Brussels, 5th February 2021

EACB comments on the Commission's Consultation Document Proposal for an Initiative on Sustainable Corporate Governance

Commission's accompanying background information on the initiative

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.

Consultation questions

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?

- 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:

Certainly, we are very much in favor of a holistic approach to business and believe that companies must reflect the social and environmental dimension in the way they do business. However, we cannot agree to an answer which suggests a trilemma (logically impossible to maximize three factors at the same time) and, even if the aim were theoretically possible, would require superhuman management skills (maximize three elements at the same time). Apart from this, answer number 1 does not leave room to reflect the primary mission of cooperatives, which is the maximization of the member benefit. The other answers, especially number 2, do not reflect our approach to business either.

Cooperatives banks are primarily focused on the promotion of the interest of their member customers, not on maximising profit. With more than 60 million members in the EU, the local communities and their well-being are very much in the focus of our activities. This implies a long-term approach to banking. Close to our members and their local communities, our business approach has always been holistic. We are convinced that environmental and social aspects have to be adequately reflected in the way cooperatives do business. Our dedication even goes beyond these elements.
Companies have to fulfill their mission in the first place. For cooperatives this implies first the fulfillment of their commitments to members. They are the customers and provide the financial basis for the business. Without members and their financial engagement, the cooperative banks would not be sound and viable. In fact, the financial performance of a company is a prerequisite of its economic viability and the basis for the engagement with communities. The social and environmental performance should not be detrimental to the viability of companies.

Thus, in the upcoming debate, is of utmost importance to take into account the special characteristics of different forms of companies and their particular focus. As stated by the Statute on the European Cooperative Society, “cooperatives are entities with particular operating principles that are different from those of other economic agents”. These particular principles include notably the principle of the primacy of the individual over capital. With their strong member base and their democratic governance, the cooperative banks are focused on their local communities and take a broader approach to business. In particular, we would like to underline that the major purpose of cooperatives is the promotion of the (economical) interest of their members and the maximization of member benefit, not the maximization of profit. By consequence cooperatives dispose of a number of differing governance features that need to be reflected in order to avoid harm to a form of company that is stakeholder-focused already.

With this in mind, in relation to the cooperative banks which have shareholders/members participating and influencing the companies’ policies, and are by nature fully engaged to support the local economy and the interests of the local society, with a long-term vision, we suggest that a special exemption is considered.

Finally, already today company directors -in the own best interest of the company have to reflect the interest of other stakeholders, including human rights violations, environmental pollution and climate change in their decisions in order they ensure the long-term sustainability of their companies.

In France, for example the national legislation already covers these aspects. According to new article 1833 al. 2 of the French Civil Code, a company must be managed in its corporate interest and must consider social and environmental issues deriving from its activities.

Many European companies have been engaged for many years in putting responsible business conduct (RBC) at the heart of their strategies and operations. They provide much non-financial information compared to companies worldwide and have made strong commitments, notably to reduce their GHG emissions, to respect human rights, to preserve biodiversity and to engage in the circular economy. They have developed common codes of conduct setting out social and environmental industry standards which they seek to confirm to and require their suppliers to acknowledge and implement; they have designed assessment tools to measure gaps with these standards and they organise the mutualisation of sustainability audits to make the latter more efficient. They are also engaged in significant transparency efforts through the publication of vigilance plans and the reporting of extra-financial KPIs.

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

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

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

- **Yes, an EU legal framework is needed**.
- No, it should be enough to focus on asking companies to follow existing guidelines and standards.
- No action is necessary.
- Do not know.

Please explain:

We support an EU framework, as in view of numerous national legislative texts/ or legislative initiatives in various Member States (France, Germany, Switzerland etc.) and worldwide guidance (e.g. OECD), there is a need to determine shared values and to ensure a level playing field on this matter.

However, we believe that cooperative banks should remain out of the scope of the EU legal framework as they have by nature a long-term vision. The major purpose of cooperatives is the promotion of the (economical) interest of their members and the maximization of member benefit, not the maximization of profit. By consequence cooperatives dispose of a number of differing governance features that need to be reflected in order to avoid harm to a form of company that is stakeholder-focused already. They also take very much into consideration the local environment.

Concerning the future EU legislation, moreover, we consider relevant to postulate the following:

- We believe that it should apply to companies exclusively with regard to their business activities which are carried out outside the EU and only with regard to the business relations maintained with partners established in third countries. There should be a general presumption that companies established in the EU act in line with the national law (constitutional/labour law) and EU framework and that they comply with the relevant human rights and environmental standards. In the same vein, activities with partners established in countries on a „positive list" from human rights/labour/environment standards perspective should not be covered by the due diligence requirements (e.g. New Zealand). Measures of a wider scope (covering all business relationships) would implicitly contest the existing EU framework which as such is based on the principles of respect for human rights, civil and labour rights and liability and includes also range of regulatory measures aimed at the protection of environment. A correct implementation of the EU law including the environmental legislation is guarded by the EC and its enforcement is done by the national authorities, supervisors, and EU institutions. For these reasons supply chains within the EU should be excluded from the future EU legislation.
- Processes, reporting and sanctions should remain reasonable , especially for small entities as "red tape" is concerned. It would be difficult to balance between legal certainty for companies on the one hand and enforce responsibility in supply chains on the other, because problems are usually contextual, and responsibility is difficult to locate to any one actor. The duty of due diligence should focus on the activities on which companies have a reasonable level of control, i.e. the company's own operations, the activities of the companies it controls and of its first-tier contractors and suppliers. It would not be appropriate to cover the whole value chain, because that would disproportionately expose companies to liability, for acts over which they have no control.
- It is important that the only obligation that might be contemplated would be an obligation of means (and not an obligation of result) as in France since the Pacte law.

Moreover, due diligence principles should be sufficiently clearly defined to avoid legal uncertainty. We suggest focusing only on the following aspects:

- The requirement to publish due diligence strategy should be proportionate and compatible with the preservation of commercial secrets.
- The legislation should oblige companies to disclose the applied procedures, the cases of potential conflicts and the measures taken to mitigate these effects.

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

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

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

Question 3a. Drawbacks

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

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

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			✓

Other interests, please specify

First, it has to be pointed out that there is already much legislation in place that requires the involvement of stakeholders in projects that can affect the rights of many groups of stakeholders.

We think that there are only few groups of stakeholders that are definitely relevant for the long-term success of an institution. The other interests only play a limited role and are too vague, thus making difficult to measure their impact in a duty of care context. The primary purpose of a company is to fulfill its mission. Members and shareholders, not other stakeholders engage and provide the capital for this activity. The key element of a director's duty of care must therefore be to ensure that -also in the interest of shareholders- an appropriate profit can be generated on the long-term.

We urge the European Commission to be realistic, with more targeted objectives on this key mission. We would like to remind that companies, if they contribute to it, cannot embody the Union's international ambitions alone. Other actors including especially States have an important role to play.

Moreover, we would like to underline that by nature, cooperative banks pay a particular attention to the interest of their member - customers and favour a long-term approach in business. As members of the cooperative banks customers have an important influence on the business policy of the bank.

Shareholders, in contrast to all other stakeholders provide the capital for the company and thereby engage. If their interests are not properly reflected, the financing of the company is put into question.

It is important that in the context of due diligence each company is free to determine which stakeholders are most relevant to its activities and decide the best ways to organize dialogue with such stakeholders.

It has to be recalled that the general law protects the other stakeholders mentioned above in a sufficient way. Companies have to respect those laws and the obligations resulting from the latter. They have to suffer serious consequences in the case of a violation of these obligations. Suitable legal

procedures (e. g. class action) ensure that stakeholders, whose rights were affected, will be protected. The respect of the law is part of the duty of care of directors. We do not see a need to additionally impose an explicit obligation of duty of care towards other categories of stakeholders.

Regarding "the likely consequences of any decision in the long term (beyond 3-5 years)", the scope of decisions should be identified by the company. Indeed, not all the decisions have an impact on the long term.

Finally, companies should not be hold responsible for all the decisions and behaviours of its partners (e.g. suppliers and/or subcontractors) along the whole value chain (no vicarious liability). The company can only be responsible for its own decisions. Decisions made by others could or should be part of those others' due diligence.

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				***V***		
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:

We are of the opinion that companies cannot carry out an exhaustive overview of all the stakeholders' interests due to the specificity of each company's environment and the multitude of ways in which people may be directly or indirectly affected or feel affected (even when they are not).

People may also feel affected even where that is not the case.

We consider therefore that it should be (and it is) up to each company to define its most relevant stakeholders and the best way to organize the dialogue with them on issues where these stakeholders are **materially** affected.

Furthermore, it is important to point out the cooperative particularities: Cooperative banks usually have a very broad member base (60 million members in the EU). These members have a vote in the general assembly, where decisions are taken on the basis of democratic principles (one member, one vote). Apart from this, cooperatives often dispose of other member bodies. Thus, there are fora for the exchange with the most important stakeholders. Any further consultation of other stakeholders must not lead to a circumvention of the general assemblies and the members' rights. Due to their broad member base, cooperatives banks by nature are also fully engaged to support the local economy and the interests of the local society. They have a long-term vision.

A "one size fits all" model would not be well-adapted.

By no means should a duty of care lead to a personal legal liability for directors with respect to company's impacts on stakeholders. It is a long-standing principle of company law that directors hold fiduciary duties to the company itself and not to third parties. Any liability for failing in relation to a company's activities should be borne by the company itself and not its directors.

Finally, we do not support a requirement to identify the opportunities arising from promoting stakeholders' interests. A holistic view on the company and its environment by the management is always helpful and awareness of the interests of shareholders, employees and customers vital. Although we do not see that a detailed assessment of the interests of other stakeholders beyond the obligations of general law, can reasonably be expected.

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

Please explain:

First, it has to be underlined that there is already public law in place, including suitable procedures to avoid possible risks and adverse impacts on stakeholders as consequence of corporate activities. There is no need to duplicate such legislation or to go beyond it. And where this is not the case, the question would rather be whether regulation should not be sought on that level. We find that no legal measures are necessary in this sphere.

In the financial sector there are already provisions, which require institutions to identify and disclose risks and adverse sustainability impacts of their activities. In particular, the SSM Guide on climate-related and environmental risks, national guidance on how to integrate such risks in their risk management. The EBA is currently working on how to integrate all ESG risks into risk management.

Moreover, non-financial reporting will require companies to measure and account for their impact on ESG elements. The relevant standards will clarify how companies have to measure their impact. The EU Disclosure Regulation (EU/2019/2088) and the EU Taxonomy (EU/2018/0178) will contribute to more transparency in relation to adverse sustainability impacts.

As a consequence of disclosure and non-financial reporting, market discipline (investors, rating agencies, etc.) will ensure that companies continuously work to correct any adverse impacts and further enhance positive contributions.

In some countries like Finland, the financial sector companies already now set their own sustainability targets e.g. UNEP-FI. Those companies try by themselves to improve their ESG balance. We therefore do not think that additional procedures are necessary.

Should nevertheless a legal obligation be introduced, it should provide institutions with a complete flexibility to decide whether and which procedures they apply. Companies should set targets in this area that are appropriate to their business and in order to fulfill (general) legal requirements or to meet higher standards if they consider this appropriate.

Given the variety of size, activity and geographical scope of institutions, institutions themselves are best placed to consider for themselves both whether science-based targets are appropriate and to fix methodology behind such targets. The diversity of situations and degrees of maturity should be considered. It would also be necessary to ensure methodological consistency with other existing obligations or under discussion.

Moreover, given that some of these factors could affect the long-term sustainability of the company, the Board should have proper oversight over them. This should not result in a legal obligation on processes, targets and results. In any case, the Board should not be in charge of putting in place any procedures. Measures taken should be based on best efforts and not judged on eventualities as for example in French law.

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

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

Please explain:

We do not agree that directors in EU companies are by definition solely focused on short term profits. Particularly, this is not true in cooperative banks.

In particular, the major purpose of cooperatives is the promotion of the (economical) interest of their members and the maximization of member benefit, not the maximization of profit. With about 60 million members in the EU, deeply rooted in local communities, they do not focus on the short-term interest of their shareholders, but on the long-term benefit for their customers and their local communities. Membership to a cooperative is normally open to everyone. In the general assemblies of cooperatives decisions are taken according to democratic principles (one man-one vote). We therefore believe that the governance of cooperatives is very receptive to the concern of their local stakeholders. Any interference into this governance would rather derail the system.

The current framework on governance of cooperative banks already reflects ESG aligned long-term horizons and sustainability (the main objective of a coop is the satisfaction of its members' needs, the development of its economic activities, profit is relevant but not pivotal; the democratic principle "one member, one vote"; normally, membership requires the acquisition of a limited amount of cooperative capital, remuneration of capital is limited, members acquire shares at face value and when leaving the cooperative never get more than the face value). There is no pressure by a profitability expectation of shareholders.

We therefore believe that cooperatives should remain excluded anyway from any obligation to balance stakeholder interests.

When taking a broader look, in general, it is unrealistic to believe that companies can carry out an exhaustive assessment of the interest of all stakeholders or of all who may consider themselves as stakeholders.

Even less can directors balance the interests of all those stakeholders. Balancing implies that all interests are brought in an equilibrium.
It is impossible for a company to provide something that is considered a balance for all interests involved. It should be up to each company to define its most relevant stakeholders, identify the risks, prevent them and, if needed, take efforts to mitigate them, but not to balance interests. Who should judge whether a balance or even the right balance has been found?
The suggested balancing of interests should not be confused with general legal obligations. In France, for example, corporate directors must consider social and environmental issues deriving from the

activities of the company (article 1833 al. 2 of the French Civil Code). Taking a holistic view and reflecting social and environmental issues is one thing, creating an equilibrium (balance) of all interests is an impossible goal.

Moreover, we see the risk that such an obligation to balance interests would completely ignore the rights of the shareholders. Shareholders invest to participate in dividends or a higher value of the company, or, as in cooperatives, because they also want to participate and influence the companies' policies. Shareholders/members of the cooperative engage and provide the capital as the basis for the activity, while other stakeholders do not provide a similar contribution. They deserve to be protected by the general law against any harm from the company. Any further influence or weight of interest, i.e. beyond the law, should remain limited, in order to avoid any harm to the financing of companies. By conclusion, greatest care should be applied when drafting such duty of care.

- The duty of care should explicitly oblige directors to consider the interest of members/shareholders in the first place.
- Directors should also consider environmental or social aspects in their decisions. There should however be no obligation to achieve a "balance" or specific result.
- Any duty to consider the interest of stakeholders can only be realistic if it only implies an approach **to search for a balance**, but not a result (find the right balance). The latter would be fully unrealistic and impossible to achieve.
- Issues of an undetermined nature and issues that are out of the scope of management of a company cannot be captured.
- Prescribing methods for assessing a balance of the interests of all stakeholders could lead to very complex procedures and turn the assessment into a principal activity of the company. Companies should be free regarding the methods to identify the interest of other stakeholders.
- If introduced any outreach should be limited to material interests of a clearly defined circle of stakeholders.
- Possibilities to challenge the results of the balancing approach should be limited. Otherwise, endless litigation could be the consequence. In fact, every good compromise leaves a majority of stakeholders not fully satisfied.

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?

- We see various serious risks of further regulating the directors' duties in the EU legislation. One main risk is related to any potential corporate directors' legal liability. It is necessary to find the right balance. The sanctions should not be specific and remain based on the actual legal civil responsibility system.
- It will be necessary to ensure that there is no infringement of the deliberative "college" character of the Board of Directors, at least in France where the Board of Directors is a deliberative collegial body. Only a collective decision allows it to exercise its roles and functions as a governing body in a valid way. Directors collectively fulfill their mission (individually, and as such, directors have no power (except for a special mandate conferred by the board). The board thus has a separate existence from that of its directors but without having a separate

legal personality. The Board of Directors being a collective body, all its members are in principle responsible in case of a faulty decision taken by this body. However, each director may avoid being held responsible by establishing in particular that he behaved as a prudent and diligent director, in particular by opposing the collegial decision of the board.

- High administrative costs must be avoided. The duty of care should not lead to an excessive burden for companies, in particular with regard to the identification of their stakeholders' interests. We stress that the EU proposals should take into account, as arising from applicable national law, the distribution of the legal powers of the various social bodies and the broad balances inherent in the social form concerned. For example, under French law, the implementation of certain procedures and the day-to-day management of the company will be more the responsibility of the general management than of the board of directors.
- If the duty to care for social and governance aspects outweighs the achievement of shareholder benefit, the incentives for the financing of commercial activities in the EU will seriously diminish and with it the interest of investors. The best basis for a long-term investment of shareholders are steadily rising profits.
- Possible risks could be the disruption of the global level playing field. Foreign companies, operating in Europe, can be targeted in a limited way (activities inside Europe).
- Possible inconsistencies with already existing provisions must be avoided. The obligations must be aligned with non-financial reporting requirements.
- In purely practical terms, if new obligations were to be the responsibility of the board of directors, or more generally of the company, it would be appropriate to ensure that the company had sufficient time to implement them. A "gradation" could therefore be envisaged in the coming into force of these new measures, which would also ensure the training of directors on these new obligations. It is important to exclude all retroactive responsibility.

How could these possible risks be mitigated? Please explain.

Risk regarding investor incentives

- In general terms, the most important mitigating factor is to ensure that the primary duty remains to ensure the profitability of the company and the fulfilment of the mission of the company, which is to meet the expectations of its members or shareholders. As members/shareholders provide the financial means for the activities, their interest must prevail.

Risks of inconsistencies with already existing provisions in different economic sectors:

These risks could be mitigated at a European level in the following ways:

- Under the French **Law n°2017-399**, a duty of vigilance applies to parent companies and the companies they control directly or indirectly, as well as the activities of subcontractors and suppliers with whom they have an "established" commercial relationship. Companies need to put in place a vigilance plan to identify risks and prevent serious violations of human rights and fundamental freedoms, human health, safety and the environment.
- The EU framework should establish thresholds to avoid too negative consequences on SMEs, as it is the case in the French law. We recommend a risk-based approach to avoid excessive burdens. In this regard, it should not be required to carry out exhaustive and extensive due

diligences but rather focus on the most important risks and limit the due diligences on first-tier suppliers. Indeed, companies should prioritize the risks (e.g. risk to occur, the severity of the risk) as it is impossible to deal with all the risks and all the stakeholders' interests.

- Finally, regarding the value chains, EU companies should not be held legally responsible for decisions or actions taken by other companies (e.g. suppliers). Additionally, no vicarious liability should be held.

Risks related to the corporate directors' legal liability:

- Regarding liability, as explained above, any EU legislative initiative should not lead to personal legal liability for directors with respect to company's impacts on stakeholders (as in the French Pacte Law). Directors only hold fiduciary duties to the company itself and not to third parties. Any such duty of care to stakeholders should be held by the company itself rather than its directors. Any overly onerous obligation on individuals such as directors could have the potentially damaging effect of discouraging individuals from taking up directorships of companies. In addition, it would not be economically realistic for directors to bear liability for corporate-scale damages. Any liabilities for failings in relation to a company's activities should therefore be borne by the company itself and not its directors.

Risks related to disruption of the global level playing field:

- The global playing field could for example be safeguarded by a globally aligned common rulebook and reporting standards.

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:

Sustainability matters (risks, impacts as well as opportunities) should be included to some extent in the company´s strategy, but again legislative measures are not the right way to promote this.

In the financial sector there already exist various texts, which require institutions to consider sustainability in the corporate strategy and decision-making (for example the SSM Guide on climate-related and environmental risks, national guidance on how to deal with climate-related risks, the EU Disclosure Regulation (EU/2019/2088) and the EU Taxonomy (EU/2018/0178)). For instance, according to the SSM Guide when determining and implementing their business strategy, institutions are expected to integrate climate-related and environmental risks that impact their business environment in the short, medium, or long term and to integrate these elements in their strategy and planning.

We would also believe that a more developed non-financial reporting would oblige companies to integrate sustainability matters in their strategy.

Specifically, the governance model of cooperatives, due to its nature is already well-tailored to reflect long- term oriented and sustainability goals and the views of stakeholders:

1. The principal object of a cooperative is the satisfaction of its members' needs and/or the development of its economic activities, in particular through the supply of banking services in the case of cooperative banks. The generation of profit is relevant – like for any other undertaking – but not the primary purpose.

2. Membership is normally open to all citizens living in the business area of the cooperative bank. EACB counts about 58 Million members of cooperative banks in the EU. The aim (and often the reality) is a life-long relationship of the member/customer with his bank.

3. Members vote in the general meeting on the major matters related to the cooperative, generally on the basis of the democratic principle (one member, one vote). There are no "lead shareholders" that drive the policy, but the policy is determined by the community of member/customers.

4. In most cases, membership requires the acquisition of a (limited) amount of cooperative capital. This amount is relatively moderate in most cases. By consequence, the shareholder structure of cooperatives is characterized by very high number of micro-holdings of capital.

5. Remuneration of capital is limited: members receive dividends for their shares, which in some jurisdictions are even subject to a cap. Generally, dividend payments are moderate and stable over long periods. However, usually the biggest part of the profit is transferred to the reserves (retained earnings).

6. Members acquire shares at face value and (when leaving the cooperative) never get more than the face value back (even less in the case of serious losses that depleted reserves). Thus, shares prices remain unchanged over decades, what excludes any speculation with cooperative shares. At the same time, since losses affect retained earnings in the first place, members of cooperatives do not have to fear for their (usually moderate) investments, when the economic environment becomes more difficult. Thus, during the financial crisis, there was no sell-off of the shares of cooperative banks as this was the case for other banks.

The aforementioned factors, everyone for itself, but especially in their interaction, provide for a governance structure that envisages a long-term orientation and customer-focus of cooperative banks. Cooperative banks cannot simply change their business policy or product range or drop certain

customer categories. They are not driven by investors to maximize profit, but have to ensure a stable, long-term profitability and high-quality services for a large number of owners at reasonable prices in order to ensure their mission.

Thus, the current framework on governance of cooperative banks already reflects ESG aligned long-term horizons and sustainability: long-term view of cooperatives is an advantage from an ESG perspective; the mitigating effects of this embedded long-term orientation should be reflected for future measures i.e.: to enhance (not duplicate) its elements. In addition, we believe that enhanced reporting and disclosure, integration in SREP process, as envisaged in CRR2/CRD5 (Article 449a CRR2, Article 98(8) CRD5), and the reviewed NFRD specifically addressed to the banking sector will also already have relevant implications on conduct and governance. SRD2 already invites institutional investors to disclose long-term objectives and asset managers to comply with such long-term policy.

Any measures being considered by the Commission should thus either not be applied to cooperatives or if this cannot be avoided, in a flexible way that is appropriate to the existing governance structures of cooperatives.

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:

In France, we are not aware of cases where certain stakeholders or groups acted to enforce the directors' duty of care on behalf of the company.

In Austria there was one case, where shareholders voted against the discharge of Board Members/Members of the supervisory board.

We are not aware of any legal action resulting from breaches of directors´ duty of care.
The fact that there are few litigations should not be interpreted to mean that law is not effective. On the contrary, that means that it is well respected.

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:

The above-mentioned AT case resulted in an enforced communication and engagement effort.

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

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

Please explain your answer:

We strongly disagree:

First of all, only shareholders (customer-owners) should be able to question the responsibility of board members regarding a violation of the duty of care or due diligence.

We consider that other stakeholders should not be given a role in the enforcement of directors' duty of care. There are already mechanisms in place, through which the interests of those stakeholders are taken into account and through which the stakeholders can already claim the company's liability (e.g. general assembly, works council, traditional civil and criminal liability mechanisms) and the EU Directive on whistleblowers' protection will help companies in preventing and mitigating the risks.

Public law should be the primary *sedes materiae* regarding the violation of any rights of stakeholders. Moreover, this ensures that only material violations of stakeholders' rights are affected. Any EU legislative initiative should not lead to personal legal liability for directors with respect to company's impacts on stakeholders. Directors only hold fiduciary duties to the company itself and not to third parties, such as external stakeholders. Any liabilities for failings in relation to a company's activities should be borne by the company itself and not its directors.

Giving anybody who feels "affected" by the activities of the company the right to challenge would lead already to an endless litigation wave. As there are by nature in most cases only "second best solutions" when compromises are to be found and decisions to be taken, there will always be stakeholders who are not fully satisfied.

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.

See answer to question 13.

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.

We believe the above definition remains ambiguous and that it is very wide. The content of due diligence requirements should be based on clearly defined principles in order to avoid legal uncertainty. Flexibility would be needed to apply these principles to the different industrial sectors.

It is important that the companies' responsibilities are not stretched so that they exceed the established legislative boundaries.

It is very important to consider proportionality in this regard, according to which the extent of the due diligence duty should depend on the risks of adverse impacts the company and especially the products, (amount of purchases) and its contribution are potentially causing.

We do not agree with the definition of the supply chain which is too broad. In practice, **it is impossible for companies to manage all the risks related to their "business relationships" along the whole supply chain.**

The focus should also be primarily on business relations outside the EU. For commercial activities within the EU there should be a presumption of conformity with legal standards. Making companies confirm that they meet the legal standards of their country would be counterproductive and end up in an unnecessary administrative burden.

Hence, especially supply chains within the EU should be excluded from the scope of the due diligence duty. Thereby, EU-companies operating in the supply chain would be relieved from unjustified

administrative pressure (EU-companies have to comply with EU-law, which guarantees the protection of human and labor rights as well as the avoidance of any negative health or environmental impacts).

The due diligence duty should focus on the activities on which companies have a reasonable level of control, i.e. the company's own operations, the activities of the companies it controls and of its first-tier contractors and suppliers. It would not be appropriate to cover the whole value chain, because that would disproportionately expose companies to liability, for acts over which they have no control. In this context, we also have concerns about an extensive legal liability of companies as they cannot mitigate on their own some of the risks. Most of the time, through collective initiatives, for instance in some specific sectors, adequate processes are established to address effectively the risks.

On another note, we suggest adding "safety risks" to the definition of "due diligence duty". Finally, we would like to better understand what is precisely meant by "climate change risk" from the perspective of a single company as in our understating the concept relates to a collective effort of all stakeholders.

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?

We believe that the banking sector should not be imposed any complementary regulation as it is already heavily regulated and ESG aspects are currently integrated into banking regulation.

We are not in favor of a theme or sector specific approach.

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.

First, we believe that exempting cooperative (banks) from the EU framework should be considered particularly with regard to their particular governance and business model, and already well-established long-term orientation to profits.

If any duties are introduced, **they should apply a principle-based approach** so that there is flexibility for different sectors, companies of different legal status to apply the rules according to what works best in their situation.

Minimum process and definitions approach should ensure an appropriate combination of flexibility with a consistent framework across countries and sectors.

- The EU framework should apply to companies primarily with regard to their business activities which are carried out outside the EU and only with regard to the business relations maintained with partners established in third countries. There should be a general presumption that companies established in the EU act in line with the national law (constitutional/labour law) and EU framework and that they comply with the relevant human rights and environmental standards. In the same vein, activities with partners established in countries on a „positive list"

from human rights/labour/environment standards perspective should not be covered by the due diligence requirements (e.g. New Zealand). Measures of a wider scope (covering all business relationships) would implicitly contest the existing EU framework which as such is based on the principles of respect for human rights, civil and labour rights and liability and includes also range of regulatory measures aimed at the protection of environment. A correct implementation of the EU law including the environmental legislation is guarded by the EC and its enforcement is done by the national authorities, supervisors, and EU institutions. There should be a presumption of the rule of law in the EU.

- The administrative for burden for SMEs must be kept as low as possible and we would favor a lighter regime for SMEs. Micro enterprises should probably be exempted. The needs of SMEs (should be taken into account as especially in the light of the Covid-19 crisis imposing excessive requirements may result counterproductive and may effectively demotivate small enterprises to engage in taking up and pursuing an economic activity.
- The duty of due diligence should focus on the activities on which companies have a reasonable level of control, i.e. the company's own operations, the activities of the companies it controls and of its first-tier contractors and suppliers. It would not be appropriate to cover the whole value chain, because that would disproportionately expose companies to liability, for acts over which they have no control.
- The principles of the due diligence requirements and their limits should be clearly defined to avoid legal uncertainty. The worst would be unclear principles, leaving the clarification of the major details to the courts. Clarification could be provided by level 2 legislation.
- The requirement to publish due diligence strategy should be proportionate and compatible with the preservation of commercial secrets.
- The EU framework should be risk-based to avoid excessive burdens. In this regard, it should not be required to carry out exhaustive and extensive due diligence processes but rather focus on the most important risks and limit the due diligences on first-tier suppliers. Companies should prioritize the risks (e.g. risk to occur, the severity of the risk) as mention in the OECD guidelines. It is indeed impossible to deal with all the risks and all the stakeholders' interests.
- EU companies should not be held legally responsible for decisions or actions taken by other companies (e.g. suppliers).
- There should not be a personal liability of directors. The supervision of the obligation should be primarily in the hands of public authorities. Civil liability should be limited to gross negligence and a material violation of rights only.

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

- Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)
- Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups
- Climate change mitigation

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

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?

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
- SMEs should be subject to lighter requirements ("principles-based" or "minimum process and definitions" approaches as indicated in Question 15)
- SMEs should have lighter reporting requirements
- Capacity building support, including funding
- Detailed non-binding guidelines catering for the needs of SMEs in particular
- Toolbox/dedicated national helpdesk for companies to translate due diligence criteria into business practices
- **Other option, please specify**
- None of these options should be pursued

Please explain your choice, if necessary

First, we believe that the EU framework should apply primarily to business activities which are carried out outside the EU and only with regard to the business relations maintained with partners established in third countries. Or at least should there be a differentiation regarding the intensity of processes, etc. Such an approach could considerably reduce the burden for most SMEs.

There should be a general presumption that companies established in the EU act in line with the national law (constitutional/labour law) and EU framework and that they comply with the relevant human rights and environmental standards. In the same vein, activities with partners established in countries on a "positive list" from human rights/labour/environment standards perspective should not be covered by the due diligence requirements (e.g. New Zealand). Measures of a wider scope (covering all business relationships) would implicitly contest the existing EU framework which as such is based on the principles of respect for human rights, civil and labor rights and liability and includes also range of regulatory measures aimed at the protection of environment. A correct implementation of the EU law including the environmental legislation is guarded by the EC and its enforcement is done by the national authorities, supervisors, and EU institutions. There should be a presumption of the rule of law in the EU. In fact, the attribution of intensive resources on e.g. the monitoring of the respect of fundamental labor rights in the EU might reveal as a misallocation as the focus should rather be on more sensitive regions of the world.

Beyond this, we firmly believe that the administrative burden for SMEs must be kept as low as possible and we would favor a differentiated regime for SMEs. Micro enterprises should probably be exempted. We are aware, however, that there are SMEs, which are active in particularly sensitive business (e.g. the import of goods from overseas), where exemptions might be highly distortive. A suitable SME framework could comprise differentiations.

- For us, the key aspect of the debate on an SME regime is, however, that the envisaged treatment of SMEs is somehow mirrored in the obligations of larger corporates and especially of banks. If larger corporates or banks would be required to demand due diligence information from their SME providers to properly fulfill their own requirements, economic realities would make any "SME light regime" a "dead letter": having only the choice to lose important customers, most SMEs would finally submit to the regime.

- The fact that SMEs would not have to provide (fully) the relevant due diligence information, must not leave large corporates or banks with an uncomplete or "low quality" due diligence profile. If certain SMEs do not have to provide relevant information or less information, this lower degree of information must be considered as fully adequate in the context of the due diligence procedures of larger corporates or banks.

Thus, obligations of SMEs and larger corporates and banks must correlate, otherwise any specific SME regime would be meaningless or dangerous:

Therefore, **pragmatic solutions need to be found to ensure that the information provided by SMEs to larger corporates on the basis of their lighter requirements is fully sufficient for the larger corporates from the perspective of their own requirements and responsibilities**.

Hence, the obligations relating to the due diligence duty should be aligned with the NFRD obligations. Moreover, also due diligence duties for SMEs and large corporates should be aligned to reporting requirements of the NFRD.

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?

- ○ **<u>Yes</u>**
- ○ No
- ○ I do not know

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

The EU Commission should include third-country companies active in the EU in the scope with a view of ensuring the application of "*"Higher* values", in particular respect for human rights and the environment, as reflected in the UN Agenda 2030 for Sustainable Development and the Paris Agreement on Climate Change and a level playing-field between companies with activities in the territory of the EU.

The Commission could consider the following criteria for application: e.g.:

- Third country companies' absolute turnover and their EU-turnover reach certain thresholds: it could be considered that the European Commission should obtain information on the EU turnover and the directive applies to any non-European company marketing products and services in the EU as long as the consolidated turnover of this company in the EU exceeds a certain threshold to be determined (20 million euros, 50 million euros, 100 million euros, etc.).

To take into account the principle of proportionality seems necessary in order not to undermine the attractiveness of European markets for goods and services. This criterion is already used in competitive matters by the Commission and national authorities.

We are not in favor of taking the number of employees in the EU, as a criterion for a threshold for foreign companies. Digital companies or FINTECH do not necessarily employ many employees in the EU.

We are not in favor either of a listing criterion. It would hamper the attractiveness of the European financial market.

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

If the European Commission wants to be a standard setter at a world level, the European obligations should remain acceptable.

The obligations should be limited to information, reporting and transparency as the more demanding the European legislation is, the more difficult it will be to apply the directive to non-European companies, the result being a reduction in the attractiveness of the European market. The legislation should not reduce the attractiveness of European markets for goods, services, and capital. It must also be avoided that the obligations can be qualified as discriminatory trade practices.

It should be an obligation of means and not impose an obligation of results.

European companies should benefit a degree of flexibility in adapting these obligations to the specifics of the sector where they operate.

Regarding penalties for non-compliance, a “name and shame” procedure, black-lists and the leverage of the access to the European market could be used to ensure the effectiveness of the scheme for example by prohibiting companies located in the EU from trading with the companies concerned) **Liability actions** are used in France. If it were to be considered criminal sanctions in particular should be avoided - at least these would appear to be disproportionate to an obligation to put in place "sufficient" risk prevention plans.

With regard to the implementation of the 'duty of care' scheme, it would be preferable to avoid implementation at the level of each Member State.
A new department of the European Commission's DG Trade could be given responsibility. In its role as guardian of the treaties, the European Commission appears to be the institution most suitable to guarantee respect for the rights guaranteed by European law in third countries.

In terms of any other liabilities or obligations foreign companies should have the same obligations as EU companies, related to the products/services distributed in the EU.

Question 18: Should the EU due diligence duty be accompanied by other measures to foster more level playing field between EU and third country companies?

- Yes
- **No**
- I do not know

Please explain:

While we believe that applying the EU rules to third country companies is necessary, the European institutions should define a framework that is not too restrictive. The more demanding the European legislation, the more difficult it will make it to apply the directive to non-European companies and the attractiveness of the European markets for goods, services, and capital.

There should be a clear obligation for the EU / states to use their leverage to address issues abroad. It would not be fair to ask companies to address endemic risks in certain countries (bribery, land title issues, working conditions) without a role for governments. Government tasks cannot simply be put on the shoulders of companies.

An equivalence table should be developed/implemented for third countries having a due diligence framework to allow comparability with EU obligations.

Question 19: Enforcement of the due diligence duty

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

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

Please provide explanation:

We do not advocate for a specific system. However, with regard to the different options considered we would like to make the following remarks.

First of all, sufficient transparency on whether the companies are complying with the due diligence duty or not must be achieved. We would expect that if sufficient transparency is provided, the market

will already be punishing the non-compliant companies and investors, customers and the public in general will react. While transparency alone may not be sufficient, we believe that the "reputation" effect could be enough and the power of "market discipline" should not be underestimated.

The possibility to designate an independent third party explicitly accredited for verifying due diligence information published by undertakings could be considered. This would be a coherent addition to the verification of non-financial statements, already required in some EU Members States and envisaged by the Commission in the context of the revision of NFRD.

Any step towards **judicial enforcement should be taken with greatest care:**

- There must be no personal liability of directors or other function holders.
- Other core principles regarding liability should be preserved: civil liability should be based on usual civil law principles, requiring a damage, a failure to put in place reasonable due diligence measures, and a causal link between the two.

If a civil liability scheme were introduced, the following parameters should be respected in order to avoid uncontrollable operational risk:

1. Every company or party should only be liable for the direct partner in the chain (provider, purchaser) as it can only oversee and monitor this part of the chain.
2. Liability should be limited to cases of gross negligence. It is not possible for big companies to oversee all of their providers. Only serious weaknesses in procedures and gross negligence in oversight should be case for civil liability.
3. Only substantial violations of the due diligence duty by the company itself should create a case for damages. A "deep pocket approach" combined with "forum shopping" must be avoided. In fact, it must be excluded that the "richest" company in the delivery chain is picked for a court procedure and sued in the country with the fastest court procedures. Moreover, it may be very difficult for courts to assess the violation of duties in a remote country. In order to reduce misjudgments, only material violations of rights should qualify for civil liability.
4. There should be a short prescription period of 3 years. It has to be avoided that civil liability from breaches of due diligence duties develop in an incontrollable risk.
5. Not only for the liability context would it be up to the EU legislator/authorities to provide certainty regarding some relevant parameters: If, for example, EU authorities believe that EU companies should not purchase in certain countries or be extremely vigilant, e.g. due to a locally unsatisfying situation regarding human rights, then suitable lists would have to be established that provide reliable guidance to importers.

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

Please explain:

We find no EU actions necessary in this sphere. The existing stakeholder dialogue and the existing consultation channels should be used, without obligating directors by law to establish and apply such mechanisms.

The companies and sectors have the best understanding about the relevance of the different stakeholders and they already gather stakeholders' views and information on voluntary basis (i.e. (representation within the board of directors, consultation on strategic orientations on the basis of the

economic and social data base). We consider that it should be up to each company to define its most relevant stakeholders and the best way to organize the dialogue with them.

It is unrealistic to believe that companies can carry out an exhaustive overview of all their stakeholders' interests and balance the interests of all the stakeholders.

The best way to reach many stakeholders would certainly be to publish the corporate strategy and in the implementation of the company's due diligence processes on the companies' websites and provide contacts for questions and suggestions.

Employees benefit from important rights of information and consultation due to their specific position in the company. Consequently, no other category of stakeholders could pretend of the same rights.

In a cooperative, millions of members can always bring forward their concerns in the general assembly.

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	✓	

We consider that it should be up to each company to define the best way to organize the dialogue with their relevant stakeholders.

Many companies have already organized the dialogue with their stakeholders through different initiatives, choosing the most suitable one, such as: advisory committee, direct dialogue, one to one meeting, internal mechanisms, partnerships, co-innovation, panels… etc.

Cooperative banks apply the principle of open membership according to which every citizen can become a member with the purchase of only one share (for little money). 60 million members of cooperative banks in the EU have the right to address matters in the general assembly and to vote (usually one man, one vote) Typically the members of cooperative banks comprise a wide range of stakeholders in the specific region where the bank is located. On top, many banks dispose of advisory bodies for their customers.

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)

Option	Ranking
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)	*1 2 3 4 5 6 7*
Regulating the maximum percentage of share-based remuneration in the total remuneration of directors	*1 2 3 4 5 6 7*
Regulating or limiting possible types of variable remuneration of directors (e.g. only shares but not share options)	*1 2 3 4 5 6 7*
Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration	*1 2 3 4 5 6 7*
Mandatory proportion of variable remuneration linked to non-financial performance criteria	*1 2 3 4 5 6 7*
Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration	*1 2 3 4 5 6 7*
Taking into account workforce remuneration and related policies when setting director remuneration	*1 2 3 4 5 6 7*
Other option, please specify	*1 2 3 4 5 6 7*
None of these options should be pursued, please explain	*1 2 3 4 5 6* ***7***

Please explain:

The introductory statement to the question is simply wrong. For quite a while already, the EBA Guidelines on sound remuneration policies under Directive 2013/36/EU demand a very risk-based remuneration system that in particular reflects risks for banks and the long-term perspective of the bank.

As a consequence of these Guidelines, banks had to put risk-based remuneration systems with a long-term perspective in place. The implementation of this system was costly and onerous.

In fact, the current system, which is not only applicable to directors, disposes of many elements addressed above:

1. The major part of variable payment has to be deferred in segments up to five years (deferral period) and after attribution be held for another period of up to one year (retention period).
2. The usual limit for variable remuneration is 100% of fix remuneration.
3. The payment has to be made in shares or instruments that reflect the book value of the bank.
4. With the integration of ESG risk into risk management, ESG aspects will automatically be reflected in the very risk-oriented remuneration frameworks.
5. As sustainability targets of an institution are set for good reasons, they would be reflected in the remuneration anyway. Beyond this, we are of the view that it must remain the responsibility of the financial institution to decide what share of variable remuneration relates to non-financial performance. Hence, a mandatory proportion of variable remuneration linked to non-financial performance criteria may turn against this holistic approach.
6. Workforce remuneration should not be relevant for directors' pay.

By conclusion, CRD IV, the EBA GL on sound remuneration policies and the ECB Guide on climate-related and environmental risks take a very holistic approach regarding remuneration and in our view stimulate sustainability-oriented behaviors in banks. We are of the view that the current framework ensures that sustainability targets will be reflected in the banks' objectives and business strategy and those aspects would have to be considered as company values in variable remuneration.

The last we want in the context of this initiative is an overhaul of this system, a layer of complexity on top or a system that can hardly be applied to banks.

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
- 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:

ESG issues are an important and evolving topic which needs to be collegially shared. We agree that the management body (both in an executive and in a supervisory function) should have an adequate knowledge and understanding of environmental, social and/or human rights matters . However, in line with the concept of collective knowledge, especially for the board members in a supervisory function, it should be differentiated between adequate individual and adequate collective knowledge. Many sectors already have requirements of directors´ suitability. It is important however that companies keep flexibility and freedom when choosing the board members they need to the best interest of their activity.

According to the ESMA and EBAGuidelines on the assessment of the suitability of members of the management body a nd key function holders under Directive 2013/36/EU and Directive 2014/65/EU both executive and non-executive boards (board members) required a sufficient collective knowledge of ESG-factors in order to properly assess the risk of the banks and in order to determine a business strategy that reflects ESG aspects.

Moreover, already the ECB Guide outlines expectations regarding knowledge. Recently also the EBA in its Discussion Paper on management and supervision of ESG risks for credit institutions and investment firms included recommendations with this respect.
Moreover, the compliance function should advise the management body on measures to be taken to ensure compliance with applicable laws, rules, regulations, and standards, and should assess the possible impact of any changes in the legal or regulatory environment on the institution’s activities and compliance framework.

Beyond this, it shall be up to the company to decide what is the desirable balance of its board’s membership.

Any requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise or to have at least one director with relevant environmental, social and/or human rights expertise could contradict the principles of collegiality and joint and several liability which governs the management body, in particular, in one-tier system, in certain jurisdictions. Thus, the focus should be on the collective knowledge.

In addition, we consider that it should be up to each company to decide if regular trainings should be organized on environmental, social and/or human rights matters, in particular for human rights matters which are not relevant for co-operative banks with no business activities carried out outside the EU and no partners established in third countries.

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
- I do not take position

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

We are opposed to any initiative regarding the limitation of share buy-backs.

Moreover, from the perspective of cooperative banks, we would like to underline that the redemption of cooperative shares must not be seen as a share buy-back. While it would fit under the broad description above, the purpose is completely different.

The redemption of co-operative shares is replacing the trading of shares at a stock market as it happens with joint stock companies. As cooperatives are variable capital companies, shares are issued to members and redeemed when a member leaves the cooperative bank. Co-operative banks' shares can only be traded with the co-operative itself. For a wide majority of co-operative banks, the shares of members are redeemed by the co-operative at nominal value. Members usually receive limited compensation on capital subscribed during membership. Co-operatives may pay a dividend to their members only from profits and the major part of the profits is usually used to set up reserves to ensure the operations and the financial situation of the co-operative bank in order to pursue their objective targets. In some countries, these reserves are indivisible and would be transferred to a social economy fund in case of liquidation.

The ECB, sensitive of this particularity has therefore stipulated in its recent recommendation to banks not to pay dividends or buy-back shares due to the impact of the current pandemic, that only "share buy-backs "aiming at remunerating shareholders".

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:

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	4	7	10
Litigation costs	1	8	8
Other costs including potential indirect costs linked to higher prices in the supply chain, costs	0	4	6

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	5	4	4
Competitiveness advantages stemming from new customers, customer loyalty, sustainable technologies or other opportunities	5	2	2
Better risk management and resilience	4	5	6
Innovation and improved productivity	4	3	2
Better environmental and social performance and more reliable reporting attracting investors	3	5	5
Other impact, please specify			

Please explain:

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

- Positive/negative impact on the economy (EU/third country).