

POSITION PAPER



Consultation Document

Call for feedback on the Platform for Sustainable Finance's report on minimum safeguards

ESBG (European Savings and Retail Banking Group)

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Introduction

The [report on minimum safeguards](#) is intended to provide advice on the application of the minimum safeguards (MS) which bring a social and governance component to the [EU taxonomy](#). The MS are mentioned in Article 3 of the [Taxonomy Regulation \(TR\)](#) as one of the criteria for environmentally sustainable activities, and are further defined in Article 18. The advice in the Report is structured by a) embedding the MS in existing EU regulation, b) identifying the substantive topics of the standards and norms referenced in Article 18 of the Taxonomy Regulation and c) by working out how compliance with MS can be established.

Analysing the standards referred to in Article 18 of the TR ([OECD guidelines for multinational enterprises \(MNE\)](#), [UN guiding principles on business and human rights \(UNGP\)](#), the [eight conventions on fundamental principles and rights at work](#) and the [international bill of human rights](#)), the report identifies four core substantive topics for which compliance with minimum safeguards has to be defined. These four topics are

- Human rights including workers' rights and consumers' rights
- Bribery/corruption
- Taxation
- Fair competition

The advice on these four topics is worked out close to the standards referenced in Article 18 TR and to upcoming EU regulation which is built on these same standards, the [Corporate Human Rights Due Diligence Directive \(CSDDD\)](#) and the [Corporate Sustainability Reporting Directive \(CSRD\)](#) and the respective disclosure requirements. As both are still not yet fully finalised there remains some uncertainty as to their implementation. Therefore, the solution developed in this report is to a) build the requirements for MS compliance on the international standards referenced in Article 18 and especially on the six steps of the UNGPs/OECD guidelines for MNE, b) point to upcoming regulations and disclosure requirements that build on these standards and c) to point to independent sources of information covering particular aspects of MS implementation which could be used for external performance checks.

More concretely the report advises to consider the following as a sign of non-compliance with MS

1. inadequate or non-existing human rights due diligence processes in companies including labour rights, bribery, taxation and fair competition
2. a company's final conviction in court, if it is related to any of the above listed topics
3. a lack of collaboration with a national contact point (NCP) or an assessment of non-compliance with OECD guidelines for MNE by an OECD NCP
4. a company not responding to allegations raised by the [Business and Human Rights Resource Centre](#)

It is further suggested that points two to four should be valid until the company has implemented a due diligence system that makes such breaches unlikely.

On the basis of this advice, the [EU Platform on Sustainable Finance](#) would like to solicit public feedback on the following questions.

More information on

- [the publication of the report on minimum safeguards](#)
- [the EU Platform on Sustainable Finance](#)
- [sustainable finance](#)
- [the protection of personal data regime for this call for feedback](#)



Your Opinion

The Report proposes two sets of criteria for the establishment of non-compliance with MS: one related to adequate due diligence processes implemented in companies (i.e. relying on corporate reporting and disclosure) and the other related to the actual outcome of these processes or the company's performance (i.e. relying on external checks on companies).

1. Do you agree with this two-pronged approach?

Yes	
No	<p>The question whether a company complies with the due diligence processes (= step 2) should, other than relying on external checks as only possibility, also be answered in the following ways:</p> <ol style="list-style-type: none">1. By proving that the applicable national legislation provides for sufficient guarantees concerning the specific topic, or2. By self-declarations made by the client concerning the specific topic, as being used e.g. by the European Investment Bank <p>Moreover, it will be difficult for financial institutions to obtain information for companies not covered by CSRD on their due diligence processes, at least in a cost-effective manner.</p>
Don't Know/no opinion/not applicable	

The advice of the report is that companies covered in the future by the EU due diligence law (the [proposed CSDD Directive](#)) which are acting in compliance with the law would be considered aligned with the human rights part of the minimum safeguards as the demands of these two legislations overlap (provided that the final scope and the requirements of CSDDD will indeed be aligned with the standards and norms of Taxonomy Regulation Article 18).

2. Chapter 4 - Do you agree with this advice of the report?

Yes	Yes, if the two legislations overlap, it would be fine.
No	
Don't Know/no opinion/not applicable	

The [UNGPs](#) require that due diligence processes implemented in a company result in human rights abuses being effectively prevented and mitigated. To check whether processes implemented in a company fulfil this requirement, the report suggests applying external checks based on a company

- a. having had a final conviction at court
- b. or not responding to complaints at OECD national contact points or allegations via [Business and Human Rights Resource Centre](#).

3. Do you agree with this approach?



Yes	
No	X
Don't Know/no opinion/not applicable	

Please explain your answer to question 3:

5000 character(s) maximum

If there are several severe offences against the law and hard convictions (a.) or parameters to fulfil lit. b., the suggestion would be ok. But there should be defined gravity thresholds, so that not every tiny violation eg. of taxation or work laws leads to an external check.

The criteria regarding a final conviction needs to be further clarified:

- How would a “material” conviction be evaluated? (by claim amount, fine amount, number of affected parties, etc?)
- If the company is not within the CSRD’s scope, where shall the financial institutions get this information from?
- When does a company that had a final conviction at court in the past stops being considered not aligned, in other words, when it is released from this mark?

Also, the BHRRC seems to have limited resources and perimeter, therefore it might not represent the most suitable organism for this purpose as only 50 countries have an OECD national contact point.

And there is limited information on the situation after the OECD national contact point’s report is closed. Should the institutions consider this information valid for all purposes even if it is a year old? It is unclear until when it is deemed to be valid.

Question 3.1 Which type of court cases should be selected as criterion for non-compliance with minimum safeguards?

5000 character(s) maximum

It must be a final court decision or judgement, against which no ordinary legal appeal whatsoever may be filed.

A negative definition could also be an alternative (“which type of court cases are NOT in scope”): labour law, tax law etc. cases that have **only a limited impact** either from a financial or reputational point of view on the company.

Question 3.2 Are there other types of external checks you would suggest (data for these checks should be publicly available and lead to the same result for a company)?

Yes	<p>The proof that the applicable national legislation provides for sufficient guarantees concerning the specific topic.</p> <p>However, it also needs to be clarified whether there are any controversy reports prepared by third-party experts or any existing certifications in place.</p>
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No	
Don't Know/no opinion/not applicable	

The advice given in the Report on corruption, taxation and fair competition is comparable to the advice on human rights in that it requires that a company has implemented processes to avoid and address negative impacts and that the company has not been finally convicted for violations in these fields.

4. Do you agree with this approach?

Yes	OK
No	
Don't Know/no opinion/not applicable	

Please explain your answer to question 4:

5000 character(s) maximum

In principle we agree, however the materiality of the conviction should be further specified. It would be useful to get further clarifications on would be the time or the deadline to stop considering an old conviction - as material for the alignment purposes.

It is difficult to assess the suitability of the processes as this is not included under the CSRD.

Moreover, there are difficulties with the perimeter (for companies not subject to tax transparency regulation).

Further processes could also be implemented by a workers' council or the Chamber of Labour, so that companies do not necessarily have to implement these.

The application of and compliance with national law, including the prescribed burden of proof, should be seen as an indicator of compliance with the minimum safeguards for both banks and companies. Given existing practices and experience, we also advocate that a company's processes should only be audited when a breach or conviction for breaches in these areas has been identified.

Question 4.1 Which type of court cases should be selected as criterion for non-compliance with minimum safeguards?

5000 character(s) maximum

It must be a final court decision or judgement, against which no ordinary legal appeal whatsoever may be filed.



A negative definition could also be an alternative (“which type of court cases are NOT in scope”): labour law, tax law etc. cases that have **only a limited impact** either from a financial or reputational point of view on the company.

Question 4.2 Are there other types of external checks you would suggest (data for these checks should be publicly available and lead to the same result for a company)?

Yes	See above question 3.2. For the purposes of tax checks, it will depend on every Member State. For example, in Spain the Tax Agency (Treasury) publishes (i) the list of defaulters; (ii) which entities are members of the Code of Good Tax Practices; (iii) which entities provide with the Tax Transparency Report.
No	
Don't Know/no opinion/not applicable	

A suggestion given in the Report on MS is to consider the human rights due diligence processes companies have implemented and do checks on their performance, rather than rely on controversy checks based on media coverage (as is done by some ESG rating agencies).

5. What do you think these changes imply for companies?

5000 character(s) maximum

This may be positive for them as media coverage may not always be reliable (even though some analysts do a later check with the company). However, further information should be included so that they can also effectively check their actions.

However, if the company has a workers' council, it would/could collect the data anyway. Furthermore, in some member states like Austria the Chamber of Labour collects this data and would react, if there is any infringement. Therefore, in such cases no further checks are necessary.

Question 5.2 What do you think these changes imply for investors?

5000 character(s) maximum

It will significantly increase the difficulty to evaluate companies' performance as they generally rely on ESG rating agencies. Evaluation on the suitability of the implemented processes is not straightforward and media coverage may be an indicator. It should be related to PIAs whenever possible. The administrative cost derived from direct analysis for the institutions to perform instead of relying on a ESG rating is too burdensome and would impair the financial activity.

However, this applies only for listed companies and companies of public interest. Companies that are in the interest of an investor (acquisition), would be checked by an expert anyway before a M&A-transaction (due-diligence report).



The [OECD guidelines for multinational enterprises](#) highlight the importance of good corporate governance. The Report takes this up by developing criteria for bribery/corruption, taxation and fair competition.

6. Do you agree with this approach?

Yes	OK, however there should be alignment with CSRD and CSDDD.
No	
Don't Know/no opinion/not applicable	

7. Do you have further suggestions or comments on the Report?

5000 character(s) maximum

- The expectations from banks should be aligned with the CSRD perimeter, in order to avoid different scopes and expectations. Banks cannot audit customers for compliance every year (long-term transactions; SMEs involved, corporate loans, etc). This should not be included. Disproportionate burden for banks due to lack of data availability and differences in perimeters with CSRD.
- There should be alignment of the CSRD with the taxation requirements. Or, alternatively, the scope of the European tax country by country reporting regulation (Directive 2016/0107) should be adapted so it is similar.
- Future non-compliance status assessment should be more precise. It should be clarified what happens after a company has been sanctioned.
- It should be clarified if the BHRC and the OCDE National Contact Point have enough resources to handle these expectations. Additionally, it is unclear what happens when a report is closed as non-compliant and for how long this report is deemed as valid. More clarity is also needed on what the periodicity of the revisions is and if the users of the information assume that the information published in that report is valid. It should be investigated if there are any other similar international organisations in this sense.
- Further development of the requirements for SMEs is needed: it should be proportionate and not represent an administrative burden to the SMEs.
- Further research should be done on available and reliable sources of information for banks and investors to establish compliance, including alignment between these criteria and available data from ESG ratings.
- Transition time after the CSRD is applicable should be considered as building data systems for a just transition period is costly.
- Paragraph 7. Sovereign bonds. It would be desirable that the KPIs and different indicators were as universal and complete as possible. Global Alliance of National Human Rights Institutions seems like an incomplete index as not all relevant countries-issuers are present and in relation to the Corruption perception index, it is rather a subjective index therefore not a very useful tool. Many different indexes exist in this respect, and the report should incorporate as many of them as possible so we can rely on any of those from the list instead of considering just one of them in particular (harmonization). That way, if the corruption issue is contemplated in the entity's strategy, it could comply with the MS.



- The draft report does not provide clarification on the frequency of the analysis of minimum social standards. A review of counterparty compliance with minimum social standards should only be required by banks at the conclusion of the contract. Banks cannot regularly review their clients' compliance, especially given the long-term nature of many transactions and the involvement of SMEs. The burden associated with a full re-analysis, inconsistencies with the CSRD limits and difficult data availability would result in a disproportionate burden for banks. For companies with a low risk of compliance with the minimum requirements, a self-declaration by the client clarifying that no material changes have occurred since the last review should be sufficient.
- Level of application: The report recognises that the data required by the template for Article 8 disclosures should be considered at the level of the undertaking, even though the table asks the company to state compliance with the minimum safeguards on the basis of individual activities. Does this mean that any exposure to a company that is active in sectors that by definition do not fulfil the minimum safeguards is not taxonomy-eligible or -aligned, even if the specific transaction finances activities that fulfil all requirements?
- The draft report states that SPV projects are often huge and require large amounts of funding. Yet, the global extension to all SPV structures proposed in the draft report is not appropriate since:
 - not all special purpose vehicles finance large-volume projects (e.g. wind farms structured as special purpose vehicles by individual citizens' initiatives that finance only one wind turbine) and
 - there is a difference whether all members of a group are within EU legislation or not.
- Therefore, the obligation to fulfil MS and reporting should:
 - be done, where applicable, by the parent company (group level, not solo level) in order to be in line with other EU-legislation (see CSRD and CSDDD (current Council proposal)) and
 - reflect the question whether all members of the group are within EU legislation (if not, it should be checked if the group head and/or the respective SPVs outside EU legislation fulfil and are in-line with specific international standards, like ILO, etc).



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