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The European Commission
Directorate-General Justice and
Consumers
Directorate A: Civil and commercial
justice - Unit A.3: Company law

The Swedish Government's response to the public consultation on the Proposal for an Initiative on Sustainable Corporate Governance

The Swedish Government would like to take the opportunity to forward its initial position on the consultation document Proposal for an Initiative on Sustainable Corporate Governance. In line with the Commission, the Swedish Government sees the need to build on the European Green Deal to tackle climate and environmental-related challenges. Sustainable business is essential to the realization of the 2030 Agenda and the social, environmental and economic dimensions of sustainable development. It is a top priority for the Swedish Government, in particular in the aftermath of the Covid-19 crisis.

The Swedish Government's response to this consultation has been preceded by a national consultation.

The response is not intended to set out a comprehensive position on each question in the consultation but will focus on a number of items of particular interest to the Swedish Government. Any final position will need to be formally cleared through the internal Swedish Government clearance process. It is of utmost importance that Member States will be given enough time to analyse any initiative on sustainable corporate governance.

The Swedish Government welcomes the announcement made by the Commission on a sustainable business initiative for 2021, listed in the Commission Work Program for 2021. The Swedish Government would like to stress that an initiative on these issues should build upon the concept of

international sustainable business and already existing international standards on business and human rights and responsible business conduct, such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises and its Due Diligence Guidance for Responsible Business Conduct.

There is also a need to recognize the importance of official development assistance (ODA) to support capacity development in low and middle-income countries, including civil society, trade unions and businesses in these countries.

The Commission has based its consultation on two separate studies: the study on due diligence requirements through supply chains and the study on directors' duties and sustainable corporate governance. The Swedish Government would like to take the opportunity to express our sincere conviction as to the need to, in accordance with the two separate studies, separate the coming initiative in line with the studies. The process and the strive towards a more sustainable EU would gain from such a separation. In line with this the following comments are divided into two separate sections:

1. Human rights, social and environmental EU due diligence duty
2. Directors' duty of care

1. Human rights, social and environmental EU due diligence duty

The Swedish Government welcomes the Commission initiative on a mandatory EU due diligence duty and wants to see an ambitious approach. It is important to express the obligation of states to respect, protect and fulfil human rights while an EU legal framework should clarify companies' responsibility to respect human rights, including in global supply chains. Sweden expects to see a gender equality perspective reflected horizontally in the legal framework. In order to avoid overlapping legislation it is important to follow closely the progress in ongoing negotiations on e.g. the Non-Financial Reporting Initiative.

The legal framework should be coherent with current obligations under international law, especially human rights law and should neither reappraise nor create new commitments under international law.

The legal framework on due diligence in global supply chains should be horizontal; cross-sectorial and cross thematic, in line with responsibilities set out in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

The legal framework should cover third-country companies that carry out activities in the EU.

The legal framework should cover all business, including SME:s and SOE:s, with adapted reporting requirements for small and medium sized companies.

The legal framework should have a system for follow-up, which should authorise a high degree of compliance and enforcement, including access to remedy.

The principle of proportionality should be upheld in order to minimize an increased administrative burden for businesses and Member States.

Barriers to trade should be counteracted.

The legal framework should be in accordance with the Green Deal, the new growth strategy to transform into a modern, resource efficient and competitive economy and with climate change, non-circular economies, scarcity of nature resources, loss of biodiversity and ecosystem services, and other major environmental challenges in mind.

The autonomy of the parties of the labour market should be safeguarded.

The legal framework should take into account and stress the necessity in keeping the social dialogue between employers' and employee organisations, in the area of sustainable business, and promote the Global Deal. The legal framework should also recognize the work of companies and international trade unions by concluding global framework agreements, emphasizing the importance of freedom of association and the right to collective bargaining.

2. Directors' duty of care

The Swedish Government firmly believes in the importance of European business contributing to a sustainable economy. An ongoing discussion about the relationship and dialogue between shareholders and companies as

well as the functioning of boards is of great importance. Critical evaluation and reviews of corporate governance are always justified.

However, before any legal measures regarding the internal operation of companies are proposed, a thorough analysis of the current system as well as the pros and cons of such measures is warranted. The Swedish Government notes that objections have been raised by several stakeholders, including leading academic expertise, concerning the empirical basis of the study on directors' duties and sustainable corporate governance.

Such an analysis must be performed before any proposal is presented. The analysis must take into account, among other things, the aspects stated hereafter.

Any measures taken must be in compliance with the division of competence between the EU and the Member States. Equally important is that the principle of proportionality should be upheld, to minimize an increased administrative burden for businesses, in particular small and medium-sized enterprises.

The models of corporate governance differ widely between the Member States. This reflects important national differences in factors such as legal frameworks, business practices and ownership structures across Member States. This diversity in corporate governance models has been recognized and respected by the EU. As stated in the directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (hereafter the Shareholder Rights Directive II), it is important to respect the diversity of corporate governance systems within the Union, which reflect different Member States' views about inter alia the roles of companies. Any strive towards harmonisation in this field must be considered carefully.

Effective and sustainable shareholder engagement is one of the cornerstones of the corporate governance model of listed companies, which depends on checks and balances between the different organs and different stakeholders. This is clearly stated in the Shareholder Rights Directive II, along with the fact that greater involvement of shareholders in corporate governance is one of the levers that can help improve the financial and non-financial performance of companies, including environmental, social and governance

factors. The mentioned directive is an example of the long-running effort among both the EU and the Member States to strengthen the involvement of shareholders. There is a risk that rules on directors' duties that single out the board of directors as an organ with independent duties *via-à-vis* various stakeholders can come into conflict with these efforts.

Moreover, the balance of interests between shareholders and the board of directors is at the core of an efficient corporate governance model, and in extension a prerequisite for companies' ability to attract risk capital. The important role of a well-functioning system for capital supply to European companies in the sustainable development of economic activities cannot be emphasized enough, especially so when recovery from the COVID-19 crisis demands our ability to strengthen the balance sheets of European companies with additional equity capital from the market. In the initiative for a European Capital Markets Union, other parts of the Commission have expressed concern for the lack of efficient supply of risk capital in Europe.

The recent amendments of the rules on directors' remuneration (the Shareholder Rights Directive II) were made to ensure that remuneration is in line with the long-term interests and sustainability of the company. As these changes came into effect as recently as 2019, the Swedish Government believes that the effect of the new rules should be analysed before further rules on the subject are proposed.

3. Closing remarks

The Swedish Government is looking forward to taking part of the collected views of stakeholders regarding the consultation. The Swedish Government stands ready to answer any questions and offers all help needed to further the process on the important issues at stake.