

Stockholm, 15 March 2021

Veronica Gaffey  
Chair of the Regulatory Scrutiny Board  
European Commission

[REDACTED]

## Gross non-compliance with the Better Regulation principles in the "Sustainable Corporate Governance" Impact Assessment and prior consultation

Dear Ms. Gaffey

We write on behalf of the Confederation of Swedish Enterprise ("Svenskt Näringsliv"), which is the main business organization in Sweden, representing 50 member organizations (industry and employer organizations) and over 60.000 member companies, among them most listed companies. It represents almost all sectors of business with the exception of the banking industry. The Confederation of Swedish Enterprise shares the European Commission's underlying objectives of the Sustainable Corporate Governance initiative. Fighting climate change and promoting sustainability and human rights must certainly be priorities for the European Union and each of its Member States. However, the current path of development where the proposed solutions to these important matters are sought within company law and corporate governance is deeply worrying.

The Confederation of Swedish Enterprise finds particularly worrying the violation of the EU Better Regulation principles in DG JUST's preparatory work on a legislative proposal on Corporate Governance. **We refer to and fully agree with the statements made by the Confederation of Danish Industry in the enclosed letter.**

Thus, we urge you to ensure that the Regulatory Scrutiny Board lives up to its quality assurance role and will look very critically at the evidence for a legislative EU proposal on Corporate Governance that will be presented to the Regulatory Scrutiny Board soon. The Better Regulation principles are too important to allow politically motivated proposals being window-dressed to appear evidence-based where they in fact mostly rely on highly disputable studies and consultations that do not meet the standards for conducting impartial surveys. Neither the EY Study "On directors' duties and sustainable corporate governance" (and in consequence) nor the Commission's consultation (since it refers directly to the conclusions of the EY study) provides a trustful picture of the situation and a correct identification of the problems which could justify an EU intervention interfering with longstanding Corporate Governance frameworks of the Member States.

We have very high regard for the work of the Regulatory Scrutiny Board and trust that our input will be well-received.

Yours sincerely,

[REDACTED]

Johan Britz  
(Deputy Director General, Business Policy)



Confederation of Danish Industry

Veronica Gaffey  
Chair of the Regulatory Scrutiny Board  
European Commission

Copenhagen, 10 March 2021

**Subject: DI calls attention to gross non-compliance with the Better Regulation principles in the “Sustainable Corporate Governance” Impact Assessment and prior consultation**

Dear Ms. Gaffey

I write on behalf of the [Confederation of Danish Industry](#) (DI), who is the largest Danish business organization representing more than 18,000 companies - large, medium and small – active across all economic sectors, to express our deep concern with the violation of the EU Better Regulation principles in DG JUSTs preparatory work on a legislative proposal on Corporate Governance which is part of an initiative called “Sustainable Corporate Governance”.

DI fully supports the ambitious EU sustainability agenda. Danish companies are in the forefront of sustainability and spearhead the industry development in areas such as renewable energy production and energy efficient solutions for buildings and industry. For Danish companies, the Green Deal provides an ambitious framework to accelerate this development across all corners of Europe. Our members already integrate sustainability risks, opportunities and impacts into their business strategies, considering that mitigating societal issues has become a key factor of their competitiveness and their “license to operate”.

However, we strongly caution against the analysis in the *EY Study on directors’ duties and sustainable corporate governance* upon which the Corporate Governance part of the above-mentioned initiative is mainly based. The analysis in the EY study suffers from **severe shortcomings from a methodological and substantial point of view** by using deeply flawed assumptions without presenting strong evidence and ignoring relevant academic research.<sup>1</sup> Consequently, **its policy recommendations stemming from the analysis are flawed**. There is no sound evidence presented that any of them would be effective, some of them are even likely to be counterproductive.

Looking at the feedback the Commission received on the Inception Impact Assessment, which was largely based on the study, it appears clearly that **numerous prominent academics<sup>2</sup> share our view and voiced similar concerns on the study**. We can mention, among others, the [response from nine Harvard professors](#)

<sup>1</sup> For our detailed comments on the EY study please see our [joint consultation response](#) submitted together with 26 other business organizations, institutional investors and self-regulatory bodies from Sweden, Denmark and Germany.

<sup>2</sup> - [Response from Professors Bassen, Lopatta and Ringe, 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.”

- [Response, 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”.

specialized in corporate governance: *“The report fails on every important dimension. It does not define the problem properly, presents inapposite evidence, fails to address or even cite the relevant academic research, and neglects elementary problems with its policy proposals. No EU policymaker should rely on this Report.”*

Notwithstanding this flow of substantial criticisms on the study and its conclusions DG JUST launched, very soon after the publication of the EY study, a **public consultation** document on a Proposal for an Initiative on Sustainable Corporate Governance, which refers directly to the conclusions of the EY study.

In the same vein as the study the questions of the consultation document are biased and do not allow responders to express dissenting opinions<sup>3</sup>. Such dissenting opinions will therefore not appear in the consultation feedback report. [ECLE 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.”*

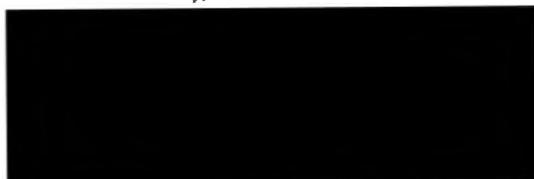
The obvious market trend that sustainability is already a competitive factor for companies is ignored both in the EY Study and in the consultation document. Likewise, the impacts of other EU initiatives pursuing more effectively and proportionate the same policy objectives as the Corporate Governance initiative are ignored. Some of these initiatives are under way (e.g. a strengthened NFRD and due diligence requirements) while others are adopted but have not yet had time to work (e.g. shareholders rights directive II and the Taxonomy regulation). Even the description of national legislation is flawed in the EY study and in the consultation.

We urge you to ensure that the Regulatory Scrutiny Board (RSB) lives up to its quality assurance role and will look very critically at the evidence for a legislative EU proposal on Corporate Governance that will be presented to the RSB soon. The Better Regulation principles are too important to allow politically motivated proposals being window-dressed to appear evidence-based where they in fact mostly rely on highly disputable studies and consultations that do not meet the standards for conducting impartial surveys.

Sustainable Corporate Governance is a complex issue - with severe potential drawbacks and unintended consequences - which deserves an extremely attentive analysis of the real problems before presenting possible solutions. Unfortunately, at this stage, neither the study (and in consequence) nor the consultation provides a trustful picture of the situation and a correct identification of the problems which could justify an EU intervention interfering with longstanding Corporate Governance frameworks of the Member States. Even John Ruggie, the architect behind the UN Guiding Principles for Business & Human Rights, [advises against](#) a questionable EU Corporate Governance reform, but instead advises to focus on Due Diligence.

I have very high regard for the work of the RSB, and I trust that our input will be well-received.

Yours sincerely,



<sup>3</sup> See e.g. Q8 where only stakeholder interests and short-term shareholder interests are put in opposition, not long-term shareholder interests, and Q25 where respondents who believe business performance, competitiveness, innovation or attracting investors will be hampered rather than strengthened are given no voice, since the design of the question simply assumes that the impacts of the proposed spelling out of directors duties at the EU level can only be positive (see e.g. the wordings: “better performance”, “competitiveness advantage”, “attracting investors” combined with respondents having only the option to indicate to what extent these (positive) effects will “increase” not decrease).