

EU PUBLIC CONSULTATION ON SUSTAINABLE CORPORATE GOVERNANCE

SUBMISSION BY THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS (USCIB)

The United States Council for International Business (USCIB) welcomes the opportunity to offer comments to the EU public consultation to inform its consideration of a possible EU Sustainable Corporate Governance initiative. As global corporate citizens doing business internationally and responsibly, USCIB and its members offer a unique, well-informed and important perspective on the public consultation for several reasons:

- We support the role business can and should play in respecting human rights. USCIB members conduct due diligence in line with the UN Guiding Principles (UNGPs) Pillar 2 Corporate Responsibility to Respect, as well as work in collaboration with governments to address fundamental labor rights.
- USCIB is a recognized global leader in international labor, human rights, and sustainability policy. We play a leading role in the negotiation and adoption of international labor standards as the U.S. Employer Representative to the ILO. We are active in human rights and labor rights policy discussions with U.S. government agencies, and as the U.S. affiliate of the International Chamber of Commerce (ICC), Business at the OECD (BIAC) and the International Organization of Employers (IOE), we bring the views of American business to the multilateral forums and UN bodies.
- USCIB acknowledges the range of views expressed by the business community, including those set out in the Responsible Business Alliance’s Roadmap for European Union Due Diligence, and is especially supportive of the promotion of best-in-class industry due diligence tools and best practices as a way to drive collective leverage.

I. Priority Areas – USCIB Comments

The EU Sustainable Corporate Governance online questionnaire is complex, covering a wide range of areas and exploring changes in established policies and institutions, as well as the addition of new requirements and obligations for companies. It poses many questions, yet answering those questions cannot reflect the reality that any approach taken in one specified area will have in terms of implications for other areas.

For USCIB members, encouraging sustainable corporate governance requires holistic “systems thinking” against the backdrop of existing principles and frameworks. It should

advance innovation and continuous improvement and avoid a one-size-fits-all static framework.

We strongly encourage the EU to gather business and other stakeholder views through actual dialogue and consultation, with due attention to context (such as ongoing impacts and burdens on companies because of the pandemic's economic disruption and ongoing constraints), and existing initiatives and systems, rather than relying on gathering separate data points which may not reflect the total picture and opportunity.

Overall, there is an outstanding issue of treatment of companies that are not domiciled in the EU but are selling into EU markets. Addressing this challenge needs to be thought through, especially in light of the need to maintain a level playing field across all sectors and enterprises, as well as enforceability.

We would welcome an initiative that includes reflection on the inclusion of sustainability risks, impacts and opportunities incorporated in strategy and decisions, as many leading companies already have. In doing so, general principles would be preferable over rigid legal requirements. Flexibility afforded to each company to decide how to include such considerations would be crucial for such general principles to be effective.

Rather than address every element of this broad questionnaire, USCIB comments call out priority areas which we believe to be most relevant to American companies doing business with and in the EU, across a wide range of sectors, and we then pose questions requiring further clarification.

Rule of Law

In the face of government governance gaps in many parts of the world, stakeholders increasingly look to global businesses, with expectations for companies to demonstrate responsible business practices throughout their global supply chain & value chain relationships.

Government corruption, lack of civil service pay, long-standing socio-cultural norms, inadequate institutional capacities, or political instability contribute extensively to decent work deficits, resulting in greater expectations of companies, and obscuring the boundaries between government duty to protect and company responsibility to respect human rights. While many companies are leveraging their supply chains to meet these challenges, shifting the burden from government accountability onto private sector actors is an inadequate and unsustainable solution on its own. The shared goal of the realization of human rights and sustainable practices for everyone everywhere will remain unattainable unless we also holistically address root cause governance issues.

The EU would therefore do more to advance human rights in business by investing in programming that enhances state capacity to pass, implement and enforce laws that align with international human rights and labor standards, including by increasing technical capacity to collect and analyze data. Moreover, post-COVID recovery is an opportunity for EU to tie its

aid, trade, and development funding to make certain changes and use that leverage over recipient countries.

Policy Coherence

Care should be taken to ensure that any new requirements are consistent with existing and authoritative frameworks, in particular the UN Guiding Principles on Business & Human Rights. The UNGPs recognize and support remediation in order to address the longer-term issues stemming from root-cause, national level-issues related to endemic concerns such as rule of law.

A requirement for companies to establish and implement adequate “due diligence” should on the one hand set clear standards (to avoid uncertainty and superfluous litigation risks) and, on the other hand, acknowledge that due diligence is risk-based, proportionate and context-specific, allowing for companies to focus on areas of risk they identify as material. In this regard, we believe that any due diligence should build on existing international frameworks such as OECD Guidance for Responsible Business Conduct and the United Nations Guiding Principles on Business and Human Rights, allowing flexibility for companies in terms of how to implement a due diligence strategy. Proposals should be drafted in a way that is flexible to the context, can evolve with best practices and changing risks and can align with changing global agreements as they evolve.

All care should be taken to avoid the promulgation of rigid approaches, such as the application of tariffs, sanctions or import restrictions that rightly seek to address human rights or labor rights concerns but – due to their rigidity – inadvertently create a disincentive for long-term supply chain engagement, the use in accordance with the UNGPs of leverage in company supply and value chains, and sustainable remediation.

Furthermore, engagement of stakeholders is important to be able to conduct proper due diligence. Involvement of stakeholders including employees should be in line with existing EU and national rules (e.g. on information and consultation of workers) and leave flexibility to employers to determine which stakeholders should be involved and how. Any provisions on workers’ rights inferred through this legislation must not interfere with member states’ social legislation or with collective agreements. In particular, rules regarding the role of trade unions or workers’ representatives should not go further than, duplicate, or disrespect what is already provided for in existing legislation.

Due Diligence vs Directors’ Duty of Care

If well-designed and effective, any enterprise’s due diligence system should not require an additional layer of measures at the BOD level. In light of that, we would suggest this area of potential focus is redundant and should be removed. The emphasis should be on the practical effectiveness of a company’s due diligence framework.

Board of Directors should have a general responsibility for the oversight of the company's ESG performance, including identifying the most relevant stakeholders' interests and deciding upon material risks and opportunities consistent with its statutory duty.

However, flexibility is key as, in general, different stakeholders may have different (and sometimes diverging) interests. Companies' boards are in the best position to make judgments on maximizing business value and identification of the most relevant stakeholders based on the company's business model. In light of this, keeping company boards' ability to exercise judgement under their legal statutory duty is important. Directors should have the flexibility to assess and decide on the important and relevant areas of focus for the long-term interests of the company and consider the biggest impacts on society and environment.

International standards, such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, already effectively focus companies on addressing risks that are connected to the company by its business relationships.

We would like to note that regarding the questions posed in 15c, we view that "Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups" as part of and not separate from effective human rights due diligence.

Coverage of all Companies/Necessity to Assess Impacts and Burdens on SMEs

Many legal developments and proposals with respect to human rights due diligence focus only on large multinational companies. This does not solve the problem that all organs of society are seeking to address.

The design or structure of corporate governance and the respective responsibilities of oversight and management functions should be left to individual companies in accordance with the applicable corporate law.

Regardless of the corporate structure, companies should work to establish and enact mechanisms and procedures enabling identification of the potential risks impacting stakeholders and the environment and, where relevant, to set up (appropriate) targets.

In this regard, a general framework which provides guidelines to companies on setting up adequate procedures and metrics, without limiting the flexibility in judgment and prioritization, could be beneficial. Strenuous administrative requirements and uncertain legal liabilities may have counter-productive effects and may be a deterrent from board service.

The UNGPs are clear that its framework applies to businesses of all sizes and sectors. SMEs represent about 90% of businesses and more than 50% of employment worldwide. In failing to include SMEs, not only are recent legislative developments contradicting the UNGPs, but they are also ignoring the rights of 50% of workers in the formal economy.

Supply Chains

The definition of the “supply chains,” which includes suppliers and subcontractors, does not recognize the many thousands of suppliers a single company may have or the level of visibility, control and/or leverage a single company has over one of its suppliers. While many argue that the financial and power imbalances that exist between global companies and their contractors should provide sufficient pressure on suppliers to comply with human rights obligations, in practice this is not the case. A single supplier may themselves be contracted by hundreds of companies. This means that a single companies’ leverage is diluted. Moreover, suppliers that do not wish to be burdened by compliance measures imposed by western multinationals have several other markets where goods can be sold without scrutiny.

What is more, domestic supply chains require as much, if not more, attention. To illustrate, a [November 2019 report](#) by the ILO, IOM, UNICEF and the OECD found that the between 75 and 90 percent of incidents of child and forced labor have no connection to global supply chains but occur in domestic markets. This is precisely why ensuring country-level rule of law should be a primary goal.

We also note that disclosure requirements can be a double-edged sword. While we support the need for transparency, businesses are often punished for publicly identifying human rights violations within their supply chains. This does more to foster a ‘cut and run’ or ‘blacklist’ approach, whereas remediation, capacity building and continuous improvements should be our shared values.

II. Questions for Clarification

The amount of money, time and resources spent in fulfilling legal obligations competes for and risks subtracting money, time and resources from addressing actual human rights impacts on the ground. How will the EU conduct a cost-benefit analysis of the deployment of private sector resources towards its proposed measures and potential impact on effectiveness and impact in light of redeployed resources.

Whereas an EU framework could be beneficial where it promotes the principle of harmonization across EU member states, what will be done to reduce reporting burdens by companies who are today filling out an increasing number of due diligence reports for several different countries? Will there be a principle of reciprocity introduced to thoughtfully respond to and alleviate this?

Has the EU undertaken any assessment of the viability and impacts some of the proposed elements identified in the questionnaire will have for companies from developing countries, in particular for SMEs?