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Directorate A
Unit A3: Company law

Sustainable corporate governance initiative

Summary report – public consultation

Disclaimer

This document should be regarded solely as a summary of the contributions made by stakeholders to the open public consultation on the sustainable corporate governance initiative. It cannot in any circumstances be regarded as the official position of the Commission or its services.

Objectives of the public consultation

The purpose of the open public consultation was to gather stakeholder input with regard to the initiative on sustainable corporate governance, and to ensure that all relevant stakeholders were given the opportunity to share their views. More specifically, the consultation aimed to:

- Gather the views of stakeholders on the need and objectives for EU intervention as well as different policy options;
- Gather data that can be used to better assess the costs and benefits of different policy options;
- Gather additional knowledge about certain specific issues, in particular in regard to national frameworks, enforcement mechanisms and current jurisprudence.

The results of the public consultation will contribute to an impact assessment accompanying the proposal. This consultation is one of several consultation activities feeding this impact assessment.

Approach to the public consultation

Open public consultations are not, by nature, statistically representative of the population (unlike, for example, public opinion polls). Therefore, their purpose is not to find answers that could be generalised, but rather to gain in-depth insights that can shed new light on a range of issues.

The questionnaire contained 26 questions including the possibility of providing additional information through open-ended questions. It was divided into five overall sections: (1) about you, (2) need and objectives for EU intervention, (3) directors' duty of care – stakeholder interests, (4) due diligence duty, and (5) other elements of sustainable corporate governance.

The questionnaire targeted a broad range of stakeholders including businesses and their directors (all sectors, all sizes, including non-EU companies), any individuals and groups impacted by their operations in the EU and in the global value chains (employees, consumers, investors, local communities, etc.), investors and their organisations, environmental organisations, trade unions and non-governmental organisations, public authorities with a possible role in supervising and enforcing the new rules, international organisations, due diligence and responsible business standard setters, auditors and other assurance providers, sustainability rating agencies, as well as research and data providers.

The questionnaire was uploaded to the Have Your Say platform of the European Commission. To maximise the response rate, the open public consultation was shared via the social media channels of the Commission. The open public consultation on the sustainable corporate governance initiative was running from October 26, 2020 until February 8, 2021, lasting 15 weeks.

Respondent profile

In total, 473.461 public responses were obtained during the consultation period. In addition, currently 149 position papers were received outside of the EU Survey.

This number was driven to a large extent by campaigns (online consultation tools) carried out by a number of NGOs (e.g. Anti-slavery International, Avaaz, Clean Clothes Campaign,

Global Witness, etc.), using pre-filled questionnaires. Of the 473.461 total responses, 472.606 responses have been identified by the Commission as submitted through campaigns. These responses will be segregated and analysed separately from the non-campaign responses.

The remaining 855 responses are further broken down in this short report.

Of these 855 respondents, 195 (22.8%) filled in the questionnaire as NGOs, 191 (22.3%) as a company/business, 173 (20.2%) as business associations, 106 (12.4%) as a EU citizen, 53 (6.2%) as Trade unions, 33 (3.9%) as academic/research institutions, 19 (2.2%) as public authorities, 10 (1.2%) as non-EU citizens, 5 (0.6%) as consumer organisations, 4 (0.5 %) as environmental organisations and 66 (7.7%) as other. Among those who responded as public authority, the following Member States are represented: Belgium (3 responses), Spain (4 responses), France (2 responses) Germany (2 responses), Czech Republic (1 response), Denmark (1 response), Estonia (1 response), Finland (1 response), Italy (1 response), Luxembourg (1 response) and the Netherlands (1 response). Therefore, in total there were 18 Member State responses, from 11 different Member States. Given that Denmark, Sweden and the Netherlands also submitted a position paper, 12 different Member States participated in this consultation.

Within the EU and UK, countries with the highest number of respondents were Germany (195 respondents, 22.8 %), Belgium (141 respondents, 16.5%), France (73 respondents, 8.5%), UK (56 respondents, 6.5%), the Netherlands (53 respondents, 6.2%), Italy (44 respondents, 5.2%), Spain (34 respondents, 4%), Finland (34 respondents, 4%), Sweden (32 respondents, 3.7%) and Austria (31 respondents, 3.6%). The non-EU country with the most respondents was the United States (23 respondents, 2.7%). 56 respondents (6.6%) are from non-EU countries other than UK and US.

238 (27.8%) of participants opted to remain anonymous, whilst 617 (72.2%) opted for their details to be published with their contribution.

As regards company responses (191 respondents, 22.3%), more than half came from large companies (109 respondents, 57.1%), the majority of which indicated they had more than 1000 employees (90 responses, 82.6%). Almost half of all company responses came from non-listed companies (94 responses, 49.2%). 34.6% (66 responses) came from listed companies, and the remaining company respondents did not indicate whether their company is listed on the stock exchange (31 responses, 16.2%).

As regards experience with due diligence, the majority of companies indicated that they have experience with voluntary measures (90 responses, 47.1%) or legal obligations (47 responses, 24.6%). Other respondents either have no experience with due diligence (20 responses, 10.5%), or did not answer this question (34 respondents, 17.8%).

Of those respondents established/registered in an EU Member State who provided information about their activities, the majority carries out their activities in several EU Member States (238 respondents, 59.1%). 93 respondents specify in which third country they are established/registered (mostly UK (25 respondents, 26.9%) and USA (15 respondents, 16.1%)). 71 respondents (59.2%) of those who are resident or established/registered in a third country and who provide more information, carry out (part of) activity in the EU. Only 26.8% (30 respondents) of respondents with third country-activities indicated that they are part of the supply chain of an EU company.

Need and objectives for EU intervention

On the question of need for companies and their directors to **take account of stakeholder interests** in corporate decisions, the majority of respondents expressing an opinion (763 respondents, 89,2%) agreed on the need for such a holistic approach (597 respondents, 78.2%), followed by those who were in favour only to the extent these issues are relevant to the financial performance of the company (141 respondents, 18.5%). Of respondents expressing an opinion, NGOs supported the need for a holistic approach with 93.2% (179 respondents), companies with 60% (99 respondents) and business associations with 58.6% (75 respondents).

As regards the need for **developing an EU legal framework for due diligence**, an overwhelming majority of overall respondents answering expressed support for action (660 respondents, 81.8%), while only a small number (118 respondents, 14.6%) considered the existing voluntary frameworks to be sufficient or is of the opinion that no action is necessary (29 respondents, 3.6%). NGOs supported the need for action with 95.9% (185 respondents), companies with 68.4% (121 respondents) and business associations with 59.6 % (93 respondents).

The large majority of respondents sharing their opinion agreed that among **potential benefits** of an EU legal framework are: (1) harmonisation to avoid fragmentation (622 respondents, 82.1%), (2) awareness of companies' negative impacts (606 respondents, 79.9%), (3) effective contribution to a more sustainable development (580 respondents, 76.5%), (4) levelling the playing field (572 respondents, 75.5%) and (5) increased legal certainty (533 respondents, 70.2%). 54% of respondents (410) think that a potential benefit is increasing leverage in the value chain, and 29.3% (222 respondents) think that a potential benefit is better chances to be part of EU supply chains for SMEs. Harmonisation is listed as a potential benefit by the majority of NGOs (86.4% of respondents), companies (81.6% of respondents), as well as business associations (80.4% of respondents). The other benefits that are considered as potential benefits by many respondents are strongest supported by NGOs, with companies and business associations being also moderately supportive. For example, awareness of companies' negative impacts, effective contribution to a more sustainable development and levelling the playing field are mostly listed as a potential benefit by NGOs (respectively 96.2%, 90.8% and 84.2% of respondents) and less by companies (respectively 67.1%, 64.6% and 45% of respondents) and business associations (respectively 54.5%, 55.2% and 69.2% of respondents).

Among the listed **potential drawbacks** of an EU legal framework: (1) 55.7% (426 respondents) expects increased administrative costs, (2) 52.8% (404 respondents) expects competitive disadvantage vis-à-vis third country companies, (3) 51.6% (395 respondents) expects penalisation of smaller companies with fewer resources and (4) 51.5% (394 respondents) expects disengagement from risky markets. Comparatively less respondents worry about responsibility for damages that an EU country cannot control (319 respondents, 41.7%), difficulty for buyers to find suitable suppliers (222 respondents, 29%), and decreased attention to core corporate activities (88 respondents, 11.5%). There are large discrepancies between companies and business associations on the one hand, and NGOs on the other hand in the sense that the former respondents think the listed drawbacks are important to a larger extent than the latter respondents. For example, administrative costs are mostly considered a

drawback by companies (81.2%) and businesses associations (95.2%), whereas only 17.4% of NGOs agrees. Similarly, 70.1% of companies and 89.8% of business associations expect competitive disadvantage vis-à-vis third country companies. Only 18.0% of NGOs think this is a drawback.

Directors’ duty of care – stakeholder interests

When asked about **which interests are relevant** for the long-term success and resilience of the company, the following percentage of respondents (who took position) thought the listed interests are relevant¹:

Table 1: Interests deemed relevant

Interests	All respondents	Companies and business associations	NGOs
interests of employees	706 (99.6%)	293 (100%)	160 (99.4%)
interests of customers	684 (99.4%)	291 (100%)	151 (98.7%)
the consequences of any decision in the long-term	613 (98.9%)	231 (98.7%)	154 (99.4%)
interests of people and communities affected by operations of the company	655 (98.4%)	249 (98.8%)	161 (99.4%)
interests of natural environment	657 (97.9%)	250 (97.7%)	158 (98.1%)
interests of people and communities affected by the company’s supply chain	602 (95.9%)	213 (93.8%)	157 (99.4%)
interests of employees in the company’s supply chain	594 (95.3%)	215 (93.1%)	153 (97.5%)
interests of society	471 (95.2%)	166 (93.8%)	135 (99.3%)
interests of shareholders	627 (94.6%)	275 (97.5%)	144 (95.4%)
interests of others	238 (91.5%)	63 (81.8%)	103 (100%)

When asked **if corporate directors should be required by law to identify stakeholders’ interests, to manage the risks for the company in relation to stakeholder interests, and to identify the opportunities**, agreement was expressed from overall respondents on all points with strong support for identifying and managing stakeholder interests (508 respondents, 72.6%) as well as managing the risks for the company in relation to stakeholders (505 respondents, 72.3%), and to a lesser extent for identifying opportunities (372 respondents, 63.3%).. Individual businesses expressed support on all points (54.3%, 59.2%, 46.8% respectively) while business associations expressed disagreement (64.6%, 65.6%, 69.9% respectively). NGOs, on the other hand, mostly agreed (93.7%, 91.8%, 83.7% respectively).

When asked about corporate directors being required by law to set up adequate **procedures and measurable (science –based) targets** to ensure impacts on stakeholders are addressed, the majority of overall respondents answering expressed support (523 respondents, 69.6%). Individual companies were acquiescent with approximately half expressing support (85

¹ Companies and business associations have very similar results and are therefore grouped together.

respondents, 49.4%) and half disagreement while business associations mostly expressed disagreement (102 respondents, 73.9%). 93.1% of NGOs (161 respondents) agree with the statement.

When asked about corporate directors **balancing the interests of all stakeholders** being clarified in legislation as part of directors' duty of care, majority of overall respondents answering expressed support (496 respondents, 68.2%). Individual companies were largely neutral, with 53,9% (90 respondents) expressing disagreement while business associations expressed disagreement (100 respondents, 77.5%).

When asked about sustainability risks, impacts and opportunities being integrated into the **company's strategy**, decisions and oversight, overall respondents answering expressed overwhelming support (637 respondents, 86,2%). Individual companies and business associations expressed the same sentiment with 70,6% (211 respondents) showing support. In the case of NGO respondents, 92.4% (159 respondents) agrees.

On the topic of **enforcement of directors' duty of care**, the majority of overall respondents answering expressed support (425 respondents, 59,6%) for stakeholders, such as for example employees, the environment or people affected by the operations of the company as represented by civil society organisations being given a role in the enforcement. NGOs particularly express support (148 respondents, or 90.8% of NGO respondents agree). Individual companies however expressed concern, with 68,9% (111 respondents) expressing disagreement while business associations expressed strong disagreement (123 respondents, 89.8%).

Lastly, while expressing overall support for the concept of sustainable corporate governance, a number of respondents cautioned about the methodology used in the preliminary EY Italy **Study on directors' duties and sustainable corporate governance** contracted by the Commission in the consultative and analytical phase and the use of its findings in the open public consultation.

Due diligence duty

When asked about the **content of possible corporate due diligence duty**, a staggering number of respondents, who revealed a preference for an option, preferred a horizontal approach over a sector specific or thematic approach (636 respondents, 92,4%). The most preferred option of overall respondents answering was the most ambitious option (331 respondents, 48.1%), namely a minimum process and definitions approach complemented with further requirements in particular for environmental issues (incl. alignment with the goals of international treaties and conventions). The second preferred option (184 respondents, 26.7%) was a principles-based approach, i.e. general due diligence duty based on key process requirements defined at EU level regarding identification, prevention and mitigation of relevant risks and negative impact. Nevertheless, some respondents (116, 14.4%) prefer none of the options. Individual companies and business associations preferred a minimum process and definitions approach without further requirements (89 respondents, 35.2%), followed by the principles-based approach (81 respondents, 32%), and a minimum process and definitions approach complemented with further requirements in particular for environmental issues (48 respondents, 19%). Individual companies and business associations had very similar preferences with one exception: individual companies were, compared to

business associations, more in favour of minimum process and definitions approach complemented with further requirements in particular for environmental issues (24.8% of companies prefer this option, compared to 12.1% of business associations). NGO respondents prefer a minimum process and definitions approach complemented with further requirements in particular for environmental issues (73.3%), followed by a principles-based approach (16.1%) and a minimum process and definitions approach without further requirements (7.8%).

Respondents that preferred a minimum process and definitions approach with or without further requirements, indicated **the following areas to be covered:** human rights (94.3%) and followed by climate change mitigation (85.6%), natural capital, land degradation, ecosystem degradation, etc. (83%) and interests of local communities, indigenous peoples' rights, and rights of vulnerable groups (83.2%).

On how the **burden for SMEs could be reduced**, overall respondents answering indicated the most effective options to be a toolbox/national helpdesk (414 respondents, 52.8%), followed by capacity building support incl. funding (326 respondents, 41.6%), detailed non-binding guidelines catering to SME needs (265 respondents, 33.8%), lighter reporting requirements for SMEs (245 respondents, 31.3%) and lighter requirements ("principles-based" or "minimum process and definitions" approaches) for SMEs (227 respondents, 29%). The remaining listed ways to reduce burdens were preferred by less than 20% of respondents. NGOs believe in a toolbox (71.8%) and non-binding guidelines (0.53%) more than companies and business associations (of whom 42.9% think a toolbox is effective, and 34.7% think non-binding guidelines are effective). On the other hand, companies and business associations are more positive than NGOs about lighter reporting requirements (37.4% compared to 12.1%) and capacity building support (40.1% compared to 20.3%)

When asked if due diligence rules should apply also to certain **third-country companies** not established in the EU but carrying out activities in the EU, an overwhelming majority of overall respondents who expressed an opinion agreed (711 respondents, 97%). Most of them (570 respondents, 90.9%) also agree that EU due diligence duty should be accompanied by other measures to foster a more level playing field between EU and third country companies.

When asked about the **enforcement mechanism** accompanying a mandatory due diligence duty, overall respondents who expressed an opinion indicated the most appropriate option to be supervision by competent national authorities with a mechanism of EU cooperation/coordination (555 respondents, 70.6%), followed by judicial enforcement with liability (388 respondents, 49.4%) and supervision by competent national authorities based on complaints about non-compliance with effective sanctions (348 respondents, 44.3%). Interestingly, individual companies and business association expressed the same preference for supervision by competent national authorities with a mechanism of EU cooperation/coordination (195 respondents, 58.7%), however followed by supervision by competent national authorities based on complaints about non-compliance with effective sanctions (76 respondents, 22.9%) and lastly judicial enforcement with liability (47 respondents, 14.2%). NGOs prefer supervision by competent national authorities with a mechanism of EU cooperation/coordination (159 respondents, 86.0%), followed by judicial enforcement with liability (157 respondents, 84.9%) and supervision by competent national authorities (131 respondents, 70.8%).

As regards **access to remedy**, the majority of respondents did not provide answers (448 respondents, 52.4%). Of those who answered the question, 45.0% (183) has some information about difficulties to get access to remedy that have arisen.

Other elements of sustainable corporate governance

As regards **stakeholder engagement**, overall respondents answering were supportive of requiring directors to establish mechanisms for engaging with stakeholders in defining corporate strategy and due diligence processes (484 respondents, 66.4%). 93.1% of NGOs respondents are supportive. However, individual companies and business associations expressed the opposite sentiment with the majority respondents disagreeing (68.0%).

As regards **remuneration of directors**, generally respondents who answered scored highest the option of making compulsory the inclusion of sustainability metrics linked, for example, to the company's sustainability targets or performance in the variable remuneration and taking into account workforce remuneration and related policies. Restricting directors' ability to sell the shares they receive as pay was also considered most efficient by a large number of respondents. Overall, approximately half of the respondents did not answer the question. Individual companies and business associations were particularly reluctant to rank options with approximately one in three providing an answer.

As regards **enhancing sustainability expertise in the boards**, overall respondents answering considered a requirement for the board to regularly assess its level of expertise on environmental, social and/or human rights matters and take appropriate follow-up (451 respondents, 62.1%), followed by a requirement for companies to consider environmental, social and/or human rights expertise in the directors' nomination and selection process (302 respondents, 41.6%) and the requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise (294 respondents, 40.5%). Individual businesses and business association either did not consider proposed options effective (128 respondents, 42.4%) or favored the requirement to regularly assess its level of expertise and take appropriate follow-up (120 respondents 39.7%). NGOs mostly favor the requirement for the board to regularly assess its level of expertise on environmental, social and/or human rights matters and take appropriate follow-up (136 respondents, 84.0%) and the requirement for companies to have a certain number/percentage of directors with relevant environmental, social and/or human rights expertise (112 respondents, 69.1%)

As regards the option of EU taking further action to regulate **share buybacks**, majority of overall respondents answering agreed (59.0%). For NGO respondents, this is even 90.3% , whereas individual companies and business associations expressed their strong disagreement (73.3% and 91.0%, respectively).

Next steps

The replies to the public consultation will help the European Commission to assess the costs and benefits of an EU initiative. This assessment will be done in the form of an Impact Assessment analysis, which will examine in particular the economic, environmental and social impacts of the initiative.