

2 February 2021

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

**Please provide reasons for your answer:**

*Corporate entities and related vehicles are constituted with a purpose and that purpose provides their objectives.*

*The effectiveness with which stakeholder interests are managed will always be one of the determinants of how successful that entity is in fulfilling its objectives. It is therefore reasonable that an active requirement to consider such matters on a holistic basis is enshrined within EU law.*

*Corporate purpose may include maximisation of social, environmental, as well as economic/financial performance. However, maximisation of social and environmental outcomes are not the purpose of all organisations and are not always necessary to ensure the agreed corporate purpose is met. Therefore, any change in EU law should not require these aspects to be maximised. On the other hand, it is important to consider "do no significantly harm" principle meaning that companies that do not have any social or environmental purpose must still ensure that those are not harmed by their business.*

*Instead, it should be the role of the directors to regularly and actively monitor and hence determine the extent that social and environmental matters should play in corporate objectives and performance and ensure that they are managed appropriately. It is reasonable to codify this obligation in law.*

**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?**

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

**Please explain:**

*INREV supports the need for companies to develop processes to identify and mitigate risks and adverse impacts on human rights, health and safety and environment through their value chain.*

*However, the risks attached to these matters vary significantly between (i) industry groups (ii) the size and nature of the entity to be regulated, and (iii) the extent and location of any international operations. For this reason, a more nuanced and risk-based approach is required than the one proposed if the solution is to be proportionate.*

*For example, INREV members would typically expect the greatest risk requiring due diligence in its supply chains to arise in respect of environmental matters; in contrast human rights would relatively be*

*a lower risk. Any proposal mandating due diligence should therefore take a risk-based approach enabling entities to tailor due diligence to the specific risks of the organisation and its supply chain.*

*Legally binding obligations should therefore be established through a principles-based framework requiring directors to act in the long-term interest of investors, and specifically requiring them to consider all aspects of corporate behaviour (ie consideration of environmental and corporate social responsibility) with these sustainability objectives being given appropriate prominence alongside directors' existing fiduciary duty to investors.*

*These principles would be complimented by guidance on the manner in which directors discharge this obligation under this expanded duty of care, with the supply chain due diligence promoted in this consultation being one example. Such an approach would allow the market to determine what is best (and indeed evolve this best practice over time) while avoiding what will otherwise need to be a rigid compromise that is overly onerous for some sectors and in others may prove to be insufficient and therefore difficult and expensive to operate in practice.*

*Although INREV encourages developments with regards to supply chain due diligence to address adverse impacts on human rights and environmental issues, we do not find it appropriate to develop a rigid, mandatory EU framework.*

**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*

*Other*

**Other, please specify:**

*Please see response to question 2.*

**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*

*Other*

**Other, please specify:**

*Risks (impact and likelihood of occurrence) are not uniform across all businesses. Therefore, the burden of compliance may exceed the benefits and not be proportionate to risk.*

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

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

**The interests of society, please specify:**

*Good corporate behaviour supports an ongoing 'license to operate' from society. Behaviour also impacts the strength or otherwise of a company's brand.*

**Other interests, please specify:**

INREV does not take any 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?**

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

**Please explain:**

*While it is reasonable and proportionate for a company to identify its stakeholders, (and to identify and manage risks and opportunities that arise from interacting with those stakeholders), it should be for the company’s directors to determine the extent of those risks and how they should best respond in fulfilling their duties, rather than having the law mandate specific action that may be disproportionate to the risk or the size of the company.*

*These proposals appear more relevant to large industrial corporations and its application for a number of activities of companies in the financial services sector is not clear. We would urge the EU to clarify which entities are in scope, but also how any law or regulations should be applied by investment managers, including its applicability to their investment vehicles and the approach to be taken for individual investments or portfolio companies so that a solution proportionate to the risk of these businesses is implemented.*

*Given the diversity of business operations that will need to be subject to any final regulation or law that emerges, this emphasises the need for a solution that has sufficient flexibility to be operated efficiently across a diverse range of business sectors if it is to be proportionate.*

**Question 7. Do you believe that corporate directors should be required by law to set up adequate procedures and where relevant, measurable (science –based) targets to ensure that**

**possible risks and adverse impacts on stakeholders, ie. Human rights, social, health and environmental impacts are identified, prevented and addressed?**

*I strongly agree*

**Please explain:**

*The same standards of behaviour should apply to all risks, not just those impacting stakeholders (ie. human rights, social, health and environmental impacts). It is for the directors to determine the likelihood and impact of risks and on a holistic basis determine which risks to take and which to avoid.*

**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*

**Please provide an explanation or comment:**

*Corporate directors should balance the interests of all stakeholders to fulfil their fiduciary duty. To do so effectively requires (i) consultation with investors and other relevant stakeholders to identify their interests and priorities (ii) development and implementation of strategy that addresses those interests.*

**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 could these possible risks be mitigated? Please explain. Where directors widely integrate stakeholder interest into their decisions already today, did this gather support from shareholders as well? Please explain.**

*None. This should be established as a matter of principle where there is a duty of care to assess all material risks, including those arising from the company's interactions with its stakeholders. Prescriptive and specific requirements will not allow the flexibility to deal appropriately with changing circumstance nor will they be proportionate, given the risk profile of doing business varies significantly between companies, sectors and across geographies.*

**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*

**Please explain:**

*These risks have the potential to be material across all businesses. Consequently, they should be considered when setting strategy.*

**Question 11. Are you aware of cases where certain stakeholders or groups (such as shareholders representing a certain percentage of voting rights, employees, civil society organisations or others) acted to enforce the directors' duty of care on behalf of the company? How many cases? In which Member States? Which stakeholders? What was the outcome? Please describe examples:**

INREV does not take any position on this issue

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

**Please describe:**

INREV does not take any position on this issue

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

*I do not take position*

**Please explain your answer:**

*This is a matter for individual companies and is an area where best market practice needs to be allowed sufficient space to evolve over time before being codified.*

**Question 13a: In case you consider that stakeholders should be involved in the enforcement of the duty of care, please explain which stakeholders should play a role in your view and how.**

INREV does not take any position on this issue

- **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.**

*Agree. A risk based approach is most appropriate which is why a principles based approach to any law or regulation mandating supply chain due diligence is essential if these measures are to be proportionate.*

**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.*

**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?**

*Our preference is for option 1. Under this approach, the additional thematic options are irrelevant as market practice will determine what is required in specific geographies and sectors. Further, it is for the directors to use their judgement in determining the work to be undertaken and the responses required.*

**Question 15b: Please provide explanations as regards your preferred option, including whether it would bring the necessary legal certainty and whether complementary guidance would also be necessary.**

*Option 1 is the only option that would allow an effective market response by using a framework with the flexibility to readily adapt and remain fit for purpose as market practice evolves. A prescriptive, centrally determined approach that cannot be tailored to the specific circumstances of a business will either not be proportionate or be ineffective.*

*As a general comment, we consider the proposed option of 'combining a horizontal approach with a theme or sector specific approach' to be unduly complicated. It is likely to be difficult to operate in practice and is likely to lead to at best diverse implementation, and more likely to confusion among stakeholders when reported on.*

**Question 16: How could companies'- in particular smaller ones'- burden be reduced with respect to due diligence? Please indicate the most effective options (tick the box, multiple choice possible). This question is being asked in addition to question 48 of the Consultation on the Renewed Sustainable Finance Strategy, the answers to which the Commission is currently analysing.**

*Other option, please specify:*

*A proportionate approach that allows actions to be determined based on interactions with stakeholders and from risk assessment is preferable.*

*This matter is relevant to all businesses irrespective of size, although the extent of analysis and the amount of action taken is likely to vary by size of company for any given business sector.*

*This approach is capable of evolving over time as business size and market practice evolve.*

**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

**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.**

No response

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

*Minimum standards are required to ensure a fair competitive landscape. It is also reasonable to seek to encourage other markets to adopt high standards of ethical and corporate governance behaviour.*

**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?**



*I do not know*

**Please explain:**

*We recommend the Commission to clarify the issues of concern and/or the measures being considered.*

**Question 19: Enforcement of the due diligence duty**

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

*Other, please specify*

**Please provide explanation:**

*There should be an obligation to report to shareholders and stakeholders within a Company's annual report. It should be the shareholders and stakeholders that should reward or punish a company by the way they engage. The other remedies seem disproportionate.*

*We recommend the EU to develop suitable reporting frameworks that encourage full and proper disclosure rather than through the judicial or regulatory measures proposed. These frameworks should be internationally consistent and enable businesses of different sizes to provide appropriately tailored information while seeking to prevent greenwashing.*

**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?**

*No*

**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 disagree*

**Please explain:**

*In adopting a risk-based approach, it should be for a company's directors to determine how best to engage with stakeholders to (i) determine stakeholders with a material interest in the business (ii) determine the interests of those stakeholders and (ii) report to those stakeholders on the company's performance and the actions taken in the areas of interest to stakeholders.*

*EU regulation should only require that appropriate engagement takes place, albeit, guidance on the nature, frequency and content of that engagement would be useful. This approach also provides the freedom for market practice to evolve.*



**Question 20c: What are best practices for such mechanisms today? Which mechanisms should in your view be promoted at EU level? (tick the box, multiple choice)**

	Is best practice	Should be promoted at EU level
Advisory body		
Stakeholder general meeting		
Complaint mechanism as part of due diligence		
Other, please specify	X	

**Other, please specify:**

*Annual report to investors. Best practice would be for this to be included in the disclosures which the auditors review or opine on.*

**Question 22: Enhancing sustainability expertise in the board**  
**Current level of expertise of boards of directors does not fully support a shift towards sustainability, so action to enhance directors' competence in this area could be envisaged [18] (Study on directors' duties and sustainable corporate governance).**  
**Please indicate which of these options are in your view effective to achieve this objective (tick the box, multiple choice).**

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

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

**Please explain:**

*What is required and proportionate will vary between company, sector and geographical operations. Proportionality dictates that the only policies of wide applicability are (i) for nominations committee to consider environmental, social and/or human rights expertise in the directors' nomination and selection process and (ii) and for boards to regularly assess their level of expertise.*

*The requirement for a percentage of directors to have sustainability skills will be difficult to satisfy in practice. How to determine expertise is in any case arbitrary, rendering this proposal ineffective.*

**Question 23: Share buybacks**

**Corporate pay-outs to shareholders (in the form of both dividends and share buybacks) compared to the company's net income have increased from 20 to 60 % in the last 30 years in listed companies as an indicator of corporate short-termism.**

**This arguably reduces the company's resources to make longer-term investments including into new technologies, resilience, sustainable business models and supply chains [19]. (A share buyback means that the company buys back its own shares, either directly from the open market or by offering shareholders the option to sell their shares to the company at a fixed price, as a result of which the number of outstanding shares is reduced, making each share worth a greater percentage of the company, thereby increasing both the price of the shares and the earnings per share.) EU law regulates the use of share-buybacks [Regulation 596/2014 on market abuse and Directive 77/91, second company law Directive].**

**In your view, should the EU take further action in this area?**

*I do not take position*

**Question 24: Do you consider that any other measure should be taken at EU level to foster more sustainable corporate governance? If so, please specify:**

*The EU should work with organisations such as IASB, IFAC and SEC together with organisations representing sustainability subject matter experts to (i) develop a globally accepted framework for reporting on relevant aspects of corporate activity that impact sustainability and (ii) on an assurance framework for this information.*

*The management and reporting of sustainability risks, mitigating actions and outcomes is still immature and bedevilled by numerous competing codes seeking disclosure and/or compliance. The EU should take leadership in simplifying and, where necessary, consolidating these codes, so that a simpler and consequently more effective framework emerges that (i) can be utilised by business of all sizes and maturities (ii) encourages all entities to progress along a sustainability pathway and (iii) has the flexibility to manage a rapidly changing corporate landscape.*