

FERMA's response to the European Commission's public consultation on sustainable corporate governance

9 February 2021

Section 1: FERMA's key messages

Introduction

FERMA welcomes the opportunity to respond to the European Commission's consultation on a proposed initiative on [sustainable corporate governance](#). The long-term sustainability of business is a preoccupation of risk managers, our Members, and we stand ready to contribute our risk-expertise to the Commission's work on this important topic.

The first question of this consultation immediately focuses on 'issues' such as '*human rights violations, environmental pollution and climate change*'. These 'issues' also constitute risks to an organisation. As risk managers, part of our role is to assess the possible risk exposures of our group as well as make and analyse scenarios, and communicate this upwards and outside. Any initiative in the area of sustainable corporate governance will have a direct impact on the risk exposures (or risk profile) of an organisation—the primary concern of the risk manager—which is why it is vital our voice is heard in this topic.

Our processes, such as the Enterprise Risk Management (ERM) framework can be beneficial not only to employees, investors and customers but also to a wider community in terms of reducing the impact and occurrence of damaging events. Such processes also steer thinking away from a short-term perspective, and help map out likely impacts on a wide variety of stakeholders (e.g. supply chain).

Furthermore, as the topic of sustainable corporate governance is inextricably linked to an organisation's risk profile, it is FERMA's view that our function is ideally placed to make a decisive contribution to their organisation's *more* sustainable corporate governance. To complement this, it is important for us that there is a strong risk-management culture at Board-level, which could be enhanced by awareness-raising or training and education.

General comments on the consultation

- Overall, FERMA agrees with the Commission insofar as that companies and their directors should take account of stakeholder interests in corporate decisions.
- However, we are against the implementation of a mandatory duty of supply chain due diligence at EU-level. Here is why:
 - It is our view that existing processes and frameworks such as ERM already encourage companies to look at the 'risks' and 'impact' in companies' operations throughout the supply chain.
 - It is our view that this problem – the possibility that there are adverse impacts on ESG in the supply chain – is best addressed by further encouraging companies to develop and maintain a holistic risk management approach.
 - If the EU wishes to act in this area, FERMA is of the view that guidelines and/or standards would be the best instrument at this stage.

- Regarding taking account of stakeholder interests as part of the Directors’ duty of care, FERMA is of the view that further discussion and analysis is required. Among the key and unanswered questions here are:
 - What is the perimeter of ‘care’ and how is it defined?
 - How are organisations expected to evidence this?
- Regarding due diligence duty, of all the options provided, FERMA most prefers the ‘Minimum process and definitions approach’, with the following remarks:
 - Requirements should be risk-based and proportionate to the nature, scale and complexity of the organisation
 - Due diligence rules should apply to third-country companies
 - Supervision is best led by national competent authorities (NCAs) with an EU coordination mechanism.

Section 2: FERMA's response to the [public consultation on planned initiative on 'Sustainable corporate governance'](#)

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

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

Reasons:

Very broadly speaking, FERMA agrees that companies need to pay due regard to stakeholder interests as well as shareholder interests. It is our view that both financial and non-financial performance should be relevant for companies.

Having a long-term vision should in principle encourage more 'sustainable' business models. And, FERMA is generally supportive of the EU's intention to further embed sustainability into the corporate governance framework.

However, it is absolutely crucial that at EU level there is a consistent messaging on sustainable corporate governance, and clarity about what is expected of companies. FERMA is supportive of the NFRD and appreciates the work done by the Commission on the EU Taxonomy. Consistency across the various initiatives should be ensured to the maximum level.

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

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

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

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

Explain...

As the association representing European Risk Management professionals, FERMA is encouraged to see the idea of using a risk management approach to ESG. However, we are of the view that creating an EU legal framework on supply chain due diligence would be sub-optimal.

FERMA is in favour of encouraging more companies to make use of Enterprise Risk Management (ERM). This framework is a key enabler of risk-sensitive operations, and can contribute to corporate efforts in becoming more sustainable.

More concretely, instead of a legal framework, FERMA urges the Commission to consider providing some non-binding recommendations or 'good practices', accompanied by a guiding principle of "comply or explain". The practices chosen by the companies can be reported in existing reporting requirements (e.g. NFRD), for example. FERMA is at the disposal of the Commission for this exercise.

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

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

Question 3a. Drawbacks

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

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

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

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

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

	Relevant	Not relevant	I do not know/I do not take position
the interests of shareholders	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of employees in the company’s supply chain	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
the interests of customers	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of persons and communities affected by the operations of the company	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of persons and communities affected by the company’s supply chain	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>



	Relevant	Not relevant	I do not know/I do not take position
the interests of local and global natural environment, including climate	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the likely consequences of any decision in the long term (beyond 3-5 years)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
the interests of society, please specify	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
other interests, please specify	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

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

	I strongly agree	I agree to some extent	I disagree to some extent	I strongly disagree	I do not know	I do not take position
Identification of the company's stakeholders and their interests	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

	I strongly agree	I agree to some extent	I disagree to some extent	I strongly disagree	I do not know	I do not take position
Management of the risks for the company in relation to stakeholders and their interests, including on the long run	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Identification of the opportunities arising from promoting stakeholders' interests	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Explanation

FERMA agrees to some extent with the above points only if the duty of care is limited to the Company activity and its perimeter of operations. Being able to manage risks depends crucially on the ability to accurately assess and quantify risks, and therefore high quality data being available is a pre requisite. Lastly, on identifying opportunities we believe this will be idiosyncratic to say the least (differing by country, industrial sector, size of business, etc.) and we do not see the relevance for corporate sustainable governance.

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

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

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

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

Please provide an explanation or comment:

While we agree to some extent, FERMA disagrees that this is an either/or question. As outlined in our explanation in Question 1, we are firmly of the view that financial and non-financial metrics are both relevant for corporations.

It is our view that the interests of ALL stakeholders is misguided, and we would argue that the interests of the MAIN stakeholders would be more appropriate language. A company's MAIN stakeholders in the long term should be responsibility of the Company (Board Level), by defining clear strategies and targets, then cascaded to corporate directors in terms of incentives plans and remuneration.

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?

Risk of delays or extra-costs in performing operational activities.
Risk of misalignment between operational functions and Company targets.

How could these possible risks be mitigated?

By defining clear long-term strategies and targets in regard of non-financial performances (i.e. risk appetite and tolerance thresholds explaining the level of risks Company is willing to take with regard of each non-financial aspect), then cascaded to corporate directors and related incentives plans and remuneration

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

- 1) A Strategic Business Plan, approved by the Board, of many organizations already takes into account the stakeholders' expectations, such as the carbon transition, new market trends, etc.
- 2) Remuneration plan of directors includes also non-financial targets to meet stakeholders expectations
- 3) The Non-Financial Disclosure approved by the Board



4) Non-Financial Targets approved by the Board...

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

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

Please explain:

As above, FERMA broadly supports the notion of encouraging more 'sustainability' at the heart of our system. It is our contention that many organisations have already made considerable shifts to more sustainable strategies, decision-making processes and oversight. However, it is certainly true that more of a move in this direction would be welcome.

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:

No cases to report

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

Please describe:

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

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

Please explain your answer:

The enforcement of directors' duty of care is the responsibility of the Company (i.e. Board level) who defines the targets to achieve and monitors the actions taken. There will increasingly be a move towards more transparency – thanks to the NFRD – and over time the commitment to duty of care will be assessed based on the reporting.

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.

FERMA generally agrees with the above definitions. In particular, we are supportive of the following concepts:

- **reasonable** efforts
- due diligence is inherently **risk-based, proportionate and context specific**
- extent of implementing actions **should depend on the risks of adverse impacts**

These concepts support the adoption of a due diligence duty in line with a company's risk profile and nature of business, as well as with the potential risk exposure associated to its supply chain.

On this vast topic, however, we are concerned what is meant and understood by ‘processes’. FERMA wishes to avoid a tick-box exercise in terms of application and compliance, and urges the Commission to focus on outcomes.

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

horizontal approach (Option 1, 2 or 3) in this question.

- Option 1. “Principles-based approach”: A general due diligence duty based on key process requirements (such as for example identification and assessment of risks, evaluation of the operations and of the supply chain, risk and impact mitigation actions, alert mechanism, evaluation of the effectiveness of measures, grievance mechanism, etc.) should be defined at EU level regarding identification, prevention and mitigation of relevant human rights, social and environmental risks and negative impact. These should be applicable across all sectors. This could be complemented by EU-level general or sector specific guidance or rules, where necessary
- Option 2. “Minimum process and definitions approach”: The EU should define a minimum set of requirements with regard to the necessary processes (see in option 1) which should be applicable across all sectors. Furthermore, this approach would provide harmonised definitions for example as regards the coverage of adverse impacts that should be the subject of the due diligence obligation and could rely on EU and international human rights conventions, including ILO labour conventions, or other conventions, where relevant. Minimum requirements could be complemented by sector specific guidance or further rules, where necessary.
- Option 3. “Minimum process and definitions approach as presented in Option 2 complemented with further requirements in particular for environmental issues”. This approach would largely encompass what is included in option 2 but would complement it as regards, in particular, environmental issues. It could require alignment with the goals of international treaties and conventions based on the agreement of scientific communities, where relevant and where they exist, on certain key environmental sustainability matters, such as for example the 2050 climate neutrality objective, or the net zero biodiversity loss objective and could reflect also EU goals. Further guidance and sector specific rules could complement the due diligence duty, where necessary.
- Option 4 “Sector-specific approach”: The EU should continue focusing on adopting due diligence requirements for key sectors only.
- Option 5 “Thematic approach”: The EU should focus on certain key themes only, such as for example slavery or child labour.
- None of the above, please specify

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

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

- All SMEs should be excluded
- SMEs should be excluded with some exceptions (e.g. most risky sectors or other)
- Micro and small sized enterprises (less than 50 people employed) should be excluded
- Micro-enterprises (less than 10 people employed) should be excluded
- SMEs should be subject to lighter requirements (“principles-based” or “minimum process and definitions” approaches as indicated in Question 15)
- SMEs should have lighter reporting requirements
- Capacity building support, including funding
- Detailed non-binding guidelines catering for the needs of SMEs in particular

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

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?

- Yes
- No
- I do not know

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

Certain turnover generated in the EU or presence of subsidiaries with production sites in Europe.

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

Same obligations as EU Companies.

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

- Yes
- No
- I do not know

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

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

Please provide explanation:

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

- Yes
- No

Section IV: Other elements of sustainable corporate governance

Question 20: Stakeholder engagement

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

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

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

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	<input type="radio"/>	<input checked="" type="radio"/>
Stakeholder general meeting	<input type="radio"/>	<input type="radio"/>
Complaint mechanism as part of	<input type="radio"/>	<input checked="" type="radio"/>

	Is best practice	Should be promoted at EU level
due diligence		
Other, please specify		

Skip Question 21

Question 22: Enhancing sustainability expertise in the board

Current level of expertise of boards of directors does not fully support a shift towards sustainability, so action to enhance directors' competence in this area could be envisaged [18] (Study on directors' duties and sustainable corporate governance).

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

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

Please explain:

It is our view that Board members should have different fields of expertise and we should avoid having a board made of experts as there is the risk to concentrate a specific knowledge in the hands of one person while the board is making collegial decisions. It is important that there is a matrix of competences for board members, which includes, but is not limited to sustainability and risk management skills. For us, it is essential that board members are educated in risk management.

Question 23: Share buybacks

Corporate pay-outs to shareholders (in the form of both dividends and share buybacks) compared to

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

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

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

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

If so, please specify:

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 0-10? 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.	Binding law, external impacts' identification and mitigation processes	Introduction into binding law, annual cost linked to scientific targets and possible reorganization of supply chains
Administrative costs	2	5	10
Litigation costs	0	2	3
Other costs, eg higher prices in supply chain	1	3	6
Better performance	3	4	8



Competitiveness advantages stemming from new customers	2	5	7
Better risk management and resilience	2	5	8
Innovation and improved productivity	0	2	5
Better environmental and social performance	2	5	8
Other impact			

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).