

Meeting with Markus Beyrer Director General, Business Europe

Scene setter

Data Protection / Schrems II

- A representative from Business Europe participated in the industry roundtable on the consequences of the Schrems II judgment that took place on 21 September. Business Europe welcomed the constructive communication on both sides of the Atlantic and stressed that there is a lot of legal uncertainty, calling for urgent guidance from the European Data Protection Board.

Digital Services Act

- Provide assurance that the Commission will take an approach to the DSA that promotes fundamental rights, including the right to freedom of expression, freedom to conduct a business as well as the freedom of establishment and provision of services, while at the same time ensuring a system for platform responsibility in relation to illegal content.

Artificial Intelligence

- JUST A2 had two bilateral meetings with Business Europe to discuss AI liability, on 20 January and 2 April 2020.
- Business Europe contributed to the public consultation¹. They stated that the scope of any new requirements should take a risk-based approach and only set market access requirements for “high-risk” AI. This should be defined to focus on where the highest and most widespread societal damage is likely to occur. As regards safety, sectoral legislation could be the better alternative. National and EU rules on liability are largely fit for purpose; any need for revision should be clearly demonstrated.

Sustainable Corporate Governance

- Mr Beyer had an exchange of views with VP Jourova on due diligence and other sustainable corporate governance-related issues on 22 July. He sent the position of BusinessEurope on the matter to the VP in a letter dated 24 July.
- The objective regarding sustainable corporate governance in this meeting would be to explain why an EU initiative is needed. BusinessEurope’s initial objection against EU harmonisation in this field seems to have turned into a “constructive opposition”. Identifying points where our views are similar is possible and there is room for further convergence.

¹ https://www.besnesseurope.eu/sites/buseur/files/media/position_papers/internal_market/2020-07-15_ai_a_european_approach_to_excellence_and_trust.pdf

Lines to take

DATA PROTECTION

- Given the importance of **data protection as a fundamental right** and as a stepping stone for a wide range of policies, the Commission attaches a great importance to the correct implementation of the new data protection rules.
- We have adopted a **multi-faceted approach to implementation**: we have engaged into bilateral dialogues with Member States on the compliance of national legislations; we work closely with data protection authorities in the context of the European Data Protection Board; we also support those authorities financially through grants.
- We have published in June an **evaluation report on the application of the GDPR**. In line with the obligation stemming from the GPPR we focused in particular on international transfers and on the **functioning of the cooperation and consistency mechanism**. However we took a much broader approach and we also examined many other aspects of the application of the GDPR.

- We have taken into account the contribution of the Council, the European Parliament, the European Data Protection authorities and our GDPR Multi Stakeholder Group.
- **The first main finding of the report** is that this legislation has empowered European citizens when it comes to the protection of their personal data. They effectively made use of their rights to lodge a complaint with their national data protection authority and to seek an effective solution.
- **Second**, the report established that the governance system, based on independent data protection authorities in the Member States and their cooperation in cross-border cases and within the European Data Protection Board ('the Board'), is working. However, one of the key objectives of the GDPR, namely to develop a truly common European data protection culture between data protection authorities is still an on-going process. The Board is working on improvements, with our full support.
- **Third**, the report shows that the GDPR offers opportunities to European companies by **fostering**

competition and innovation, ensuring the free flow of data within the EU and creating a level playing field with companies established outside the EU, based on the respect of European standards.

- **Finally**, we were able to confirm that the GDPR, having been conceived in a technology neutral way, is an essential and flexible tool to ensure that the development of new technologies is in compliance with fundamental rights.
- After two years, we can also already see where we need to make more progress. A number of areas for future improvement have been identified.
- It is likely that most of the issues identified will benefit from more experience in applying the GDPR in the coming years. Our report sets out possible ways to address them, one of the main ones being the need to ensure that **national data protection** authorities **have the necessary human, technical and financial resources**.
- Another one is the need for **more uniformity in the implementation of the rules in our Member States**. The GDPR removed a plethora of different rules across

Europe, but more work is needed. The Commission will play its part here, closely monitoring the situation in our regular exchanges with Member States.

- We also need a **more European approach from national data protection authorities**, with more efficient working arrangements between them.

Relation GDPR and Data Strategy

- On 19 February, together with the White Paper on AI, the Commission issued a Communication on a European strategy for data. It sets out the actions that the Commission plans to undertake in the coming five years to further develop the data economy in Europe and to increase the competitiveness of Europe's businesses.
- The European Strategy for data aims to enable a wider availability of privately and publicly held data, in particular through the creation of European data spaces. The Strategy targets all kinds of data, not only industrial but also personal data. Therefore, any policy measure foreseen in the Strategy which involves access to personal data must fully comply with the European data protection legislation.

- In particular, it is important that any personal data sharing is carried out based on an appropriate legal basis (such as legislation laying down a legal obligation) and with appropriate safeguards.
- Furthermore, support for measures giving individuals control over their data is also foreseen in the Strategy, through the development of concrete tools such as personal data spaces. These measures will contribute to the effective application of the GDPR.
- In that sense, GDPR and future initiatives following from the Data Strategy play together.

BACKGROUND

Processing of health data under GDPR in the Covid-19 context

- Health data are considered as sensitive data under the GDPR and their processing can therefore only take place under strict requirements. The GDPR however provides that one of the legal grounds for processing such personal data is public interest in the area of public health. In this case, Union law or Member State law shall provide suitable and specific measures to safeguard the rights and freedoms of the concerned individual.
- In particular, the GDPR provides that processing necessary for humanitarian purposes, including for monitoring epidemics and their spread in situations of humanitarian emergencies, qualifies as an important ground of public interest.
- In short, the GDPR provides for a legal framework for data protection which is fit also in time of epidemics. It is not an obstacle to the processing of personal data necessary to fight the coronavirus pandemic, it offers enough flexibility provided the conditions and appropriate safeguards are in place. However, once the context justifying such processing has changed (e.g. after the end of the pandemic), then the necessity and proportionality of the processing will have to be reassessed.

One-stop-shop mechanism and consistency mechanism

- The GDPR provides for a "one-stop-shop" mechanism. This means that companies conducting cross-border processing activities only have to deal with one national data protection supervisory authority ('the Lead Supervisory Authority').
- A co-operation and consistency mechanism allows for a coordinated approach between all the data protection authorities involved. In accordance with Article 60 GDPR, in cross-border cases the Lead supervisory authority submits its draft decision to all concerned data protection authorities for their opinion and shall take into account their views. Any concerned supervisory authority may raise a relevant and reasoned objection to the draft decision. If the Lead supervisory authority disagrees, it shall submit the matter to the consistency mechanism which will require a decision from the European Data Protection Board.

SCHREMS II

- I would like to thank Business Europe for its useful contributions during the roundtable on international data flows on 21 September.
- The aim of that meeting was to understand better what is happening on the ground and how this can inform our work.
- In response to the judgment, the Commission has several work streams.
- Our first objective is to guarantee the protection of personal data transferred outside the EU in full compliance with the Court's ruling.
- This also means that companies should be able to rely on solid transfer mechanisms. That's what you rightly expect, as you need to transfer data as part of your daily operations.
- That is also why exploratory talks are ongoing on the best way to address the issues raised by the Court with our US counterparts, as indicated in the joint press statement I issued with US Commerce Secretary Ross.

- But we also have to recognise that the judgment raises complex issues, related to an area – national security – that, by its nature, is particularly sensitive.
- Therefore, these are not issues that can be resolved through a “quick fix”. We need sustainable solutions that deliver legal certainty in full compliance with the judgment.
- In parallel, we are finalising the modernisation of the Standard Contractual Clauses.
- We have been working on this in the past months to fully align the SCCs with the GDPR and to ensure that they are adapted to the realities of today’s digital economy.
- After the Court’s judgment, we are now integrating in our draft the additional clarifications provided by the Court on the conditions under which SCCs can be used.
- Because the SCCs are so widely used and are particularly useful for smaller businesses, finalising this work is a top priority for us.
- At the same time, we don’t want speed over quality. We want to get this right and ensure that the new SCCs are

truly useful to assist companies in their compliance efforts.

- On that basis, we intend to launch the adoption process in the coming weeks.
- Of course, it will also be important that our work on the new SCCs is aligned with the guidance that is currently being prepared by the European Data Protection Board.
- We are therefore working closely with the data protection authorities, which have announced that, following the first FAQs issued immediately after the judgment, more detailed guidance will be prepared.
- I believe that it is important that such guidance is, as much as possible operational, based on practical steps and concrete examples, to assist companies in their compliance efforts. My services are advocating for such an approach within the Board.

DEFENSIVES

There is no guidance, companies do not know how to comply with the judgment.

- We understand that there is a need for guidance and have urged the EDPB to accelerate its work on this. It is essential that there is a uniform interpretation and approach across the EU, and this can only be provided by the EDPB.
- We already worked with the Board on the first guidance document and will continue to push for guidance that is as operational and practical as possible.
- In our own work on the modernisation of the SCCs, we are also trying to operationalise some of the clarifications provided by the Court, which we believe will be helpful to assist companies in their compliance efforts.
- At the same time, also the new SCCs will of course have to be used in line with the conditions set by the Court.
- This is also why the input we receive from industry is so important. It allows us to understand your needs and learn from your experience on the ground.
- The information we receive from you in turn feeds into our work, on the SCCs and with the EDPB.

What are your views on the White Paper issued by the US Department of Commerce on the Schrems II Decision?

- While I understand that it may be helpful for companies that transfer data to the US to be provided with more information about the US legal framework, it should also be clear that trying to re-litigate the case is not going to help anyone.
- The Court has set a standard, and whether we like it or not, that standard has to be complied with, by companies, by data protection authorities and by the Commission in its contacts with the US.
- In our view, the focus of our efforts should be on exploring possible solutions to the issues identified by the Court, not on revisiting or “re-litigating” parts of the judgment.

To avoid that it becomes too difficult to transfer personal data, the derogations under the GDPR should be interpreted more broadly.

- The judgment has not changed the situation on this aspect: derogations remain what they are, i.e. exceptions to the general rule.

- While they of course continue to be available for specific transfers, they cannot become the default solution. This would be contrary to the rationale of the GDPR as interpreted also by the Court.
- Moreover, it would leave individuals without any protections, which would be a rather paradoxical outcome of a judgment that focuses on the need to ensure some continuity of protection when data is transferred abroad.

[Background: the GDPR contains certain statutory grounds for transfers in specific situations (e.g. where an individual has given consent to the transfer or where the transfer is necessary on public interest grounds). These so-called 'derogations' can in principle only be relied on if there is no adequacy decision and it is not possible to provide safeguards by other means. As there is no requirement to provide any safeguards when relying on such 'derogations', they are only meant as exceptions, i.e. for limited, non-systematic transfers. After the Schrems II judgment, there have been calls from companies to reconsider this interpretation (which follows from the GDPR itself and guidance from the European Data Protection Board) and also allow regular, systematic transfers on the basis of the derogations. However, this would mean that personal data that is currently protected by SCCs or other tools would no longer benefit from any protections when transferred abroad.]

There should be an enforcement moratorium.

- Such an enforcement moratorium is not possible under the GDPR. This has also been made clear by the EDPB in public statements in the past.
- Data protection authorities have discretion when it comes to launching ex officio investigations, but are required to act when receiving complaints from individuals.
- As you probably have seen, several complaints have already been lodged by civil society that are currently being looked at.
- Of course, the data protection authorities also understand that this is a difficult situation, but they will not accept negligence.
- Some key steps that companies can take include mapping their data transfers, carrying out risk assessments, where necessary implement additional safeguards, etc.
- And of course, all of this should be properly documented to demonstrate due diligence if it comes to a dialogue with a data protection authority.
- In fact, this is something that any case already follows from the accountability principle under the GDPR.
- At the same time, we also recognise that these first investigations (and potential enforcement action) make guidance even more important, to

allow companies to comply, but also to avoid fragmented decisions by data protection authorities.

- This is why we have urged the EDPB to accelerate its work.

We are concerned about calls for data localisation

- We have repeatedly confirmed the Commission's commitment to facilitate data flows.
- This is notably reflected my statements in the European Parliament, the Communication on two years of GDPR adopted in June and the Commission's Data Strategy.
- That is also what we continue to pursue in our engagement with international partners in different fora to promote safe and free data flows. This includes for instance the very promising work at the OECD with the US and Japan building on the Data Free Flow with Trust initiative.
- For us, developing strong privacy safeguards and promoting free flow of data are not opposite objectives, but rather complementary ones that can reinforce each other.

DSA AND ILLEGAL CONTENT

- The internet has provided unprecedented possibilities for new business models to thrive and for individuals from all over the world to communicate and share ideas and engage in discussions – also in area of the world where such possibilities traditionally have been very limited.
- But, this Gutenberg-moment has also carried with it a number of challenges.
- The problem of illegal content online is not going away. The societal costs and suffering caused to the individual victims of the spread of criminal content such as illegal hate speech, terrorist content and child sexual abuse material is a very serious concern to the European Commission.
- Also, we want to ensure that consumers are effectively protected online and that no illegal products are available.
- The Digital Services Act will look at the platforms liability and set out a comprehensive approach towards all forms of illegal content online. The policy approach that we formulate will have to combine and reconcile a number of fundamental rights, including right to

freedom of expression, freedom to conduct a business as well as the freedom of establishment and provision of services.

- This is a complex file which requires evidenced policymaking to ensure we get it right. The Commission is currently analysing the results of the public consultation that closed on 8 September 2020.
- I can assure you that we will carefully assess all pertinent factors to ensure a proposal that allows us to effectively tackle illegal content while protecting Fundamental Rights.

BACKGROUND

As part of the European Digital Strategy, the European Commission has announced a Digital Services Act package to strengthen the Single Market for digital services and foster innovation and competitiveness of the European online environment.

The legal framework for digital services has been unchanged since the adoption of the e-Commerce Directive in the year 2000. Ever since, this Directive has been the foundational cornerstone for regulating digital services in the European Union.

However, the online world and the daily use of digital means are changing every day. Over the last 20 years, many new ways to communicate, shop or access information online have been developed, and those ways are constantly evolving. Online platforms have brought significant benefits for consumers and innovation, as well as wide-ranging efficiencies in the European Union's internal market. These online platforms facilitate cross-border trading within and outside the Union and open entirely new business opportunities to a variety of European businesses and traders by facilitating their expansion and access to new markets

Although new services, technologies and business models have brought many opportunities in the daily life of European citizens, they have also created new risks to citizens and society at large, exposing them to a new range of illegal goods, activities or content.

The new Digital Services Act package should modernise the current legal framework for digital services by means of two main pillars:

- First, the Commission would propose clear rules framing the responsibilities of digital services to address the risks faced by their users and to protect their rights. The legal obligations would ensure a modern system of cooperation for the supervision of platforms and guarantee effective enforcement.
- Second, the Digital Services Act package would propose ex ante rules covering large online platforms acting as gatekeepers, which now set the rules of the game for their users and their competitors. The initiative should ensure that those platforms behave fairly and can be challenged by new entrants and existing competitors, so that consumers have the widest choice and the Single Market remains competitive and open to innovations.

As a part of a robust and active consultation process, the Commission has initiated a public consultation to support the work in analysing and collecting evidence for scoping the specific issues that may require an EU-level intervention. All European and non-European citizens and organisations are welcome to contribute to this consultation. The consultation was open until 8 September 2020.

ARTIFICIAL INTELLIGENCE (incl. liability)

- The AI White Paper that the Commission published on 19 February 2020 pursues a human-centric approach. It sets out regulatory options to foster an ecosystem of excellence and trust.
- Following the White Paper, the Commission plans to present a legislative proposal in the first quarter of 2021.
- To help Europe pursue excellence in the area of AI, the White Paper presents initiatives including investments, coordination of research and fostering relevant skills.
- As regards trust, the EU already has fundamental rights legislation relevant for AI, in particular on data protection, privacy, non-discrimination and equality; and relevant laws on consumer protection, copyright and the functioning of law enforcement authorities.
- The effectiveness of this acquis may be challenged by the complexity and opacity of certain AI applications ('black boxes') which would require highly specialised expertise and processes to comprehend and control.
- AI may also challenge the effectiveness of current national civil liability rules. To ensure trust and

encourage the uptake of AI, it is also important to make sure that victims of damage caused by the use of AI are not less compensated than victims of traditional products and services.

- At the same time, businesses need legal certainty. They need to know their liability risks so that they can ensure themselves against them.
- To address these challenges, the White Paper includes documentation-, testing, and accountability-requirements to benefit the effective enforcement of existing laws and help those who deploy AI systems comply.
- In addition, the elaboration of technical norms, standardisation and certification could facilitate compliance with higher level legal requirements.
- The requirements will be proportionate to the risk to rights or safety of people.
- We also need to enable supervisory authorities to keep fulfilling their mandate where AI is used. They need adequate capacities and they need to work together.
- An open public consultation on the contents of the AI White Paper was open from 19 February to 14 June

2020. The Commission is now analysing more than 1200 responses.

- The opaqueness of some applications is often identified as a challenge, and there is a desire to always know who is responsible for automated outcomes.
- Funding and equipment of authorities is also identified as a priority and some ask for centres of expertise.
- Most of the respondents to the public consultation were in favour of adapting national liability rules for all or for specific AI applications to better ensure proper compensation and a fair allocation of liability. The majority of businesses in this category were SMEs.
- The EP will soon adopt resolutions providing detailed recommendations for the Commission on ethics and fundamental rights and on a civil liability regime for AI-systems. The respective reports were adopted in the JURI committee on 28 September.

DEFENSIVES

What are the main findings of the public consultation?

- The high participation consisting in 1200 replies and 400 submissions of self-standing position papers shows that this initiative meets a lot of interest throughout different groups of stakeholders.
- The Commission received feedback inter alia from civil society organisations and individual citizens, industry, academia, and public authorities.
- 14% of the responses came from outside the EU27.
- A large majority of the respondents is concerned about fundamental rights threats due to the use of AI.
- The opacity of some applications is often identified as a challenge in this regard.
- Funding and equipment of authorities were identified as a priority and some ask for centres of expertise.

How did stakeholders position themselves as regards the proposals put forward by the Commission in its White Paper?

- When it comes to the question how an application is categorised as risky, there was a clear preference to focus on concrete use cases rather than looking at sectors for the determination.
- There is general support for transparency and clear identification of who is responsible for automated results. Most stakeholders agree with importance of accountability, transparency, documentation.
- When it comes to prescriptive requirements that would interfere with how applications may be built, there was some reluctance, notably among industry stakeholders.

What are the next steps following the White Paper and the consultation?

- The Commission plans to present a legislative proposal in the first quarter of 2021.
- Currently, the Commission services are working to further concretise the elements from the White Paper to develop appropriate and proportionate binding rules for the use of risky automation.

How you will make sure that the framework will not hamper innovation and competitiveness in the EU compared to other regions of the world

- Promoting innovation is not only about regulation, but also about funding, fostering investment and networking.
- We need to create an enabling environment for innovation. The Commission pursues a whole range of activities that are presented in the AI White Paper under the heading of the “ecosystem of excellence”.
- Regulation does not only limit what actors can do. It also creates a level playing field and can foster legitimate trust, which is a very important factor for the uptake of the development and use of new technologies. We need the right kind of innovation.

- Developing AI on the basis of shared European values can be a competitive advantage.

How will you guarantee trustworthy AI?

- We already have a solid framework of legislation at EU and national level to protect fundamental rights and to ensure safety and consumer rights. To prevent breaches of these rules and to ensure that possible breaches can be addressed by national authorities, risky applications need to be well documented and provide an adequate degree of transparency.
- The White Paper sets out concrete requirements for the development and deployment of high-risk AI:
 - to be technically robust and safe,
 - the data sets used for training must be appropriate for the purpose in order to avoid unfair bias,
 - appropriate records of the data used to train the algorithm must be ensured,
 - individuals should be clearly informed when dealing with an AI system, and
 - sufficient human oversight must be foreseen in order to ensure that the AI system does not undermine human autonomy.

How do you define Artificial Intelligence?

- There is globally no consensus on a definition of AI.
- Defining a set of technology is one thing, defining, which technology-challenges we need to address is another. We need to target all uses of technology that are challenging fundamental rights or safety. The opacity of automation plays an important role in this regard.
- The White Paper refers to the definition of AI adopted by the Commission in April 2018 and the definition prepared by High Level Expert Group.
- The White Paper mostly focuses on machine learning because it is what makes AI most opaque and in certain situations unpredictable. Machine learning is a subset of AI and implies that algorithms are “trained” on data.

Will the EU regulate facial recognition for remote identification?

- EU data protection rules already prohibit in principle the processing of biometric data for the purpose of uniquely identifying a natural person, except under specific conditions.
- Specifically, remote identification can only take place for reasons of substantial public interest. It must be based on EU or national law, the use has to be duly justified, proportionate and subject to adequate safeguards.
- Facial recognition for remote biometric identification is currently the exception. Following the consultation on the AI White Paper, the Commission reflects on the necessity of further regulatory steps.

BACKGROUND

AI White Paper

In the AI White Paper, the Commission proposes a framework for trustworthy Artificial Intelligence, following a balanced approach based on excellence and trust that aims to address high-risk AI systems without putting too much burden on those who develop and deploy less risky ones. The White Paper mostly focuses on machine learning because it is what makes AI most opaque and in certain situations unpredictable, but it does not exclude other AI systems, such as expert systems, which follow pre-defined rules. Expert systems are fully interpretable. Their results (output) can precisely be determined based on their determined rules and the input data.

Regarding the pursuit of excellence, in partnership with the private and the public sector, the ambition is to mobilise resources along the entire value chain and to create incentives to accelerate deployment of AI, including by smaller and medium-sized enterprises. This includes working with Member States and the research community, and attracting and keeping talent.

Regarding the ecosystem of trust, the Commission pursues a human-centric approach to AI. This means first and foremost ensuring that AI applications comply with EU law that protects consumer and fundamental rights. For example, gender bias in algorithms or training data used for recruitment AI systems could lead to unjust and discriminatory outcomes, which would be illegal under EU non-discrimination laws. It is important to prevent breaches of fundamental rights and consumer laws and if they occur, to ensure that those breaches can be addressed by the national authorities. The complexity and opacity of certain AI systems makes it difficult to see if they comply with fundamental rights obligations. The establishment of accountability and transparency requirements, combined with improved enforcement capacities, will ensure that legal compliance is considered at the development stage of AI systems and, in case of a breach, such requirements will allow national authorities to investigate whether the use of AI complied with EU law. On this basis, the White Paper sets out concrete requirements for the development and deployment of high-risk AI systems.

The definition of high-risk AI applications will be further concretized. Some uses are critical in all sectors, e.g. use of AI for recruitment or for certain consumer services such as financial credits.

In relation to the addressees of the legal requirements that would apply in relation to high-risk AI applications, obligations are to be distributed among the many actors involved in the lifecycle of an AI system (e.g. the developer, the deployer, the person who uses an AI-system, [maintenance] service providers etc.). Obligations should be addressed to the actor(s) best placed to address potential risks. While developers may be best placed to address risks arising from the development phase, their ability to control risks during the use phase may be more limited. In that case, the deployers should be subject to the relevant obligation.

Regarding the geographic scope, the requirements should be applicable to all relevant economic operators providing AI-enabled products or services in the EU, regardless of whether they are established in the EU or not.

The White Paper suggests that prior conformity assessments would be necessary to verify and ensure that certain requirements applicable to high-risk applications are complied with. The

prior conformity assessment could include procedures for testing, inspection or certification. It could include checks of the algorithms and of the data sets used in the development phase. In addition, there would also be an ex-post control, for example to verify that an application is used in full respect of fundamental rights.

Depending on a legislative proposal, Member States might need to implement new rules on high-risk AI, with the support of the Commission and a network of national authorities to ensure coherent implementation. Member States' existing authorities are very well placed to do so. For example there are already authorities that enforce the respect fundamental rights or guarantee the safety of cars, toys, cosmetics or medicine. The White Paper acknowledges that it would be beneficial to support competent national authorities to enable them to fulfil their mandate where AI is used. As far as the compliance with data protection rules is concerned, the national Data Protection Authorities have been provided with increased powers under the GDPR.

SUSTAINABLE CORPORATE GOVERNANCE

- We have **crossed the sustainability boundaries** of value creation and now the sustainability crisis is coupled with the **COVID crisis**. We want to **recover** from this in a **sustainable, competitive and just** way.
- The **role** and the **responsibility** of the **business sector** in reaching these sustainability and recovery objectives **cannot be overestimated**.
- It is **not enough if frontrunner** companies change **voluntarily, selectively** and at **their own pace**. We need to **change the mainstream**, more **systematically** and **urgently**.
- This requires **improving the governance** of companies and the impacts in their **supply chains**, and I am determined to **propose next year an initiative** on sustainable corporate governance.
- The initiative would address **directors' duties, due diligence** in the supply chains, as well as **other elements** of corporate governance (e.g. incentives by remuneration, involvement of sustainability expertise and engagement with stakeholders).

- We aim at a framework that is **clear** and **coherent**, with appropriate **enforcement**.
- I am convinced that a **broad based** and **horizontal** measure – covering all sectors – would bring the most benefits.
- We would pay special attention to the possible – direct and indirect – impacts on **small and medium-sized enterprises**, including **costs** as well as **benefits** for them.
- We are also examining how to cover some **third-country companies** that are active in the EU.
- We will soon be launching *[date of launch still to be confirmed, if before or after this address]* an **open public consultation**, asking specific detailed questions. We are looking forward to receiving your contribution as well.

DEFENSIVES

Due diligence:

BusinessEurope has strong concerns regarding the possible introduction of an EU mandatory framework for supply chain due diligence.

- The due diligence study conducted for the Commission shows that the **voluntary “corporate social responsibility” approach, supported by reporting on a “comply or explain basis”, failed**: only one third of the 300 companies responding to the survey claim to have due diligence processes in place to identify and mitigate negative human and environmental impact in their supply chains. Other studies show even worse figures (for example a very recent German survey shows that 15-19% of companies have due diligence processes).
- A large majority of individual company respondents (over 300) to the due diligence study survey expressed **support** for mandatory due diligence rules.
- **EU harmonisation may bring benefits over the development of national initiatives which would lead to a fragmentation of approaches and which could result in extra costs.**
- The experience with the French law shows that a non-negotiable legal standard can **contribute to changing the regulatory and behavioural environment in the third country** of the supply chain. **Such positive impact of an EU standard would be even higher.** Moreover, our initiative is meant to be part of a **smart mix** and could be accompanied by other measures, which foster a better environment in third countries (trade agreements, other support measures).

It is crucial to base any action on existing international standards and guidelines.

- Our initiative would **build upon existing UN and OECD standards and guidelines** (the **United Nations’** Guiding Principles on Businesses and Human Rights, as well as on the **OECD** Guidelines for Multinational Enterprises and the related Due Diligence Guidance for Responsible Business Conduct). It would also take into account the experiences with existing national and EU regulation. Furthermore, we are exploring how to align the due diligence duty to international human rights and environmental commitments (fundamental and labour rights conventions, Paris climate agreement, etc.)

Would a due diligence duty not put EU companies at a competitive disadvantage vis-a-vis third country companies?

- Although operating in the EU without proper establishment is relatively rare, we are looking into possibilities to cover **also some third country companies not formally established but operating in the EU**.
- Strengthening sustainability chapters in **trade agreements**, which is subject to ongoing reflections, would help levelling the playing field globally.
- The due diligence study also shows that **no significant** negative distortions for EU companies are expected which would result from setting up and operating necessary due diligence processes. We will analyse other costs possibly linked to reorganisations of supply chains.

Many business operators, whilst calling for due diligence legislation, also call for actions to take place in producing countries: can the Commission play a role on both ends?

- The Commission services having competence in **complementary areas** on this matter cooperate in this process. **Other policies**, such as development cooperation, neighbourhood policy, trade and external relations contribute with support, funding, dialogue, agreements. There is also an ongoing reflection about how to make trade agreements support the transition better. These policies reinforce each other.

A new legislative framework should not invert the responsibilities of states and companies.

- To ensure that human rights are protected, States need to establish specific legal requirements. Companies (i.e. legal persons) shall respect human rights as much as physical persons, this has already been agreed in the UN 10 years ago when clarified in the UN Guiding Principles on Businesses and Human Rights. The commentaries of human rights covenants state that States shall legislate to require companies to respect such rights across their value chain. This is the way to ensure that States provide an effective protection framework for such rights.

Possible legislation should take into account that the COVID crisis heavily disrupted global value chains and the challenges in rebuilding them.

- We will carefully analyse cost impacts and pay particular attention to the needs of SMEs.

- Our public consultation will ask a detailed question about how SMEs burden could be reduced.

Multinational companies often operate in challenging circumstances, for example because of conflict, rule of law gaps or weak local governance.

- Properly implemented due diligence processes **help directors identify** the sustainability **risks** and **impacts** of the company, allowing them to **manage** those risks and **address** negative impacts **better**.

Will a possible EU law on due diligence have a limited scope with regard to supply chains? It is extremely complex for large multinationals to ensure full control at all levels of their supply chain, in particular those beyond tier one and downstream .

- The aim is to ensure the right balance here: the rules should be **effective** and should **not be easy to circumvent**. Human rights and environmental harm occurs more often beyond tier one, so covering only tier one suppliers would jeopardise the effectiveness of the measure. The French law also goes beyond tier one. In addition, such rule would also be very easy to circumvent putting the legitimacy of the measure in question.
- However, there is an embedded flexibility in due diligence as it is inherently **risk-based** and **requires continuous improvement**. The company should identify which supply chain is the most risky and prioritise the most serious issues first.

Any framework on due diligence should be based on an obligation of means rather than obligation of results. Companies should be exonerated from liability if they comply with a due diligence process standard.

- This is a **balancing** exercise: it is important to make sure that companies not only **establish processes** but also **implement them efficiently**.
- We hope our **public consultation** will inform us what can be added to a process requirement and also ensure the necessary legal certainty for companies.

A potential new reporting requirement should not overlap with the requirements under the Non-Financial Reporting Directive.

- We would like to ensure that **the non-financial reports provide stakeholders all the information** they need to **monitor** companies and directors, and – eventually – to **hold them to account**, with regard to their duties in relation to sustainability.

- We will pay particular attention to the **consistency** and the **links** between this initiative and the review of the NFRD.

The level of detail of a due diligence legislation should be proportionate to provide clarity for business, but without encouraging a tick-box approach.

- Care will be taken to ensure that the possible EU law and its obligations are **sufficiently clear**, also in order to prevent that it generates unnecessary litigation. At the same time, it should be **flexible** enough so that companies can adapt to their specificities.
- We are also exploring the possibility to **combine level 1 and 2 measures** and **legislation combined with non-binding guidelines**.

A possible mandatory approach on due diligence will impose bigger burdens on SMEs. Also, obligations will be imposed in any event on SMEs downstream, as part of the supply chain of companies that are within the scope. Any EU measure needs to take this into account.

- I agree that we need to **alleviate the burden** on SMEs. For instance, a **lighter** regime, more detailed **guidance** and a **gradual phasing in** of the new obligations are all possible options being explored.
- We also need to take into account that SMEs can be active in **high-risks sectors**, but they would also see **benefits** of the new rules: they may become better candidates to become a supplier of an EU company, they would themselves reap the benefits of addressing sustainability issues properly, they could get access to finance more easily etc.

Directors' duties:

Companies are already taking account of diverse stakeholders' interests alongside the financial interests of shareholders. It is a false assumption that shareholder value creation is necessarily contrary to a stakeholder-oriented approach. No EU legal requirements are necessary.

- A recent study conducted for us on directors' duties shows that there is a **growing predominant focus in corporate governance on short-term financial performance**.
- Companies today **pay dividends to the shareholders** (or ensure payouts to shareholders through **share buy-back** programmes) **before they secure the resilience and long-term viability of the company**. They do **not invest enough** into **medium-to-long-term goals**: into innovation, new technologies and the workforce.

- This harms their productivity, innovativeness, sustainability, competitiveness.
- This is despite the fact that in **all** EU Member States **directors owe their duties to the company and not to the shareholders**, even if there are **differences in national company law requirements**.
- So we are considering how to make it clear in the law what is expected from the directors. This would also empower directors to withstand short-term pressure.
- We should also **clarify** that **directors** need to have **a strategic view** over **all sustainability** matters.
- **Remuneration policies** need to be looked at to ensure that the incentives of the directors are aligned with the interests of the company.

In certain cases the interests of some stakeholders may be conflicting with each other (e.g. in restructuring, recovery, insolvency, merger or division). The company needs flexibility to balance those stakeholders' interests.

- All stakeholders' interests as well as the **long-term interest of the company** should always be considered in board decisions. We do not aim at making a hierarchy between the different interests, but focusing predominantly on one interest (i.e. short-term financial) should not be the norm.

It would be too early to amend the recent Shareholder Rights Directive 2. Transferring more competences from the board to the shareholders would disrupt well-functioning corporate governance structures.

- Transferring more rights to shareholders is **not the guiding principle** of our initiative. The **main objective** would now be to **take better account of other stakeholders' interest**, not only that of shareholders, and to explore the possibilities of **enabling other stakeholders as well to hold directors to account**.

BACKGROUND

The **Commission's 2018 Sustainable Finance Action Plan** announced consultative and analytical work to prepare a possible policy initiative, undertaken by two DG JUST studies, on **due diligence requirements in the supply chain** (published February 2020) and on **directors' duties and sustainable corporate governance** (published July 2020). Evidence collected show an **increasing trend of corporate short-termism** and **failure of voluntary action and reporting** in incentivising the change of companies' behaviour.

In a number of strategies implementing the **European Green Deal** as well as the **Recovery Plan**, the Commission announced a new **initiative on sustainable corporate governance for 2021**. It may take form of a legislative proposal "addressing human rights, and environmental duty of care and mandatory due diligence across economic value chains".

The Inception Impact Assessment ("**roadmap**") on the initiative is open for consultation until 8 October. A **public consultation** was planned to be launched still in September.

In parallel, the **EP's JURI committee** is preparing 2 reports on the topics covered but the sustainable corporate governance initiative; namely, an own initiative legislative report (**INL**) on "**Corporate Due Diligence and Corporate accountability**" (rapporteur Lara Wolters, S&D, NL) and an own initiative report (**INI**) on "**Sustainable Corporate Governance**" (rapporteur Pascal Durand, Renew, FR). Two studies are being prepared for the EP to underpin these reports.

In the meantime, more and more **MS** are having **laws, initiatives and plans** to reform corporate governance measures (DE, AT, FI, FR, NL, DK, IT, BE, LU, SE); the **FR Duty of Vigilance Law** being the first and most prominent, and **DE Supply Chain Act** considerations being the most recent.

As regards the position of stakeholder, during the consultative and analytical work that preceded the announcement of the initiative, **civil society** has exhibited **very strong support** in numerous instances, while **business associations** naturally expressed **initial hesitations** about possible mandatory rules, however are recently also starting to support the voice of **large individual businesses** who have repeatedly spoken out in EU fora and issued multiple calls **in support of EU level action**, to stop free-riding.

Consumer Affairs in relation to the Recovery Plan

Product Safety

- **Artificial Intelligence** and new technology products have great potential from both the industry's and consumers' point of view.
- **But** products using these technologies may present new risks, such as for example, cyber-threats affecting safety.
- It is necessary that producers make sure that these products are safe for consumers, which is also in the interest of the wide take-up of the technology.
- Furthermore, consumers buy increasingly **online**: in 2019, 63% of EU consumers purchased online. Consumer products should be safe whether they are sold to consumers **online or offline**.
- The Commission is gathering evidence on the size of these problems and how they can be tackled. This will feed into the evaluation and impact assessment of the **General Product Safety Directive**.

DEFENSIVES

When is the General Product Safety Directive proposal expected?

- As announced in the revised Commission 2020 Work Programme, the new proposal is expected for Q2 2021.

What is the General Product Safety Directive proposal going to focus on?

- The Commission will carry out an impact assessment and evaluation of the Directive to assess its implementation and how it can be further improved. The Commission has already preliminarily identified several areas that need to be tackled and for what we will gather further evidence, just to mention a few:
 - New digital challenges to product safety, in particular regarding online product safety market surveillance as well as challenges of new technology products that could cause cybersecurity risks in relation to safety, personal security risks and that self-evolve.
 - Enforcement issues: There are still too many dangerous products available to consumers on the EU market. In 2019 over 2 200 dangerous products were notified in the EU Rapid Alert System, but the actual number is likely to be much higher since not all consumer products on the EU market can be screened by market surveillance authorities. There are other enforcement issues tentatively identified, for example, product traceability is insufficient and the effectiveness of recalls of dangerous products from consumers is low.

Do you intend to regulate the responsibilities of online operators? Is there going to be any overlap with the Digital Services Act?

- The safety of products sold online will be considered as one of the issues to be tackled by the revision of the General Product Safety Directive, but also for the Digital Service Act. Within these discussions, the framework should be assessed including the responsibilities of online operators in order to ensure consumer protection as well as a level-playing field for companies. Commission services will coordinate to ensure coherence between the two initiatives.

The New Consumer Agenda

- **Consumer spending** will represent an important part of the **recovery**. We must reinforce consumers' confidence, and, at the same time, we **should not impose an undue heavy burden on companies**.
- **Only a coherent and comprehensive EU consumer policy** will be able to address new vulnerabilities and contribute to the collective recovery under the green and digital transitions; thus, the New Consumer Agenda (to be adopted on 18 November) will focus on key priority areas:
 - **Empowering consumers in the green and digital transitions;**
 - **Protecting vulnerable consumers;**
 - **Enforcing consumers' rights;** and
 - **International cooperation.**
- The New Consumer Agenda is currently open to public consultation, until 6 October; we would very much welcome the input of Business Europe to this strategy.

Green Consumption Pledges

- I am launching, under the Consumer Agenda a new non-regulatory initiative, the Green Consumption Pledges, which will be developed in cooperation with the industry, on a voluntary basis. This initiative aims to contribute to a sustainable economic recovery and to empower consumers to make greener choices.
- We are starting the green consumption pledges first with a few pilot projects with pioneer companies. The objective is to bring on board in the years to come a large number of companies in all sectors.
- If you have, within your members, companies that would like to be involved in the project, in the first phase or later on, we would be delighted to work with them.

DEFENSIVES

The New Consumer Agenda

How could you ensure that an agenda of such a high ambitions could concretely work, in terms of resources and practical implementation?

- The agenda is the tool to formulate our clear and long-term vision under which to identify and the funding under the new MFF. The priorities of the new Single Market Programme will have to support the objectives of the agenda.
- As well, I intend to call upon the Member States to align their funding streams to their consumer policy priorities. Each country will be invited to closely involve key stakeholders, including **businesses** and consumer organisations in the implementation of its consumer policy.

BACKGROUND

The New Consumer Agenda

The adoption of the Consumer Agenda is planned for November 2020, while the three flanking initiatives – i.e. a proposal aiming to empower consumers in the green transition, a review of the Directive on consumer credit agreements for consumers (2008/48/EC), and a review of the General Product Safety Directive (2001/95/EC) will be adopted in 2021.

The New Consumer Agenda should address both post-COVID consumer situation and longer-term consumer policy challenges. Issues range from rogue traders abusing the fast evolving markets and offering products at excessive prices, to advertisements with bogus claims or even offers of unsafe products. These emerge at the time of increased consumer vulnerabilities.

There is, therefore, a need to adapt the European consumer policy framework to market evolutions, including the rapid digital and green transitions. In doing so, it is important to avoid new obligations in consumer legislation that could generate undue extra burden or costs on companies grappling with the impact of the crisis.

A balanced policy requires a holistic approach to consumer agendas, taking into account all emerging issues also linked to the pandemic's effects at large. Vulnerable consumers are and will be most likely to suffer disproportionately from any socio-economic downturn resulting from the coronavirus pandemic. Such vulnerability may no longer stem primarily from health or socio-economical disadvantages. New sources of consumer vulnerability increasingly extend to, for instance, situations of over-indebtedness, reduced digital literacy, geographical remoteness, etc.

The five key priority areas remain valid also post-COVID: consumer empowerment in both the green and the digital transitions, consumer vulnerabilities (including in financial services), enforcement of EU law, and international cooperation.

Three cross-cutting themes need to be address in each priority area: trust and transparency of responsibilities between authorities, consumers and businesses; better information to consumers and fighting false information; ensuring consumers feel safe and reassured in the new consumer policy framework.

It will be important for all Member States to enhance action on these elements, and the cooperation with the Commission and the other Member States, for an improved coherence of policy priorities and implementing measures

This strategic Commission Communication will also serve as the chapeau for several legislative proposals which will be made reference to in the Communication and adopted in 2021:

1. Revision of Directive 2001/95/EC on general product safety (GPSD)

The aim of the revision is to ensure all non-food consumer products on the EU market are safe and to ensure a level-playing field for all businesses online and offline. This would allow to maintain the “safety net role” of the Directive. Among other aspects, it aims to address product safety issues linked to new technologies, such as Artificial Intelligence and product safety challenges in online sales. The revision also aims at making product recalls more effective to keep unsafe products away from consumers and at enhancing market surveillance.

2. Revision of Directive 2008/48/EC on consumer credit (CCD)

In 2019 an evaluation of this Directive showed that it does not fully ensure high standards of consumer protection across the EU. The objective to foster a well-functioning internal market has only been partially achieved. The revision will extend consumer protection to new (non-bank) operators (e.g. peer-to-peer lending platforms) and new products (e.g. short-term high-cost loans), which can lead to over-indebtedness. It will also update the information disclosure requirements to reflect the effects of digitalisation and shift to online contracts. It will strengthen the effectiveness of creditworthiness assessment rules to make sure the assessment is done in the interest of the consumer (as required by the Court of Justice). These revisions should provide for a more effective prevention of misusing consumer vulnerabilities in the financial sector.

3. New legislative initiative to empower consumers in the green transition

This initiative, announced in the Green Deal and Circular Economy Action Plan, aims to ensure that consumers are provided with more accurate, clearer and more reliable information in order to choose durable, repairable and sustainable products. In order for consumers to actively participate in the green transition, they need trustworthy information on the expected lifespan and reparability of products, on their sustainability and environmental impact.

The scope and content of this legislative proposal will build on synergies with various work-streams that are under way in different Commission services (ENV, GROW, CNECT) in response to the Green Deal and the new Circular Economy Action Plan, notably on product standards on material efficiency (durability/reparability) and technical methodologies (e.g. Product/Organisational Environmental Footprint).

The Open Public Consultation on the whole consumer package started on 30 June will last until 6 October - Link: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12464-A-New-Consumer-Agenda/public-consultation>

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