**Complementary explanations and comments to questions - 43, 46, 47, 64, and 67**

**Jernkontoret**

**Question 43**

The Shareholder Rights Directive II put into hard law a number of measures aimed at encouraging shareholder engagement complemented by measures strengthening shareholders’ say also in an attempt to gear companies and their investors towards long term objectives (including ESG). Not only is it too early to measure the results of these rules (implementing regulation is still to come into force) but going beyond could risk negatively impacting the way companies function and interact with their shareholders. Furthermore, companies need flexibility to define which ESG factors are relevant/material to them and their stakeholders, rather than prescribing this. Regulating even further voting frameworks in companies would trigger a further transferring of the responsibilities of the board to shareholders which would negatively disrupt well-functioning corporate governance structures. The primary purpose of boards is to develop the strategy, control management (including risk management processes) and take corrective action on strategies and in relation to the management. These competences should not be watered down and placed in the hands of shareholders/investors who would likely not have the expertise nor the means to have an informed vote. This could also give way to an added dependence of the latter on the services of proxy advisors. Ultimately shareholders continue to have a say and if disappointed with the company’s direction in relation to ESG and performance they can take corrective action by removing/changing the board.

**Question 46**

Since many years, companies have taken account of diverse stakeholders’ interests alongside the financial interests of shareholders, not only because this is an expectation placed on them, but because they see the value also for the financial position of the company, in doing so. Therefore, taking account of all relevant stakeholders’ interests, as determined by the company, is directly linked to the performance and interest of the company. It is therefore a totally wrong assumption that companies exclusively prioritize shareholder value or that shareholder value creation is necessarily contrary to a stakeholder-oriented approach. This is often part of companies’ CSR/sustainability practices, which by their voluntary nature go beyond what is required by law. Corporate governance codes in many member states (e.g. Belgium, France, Germany, Italy and the Netherlands) have already introduced recommendations nudging companies around stakeholder value. We consider that no new EU legal requirements are necessary in order for companies and their directors to take diverse stakeholder interests into account in corporate decisions, as they would negatively disrupt a long-standing and fine-tuned balance of governance structures composed by general meeting (shareholders), boards and the management.

In addition, due to the Non-Financial Reporting Directive, certain companies are also obliged to be transparent in the way they take stakeholders interests into account on issues that are material to the company. More prescriptive requirements beyond this would not allow transparency actions and reporting tailored to the specific way companies function. For example, it should be noted that in certain cases not all the interests of stakeholders of companies are fully compatible with each other, sometimes they are even contradictory (e.g. workers, shareholders, investors, creditors, consumers) depending on the situation (e.g restructuring, recovery, insolvency, merger or division). The company needs flexibility to balance those individual stakeholders’ interests as, depending on the situation, they can often not be put on the same level, otherwise it would lead to contradictory approaches. This would likely have a negative impact on several fundamental principles of our market economy model which is the freedom of enterprise and property (ownership) rights

**Question 47**

We are not in favour of the possible introduction of an EU mandatory framework for supply chain due diligence. There are risks of a fragmented and diverging legislative approach by individual members states on supply chain due diligence for multinational companies operating in different countries. While the development of national initiatives on mandatory due diligence calls for levelling the playing field to safeguard competitiveness of European companies, it is crucial to base any action on international standards and guidelines, as many European companies are part of global supply chains and must be able to maintain global competitiveness and reflect meaningful requirements on their international supplies.

Adopting a new legislative framework raises many questions – scope, adequate level of accountability, how to ensure that the responsibilities of states and companies are not inverted - and could have negative and unwanted impacts (e.g. on competitiveness of European companies, jeopardising meaningful and successful company-best practices, and possibly dampening investment in third countries). In addition, at a time where value chains are heavily disrupted due to the COVID19 crisis, introducing a new layer of legislation in the near future could make it harder for companies to effectively secure, redesign or be able to rebuild essential supply chains in the upcoming exit and recovery phases. Potential legislation would need to take this into account and also consider long-term structural changes to global value chains induced by COVID-19.

While offering expanded sourcing and other business opportunities, by operating in the framework of global value chains, companies face a number of challenges: they have to manage complex production processes, scattered around different locations, in many cases using inputs that come from many different suppliers, and often the environments in which they operate are challenging, both from a human rights and environmental point of view, for example because of conflict, rule of law gaps or weak local governance. Whilst many companies have devised approaches to verify and control their suppliers, it is extremely complex for large multinational companies to ensure full control at all levels of their supply chain, in particular those beyond tier one. Companies also face challenges downstream in the value chains as their goods and services could be used both for military and civilian purposes. Sometimes it is difficult for a company to control the final application of the product or service and therefore even more challenging to ensure that it is not used by a given public or private entity in a way that could constitute a human rights violation for instance.

As stated above, we oppose an EU framework for supply chain due diligence related to human rights and environmental issues. If the EU does decide to go ahead with a legislative measure, the following fundamental considerations need to be taken into account:

- Any new initiatives by the European Commission should be backed up by a **strong impact assessment** that clearly identifies the potential failures of the market, existing soft law approaches including by international organisations (e.g. OECD, UN) and voluntary approaches by companies, when it comes to address due diligence and how to limit them without taking disproportionate measures.

- When devising any EU measure, the **flexibility needed** by companies and the potential of soft law should not be forgotten – a **mixed approach is key**. Whether in complying with mandatory requirements or in their own actions, companies should be able to devise solutions which fit their size, sector, operating markets and business model and allow them to identify where the material risk of adverse impacts (e.g. on human rights or environment) is highest and to focus their efforts and resources there.

- Any framework should be based on an **obligation of means rather than obligation of results**.

- The precise content of a mandatory due diligence should carefully consider the variations across different actors, contexts, sectors or nature of the supply chain. For example, companies may enter in business with suppliers from countries that do not share and recognise the same standards as the EU (e.g. on freedom of association, equality between men and women, or freedom of speech). This means legal uncertainty related to the consequences in terms of due diligence and accountability. Consideration should be made on the impact on **EU companies’ overall competitiveness** vis-à-vis companies from other parts of the world. **Third country private or publicly held companies** could, under certain conditions (e.g. turnover-based threshold in the EU) also be covered by the measures.

- **Role of governments and companies should not be mixed**. Companies do not have the mandate nor the capability to solve all the problems arising from failing states or weakly governed states causing e.g. human rights breaches in domestic supply chains.

- **Any EU framework should not exclusively focus on the company and its direct stakeholders alone**. In order to effectively reduce or mitigate risks, due diligence has to be taken in a holistic way by involving many actors of the ecosystem of supply chains, from companies (multinational and local) to states, NGOs to consumers.

- If reporting requirements are **devised overlap must be avoided with regard to the Non Financial Reporting Directive, the taxonomy regulation**, and any future revision or new standards developed in this area.

- Consideration needs to be given to **practical challenges companies could face to comply with legislation**:

* + If there are large and diverse value chains.
  + If suppliers reject to comply (e.g. in a dependence relationship), in particular if there are no alternative suppliers or they are scarce and it is difficult to engage with a new supplier and build a new business relationship to avoid business disruption.
  + How to handle subcontractors with which the company does not have a direct relationship.

- Cooperation with business associations and companies is essential in the development of any European measures - voluntary or mandatory - because they better understand these practical challenges of supply chains downstream or upstream.

- When it comes to **accountability** it would be inappropriate to hold only European companies accountable for damages occurring through global supply chains when it is impossible to control all the components of the chain and the many other actors involved. Regulatory requirements must not lead inadvertently to situations where companies are held liable precisely because they took due diligence measures.

- **Imposing too many far-reaching obligations on the board, making them liable for what happens several layers down a complex supply chain in a territory outside of the EU where, the state structures should be taking responsibility to ensure protection of human right and environment,** leads to a disproportionate liability weight for individual company directors.

- Any new framework should be **fully in line with internationally recognised standards** such as the UN Guiding Principles on Business and Human Rights (UNGP) and the OECD due diligence guidance for responsible business conduct. European companies operating worldwide already refer to these standards to conduct business in a responsible way. The UNGP in particular clearly delineate between the state responsibility to protect and the business responsibility to respect. This division of responsbilities should be embedded in any legislative initiative.

- **Regulatory requirements need to be sufficiently clear so that business can implement with confidence of compliance**. The level of detail should be proportionate to provide clarity for business, but without being prescriptive to a point that encourage a **tick-box approach** rather than the more holistic approach and which takes away necessary flexibility for companies to adapt to their specificities.

- **Regulatory requirements must not lead inadvertently to situations where companies are held liable precisely because they took due diligence measures**.

To conclude, this issue is primarily the responsibility of national governments, not companies nor their directors, and it should be regulated at global level, if regulated at all.

**Question 64**

Investment in R&I is key to reach sustainability objectives and the consideration of R&I in the taxonomy is of utmost importance to encourage investors to further fund R&I projects.

Since R&I is by nature dedicated to enable performance in the future and is not necessarily directly linked to a specific economic activity or sector and might pursue other sustainability objectives as those defined by taxonomy regulation, it could be worth to consider a dedicated category for R&I.

However, it is not entirely clear how such a dedicated category for R&I would fit into the taxonomy approach developed by the Technical Expert Group. Such a category would require a massive adaptation of the current framework. This would be necessary as the current taxonomy approach is designed to categorize economic activities as environmentally sustainable (“green”) based on actual performance, which could exclude relevant innovation projects from eligibility based on: a) non-contribution to the “green” taxonomy objectives (e.g.: health or digital related innovation); b) the taxonomy not considering the future potential impact or target performance of “enabling” activities such as (for example the development of Carbon Capture and Storage (CCS) technology); c) the taxonomy not covering the economic activity, because of the non-existence of thresholds and screening criteria (e.g. nuclear is not listed in the taxonomy’s categories and therefore projects dealing with sustainable nuclear waste treatment, could not be supported).

In this context we see a high risk that a separate category under the taxonomy regulation could lead to misleading categorization of R&I projects as “sustainable”/”not sustainable” or which could eventually lead to allocation of investments away from activities not covered in the taxonomy or to niches like green innovation or specific sectors only, which cannot be considered as useful with regard to the overarching objectives.

A more promising approach might be to consider R&I efforts as “enabling” towards the objectives of the taxonomy and adapt screening criteria accordingly to ensure that R&I linked to the transition is eligible under the EU taxonomy framework.