

## **EuropeanIssuers Position on European Commission's Consultation on Sustainable Corporate Governance**

**8 February 2021**

In the context of the European Commission's public consultation on Sustainable Corporate Governance, EuropeanIssuers would like to reiterate its position on the consultation paper, as well as the various points touched upon throughout the questionnaire.

EuropeanIssuers fully supports the concept of sustainable corporate governance which helps reconcile economic growth, social progress and environment protection. Companies across Europe are already integrating such a concept in their strategy which they decline in different ways: enhanced dialogue with stakeholders, CSR risks apprehended at board level, CSR criteria included in executive remuneration.

However, we have several observations in relation to the public consultation document used for the purpose of gathering the feedback from stakeholders.

Firstly, from a methodological point of view, we regret that the questions of the consultation document are biased and do not allow the participants to express dissenting opinions without being regarded as opponents of good governance. The ECLE has raised this issue stating that "the drafters of the questionnaire have ignored an elementary principle of questionnaire design which is that it should aim to ensure that the answers to the questions asked reveal the full extent of social reality (in this case the full extent of the views held) rather than support the designers' preconceived notions of what that social reality is." This is due to the consultation paper referring directly to the conclusions of the EY Study on directors' duties and sustainable corporate governance, study which has been heavily criticised in the context of the Commission's consultation on its Inception Impact Assessment.

On Corporate Governance issues, EuropeanIssuers would like to underline that it is not true that boards of directors do not include CSR issues in the definition of the company's strategy, it is also wrong to say that boards have a short-term view and focus on the interests of shareholders at the expense of other stakeholders' interests. Companies attach great importance to their stakeholders and engage in regular dialogue to up with hundreds of them. It is simplistic and reductive to oppose the financial interest of shareholders (necessarily short-term) with the interests of all stakeholders (necessarily long-term). Finally, it is not acceptable to claim that board members are incompetent on environmental, social or human rights issues. More globally, EuropeanIssuers deplores the fact that the questionnaire appears to ignore other legislative initiatives, such as the recently amended Shareholder Rights Directive or the Non-Financial Information Directive (NFRD) currently under review.

Therefore EuropeanIssuers denies the need of an EU legislation:

- to create an obligation for the company to identify its stakeholders and to manage risks and opportunities related to them, subject already widely covered by the NFRD;
- to require the board of directors to "balance the interests of all stakeholders" which would lead to a risk of paralysing the functioning of the board and management in addition to enhancing the risk of litigation
- to impose stakeholder information/consultation processes to the board of directors as it is up to companies not only to identify the stakeholders with whom they wish to engage in dialogue, but also to define the appropriate means and periodicity of such a dialogue;
- to add a new layer of legislation on executive compensation, while the Shareholder Rights Directive has already incorporated long-term consideration;
- to impose CSR expertise requirements as part of the board member recruitment process which is one among many other fields of expertise expected of board members;
- to further regulate the practice of share buybacks, which is already subject to a European supervision.

In our view, if the EU considers necessary to take further action on the issue of corporate governance, we consider that any action shall be weighted through the subsidiarity and proportionality principles enshrined in Article 5 of the TEU. Based on this, such a corporate governance and company law subject should be better dealt **in the form of a Recommendations towards the Member States in order to avoid a one size fits all approach due to the wide diversity of corporations and practices.**

Regarding the consultation questions relating to a European Due Diligence obligation, EuropeanIssuers would like to highlight the following key points of its response:

- The EU Due Diligence framework should not be overly descriptive and leave flexibility to companies in setting up their risk mitigation processes. It should ensure **legal certainty** and be fully aligned with internationally recognized principles of responsible business conduct, such as the OCDE Guidelines for Multinational Enterprises or the United Nations Guiding Principles on Business and Human Rights (UNGPs).
- It should be **proportionate** and only address the contractual relationship between the company and the first-tier suppliers instead of being mandatory along the entire supply chain, taking into consideration the bargaining and contractual power of companies. Moreover, SMEs should be excluded from such a duty, unless they decide to opt-in voluntarily.
- It should be an **obligation of means** and focus on the establishment of a "**due-diligence system**", which encompasses measures and procedures that ensure the monitoring of suppliers' compliance with the company's due diligence requirements.
- It should focus on **the most severe risks**, with a risk-based approach, taking into account the fact that it is impossible to mitigate every single risk on the supply chains. Due diligence is an ongoing process which must be improved over time focusing first on the most salient risks before analysing less important risks.
- It should also be **applicable to non-EU companies operating in the EU** to ensure a level playing field.

- Due to the **importance of human rights**, EuropeanIssuers advocates for starting with a thematic approach focusing on this issue. The issue of **climate change is a global environmental risk** resulting from a multitude of actors, wherever they are located. It should therefore be addressed in a different, appropriate legislative framework.
- Last, the **issue of liability needs to be addressed**: the EU framework should not impinge on general principles of civil law. It could only require companies to make best efforts to avoid violations of human rights. It should also refrain from granting third parties (e.g., non-governmental organizations) a right to bring actions against the company or the management of a company before national courts.

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We aim to ensure that EU policy creates an environment in which companies can raise capital through the public markets and can deliver growth over the longer term. We seek capital markets that serve the interests of their end users, including issuers.

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