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BUSINESSEUROPE

THE DIRECTOR GENERAL

Mr Maroš Šefčovič
Vice President Interinstitutional
Relations and Foresight
European Commission
Rue de la Loi 200
B-1049 Brussels
BELGIUM

30 April 2021

Dear Vice President,

RE: Upcoming Sustainable Corporate Governance package: impact assessment concerns

I am writing to you in relation to the preparation of the impact assessment of the future *Proposal for an Initiative on Sustainable Corporate Governance*.

BusinessEurope fully shares the objectives intended with the upcoming initiative. In order to remain competitive, companies and in particular their boards need to factor in sustainability considerations into their decision-making and strategies. The EU corporate governance framework has proven throughout the last two decades that it is able to nourish this transition towards sustainability and stakeholder value thanks to a framework of well-balanced, targeted rules (e.g. some very recent such as Shareholders Rights Directive II and Non-Financial Reporting Directive), complemented by corporate governance codes (frequently updated) and company practices.

We have strong concerns on three major elements in the preparation of the impact assessment underpinning the future initiative which point to a departure from the existing framework that largely remains fit for purpose: (1) Commission Study on Directors duties (2020), (2) the recent public consultation and the (3) Inception Impact Assessment.

The mentioned Study suffers from severe shortcomings by being based on a flawed methodology leading to a negative and misleading (short-termism) picture of European companies that is not supported by facts. This has been widely pointed out by experts from all over Europe and other parts of the World who shared our view and voiced their criticism to the study[1]. There are problems with definitions, sample of companies used,

[1] Response from Professors [redacted], University of Hamburg: "*First, and unfortunately, the Initiative is based on a study by consultancy firm EY that* ***does not take the basic academic norms of empirical research into account****. It randomly collects empirical findings without filtering by qualitative criteria*."
Response from ECLE (European Company Law Experts): it "*proceeds by* ***unsupported assertions*** *– managers and investors are short-termist and corporate law is responsible for it – rather than rigorous demonstration.*"

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one-sided academic sources, the lack of rigorous evidence and biased reasoning. Even one of the key world figures on responsible business conduct, John Ruggie, the architect behind the UN Guiding Principles for Business & Human Rights, has stated that "(board) *directors are not the main driver of short-termism* " and advises against a corporate governance reform. Consequently, the policy recommendations stemming from the analysis are deeply flawed and should not guide the future initiative. In the words of the recently published Commission communication[2] "*scientific evidence is another cornerstone of better regulation vital to establishing an accurate description of the problem, a real understanding of causality and therefore intervention logic; and to evaluate impact*. The present impact assessment needs to live up to this important principle.

Notwithstanding this flow of substantial criticisms on the study, the subsequent public consultation running until February 2021 refers directly to the conclusions of the study, basing many of its questions on the findings and assumptions made in the former.

In the same vein as the study, several **questions of the consultation document were biased** and did not allow responders to express dissenting opinions[3]. Such dissenting opinions will therefore risk not appearing in the consultation feedback report. The European Company Law Expert group has pointed to this systematic flaw stating: "*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 kind of the questionnaire design undermines the very fundamentals of better regulation. It is our understanding that such flaws as appear in the consultation document might also go against the Commission's new communication on its better regulation policies.

Center for Corporate Governance, CBS: "*Our main research areas are stewardship (responsible, long-term ownership), board work, and compliance. We find that the EY Study has **serious and systematic flaws in all three areas**.*"
Response from Professor Edmans, London Business School: "*I personally benefit from evidence claiming that the current system is short-termist and needs to be radically reformed. However, **I believe even more strongly in the importance of following the most rigorous evidence, regardless of what it finds***."
Response from 21 Nordic law professors: *"the [..] Study is so biased in its approach and so **openly and excessively political in furthering a specific regulatory outcome**, that we find ourselves compelled to address these shortcomings".* Comments by Harvard Law School at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F594640 and from Law School of Columbia University at https://clsbluesky.law.columbia.edu/2020/11/09/the-european-commissions-sustainable-corporate-governance-report-a-critique/

[2] Commission communication on better regulation, 29 April 2021, page 6: https://ec.europa.eu/info/sites/default/files/better_regulation_joining_forces_to_make_better_laws_en.pdf

[3] See, questions 1, 8 and 10 which make assumptions on short-term behaviour and disregard of stakeholders interests by companies and their directors; question 22 which assumes sustainability expertise in boards does not exist.

The Commission inception impact assessment also tends to mix up the areas of corporate governance and due diligence. They need to be distinguished in the future initiative. Although these areas are interrelated to some extent, it is not appropriate that they are treated in the same way as seems to be the case so far. There is an attempt to artificially extrapolate the issues and problems from one area to another, disregarding the essence of each of them. This will only lead to inadequate solutions.

The European Corporate Governance framework has been the result of a steady, balanced and evolutionary process. The potential drawbacks and unintended consequences when acting in this area are too great which is why EU action needs to be prepared carefully, rigorously following better regulation principles. Unfortunately, at this stage, we fear the study and the public consultation will not provide a trustful picture of the situation and a correct identification of the problems which could justify a far-reaching EU intervention interfering with longstanding Corporate Governance frameworks of the Member States.

We urge the Commission to rectify the widely noticed flaws in the preparation of its Impact Assessment and respective proposals. I remain at your disposal for any further discussion on the topic.

Yours sincerely,