive effect on the fine-tunned balance (built over decades) between boards, management and shareholders and could potentially create endless frivolous litigation (e.g.by anyone seeking to harm the company, including competitors).

Reply to question 13: I strongly disagree.

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?

We recognise that the consultation of relevant stakeholders is important in the normal functioning of companies. To generate significant benefits, the company, best placed to know the impact stakeholders have on its activities and inversely (the impact it has on those stakeholders), should be given the flexibility to determine the relevant stakeholders depending on its specificities and the type of measures/mechanisms to inform, consult and engage with them. Companies already organise the dialogue with their stakeholders ***using different mechanisms that are suitable to the intended goals: advisory committees, roadshows, direct dialogue, one-to-one meetings, partnerships, co-innovation, panels****… etc.*

Many companies voluntarily (or beyond the legal requirements) publish the so-called sustainability reports which often include stakeholder engagement processes.

New legal requirements risk destabilising or duplicating existing effective provisions*. They could lead to either meaningless box-ticking exercises or to conflicting situations (between different stakeholders' interests) that would reduce efficiency of decision-making processes in companies and harm their competitiveness. Also, if there are requirements throughout the entire supply chain, at which levels should a company make sure to have a consultation mechanism? Only in their own direct operations or beyond that?* ***It is not practically feasible to require a company to put in place and manage a consultation mechanism with each and every supplier****.*

We consider ***workers as important stakeholders, however of a different nature to other stakeholders, as they are part of the company****. Whilst it is important that they also have the possibility to be involved in discussions on company strategy (including due diligence), this must occur in full respect of national industrial relations systems. Furthermore, there is no need for further EU legal requirements to ensure this involvement. The EU directive on information and consultation is already sufficient.*

Reply to question 20a: I strongly disagree.

Question 21: Asks to rank further regulatory options in terms of their effectiveness to contribute to countering remuneration incentivising short-term.

Clear, understandable and comprehensive information on remuneration of board directors and its alignment with the listed company's long-term strategy helps boosting confidence in companies and ultimately in the markets. A good balance ***was reached in the recent Shareholders Rights Directive 2 in terms of the level of prescription of the rules regarding remuneration policies*** *to avoid triggering negative side effects.*

The fully intended outcome of the negotiations on the ***Shareholders Rights Directive II*** *was that disclosure requirements and shareholder say-on-pay were substantially increased, thus focusing on increased transparency but leaving the substance of the executive pay to the companies and their shareholders.*

It seems ill-advised to reopen this discussion again so shortly after, especially when this part of the directive has not yet come into effect in practice. It would be ***premature*** *and in breach of EU better regulation principles.*

Although the directive has no legal requirement to include non-financial KPIs in its remuneration criteria, ***a recital encourages listed companies to assess directors' performance using both financial and non-financial KPI's****. Whatever KPIs a company chooses to use, there must be transparency in both the remuneration policy and report as robustness and reliability of those KPIs are key to investor confidence.*

Moreover, the ***relevant rules of the Shareholders Rights Directive II clearly state that remuneration policy must contribute to the company's business strategy and long-term interests and sustainability*** *and must explain how it does so. This is a good balance which is even being strengthened by national corporate governance codes around the substance of executive remuneration. Defining percentages of variable remuneration, determining in detail which ESG components should go into variable remuneration or determining remuneration on the basis of the remuneration of the workforce is very far-reaching and intrusive on the fundamental rights of private companies and, where applicable, the autonomy of collective bargaining. This was specifically excluded from the directive and for very good reasons. It should remain for each individual company to decide how best to align executive remuneration with its business model, strategy and goals (also long term).*

Reply to question 21: None of these options should be pursued.

Question 22: 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. Please indicate which of these options are in your view effective to achieve this objective (tick the box, multiple choice).

This is a biased question. ***The assertion*** *that current level of expertise in boards generally does not fully support a shift towards sustainability* ***is not supported by facts.*** *The* ***skillset of board members is expanding*** *also to meet the increasing needs of companies around digital and green transformation goals[11]. For instance, sustainability expertise is a criterion which is increasingly being reflected in the competence profiles for the supervisory board. In addition, the establishment of sustainability committees on supervisory boards is becoming increasingly common - also in response to corresponding demands from investor circles[12].* ***The real debate about board competences is about how to drive values and change without recurring to a static box-ticking exercise,*** *which would derive from a legislative approach.*

Not all relevant competencies can practically be represented *in the board. That would require board sizes that are too big to function. However, this is not a problem in practice because boards, of course,* ***also draw on competences/expertise outside the board****.*

[11] Italian CONSOB Report on Corporate Governance (published in 2020, on the 2019 trends), the board composition went to progressively enhance in terms of expertise: whilst the managerial professional background slightly decreased (from 75% in 2011 to 68,5% in 2018), the consultant/professional and the academic backgrounds increased (respectively from 16,2% to 21,3% and from 7,6% to 9,4%).

[12] See, as example, https://www.blackrock.com/uk/individual/2021-larry-fink-ceo-letter

It is the task of the specific company to assess the desirable balance of competences and skills in the board and its committees at any specific time. ***The optimal mix of competencies will change over time*** *for any given company. Corporate governance codes in different member states propose companies to be transparent on their policies regarding board's skills and competences and the respective implementation of those policies. In addition,* ***gradual engagement with stakeholders also allows to extend networks to source further diversity and expertise****.*

The composition and the profile of board members is not something to be mandated by regulation. Any of the ***legal requirements could have the unintended effect of placing certain skills at a higher level compared to others (not mandated by law) perhaps equally or more important for a company's long-term sustainability****.*

Reply to question 22: None of these are effective options.

Question 23: Corporate pay-outs to shareholders (in the form of both dividends and share buybacks) compared to the company's net income have increased from 20 to 60 % in the last 30 years in listed companies as an indicator of corporate short-termism. This arguably reduces the company's resources to make longer-term investments including into new technologies, resilience, sustainable business models and supply chains [19]. 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?

The ***statement in this question has been largely contested by experts***[13] *in the last months, who consider that the level of dividends and share repurchases in the EU is neither depriving firms of capital needed to invest nor providing any other evidence of systematic and harmful short-termism. The statement* ***overestimates European companies' pay-outs*** *since it ignores inward flows, e.g. capital increases and debt financing.*

Two other issues should be considered when analysing pay-outs in European companies. Firstly, when looking beyond large listed companies, for example, to the ***levels of R&D of smaller companies across the EU, the expenditure in R&D rate has increased*** *over the time period considered in the Commission study*[14]*. The* ***EU is the global leader on high-value green patents***[15]*,* ***and this suggests the strong commitment of EU companies in green transition*** *(note that 87% of green inventions in the EU are produced by the private sector). Secondly, the correct* ***concept to use is Net shareholders pay-out, instead of the Gross shareholder pay-out****. The latter concept fails to take into account equity issuances that move capital from shareholders to companies. The Net shareholders pay-out takes into account the pay-ins from new financing, be it in debt or equity. And data demonstrates that EU listed companies issue much more equity than they repurchase.*

There is already a legal framework on share buybacks and there are EU market practices which are dealt with by the Market Abuse Regulation. Further legislation is not necessary.

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[13] Ibid, p.5.

[14] Ibid p.5.

[15] 2020 Industrial R&D Investment Scoreboard: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2458

Reply to question 23: **I strongly disagree.**

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

Preserving the comply-or-explain approach

*The **integrity of the "comply or explain" approach** in the EU must be preserved. This approach is **widely supported by companies, boards, investors, shareholders, national regulators and market authorities**. It allows companies to tailor corporate governance mechanisms to their specific circumstances, ownership structure, size, sector and culture. It also **allows to go beyond (and ahead of) legislation** in the pursuit of objectives that are in the interest of the company, its stakeholders and the society at large (e.g. sustainability, board diversity policies, etc). "**Comply or explain" has helped making Europe a world reference** when it comes to corporate governance and culture. It is essential to continue to protect and promote this approach as a viable means to achieve corporate governance goals, including those related to sustainability.*

Delisting concerns due to highly regulated environment

*We have witnessed a **worrying decrease in listings in the past years**, and since 2015 there have been **300% fewer initial public offerings (IPOs) in European stock markets**. One of the main reasons explaining these figures is the **cost and burdens of legal requirements**. Since 2005, Europe's share of the global stock market value of non-financial companies has fallen by nearly 50 %, while the dominance of the US and China has grown. The total stock market value of all European listed companies today equals probably only one tenth of the global market value. There is **an inefficient supply of (risk) capital in Europe which the European Capitals Market Union strategy is trying to address**. It is of utmost importance that any future initiative stemming from DG JUST is reconcilable with these objectives.*

On due diligence

Question 2: 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?

*When it comes to addressing adverse impacts on human rights and environmental issues **the EU is not starting from zero.***

***Companies are committed to protecting human rights and the environment to meet the expectations of responsible business conduct**. Since the adoption of the UN Guiding Principles and the OECD MNE Guidelines, as well as a general recognition by companies of the importance of responsible business conduct, more companies have taken on the task of elaborating due diligence approaches in often very complex situations. The existing frameworks provide ample possibilities to do so, especially in an enhanced and concerted private-public effort.*

Due diligence initiatives (both sectoral or individual) have increasingly been adopted with good results and integration of Environmental, Social and Governance (ESG) considerations into corporate strategies is gradually becoming a norm in European companies.

***The Non-Financial Reporting Directive** already requires public interest companies to disclose information on the policies they implement in relation to environmental protection, social responsibility and treatment of employees, respect for human rights, measures to counter corruption and bribery, and measures to ensure diversity on company boards[16].*

*In 2017, the EU also adopted due diligence rules around **conflict minerals**, more recently in the context of **export controls** on dual-use items and is now considering adopting soon due diligence rules around **deforestation and on batteries**.*

*While offering expanded sourcing and other business opportunities, by operating in the framework of global supply chains, companies face a number of **challenges**:*

- *They have to manage **complex production processes, scattered** around different locations, in many cases using inputs that come from many different suppliers.*
- *Often the environments in which they operate are challenging, both from a human rights and from an environmental perspective, for example because of **conflict, rule of law gaps, corruption, or weak local governance**.*
- *Despite applying all the possible means to verify and control their suppliers, it is extremely complex for large multinationals to ensure full control at all levels of their supply chain, in particular those **beyond tier one**.*
- ***Local (third country) legal requirements** might differ from European ones (e.g. company law), raising questions on the applicable law – EU or local. Companies*

[16] Article 19a of the NFRD determines that Member States shall provide that undertakings may rely on national, Union-based or international frameworks, and if they do so, undertakings shall specify which frameworks they have relied upon.

should not be put into a position of choosing which jurisdiction to follow. This will result in the decoupling of products and the disturbance of global supply chains.

- *We also have to look at cases where **suppliers reject to comply** (e.g. in a dependence relationship), in particular if there are no alternative suppliers or they are scarce, and it is difficult to engage with a new supplier and build a new business relationship to avoid business disruption. How to handle subcontractors with which the company does not have a direct relationship, or that largely operate in the informal economy?*

- *Companies have **different degrees of bargaining power** that can either facilitate or limit their leverage in obtaining information (and a particular behaviour) in the supply chain. It should be noted that this bargaining power does not always depend on the size or the place in the supply chain.*

The mentioned Commission study on due diligence requirements through the supply chain from February 2020[17] shows that there are many initiatives across sectors and in different types of companies.

***Several companies covered by the study did express EU action would be a way to ensure a level playing field** by avoiding fragmentated national approaches harmful to the competitiveness of European companies. **Although this is an advantage** that we also acknowledge, if certain conditions are met (see below), we would like to underline that **a clear majority of European businesses from all sizes and sectors do share concerns regarding the possible introduction of an EU mandatory framework** for supply chain due diligence.*

The Commission points to the fact that human rights violations occur in supply chains internationally, but not how legally binding rules for EU companies would make them disappear. And, although it seems clear that intra-EU supply chains should be covered, it gives no justification why it should be the downstream companies rather than the member state in question that should have the responsibility to remedy the situation (given that all member states are required to have in place rules for compliance with basic human rights, if not then that should be the first line of action). Furthermore, the Commission has not shown that the possibilities to further develop voluntary schemes have been exhausted.

*Adopting **a new legislative framework in this area raises many questions**:*

- *What shall be the scope?*
- *How to ensure legal certainty?*
- *Which is considered an adequate level of accountability?*
- *How to ensure that the responsibilities of states and companies are not inverted?*
- *How to assess responsibilities within companies (executive and non-executive directors in one- or two-tier systems), supply chains of different sizes and nature?*

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[17] https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en

- *How to deal with the negative and unwanted impacts (e.g. jeopardising meaningful and successful company practices, possibly dampening investment in third countries or affecting European companies' competitiveness)?*
- *How to make sure European smaller companies are not irreversibly impacted?*
- *Should public held companies and the public sector be held accountable for their supply chains in the same (or stricter) terms as private companies?*
- *How about public administrations that do not abide by the same level of due diligence obligations as private entities?*

*In addition, at a time where supply chains are heavily disrupted due to the **COVID19 crisis**, introducing a new layer of legislation in the near future could make it harder for companies to effectively secure, redesign or be able to rebuild essential supply chains in the recovery phase. Potential legislation would need to take this into account and equally consider long-term structural changes to global supply chains induced by COVID-19.*

*The **EU should lead the process of international cooperation on supply chain due diligence**. This is important to ensure a global level playing field, support the competitiveness of European companies that operate in a global market, and at the same time promote a more coordinated and effective global response to due diligence questions, building on the progress achieved through the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights.*

Conditions for a workable and balanced EU framework

***If the EU decides to go ahead** with a legislative measure, the following **fundamental considerations need to be taken into account in order to make it a workable and effective instrument**:*

1) *Scope and legal certainty*

- *The focus should be: on the area of direct impact, i.e., companies' own operations, and **tier 1 suppliers of the upstream supply chain with whom there is an established commercial relationship;** on **the most severe risks**.*
- *Any EU measure needs to **take account of the needs of Small and medium-sized companies (SMEs)** and be able to factor in the think small first principle. Depending on the extent and nature of those measures several options should be considered, from exemptions to softer requirements. **Support for SMEs** will be required whether they are in or out of the scope of a binding framework.*
- *The **level of detail** should be **proportionate** to provide clarity for business, but without being prescriptive to a point that encourages a tick-box approach, rather than the more holistic materiality-based and impact-oriented approach and which takes away necessary flexibility for companies to adapt to their specificities.*
- *Companies need legal certainty in order to operate. Regulatory requirements need to be **sufficiently clear** so that business can implement with confidence of*

*compliance. In particular, it is essential that **key terms** are clearly defined, i.e. due diligence requirements, severe impacts and human rights covered (the definition of which should be made by reference to internationally recognized standards such as Universal Declaration of Human Rights, the OECD guidelines and the fundamental ILO Conventions).*

- ***Catch-all definitions** (e.g. of damage, cause or contribute) must be avoided as they may trigger liability beyond established legal principles (e.g. requiring direct/causal links) and would lead to conflicting judicial interpretations across the EU. Too broad definitions would also have extraterritoriality effects.*

***2)** <u>Accountability and remedy</u>*

- *When it comes to accountability, it would be inappropriate to hold only European companies accountable for damages **when it is impossible to control all the components of the chain and many other actors involved**. Accountability is about taking reasonable steps to prevent and address risks whilst recognising it is not possible to control the whole supply chain.*
- *Any framework should be based on an **obligation of means** rather than an obligation of results. Having a meaningful due diligence process (to be carefully) in place is also a way to help to facilitate meaningful stakeholder engagement getting away from a simple box-ticking exercise.*
- *Important to develop **the legal notion of "safe harbour"**. Companies should not be held liable for harm in their supply chain when they have not directly caused it, could not reasonably be aware of it or when they took the appropriate due diligence measures to prevent it. Regulatory requirements should not lead inadvertently to situations where companies are held liable precisely because they took meaningful due diligence measures.*
- *There should be **no vicarious liability** whereby companies become responsible for actions of other autonomous entities.*
- *As with the OECD guidelines, **concepts such as "cause" and "contribute" or "being linked to"** should be applied when determining liability of the company in the supply chain. This is essential to work out a reasonable responsibility for companies, especially taking into account whether adverse impacts are caused by their own activities, or the activities of others. In order for a remedy to be used there must be a direct causal link between the company's activities and the damage suffered by those affected.*
- ***Rules on burden of proof** should be proportionate (meaning no reversal of the burden in prejudice of companies) and EU companies should be able to hold data they collected during their due diligence processes for a reasonable period in order to enable them to make use of their rights to defence in court.*

3) *Preserving the level playing field*

- *It is therefore essential that any EU initiative clearly sets out the main due diligence requirements which **member states cannot further add to**, to avoid the risk of fragmentation of the internal market.*
- *Consideration should be made to the impact on EU companies' overall **competitiveness vis-à-vis companies from other parts of the world**.*
- ***When they are active in the internal market, third country private or publicly held companies** should also be covered by the future EU framework.*

4) *The role and the nature of companies*

- ***The roles of companies and states should not be mixed up**. In the area of human rights for example, the UNGP clearly delineates between the state duty to protect, and the business responsibility to respect. This division of responsibilities should be embedded in any legislative initiative. Companies do not have the mandate nor the capability to solve all the problems arising from weak governance that may, for instance, cause human rights breaches in domestic supply chains.*
- *It should not disrupt and revolutionise the basic principles underpinning national company laws and the **function and purpose of the limited liability company.***

5) *Reporting requirements and articulation with other EU laws*

- ***Overlap must be avoided with other EU requirements,** such as the Non-Financial Reporting Directive (NFRD) soon up to revision, any future EU standards as well as with the recently adopted disclosure and taxonomy regulations. The same should apply in the case of targeted EU legislation, such as in the area of responsible sourcing of minerals. Otherwise, the likely overlapping reporting requirements will lead to significant administrative burden for companies. Current and future requirements need to work together.*
- *Any EU framework should also ensure that **commercially sensitive information** is protected in the context of companies' reporting requirements.*
- *There should be articulation with the EU Directive on **whistle-blower protection** and due diligence provisions in other EU Regulations, such as on **export controls on dual use items** (i.e. the EU instrument should not question decisions that have been made by the EU Member States authorities regarding EU exports).*

6) *A mixed and holistic approach*

- *Companies are not able nor do have the mandate to solve all the problems on their own. Any **EU framework should not exclusively focus on the company** and its direct stakeholders alone. In order to effectively reduce or mitigate risks, due diligence has to be taken in a holistic way by involving many actors of the ecosystem of supply chains, from companies (multinational and local) to states (who have a duty to protect), NGOs to consumers.*
- ***Coordination** between different initiatives (e.g. Justice, Trade etc) can help make supply chains more robust and avoid disruption of international trade.*

- ***Companies*** *need support on the ground in third countries and reliable information on the environmental and human rights situation. Despite the best efforts by companies this is not always attainable. EU delegations in third countries could play a role in filling this information gap. Guidelines or EU guides could be elaborated by the Commission to support companies in preventing the risks by focusing on specific regions / risks.*

- ***Too strict and punitive-nature measures would risk being counterproductive****. This may lead to overcompliance, where European companies may feel compelled to pull out from a market, when depending on the risk, non-disengaging or improved engagement would serve better the objectives an EU framework intends to achieve. Also, competitors of EU companies, which do not abide by similar legislation, will probably not do the same.*

- ***Potential of soft law should be fully recognised****. Whether complying with mandatory requirements or in their own actions, companies should be able to devise solutions which fit their size, sector, operating markets and business model and allow them to identify where the material risk of adverse impacts. The EU should ensure that best practices taken by sectors and companies are respected and can be as considered as means of compliance with any future framework.*

- ***State-owned companies*** *and other entities should be covered.*

7) *International standards*

- ***Any EU measure should be aligned with international standards*** *and guidelines (especially UNGPs and OECD), as many European companies are part of global supply chains and must be able to maintain global competitiveness and reflect meaningful requirements on their international suppliers. Companies and authorities are already familiar with these principles and refer to them to ensure a responsible business conduct.*

8) *Stakeholder engagement*

- *Engagement of stakeholders is* ***important*** *to be able to conduct proper due diligence.*

- *Involvement of stakeholders including employees should be* ***in line with existing EU and national rules*** *(e.g. on information and consultation of workers) and leave flexibility to companies to determine which stakeholders should be involved and how.*

- *Any* ***provisions on workers' rights*** *inferred through this legislation must not interfere with member states' social legislation or collective agreements. In particular, rules regarding the role of trade unions or workers' representatives should not go further than/duplicate or disrespect what is already provided for in existing legislation.*

9) Proportionality and impact assessment

- *A **robust impact assessment** will be necessary given the critical impact an EU framework will have in European companies. If not prudently prepared, any measure could seriously affect the competitiveness of European companies and expose them to enormous litigation risks.*
- *Risks cannot be practically or effectively assessed or managed if companies will be required to identify, assess, mitigate/prevent and account on **every risk** within their business, including risk to customers and end users, whether inside or outside the EU and whether upstream or downstream. Companies should be able to prioritise the risks (e.g. risk to occur, severity) as mentioned in the OECD guidelines.*

Reply to question 2: No, it should be enough to focus on asking companies to follow existing guidelines and standards.

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)?

These potential benefits would only materialise if the rules included in a European framework are workable and proportionate and do not lead to a situation where European companies are put at a strong disadvantage when compared to companies from third countries.

Reply to question 3: Levelling the playing field, avoiding that some companies freeride on the efforts of others; Harmonisation to avoid fragmentation in the EU, as emerging national laws are different; Other.

Question 3a: Please indicate which among the following possible risks/drawbacks linked to the introduction of an EU due diligence duty are more important for you?

Reply:

- 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.

- 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 (drawbacks):

a) Letting companies take over the traditional role of the state in ensuring adherence to rules.

b) risk of disengagement of states themselves regarding their duties to protect human right.

c) Risk of overlapping with other existing legislation.

d) Jeopardizing commercially sensitive information if reporting obligations go too far.

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?

Legally imposed requirements would raise several critical questions: What would be the methodology followed? How would these procedures and targets fit companies of different sizes, sectors, ownership and board structures range of activities? And as a consequence, how could companies have legal certainty that they have complied with legal requirements in a reasonable way? How not to fall into a one-size-fits-all approach hampering and slowing down decision-making processes in companies without a clear added value?

The new Taxonomy reporting requirements already foresee that a company reports on environmental efforts, and how it intends to make the green transition happen (via CapEx), whilst respecting minimum social safeguards.

Moreover, the use of targets is only one of the many legitimate ways a company may choose to help it safeguard the interests of various stakeholders. A proportionate approach dictates that companies must retain the ability to tailor their approach to the particular circumstances they face, including by using approaches other than setting targets.

Furthermore, the mentioned aspects have been addressed in various pieces of regulation with regard to a company's responsibility, as for example the NFRD. Adding further requirements to director's duties increases the complexity of a company's management unnecessarily.

Reply to question 7: **I strongly disagree.**

Question 14: Please explain whether you agree with this (due diligence) definition and provide reasons for your answer.

This "due diligence" definition needs to be revised.

***Due diligence should be risk-based, proportionate and context specific**. Due Diligence should also **set priorities**, by seeking first to prevent and mitigate most severe human rights impacts. There is need for clear explanation of what "adequate processes" are. What a "reasonable effort" is can also lead to multiple interpretations which is especially problematic when it is linked to a legally binding and sanctioned obligations.*

*Also, it is important to stress that **"climate change risk**" is a collective effort of all stakeholders. Macro societal challenges, such as climate change and global biodiversity loss, represent a global risk for the planet resulting from global economic activity. **These are not risks which are within the sole or main control of any particular private actor**. Moreover, taking into account the broad definition of a supply chain, it becomes virtually impossible to evaluate every business relationship on its impact on health and environmental impacts. Such macro societal challenges (including climate challenge) are best captured through dedicated legislation and regulations, as is currently done by the EU. It should be noted that EU companies have to comply with environmental/climate legislation in countries where they develop their activity.*

*Definition of "Supply chain": we disagree with this definition which is **too broad**. Are "suppliers" both upstream and/or downstream, and does it include all levels/tiers of suppliers throughout the value chain or (as we prefer) just tier 1 suppliers where the company has a possibility to impact/have contractual agreement? In practice, it is impossible to manage all the risks related to a company's "business relationships" along the whole supply chain. Companies' efforts should be **limited to first-tier suppliers/subcontractors**. The scope of "business relationships" within the supply chain must be clearly defined. We suggest that this only covers such parties that the company is directly connected to through contractual relationships. Both the OECD and the UNGPs provide good guidance/inspiration in this regard.*

Question 15: Please indicate your preference as regards the content of such possible corporate due diligence duty (tick the box, only one answer possible)

Reply to question 15: **none of the above. See reply to question 2.**

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

Until we see the details of the EU framework, we cannot rule out any of the specific measures suggested, as it much depends on the extent and nature of the future measures. All the options should be considered in the impact assessment from the point of view of effectiveness and administrative-burden reduction.

SMEs face distinct challenges in meeting due diligence responsibilities because of their size and activities, available resources (scarcer than with multinational companies) and leverage in obtaining information (and a particular behaviour) in the supply chain. A possible mandatory approach will impose bigger burdens on them.

And even if SMEs are out of the scope of an EU initiative, the obligations will be imposed on them downstream, as they may be part of the supply chain of companies that are within the scope. Therefore, support for SMEs will be necessary regardless of the scope.

Reply to question 16:

- All SMEs [16] should be excluded.

- Micro-enterprises (less than 10 people employed) should be excluded.

- SMEs should be subject to lighter requirements.

- 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.

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?

Reply to question 17: **Yes.**

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?

*It is a **well-accepted principle that it is States' responsibility to protect** human rights and fundamental freedoms. International cooperation is key to address questions related to due diligence and the EU should play a leading role in developing partnerships and cooperation. This can take place at multilateral level, such as the UN or the OECD. The EU initiative on Trade and Climate at the WTO is another good example that seeks to ensure more ambitious* *disciplines on sustainability at global level and it should contribute to a more levelled playing field.*

*It is also important that **the EU takes a role in facilitating better implementation of the UNGPs across the world**, in particular in the framework of the UN roadmap on better implementation, currently being developed. It is also important to strengthen technical cooperation to support countries in implementing the UNGPs, particularly in the global south, as well as supervisory mechanisms to enhance peer pressure.*

***Cooperation can also take place at bilateral level**, for instance through the EU's trade policy and its extensive network of trade agreements and the dedicated chapters on trade and sustainable development. These chapters not only include ambitious and enforceable binding provisions in areas such as labour, climate change and the environment, human rights and Corporate Social Responsibility, but they also establish a framework of bilateral cooperation with the EU's partners.*

*At **unilateral level**, the EU can also use its Generalised System of Preferences (GSP), which currently under revision, to promote sustainable practices in trade. Addressing foreign subsidies that in many cases are responsible for overcapacities and market distortions may also contribute to levelling the playing field. The Commission is already working towards the establishment of dedicated legal instruments.*

It is essential that the Commission ensures that all these and other measures (in other areas) are complementary and compatible.

Reply to question 18: Yes.

Question 19a: In your view, which of the following (enforcement) mechanisms would be the most appropriate one(s) to enforce the possible obligation of due diligence (tick the box, multiple choice)?

The nature and scope of enforcement mechanisms and sanctions will depend on the exact content and scope of the regulation/obligation. The underlying philosophy of future action on due diligence should be to push companies towards sustainability in their operations within supply chains, not to act as punishment.

The following considerations are essential when drafting an appropriate enforcement mechanism:

- *Punitive steps must be proportionate and transparent.*
- *There is also a critical difference if those breaches occur only the first tier of the supply chain or throughout the entire supply chain. Should the mandatory due diligence obligations apply in the entire supply chain, sanctions should be determined differently for breaches in respectively first tier and beyond first tier. Companies' due diligence efforts should also be positively acknowledged and taken into account.*
- *Enforcement of the due diligence obligation should relate to whether a company has put in place appropriate due diligence measures in accordance with the obligation.*

- *Sanctions should consider how much the company could reasonably be aware of, how much it could influence and mitigate and how serious the breach was. The notion of "safe harbour" should be applied here meaning companies should not be liable for impacts if they demonstrate that reasonable due diligence measures were taken (idem if appropriate remedies have been implemented).*
- *Civil liability should only apply if (i) due diligence has not been carried out and (ii) usual rules of civil liability are satisfied (damages occurred and a causal link between the two is established).*
- *There should be no vicarious liability whereby companies become responsible for actions of other autonomous entities.*
- *Judicial safeguards should be considered, comprising balanced protective measures against abusive or frivolous litigation accompanied by regulation of litigation funders (as with the recently adopted directive on representative actions).*
- *The amounts and types of effective, proportionate and dissuasive sanctions should be left to Member States in accordance with their existing legal frameworks.*
- *It would not be appropriate to impose criminal sanctions.*

Reply to question 19a: Other.

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