Position Paper

Response to EC consultation on sustainable corporate governance

Our reference:	ECO-IAR-21-015	Date:	10 February 2021
Referring to:	EC consultation on sustainable corporate governance		
Contact person:	Economics & finance department, Conduct of business department	E-mail:	ecofin@insuranceeurope.eu, cob@insuranceeurope.eu
Pages:	23	Transparency Register ID no.:	33213703459-54

Summary

The insurance industry strongly supports the efforts of the European Commission (EC) to promote the move to a sustainable economy. As Europe's largest institutional investor, the insurance sector is committed to the EU's sustainability objectives and to this transformation. The industry pays careful attention to potential ESG issues arising in the course of its business or occurring in the value chain. European insurers strongly agree that economic activities must not cause or contribute to adverse impacts on human rights and the environment and welcome corporate decisions that duly take account of a broad spectrum of considerations relevant to the financial performance of companies in the long term.

Should the EC decide to establish an EU-level legal framework, it is critically important that it strikes the right balance between the benefit of greater transparency and the burdens on companies. A possible general EU legal framework would also need to consider that legislative action should be focused on sectors that are lagging behind in the transition to sustainability. For the insurance sector, there are already a number of requirements to address adverse impacts on human rights and environmental issues.

To enable an orderly and efficient transformation to occur, the insurance industry is of the opinion that, before proposing new legislative requirements on sustainable corporate governance, the EC should:

- Carefully assess the impact of measures that already cover the integration of sustainability into corporate governance frameworks for the financial sector. Consideration of existing EU-level legislation and initiatives addressed to the financial sector and its sub-sectors is key before proposing new regulatory interventions. This sectoral legislation is ignored and should be duly and impartially accounted for in EC's studies in this area.
- Ensure that proposed measures do not create inconsistency and overlap with existing requirements related to the initiatives of the 2018 Action Plan on Sustainable Finance, eg the Environmental Taxonomy Regulation, Sustainable Finance Disclosures Regulation, the upcoming review of the Non-Financial Reporting Directive and the EC amendments to the Solvency II and Insurance Distribution Directive frameworks in terms of sustainability risks and factors.
- Recognise that the transformation is already underway and the role that markets played in it so far.

Insurance Europe aisbl
Rue du Champ de Mars 23, B-1050 Brussels
Tel: +32 2 894 30 00
E-mail : info@insuranceeurope.eu
www.insuranceeurope.eu

As sustainability is a global issue, it needs to be addressed through **a global approach and international coordination**. Global coordination efforts between public players need to be enhanced to promote sustainable finance via the convergence of standards and best practices. While the industry welcomes the ambition of the EC to take a leading role in this process, it is imperative that global markets agree on a set of standards.

The insurance industry also agrees with the EC that due diligence is a risk-based, proportionate and context-specific concept. However, it remains unclear how generic, binding due diligence requirements should be designed in a feasible and proportionate way. For this reason, the insurance industry is in favour of a **principles-based approach to a possible corporate due diligence duty**, in line with existing standards and conventions. This would not preclude the possibility of integrating it with **additional requirements for sectors** more exposed to sustainability risks.

In terms of **stakeholder engagement and remuneration**, the industry notes that there is no "one size fits all" solution. All companies have different stakeholders and there are significant differences in the sustainability risks and factors associated with companies' business models. Therefore, companies will need to assess which stakeholders need to be represented in engagement/outreach strategies and how to align the long-term interests of their stakeholders with their business strategy.

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?

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

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

Please provide reasons for your answer:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

The insurance industry strongly supports the efforts of the European Commission (EC) to promote the move to a sustainable economy. As Europe's largest institutional investor committed to promoting this transformation, the industry welcomes corporate decisions that duly consider a broad spectrum of interests. In fact, such a consideration can be relevant to the financial performance of the company in the long term.

To enable an orderly and efficient transformation to occur, the insurance industry encourages the EC to perform an in-depth impact assessment, going beyond a tick-box exercise and adequately considering the unintended consequences that such a framework could create.

The insurance sector urges the EC to:

- **Carefully assess the (current and expected) impact of measures that already cover the integration of sustainability into corporate governance frameworks for the financial sector. Consideration of existing EU-level legislation and initiatives addressed to the financial sector and its sub-sectors is key before proposing new regulatory interventions.** This sectoral legislation is ignored and should be duly accounted for in EC studies in this area.
- **Ensure that proposed measures do not create inconsistency and overlap with existing requirements related to the initiatives of the 2018 Action Plan on Sustainable Finance.** These are already set in motion and have the potential to provide adequate financial and behavioural incentives to foster the transformation process for insurers. For example, duplications should be avoided with:
  - Environmental Taxonomy Regulation (eg minimum safeguards and "do no significant harm" principle, which included supply chain considerations)
  - Sustainable Finance Disclosures Regulation on sustainability-related disclosures in the financial services sector
  - The review of the Non-Financial Reporting Directive
  - The EC proposals amending Delegated Regulation (EU) 2015/35 on the integration of sustainability risks in the governance of (re)insurance undertakings and amending Delegated Regulations (EU) 2017/2358 and (EU) 2017/2359 on the integration of sustainability factors and preferences into the product oversight and governance requirements for insurance undertakings and distributors

- **Recognise that the transformation is already underway and the role that markets played in it**. This means considering all possible ways forward, including non-legislative options. It is particularly important to explore options to refine existing transparency and reporting requirements, which may guide the path to a proportionate and even more effective sustainability transformation in the long run.

As sustainability is a global issue, it needs to be addressed through **a global approach and international coordination**. Global coordination efforts between public players need to be enhanced to promote sustainable finance via convergence of standards and best practices. While the industry welcomes the ambition of the EC to take a leading role in this process, it is imperative that global markets agree on a set of standards. Pushing forward unilaterally may end up creating an unlevel playing field and expose European undertakings to a competitive disadvantage. Should the EC decide to establish an EU-level legal framework, it is critically important that it strikes the right balance between the benefit of greater transparency and the burden on companies, particularly in relation to reporting.

Finally, the policy options set out in the inception impact assessment might not be effective in incentivising corporate boards to better align their business decisions in terms of sustainability. On the contrary, some solutions could impose a binding corporate governance regime leading to unintended consequences. They may redefine the current understanding of the freedom to conduct business as guaranteed by Article 16 of the charter of fundamental rights of the EU. From the perspective of the insurance industry, which is subject to a legal framework dedicated to protecting the interests of policyholders, they may raise serious consistency issues with prudential regulation and expose both supervisors and insurance undertakings to a conflict of objectives.

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?

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

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

Please explain:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

Insurance Europe strongly agrees that economic activities must not cause or contribute to adverse impacts on human rights and the environment. The sector is committed to EU sustainability objectives and has been actively contributing to a considerable number of related legislative proceedings at EU level. The insurance sector has been and will continue paying careful attention to potential ESG issues arising in the course of its business or occurring in its value chain, being aware of numerous sustainability-related initiatives around the world and building on their experiences. In addition, insurers will have to reflect and anticipate the evolving expectations of consumers, shareholders and other stakeholders towards sustainability in order to remain competitive.

In view of this, a general EU legal framework for supply chain due diligence might not be the best way to encourage all economic players to take action to address adverse impacts. A general framework should not negatively affect the development of common standards for corporate due diligence, which are already emerging on a voluntary basis. While the insurance industry is of the opinion that a general due diligence obligation might have benefits, eg harmonised rules between the different EU member states and common minimum standards based on OECD Guidelines and UN Guiding Principles, it might also overlook specific characteristics of the sector and differences in the level of sophistication in dealing with adverse impacts.

Should a general EU legal framework for supply chain due diligence be developed, it needs to consider that:

- **Legislative action should be focused on sectors that are lagging behind in the transition to sustainability. Not all sectors are at the same level in terms of the way they address adverse impacts on human rights and environmental issues**. Specific sectoral legislation could be based on the taxonomy that is currently under development.
- **For the insurance sector, there are already a number of requirements in this respect and they should not overlap with potential new measures.** For example:
    - The Sustainable Finance Disclosures Regulation (SFDR) already covers due diligence duties in terms of adverse impacts related to all sustainability factors, ie environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.
    - Recent Solvency II amendments incorporate the consideration of sustainability factors into the prudent person principle, which is at the core of insurers' investments.

  According to all these requirements, financial market participants will already be required to take into account adverse impacts in their investment activities and even to publish on their website a set of mandatory indicators for adverse impact. Beyond this, more requirements cover sustainability risks at entity level, consistency of remuneration policies with sustainability risks and customer disclosures.
- **Attention should be paid to the consistency of existing legislation across sectors for both new and potential existing requirements to work well in practice.** For example, a smooth and in-depth implementation of existing requirements for insurers (eg those related to the SFDR) will need proper ESG data on the adverse impacts of all assets/activities in companies in which insurers invest. This requires **adequate sustainability-related information flows**: comparable robust and reliable ESG information (including adverse impacts data, coherent with the requirements of the SFDR) at the level of companies should be publicly available to insurers to comply with the requirements of the SFDR (see joint call for a centralised register for ESG data).

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

a. Ensuring that the company is aware of its adverse human rights, social and environmental impacts and risks related to human rights violations other social issues and the environment and that it is in a better position to mitigate these risks and impacts.
b. Contribute effectively to a more sustainable development, including in non-EU countries.
c. Levelling the playing field, avoiding that some companies freeride on the efforts of others.
d. Increasing legal certainty about how companies should tackle their impacts, including in their value chain
e. A non-negotiable standard would help companies increase their leverage in the value chain
f. Harmonisation to avoid fragmentation in the EU, as emerging national laws are different
g. SMEs would have better chances to be part of EU supply chains
h. Other

- **a. Ensuring that the company is aware of its adverse human rights, social and environmental impacts and risks related to human rights violations other social issues and the environment and that it is in a better position to mitigate these risks and impacts.**
- **b. Contribute effectively to a more sustainable development, including in non-EU countries.**
- **c. Levelling the playing field, avoiding that some companies freeride on the efforts of others.**
- **f. Harmonisation to avoid fragmentation in the EU, as emerging national laws are different**
- **g. SMEs would have better chances to be part of EU supply chains**

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)?

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

- **a. Increased administrative costs and procedural burden**
- **b. Penalisation of smaller companies with fewer resources**
- **c. Competitive disadvantage vis-à-vis third country companies not subject to a similar duty**
- **d. Responsibility for damages that the EU company cannot control**
- **g. Disengagement from risky markets, which might be detrimental for local economies**

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

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

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

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

the interests of society, please specify:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

All stakeholders identified above (and beyond, eg younger and future generations) are relevant for the long-term success of a company and are also members of society.

However, it is important that each company can determine which stakeholders are most relevant to its activities and decide the best ways to organise dialogue with such stakeholders. Regarding "the likely consequences of any decision in the long term (beyond 3-5 years)", it should be noted that there can be cases where long-term considerations are not relevant depending on the context in which the company operates.

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

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

Please explain:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

Identification of the company's stakeholders and their interest is a natural and essential component of directors' duty. Directors are expected to consider the interests of stakeholders as well as all material risks to the company. Based on current experience, corporate directors already include stakeholder interests in their decision making. This means that there is no need to regulate further.

Insurance Europe fully acknowledges the relevance of stakeholder interests to the long-term success of undertakings. As the EC rightly points out, the corporate legal frameworks applicable in the EU require the members of the management board to act in the best interests of companies and, if necessary, redefine the best interests of the company and align the business strategy accordingly. This obligation would include the proper reflection of stakeholder interests.

Potential new legal requirements should also take into account administrative burden as well as competitiveness issues for globally active European undertakings. In addition, unnecessary and undue personal liability of the directors cannot be justified given the widely observed practices. It should be noted that monitoring and decision-making for such matters are usually done at the level of the management and not by the board of directors. This would also conflict with the main principles of civil and criminal liability of legal entities and their directors in most EU jurisdictions.

In view of this, the industry invites the EC to fully consider ongoing initiatives and findings in the context of the 2018 Action Plan on Sustainable Finance, eg EIOPA advice on short-termism (see here). For the insurance sector, there are also related requirements in prudential legislation, eg recent Solvency II amendments requiring insurers to consider the long-term impact of their investment strategy and decisions on sustainability factors, the related EIOPA advice on the role of the administrative, management and supervisory body, etc.

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

a. I strongly agree
b. I agree to some extent
c. I disagree to some extent
d. I disagree
e. I do not know
f. I do not take a position

- **d. I disagree**

Please explain:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

Facilitated dialogue between stakeholders and companies would potentially provide an additional opportunity to build a better understanding of the sustainability implications of business activities, which will form the basis for making a management decision by corporate directors and management teams. However, any legal obligation that directly requires pre-defined, uniform actions should not unduly restrict the management's ability to address the sustainability issues in an effective manner.

It is vital that the legal framework ensures that the management are entrusted with sufficient flexibility and encouraged to account for the nature of the issues at stake, in line with the characteristics of their businesses and applicable legislation and guidelines (both within and beyond the EU). The directors' duty of care should not be used as a substitute for binding transition plans.

In order to ensure the directors can act to their fullest capacity, it is essential that their decisions are not directly subject to appeal or blame for failing to reconcile conflicting interests, for example in the case of insurance business between policyholders and other stakeholders. Otherwise, integrating stakeholders' interests into the decision-making process, including decisions on corporate strategy, would raise difficult legal questions.

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?

a. I strongly agree
b. I agree to some extent
c. I disagree to some extent
d. I disagree
e. I do not know
f. I do not take a position

- **d. I disagree**

Please provide an explanation or comment:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

Insurance Europe challenges the generalisation of the assumptions underlying this question:

1. The generalisation cannot be made that companies are oriented towards short-term results. Short-termism should not be confused with the need for companies to keep their operations competitive and attractive to investors, which is not at odds with economic sustainability without which the transformation that will enable the transition will not be possible. The short-term financial interest of shareholders and the consideration of stakeholder interests are not necessarily contradictory.

2. **The underlying studies commissioned by the EC lack a comparative analysis of the exposure of economic sectors to short-termism and include general conclusions that are not applicable to the insurance sector**. While it may be true in general terms that companies have an increasing focus on short-term financial performance to the detriment of sustainable transformation, appropriate solutions should be tailored to the specifics of sectors.

   The insurance industry would highlight that short-term performance is not in line with the insurance industry's long-term business model. Insurers invest in long-term assets to match their long-term liabilities generated by long-term products, such as pension and savings products. For example:
   - Life insurance companies often cover financial protection for contracts with a duration of decades.
   - Casualty insurers settle claims over many years in long-tail business lines.

   Insurers maintain the required amount of capital to meet their contractual obligations at any time and taking account of even remote stress scenarios.

   Insurers are legally required to establish risk-management systems comprising the strategies, processes and reporting procedures necessary to identify, measure, monitor, manage and report the risks, on a continuous basis, at an individual and at an aggregated level, to which they are or could be exposed, and their interdependencies. This all-embracing risk concept of course includes sustainability risks. The EC proposal on amending Delegated Regulation (EU) 2015/35 on the integration of sustainability risks in the governance of (re)insurance undertakings would only clarify this.

   The EIOPA advice on short-termism (see here) provides further evidence in this respect by clearly stating that "*There is no clear evidence of behaviours that could be labelled as undue short-termism in insurance and IORPs and which could eventually put pressure on those corporations*" and that "*There is no clear evidence of undue short-term pressures from financial markets on (re)insurance undertakings and IORPs, although their investment behaviour practices are sensitive to macroeconomic circumstances*".

3. The commission does not provide any robust evidence to justify the assumption that failure to balance the interests of all stakeholders results in companies, including insurers, generally failing to integrate potential new opportunities for building resilience, to the detriment of the interests of society. A growing number of insurance market participants have increased their efforts, not least in anticipation of changing customer preferences and strengthening product governance requirements. In addition, the insurance sector continues to increase its commitment to the sustainability transformation.

With reference to the scope of directors' duties of care, please see the response to Q6.

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?

- Conflict between corporate legislation and sectoral regulation (eg Solvency II Directive)
- Competitive disadvantage vis-à-vis third-country companies not subject to a similar duty
- Disengagement from certain developing markets that can have higher risks, to the detriment of local and developing economies
- Increased legal risks for corporate directors

- Increase in premiums for (or coverage exclusions in) directors' and officers' insurance policies, and negative consequences for remuneration
- Increased administrative costs and procedural burdens

How could these possible risks be mitigated? Please explain.
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

If corporate legislation clarifies the director's duty of care by requiring the involvement of stakeholders in a sustainability mission, conflicts of interests with insurance regulation would occur. Preamble 16 of the Solvency II Directive defines the adequate protection of policyholders and beneficiaries as the main objective of (re)insurance regulation and supervision, even outranking the common goal of financial stability in case of doubt. Should the interests of stakeholders and policyholders not be harmonised, both supervisors and directors may be exposed to potential conflicts of interest.

With respect to the enforcement of the directors' duty of care, it needs to be made clear that only companies can take enforcement actions and that stakeholders cannot directly do so. Any damages should only be payable to the companies, not stakeholders. Stakeholders should have other remedies for immediate damage, and this would to some extent prevent frivolous litigation.

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?

a. I strongly agree
b. I agree to some extent
c. I disagree to some extent
d. I disagree
e. I do not know
f. I do not take a position

- **c. I disagree to some extent**

Please explain:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

As mentioned in the response to Q8, evolving sectoral regulation will clarify the responsibilities of supervisors and insurance undertakings on integrating sustainability risks, impacts and opportunities (eg the EC's draft regulation on amending Delegated Regulation (EU) 2015/35 on the integration of sustainability risks in the governance of (re)insurance undertakings). This proposal aims to integrate sustainability risks in the system of governance. It also requires (re)insurers to adopt a stewardship approach in their investing strategy, eg taking into account the potential long-term impact of their investment strategy and decisions on sustainability factors. Hence, Insurance Europe disagrees with the underlying assumption of Q10 that further legislation is necessary in this regard.

Enforcement of directors' duty of care

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

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

N/A

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

N/A

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

- *a. I strongly agree*
- *b. I agree to some extent*
- *c. I disagree to some extent*
- *d. I disagree*
- *e. I do not know*
- f. *I do not take a position*

- **d. I disagree**

Please explain your answer:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

Insurance Europe would like to reiterate the potential conflict of interest between employees or civil society organisations and the objectives of insurance regulation, eg the interests of policyholders (see comments on Q9). Neither shareholders nor any other stakeholder group can enforce their interests in violation of policyholder protection.

In addition, it should be noted that directors owe duties to the company itself and not to third parties, such as external stakeholders. Therefore, any EU legislative initiative should not lead to personal legal liability for directors with respect to a company's impact on stakeholders.

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

N/A

Section III: Due diligence duty

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

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

The insurance industry understands the EC's rationale for envisaging this approach and agrees that due diligence is a risk-based, proportionate and context-specific concept. However, it remains unclear how generic, binding due diligence requirements could be designed in a feasible and proportionate way. Non-binding guidelines on a "comply or explain" basis are a better way to promote due diligence.

Regulatory action should be properly considered. It is vital that companies are not liable for damage caused by others in their value chain, especially if they are not under their responsibility or control. To avoid unintended consequences and legal risks, **potential obligations should be based on a solid definition.**

In addition, the industry notes that:

- As respondents to the EC's study on due diligence requirements through the supply chain accurately pointed out, the current legal landscape does not provide companies with legal certainty about their due diligence obligations in relation to human rights, social and environmental matters. However, the establishment of the supply-chain due diligence duty may lead to unintended consequences without a proper definition of the due diligence duty. This is because companies may be confronted with incalculable legal risks arising from possible civil law liabilities to administrative or even criminal sanctions, which may result in a complete withdrawal from markets with questionable sustainability frameworks.
- The EC has to ensure that such due diligence duty is proportionate and is accompanied by a clearly defined scope and rationale: no performance obligation, prevention adapted to the risks, with a limitation to the principal suppliers and tier 1 subcontractors, and adapted processing of sensitive data. Companies should not be held vicariously liable at the risk of undermining both the autonomy of legal persons and the principle of personality for offences and penalties. The risk is that this would create a massive and onerous administrative burden, without producing a significant result.

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 ie. 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.

a. Option 1. "Principles-based approach": A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These *should be applicable across all sectors. This could be complemented by EU-level general or sector specific guidance or rules, where necessary*

b. *Option 2. "Minimum process and definitions approach": The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.*

c. *Option 3. "Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues". This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.*

d. *Option 4 "Sector-specific approach": The EU should continue focusing on adopting due diligence requirements for key sectors only.*

e. *Option 5 "Thematic approach": The EU should focus on certain key themes only, such as for example slavery or child labour.*

f. *None of the above, please specify*

- **a. Option 1. "Principles-based approach"**

Please specify:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

The insurance industry is in favour of a principles-based approach, which is in line with existing standards and conventions such as those cited in option 2. The sector would appreciate clear EU non-binding guidelines on a "comply or explain" basis and is not in favour of legal requirements.

Nevertheless, should the EC decide to introduce certain requirements they should be defined as a minimum standard with regard to the necessary processes and should aim for maximum harmonisation between member states.

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?
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

- **d. Option 4. "Sector-specific approach": The EU should continue focusing on adopting due diligence requirements for key sectors.**

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.
(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

Insurance Europe strongly prefers a principles-based approach based on EU non-binding guidelines on a "comply or explain" basis. However, it would not preclude the possibility that the EC sets out legal requirements addressed at targeted sectors that are more exposed to sustainability risks, provided the challenges regarding legal certainty are solved. Given that, Insurance Europe notes that there is no evidence that the insurance sector is one that is exposed to higher risks.

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)

- *a. Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)I agree to some extent*
- *b. Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups*
- *c. Climate change mitigation*
- *d. Natural capital, including biodiversity loss; land degradation; ecosystems degradation, air, soil and water pollution (including through disposal of chemicals); efficient use of resources and raw materials; hazardous substances and waste*
- *e. Other, please specify*

N/A

Other, please specify:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A

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?
(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A

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?
(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A

Question 15f: If you ticked option 4) in question 15, which sectors do you think the EU should focus on?
(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A

Question 15g: If you ticked option 5) in question 15, which themes do you think the EU should focus on?
(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A

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

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

- **f. SMEs should have lighter reporting requirements**

Please explain your choice, if necessary:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

While SMEs often have fewer resources or expertise available for such due diligence, they cannot be excluded, especially if operating in sectors at risk. Should the EC decide to introduce minimum requirements, lighter minimum requirements, with exclusions based on specific thresholds, could be adequate solutions to reduce the burden for SMEs. Should such duty of vigilance be implemented in legislation, it needs to clearly consider the impact on EU SMEs and avoid negative consequences. Even if they are outside the scope of legislation, it could happen that SMEs end up being still within the scope as suppliers or subcontractors to larger firms. In these cases, lighter requirements are key.

Finally, reporting exemptions should be granted to also avoid excessive burdens on groups, as is the case in the NFRD, which provides that "an undertaking which is a subsidiary undertaking shall be exempted from the obligation of reporting, if that undertaking and its subsidiary undertakings are included in the consolidated management report or the separate report of another undertaking" (Article 19a, point 3).

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?

a. *Yes*
b. *No*
c. *I do not know*

- **a. Yes**

Question 17a: What link should be required to make these companies subject to those obligations and how (e.g. what activities should be in the EU, could it be linked to certain turnover generated in the EU, other)? Please specify.
(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

The competitiveness of EU-based companies should be protected. Being based outside the EU should not be a competitive advantage from a regulatory perspective.

Question 17b: Please also explain what kind of obligations could be imposed on these companies and how they would be enforced.
(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A

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?
a. Yes
b. No
c. I do not know

- **a. Yes**

Please explain:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

In the absence of globally agreed standards, competitors not subject to due diligence duties may step in, ending up in a situation where European companies suffer competitive disadvantages while the violation of sustainability goals continues to exist. Therefore, Insurance Europe would strongly advocate globally agreed standards on due diligence requirements.

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

- **a. Judicial enforcement with liability and compensation in case of harm caused by not fulfilling the due diligence obligations**
- **d. Other**

Please provide explanation:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

The insurance industry is of the opinion that it is important to keep in mind the significant local differences in each EU member state. Any enforcement mechanism should apply proportionately.

Question 3, point (a) lists a number of drawbacks arising from the introduction of mandatory due diligence requirements. Insurance Europe would underline that direct sanctions — irrespective of whether they are based on liabilities that do not reasonably fall within the company's responsibilities or penalties imposed by supervisory authorities — can result in unintended consequences. For example, these can contribute to decisions to withdraw business from markets with an unclear record on human rights and environmental issues. While this could be the objective, the timing and the consequences should be carefully evaluated.

In addition, apart from the potential ramifications for the competitiveness of European undertakings, it may be worth considering if a disengagement of undertakings is really helpful to improve the situation in these jurisdictions.

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

a. Yes
b. No

- **b. No**

Section IV: Other elements of sustainable corporate governance

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?

- *a. I strongly agree*
- *b. I agree to some extent*
- *c. I disagree to some extent*
- *d. I disagree*
- *e. I do not know*
- *f. I do not take a position*

- **d. I disagree**

Please explain:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

There is no "one size fits all" solution. All companies have different stakeholders and they will therefore need to assess which stakeholders need to be represented in engagement/outreach strategies. It is thus important that each company is free to determine which stakeholders are most relevant to its activities and decide the best ways to organise dialogue with them.

It is a natural and essential component of directors' duties that they consider the interests of stakeholders as well as all material risks. Based on current experience, corporate directors already include stakeholder interests in their decision-making, demonstrating that there is no need for regulating this area. The industry is concerned that legal requirements would increase the administrative burden and jeopardise the competitiveness of European undertakings in the global market.

Question 20b: If you agree, which stakeholders should be represented? Please explain.
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A

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

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

Other, please specify:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

The EC should acknowledge and promote best practices by companies to organise effective dialogue with their stakeholders through a variety of own-initiatives. However, it is important that companies have the freedom to choose the dialogue mechanisms most appropriate to their specific circumstances and activities. Examples include advisory committee, roadshows, direct dialogue, bilateral meetings, internal mechanisms, partnerships, co-innovation and panels.

Remuneration of directors

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

Question 21: Please rank the following options in terms of their effectiveness to contribute to countering remuneration incentivising short-term focus in your view.
This question is being asked in addition to questions 40 and 41 of the Consultation on the Renewed Sustainable Finance Strategy the answers to which the Commission is currently analysing.

	Ranking 1-7 (1: least efficient, 7: most efficient)
Restricting executive directors' ability to sell the shares they receive as pay for a certain period (e.g. requiring shares to be held for a certain period after they were granted, after a share buy-back by the company)	
Regulating the maximum percentage of share-based remuneration in the total remuneration of directors	
Regulating or limiting possible types of variable remuneration of directors (e.g. only shares but not share options)	
Making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration	
Mandatory proportion of variable remuneration linked to non-financial performance criteria	
Requirement to include carbon emission reductions, where applicable, in the lists of sustainability factors affecting directors' variable remuneration	
Taking into account workforce remuneration and related policies when setting director remuneration	
Other option, please specify	***X***
None of these options should be pursued, please explain	

Please explain:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

The industry fully agrees that companies should integrate the long-term interests of their stakeholders in their decision-making processes and that the remuneration policies may constitute an adequate tool to align these interests with companies' business strategy. However, a one-size-fits-all approach would ignore the differences in sustainability risks and factors associated with various companies' business models and would not contribute to enhanced stakeholder engagement. Should the EC decide to implement any blanket provisions on remuneration, such provisions should not jeopardise other functions of remuneration policy.

The current regulation of insurance companies — which applies to undertakings beyond the scope of the Shareholders Rights Directive (SRD) — effectively ensures a balanced approach by empowering competent authorities to address remuneration principles in the supervisory process. Indeed, insurance regulation for the remuneration of directors and certain staff levels (key function holders and individuals whose professional activities have a material impact on the undertaking's risk profile) is already aligned with long-term and sustainability goals while also being aligned to other key objectives of insurance supervision (ie, policyholder protection, financial stability).

According to the Solvency II Delegated Regulation ((EU) 2015/35) article 275, remuneration policies should already include non-financial criteria: "*financial and also non-financial criteria shall be taken into account when assessing an individual's performance*". In addition, variable remuneration is subject to a deferral period of no less than three years. It should be noted that the Solvency II framework is regularly updated and an EC proposal to better integrate sustainability into the framework is already tabled. If implemented, it already requires consistency in the remuneration policies of insurance undertakings, meaning that non-financial performance ought to be part of remuneration assessments, along with other relevant factors, such as financial performance. EIOPA submitted its opinion to the EC that the supervision of remuneration principles in the insurance sector explicitly names ESG criteria as a benchmark for the qualitative performance assessment.

Enhancing sustainability expertise in the board

Current level of expertise of boards of directors does not fully support a shift towards sustainability, so action to enhance directors' competence in this area could be envisaged (Study on directors' duties and sustainable corporate governance).

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

- *a. Requirement for companies to consider environmental, social and/or human rights expertise in the directors' nomination and selection process*
- *b. Requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise*
- *c. Requirement for companies to have at least one director with relevant environmental, social and/or human rights expertise*
- *d. Requirement for the board to regularly assess its level of expertise on environmental, social and/or human rights matters and take appropriate follow-up, including regular trainings*
- *e. Other option, please specify*
- *f. None of these are effective options*

- **f. None of these are effective options**

Please explain:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

Sustainability competence cannot be defined in absolute terms, as it relies on the context for each company. The need for sustainability competence differs between sectors, for example, and it can be achieved in different ways. There are no formal qualifications that are commonly agreed and available to verify such skills or knowledge. While Insurance Europe would agree with encouraging companies to assess the level of expertise of their boards and management on a non-binding basis, flexibility should be preserved.

Share buybacks

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

Question 23: In your view, should the EU take further action in this area?

a. I strongly agree
b. I agree to some extent
c. I disagree to some extent
d. I disagree
e. I do not know
f. *I do not take a position*

- **d. I disagree**

Question 23a: If you agree, what measure could be taken?
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A

Question 24: Do you consider that any other measure should be taken at EU level to foster more sustainable corporate governance?
If so, please specify:
(5000 character(s) maximum, including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A

Section V: Impacts of possible measures

Impact of the spelling out of the content of directors' duty of care and of the due diligence duty on the company

Question 25: 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 (lowest impact) – 10 (highest impact)? 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.

N/A

Estimation of impacts on stakeholders and the environment

Question 26: 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).*

(5000 character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.)

N/A