OECD Secretariat input to European Commission Consultation Document Proposal for an Initiative on Sustainable Corporate Governance

This document has been developed by the OECD Secretariat[1] under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of OECD member countries.

Please note that this document is limited to comments to the explanatory sections of the European Commission's consultation questionnaire regarding the Proposal for an Initiative on Sustainable Corporate Governance. Furthermore, inputs have not been provided to questions which do not concern OECD standards or the mandates of contributing OECD divisions. Questions that have not been responded to have been omitted from this document.

[1] This document was developed by the OECD Centre for Responsible Business Conduct in close cooperation with the OECD Corporate Affairs Division, OECD Financial Markets Division, OECD Environment Directorate and OECD Centre for Entrepreneurship, SMEs and Entrepreneurship Division.

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?

Human rights and environmental impacts are of growing importance in the context of corporate risk management and governance. The importance of appropriately considering these issues in the context of business operations is also recognized in OECD and other international instruments.

For example the G20/OECD Principles of Corporate Governance (2015) ("G20/OECD Principles") recognize that corporate boards should take due regard of, and deal fairly with stakeholder interests including those of employees, creditors, customers, suppliers and other stakeholders, and that observance of environmental and social standards is relevant in this context. (See Chapters IV and VI) The G20/OECD Principles also recognize the importance of high ethical standards, risk management systems and compliance programs to ensure respect for local laws and commitments to stakeholders including with respect to human rights and environmental issues. (See also Questions 5-10).

Likewise the OECD Guidelines for Multinational Enterprises ("MNE Guidelines") include a clear expectation that businesses should respect the internationally recognized human rights (see Chapter II.A.2 and Chapter IV) and protect the environment (Chapter VI) and more broadly that they should seek to prevent and mitigate adverse environmental and social impacts associated with their activities and business relationships.

As instances of corporate misconduct with respect to these issues remain widespread, policy reflections on how to further elevate these issues in company operations, strategy and governance may be merited. (see also Questions 5-9).

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?

Government policy to promote respect for human rights, decent work and protection of the environment in global supply chains should involve a smart mix of voluntary, mandatory, national and international measures. It is the view of the OECD Secretariat that among these measures an EU legal framework for supply chain due diligence to address adverse impacts on human rights and environmental issues may be appropriate. OECD Responsible Business Conduct (RBC) standards including the OECD MNE Guidelines and accompanying due diligence guidances are non-binding, but they recognize governments should have various regulatory frameworks in place on matters covered by the OECD MNE Guidelines. It is not expected that members adopt mandatory due diligence requirements, but it doesn't prevent them from doing so.

It has been over 10 years since the OECD MNE Guidelines were updated to include an expectation that enterprise carry out due diligence and since the UN Guiding Principles for Business and Human Rights ("UNGPs") were introduced. In this time there has been significant progress with respect to how businesses identify and respond to risks but many businesses still do not carry out due diligence and many do not so in way that is effective or in line with international standards.[2] As a result negative impacts associated with corporate behavior such as forced labor, inadequate workplace health and safety, and environmental damage continue to arise.

Legislation can:

- Galvanize business action:
    - Experience from the minerals sector has shown that regulatory measures have had the largest impact in terms of promoting responsible sourcing of minerals among businesses. While voluntary standards have a role to play in promoting uptake, especially among the more progressive businesses, well-designed regulatory approaches have provided the strongest impetus for business to change how they operate.[3]
- Contribute to preventing and mitigating adverse impacts on the ground:
    - In this respect, following the development of the *OECD Due Diligence Guidance for Responsible Mineral Supply Chains from Conflict affected and High-Risk Areas*, the most longstanding OECD supply chain due diligence standard, as well as enactment of Section 1502 of the Dodd Frank Wall Street Reform & Consumer Protection Act,[4] the UN Group of Experts on the Democratic Republic of the Congo stated that, as a result of the implementation of due diligence in mineral supply chains "the security situation at tin, tantalum and tungsten mine sites has improved and trade in tin, tantalum and tungsten has become a much less important source of financing for armed groups."[5]

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[2] Multiple external reports as well as OECD reports in certain sectors confirm this. See for example, Corporate Human Rights Benchmark (2020) https://www.worldbenchmarkingalliance.org/publication/chrb/; Alliance for Corporate Transparency (2019) https://www.allianceforcorporatetransparency.org/assets/2019_Research_Report%20_Alliance_for_Corporate_Transparency-7d9802a0c18c9f13017d686481bd2d6c6886fea6d9e9c7a5c3cfafea8a48b1c7.pdf; European Parliamentary Research Service (2020) Corporate due diligence and corporate accountability, https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654191/EPRS_STU(2020)654191_EN.pdf: OECD, Global Uptake of Minerals Due Diligence (forthcoming 2021)

[3] OECD (2016) Report on the Implementation of the Recommendation on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=COM/DAF/INV/DCD/DAC(2015)3/FINAL&docLanguage=En

[4] Passed in 2010 Section 1502 of the Dodd-Frank Wall Street Reform & Consumer Protection Act requires public companies in the U.S. to disclose their use of tin, tungsten, tantalum and gold (3TGs) in their products and determine if they are sourced in an ethical manner.

[5] Since then, while progress can be noted particularly for 3T supply chains, significant challenges remain for responsible gold supply chains as criminal and illegal elements continue to dominate the trade in the region. It's

- Support a level playing field:
  - An EU standard could also contribute to a more level playing field for European companies. In this respect due diligence efforts can vary significantly across competitors as well as amongst sectors, where sectors which are not-consumer facing have been slower to adopt RBC due diligence practices.
- Support legal certainty:
  - An EU standard can also provide business with a well-defined legal framework against which they can demonstrate they are acting responsibly, allowing them to proactively safeguard themselves against reputational risks, negative campaigns and litigation where they comply with those expectations as well as respond to growing demands from institutional investors.[6]
  - Developing a legal framework at an EU level will also be useful to guarding against a patchwork of regulations and introduction of inconsistent expectations for corporates with transnational supply chains and operations (a common feature of most companies today), provided it aligns with existing standards already in use. (see also Question 14).
  - Clear cross-sectoral requirements can also promote consistently in enforcement and avoid disproportionate expectations being put on companies which are most visible and active with respect to RBC.

In this respect, it is telling that 70% of businesses surveyed for the EU-led study on mandatory due diligence agreed that EU regulation might provide benefits for business, including legal certainty, level playing field and protection in case of litigation. [7]

At the same time, it is important that regulatory measures are carefully designed and implemented to avoid a tick the box-approach, avoid undue compliance costs, reinforce existing effective approaches and standards and mitigate any potential unintended outcomes such as de-risking. These issues are explored in further detail in Questions 3a and 14-16.

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?

An EU legal framework can contribute to increased implementation of due diligence practices, better management and prevention of adverse impacts on the ground as well as a more level playing field and legal certainty for business (see Question 2).

This in turn can contribute to long term resilience and value for business and avoidance of short term volatility. In this respect the potential benefits of responsible business practices generally have been analyzed and documented in various studies by academics and other experts in recent years.[8]

The OECD and the Columbia School of International and Public Affairs undertook an analysis of reported benefits of responsible business conduct, including supply chain due diligence.[9] To inform a forthcoming OECD report on understanding the cost and value of due diligence in the minerals sector the OECD has also undertaken interviews on this theme with a large number of stakeholder including practitioners and other

important to note that 90%+ of 3T production in Central Africa is covered by a responsible sourcing industry association, whereas there are currently no scalable on-the-ground solutions for gold mining. OECD (2016) Report on the Implementation (see footnote 2)

[6] In this respect, over 100 institutional investors representing over 5 trillion USD AUM have called for a mandatory due diligence law. Additionally under the EU Sustainable Finance Disclosure Regulation asset managers will have to report on their due diligence policies as well as exposure to principle adverse impacts at a portfolio level. The report of European Supervisory Authorities (ESAs) on Draft Regulatory Technical Standards associated with the SFRD have defined some of these principle adverse impacts as a function of implementation of the due diligence with respect to certain issues. See ESA Final Report on draft Regulatory Technical Standards (2021) https://www.eiopa.europa.eu/content/final-report-draft-regulatory-technical-standards_en

[7] EPRS (2020) Corporate due diligence and corporate accountability (see footnote 1).

[8] See for example Whelan and Fink, The Comprehensive Business Case for Sustainability, The Harvard Business Review (2016) https://hbr.org/2016/10/the-comprehensive-business-case-for-sustainability

[9] OECD and Columbia School of International Public Affairs (SIPA) (2016) Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct Framework and Assessment Tool for Companies https://mneguidelines.oecd.org/Quantifying-the-Cost-Benefits-Risks-of-Due-Diligence-for-RBC.pdf

experts. The below answers are informed by this research.

- In general, companies that conduct business responsibly have reported non-commercial benefits such as an improved perception of the firm internally as well as externally, increased ability to retain and attract talent, increased productivity, increased shareholder returns, reduced stock price volatility, and improved investor satisfaction. Many companies also reported increased revenues through access to markets, and increase in sales volume and price premium due to consumer awareness of social responsibility, although this is inconsistent across companies, products, and regions. There are of course many variables in verifying the causal relationship between due diligence measures and benefits.
- Stakeholders have also reported significant cost-saving from cheaper loans which can offset and pay for due diligence implementation. For example, a leading commodities trader active in the minerals and metals sector reported to the OECD that a lender is willing to shave off as many as three basis points from a multi-year loan worth several billion USD if the trader meets responsible sourcing KPIs related to human rights and carbon emissions.
- On an operational level, information collection and risk assessments stemming from due diligence are reported to lead to an increased ability to detect problems and risks early. Risk prevention and/or mitigation reduces a company's exposure to potentially large remediation costs (e.g. litigation and compliance costs) it might incur if the risk were not addressed and protects the company from long-term damage. Due diligence can also reduce business contracting costs over the long term as companies establish stronger, healthier supplier relationships.
- Upstream companies may see many of these same benefits when implementing due diligence, though the main benefit reported by upstream interviews in the minerals sector has been market access. OECD countries committed to promoting responsible business conduct make up 75% of the global share of GDP.[10] Likewise, self-regulatory industry bodies and certification schemes are also increasingly adopting due diligence audit requirements based on OECD due diligence guidance. For example, in mineral supply chains, five industry programmes, representing approximately 90% of gold refining, 95% of tantalum production and 85% of tin production have implemented due diligence requirements for their members and their standards are assessed to be aligned with OECD guidance.[11] Failure to pass an industry audit by these industry programmes could result in the de-listing of metal producers, which has immediate commercial implications of prohibiting them from selling their products in key markets and exchanges.
- Furthermore, OECD analysis shows that SMEs may benefit from better access to supply chains, in the EU and elsewhere.[12] However, large difference are likely to exist among SMEs in this respect, and the relatively higher impact of fixed costs on smaller entities may reduce net benefits for (certain) SMEs. In this respect an assessment of net benefits should take place as part of the Commission's impact assessment. (see Question 16) Furthermore for net benefits to be maximized strong complementary support is needed for SMEs. (see Question 18)

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)?

Any draw backs associated with a future EU law will be significantly impacted by its design including its content and scope and the extent to which it aligns with core principles of international standards and is supported by complementary measures.

Without clarity on the aforementioned elements it is difficult to predict specific drawbacks. Nevertheless some points for consideration include: (1) potential costs and competitive impact and (2) de-risking and

[10] See OECD Data, Gross Domestic Product https://data.oecd.org/gdp/gross-domestic-product-gdp.htm Last accessed 9 February 2021

[11] See OECD, Alignment Assessments of industry programs with OECD minerals guidance http://mneguidelines.oecd.org/industry-initiatives-alignment-assessment.htm Last accessed 9 February 2021

[12] OECD (2019) SME and Entrepreneurship Outlook, https://www.oecd.org/industry/oecd-sme-and-entrepreneurship-outlook-2019-34907e9c-en.htm

disengagement from high-risk areas. However, we underline our view that on balance the benefits of legislation on due diligence would outweigh the potential drawbacks, in particular since we believe the drawbacks can be mitigated through effective design and complementary measures.

Costs:

Investments in human resources, management time and external advisory support and management systems may be necessary in order to design and oversee RBC due diligence processes. Studies that have sought to quantify these costs have varied dramatically in their estimates, depending on the firms surveyed and the company measures researchers define as falling under the scope of 'due diligence'. For example research conducted by Columbia University for the OECD[13] on the costs of due diligence in mineral supply chains by US firms reported initial costs ranging from $14k USD to $25 million USD, followed by on-going annual costs ranging from $14k USD to $406k USD. Despite the vast difference in cost estimates most studies are consistent with respect to the fact that they present higher initial costs - which are long term investments in improved systems and human capital formation - followed by lower on-going operating costs.

High-initial investments could put EU companies at a short term disadvantage vis-à-vis companies without due diligence requirements imposed on them. However companies in the EU are already held to high standards on a number of adjacent issues that may overlap with due diligence expectations. For example, compliance with legal requirements in relation to worker health and safety and environmental degradation, as well as bookkeeping and KYC laws that are already in place for many enterprises may require similar risk management and professional record keeping frameworks as are needed for due diligence processes. Additionally cost burdens can be mitigated by encouraging responsible collaboration, providing information to companies to support their due diligence efforts, and by considering special financial support or tax holidays to offset start-up costs. We address these and other possible complementary measures in Question 18.

Beyond costs to European companies subject to the law, there is a risk that due diligence requirements will be cascaded up to companies with smaller market power and less access to resources who will be required to shoulder the financial burden of due diligence and improvements to environmental and social performance. Such expectations may fall most heavily on companies working in high-risk geographies or sectors, that are also often the most vulnerable to risk, face difficult logistics, and have the highest burden of meeting due diligence standards. Alignment around recognized international standards which include an expectation that companies also consider how their purchasing and pricing decisions affect abilities of suppliers to meet their policies can mitigate some of this risk. Financial support by governments and larger downstream companies into the due diligence efforts of these actors can also help. Finally processes aimed at enhancing efficiency in carrying our due diligence such as reducing potentially duplicative audits and increasing market access through mutual recognition between different credible due diligence schemes can also reduce these costs. Additionally trade agreements can also play a role in ensuring consistency with incentives and offering support measures. (See also Question 18)

De-risking:

Due diligence efforts when dealing with smaller upstream actors, particularly but not limited to those in high-risk areas, can require more investment of staff time and other resources (e.g. continuous stakeholder engagement, tracking improvement, and regular spot checks), leading to further costs. Where there are alternative markets, suppliers or products to choose from and countervailing factors and incentives are absent, banks, investors and buyers may sometimes choose to avoid the costs of having to conduct enhanced due diligence by avoiding those high risk industries or geographies altogether. Likewise, smaller upstream actors may struggle to compete as they are not able to implement the same operational standards as industrial actors. These two factors can lead to the phenomena of 'de-risking', i.e. de facto embargoes on sourcing from smaller actors and/or high-risk geographies or sectors.

In this respect EU rules must be very clear that de-risking is not their intention. Due diligence expectations should be rooted in progressive improvement which can be reinforced by offering clearly defined grace periods, and should avoid a focus on certifications or requirements of 100% risk free supply chains. Additionally, rules should be clear that while certain impacts or situations may require immediate disengagement, for most impacts companies are encouraged to continue engaging with their business relationship to drive progressive improvement over time. By anchoring rules in international due diligence standards, these important counterbalancing concepts would be included in the law.

Furthermore, awareness raising and creating incentives to promote responsible engagement are critical to

[13] OECD and Columbia SIPA, Costs and benefits of due diligence (see footnote 8).

combat de-risking. Government, investors and financial institutions can be a driving force in changing attitudes regarding de-risking. Potential countermeasures to consider with respect to de-risking include offering incentives to companies that engage responsibly in high-risk areas through favorable loan terms, export credits, and loan guarantees and supporting upstream supply chain actors in high-risk areas by offering technical assistance, capacity building, and logistical support. (See also Question 18)

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?

The interests of shareholders, employees and other stakeholders such as persons affected by the operations and supply chains of a company can be relevant to the long-term success and resilience of companies.

In this respect the G20/OECD Principles recognize the interests of employees and other stakeholders and their important role in contributing to the long-term success and performance of the company (See *About the Principles*). They likewise acknowledge that unethical and illegal practices by corporate officers may not only violate the rights of stakeholders but also be to the detriment of the company and its shareholders in terms of reputation effects and an increasing risk of future financial liabilities.

Recent academic studies have sought to demonstrate this linkage. For example, recent research from Harvard Business School found that corporate investments in stakeholder relations served as a strategic resource for many companies during the COVID-19 pandemic. Strong relationships were found to be tangible assets and generated significant value, resulting in a crisis return premium through improved returns.[14] Studies led by business professors from MIT and Harvard have also highlighted how operational excellence and 'good jobs' strategies enable companies to compete successfully in free markets.[15] This work found that corporate investment in workers results in lower costs, higher profits, and greater customer satisfaction.

The ability of companies to plan for future environmental challenges and consider evolving areas of risk and adverse impacts of their operations and supply chains is crucial. Engaging with stakeholders is critical for forward planning. This is increasingly important to ensure the resilience of businesses, as well as the resilience of economies and financial markets as the global climate emergency and biodiversity loss continue to manifest themselves. A good example is with respect to adverse risks and impacts arising from failure to take into account climate adaptation needs (e.g. climate proofing infrastructure to ensure safety requirements are met in case of extreme climate related events). Such considerations are relevant not only to protecting workers and communities but also to ensuring the functioning of supply chains and the logistics/transportation/supply of essential goods.

Understanding the importance of these issues and their contribution to long term value relative to other considerations companies are faced with will be important. In this respect further analysis and guidance to companies on how to consider potential tradeoffs as well as recognize potential equilibriums and synergies

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[14] Corporate Resilience and Response During COVID-19. Cheema-Fox, Alex, Bridget LaPerla, George Serafeim, and Hui (Stacie) Wang. Harvard Business School Working Paper, No. 20-108, April 2020. (Revised September 2020)
[15] Zeynep Ton for instance outlines why engaging workers leads to greater productive, better service, and increased job retention. And that beyond boosting companies' competitiveness, improving service workers' jobs could have a huge impact on the U.S. economy. See Zeynep Ton. The Case for Good Jobs. Harvard Business Review. 30 November 2017 https://hbr.org/2017/11/the-case-for-good-jobs.
Rebecca Henderson sets out why firms have not just a moral duty to contribute to the health of the institutions that keep our society strong and our capitalism genuinely free and genuinely fair, but also an economic interest in doing so. See Reimagining Capitalism in the Shadow of the Pandemic. Rebecca M. Henderson. Harvard Business Review. 28 July, 2020. https://hbr.org/2020/07/reimagining-capitalism-in-the-shadow-of-the-pandemic

would be useful.

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?

As set out above (see Question 1 and Question 5), stakeholder interests can be relevant to long term corporate value. OECD standards also recognize the relationship between company and stakeholder interests and the responsibility of directors to identify and manage risks and opportunities to a company, which may include stakeholder interests.

The G20/OECD Principles provide that governance frameworks should recognize the interests of stakeholders and their contribution to the long-term success of the corporation. (Chapter IV) They also recognize that an important responsibility of the board is to oversee the risk management system and systems designed to ensure that the corporation obeys applicable laws, including tax, competition, labor, environmental, equal opportunity, health and safety laws. (Chapter VI) Furthermore, even where stakeholder interests are not legislated, many firms make additional commitments to stakeholders, and concern over corporate reputation and corporate performance often requires the recognition of broader interests. For multinational enterprises, this may in some jurisdictions be achieved by companies using the MNE Guidelines for due diligence procedures that address the impact of such commitments. (Chapter IV.A)

The OECD Due Diligence Guidance on Responsible Business Conduct (2018) ("RBC Due diligence guidance") also recognizes that responsibility for RBC issues should be assigned to boards and that boards will generally be involved in approving an enterprise's RBC policy and taking decisions about a business strategy which may have implications for RBC. In this respect introduction of mandatory due diligence rules will to some extent drive directors to consider the interests of, and risks and opportunities associated with affected or potentially affected stakeholders.

Rules that enable and incentivize companies to identify stakeholders, their interests and how they can impact the long-term risks and opportunities to a company can help to draw the attention of directors to these issues and appropriately engage relevant functions across the business in responding. In this respect some national laws and codes already allow or encourage corporate directors to identify the company´s stakeholders and balance interests, as well as consider the impact of the company's operations on the community and the environment.[16]

However policy makers also have a responsibility to put in place a framework that is flexible enough to meet the needs of corporations operating in widely different circumstances, to facilitate new opportunities, create value and to determine the most efficient deployment of resources. (See G20/OECD Principles Chapter I A). In this respect such rules should be careful not to unduly restrict director's ability to exercise objective and independent judgement.

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

[16] For example the Revised UK Corporate Governance Code 2018 broadens the definition of governance and emphasizes the importance of i) positive relationships between companies, shareholders and stakeholders, ii) a clear purpose and strategy aligned with healthy corporate culture, and iii) remuneration which is proportionate and supports long-term success. The French Government also introduced the 2019 French PACTE Act no. 2019-486 (the Action Plan for Business Growth and Transformation), which includes the addition of provisions to the French Civil Code that allow for the integration of social and environmental objectives in corporate by-laws. See also the UK Companies Act. 2006. Sec 172. https://www.legislation.gov.uk/ukpga/2006/46/section/172

targets to ensure that possible risks and adverse impacts on stakeholders, ie. human rights, social, health and environmental impacts are identified, prevented and addressed?

The G20/ OECD Principles recognize that an area of increasing importance for boards is oversight of the company's risk management. Such risk management oversight will involve oversight of the accountabilities and responsibilities for managing risks, specifying the types and degree of risk that a company is willing to accept in pursuit of its goals, and how it will manage the risks it creates through its operations and relationships. (Chapter VII) Furthermore the Principle's recognize that companies are well advised to establish and ensure the effectiveness of internal controls, ethics, and compliance programmes or measures to comply with applicable laws, regulations, and standards including those related to work and safety conditions, human rights, and the environment (amongst others). (Chapter V.D.7)

The OECD MNE Guidelines also recognize that companies should carry out due diligence to identify and respond to environmental and social impacts associated their own activities as well as across their business relationships and supply chains. Establishing appropriate management systems as well tracking performance against targets are key components of the due diligence process (see Question 14 and 15e).

The OECD MNE Guidelines and RBC Due diligence guidance also outline expectations on setting of targets aligned with international standards. This includes for instance, establishing and maintaining a system of environmental management appropriate to the enterprise, using measurable objectives and targets for improved environmental performance and resource utilization.[17]

Senior management will often be best placed to oversee implementation of due diligence processes and to track performance against detailed targets as this may involve close coordination with technical staff and daily management decisions. However assigning oversight of due diligence and high-level environmental/social objectives to directors could help to elevate their importance within a corporation. If RBC due diligence is introduced as a legal expectation business directors will have a responsibility for ensuring it is carried out to the extent directors are normally expected to ensure that a company obeys legal expectations.

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

The G20/OECD Corporate Governance Principles set out that taking into account the costs and benefits of regulation, governments have an important responsibility for shaping an effective regulatory framework that provides for sufficient flexibility to allow markets to function effectively and to respond to new expectations of shareholders and other stakeholders. (*About the Principles*) They also provide that boards should apply high ethical standards and should take into account the interests of stakeholders. (Chapter VI.C)

As discussed above, to the extent that stakeholder interests are relevant to the risks and opportunities faced by a company, they should already be considered by directors in the context of their duty of care. In this respect in some countries, boards are already legally required to act in the interest of the company, taking into account the interests of shareholders, employees, and the public good. (Chapter VI.A).[18]

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[17] See OECD Guidelines for Multinational Enterprises. 2011. Chapter VI. Environment; See also NCP of the Netherlands (2019) Final Statement Oxfam Novib, Greenpeace Netherlands, BankTrack and Friends of the Earth Netherlands (Milieudefensie) versus ING, finding that companies have an obligation to seek to measure and disclose their environmental impacts even in the face of evolving standards of environmental and social risk reporting. https://www.oecdguidelines.nl/documents/publication/2019/04/19/ncp-final-statement-4-ngos-vs-ing

[18] For example, it is widely acknowledged in Australia that material climate change risks are relevant to a director's duty of care and diligence and the duty to act in the best interests of a company. Similar duties are owed by superannuation trustees and others in fiduciary relationships. See Allens Linklaters (2020) Climate Change

Although the G20/OECD Principles recognize the relevance of stakeholder interests, the relative benefits and drawbacks of further clarifying this expectation in legal definitions of director's duty of care may need further consideration. In this respect, policymakers should consider to what extent inclusions of stakeholder interest's in director's duty of care could dilute clarity of director's responsibilities and thereby undermine accountability of the board. Relatedly it is also important to consider to what extent such an expectation is enforceable as a legal requirement. Policymakers should also consider to what extent such an expectation may hinder a director's abilities to exercise independent and objective business judgment and appropriately mitigate against this risk.

Question 9. Which risks do you see, if any, should the directors' duty of care be spelled out in law as described in question 8? How could these possible risks be mitigated? Please explain.

Corporate governance requirements and practices are typically influenced by an array of legal domains, and corporate governance practices of individual companies are also often influenced by human rights and environmental laws. Under these circumstances, there is a risk that the variety of legal influences may cause unintentional overlaps and even conflicts, which may frustrate the ability of directors to pursue key corporate governance objectives. It is important that policy-makers are aware of this risk and take measures to limit it. (See OECD/G20 Principles, Chapter I.C)

Likewise, understanding and balancing the rights and needs of a diverse groups of stakeholders can be challenging, since business stakeholders by definition are not homogenous. For example, conflicting assessments of risks may occur between company officials and its shareholders or among different shareholders themselves. Competing interests may also exist amongst stakeholders groups as well -- for example when the risk and associated costs of unemployment at a certain plant are weighted against the risks of its continued negative impact on the environment.

At present there is no standard, agreed-to method of aggregating or balancing the interests of different constituencies in the face of trade-offs particularly across diverse corporate structures. In this respect the EU should allow for the flexibility needed for directors to exercise independent, objective judgement. It would be important to promote transparency in Board decision-making processes, in a way that also recognizes the large diversity in the types of decisions and issues considered by boards, some of which may require greater transparency than others.

Other possible risks that have been raised are that such a rule could chill investments in EU companies. Studies and perspectives on these issue are varied and the OECD has not conducted its own analysis of this issue and thus cannot comment on this point.

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?

OECD standards recognize that RBC which includes avoiding and addressing negative impacts of business operations, while contributing to sustainable development, should be considered as a key part of the business strategy. This includes integrating sustainability risks, impacts and opportunities into a company's strategy, decisions and oversight and is reflected in OECD RBC due diligence recommendations. While consideration of sustainability issues is becoming increasingly common for

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Directors Report 2020 https://www.allens.com.au/globalassets/pdfs/campaigns/climate-change-directors-report-june-2020v2.pdf businesses, some studies have pointed out that such issues are often not incorporated in core strategies.[19]

An expectation that companies include such issues in the context of their strategy, oversight, and decisions could be useful to ensuring this is integrated as a core aspect of business operations. However companies should be given some flexibility with respect to how they achieve this given the diversity of corporate models and operating contexts.

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?

The OECD has not studied this issue in detail however certain academic reports have pointed to the fact that in EU Member States, enforcement of directors' duty of care by stakeholders as well as litigation brought by the company against board members for alleged breaches of the duty of care is low. According to a 2013 LSE Study[20], in most EU jurisdictions, the only stakeholder empowered to instigate legal proceedings against the directors on behalf of the company are the board of directors, the supervisory board (in two-tier systems), and/or the shareholders in the general meeting.

The study notes that enforcement of the company's claims against its directors are hindered by risks of conflict of interest, collective action and reputational issues[21]. The difficulties of enforcing directors' duties on behalf of the company also lie on the lack of clear definition of "company interest" in company law frameworks, which is often either not defined at all, or closely associated to the interests of shareholders.

In the current context, generally stakeholders of the company (other than shareholders, including employees, local communities, civil society organizations, etc.) lack legal standing to enforce directors' duty of care.

Separately, it is worth noting that shareholder resolutions and activism regarding management of climate impacts and risks is on the rise globally.[22] However typically such shareholder resolutions cannot seek to 'usurp the powers' of directors, nor can shareholders propose advisory resolutions, for example, expressing the opinion that the directors are failing to adequately account for climate change risk.

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,

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[19] In this respect a 2014 global survey of over 3,800 senior managers conducted by the MIT Sloan Management Review with the Boston Consulting Group and UN Global Compact found that whereas 90% of executives find sustainability to be important, only 60% of companies incorporate sustainability in their strategy, and 25% have sustainability incorporated in their business model. The study further found that only 22% of executives and managers believe that their own boards are actually providing substantial oversight on sustainability issues. See MIT Sloan And BCG (2014) 2014 Sustainability & Innovation, Global Executive Study and Research Project https://sloanreview.mit.edu/projects/joining-forces/

[20] See Study on Directors' Duties and Liability prepared for the European Commission DG Markt by: Carsten Gerner-Beuerle, Philipp Paech and Edmund Philipp Schuster, Department of Law, London School of Economics, London, April 2013

[21] Ibid. page xiii

[22] Ceres maintains a Climate and Sustainability Shareholder Resolutions Database, which at February 2020 showed around 1,068 resolutions that had been put to companies worldwide since early 2017. See https://www.ceres.org/resources/tools/climate-and-sustainability-shareholder-resolutions-database

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.

I. General definition:

We suggest aligning the definition with how due diligence is already defined and conceptualized in the OECD Due Diligence Guidance for Responsible Business Conduct ('RBC Due diligence guidance'), to promote clarity and consistency for business.

In this respect we propose the following aspects be included in a definition:

- 'Due diligence' means the process enterprises should carry out to identify**,** prevent, mitigate and account for how they address actual and potential adverse impacts in their own operations, their supply chain and **other business relationships**, **as recommended in the OECD Guidelines for Multinational Enterprises and UN Guiding Principles for Business and Human Rights.**

- Effective due diligence should include efforts to embed responsible business conduct into **policies and management systems**, and **provide for or cooperate in remediation where necessary.**

- **Due diligence is shaped by the following key characteristics**: it is preventative; involves multiple processes and objectives; is commensurate with risk; is dynamic; does not shift responsibilities; concerns internationally-recognised standards on responsible business conduct; is appropriate to an enterprises circumstances; can be adapted to deal with the limitations of working with business relationships; is informed by engagement with stakeholders; and involves ongoing communication.[23]

II. Key due diligence steps and characteristics

<u>6 Step Framework</u>

Under the RBC Due diligence guidance, due diligence involves a 6-step process. We would suggest that the law be informed by this framework and explicitly incorporate these steps as well as the characteristics (below), in order to support a clear but also flexible principles-based approach. These steps include:

1. Embed responsible business conduct into the enterprise's policies, management systems and business relationships
2. Identify and assess actual and potential adverse impacts associated with the enterprise's operations, products or services
3. Cease, prevent and mitigate adverse impacts
4. Track implementation and results

[23] OECD (2018) Due Diligence Guidance for Responsible Business Conduct https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm 'Characteristics of Due Diligence–The Essentials', p.16-19.

5. Communicate how impacts are addressed
6. Provide for/cooperate in remediation, when appropriate

The RBC Due diligence guidance sets out these steps, as well sub-steps and practical actions to ensure effective processes and outcomes. The steps are all inter-related, dynamic and iterative; learnings from each element feed and build into one another, and so using the whole framework is important.

Characteristics

RBC due diligence is also defined by key characteristics of due diligence. These characteristics have been widely recognized as important principles for ensuring due diligence is effective and in the context of OECD Alignment Assessment processes (see Question 18) have proven to be decisive factors for assessing the level of sophistication and meaningfulness of due diligence frameworks and implementation strategies. They are also crucial to ensuring that due diligence expectations are reasonable and implementable by companies. As such we suggest that these be incorporated into definitions and concepts of due diligence together with the 6 steps described above.

Reference to existing standards

The RBC Due diligence guidance has been adopted by 48 countries, including all but two EU Member States. References to and alignment with existing international standards helps to set a clear and consistent standard for companies and helps them to streamline cross-border processes, avoid conflicting laws and unnecessary compliance costs. On this basis, countries can seek to establish mutual-recognition regimes with other countries who adopt the same international standards. It also helps foster consensus on technical aspects of due diligence, given that these standards were developed with broad support from policy makers, business, unions and civil society. In the EU, OECD standards are already referenced in the text of Regulation 2019/2088 on sustainability-related disclosures in the financial sector[24] and form the basis of Regulation 2017/821 laying down supply chain due diligence obligations for importers of 3TG[25]. They are referenced in the French *Duty of Vigilence* law and the Dutch Child Labour Due Diligence Law. OECD sectoral standards also form the basis of legal requirements in non-EU countries, including in the U.S. and the African Great Lakes region, and government-backed industry standards for responsible mineral sourcing in China, United Arab Emirates and India.

III. Scope of due diligence duty

The term "supply chains" is not easily translatable to service-oriented industries (specifically the financial sector), even if it is broadly interpreted as the question indicates to include business relationships. The MNE Guidelines and RBC Due diligence guidance instead expect enterprises to conduct due diligence on their *own operations, supply chains and other business relationships*. We suggest the Commission reflects OECD/UNGP terminology and extends the scope of the due diligence duty to "all business relationships"-- which can be defined and understood to mean business relationships though supply chains, but also value chains (e.g. investment lending portfolios), corporate structures, joint ventures, subsidiaries, and other advisory services (e.g. legal, accounting).

Under the RBC Due Diligence guidance the due diligence approach is meant to apply to the entire supply chain and value chain using a risk-based approach. A value-chain due diligence approach is important for a number of reasons.

- It helps to ensure that the most severe and urgent harms are identified and addressed– many of the most severe RBC impacts linked to companies in the EU will tend to be via their indirect business relationships–not caused by their own operations/activities or by subsidiaries or Tier 1 suppliers. Tier 1 business relationships are often intermediary buyers, primary product

[24] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (Text with EEA relevance), https://eur-lex.europa.eu/eli/reg/2019/2088/oj
[25] Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/legal-texts-and-documents/

processors, or agents and so are not always the most appropriate target of a company's due diligence.

- It can help to ensure that downstream actors with resources and leverage are engaged and informed.
- It can create a more even playing field as requirements are 'passed' along the supply chain to indirect suppliers (for example, legislative requirements in the U.S. and the African Great Lakes region have had a marked impact on the mineral sourcing practices of Chinese metal smelters/refiners; and contributed to the development of Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains). [26]

A value chain approach does not expect companies to monitor and track every individual sub-supplier, trace every single product; or guarantee "perfect" results or "100% risk-free" supply chains–these approaches are inconsistent with the risk-based and dynamic nature of due diligence. Instead, due diligence aims at **prioritising** the most severe risks for action (based on severity and likelihood of harm), wherever they sit in the value chain.

IV. Risks scope

The scope of risks covered in an EU law should ideally be mapped against the risk scope of the due diligence chapters in the MNE Guidelines and the RBC Due diligence guidance. In this respect we would suggest the law to address not only human rights, environmental and health impacts, but also wider governance impacts. The consequences of corruption on human rights, security and conflict have been widely reported[27]. Human rights abuses, corruption and environmental destruction also risk becoming increasingly intertwined as demand for land and natural resources intensifies. Furthermore, currently bribery legislation in the EU does not generally incorporate value chain due diligence.

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.

We suggest that a principle-based approach is taken at the horizontal level, with sufficient detail on: (1) key principles or characteristics of value-chain due diligence and (2) practical due diligence steps and supporting measures. Much of this detail–which is needed to drive consistency in implementation and avoid a box-ticking approach--is already set out in the OECD RBC Due diligence guidance. (See also Question 14 and our suggestions on due diligence definitions). In this respect each step and sub-step in the RBC Due diligence guidance is supported by practical actions which are designed to be cross-cutting and to drive consistent and effective implementation. We suggest that a similar level of granularity is incorporated into a due diligence law, to help drive common understandings of the law's requirements.

[26] See (OECD) Promoting Responsible Supply Chains in China https://mneguidelines.oecd.org/responsible-business-conduct-china.htm (last accessed 9 February 2021)

[27] For example See OCHR, "Corruption and human rights" https://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/Corruption.aspx (last accessed 9 February 2021).

Requirements that are very generic, and lack detail or clarity, risk being misinterpreted and inconsistently implemented.

We also appreciate the need for sector specific guidance but believe that development of a horizontal cross-cutting legal requirement should be prioritized by the EU as many companies today operate and have business relationships across sectors. Furthermore development of sector specific standards can be time and resource intensive and any future sectoral standard should align with foundational expectations regarding due diligence (which can be established in this law).

Likewise we also appreciate the need for clear and consistent definitions and minimum expectations, however we would not support the development of a predefined or closed list of risks that companies must conduct due diligence against. This is because it is difficult to predict all impacts for all companies, even if limited to "severe" impacts or risks. Risks also change significantly over time or with emerging/new sectors and contexts. A predefined risk list in the context of a cross-sectoral law is also likely to be overly simplistic as it would have to focus on risks most sectors have in common rather than those most significant to specific companies. In this respect it could be both too narrow (omitting risks which are most important for certain companies) as well as too wide (having companies conduct due diligence against risks that are not a priority for them). Lastly the due diligence processes is designed to compel companies to consider these issues in a critical and ongoing fashion, a set of pre-defined impacts may incentivize a box-ticking approach.

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 would recommend that level 1 legislation prioritizes the elaboration of the foundational due diligence expectations that can apply across sectors (and as described in our answer to question 14). Horizontal, principle-based legislation could be accompanied by sector-specific rules and expectations over time, to ensure that expectations are tailored and relevant to the specificities of the sector. This specificity is important: for example, the main risks and where they sit in the supply chain vary across sectors; the nature of supply chains and key points of leverage/influence can also be very different. The OECD has already developed government-backed due diligence recommendations for the minerals, agricultural, garment & footwear and financial sectors, and the Commission could refer to these as guidance in the meantime.

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.

See response to Q15a.

Level 1 legislation should seek to find a balance between providing sufficient detail to ensure that core standards drive effective implementation, while also giving companies some flexibility to adapt their processes to the specific risk and circumstances of their operations and value chains—ensuring that risk identification, management, mitigation/prevention and remediation is all directed towards the most urgent harms for that company.

A Level 1 law based on the essential characteristics and 6-step framework in the RBC Due diligence guidance (including sub-steps and practical actions), with detail on what each step entails, could provide companies with sufficient legal certainty about what a meaningful due diligence process looks like—particularly if sectoral rules/expectations are developed at Level 2 or as guidelines.

Implementing and assessing (in the case of competent authorities) the quality of risk-based due diligence and supply chain risk management is not a new concept for companies or governments. It's already required for different types of companies and financial actors for, among others: money laundering and terrorist financing; bribery and corruption; health & safety; EU product rules; food safety; and EU sectoral legislation (e.g. EU Timber and Minerals Regulations). Avoiding a predefined (or closed) list of risk provides companies with the necessarily flexibility to adapt due diligence processes to their own circumstances and risk profiles.

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)

In addition to these identified by the EC we also suggest explicitly mentioning "environmental rights" - both procedural and substantive, as an area to be covered.

In addition, climate change adaptation needs should also be covered as part of the climate change related adverse risks and impacts of business and an area that should be captured as part to the due diligence process. Businesses should be required to look at their contributions to the adverse impacts of climate change (through GHG emissions), as well as the need to implement climate adaptation and resilience measures when appropriate to mitigate the adverse impacts of climate change on workers, communities and the environment- as they relate to the operations of the business.

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?

Although a closed set of risks should not be included in the law, attaching clear definitions to describe real and potential adverse impacts companies may face can be useful. In this respect the EU should rely on existing definitions and international standards where they exist. For example impacts to workers can defined in relation to ILO core conventions and human rights impacts can be rooted in international Human Rights conventions.

In contrast to human rights and labor related impacts, businesses will almost certainly contribute to negative environmental impacts through their activities (e.g. through emissions, use of natural resources, generation of waste). As such it will be import to define adverse environmental impacts in relation to divergences from recommended management standards and international benchmarks and standards where they exist. For example these may include environmental management expectations included in the OECD MNE Guidelines (Chapter VI) and RBC Due Diligence Guidance as well as targets described the Paris agreement, ISO standards, science-based targets and other multilateral environmental agreements more broadly. Adverse impacts to procedural environmental rights can be benchmarked against the Aarhus convention as a starting point. (See also Question 15e on target setting)

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?

Under OECD Due Diligence standards performance expectations vary based on *their relationship to, or involvement with*, adverse impacts.

Where companies *cause* or *contribute* to adverse impacts, they are recommended to prevent or otherwise cease and remediate adverse impacts. In this respect, establishing clear substantial requirement to "avoid causing or contributing to adverse impacts" (see 15d) can be useful to companies in understanding their obligations. See the following definitions of these concepts in questions 29 & 30 of the OECD RBC Due diligence Guidance (pp 70-72):

> *"**Cause**: An enterprise "causes" an adverse impact if the enterprise's activities[28] on their own are sufficient to result in the adverse impact.*
> ***[...]***
> ***Contribute:** An enterprise "contributes to" an impact if its activities, in combination with the activities of other entities cause the impact, or if the activities of the enterprise cause, facilitate or incentivise another entity to cause an adverse impact. Contribution must be substantial, meaning that it does not include minor or trivial contributions. The substantial nature of the contribution and understanding when the actions of the enterprise may have caused, facilitated or incentivised another entity to cause an adverse impact may involve the consideration of multiple factors.*
>
> *The following factors can be taken into account:*
> - *the extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring.*
> - *the extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability.*
> - *the degree to which any of enterprise's activities actually mitigated the adverse impact or decreased the risk of the impact occurring.*
>
> *The mere existence of a business relationship or activities which create the general conditions in which it is possible for adverse impacts to occur does not necessarily represent a relationship of contribution. The activity in question should substantially increase the risk of adverse impact."*

More broadly, where adverse impacts are "directly linked" to a companies' operations, products or services by a business relationship (e.g. the adverse impacts are being caused by companies in their supply chains, investment portfolios etc.), the MNE Guidelines and RBC Due diligence guidance recommend they seek to prevent and mitigate the impact using a risk-based approach. Perfect results through value chains are not expected or realistic, and therefore clarity on how companies should demonstrate good faith efforts and progressive improvements will be important to establishing certainly as to whether they are in compliance with the rules.

The characteristics of due diligence (described in question 14) can help companies as well as relevant authorities assess quality and good faith nature of their efforts in a consistent manner. In this respect, clear process expectations around due diligence should be defined in the law (see Questions 14 and 15) and businesses should also be expected to set appropriate targets with respect significant risks and impacts in consultation with stakeholders. These targets can include process as well as outcome metrics. Businesses should also be asked to report against these targets and demonstrate that they are making progress over time.

Concrete, relevant, measurable risk reporting—on specific risks, impacts, actions and outcomes—is both integral to, and an effective marker of, effective due diligence. If done well, it provides a crucial tool for investors, beneficiaries and other stakeholders to understand how RBC commitments are put into practice; track the effectiveness of measures adopted; and monitor progress in relation to specific impacts/risks and outcomes. Setting targets as well as tracking public reporting on due diligence processes, findings and plans is part of the due diligence process itself, and should be integrated accordingly (See OECD RBC Due diligence Guidance, Step 4- Step 5).

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

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[28] OECD (2011) Guidelines for Multinational Enterprises, Chapter IV, Para 42. states that "'Activities can include both actions and omissions."

Commission is currently analysing.

Under OECD RBC standards Small and Medium-sized Enterprises (SMEs) are expected, like other businesses, to apply due diligence. However RBC Due diligence guidance differentiates between what is expected for SMEs–by acknowledging the specific circumstances and challenges many SMEs may face. In particular:

- SMEs may have limited leverage over their suppliers and limited resources to allocate towards building the capacity of suppliers to meet RBC requirements. They may not have the market power to influence their business relationships by themselves.
- SMEs may have constrained access to financial, human and knowledge resources, which may make it more challenging for smaller enterprises to implement due diligence compared to larger enterprises. At the same time, SMEs often have smaller operations and fewer suppliers, which can reduce the complexity of their supply chain, and make them more agile.
- Fixed costs related to due diligence may weigh stronger on SMEs than larger businesses, leading to an uneven playing field and a competitive disadvantage of SMEs compared to their larger competitors.

The RBC risk-based due diligence approach and emphasis on proportionality help to ensure that due diligence processes can be tailored as appropriate to an enterprises circumstances, including its size. In this respect:

- SMEs might have more limited resources for due diligence and may work collaboratively (i.e. through industry associations etc.)
- A SME with limited leverage over its suppliers and limited resources to allocate towards building the capacity of suppliers to meet RBC requirements, may consider establishing robust prequalification processes.
- Performance targets and metrics for continuous improvement may be scaled, as appropriate, to SMEs.

As SMEs currently comprise 99.5% of companies operating in the EU and around 50% in value added across OECD countries, the potential contribution of SMEs to irresponsible business conduct could be significant. Excluding them from EU rules would create a significant gap in terms of application of the law. As a result, the EU could lose oversight over many of its highest-risk companies and supply chains (including e.g. SMEs that manufacture/import/operate as middle men for export outside the EU). Exclusion of SMEs could also create challenges for companies falling under the scope of the law as they would not have access to due diligence information from these companies or be able to undertake collaborative or complementary approaches. Finally, excluding SMEs from the law may also put them at a disadvantage in terms of their growth potential, access to capital, and integration into global value chains, since RBC expectations are increasingly required by companies seeking finance or to do business with larger MNEs.

At the same time policy makers must consider this issue in the context of wider set of policy questions on how governments can contribute to inclusive growth through SME policies, understanding that SMEs are important drivers of growth, innovation and employment and already face significant barriers accessing certain markets and engaging in international trade.

Finally, in considering these issues, the following aspects should be taken into account:

- SMEs should not as a group automatically be provided with lighter requirements, but certain groups/types of SMEs could be entitled thereto in case the principle based approach indicates this is possible. Further analysis should be made of both the impact of costs and the prevalence of risk for different groups/types of SMEs, to better take the diversity of SMEs in relation to due diligence into account and explore its implications. This could for instance be done via the development of SME typologies, focused on the relevant SME attributes for due diligence.[29]

[29] The OECD SME Strategy aims to develop typologies to better understand SME diversity from a variety of policy perspective, including the internationalisation of SMEs, a topic that was included in an extensive literature review on SME and entrepreneurship typologies. (on file with the OECD).

- Furthermore, the consideration of SMEs in regulation is often focused on costs and administrative burdens rather than on the benefits, which the leads to questions regarding exemptions, mitigation measures and special regimes. However, the “Think Small First” perspective implies that considering SMEs should take place from start, with the aim that well designed regulation is of benefit to smaller players - by remedying market failures and information asymmetries and levelling the playing field. If it is not to the benefit of small players, in some cases the regulatory costs involved for SMEs may actually be necessary and inevitable to pursue policy objectives that require critical business behavior changes and to address the fact that SMEs are sometimes risky players. Where such costs are not convincingly needed as incentives, or are not proportional to objectives pursued they should be avoided, taking into account that size contingent exemptions can in some cases also act as barriers to growth beyond the threshold levels that exemptions apply to.

- Given these considerations and the importance of the topic for SMEs, it is critical that the impact assessment on the proposal includes a robust SME test, that aims to assess quantitatively and qualitatively the benefits and costs of the proposal for (different groups of) SMEs, and takes the impact of other regulatory proposals and development regarding ESG into account

In this respect more study could be undertaken to inform policymakers as to:

- The extent to which SMEs (and different categories of SMEs) are associated with high-risk sectors and the adverse impacts sought to be addressed by the law;
- The extent to which inclusion of SMEs within the scope if the law would help prevent, mitigate and address such risks and impacts;
- The costs and potential competitive (or anti-competitive impacts) on SMEs should they be subject to the law;
- How including SMEs within the scope of the rules can impact the ability to monitor and enforce them; and
- The feasibility of introducing alternative approaches or measures to mitigate costs and challenges.

With respect to the last point there are various approaches policy makers can consider in lieu of exemptions to ensure due diligence expectations for SMEs are not unduly onerous and to provide them with support in meeting these expectations. In this respect policy makers can consider:

- Allowing longer transition times for SMEs to implement due diligence processes
- Providing support to help with capacity building, information collection and management
- Providing guidance for how due diligence expectations can be met through collaborative approaches (see Question 18).

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?

The MNE Guidelines and RBC Due diligence guidance recommends all enterprises carry out due diligence in accordance with the 6-step framework. Due diligence is designed to work most effectively when all actors in the value chain are involved in the process, and sharing relevant, up to date information on red flags and impacts. In this respect it is important the rules apply to companies legally located in the EU as well as those carrying out activities in the EU to ensure a level playing field and consistency across operators in Europe. Exempting certain actors—such as foreign companies who operate in or offer goods and services in the EU—from the scope of the law not only risks resulting in competitive disadvantages for EU companies who will have to invest in establishing due diligence systems; it also risks creating key information gaps within the chain which would make it more challenging for EU companies to meet the law’s standards. Furthermore it also creates uncertainty for EU consumers.

There seems to be precedent for application of EU law to third- country companies which are not established in the EU but carry out (certain) activities in the EU including geo-blocking and geodiscrimination laws for online sellers, EU consumer protection and unfair commercial practices law. Recent EU Regulations which include due diligence expectations including the Sustainable Finance Disclosure Directive and the EU Responsible Mineral Supply Chains Regulation apply equally companies/financial service practitioners legally established in the EU as well as to those providing goods or services within the EU while being legally established elsewhere. These existing regulations could serve as model for how expectations can be monitored and enforced with respect to companies who are not established 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?

Government policy to promote respect for human rights, decent work and environmental protection in global supply chains should involve a smart mix of voluntary, mandatory, national and international measures. A package of complementary measures will be necessary to reinforce due diligence expectations and achieve the objectives of the law. This should include:

- **Information – on supply chains, traceability and risk:** Effective due diligence requires accurate, credible and up-to-date information on supply chains, as well as RBC risks across sectors and geographies. The EU may wish to consider consolidating existing trade and custom data on origin of raw materials, intermediate products and services, and making such information accessible to the market. This could help to significantly reduce the costs for each company to collect and obtain such information independently. Additionally, providing thematic or country-specific risk-based information to companies can be an important tool to advance RBC due diligence. For example the U.S. Department of Labor's List of Goods Produced by Child Labor or Forced Labor supports companies to pinpoint areas where the risk of child labour or forced labour is high. The EU's own list of conflict-affected and high-risk areas,[30] as well as the planned "white list" of smelters and refiners, are good illustrative examples. We believe it is important however that such information is treated as indicative and non-exhaustive, as clearly specified in the EU's list of conflict-affected and high-risk areas.
- **EU Recognition of credible due diligence schemes to allow for collaboration (with appropriate limits and safeguards):** Collaboration on due diligence can be beneficial in pooling knowledge on sector risks and solutions, increasing leverage, and making due diligence more efficient, for example through scaling up of effective and proven processes, recognition of existing assessments of business relationships and through common reporting frameworks for business relationships. Cost sharing and savings is often a benefit to collaborative approaches.

  An EU law offers an opportunity to raise standards across initiatives in different sectors and facilitate collaborative efforts,[31] the OECD's Alignment Assessment methodologies and tools [32] may be helpful here. These initiatives are important and useful tools to help companies meet their responsibilities. However, we suggest that any EU "due diligence scheme recognitions process" reflects the principle that companies retain ultimate responsibility for their own due diligence obligations, and avoids any impression of providing a de facto "safe harbor" for companies that participate in initiatives. Based on OECD assessment of schemes in through our alignment assessment process, a companies' membership within an industry scheme or initiative *can* be a useful reference for undertaking risk-based checks or screens, *but is not a guarantee of compliance with all the initiatives' underlying standards*.

[30] Indicative, non-exhaustive, and regularly updated list of conflict-affected and high-risk areas (CAHRAs) (as defined under Regulation 2017/821) https://www.cahraslist.net/ (last accessed 9 February 2021).
[31] In this respect has been a proliferation of industry-led, government-backed and multi-stakeholder initiatives, yet these vary hugely in their scope and core activities–from a focus on narrow technical issues, risks or countries, to providing tools and guidance, carrying out supplier audits, setting standards and certifying members. They also vary in their alignment with due diligence principles and standards, transparency and accountability mechanisms.
[32] OECD Alignment Assessments are a voluntary process to assess the alignment of initiatives with the OECD due diligence recommendations based on an established methodology. Seven Alignment Assessments have been completed, with others ongoing. For more information see https://mneguidelines.oecd.org/industry-initiatives-alignment-assessment.htm and https://www.oecd.org/daf/inv/mne/alignment-assessment-due-diligence-garment-footwear.htm

- **Commitments for continuing to deploy funding instruments to support root causes of environmental and social harms and setting up systems in priority countries outside EU:** Access to financial support and capacity building programs in producing countries will be important to ensuring companies can respond to due diligence expectations when operating or sourcing outside the EU. Official development assistance and other SDGs-related partnerships can be harnessed to support the implementation of due diligence processes by domestic and foreign businesses. Support to address root causes of harm in global value chains, such as informality, poverty, corruption and overall lack of enforcement of environmental, labour or criminal law, is particularly important. Integrating RBC standards and requirements for due diligence into investment policies and agreements can help ensure accountability of companies and governments abroad. Some countries have included such criteria in their investment laws. There are also significant opportunities to further strengthen and align procurement rules and public financing conditions with standards such as the MNE Guidelines and UNGPs.

- **Financing support or incentives for costs associated with due diligence e.g. through EU Next Generation Fund or otherwise:** This may include, for example, special financing instruments for business to have preferable rates of finance when making supply chain improvements, to help offset costs of implementation, or other forms of financial support such as tax credits or subsidies for start-up costs. It may also involve providing training or expertise on the implementation of due diligence processes.

- **Effective, efficient and coherent SME policies that support the participation of SMEs in international trade and global value chains in an inclusive and responsible way**: A stronger participation of SMEs in international trade and GVCs can contribute to inclusive growth. SME policies that support SME internationalization in a responsible and inclusive way can help foster the business practice due diligence aims to promote. SMEs in particular may need assistance with access to finance and other resources.[33]

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)?

Enforceability is critical to ensuring that rules are complied with and that the law achieves its objectives. OECD RBC standards do not include recommendations regarding legal enforcement models and the OECD has not undertaken analysis of the relative advantages of various enforcement models and thus we are not able to comment directly on this issue.

However we believe that rules should be clear about how different expectations under the law may or may not be subject to different enforcement mechanisms. For example, enforcement processes to assess (lack of) quality of due diligence processes may be different than those considering (civil liability on) whether a business caused or contributed to adverse impacts and is therefore responsible for remediating them.

We also wanted to draw attention to the fact that remediation, is an important component of RBC Due diligence. In this respect it is recognized that companies must cease, address and remediate any impacts they cause or contribute to through their own activities. OECD RBC standards also recognize that in certain situations an enterprise can contribute to impacts if the activities of the enterprise cause, facilitate or incentivize *another entity* to cause an adverse impact. In this respect it is recognized that contribution must be substantial, and will be assessed based on (also elaborated above in question

[33] OECD (2020) Financing SMEs and Entrepreneurs: An OECD Scoreboard, https://www.oecd.org/cfe/smes/financing-smes-and-entrepreneurs-23065265.htm

15e):

- the extent to which an enterprise may encourage or motivate an adverse impact by another entity, i.e. the degree to which the activity increased the risk of the impact occurring.

- the extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e. the degree of foreseeability.

- the degree to which any of enterprise's activities actually mitigated the adverse impact or decreased the risk of the impact occurring.

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?

If RBC due diligence is introduced as a legal requirement, by implication business directors would have a responsibility for ensuring stakeholder engagement is carried out to the extent directors are normally expected to ensure that a company obeys the law.

Meaningful stakeholder engagement is a key component of the RBC Due diligence process. However expectations for engagement are stronger where stakeholders are impacted by enterprise's own activities (as compared to though a supply chain). In this respect the RBC Due diligence guidance provides that engaging with impacted and potentially impacted stakeholders and rightsholders may be especially relevant when an enterprise is:

- identifying actual or potential adverse impacts in the *context of its own activities.*
- devising prevention and mitigation responses to risks of adverse impacts *caused or contributed to by the enterprise.*
- identifying forms of remedy for adverse impacts *caused or contributed to by the enterprise* and when designing processes to enable remediation.
- tracking and communicating on how actual or potential identified human rights impacts in the *context of its own activities* are being addressed. (Q.10 RBC Due diligence guidance).

Additionally, in some cases, stakeholder engagement or consultation is a right in and of itself; for example the right of workers to form or join trade unions and their right to bargain collectively are internationally-recognised human rights. RBC due diligence also recognizes that enterprises can prioritise the most severely impacted or potentially impacted stakeholders or rightsholders for engagement. The degree of impact on stakeholders or rightsholders may inform the degree of engagement.

The G20/OECD Principles likewise recognize that unethical and illegal practices by corporate officers may not only violate the rights of stakeholders but also be to the detriment of the company and its shareholders in terms of reputation effects and an increasing risk of future financial liabilities. They therefore note that it is to the advantage of the company and its shareholders to establish procedures and safe-harbours for complaints by employees, either personally or through their representative bodies, and others outside the company, concerning illegal and unethical behaviour. (Chapter IV.E).

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

According to the RBC Due Diligence guidance stakeholders are persons or groups who have interests that are or could be impacted by an enterprise's activities. Not all individuals and groups considered as stakeholders will have interests that can be affected by a specific activity carried out by an enterprise. It will therefore be important for the enterprise to identify the individuals and groups with interests that must be taken into account with respect to a specific activity (relevant stakeholders). (Q8, RBC Due diligence guidance).

Moreover, due diligence concerns the interests of stakeholders that have been affected (impacted stakeholders) as well as those whose interests have not been affected but could be (potentially impacted stakeholders).

However not all interests are of equal importance and it is not necessary to treat all stakeholders in the same way. Where the interest is individual human rights or collective rights (held by groups such as indigenous peoples) the stakeholders whose human rights are or may be affected can be referred to as "rightsholders". Stakeholders will differ depending on the enterprise and its activities. For example, impacted and potentially impacted stakeholders and rightsholders may include:

-communities at local, regional or national level
-workers and employees including under informal arrangements within supply chains and trade unions
-consumers or end-users of products.

Additionally, relevant stakeholders that may be important for meaningful engagement may include:

- NGOs, local civil society organisations, NHRIs
- community-based organisations and local human rights defenders
- industry peers
- host governments (local, regional and national)
- business partners (including suppliers)
- investors/shareholders

In situations where there are a vast number of impacted or potentially impacted stakeholders or rightsholders, an enterprise may engage with credible stakeholder representatives, in particular where engaging with individuals can undermine certain rights or collective interests. For example, when deciding to restructure or close a factory, it may be important to engage with trade unions, rather than individual workers, in order to mitigate the employment impacts of the decision, as the right of workers to form or join trade unions and their right to bargain collectively are internationally-recognised human rights. OECD recommendations also recognize that engagement with stakeholders can be prioritized (See question 20a).

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.

The G20/OECD Principles (Chapter VI.D.4) recommend aligning key executive and board remuneration with the longer term interests of the company and its shareholders. They cite as good practice for boards to develop and disclose a remuneration policy statement covering board members and key executives that specifies the relationship between remuneration and performance, and that includes measureable standards that emphasize the longer run interests of the company over short-term considerations. While the Principles cite a number of measures that may be taken by companies as part of such policy statements, including specifying terms to be observed by board members and key executives for holding and trading the stock of the company and the procedures to be followed in granting and re-pricing of options, they provide flexibility as to what the terms of such measures should be.

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.

We are not in a position to assess the potential costs and benefits of a clarified duty of care, considering the considerable uncertainty regarding what exactly this would entail, its impact across a range of legal frameworks, systems, enforcement mechanisms, case law and practices across different EU states.

The broad costs and benefits associated with due diligence are discussed in Question 1,3-3.a and 26. In the absence of additional data and analysis it is difficult to rate to what extent these costs/benefits would manifest under a non-binding versus legislative approach. This is also the case as most environment and social due diligence legislation has only been introduced in recent years, as such the costs and benefits associated with them is yet to be determined.

Question 26: Estimation of impacts on stakeholders and the environment
A clarified duty of care and the due diligence duty would be expected to have positive impacts on stakeholders and the environment, including in the supply chain. According to your own understanding and assessment, if your company complies with such requirements or conducts due diligence already, please quantify / estimate in quantitative terms the positive or negative impact annually since the introduction of the policy, by using examples such as:

- Improvements on health and safety of workers in the supply chain, such as reduction of the number of accidents at work, other improvement on working conditions, better wages, eradicating child labour, etc.
- Benefits for the environment through more efficient use of resources, recycling of waste, reduction in greenhouse gas emissions, reduced pollution, reduction in the use of hazardous material, etc.
- Improvements in the respect of human rights, including those of local communities along the supply chain
- Positive/negative impact on consumers
- Positive/negative impact on trade
- Positive/negative impact on the economy (EU/third country).

We are not in a position to assess the potential costs and benefits of a clarified duty of care, considering the considerable uncertainty regarding what exactly this would entail, its impact across a range of legal frameworks, systems, enforcement mechanisms, case law and practices across different EU states.

Potential costs and benefits of introduction on mandatory EU due diligence rules are discussed in Questions 1 and 3. Additional impacts are considered below.

Increased up take of value-chain due diligence can promote a more expansive approach to prevention and mitigation of harm by business. This is important as many environmental and social harms occur in the supply or value chains of European companies, rather than in their direct operations, where they are often less likely to be addressed. For example research by the OECD has found that a significant amount of instances of child labour and forced labour is "hidden" in supply chains; across regions between 28 and 43 per cent of the child labour estimated to contribute to exports does so indirectly, through preceding tiers of the supply chain (such as extraction of raw materials or agriculture).[34] In the content of climate issues it has been estimated that Scope 3 emissions account for upwards of 80% of certain companies total emission rates, yet reporting on Scope 3 emissions remains poor and efforts to mitigate climate issues throughout supply chains remain relatively nascent.

Due diligence expectations can also drive concrete changes in risk management at the level of companies. For example a study on the application of the French Duty of Viligence law found that the vast majority of companies subject to the law carried out new risk mapping or reviewed procedures for identifying existing at-risk suppliers as a result of it.[35] Likewise a study by the Federal Institute for Geosciences and Natural Resources (BGR) has found that due diligence legislation in the minerals sector has led to increased uptake of due diligence management practices along supply chains, including more detailed chain of custody documentation to enable tracking and tracing of mineral flows. It also found that reported import and export figures are better aligned. This in turn can positively reinforce future supply chain risk assessments as detection of trade inconsistencies and supplier red flags may become more straightforward. [36]

Due diligence can also support stronger reporting and tracking of company performance on management of impacts (see question 15e) and help respond to information needs of investors and other stakeholders. For example, reporting on due diligence processes (policies, measures taken, the outcomes of those measures) can indicate the ambition and effectiveness of an enterprises efforts to avoid and address risks. In 2012, the United States Securities and Exchange Commission, in relation to the release of its final rule on mineral supply chain due diligence report, stated:

> *One modification from the proposal, based on comments we received, is that the final rule requires an issuer to use a nationally or internationally recognized due diligence framework, if such a framework is available for the specific conflict mineral. We are persuaded by commentators that doing so will enhance the quality of an issuer's due diligence, promote comparability of the Conflict Minerals Reports of different 28 issuers, and provide a framework by which auditors can assess an issuer's due diligence. This requirement should make the rule more workable and less costly than if no framework was specified. Presently, it appears that the only nationally or internationally recognized due diligence framework available is the due diligence guidance approved by the Organisation for Economic Co-operation and Development ("OECD").*[37]

Due diligence reporting can serve as a proxy for measuring environmental and social performance in the absence of appropriate universal indicators on some ESG issues. However to date, due diligence reporting is not widespread amongst European companies. Research by the Alliance for Corporate Transparency found that among companies reporting under the EU non-financial reporting directive, while over 90% of companies express a commitment to respect human rights and over 70% endeavor to ensure the protection of human rights in supply chains the majority of companies do not provide any

[34] OECD, ILO, IOM, UNICEF (2019) Ending child labour, forced labour and human trafficking in global supply chains https://mneguidelines.oecd.org/ending-child-labour-forced-labour-and-human-trafficking-in-global-supply-chains.htm

[35] EDH (2019) Application of the Law on the Duty of Vigilence https://www.e-dh.org/userfiles/Etude%20plans%20de%20vigilance%202019%20-%20VEN.pdf

[36] PhilipSchütte, Resources Policy (2019)International mineral trade on the background of due diligence regulation: A case study of tantalum and tin supply chains from East and Central Africa, https://www.sciencedirect.com/science/article/pii/S0301420718304720

[37] See pp. 27-28 of the SEC's Final Rule implementing section 1502 of the Wall Street Reform and Consumer Protection Act, https://www.sec.gov/rules/final/2012/34-67716.pdf

information that would allow a stakeholder to understand how this commitment is put into practice. Only 36% describe their human rights due diligence system, 26% provide a clear statement of salient issues and 10% describe examples or indicators to demonstrate effective management of those issues.[38]

Importantly, by way of enhancing risk management and reporting processes of companies, due diligence expectations have been proven to lead to concrete impacts on the ground. Evidence from the minerals sector has shown that as a result of implementation of due diligence processes conflict-financing from trade of certain minerals diminished in the Great Lakes region (see Question 1). Furthermore, in high-risk areas, direct economic benefits are commonly created for local communities as a result of responsible engagement; through the due diligence process foreign companies undertake more efforts to obtain their "social license to operate". If properly construed, strong reporting expectations can also drive real impact. For example a recent study by the central bank of France found that mandatory climate disclosure regulations introduced in France have contributed to French investors curbing their investments in fossil fuel companies by 40%.[39]

[38] Alliance for Corporate Transparency (2019) (see footnote 1) http://allianceforcorporatetransparency.org/assets/2018_Research_Report_Alliance_Corporate_Transparency-66d0af6a05f153119e7cffe6df2f11b094affe9aaf4b13ae14db04e395c54a84.pdf

[39] Mésonnier and Nguyen, Banque de France (2021) Showing off cleaner hands: mandatory climate-related disclosure by financial institutions and the financing of fossil energy https://www.banque-france.fr/sites/default/files/medias/documents/wp800.pdf