

BANKTRACK

BANKTRACK'S SUBMISSION TO THE EU COMMISSION'S CONSULTATION ON 'SUSTAINABLE CORPORATE GOVERNANCE'

FRIDAY 5TH FEBRUARY, 2021

Note that BankTrack is focused in our human rights work on advocating for private sector banks to fully implement the UNGPs, and our comments in this questionnaire will focus on the role of these banks.

Section I: Need and objectives for EU intervention 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.

Please provide reasons for your answer:

Yes, companies including financial institutions, should take environmental, social and governance issues into account and it is critical that legislative and regulatory provisions require this. Significant changes are urgently needed to the dominant economic and business models based on the pursuit of endless growth and the prioritisation of short-term profits and shareholder value over planetary boundaries and social justice. Enterprises need to elevate and protect the interests of all stakeholders - including employees, workers, affected communities, indigenous peoples and human rights, environmental and land defenders. Due consideration of human rights violations, environmental pollution and climate change through robust human rights and environmental due diligence makes good business sense for financial institutions and companies alike. As due diligence is a forward-looking function which identifies potential risks and adverse impacts, it can help to ensure that banks avoid financing companies or projects that are likely to cause severe harms to people and planet, and also to the bank's reputation.

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:

Yes, such an EU legal framework is needed. In addition to the above, it should provide for access to remedy for victims of human rights and environmental harms located in and outside of the EU.

Despite growing awareness of the international standards on responsible business conduct, there continues to be growing evidence of devastating human rights and irreversible environmental harms resulting from and linked to business activity. Current voluntary measures have not been effective in holding companies, including financial institutions, accountable for the harms that they have caused.

BankTrack has produced three Human Rights Benchmarks (in 2014, 2016 and 2019) analysing the performance of up to 50 of the largest banks against a set of criteria based on the requirements of the UNGPs. We have seen the majority of these large banks develop policies to respect human rights, however most have not gone further than this. In particular, there is little progress on reporting, with most banks' reporting limited to covering internal policy developments, with only very few considering their main human rights risks, discussing specific impacts or reporting related indicators. There continues to be an almost total lack of accountability mechanisms that banks have established or participated in, despite such mechanisms being a clear requirement of the UNGPs. Finally, banks are not showing how their efforts lead to real improvements on the ground.

These findings make it clear that voluntary measures have not been sufficient to ensure that banks are adequately conducting due diligence, including playing an active role in remediation of adverse impacts linked to their finance, prioritising the most severe impacts, and showing in their reporting how they have done so. Therefore, mandatory human rights and environmental due diligence legislation is necessary to ensure that all banks are properly respecting human rights and the environment.

A coherent EU legal framework should establish a robust, enforceable and mandatory due diligence standard for companies, including banks and other financial institutions, to prevent and address their negative human rights and environmental impacts in operations and financing activities. It should apply to all companies, including banks and other financial institutions, domiciled or based in the EU or active on the EU market. To ensure much needed accountability for corporate harms to people and the planet, companies must be held liable for harms.

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:

EU legislation should also, and most importantly, empower victims and their representatives, including NGOs, to fight against human rights and environmental abuses. This includes the consultation and, where applicable, consent of all relevant stakeholders. Stakeholders should be informed, consulted and

involved in the due diligence process. In addition, due diligence processes must ensure respect for indigenous peoples' and local communities' rights, in particular the right to Free, Prior and Informed Consent (FPIC). The EU legal framework should include a legal liability for both: (1) breach of due diligence requirements; and (2) human rights and environmental harms. It should ensure that it supports access to remedy for victims both in and outside of the EU.

Following the introduction of legislation in many countries that requires some form of reporting on human rights and broader environmental and social governance issues, we have seen a number of banks committing to perform some form of human rights due diligence in line with requirements in the UNGPs, as well as other voluntary initiatives such as the Equator Principles. However, the current lack of policy coherence allows for a large number of banks and other companies to continue to not fulfil their obligations to conduct adequate human rights and environmental due diligence, often in spite of their espoused commitments. The introduction of new rules requiring due diligence would level the playing field and ensure that those companies and financial institutions who are disregarding the impacts of their activities on the environment and human rights do not undercut others who are adequately assessing the mitigating these risks.

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: (max 5000 characters)

None of the above.

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

BankTrack did not provide answers to these questions.

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.

Yes, we agree with this definition. However, it is worth stressing that the definition should align its wording with international due diligence standards, such as the UNGPs and the OECD Guidelines.

In that regard, in addition to the above the due diligence duty should:

- Make clear that, as stated in the UNGPs, “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services; which is wider than what is commonly referred to as a companies or financial institutions’ “supply chain”.
- Oblige companies, including banks and other financial institutions, to first effectively identify and assess any actual or potential adverse human rights, social, health and environmental impacts, prior to ceasing, preventing, mitigating and accounting for these impacts. This is critical for ensuring that they respond more effectively in preventing, mitigating and publicly disclosing their risks and impacts.
- Extend to require companies, including financial institutions, to consider the adverse impacts it is directly linked to through its business relationships (in addition to the risks of adverse impacts a company causes or contributes to). This could be in the context of personnel, business partners and other parties directly linked to a financial institution’s operations, products or services - including the bank’s client and investee relationships.
- Be an ongoing process rather than a single incident and companies, including financial institutions, should be required to monitor the effectiveness of the measures they are taking.
- Include a remediation duty, that is, the obligation to actively engage in the remediation of adverse impacts where companies or financial institutions cause or contribute to harm by way of actions or omissions, or, where a company has not caused or contributed to the harm but its operations, products or services (e.g. finance) are directly linked to it, the obligation to exercise or increase its leverage over those responsible to help ensure that remediation is provided.

[Optional] 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 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?

The due diligence duty should be both cross-sector and cross-thematic, covering human rights including labour rights, environmental issues and climate change. Companies, including financial institutions, undertaking activities with high environmental, human, social and governance risks, as well as operations in high-risk sectors should be required to take additional steps, proportionate to those risks. For higher risks, companies should therefore be given further guidance on the implementation of the due diligence duty, including on additional requirements, criteria and definitions. This guidance should be developed in consultation with stakeholders.

Question 15c: If you ticked options 2) or 3) in Question 15 please indicate which areas should be covered in a possible due diligence requirement (tick the box, multiple choice)

- Human rights, including fundamental labour rights and working conditions (such as occupational health and safety, decent wages and working hours)
- Interests of local communities, indigenous peoples' rights, and rights of vulnerable groups
- Climate change mitigation
- 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
- Other, please specify

Other, please specify:

The material scope of the EU directive should cover all human rights, including workers' and trade union rights, and Indigenous rights - in particular the right to Free, Prior and Informed Consent (FPIC). Due diligence obligations should also cover social, health and environmental impacts, as well as anti-corruption, corporate governance and tax matters.

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 (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:

The legislation should introduce sanctions and legal liability for both: (1) breaches of the due diligence standards; and (2) human rights and environmental harms that a company/financial institution has caused or contributed to (and failed to remedy to the satisfaction of affected people and communities). A range of enforcement mechanisms including judicial enforcement will help to ensure that companies make the appropriate changes in their conduct and that people and communities that suffer harm have meaningful access to effective remedy. To ensure that victims have meaningful access to remedy, the burden of proof should be reversed in proceedings against companies and limitation periods for bringing legal actions must be extended.

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

Please explain.

EU legislation should establish the responsibility to conduct stakeholder engagement as part of the implementation of the due diligence duty of the company (including for banks and other financial institutions).

Stakeholder engagement must be done throughout all stages of the human rights and environmental due diligence (HREDD) process. It should also be integrated into remediation processes and efforts to compensate for damage and loss. To ensure that this is meaningful, these processes must involve all relevant stakeholders. These should be identified through impact assessments and engagement with local actors.

Stakeholder engagement should provide affected groups with the opportunity to be actively involved in the design, implementation and evaluation of business projects and operations. It allows companies/financial institutions to understand the perspective of those who may be affected by their decisions and activities, and to benefit from local knowledge and experience.

Engagement processes should aim to understand how existing context and/or vulnerabilities may create disproportionate impacts on certain groups. Special attention should also be paid to implementing a gender-based approach to ensure the safe and equal participation of women in decision-making processes. Finally, companies/financial institutions should be required to adhere to international standards on free prior and informed consent (FPIC) to engage with indigenous peoples and local communities.

Question 20b: If you agree, which stakeholders should be represented? Please explain.

All persons or groups that are directly, indirectly or potentially affected by a company's project or operations should be represented. This includes a range of persons and other actors who are credible proxies, such as (but not limited to): workers; trade unions; NGOs; grassroots organisations; community members; indigenous peoples and communities; forest communities; coastal communities; human rights, land and environmental defenders; women and women's organisations; minorities; marginalised communities and their representatives; community leaders; migrant workers groups and representatives; faith-based organisations; and local authorities. Relevant experts on human rights, environment or other subject matter areas should also form part of the stakeholder engagement process.

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		Yes
Stakeholder general meeting	Yes	
Complaint mechanism as part of due diligence	Yes	
Other, please specify	Yes	

Other, please specify:

It is essential that stakeholder engagement happens at the local level. Consultations should include the identification and assessment of contextual risks to affected stakeholders. Additional meetings with specific groups of stakeholders may be appropriate to ensure meaningful engagement with those who are differently or disproportionately affected or who may face barriers to involvement in other processes.

Companies should also ensure that information shared is feasibly accessible and available to stakeholders in a manner appropriate to the context, for example by taking language, literacy levels and cultural factors into account.

Financial institutions should ensure, using their leverage, that stakeholder consultations are conducted and all information is made available to affected stakeholders and interested parties, wherever their finance supports activities for which such consultations are appropriate (including through general corporate finance as well as project-related finance).

An effective grievance mechanism, in line with the principles of the UNGPs, is an important mechanism in all contexts. These should not substitute trade unions, meaningful stakeholder engagement and should complement judicial or other remediation efforts.

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).

Answer:

Incorporating a mandatory duty of care and due diligence duty could have considerable positive effects. These include:

- Reduction in harassment, threat and killings of human rights, land and environmental defenders by holding companies, including financial institutions, accountable for their involvement and through the use of meaningful stakeholder engagement processes and specific risk assessment and response methodologies.
- Reductions in land grabs and violation of the rights of local communities in host countries, including indigenous peoples and forest communities through appropriate implementation of free prior and informed consent principles.