

To: Valdis Dombrovskis, Vice-President of the European Commission

cc: Jean-Claude Juncker, President of the European Commission
cc: Jyrki Katainen, Vice-President of the European Commission
cc: Olivier Guersent, Director-General for Financial Stability, Financial Services and Capital Markets Union
cc: Martin Spolc, Head of Unit, DG Financial Stability, Financial Services and Capital Markets Union, European Commission

Brussels, 23 July 2018

Dear Vice-President Dombrovskis,

We warmly thank you for your response to our letter of 22 March 2018, titled "On a Human Rights Mandate for the Technical Expert Group on Sustainable Finance"¹, and welcome the Commission's willingness to engage with civil society and trade unions on this crucial topic.

As our original letter was sent in the months preceding the release of COM (2018) 353² concerning a "framework to facilitate sustainable investment" ('the taxonomy'), we would like to congratulate you for the positive steps taken to ensure that legally-protected human rights are considered and respected in this core component of the Commission's work, namely through the development of criteria to operationalise a 'do-no-harm' approach³, as well as minimum safeguards⁴ based on the International Labour Organisation's (ILO) core conventions (collectively, 'the human rights provisions').

The Commission's approach increasingly demonstrates that the inseparability of climate-related, environmental and social factors should be a permanent feature in the EU's approach to the development of all public policy initiatives related to sustainable finance. Nonetheless, we would also like to express our reservations as to whether the Commission's current approach to developing the provisions will ensure this intended outcome.

¹ 'On a human rights mandate for the Technical Expert Group on Sustainable Finance' (2018). Available: <https://shareaction.org/wp-content/uploads/2018/03/Letter-to-Commission-TEG-Mandate.pdf>

² European Commission (2018), *Proposal for a regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment*. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0353&from=EN>

³ Ibid. Art 12

⁴ Ibid. Art 13

The potential uses of the taxonomy by the European Union, Member States, and financial market actors, constitutes it a key tool which is expected to significantly impact the flow of capital towards particular assets and activities. It is therefore crucial that the design of the taxonomy guarantee a high level of effectiveness to the protection of human rights, as capital flows should not be incentivised towards activities that may be environmentally sound, but otherwise unsustainable. In addition, the taxonomy must facilitate the ability of end-investors, including retail investors, beneficiaries and policyholders, to ensure their capital is allocated in activities that do not harm their social interests, even in the context of climate or environmentally friendly investments. Being able to meet these expectations is a core component of how investors should approach acting in the best interests of their clients, for which a high level of granularity is needed. We consider this granularity to be currently missing from the Commission's planning.

It is our strong belief that the resilience of financial institutions is closely related to the ability to mitigate reputational and liability risks resulting from their operations, which the proposed taxonomy should not unwittingly detract from. Well-functioning, healthy and legitimate markets are based on a holistic approach to responsible investment, which fully accounts for how different elements of the ESG spectrum interact with each other. The taxonomy will also be a crucial reference point for any action aiming to foster sustainable and transparent corporate governance that is conducive to sustainable investments. Consultation with appropriate experts, as outlined below, would greatly facilitate the Commission's intention of developing a taxonomy that would truly guide sustainable investments.

We would like to offer the following recommendations on how human rights should be reflected in the immediate development of the taxonomy for environmentally sustainable economic activities ("environmental taxonomy"). Our recommendations concern the content of the human rights provisions, the structure of these provisions, as well as the development and governance of the taxonomy as a whole. In addition, we would like to offer two further recommendations, the first concerning good governance safeguards, as referred to in the explanatory memorandum to COM 2018 (353), and the second concerning the development of a taxonomy for activities contributing to social objectives ('social taxonomy').

On the mitigation of human rights risks in the environmental taxonomy

I. The content of the human rights provisions

We commend the Commission's intention of ensuring the development of 'do-no-harm' principles, as outlined in Article 12 of COM (2018) 353. Nonetheless, we regret that this

provision, as it currently stands, is not directly linked to the mitigation of harm related to human rights, as it will be developed exclusively vis-à-vis the environmental objectives covered by the taxonomy. We encourage the Commission to explore ways in which 'do-no-harm' principles can be independently linked to standards and instruments covering human rights and social factors.

We are encouraged by the Commission's intention to develop minimum safeguards in reference to the eight fundamental conventions of the ILO, as described in Article 13 of COM (2018) 353. Nonetheless, we would encourage the Commission to widen the scope of legal instruments on which such safeguards would depend, as the wide range of economic activities that will be covered by the taxonomy will have an impact across a far wider range of human rights and social risks than just labour rights.

In particular, we would encourage minimum safeguards to be informed by:

1. The EU Charter of Fundamental Rights, which covers, but is not limited to, the protection of liberty, personal integrity, privacy, the protection of personal data, and property;
2. The International Bill of Human Rights, comprised of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, of which all EU Member States are party;
3. The United Nations Guiding Principles on Business and Human Rights⁵, which constitute the authoritative international normative framework on mitigating human rights risks related to business activity, supported by Council Conclusions 10254/16⁶. Recent legislative developments, such as the French Duty of Vigilance Law⁷, reflect the principles of the UN Guiding Principles, and set out requirements for the development, publication, review and oversight of 'vigilance plans' to oversee the mitigation of severe impacts on human rights and the environment resulting from business activity. The Principles are binding on all business enterprises, including private equity investors⁸.

⁵ United Nations (2011), *Guiding Principles of Business and Human Rights*. Available: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

⁶ Council of the European Union (2016), *Council Conclusions on Business and Human Rights*. Available: <http://data.consilium.europa.eu/doc/document/ST-10254-2016-INIT/en/pdf>

⁷ *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre 2017*. Available: <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>

⁸ British Institute of International and Comparative Law and Principles for Responsible Investment (2017), *BIICL and PRI Workshop on Human Rights in Private Equity*. Available: <https://www.unpri.org/download?ac=3989>

While we consider these three sources to provide an authoritative basis of references for the content of the provisions, this list should not preclude the use of wider instruments outlining, where relevant, the rights of vulnerable groups⁹, as well as additional considerations linked to international humanitarian law for investments in the context of conflict.

II. The structure of the human rights provisions

Once the Commission has widened the scope of instruments on which the provisions should be based, we recommend a three-step approach to their development:

1. As a first step, we agree that both the minimum safeguards and the criteria behind the 'do-no-harm' approach should be developed uniformly, as outlined in your response to our letter;
2. As a second step, the Commission should consider whether activity-specific criteria in relation to human rights are necessary, to ensure sector-specific human rights risks are captured by the aforementioned safeguards;
3. As a third step, the Commission should ensure that appropriate due diligence requirements are in place to determine compliance with both the minimum safeguards and the 'do-no-harm' criteria. The development of these provisions is an important step but otherwise incomplete without ensuring they are adhered to effectively and in a transparent manner. A crucial reference for this work should be the OECD "Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises"¹⁰ ("Key Considerations"). The Key Considerations provide guidance for how asset owners and asset managers can carry out due diligence in order to best comply with the OECD Guidelines for Multinational Enterprises¹¹, also endorsed by Council Conclusions 10254/16.

⁹ The rights of vulnerable groups, including those of women, children and migrant workers, are referred to in the seven core international human rights treaties ("United Nations Conventions") and are binding on state parties.

¹⁰ OECD (2017), *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*. Available: <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

¹¹ OECD (2011), *OECD Guidelines for Multinational Enterprises*. Available:
<http://www.oecd.org/daf/inv/mne/48004323.pdf>

III. The development and governance of the human rights provisions and the taxonomy as a whole

We regret that the Commission did not widen the call for applicants for the Technical Experts Group on Sustainable Finance ('Technical Expert Group') to include experts with specific knowledge of human rights issues, as we believe that such inclusions would have facilitated the Commission's work in developing effective minimum safeguards and criteria for the 'do-no-harm' approach. Nonetheless, even at this later stage, we believe that the following would support the Commission in achieving this outcome:

1. In terms of the work of the Technical Expert Group:
 - a. A formally established group of human rights experts, including trade union representatives, academic experts, and civil society organizations, which would follow and advise on the work of the Technical Expert Group consistently and not in an ad-hoc fashion;
 - b. The inclusion, through permanent observer status to the Technical Expert Group's work, of trade union representatives, academic experts and civil society organizations with expertise in human rights and social issues.
2. In terms of the Platform on Sustainable Finance, as outlined in Article 15 of COM 2018 (353) ('the Platform'):
 - a. A clear commitment that the Commission's selection process explicitly call for human rights experts, including civil society and trade union representatives, to ensure that it has the relevant expertise to continue to review and improve the integration of human rights considerations into the development and application of the taxonomy;
 - b. The inclusion of the European Union Agency for Fundamental Rights (FRA) in the Platform.

On the development of governance safeguards

We regret that governance safeguards, as referred to in the Explanatory Memorandum of COM 2018 (353), are wholly lacking from the work and mandate of the Technical Expert Group. We would like to emphasise that good governance, related to issues such as taxation practices,

corruption, and board structure, are not simply an 'investment target'. Good governance provisions are a crucial component of ensuring the proper design and implementation of all sustainable investments. As such, the Commission must ensure the development of governance safeguards to accompany the development of the taxonomy from the outset.

On the development of a taxonomy for activities contributing to social objectives

To properly respond to the sustainability challenge, the EU needs to broaden its current ambitions beyond an environmental taxonomy. We would strongly recommend that the Commission commit to the development of a wide-ranging and robust 'social taxonomy', as the current wording of the review clause of COM 2018 (353) suggests that the development of a social taxonomy is not a certainty.

We recommend that the Commission commit to its development from the outset, as well as publicly outline this process, by setting a clear timeframe. This work should under be undertaken without undue delay, commencing earlier than the Commission's current proposed timeline, extending to 2026 and beyond.

To conclude, we would like to recognise the enormity of the Commission's task. It is not our wish that this work be further complicated, but firmly believe that for the taxonomy to serve its intended purpose the Commission needs to adopt a more holistic and comprehensive approach to its development.

Consultation with appropriate experts, as outlined above, would greatly facilitate the Commission's intention of developing a taxonomy that would truly guide sustainable investments and responsible corporate governance.

We thank you for your attention and continued engagement on this crucial topic.

Sincerely,

