

Transparency register number: 270408511443-95

**France Invest's response to the European Commission's  
Consultation on Sustainable Corporate Governance**

*Established nearly 40 years ago, France Invest brings together venture capital, private equity, infrastructure and private debt teams based in France, as well as the associated professions which support them. Its membership currently counts 340 management firms and 170 associate members.*

*Private equity supports unlisted companies for a fixed period of time and provides them with the equity capital, through the acquisition of minority or majority stakes in their capital, needed to finance growth and transformation projects. It supports the creation of start-ups (venture capital), participates in the growth and transformation of many regional SMEs and mid-caps (growth capital) and contributes to the transfer of companies (replacement capital).*

*France Invest's members represent one of the main growth drivers for the French and European economy and support a significant portion of employment in France and Europe. In 2019, its members raised 41 bn EUR to finance companies, both through equity and debt, and infrastructure projects, over the coming 5 years. French private equity is no1 in the EU27 in terms of funds raised, capital invested, and number of companies funded. About half of the funds raised by French private equity players come from abroad, and European companies, in particular start-ups and SMEs, are the main recipients of their investments. In 2018, companies backed by French private equity created 75,000 jobs.*

*France Invest is a member of Invest Europe and shares the views expressed in the Association's response to the Commission's consultation. Our response takes particular account of the specificities of the French market.*

**General comments**

- [EU intervention on sustainable corporate governance](#)
  - The terms used in any new framework should be precisely defined. We understand "corporate directors" as referring to non-executive members of supervisory bodies who are primarily responsible for defining the company's

strategy and/or controlling the management and we understand “management” as referring to the persons in charge of the operation of the company.

- An EU legal framework on due diligence duty (including considerations of human rights violations, environmental pollution and climate change) is needed. However, its introduction should be timely ((post) crisis context). In addition, it should take into account existing EU (e.g. Disclosure, Taxonomy Regulations) and national (PACTE law) regulations as well as self-regulation and best practices. Last, but not least, it should be proportionate.
- Duty of care
  - Most directors’ duties are already enshrined in existing European Regulations.
  - Companies should remain free to determine which stakeholders are most relevant to their activities and to decide how to organize dialogue with them.
  - Shareholders, employees and customers may be considered as priority stakeholders. It should be clarified how stakeholders’ interests should be weighted compared to those of shareholders.
  - Directors owe fiduciary duties to the company itself and not to third parties. Any new EU initiative should not lead to personal liability for directors and managers with respect to the impacts of the company on its stakeholders.
- Due diligence duty
  - As regards the content of such possible corporate due diligence duty, we support a “Minimum process and definitions approach and suggest reducing the burden on smaller companies.
  - 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 existing European legal framework already provides for rules regarding remuneration structures.
  - It would not be appropriate for EU legislation to impose selection criteria for their Boards.

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

### Background:

*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?

Please choose between: (only one option possible)

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

Please provide reasons for your answer (maximum 5,000 characters).

First and foremost, we would like to highlight that some notions referred to in the consultation should be clarified. More specifically, we understand “corporate directors” as referring to non-executive members of supervisory bodies who are primarily responsible for defining the company’s strategy and/or controlling the management and we understand “management” as referring to the persons in charge of the operation of the company.

**Yes, we agree that stakeholder interests - including human rights violations, environmental pollution and climate change considerations - are relevant to the financial performance of companies in the long term.** We believe that companies and their directors should take account of these interests in corporate decisions alongside financial interests of shareholders.

We would like to recall that **work has already been undertaken at EU level, in particular in relation to environment and climate.** In particular, in relation to environment and climate, specific legislation has already been adopted and will be reinforced by the measures set out in the EU Green Deal. Examples of existing and future legislation include the European sustainable finance package – e.g. the Taxonomy Regulation and the Non-Financial Reporting Directive. Our

members are currently striving to comply with these numerous and heavy requirements. Therefore, we would like to underline that **any new EU initiative should be consistent with other existing pieces of legislation.**

In addition, **some initiatives have already been taken at national level** and some Member States have already developed requirements in relation to sustainable governance. We believe that such existing obligations should be taken into account when developing any new framework at EU level.

For instance, in France, **the PACTE law, which was introduced in 2019, requires that all French companies are managed in line with their corporate interest, while taking into account social and environmental issues related to their activities.** In addition, French companies, on a voluntary basis, may introduce in their by-laws a statement on their purpose (“raison d’être”) and describe the values they adopt and for which they will allocate resources. Their “raison d’être” is the expression of what is essential to fulfil their corporate purpose and may include public-interest values. French companies may also register as so-called mission businesses (“sociétés de mission”). According to MEDEF, the issue of incorporating social and environmental matters into company decision-making is already broadly accepted and embraced.

**Furthermore, it should be noted that existing practices and self-regulation already contribute to taking these interests into account.**

We would like to take this opportunity to highlight that **the members of France Invest are strongly committed to promoting Environmental, Social and Governance (ESG) factors<sup>1</sup> and are well aware of the importance of taking such considerations onboard.** For instance, France Invest's ESG Commission was launched in 2009 and now counts around 40 members. In its “First Approaches to ESG reporting and due diligence” guide, published in September 2014, the Association issued initial recommendations on integrating ESG issues into the investment process. Today, an increasing number of its members are integrating ESG issues into their investment decisions and business practices and their support for companies.

**Our members have a fiduciary duty and act in the best interest of investors** and strive to meet their demands in terms of ESG. In order to improve their ESG dialogue with investors, France Invest published a number of recommendations to harmonize ESG questionnaires according to a

---

<sup>1</sup> <https://www.franceinvest.eu/en/news-france-invest/act-for-sustainable-growth>

number of principles established by UN PRI and TCFD, among others<sup>2</sup>. Thus, a common repository (definitions and due diligence questionnaire) was adopted and made available to both parties.

**Our members take ESG considerations into account at each stage of the investment's process:** from the purchase's phase of the portfolio company, during the holding period and, finally, during the divestment phase of the undertaking. One of the specificities of venture capital and private equity funds consists in supporting portfolio companies throughout a holding period, which is on average 5 or even 7 years. It is during this holding period that ESG actions can be carried out and monitored.

**The companies supported by our members design corporate governance structures that hold management to account and incentivise long term value creation.** In companies backed by private investors, governance aims to establish a trust-based relationship between shareholders and company managers. Indeed, value creation is conditional upon ensuring equitable direct relationships between shareholders and managers. Shareholder value is an inherently long-term concept as, per definition, shareholders are long term investors.

**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?**

Please choose between: (only one option possible)

- **Yes, an EU legal framework is needed.**
- No, it should be enough to focus on asking companies to follow existing guidelines and standards.
- No action is necessary.

---

<sup>2</sup> <https://www.franceinvest.eu/wp-content/uploads/Rapports-guides/ESG/France-Invest-Commission-ESG-GT5-Projet-de-recommandation-18-octobre-2019.pdf>

- **Do not know.**

**Please explain (maximum 5,000 characters).**

As a preliminary comment, we would like to highlight that **the timing of the introduction of any new requirements on companies should be carefully assessed**. Indeed, in a context of (post) health crisis, companies - in particular small companies – may be fragile and should not be overburdened by additional obligations. They should be given some time to recover before they can adapt to and comply with new requirements.

**We agree that human rights, social and environmental due diligence requirements should be introduced at EU level.**

As explained previously, **legislative work has already been undertaken, both at EU level and national level**. In particular, in relation to environment and climate, specific legislation has already been adopted and will be reinforced by the measures set out in the EU Green Deal. Examples of existing and future legislation include the European sustainable finance package – e.g. the Taxonomy Regulation and the Non-Financial Reporting Directive. In France, the PACTE law, which was introduced in 2019, requires that all French companies are managed in line with their corporate interest, while taking into account social and environmental issues related to their activities. Our members are currently striving to comply with these numerous and heavy requirements. **Therefore, any new EU initiative in the field of sustainable corporate finance should be consistent with other existing pieces of legislation.**

In addition, as explained previously, we would like to point out that **existing practices and self-regulation already contribute to considering human rights, social and environmental due diligence**.

In particular, private equity backed companies design corporate governance structures that hold management to account and incentivise long term value creation.

For example, **in France, self-regulation plays a central role with regards ESG considerations in the venture capital and private equity sector:**

- Upon joining France Invest, its members have to sign the Charter of Commitments for Investors in Growth, which sets out 16 commitments that address economic, social and human, environmental and good governance issues.
- They also have to comply with France Invest's Code of Ethics.

- Progress has recently been made on sharing the value created between shareholders and employees (please refer to France Invest’s guide on “Sharing value creation between shareholders and employees”) and on promoting gender parity in positions of responsibility (please refer to France Invest’s Charter on Gender Equality), both in asset management companies and in the companies they support.
- The Association thus promotes the adoption of governance best practice among its members and the companies they support.

In any case, it is of utmost importance that **any new EU framework should provide for the application of the proportionality principle**. Such a framework should apply to all companies, but with lighter minimum requirements for SMEs, including SMEs backed by private equity and venture capital fund managers. It should be practical and not impose a disproportionate burden on smaller companies. In this context, proportionality should be assessed on the basis of size, capabilities and risk exposures, and resource availability. It is crucial to recognise that smaller companies may have limited supply chain options and limited scope to orchestrate any change. If an extension of the scope of NFRD to smaller undertakings were considered, we suggest allowing smaller undertakings to identify the issues which are most relevant to their activities.

**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? (multiple choice)**

	Yes/No
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	Yes
Contribute effectively to a more sustainable development, including in non-EU countries	Yes
Levelling the playing field, avoiding that some companies freeride on the efforts of others	Yes
Increasing legal certainty about how companies should tackle their impacts, including in their value chain	Yes
A non-negotiable standard would help companies increase their leverage in the value chain	
Harmonisation to avoid fragmentation in the EU, as emerging national laws are different	Yes
SMEs would have better chances to be part of EU supply chains	

Other (please specify)	
------------------------	--

**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? (multiple choice)

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

**Section II: Directors’ duty of care – stakeholders’ interests**

Background:

*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	I do not
--	----------	-----	----------



		relevant	know/I do not take a 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 perimeter is too vague (uncertainty)			X
the interests of persons and communities affected by the company's supply chain perimeter is too vague (uncertainty)			X
the interests of local and global natural environment, including climate already in place (taxonomy)			X
the likely consequences of any decision in the long term (beyond 3-5 years) already in place (taxonomy)			X
the interests of society, please specify	X		
other interests, please specify			

In our opinion, **shareholders, employees and customers are key stakeholders which are well identified, and their interests need to be considered as priority stakeholders by companies.**

Other suggested stakeholders or groups or stakeholders are either **too vague or could be relevant, but at a different level.** For instance, we find it very worrying that it is unclear whether stakeholders' interests would be weighted equally with those of shareholders and, if so, how directors are expected to resolve conflicts between various stakeholder and shareholder constituencies. In addition, we would like to draw the Commission's attention on the need for any legislation to be precise both in terms of definitions and with respect to the specific requirements on companies (e.g. "communities"). Any lack of precision is likely to lead to risk of costly litigation which will give rise to uncertainty.

Moreover, we would like to recall that the complexity and diversity of issues involved in social and environmental issues are such that a large number of actors are involved. **Companies alone should not be responsible for the European Union's international ambitions;** other actors, including especially States, have an important role to play, i.e. the private sector cannot take responsibility for these issues, and the public sector should set an example.

**Question 6 - Do you consider that corporate directors should be required by law (1) to 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, and (3) 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 (maximum 5,000 characters).**

As explained previously, it is of utmost importance that **any new EU framework should provide for the application of the proportionality principle**. Such a framework should apply to all companies, but with lighter minimum requirements for SMEs, including SMEs backed by private equity and venture capital fund managers. It should be practical and not impose a disproportionate burden on smaller companies. In this context, proportionality should be assessed on the basis of size, capabilities and risk exposures, and resource availability. It is crucial to recognise that smaller companies may have limited supply chain options and limited scope to orchestrate any change. If an extension of the scope of NFRD to smaller undertakings were considered, we suggest allowing smaller undertakings to identify the issues which are most relevant to their activities.

Regarding the identification of the company’s stakeholders and their interests, **it is crucial that each company remains free to determine which stakeholders are most relevant to its activities and decides the best ways to organize dialogue with such stakeholders**. In this respect, to help

its members, France Invest published recommendations to facilitate dialogue between management companies and institutional investors on ESG issues.

We would like to underline that **the identification and management of stakeholders' interests should be performed by the company's management**. Indeed, the company's supervisory bodies are not well placed to identify and manage stakeholders' interests. As explained previously, the company's management is in charge of the operation of the company, whereas the company's supervisory bodies are primarily responsible for defining the company's strategy and/or controlling the management. As a consequence, we believe that the company's management is in a better position to identify and manage these issues.

In our opinion, companies should identify **the most relevant stakeholders and the most salient risks** in order to implement actions to address those salient risks in priority, including preventing, mitigating and accounting for how they address their potential impacts. **Any EU initiative requiring companies to carry out an overview of stakeholders' interests should be flexible enough to reflect the specificity of each company's own environment and activities**. It should be recalled that companies may have a myriad of stakeholders who may be impacted directly or indirectly by their activities (including positive impacts). Moreover, certain stakeholders' interests will necessarily be contradictory with others. Therefore a "one size fits all" model is not adapted to cope with this objective. Without a focus on salience and the most significant risks, companies' responses may lack focus and be contradictory.

In particular, **we find it very worrying that it is unclear whether stakeholders' interests would be weighted equally with those of shareholders** and, if so, how directors are expected to resolve conflicts between various stakeholder and shareholder constituencies.

In any case, **companies should not be held responsible for decisions and behaviour of third parties** (e.g. suppliers and/or subcontractors) **along the whole value chain**. **Any new EU initiative should not lead to personal legal liability for directors and managers with respect to company's impacts on stakeholders**. It is a long-standing principle of company law that directors hold fiduciary duties to the company itself and not to third parties. Any liability for failing in relation to a company's activities should be borne by the company itself and not its directors.

**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, i.e. human rights, social, health and environmental impacts are identified, prevented and addressed?**

Please choose between: (only one option possible)

- 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

Please explain (maximum 5,000 characters).

We do not support any legal obligation for corporate directors to set up procedures and measurable targets to ensure that possible risks and adverse impacts on stakeholders are identified, prevented and addressed. Indeed, corporate directors are not responsible for settings procedures, it is the role of the management of the company.

Furthermore, given the variety of size, activity and geographical scope of European companies, any new EU initiative should allow companies complete flexibility to decide whether and which procedures and targets in this area are appropriate to their business.

In addition, as explained previously, we would like to recall that, in relation to environment and climate, specific legislation has already been adopted at EU level and will be reinforced by the measures set out in the EU Green Deal. Examples of existing and future legislation include the European sustainable finance package - containing the Taxonomy Regulation and related delegated acts, the Non-Financial Reporting Directive and associated guidelines on greenhouse gas reporting - the Emission Trading Scheme, the Environmental Liability Directive and future guidelines on environmental damage, and the Industrial Emissions Directive. Thus, methodological consistency with other existing or under discussion obligations is essential.

**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?

Please choose between: (only one option possible)

- 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**

Please provide an explanation or comment (maximum 5,000 characters).

**We do not share the view that corporate directors focus on the short-term financial interests of shareholders.** Indeed, as explained previously, shareholder value is an inherently long-term concept, in particular for venture capital and private equity, where shareholders are per definition long term investors.

Moreover, **companies may have a myriad of direct and indirect stakeholders** (ranging from employees to customers, civil society including NGOs and local communities, business partners, public authorities, etc.). Certain stakeholders' interests will necessarily be contradictory with others and balancing the interests of all stakeholders may prove practically challenging, if not impossible.

In particular, **we find it very worrying that it is unclear whether stakeholders' interests would be weighted equally with those of shareholders** and, if so, how directors are expected to resolve conflicts between various stakeholders and shareholder constituencies.

In any case, **companies should not be held responsible for decisions and behaviour of third parties** (e.g. suppliers and/or subcontractors) **along the whole value chain.**

Besides, **any new EU initiative should not lead to personal legal liability for directors with respect to company's impacts on stakeholders.** It is a long-standing principle of company law that directors hold fiduciary duties to the company itself and not to third parties. Any liability for failing in relation to a company's activities should be borne by the company itself and not its directors.

**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? (maximum 5,000 characters)**

**The majority of directors' duties – e.g. act in good faith in the best interests of the company, exercise skill and care and avoid conflicting interests - are already enshrined in existing European Regulations.** We do not see any merit in introducing new legislative measures in this respect.

Moreover, **we are concerned that the proposed approach could place a personal burden on directors, rather than on the company.**

Any further EU initiative should not lead to personal legal liability for directors and officers with respect to company's impacts on stakeholders. **Directors only owe fiduciary duties to the company itself and not to third parties.** Placing an obligation on directors to pursue both the company's interest and diverse external stakeholders' interests, which may be contradictory, would generate conflicting situations. It would therefore not be practicable nor acceptable for directors to face personal liability. Likewise, it would not be economically realistic for directors to bear liability for corporate-scale damages. Any liabilities for failings in relation to a company's activities should therefore be borne by the company itself and not its directors.

**How could these possible risks be mitigated? Please explain. (maximum 5,000 characters)**

In order to mitigate this possible risk, we recommend that any new requirements should focus on "reasonable effort", rather than introducing an obligation of results.

Besides, we would like to reassert our recommendation for the EU framework to provide for the application of the proportionality principle.

**Where directors widely integrate stakeholder interest into their decisions already today, did this gather support from shareholders as well? Please explain. (maximum 5,000 characters)**

As reported by MEDEF, the French experience shows that the integration of stakeholders' interests into company decision-making received support from shareholders and investors.

Indeed, **investors value positively companies which conduct their business taking into account stakeholders' interests and adopt a long-term perspective;** such companies minimise climate, transition and reputational risks, and they are likely to be more sustainable and responsive to changing needs of consumers.

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

**Please choose between: (only one option possible)**

- 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

Please explain. (maximum 5,000 characters)

Stating that companies do not often have a strategic orientation on sustainability risks does not reflect the reality and the various levels of companies' integration of sustainability into their strategy. In fact, companies do integrate ESG factors, because they are subject to legal obligations (as explained previously, European and national legislations already exist in this respect) or because they are committed to do so.

For instance, the Holroyd report<sup>3</sup> published in July 2020 shows that **French companies are at the forefront of taking ESG factors into consideration**. For instance:

- French companies have produced non-financial reporting since 2001. In this context, a benchmark of the main financial markets, produced by I4CE, Climate KIC and PwC, calculates a publication score of 77% for companies listed in Paris in terms of non-financial reporting. In addition, French companies and groups of more than 5,000 employees in France or 10,000 employees worldwide are subject to a duty of care.
- In December 2015, at the international climate conference in Paris, French financial companies made a commitment to adapt their activities to meet the objective of limiting global warming to a maximum of 1.5°C set by the Paris agreement signed at the end of the summit. In July 2019, the representatives of the Paris financial centre made further ambitious commitments regarding the timing of the exit from coal-related activities. All actors will have to present an individual coal exit strategy, whose progress will be measured each year.

As described previously, **French venture capital and private equity players are strongly committed to promoting Environmental, Social and Governance (ESG) factors<sup>4</sup> and are well aware of the importance of taking such considerations onboard**. They have taken numerous initiatives in this respect, sometimes ahead of international organisations. For example, the

<sup>3</sup> [https://minefi.hosting.augure.com/Augure\\_Minefi/r/ContenuEnLigne/Download?id=90AA3BA2-50B8-4E96-BAE2-769EACCA0E8A&filename=Rapport%20d%27Alexandre%20Holroyd\\_Choisir%20une%20finance%20verte%20au%20service%20de%20l%E2%80%99Accord%20de%20Paris.pdf](https://minefi.hosting.augure.com/Augure_Minefi/r/ContenuEnLigne/Download?id=90AA3BA2-50B8-4E96-BAE2-769EACCA0E8A&filename=Rapport%20d%27Alexandre%20Holroyd_Choisir%20une%20finance%20verte%20au%20service%20de%20l%E2%80%99Accord%20de%20Paris.pdf)

<sup>4</sup> <https://www.franceinvest.eu/en/news-france-invest/act-for-sustainable-growth>

Climate Initiative (iC20) was launched by 5 French private equity funds at the COP21 in 2015, under the banner “2020 Carbon Initiative”, which turned into the International Climate Initiative when it was adopted by the PRI in 2018, becoming an international reference<sup>5</sup>.

## **Enforcement of directors’ duty of care**

### Background:

*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. (maximum 5,000 characters)**

Directors owe a legal duty of care (fiduciary duty) to the company. **It is not appropriate to require directors to have a legal duty of care to stakeholders.** Any such duty of care to stakeholders is and should be held by the company itself rather than its directors. In any case, not all stakeholders should have the same rights (if any) as to the enforcement of directors’ duty of care.

It should be noted that, through dialogue and engagement, shareholders have some tools to ensure that stakeholders’ interests are taken into account by companies, e.g. voting against the election of a director or proposing new board members.

In addition, a company's obligation towards third parties should be above all an obligation of transparency, through publicly available reporting on its practices.

---

<sup>5</sup> <https://www.franceinvest.eu/wp-content/uploads/Rapports-guides/Act-for-Sustainable-Development-2010-2030.pdf>



We would like to take this opportunity to point out that one of the specificities of venture capital and private equity funds consists in supporting portfolio companies throughout a holding period, which is on average 5 or even 7 years, and operate over the long term.

**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. (maximum 5,000 characters)

In our opinion, placing responsibilities on directors will lead to **increased insurance costs for companies**, as they will seek to insure the risks borne by the members of their boards.

Also, it should be reminded that directors are human beings and that **boards'/companies' responsibilities should not be borne by individuals**.

**Question 13 - Do you consider that stakeholders, such as 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?**

Please choose between: (only one option possible)

- 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

Please explain your answer. (maximum 5,000 characters)

Any new EU initiative should not lead to personal legal liability for directors with respect to company's impacts on stakeholders. **Directors only owe fiduciary duties to the company itself and not to third parties, such as external stakeholders**. Any liabilities for failings in relation to a company's activities should be borne by the company itself and not its directors.

**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.**  
(maximum 5,000 characters)

### Section III: Due diligence duty

#### Background:

*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 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. (maximum 5,000 characters)

**We broadly agree with the proposed definition.**

We believe that **the duty of due diligence should focus on the activities on which companies have a reasonable level of control**, i.e. the company’s own operations, the activities of the companies it controls and of its first-tier contractors and suppliers. **It would not be appropriate to cover the whole value chain**, because that would disproportionately expose companies to liability, for acts over which they have no control, including for how their products are used.

More generally, as explained previously, we believe that **the timing of the introduction of any new requirements on companies should be carefully assessed**. Indeed, in a context of (post) health crisis, companies - in particular small companies – may be fragile and should not be overburdened by additional obligations. They should be given some time to recover before they can adapt to and comply with new requirements.

In addition, **we would like to reassert the need for consistency of any new framework with existing regulations (e.g. Taxonomy) and for proportionality.**

**Question 15** - Please indicate your preference as regards the content of such possible corporate due diligence duty (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:

- Options 1, 2 and 3 are horizontal, i.e. cross-sectorial and cross-thematic, covering human rights, social and environmental matters. They are mutually exclusive.
- Options 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.

	Yes/No (only 1 option possible)
Option 1 - “Principles-based approach”: A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These should be applicable across all sectors. This could be complemented by EU-level general or sector specific guidance or rules, where necessary.	
Option 2 - “Minimum process and definitions approach”: The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or	Yes

further rules, where necessary.	
Option 3 - “Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues”. This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.	
Option 4 - “Sector-specific approach”: The EU should continue focusing on adopting due diligence requirements for key sectors only.	
Option 5 – “Thematic approach”: The EU should focus on certain key themes only, such as for example slavery or child labour.	
None of the above, please specify.	

**Question 15a** - If you have chosen option 1, 2 or 3 in Question 15 and you are in favour of combining a horizontal approach with a theme or sector specific approach, please explain which horizontal approach should be combined with regulation of which theme or sector? (maximum 5,000 characters)

**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. (maximum 5,000 characters)

**Question 15c** - If you ticked option 2) or 3) in Question 15, please indicate which areas should be covered in a possible due diligence requirement (multiple choice).

	Yes/No
Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)	Yes
Interests of local communities, indigenous peoples’ rights, and rights of vulnerable groups	No
Climate change mitigation	Yes
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	Yes

Other, please specify	
-----------------------	--

**Question 15d** - If you ticked option 2) in Question 15 and with a view to creating legal certainty, clarity and ensuring a level playing field, what definitions regarding adverse impacts should be set at EU level? (maximum 5,000 characters)

**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? (maximum 5,000 characters)

**Question 15f:** If you ticked option 4) in Question 15, which sectors do you think the EU should focus on? (maximum 5,000 characters)

**Question 15g** - If you ticked option 5) in Question 15, which themes do you think the EU should focus on? (maximum 5,000 characters)

**Question 16** - How could companies' - in particular smaller ones' - burden be reduced with respect to due diligence? Please indicate the most effective options (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.

	Yes/No (multiple choice possible)
All SMEs should be excluded	
SMEs should be excluded with some exceptions (e.g. most risky sectors or other)	
Micro and small sized enterprises (less than 50 people employed) should be excluded	Yes
Micro-enterprises (less than 10 people employed) should be excluded	Yes
SMEs should be subject to lighter requirements ("principles-based" or "minimum process and definitions" approaches as indicated in Question 15)	Yes
SMEs should have lighter reporting requirements	Yes
Capacity building support, including funding	
Detailed non-binding guidelines catering for the needs of SMEs in particular	Yes

Toolbox/dedicated national helpdesk for companies to translate due diligence criteria into business practices	
Other option, please specify	
None of these options should be pursued	

**Please explain your choice, if necessary. (maximum 5,000 characters)**

As explained previously, it is crucial that **any new EU initiative should embed the proportionality principle** i.e. it should apply to all companies, but with **lighter minimum requirements for SMEs**, including SMEs backed by private equity and venture capital fund managers.

Proportionality should be assessed on the basis of size, capabilities and risk exposures, and resource availability. It is crucial to recognise that smaller companies may have limited supply chain options and limited scope to orchestrate change. If an extension of the scope of NFRD to smaller undertakings were considered, **we suggest allowing smaller undertakings to identify the issues which are most relevant to their activities.**

**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?**

**Please choose between:**

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

In order to ensure a level playing field, non-EU companies which have significant operations in the EU market should be subject to the same obligations.

**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. (maximum 5,000 characters)**

**Question 17b - Please also explain what kind of obligations could be imposed on these companies and how they would be enforced. (maximum 5,000 characters)**

**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?**

Please choose between:

- Yes
- No
- I do not know

Please explain. (maximum 5,000 characters)

**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 (multiple choice)?

	Yes/No
Judicial enforcement with liability and compensation in case of harm caused by not fulfilling the due diligence obligations	No
Supervision by national competent 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 fines)	No
Supervision by national competent authorities (option 2) with a mechanism of EU cooperation/coordination to ensure consistency throughout the EU	Yes
Other, please specify	

Please provide explanation. (maximum 5,000 characters)

**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?

Please choose between:

- Yes
- No

In case you answered yes, please indicate what type of difficulties you have encountered or have information about. (maximum 5,000 characters)

If you encountered difficulties, how and in which context do you consider they could (should) be addressed? (maximum 5,000 characters)

#### Section IV: Other elements of sustainable corporate governance

##### Question 20 - Stakeholder engagement

Background:

*Better involvement of stakeholders (such as 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?**

Please choose between: (only one option possible)

- 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

Please explain. (maximum 5,000 characters)

In our opinion, there should be no legal requirement at EU level regarding the definition of the scope of a company's stakeholders and how dialogue between them should be organised.



For example, employees occupy a specific and fundamental position in the company, which justifies important rights of information and consultation. For instance, one of the objectives of our members is to share the value created, in particular with employees. In France, value sharing schemes have developed, in particular thanks to the introduction of the PACTE law<sup>6</sup>.

Other categories of stakeholders will require different levels and types of information. Depending on the size and on the level of decentralization of the company considered, dialogue may be set at local, regional, national, European or international level.

Moreover, **in practice, companies may not be able to carry out an exhaustive overview of all their stakeholders' interests.** They can only identify the most relevant stakeholders and prevent, mitigate and account for how they address their impacts.

In addition, **it may be impossible to balance the interests of all the company's stakeholders,** especially in sectors where companies have a myriad of stakeholders. Activities which may have a highly positive impact on one set of stakeholders, or even be crucial for their human rights, could have negative impacts on others.

**Question 20b - If you agree, which stakeholders should be represented? Please explain.**  
(maximum 5,000 characters)

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

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

We would like to draw the attention of the Commission that **the proposed mechanisms are mainly aimed at large groups.** Smaller companies are often in contact with various stakeholders on a local and informal basis.

<sup>6</sup> <https://www.franceinvest.eu/wp-content/uploads/Rapports-guides/Act-for-Sustainable-Development-2010-2030.pdf>

Moreover, we do not understand what stakeholder general meetings refer to.

**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 (Study on directors’ duties and sustainable corporate governance).**

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

**This question is being asked in addition to Questions 40 and 41 of the Consultation on the Renewed Sustainable Finance Strategy the answers to which the Commission is currently analysing.**

**Ranking 1-7 (1: least efficient, 7: most efficient)**

	Ranking (1 to 7)
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.** (maximum 5,000 characters)

It is important to strike the right balance between the aim to better regulate remuneration mechanisms and the need to allow companies define by themselves the most appropriate remuneration structures. One way to achieve this goal is to precisely lay down in the law the overarching principles of remuneration that companies must follow and to impose a high level of transparency on their practices. **We believe that existing EU legislation already contains provisions regarding remuneration structures.** In addition, **soft law and self-regulation also prove efficient to contribute to establish balanced remuneration systems.**

We do not agree with the general statement that current executive remuneration schemes, in particular share-based remuneration and variable performance criteria, promote focus on short-term financial value maximisation. More specifically, **in the venture capital and private equity sector, there is no evidence suggesting that share ownership in private equity contributes to a short-term focus.** In this regard, **we would like to highlight the alignment of interest and long-term focus that the private equity model involves.**

**Question 22 - Enhancing sustainability expertise in the board**

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

**Please indicate which of these options are in your view effective to achieve this objective (multiple choice).**

	Yes/No
Requirement for companies to consider environmental, social and/or human rights expertise in the directors' nomination and selection process	
Requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise	
Requirement for companies to have at least one director with relevant environmental, social and/or human rights expertise	
Requirement for the board to regularly assess its level of expertise on environmental, social and/or human rights matters and take appropriate follow-up, including regular trainings	X
Other option, please specify	
None of these are effective options	

**Please explain. (maximum 5,000 characters)**

In our opinion, **it would not be appropriate for EU legislation to impose selection criteria for their Boards.** It should be up to the Board, which is a collective body, to consider the most appropriate skill set for its membership and that of the Board committees. Indeed, the competence and expertise of the members for the board have to be examined on a case-by-case basis, depending on the company considered.

We understand that the obligation for the board to assess level of expertise is already inherent to the obligations of directors and boards.

#### **Question 23 - Share buybacks**

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

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

**Please choose between: (only one option possible)**

- 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

**Question 23a** - If you agree, what measure could be taken? (maximum 5,000 characters)

**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. (maximum 5,000 characters)

We believe that **sustainable governance should also incorporate the issue of gender diversity among non-executive directors.**

**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.

	Non-binding guidance  Rating 0-10	Introduction of these duties in binding law, cost and benefits linked to setting up/improving external impacts’ identification and mitigation processes  Rating 0 (lowest impact) - 10 (highest impact) and quantitative data	Introduction of these duties in binding law, annual cost linked to the fulfilment of possible requirements aligned with science based targets (such as for example climate neutrality by 2050, net zero biodiversity loss, etc.) and possible reorganisation of supply chains  Rating 0 (lowest
--	---	---	---

			impact) - 10 (highest impact) and quantitative data
Administrative costs including costs related to new staff required to deal with new obligations			
Litigation costs			
Other costs including potential indirect costs linked to higher prices in the supply chain, costs linked to drawbacks as explained in question 3, other than administrative and litigation costs, etc.  Please specify.			
Better performance stemming from increased employee loyalty, better employee performance, resource efficiency			
Competitiveness advantages stemming from new customers, customer loyalty, sustainable technologies or other opportunities			
Better risk management and resilience			

Innovation and improved productivity			
Better environmental and social performance and more reliable reporting attracting investors			
Other impact, please specify			

Please explain. (maximum 5,000 characters)

**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).

(maximum 5,000 characters)

**Contact**

For further information, please feel free to contact Carine Delfrayssi, European and Regulatory Affairs at France Invest, at [c.delfrayssi@franceinvest.eu](mailto:c.delfrayssi@franceinvest.eu) or +33(0)1 47 20 99 79.

\*\*\*