



aba response to the EU Commission's Consultation on Sustainable Corporate Governance

(08 February 2021)

The **aba Arbeitsgemeinschaft für betriebliche Altersversorgung e.V.** - is the German association representing all matters concerning occupational pensions in the private and public sector. The aba has 1,100 members including corporate sponsors of pension schemes, IORPs, actuaries and consulting firms, employer associations and unions, as well as insurance companies, banks and investment managers. According to our statutes, our mission is to represent existing schemes as well as to expand coverage of occupational pensions independent of vehicle. We are a member of the European Association [PensionsEurope](#).

Please do not hesitate to contact us if you have any questions:

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In this document we only list the questions we responded to. For all questions and the explanatory text, please see the [PDF linked on our website](#).

General comments

We welcome the opportunity to respond to this consultation on sustainable corporate governance.

From the text of the consultation it was unclear to us, whether IORPs would be affected as investors of those companies subject to new governance requirements, or whether they themselves would also be subject to those new requirements. In responding to this consultation, we have therefore considered both perspectives: first, IORPs are of course investors and need information about the companies they invest in. The need for extensive and sound ESG information is growing with the introduction of the Disclosure Regulation, which requires financial market participants¹ to publish information about the assets they are invested in.

Second, IORPs are also companies and subject to governance requirements under the [IORP II Directive](#) (see Chapter 1 “system of governance”; and its national transpositions). Some of the questions we have therefore answered from the perspective of a company potentially subject to new governance requirements. For IORPs closely related to a sponsoring employer, the boundaries between those two perspectives are blurred: the governance requirements for the sponsor are likely to have an impact on the IORP as well.

From our perspective it would not be beneficial to include IORPs in horizontal legislation with the aim to improve governance. Since IORPs already have governance requirements in the IORP II Directive, these should be amended if necessary (this could be done for all relevant (financial) sectors). In the case of IORPs, national law makers could then tailor the national requirements to their specific circumstances.

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

Question 1: Due regard for stakeholder interests¹, 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.

Please provide reasons for your answer:

As our European umbrella organization PensionsEurope has pointed out before, companies and their directors should take account of the interests of stakeholders including employees and customers, covering issues such

¹ IORPs are considered financial market participants by the Disclosure Regulation (Art. 2).

as human rights violations, environmental pollution and climate change in corporate decisions alongside financial interests of shareholders since these issues are relevant to the financial performance of the company in the long-term. However, the cumulative impacts of existing measures need to be carefully assessed and monitored before considering additional initiatives.

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.

Please explain:

Generally, we would like to point out there are international guidelines in place for due diligence (e.g. OECD Due Diligence Guidance for Responsible Business Conduct).

Turning to IORPs in particular, the IORP II Directive addresses governance, including ESG aspects. If it is decided that the governance rules for IORPs should be adjusted, it should be done by amending the IORP II Directive.

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**

Other, please specify:

In some areas, an EU legal framework for issues around governance already exists (e.g. as is the case for IORPs in the IORP II Directive). It seems sensible to adjust the legislation in these areas rather than introducing something completely new.

The IORP II Directive already includes a number of Articles on governance (including ESG aspects). If changes are introduced, these should be made by amending those articles, rather than developing a horizontal Directive alongside them. This would allow for the best possible integration of the new rules with the existing rules, and allow Member States to implement the changes as they see fit for their IORPs.

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**

Other, please specify:

This new legislation could lead to unnecessary cost. In case of IORPs, additional costs might ultimately be borne by the beneficiaries in the form of lower occupational pensions. While additional cost might be justified, we urge the Commission to bear this in mind.

Small companies are often hit disproportionately by additional costs. They should therefore be subject to non-binding guidelines to avoid onerous administrative burden. Some might opt for strict supply chain due diligence for societal / governance reasons. Others might find it easier to secure capital market funding when following strict supply chain due diligence. A voluntary approach therefore seems adequate for small companies.

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

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

	Relevant	Not relevant	I don’t 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		x	
the interests of persons and communities affected by the company’s supply chain		x	
the interests of local and global natural environment, including climate	x		
the likely consequences of any decision in the long term (beyond 3-5 years)			x
the interests of society, please specify	x		
other interests, please specify	x		

- the interests of society, please specify:

IORPs fulfill an important role: they provide their members with income in retirement. This alleviates the burden on the state pension (first pillar) and potentially also on measures such as social assistance in old age. For the long-term success of IORPs it is important to have the trust, acceptance and support of society, which is then likely to be mirrored in an adequate legal framework for IORPs, allowing them to fulfill their role as “pension institutions with a social purpose that provide financial services” (Recital 32 of the IORP II Directive).

- other interests, please specify:

Since we are responding from the perspective of an IORP, the answers differ from e.g. those for a company producing goods. The interests of persons and communities affected by the company's supply chain and the interests of local and global natural environment are unlikely to be affected by the operation of an IORP – we have therefore stated that their interests are not relevant. However, IORPs have other stakeholders whose interests are important to their long-term success: sponsoring employers, members and beneficiaries.

This shows that it is important to tailor any potential legislation about governance to the type of company subject to the legislation.

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?

No response given, explanation below.

Please explain:

Some of these issues are addressed in the own risk assessment laid down in Art. 28 of the IORP II Directive (see point (h) "where environmental, social and governance factors are considered in investment decisions, an assessment of new or emerging risks, including risks related to climate change, use of resources and the environment, social risks and risks related to the depreciation of assets due to regulatory change.").

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

Please explain:

It is not clear to us what is meant by "adequate procedures and where relevant, measurable (science-based) targets to ensure that possible risks (...) are addressed". Without understanding the idea behind this, how it would be applied and what that would mean in practice, it is not possible for us to answer the question. Setting and measuring these types of impact is very complex and often also closely related to ethical and therefore normative issues.

Nevertheless, we would like to point out that in this context both the Disclosure Regulation and the Taxonomy Regulation should be considered in all further developments in order to connect potential requirements with existing legislation.

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:

We understand that this question is being asked with listed companies in mind which report on a quarterly basis. We therefore respond from the perspective of an investor and strongly agree with the call for a longer-term focus.

We would also like to emphasise that IORPs by their nature – providing services and benefits over several decades to their members – focus on the long-term.

Finally, we would like to point out that the understanding what is “short-term” and what is “long-term” depends a lot on the context. It is therefore difficult / impossible to capture these concepts sensibly in a single definition for all companies.

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?

Not so much a risk, but rather a potential barrier or obstacle to focusing more on the long-term: the surrounding legislation needs to support the focus on the longer-term.

How could these possible risks be mitigated? Please explain.

Both existing and new legislation should be assessed as to whether it sets requirements and / or incentives compatible with a focus on the long-term.

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

Generally we would expect an increase in shareholder engagement due to developments such as the Shareholder Rights Directive and other ESG initiatives.

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:

In Germany, many IORPs have employee (in addition to employer) representatives on their board. Often, employee representatives push for the consideration of social issues.

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:

In Germany, co-determination is enshrined in law (Gesetz über die Mitbestimmung der Arbeitnehmer).

Shareholder engagement can be another lever to enforce the directors' duty of care.

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.

See question above; in Germany employees are represented in the Board of the companies defined in Art. 1 of the Co-determination law (in those with specific legal forms and more than 2.000 employees).

Section III: Due diligence duty

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

We note that the definition is very similar to the OECD definition of due diligence; to us this approach seems sensible.

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

Please specify:

Legislation on governance already exists at EU level for various sectors. If adjustments are needed in this area, a sector-specific approach seems sensible. Different companies face different challenges in terms of due diligence. This varies e.g. between companies producing goods and those providing services, but also e.g. between different financial market actors.

We therefore suggest to amend relevant sectoral legislation (for IORPs: the IORP II Directive) to incorporate requirements on sustainable corporate governance. This would have the advantage of building on existing legislation in each area; while, where necessary, allowing national law makers to tailor the requirements to their circumstances.

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.

Amending the IORP II Directive and the following national transpositions are unlikely to require complementary guidance from the EU level. (It is not entirely clear to us what is meant here: who would issue the complementary guidance?).

Question 15f: If you ticked option 4) in question 15, which sectors do you think the EU should focus on?

We suggest to amend sector legislation (for IORPs: the IORP II Directive) to incorporate requirements on sustainable corporate governance. This would have the advantage of building on existing legislation in each area; while, where necessary, allowing national law makers to tailor the requirements to their circumstances.

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

Please explain your choice, if necessary

As our European umbrella organisation PE has pointed out before, Small companies should be subject to non-binding guidelines to avoid onerous administrative burden. Some might opt for strict supply chain due diligence for societal / governance reasons. Others might find it easier to secure capital market funding when following strict supply chain due diligence. A voluntary approach therefore seems adequate for small companies.

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:

We partly do not understand the response options: which national authorities does this refer to?

Involving auditors should be considered as another option.

Section IV: Other elements of sustainable corporate governance

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

Please explain.

As stated above, in German companies employees are often represented on the Board. In IORPs, employer representatives are often joined by employee representatives in the Board.

Engagement with stakeholders should not be mandatory, but rather be fostered where a director wishes to pursue it.

VM/SD 09 February 2021