

Global Witness response to the HKEX Consultation Paper on the Review of the Environmental, Social and Governance Reporting Guide and Related Listing Rules

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Introduction

Global Witness is a not-for-profit organisation with case study research and policy expertise across a number of sectors including mineral and oil extraction, forest commodities and financial investors (see www.globalwitness.org for more details). What is clear when considering these sector examples is that while the respective industries are taking steps to identify, analyse, mitigate and remedy the adverse impact their business has on the planet, ultimately there is little harmonisation and legal enforcement. Consequently, Global Witness supports mandatory rules being introduced globally on company due diligence to build on current initiatives.

Consultation response

Question 3: *Do you agree with our proposal to amend the Guide to introduce Mandatory Disclosure Requirements?*

Yes, it is extremely positive that these guidelines would move to mandatory requirements. There is a growing international trend towards mandatory disclosure, in particular in the European Union as part of the Action Plan on Financing Sustainable Growth¹.

Question 4: *If your response to Question 3 is positive, do you agree with our proposal to introduce an MDR requiring a statement from the board containing the following elements:*

- (a) a disclosure of the board's oversight of ESG issues?*
- (b) the process used to identify, evaluate and manage material ESG-related issues (including risks to the issuer's businesses); and*
- (c) how the board reviews progress made against ESG-related goals and targets?*

Question 5: *Do you agree with our proposal to set out in a note that the board statement should include information on the issuer's current ESG management approach, strategy, priorities and goals/targets and an explanation of how they relate to the issuer's businesses?*

Question 6: *Do you agree with our proposal to amend the Guide to introduce an MDR requiring disclosure of an explanation on how the issuer has applied the Reporting Principles in the preparation of the ESG report?*

In order to show that companies are adequately disclosing, they should have in place due diligence processes for assessing their ESG issues. The current OECD Guidelines for Multinational Enterprises² (MNEs) provide the relevant due diligence recommendations addressed by governments to multinational enterprises operating in or from adhering countries. The Guidelines

¹ European Commission, "Commission action plan on financing sustainable growth", 8 March 2018, https://ec.europa.eu/info/publications/180308-action-plan-sustainable-growth_en

² Organisation for Economic Co-operation and Development, "OECD Guidelines for Multinational Enterprises", 2011, <http://mneguidelines.oecd.org/guidelines/>

provide the relevant principles and standards for responsible business conduct and are the only multilaterally-agreed and comprehensive code of responsible business conduct that governments have committed to promoting. This guidance has subsequently been developed for more sector specific application, including for institutional investors, textiles and garment supply chains, agriculture, minerals and extractives.

In addition, the draft processes for companies outlined in this consultation should be extended to better reflect the concept of due diligence under the OECD Guidelines for MNEs, i.e. that due diligence involves a bundle of interrelated processes to identify adverse impacts, prevent and mitigate them, track implementation and results and communicate on how adverse impacts are addressed with respect to the enterprises' own operations, their supply chains and other business relationships.

Question 13: *Do you agree with our proposal to upgrade the disclosure obligation of all Social KPIs to “comply or explain”?*

As stated, the issuer should be required to disclose the process used for selecting material ESG factors, and this process should be in line with the OECD due diligence guidance as previously outlined in this response.

Regarding the use of ‘comply or explain’, there are examples where such a system has not been fully effective due to lack of overall application. It has been shown that compliance with the European Union’s strengthened corporate sustainability reporting requirements (such as the Non-Financial Reporting Directive, NFRD³) is tempered by two problems. Firstly, the reporting requirements are weak (in terms of scope of the reporting and of its timing, as the non-financial report is not always integrated into the main annual report) and secondly, they are essentially voluntary, implemented through the ‘comply or explain’ model.

An example of such EU member state regulation is the UK’s Stewardship Code⁴ which has led to some improvements in reporting. However a survey in 2014 of compliance by FTSE 350 companies found that more than one third (39%) failed to comply with the UK’s Corporate Governance Code in full.⁵ One reason for this is that the UK Financial Reporting Council does not have adequate enforcement powers to address non-compliance or chooses not to use them⁶.

Another example which highlights the inadequate nature of ‘comply or explain’ is the French Duty of Vigilance Law⁷, which establishes an obligation for parent companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities. However, a study of 80 of the disclosures after the first year of the law revealed few had met the reporting

³ Available at: https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en

⁴ Further information is available here: Financial Reporting Council, “UK Stewardship Code”, <https://www.frc.org.uk/investors/uk-stewardship-code>

⁵ Grant Thornton, 2014, Corporate Governance Review 2014, <https://www.grantthornton.co.uk/globalassets/1.-member-firms/united-kingdom/pdf/publication/2014/corporate-governance-review-2014.pdf>

⁶ Client Earth, 28 April 2017, “ClientEarth complaint prompts transformed climate reporting from oil and gas firms”, <https://www.clientearth.org/clientearth-complaint-prompts-transformed-climate-reporting-oil-gas-firms/>

⁷ <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&dateTexte=20190719>

requirements of the law in full, and some companies had not reported at all.⁸ This displays the shortcoming of ‘comply or explain’ in effecting real change in company disclosure.

The new EU Guidelines on Non-Financial Reporting for companies⁹ provide some information on how to disclose corporate impacts on society, human rights, environment and other areas, but remain vague as to how human rights impacts and contributions to climate change scenarios should be assessed, and are non-binding. As such, we would recommend that the upgrade relating to the disclosure obligation of all social KPIs be further strengthened to an MDR.

Question 16: *Do you agree with our proposal to introduce the following new KPIs in respect of supply chain management?*

(a) Description of practices used to identify environmental and social risks along the supply chain, and how they are implemented and monitored.

(b) Description of practices used to promote environmentally preferable products and services when selecting suppliers, and how they are implemented and monitored.

Question 17: *Do you agree with our proposal to introduce a new KPI requiring disclosure of anti-corruption training provided to directors and staff?*

EU policy makers have recently agreed upon disclosure rules for investors where they agreed that the risks that investors must disclose on should be aligned with the United Nations Principles for Responsible Investment (UNPRI)¹⁰. The UNPRI includes corruption as a risk and this should form part of any company disclosure¹¹. As such, we agree with the proposal to introduce KPIs relating to environmental and social risks in respect of supply chain management, but we would recommend that governance risks also be included, in line with the UNPRI. We would also recommend that the process for doing this (as described in Q16 a) be in line with the OECD due diligence guidance, as outlined above and go beyond disclosure simply relating to practices used to identify such risks.

For more information, please contact:

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⁸ Collectif Éthique sur l'étiquette, 21 February 2019, “Deux ans après l'adoption de la loi sur le devoir de vigilance, les entreprises dans le viseur des ONG”, <https://ethique-sur-etiquette.org/Deux-ans-apres-l-adoption-de-la-loi-sur-le-devoir-de-vigilance-les-entreprises>

⁹ European Commission, 2017, C/2017/4234: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01))

¹⁰ <https://www.unpri.org/esg-issues>

¹¹ <https://www.unpri.org/esg-issues/governance-issues/corruption>