EC consultation on the Sustainable Corporate Governance initiative

A Eurelectric response paper

February 2021

Eurelectric represents the interests of the electricity industry in Europe. Our work covers all major issues affecting our sector. Our members represent the electricity industry in over 30 European countries.

We cover the entire industry from electricity generation and markets to distribution networks and customer issues. We also have affiliates active on several other continents and business associates from a wide variety of sectors with a direct interest in the electricity industry.

We stand for

The vision of the European power sector is to enable and sustain:
- A vibrant competitive European economy, reliably powered by clean, carbon-neutral energy
- A smart, energy efficient and truly sustainable society for all citizens of Europe

We are committed to lead a cost-effective energy transition by:

investing in clean power generation and transition-enabling solutions, to reduce emissions and actively pursue efforts to become carbon-neutral well before mid-century, taking into account different starting points and commercial availability of key transition technologies;

transforming the energy system to make it more responsive, resilient and efficient. This includes increased use of renewable energy, digitalisation, demand side response and reinforcement of grids so they can function as platforms and enablers for customers, cities and communities;

accelerating the energy transition in other economic sectors by offering competitive electricity as a transformation tool for transport, heating and industry;

embedding sustainability in all parts of our value chain and take measures to support the transformation of existing assets towards a zero carbon society;

innovating to discover the cutting-edge business models and develop the breakthrough technologies that are indispensable to allow our industry to lead this transition.

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WG Financial Regulation & Market Integrity
WG Social Sustainability

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Consultation Document Proposal for an Initiative on Sustainable Corporate Governance

Fields marked with * are mandatory.

Disclaimer
This document is a working document of the Commission services for consultation and does not prejudge the final decision that the Commission may take.
The views reflected on this consultation paper provide an indication on the approach the Commission services may take but do not constitute a final policy position or a formal proposal by the European Commission.
Please note that in order to ensure a fair and transparent consultation process only responses received through the online questionnaire will be taken into account and included in the report summarising the responses.

Introduction

Political context

The Commission's political guidelines set the ambition of Europe becoming the world's first climate-neutral continent by 2050 and foresee strong focus on delivering on the UN Sustainable Development Goals[1], which requires changing the way in which we produce and consume. Building on the political guidelines, in its Communication on the European Green Deal[2] (adopted in December 2019) and on A Strong Social Europe for Just Transition[3] (adopted in January 2020) the Commission committed to tackling climate and environmental-related challenges and set the ambition to upgrade Europe's social market economy.

The European Green Deal sets out that "sustainability should be further embedded into the corporate governance framework, as many companies still focus too much on short-term financial performance compared to their long-term development and sustainability aspects."

Sustainability in corporate governance encompasses encouraging businesses to frame decisions in terms of their environmental (including climate, biodiversity), social, human and economic impact, as well as in terms of the company's development in the longer term (beyond 3-5 years), rather than focusing on short-term gains.

As a follow-up to the European Green Deal, the Commission has announced a sustainable corporate governance initiative for 2021, and the initiative was listed among the deliverables of the Action Plan on a Circular Economy[4], the Biodiversity strategy[5] and the Farm to Fork strategy[6]. This initiative would build on the results of the analytical and consultative work carried out under Action 10 of the Commission's 2018 Action Plan on Financing Sustainable Growth and would also be part of the Renewed Sustainable Finance

Strategy.

The recent Communication “Europe's moment: Repair and Prepare for the Next Generation” (Recovery Plan)[7] (adopted in May 2020) also confirms the Commission’s intention to put forward such an initiative with the objective to “ensure environmental and social interests are fully embedded into business strategies”. This stands in the context of competitive sustainability contributing to the COVID-19 recovery and to the long-term development of companies. Relevant objectives are strengthening corporate resilience, improving predictability and management of risks, dependencies and disruptions including in the supply chains, with the ultimate aim for the EU economy to build back stronger.

This initiative is listed in the Commission Work program for 2021 [8].

EU action in the area of sustainable corporate governance will complement the objectives of the upcoming Action Plan for the implementation of the European Pillar of Social Rights, to ensure that the transitions towards climate-neutrality and digitalisation are socially sustainable. It will also strengthen the EU’s voice at the global scene and would contribute to the respect of human rights, including labour rights– and corporate social responsibility criteria throughout the value chains of European companies – an objective identified in the joint Communication of the Commission and the High Representative on the Global EU response to COVID-19[9].

This initiative is complementary to the review of the Non-Financial Reporting Directive (NFRD, Directive 2014/95/EU[10]) which currently requires large public-interest companies to disclose to the public certain information on how they are affected by non-financial issues, as well as on the company’s own impacts on society and the environment. The NFRD also requires companies to report on their social and environmental policies and due diligence processes if they have them, or otherwise explain why they do not have any (comply or explain approach). Whilst the NFRD is based on incentives “to report”, the sustainable corporate governance initiative aims to introduce duties “to do”. Such concrete actions would therefore contribute to avoiding “greenwashing” and reaching the objectives of the on-going review of the NFRD too, in particular the aim of enhancing the reliability of information disclosed under the NFRD by ensuring that the reporting obligation is underpinned by adequate corporate and director duties, and the aim of mitigating systemic risks in the financial sector. Reporting to the public on the application of sustainability in corporate governance and on the fulfilment of directors’ and corporate duties would enable stakeholders to monitor compliance with these duties, thereby helping ensure that companies are accountable for how they mitigate their adverse environmental and social impacts.

The initiative would build upon relevant international standards on business and human rights and responsible business conduct, such as the United Nations’ Guiding Principles on Businesses and Human Rights and the OECD Guidelines for Multinational Enterprises and its Due Diligence Guidance for Responsible Business Conduct.

As regards environmental harm linked to deforestation, the Commission is also conducting a fitness check of the EU Timber Regulation and an impact assessment.

Finally, Covid-19 has put small and medium sized companies under financial pressure, partly due to increased delay in the payments from their larger clients. This raises the importance of the role of board members of companies to duly take into account the interests of employees, including those in the supply chains as well as the interests of persons and suppliers affected by their operations. Further support measures for SMEs also require careful consideration.

Results of two studies conducted for the Commission

To integrate properly sustainability within corporate strategies and decisions, the High-Level Expert Group on Sustainable Finance[11] recommended in 2018 that the EU clarifies corporate board members´ duties so that stakeholder interests are properly considered. Furthermore, they recommended for the EU to require that directors adopt a sustainability strategy with proper targets, have sufficient expertise in sustainability, and to improve regulation on remuneration.

In its 2018 Action Plan on Financing Sustainable Growth[12] the Commission announced that it would carry out analytical and consultative work on the possible need to legislate in this area.

The Commission has been looking at further obstacles that hinder the transition to an environmentally and socially sustainable economy, and at the possible root causes thereof in corporate governance regulation and practices. As part of this work, two studies have been conducted which show market failures and favour acting at the EU level.

The *study on directors' duties and sustainable corporate governance* [13] evidences that there is a trend in the last 30 years for listed companies within the EU to focus on short-term benefits of shareholders rather than on the long-term interests of the company. Data indicate an upward trend in shareholder pay-outs, which increased from 20% to 60% of net income while the ratio of investment (capital expenditure) and R&D spending to net income has declined by 45% and 38% respectively. The study argues that sustainability is too often overlooked by short-term financial motives and that to some extent, corporate short-termism finds its root causes in regulatory frameworks and market practices. Against these findings, the study argues that EU policy intervention is required to lengthen the time horizon in corporate decision-making and promote a corporate governance more conducive to sustainability. To achieve this, it spells out three specific objectives of any future EU intervention: strengthening the role of directors in pursuing their company's long-term interest by dispelling current misconceptions in relation to their duties, which lead them to prioritise short-term financial performance over the long-term interest of the company; improving directors' accountability towards integrating sustainability into corporate strategy and decision-making; and promoting corporate governance practices that contribute to company sustainability, by addressing relevant unfavourable practices (e.g. in the area of board remuneration, board composition, stakeholder involvement).

The *study on due diligence requirements* through the supply chain[14] focuses on due diligence processes to address adverse sustainability impacts, such as climate change, environmental, human rights (including labour rights) harm in companies' own operations and in their value chain, by identifying and preventing relevant risks and mitigating negative impacts. The study shows that in a large sample of mostly big companies participating in the study survey, only one in three businesses claim to undertake due diligence which takes into account all human rights and environmental impacts. Therefore voluntary initiatives, even when backed by transparency do not sufficiently incentivise good practice. The study shows wide stakeholder support, including from frontrunner businesses, for mandatory EU due diligence. 70% of businesses responding to the survey conducted for the study agreed that EU regulation might provide benefits for business, including legal certainty, level playing field and protection in case of litigation. The study shows that a number of EU Member States have adopted legislation or are considering action in this field. A potential patchwork of national legislation may jeopardise the single market and increase costs for businesses. A cross-sectoral regulatory measure, at EU level, was preferred to sector specific frameworks.

Objectives of this public consultation

This public consultation aims to collect the views of stakeholders with regard to a possible Sustainable Corporate Governance Initiative. It builds on data collected in particular in the two studies mentioned above and on their conclusions, as well as on the feedback received in the public consultation on the Renewed Sustainable Finance Strategy[15]. It includes questions to allow the widest possible range of stakeholders to provide their views on relevant aspects of sustainable corporate governance.

About you

*Language of my contribution

- Bulgarian
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- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- German
- Greek
- Hungarian
- Irish
- Italian
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- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* Surname

Benfatto

* I am giving my contribution as

- ○ Academic/research institution
- ● Business association
- ○ Company/business organisation
- ○ Consumer organisation
- ○ EU citizen
- ○ Environmental organisation
- ○ Non-EU citizen
- ○ Non-governmental organisation (NGO)
- ○ Public authority
- ○ Trade union
- ○ Other

* First name

Stella

* Email (this won't be published)

sbenfatto@eurelectric.org

* Organisation name

255 character(s) maximum

Eurelectric

* Organisation size

- ○ Micro (1 to 9 employees)
- ● Small (10 to 49 employees)
- ○ Medium (50 to 249 employees)
- ○ Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the transparency register. It's a voluntary database for organisations seeking to influence EU decision-making.

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* Country of origin

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

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

- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon

French Southern and Antarctic Lands

- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland

- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia

Sandwich Islands

- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia

Canada
Cape Verde
Cayman Islands
Central African Republic
Chad
Chile
China
Christmas Island
Clipperton
Cocos (Keeling) Islands
Colombia
Comoros
Congo
Cook Islands
Costa Rica
Côte d’Ivoire
Croatia
Cuba
Curaçao
Cyprus
Czechia

India
Indonesia
Iran
Iraq
Ireland
Isle of Man
Israel
Italy
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Kiribati
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Panama
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Paraguay
Peru
Philippines
Pitcairn Islands
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Portugal
Puerto Rico
Qatar
Réunion
Romania
Russia
Rwanda
Saint Barthélemy
Saint Helena Ascension and Tristan da Cunha

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

Democratic Republic of the Congo

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- Denmark
- Liberia
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* Publication privacy settings

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

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

☑ I agree with the personal data protection provisions

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

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

Consultation questions

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

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

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

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

- Yes, both in and outside the EU
- No

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

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

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

- Yes
- No

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

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

- Yes
- No

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

- Yes
- No

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

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

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

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

Please provide reasons for your answer:

We here interpret the word 'maximisation' more as 'expanding' and thereby set social and environmental performance more on the agenda. However, we do not believe social and environmental performance shall overshadow financial performance. Hence, we believe both types of goals go well hand in hand based holistic approach. See more details on Eurelectric's views in subsequent questions (section II).

As a general remark to this consultation, Eurelectric understands that the scope of the sustainable corporate governance regulatory initiative would include listed companies. However, such initiatives are not only relevant to listed companies. Hence, some big companies are owned by non-listed funds, are publicly-owned or are family owned. Thus, in order to have a level playing field, a definition of the companies in scope should take this fact into account. Depending on how the expected reviewed Non-Financial Reporting Directive turns out, an appropriate definition of the scope could possibly adhere to the same scope of companies being subject to the NFRD.

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

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

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

- (selected)

Yes, an EU legal framework is needed.

- No, it should be enough to focus on asking companies to follow existing guidelines and standards.
- No action is necessary.
- Do not know.

Please explain:

The main reason for recommending an EU legal framework is to avoid fragmentation at national level with different legislations in place, specifically in regards to due diligence. Nevertheless, the establishment of such a legal framework should be coordinated with the elaboration and entering into force of other EU initiatives such as the non-financial reporting directive, which will have an impact on corporate governance. Besides, we recommend that any EU legal frameworks should be built on global frameworks and standards (such as UN and OECD). Further details on Eurelectric's views are provided in answers to questions 14 and 15.

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)?

- [x] 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
- [x] Contribute effectively to a more sustainable development, including in non-EU countries
- [x] Levelling the playing field, avoiding that some companies freeride on the efforts of others
- [x] Increasing legal certainty about how companies should tackle their impacts, including in their value chain
- [ ] A non-negotiable standard would help companies increase their leverage in the value chain
- [x] Harmonisation to avoid fragmentation in the EU, as emerging national laws are different
- [ ] SMEs would have better chances to be part of EU supply chains
- [ ] Other

Question 3a. Drawbacks

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

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

Other, please specify:

As marked above, we see several risks related to implement the suggested legal framework. In this connection it shall also be underlined that there is a need for a reasonable long run-in phase as it would take some time before you can find suitable suppliers that can document fulfilment of having observed criteria set. However, if the obligations turn out to be reasonable and not too comprehensive this risk is smaller compared to a situation where a more comprehensive setup is chosen.

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

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

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

	Relevant	Not relevant	I do not know/I do not take position
the interests of shareholders	●	○	○
the interests of employees	●	○	○

the interests of employees in the company's supply chain	◉	○	○
the interests of customers	◉	○	○
the interests of persons and communities affected by the operations of the company	◉	○	○
the interests of persons and communities affected by the company's supply chain	◉	○	○
the interests of local and global natural environment, including climate	◉	○	○
the likely consequences of any decision in the long term (beyond 3-5 years)	◉	○	○
the interests of society, please specify	◉	○	○
other interests, please specify	○	○	○

the interests of society, please specify:

E.g. the EU 2030 and 2050 decarbonisation targets and the measures that mitigate the loss of biodiversity, pollution, etc. and promote recycling and water protection.

Question 6. Do you consider that corporate directors should be required by law to (1) identify the company´s stakeholders and their interests, (2) to manage the risks for the company in relation to stakeholders and their interests, including on the long run (3) and to identify the opportunities arising from promoting stakeholders' interests?

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

Please explain:

Provided that Eurelectric understood the question as referring to board of directors (in the question mentioned as “corporate directors”), their duty is not to manage aspects of the company, including stakeholders’ interests.

Overall, of the above mentioned points are part of the successful management of a company and are therefore a core interest of the directors of the company themselves.
Under the applicable company law doctrine in force in at least a great deal of the member states, it is the directors’ duty of care to promote the long-term corporate benefit. While this duty is first and foremost directed towards the company, and ultimately all its shareholders, it must be noted that the directors are also expected to balance relevant stakeholders’ interests against the shareholders’ interests. It is further crucial to note that the directors not only have the right, but also the obligation to promote stakeholders’ interests, when this in line with the long-term corporate benefit. Due to this fact corporate directors duty of care already encompasses the consideration of all relevant risks and opportunities that are important for the long-term corporate benefit.

Specifically, on the identification of company’s stakeholders, we are aware that we can only grow if we take into account the ecosystem in which we operate, and which is made up of many different stakeholders. It is important to identify key stakeholders and conduct dialogue with them on a continuous or on an ad-hoc basis in order to compare their expectations with the company’s strategy (materiality analysis). There are as many ways of identifying stakeholder interests as there are companies (local vs. centralised identification, thematic vs. generic identification…).

Moreover, on the management of the risks and opportunities in relation to stakeholders, we recall that the first mission of the Board is to determine the strategy of the company, considering the risks it is confronted with and the opportunities it has identified. Integrating and reporting on risks factors are key components of corporate stewardship and have already been included in EU legislation for a long time. In accordance with the Accounting directive, the management report shall include “a fair review of the development and the performance of the undertaking’s business and of its position, together with a description of the principal risks and uncertainties that it faces”. The non-financial reporting directive (NFRD) has notably extended the scope of this risk assessment by requiring companies to publish a non-financial statement which is, in France, part of the management report and therefore falls under the responsibility of the Board of Directors. Consequently, we consider that the framework regarding the integration of sustainability risks, impacts and opportunities is already in place and efficient. This framework will certainly be strengthened following the review of NFRD and overlapping legislation should therefore be avoided

For this reason, we do not see a need for additional regulatory measures. We therefore believe that it is appropriate for the directors to take these into account in their decision-making, but not for this to be required by law.

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

- I strongly agree
- I agree to some extent

- [x] I disagree to some extent
- [ ] I strongly disagree
- [ ] I do not know
- [ ] I do not take position

Please explain:

Provided that Eurelectric understood the question as referring to board of directors (in the question mentioned as “corporate directors”), their duty is not to manage aspects of the company, including stakeholders’ interests.

Companies must at all times abide by the applicable legislation in force in the countries in which they operate. Instead of introducing completely new stakeholder-related requirements into company law, ESG issues can be best addressed in special legislation. Processes and targets aimed at identifying, preventing and addressing are most effective and coherent to adopt by means of due diligence legislation, not by means of company law.
For instance, regarding targets, some companies have already set up ambitious targets on ESG issues (eg. Regarding the reduction of CO2 emissions or waste, gender diversity etc.). However, the choice and timeline of such targets should remain at our discretion. Good practice within the non-financial statement is to disclose voluntary targets, the dedicated resources for their implementation and the methodologies allowing to take into account uncertainties linked to different scenarios. It would therefore be more appropriate to address this issue on the revision of NFRD.

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

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

Please provide an explanation or comment:

Provided that Eurelectric understood the question as referring to board of directors (in the question mentioned as “corporate directors”), their duty is not to manage aspects of the company, including stakeholders’ interests.

As already stated in question 6, it is of utmost importance to note that the company law doctrine already in force prescribes that the directors have the duty to promote the long-term corporate benefit, which generally does not equate to short-term financial interests of the shareholders. While performing their duties, the directors must assess all factors that are important to the company’s performance in the long run, including the interests of relevant stakeholders. If it is in line with the long-term financial interests of the company, the directors have also the obligation to promote relevant stakeholders' interests. Clarifying the directors' duty of care in this respect would not bring about anything new in substance, and it is doubtful whether it would thus produce any significant results.

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?

Amending the directors' duty of care in the proposed manner contains several fundamental issues, which have not been addressed in the Study on directors' duties and sustainable corporate governance, including (but not only):

- Conflict of interest: if the directors are to equally and simultaneously promote the interests of the shareholders and various stakeholder groups, how is it resolved, whose interests take precedence in a conflict of interests? As directors are personally liable for breaching their duty of care, this situation would lead to substantial legal uncertainty. It also is worth noticing that in many cases different stakeholders may have conflicting interests. For example, the interests of the employees may be in severe incongruence with the interests of the local environment. Pursuing various and often conflicting targets in a satisfactorily way is extremely difficult, and easily results in inefficiencies. This in combination with the fact that directors would no longer safeguard the interests of the shareholder, could result in decreased incentives to invest in stock corporations. This in turn could also lead to decreased yields for pension funds, which would have wide implication for the society at large. Moreover, control over directors may decrease, if they are no longer accountable towards any single interest group, such as the shareholders. This would again result in less efficient management of companies or even paralyse the decision-making process (i.e. potential situation of stalemate for management).

- Complexification of the decision-making process in order to be able to justify the reason for prioritising one interest over another;

- Disinvestment by shareholders who would fear that their interests would be diluted by the interest of too many other stakeholders with conflicting agendas;

- Risk of litigation: the legal obligation for the company's governing bodies to take into account the often-contradictory interests of stakeholders would fuel a plethora of litigations;

- Risk of judicial interference in management decisions as the judge would substitute his judgement of how the interests in question should be weighed. It is therefore vital to consider these risks and open questions before amending the content of the directors' duty of care.

How could these possible risks be mitigated? Please explain.

At this stage, we recommend refraining from setting up a strict definition of duty of care or company interest at EU level (see answers above).

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

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

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

Please explain:

In principle, we do agree that companies should have a strategic orientation on sustainable risk. Nevertheless, the non-financial reporting directive already lays down rules according to which companies are required to disclose relevant and material information on policies, outcomes and risks concerning environmental aspects, social and employee-related matters, respect for human rights, anti-corruption and bribery issues and diversity on the board of directors. As this information is disclosed in the management report, which is a report of the board of directors, it is already integrated into the company's strategy, decisions, and oversight.

Enforcement of directors' duty of care

Today, enforcement of directors' duty of care is largely limited to possible intervention by the board of directors, the supervisory board (where such a separate board exists) and the general meeting of shareholders. This has arguably contributed to a narrow understanding of the duty of care according to which directors are required to act predominantly in the short-term financial interests of shareholders. In addition, currently, action to enforce directors' duties is rare in all Member States.

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

Please describe examples:

Companies are regularly challenged on their decisions and practices which may lead to organizational /process changes.

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

Please describe:

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

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

Please explain your answer:

We agree that relevant stakeholders do play a role in the decision process (such as identification, risk mapping…) but in case of failure (in France, failure to establish or publish a vigilance plan) classical remedies are available. In fact, the directors and the company itself are already liable for any damage that the cause third parties as well as the environment in the face of tort law and criminal code. Stakeholders' rights can in this regard be best enforced by means of tort law and criminal law. Mixing these elements with company law and the concept "duty of care" is prone to confusion and legal uncertainty. Since there are numerous good reasons to direct the directors' duty of care towards the company and its shareholders, it is also natural that only these can enforce the directors' duty of care. Thus, enforcement of directors' duty of care is not the role of stakeholders.

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.

At this stage, at EU level, we do not agree to give stakeholders a legal right enforce the duty of care as such.

Section III: Due diligence duty

For the purposes of this consultation, "due diligence duty" refers to a legal requirement for companies to establish and implement adequate processes with a view to prevent, mitigate and account for human rights (including labour rights and working conditions), health and environmental impacts, including relating to climate change, both in the company's own operations and in the company's the supply chain. "Supply chain" is understood within the broad definition of a company's "business relationships" and includes subsidiaries as well as suppliers and subcontractors. The company is expected to make reasonable efforts for example with respect to identifying suppliers and subcontractors. Furthermore, due diligence is inherently risk-based, proportionate and context specific. This implies that the extent of implementing actions should depend on the risks of adverse impacts the company is possibly causing, contributing to or should foresee.

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

Eurelectric welcomes the initiative of defining due diligence and addressing the complexity of this concept. The industry is committed to apply the core definition of due diligence as defined in the OECD Guidelines for Multinational Enterprises and in the UN Guiding Principles on Business and Human Rights.

Nevertheless, an extension of a company's responsibility related to "due diligence duty" on health and, in particular, environmental impacts inevitably may – if too comprehensive – lead to legal uncertainty and an inappropriately level of responsibility besides an unlevelled playing field globally. Additionally,taking into account the broad definition of "supply chain", it becomes virtually impossible to evaluate in depth every business relationship on its impact on health and environmental impacts.
As a consequence, we recommend to narrow down the definition of a due diligence duty. A due diligence duty should be based on the minimal social safeguards known from the Sustainable Finance Taxonomy, i.e. it should be based on the European Pillar of Social Rights and should also recognise the relevance of international minimum human and labour rights and standards carried out in alignment with the OECD Guidelines for Multinational Enterprises and UN Guiding Principles on Business and Human Rights. Compliance with those international standards, enshrined the Charter of Fundamental Rights of the European Union, is already implemented in several legislative actions and could, thus, be carried out to a reasonable extend also in this context without compromising the competitiveness of European businesses. This brings the advantage that the due diligence duty becomes more manageable for companies and more effective.
A rather broad definition, on the other hand, is in danger of being ineffective, e.g. because companies might focus on different/wrong effects of their actions.

Eurelectric shall recommend the Commission to be inspired by existing national legislation in some Member States such as the French Law on the Duty of Vigilance adopted in 2017, which is based on a definition of due diligence according to OECD guidance and UNGP. We are, however, reluctant to create 'hard law' in this connection at the current stage.

Considering the purpose of this consultation and its hard law perspective, we would like to emphasise two aspects of the proposed definition:

1. The supply chain cannot reasonably cover all second-level suppliers and subcontractors as this would easily amount to hundreds of thousands of players to include. Mandatory due diligence should focus on the first tier of the supply chains (direct subcontractors or providers) where co-contractors are effectively able to exercise leverage through the contractual relationship. Regarding any further obligation down the supply chain, clarity should be given as to how companies should take measures to exercise leverage as it is practically impossible for undertakings to control every single part of the entire supply chain.
2. The issue of climate change is a global environmental risk resulting from a multitude of actors, wherever they are located. It is also a cumulative phenomenon over time as CO_2 emissions remain for about one century before being disintegrated. In this view, it is not possible to attribute responsibility for climate change to one single operator. At global level, the UN Paris Agreement Climate Protocol sets up responsibility for reducing greenhouse gases (GHG) emissions to States which are parties to the Agreement. Given this specificity of global effect, it is not possible to define due diligence on climate change for a specific company. The issue of climate change should therefore be addressed in a different, appropriate legislative

framework. EU industry, especially the electricity sector is subject to the Emission Trading System (EU ETS) and is fully committed to decarbonisation and reaching the 2030 as well as the 2050 GHG reduction targets.

Overall, we would also recommend to provide some guidance on the terminology “reasonable efforts”.

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

- ○ Option 1. “Principles-based approach”: A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These should be applicable across all sectors. This could be complemented by EU-level general or sector specific guidance or rules, where necessary
- ◉ Option 2. “Minimum process and definitions approach”: The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.
- ○ Option 3. “Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues”. This approach would largely encompass what is included in option 2 but would complement it as regards, in particular,

environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.

- Option 4 “Sector-specific approach”: The EU should continue focusing on adopting due diligence requirements for key sectors only.
- Option 5 "Thematic approach": The EU should focus on certain key themes only, such as for example slavery or child labour.
- None of the above, please specify

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

Eurelectric supports Option 2. We also call for including companies that fall under the scope of the proposed framework/requirements to be involved in the development of such an EU framework.

This approach recommends that the due diligence obligation should be cross-sectorial and based on key process requirements. In addition, we believe that any mandatory due diligence should focus on very specific and clearly defined social and human rights.

• Human rights and social rights should be defined by reference to the Charter of Fundamental Rights of the European Union (CFR), to UNGP, i.e. rights expressed in the International Bill of Human Rights coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. Such definitions shall be easily readable and unequivocal.

• The issue of climate change is a global environmental risk resulting from a multitude of actors, wherever they are located. It is also a cumulative phenomenon over time as CO_2 emissions remain for about one century before being disintegrated. In this view, it is not possible to attribute responsibility for climate change to one single operator. At global level, the UN Paris Agreement Climate Protocol sets up responsibility for reducing greenhouse gases (GHG) emissions to States which are parties to the Agreement. Given this specificity of global effect, it is not possible to define due diligence on climate change for a specific company. The issue of climate change should therefore be addressed in a different, appropriate legislative framework. EU industry, especially the electricity sector is subject to the Emission Trading System (EU ETS) and is fully committed to decarbonisation and reaching the 2030 as well as the 2050 GHG reduction targets.

• The EU should consider a separate legislative initiative concerning the fight against Bribery. National legislations, within or outside the EU (e.g., the US FCPA, the UK Bribery Act, the French Sapin 2 Law), have adopted ambitious and extraterritorial provisions to fight corruption. As corruption requires zero tolerance, the undertaking must promote and disseminate a culture of anti-corruption compliance by establishing the prevention and detection of corruption at a prioritisation level. A separate framework is justified because of

the specificities of the issue which require to put in place dedicated means. It may be noted that France and the UK have adopted separate legislations governing due diligence in relation to supply chains on the one hand and the fight against corruption on the other hand.
The EU needs a harmonised framework with an extraterritorial scope (like GDPR) to avoid fragmentation, comparable to the rules adopted by some of our major trade partners. This would also be an important political signal from the EU to other trade partners that active or passive corruption will not be tolerated.

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.

Experience shows this field requires time to be developed. Thus, we recommend focusing on minimum requirements and definitions until we have the necessary experience on a balanced approach and what works in practice. We do agree that harmonization is needed and that too loose guidance may delay a development in the right direction.

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

- [x] Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)
- [x] Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups
- [ ] Climate change mitigation
- [ ] Natural capital, including biodiversity loss; land degradation; ecosystems degradation, air, soil and water pollution (including through disposal of chemicals); efficient use of resources and raw materials; hazardous substances and waste
- [x] Other, please specify

Other, please specify:

The issue of climate change is a global environmental risk resulting from a multitude of actors, wherever they are located. It is also a cumulative phenomenon over time as CO2 emissions remain for about one century before being disintegrated. In this view, it is not possible to attribute responsibility for climate change to one single operator. At global level, the UN Paris Agreement Climate Protocol sets up responsibility for reducing greenhouse gases (GHG) emissions to States which are parties to the Agreement. Given this specificity of global effect, it is not possible to define due diligence on climate change for a specific company. The issue of climate change should therefore be addressed in a different, appropriate legislative framework. EU industry, especially the electricity sector is subject to the Emission Trading System (EU ETS) and is fully committed to decarbonisation and reaching the 2030 as well as the 2050 GHG reduction targets.

Question 15d: If you ticked option 2) in Question 15 and with a view to creating legal certainty, clarity and ensuring a level playing field, what definitions regarding adverse impacts should be set at EU level?

We would like to stress the fact that the coherence with Regulation EU 2019/2088 (Sustainable Finance Disclosure Regulation) is paramount. Indeed, the ESAs will shortly deliver Regulatory Technical Standards (RTS) with regard to the content, methodologies and presentation of sustainability related disclosures by financial market participants. The RTS will relate among others to the description of principal adverse impacts on sustainability factors. If investors are required to report on different adverse impacts regarding sustainability factors from issuers, the confusion will be complete. This has to be avoided by streamlining definitions between the different sustainability-related EU pieces of legislation.

With regards to an EU legislation for Human Rights Due Diligence We urgently recommend that the legislature clearly defines the concept of adverse impacts on human rights in order to create legal certainty for all parties involved.

EU can draw upon international commitments, conventions and guidelines (ILO, UN and OCDE guidelines) and the expertise of companies which will have to fulfil the requirements.

Question 15e: If you ticked option 3) in Question 15, and with a view to creating legal certainty, clarity and ensuring a level playing field, what substantial requirements regarding human rights, social and environmental performance (e.g. prohibited conducts, requirement of achieving a certain performance/target by a certain date for specific environmental issues, where relevant, etc.) should be set at EU level with respect to the issues mentioned in 15c?

Question 15f: If you ticked option 4) in question 15, which sectors do you think the EU should focus on?

Question 15g: If you ticked option 5) in question 15, which themes do you think the EU should focus on?

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

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

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

Please explain your choice, if necessary

> The UNGPs and the OECD MNE Guidelines state that though all businesses have a responsibility to respect and protect rights, their policies and practices should be commensurate with the size and nature of the human rights and environmental risks associated to their operations. A small, low-risk company would take less burdensome steps than a larger company or one with activities that are more likely to lead to human rights abuses and environmental destruction.
> If based on “soft law” The due diligence legislation should apply to all corporations, regardless of size. The legislation should make clear that the complexity and detail of a company’s due diligence should reflect various factors, including size, sector, operational context, ownership, structure, and the severity of their adverse human rights risks and impacts.

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

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

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

Any requirement that may be introduced at EU level should apply to undertakings based in the EU as well as outside the EU to the extent possible. Hence, the criteria triggering the due diligence obligation should be, if possible, identical to those triggering the obligation for EU companies. The turnover generated in the EU is probably the easiest criterion to apply in this respect. Overall, this answer would require more analysis. Some of the following aspect should be considered when defining obligations for third-country companies:

- Has a subsidiary established in the EU,
- specific amount of turnover or investments in the EU,
- Is subject to an EU based license regime, such as a MiFID license.

Once such analysis is carried out, corrective measures could be:

- To issue warnings,
- To impose a temporary limitation of the activity,
- To withdraw a certain certification/authorization,
- To impose an administrative fine which can be a fixed amount or a percentage from the turnover generated in the EU.

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

As explained in 17a, non-EU companies operating in the EU should have to the extent possible the same obligations as EU companies. Otherwise, a fair level playing field would not be achieved.

As regards enforcement, the lack of compliance could lead to “name and shame” by market participants, consumers, NGOs and other stakeholders. Market pressure may then be significant on companies refusing to abide by the rules. In addition, compliance with due diligence obligations by non-EU companies could be obtained through upgraded Trade and Sustainable Development (TSD) Chapters in trade agreements between the EU and its trading partners. Also, we recommend UN and OECD guidelines to be the “backbones” of rule setting in order for those rules to be well-known for third country companies. In this context, Eurelectric urges the European Commission to work for the development of global standards.

In general, in terms of how such rules can be enforced, we suggest further investigations on this matter take place drawing on experience already made. As an option, enforcement measures could include restrictions on operation within the EU, exclusion from public tenders and others.

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?

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

Please explain:

Also reporting obligations should be applied for third country companies to the extent possible. Further, a workable sanctioning regime for third country companies should be secured in order to have a level playing field.

In that respect, EU should adopt a holistic approach, including trade policy tools. In particular, EU templates for the Trade and Sustainable Development (TSD) chapters under bilateral Free Trade Agreements should be upgraded and enforced to make sure that EU trading partners improve responsible business conduct and CSR practices by their domestic companies and foreign-invested companies. Dispute settlement mechanisms and sanctions in the event of non-compliance with TSD chapters of FTAs should be introduced, subject to a competitiveness edge test.

Question 19: Enforcement of the due diligence duty

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

- [ ] Judicial enforcement with liability and compensation in case of harm caused by not fulfilling the due diligence obligations
- [ ] Supervision by competent national authorities based on complaints (and/or reporting, where relevant) about non-compliance with setting up and implementing due diligence measures, etc. with effective sanctions (such as for example fines)
- [x] Supervision by competent national authorities (option 2) with a mechanism of EU cooperation/coordination to ensure consistency throughout the EU
- [ ] Other, please specify

Please provide explanation:

We generally recommend supervision at national level. However, in order to secure a level playing field we agree that mechanism of EU cooperation/coordination should be introduced as a supplement to national supervision.

Question 19b: In case you have experience with cases or Court proceedings in which the liability of a European company was at stake with respect to human rights or environmental harm caused by its subsidiary or supply chain partner located in a third country, did you encounter or do you have information about difficulties to get access to remedy that have arisen?

- ( ) Yes
- ( ) No

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

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

Section IV: Other elements of sustainable corporate governance

Question 20: Stakeholder engagement

Better involvement of stakeholders (such as for example employees, civil society organisations representing the interests of the environment, affected people or communities) in defining how stakeholder interests and sustainability are included into the corporate strategy and in the implementation of the company’s due diligence processes could contribute to boards and companies fulfilling these duties more effectively.

Question 20a: Do you believe that the EU should require directors to establish and apply mechanisms or, where they already exist for employees for example, use existing information and consultation channels for engaging with stakeholders in this area?

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

Please explain.

We disagree to some extent as we, at this stage, find the current level of stakeholder involvement and legal requirements appropriate although we also agree that further guidance and an apply mechanism for this current setup could be beneficial if based on the necessary flexibility for the company. Thus, It is generally to be encouraged that companies facilitate dialogue with their relevant stakeholders and communities affected by their operations, since stakeholder views are important in determining materiality and how best to communicate on sustainability. Moreover, it is in a company’s own interest to be conscious of its most relevant stakeholders’ interests in order to be able to focus its ESG efforts on what matters to them and also build and retain stakeholder trust. On the other hand, from dialogue with its stakeholders a company gains valuable insight on the resources it is dependent on and on the factors contributing to its success. It is to each company (based on its activity, structure and location) to identify its most relevant, representative and credible stakeholders which will take part in the process and how; and to operate a deliberate choice between possible conflicting interest.

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

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

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

Other, please specify:

It is up to each company to organize the best way to identify and engage with relevant stakeholders taking into account activity, structure, location and history. All of the mechanisms listed above may be considered as best practices and are already included in the guiding documents of the OECD. Thus, we would recommend to refer to these exiting documents, without creating a new EU framework on this.

Question 21: Remuneration of directors

Current executive remuneration schemes, in particular share-based remuneration and variable performance criteria, promote focus on short-term financial value maximisation [17] (Study on directors' duties and sustainable corporate governance).

Please rank the following options in terms of their effectiveness to contribute to countering remuneration incentivising short-term focus in your view.

This question is being asked in addition to questions 40 and 41 of the Consultation on the Renewed Sustainable Finance Strategy the answers to which the Commission is currently analysing. Ranking 1-7 (1: least efficient, 7: most efficient)

Restricting executive directors' ability to sell the shares they receive as pay for a certain period (e.g. requiring shares to be held for a certain period after they were granted, after a share buy-back by the company)	☆☆☆☆☆☆

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

None of these options should be pursued, please explain	

Please explain:

Before introducing any further amendments with respect to directors' remuneration it is to be noted that Directive 2007/36/EC on shareholders' rights (SHRD) was only recently amended with Directive (EU) 2017 /828 of the European Parliament and of the Council of 17 May 2017, which in turn has only been implemented in the member states since 10 June 2019. In accordance with Article 9a of the amended SHRD, listed companies are required to establish a remuneration policy, which shall contribute to the company's business strategy and long-term interests and sustainability. The remuneration policy shall explain how the pay and employment conditions of employees of the company were taken into account when establishing the remuneration policy. The existing remuneration-related legal framework in force in the EU thus already addresses the topics under question 21 above.

Before adopting any further EU legislation in this regard, it should be carefully observed and assessed, whether the recently adopted legislative initiatives already suffice in achieving the desired outcomes. Moreover, in the recent years there has also been an emerging trend as to the inclusion of sustainability and non-financial performance metrics in the directors' remuneration criteria. This further underlines the fact that at this stage, we do not see a need for current rules to be reviewed before the impact of already adopted regulatory initiatives has been analysed.

Lastly, it is imperative that that all companies' efforts should be harnessed in climate change mitigation, whereas only some companies are listed and are therefore subject to legislation regulating directors' remuneration. Further regulation in this regard could thus lead to an unlevelled playing field.

Question 22: Enhancing sustainability expertise in the board

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

- ☐ Requirement for companies to consider environmental, social and/or human rights expertise in the directors' nomination and selection process
- ☐ Requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise
- ☐ Requirement for companies to have at least one director with relevant environmental, social and/or human rights expertise

- [x] Requirement for the board to regularly assess its level of expertise on environmental, social and/or human rights matters and take appropriate follow-up, including regular trainings
- [ ] Other option, please specify
- [ ] None of these are effective options

Please explain:

Directors are required to handle a number of responsibilities, incl. environmental and social issues already part of other legislative initiatives. It is therefore already by now natural when assessing a qualified candidate for a director position to consider expertise in this field as an advantage in director appointment.
However, at this stage, we do not agree that there should be mandatory requirements on this. Any initiative in this regard should take a soft law approach in order to ensure flexibility for the companies.

Question 23: Share buybacks

Corporate pay-outs to shareholders (in the form of both dividends and share buybacks) compared to the company's net income have increased from 20 to 60 % in the last 30 years in listed companies as an indicator of corporate short-termism. This arguably reduces the company's resources to make longer-term investments including into new technologies, resilience, sustainable business models and supply chains[19]. (A share buyback means that the company buys back its own shares, either directly from the open market or by offering shareholders the option to sell their shares to the company at a fixed price, as a result of which the number of outstanding shares is reduced, making each share worth a greater percentage of the company, thereby increasing both the price of the shares and the earnings per share.) EU law regulates the use of share-buybacks [Regulation 596/2014 on market abuse and Directive 77/91, second company law Directive].
In your view, should the EU take further action in this area?

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

Question 23a: If you agree, what measure could be taken?

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

Generally, we believe in a phased-in approach building on experiences made as we go along. Further measures could encompass the support of harmonised and streamlined ESG standards and requirements. We support more guidance, within this field and recommend to implement a balanced approach. Finally, less intrusive rules should be taken into consideration before more rigid directions are established.

Sustainability is having momentum as it is part of or the reasoning behind several legislative initiatives taken, cf. the Green Deal etc. Thus, we believe that sustainability will play a key role in general for more or less all sectors. For this reason, we shall recommend to await the impact and experiences these – already taken – initiatives will have. Thus, both positive as well as negative experiences shall be analysed further in the near future.

Section V: Impacts of possible measures

Question 25: Impact of the spelling out of the content of directors’ duty of care and of the due diligence duty on the company
Please estimate the impacts of a possible spelling out of the content of directors’ duty of care as well as a due diligence duty compared to the current situation. In your understanding and own assessment, to what extent will the impacts/effects increase on a scale from 0-10? In addition, please quantify/estimate in quantitative terms (ideally as percentage of annual revenues) the increase of costs and benefits, if possible, in particular if your company already complies with such possible requirements.

Table

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

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

Please explain:

The table above is left blank, as the impact of potential measures that are not yet legally binding/non – binding is rather difficult to predict. To assess the impact of introduction of these duties at quantitative level is practically impossible. This is not least the case with regard to distil them from other factors (especially in relation to costs).
The suggested logic to rate costs and benefits in the same table might lead to misconception. At this early stage, we shall therefore recommend to await further analysis of need when the impact of other regulatory initiatives is known. In this context also experience from companies having adapted policies and practices should be taken into account in order to allow for any requirements or guidance to be implemented in the most efficient way.

Question 26: Estimation of impacts on stakeholders and the environment
A clarified duty of care and the due diligence duty would be expected to have positive impacts on stakeholders and the environment, including in the supply chain. According to your own understanding and assessment, if your company complies with such requirements or conducts due diligence already, please quantify / estimate in quantitative terms the positive or negative impact annually since the introduction of the policy, by using examples such as:
- Improvements on health and safety of workers in the supply chain, such as reduction of the number of accidents at work, other improvement on working conditions, better wages, eradicating child labour, etc.
- Benefits for the environment through more efficient use of resources, recycling of waste, reduction in greenhouse gas emissions, reduced pollution, reduction in the use of hazardous material, etc.
- Improvements in the respect of human rights, including those of local communities along the supply chain
- Positive/negative impact on consumers
- Positive/negative impact on trade
- Positive/negative impact on the economy (EU/third country).

We do not believe a fair and reasonable evaluation can be made before we know the impact from other initiated regulatory proposals or legislation under implementation have been analysed further based on experience.

Thus, at this early stage there is a lack of sufficient data to assess the impact stemming from improving duty of care and the due diligence duty according to voluntary work done in this field. The potential methodology for such assessment needs also to be based on practically employment.

Contact

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Eurelectric pursues in all its activities the application of the following sustainable development values:

Economic Development

- Growth, added-value, efficiency

Environmental Leadership

- Commitment, innovation, pro-activeness

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