

Minutes of meeting of CAB PRES and CAB JOUROVA with Business Europe on Sustainable Corporate Governance - 23/04/2021 (videoconference)

Participants: Simona Constantin, CAB JOUROVA; Charmaine HILL, PRES CAB
Pedro Oliveira, Director for Legal Affairs at Business Europe

Business Europe welcomed the possibility to express their views on the Sustainable Corporate Governance initiative on which they are in contact with about 25 other business associations and they are all monitoring this closely.

The main views expressed were as follows:

On due diligence:

- Businesses have already started to move towards sustainability through big efforts in recent years, so they are not opposed to this;
- Companies want: legal certainty, level playing field by not leaving too much room for MS to go beyond the EU level of harmonisation, and complementary support measures;
- Ensure coherence and avoid overlap with other COM initiatives which include due diligence aspects;
- The obligations should be of means/best efforts; companies should not be responsible for harm outside their control; this is also key should there be liability included;
- Careful treatment of SMEs; either in or out of mandatory obligations, they will still be caught by due diligence rules since they are part of supply chains; the initiative should include elements to support SMEs and the level of their obligations should be more proportionate;
- No interference with the existing public international law rules under Rome II and Brussels I Regulations to avoid that parties from all over the world would sue companies in the EU.
- Attention to extra-territoriality aspects;

On directors 'duties:

- Overall, the position is more reserved compared to due diligence;
- Concerns about changing the purpose of the company; the objective of companies is to work for profit, but of course they already do so by considering stakeholders; instead of harmonisation of national laws/codes on this, maybe a standard such a B-corp could be considered; being too intrusive risks killing the market based economic model;
- Questionable if binding rules are needed as regards stakeholders involvement, since companies already do so;
- Liability: directors should not be liable towards other parties, but only towards the company; shareholder rights to challenge board decisions exist already, at different levels in MS; giving legal standing to employees organisations risks bypassing existing EU and national law providing for clear rights of consultation and involvement of employees (eg. present in boards in some MS); difficult to qualify who is an interested party in order to give legal standing for NGOs (the Collective Redress Directive is better defined as linked to clear consumer legislation, but in this SCG proposal the issues are very broadly defined as human rights, climate, environment). There is also a risk that competitors will finance law suits.
- Concerns (brought also to the attention of VP Sefcovic and SG) about the Ernst and Young study on directors 'duties about which many renown university and researchers have said that it has methodological flaws and lacks

representativeness given that 1/3 of the companies consulted for the study are from UK.

On remuneration aspects:

- The Shareholder Rights Directive is a balanced outcome of a very difficult process; it already includes remuneration requirements and the first reports on this are due this year; it would not be appropriate to open again now this Directive;

When asked what would be key elements for a balanced proposal that would still deliver on the sustainability objective, the views were:

- Due diligence: obligation of means, not results and at process level (understanding that at principle level would not be sufficient); this should be proportionate and risk based; it should be commensurate to the size of the company; enough flexibility should be left to companies to prioritise the level of due diligence depending also on whether they operate in risky areas or sectors; include support tools for SMEs; design liability along the OECD guidance which is accepted by all stakeholders;
- Directors' Duties: take interests into account as a principle and designed rather as a recommendation; allow flexibility for how to take into account various interests;
- Ensure coherence with the Non-financial Reporting Directive and cautiousness as regards not bypassing labour law.

CAB PRES and CAB JOUROVA thanked for these views and informed about the ongoing preparatory steps towards the adoption of a legislative proposal on Sustainable Corporate Governance. They also stated the overall Commission priority of moving towards sustainability, while acknowledging that it is important to find the right approach and balance.