

## CONSULTATION REACTION

### Reaction of the Dutch Banking Association to the Consultation on Sustainable Corporate Governance

Date: 8 February 2021

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#### Key messages

- **EU legal framework for supply chain due diligence**

We are supportive of legislation in this area, and we believe that a balanced, well-designed and implemented EU legal framework is preferred over national legislation as:

- A broader, larger and more international group of companies performing due diligence, will enhance the impact of due diligence.
- The impact will also increase if companies can focus on the most salient issues, while not having to spend time looking for and dealing with national differences with respect to due diligence.
- An EU wide approach enhances collective efforts by companies and banks across Europe on setting of standards for best due diligence practices and takes out unjust (cost) advantage of laggards from inside the EU (benefitting from weaker national legislation), as well as from abroad; non-EU companies active on the EU market.

- **The lines between a non-judicial and judicial process should not be blurred.**

Due diligence has thus far a Responsible Business Conduct (RBC) process. RBC has always been voluntary and co-operative. Introducing enforcement of legal standards and norms, however, means a more legalistic approach. In our view legalistic approaches that are focused on establishing liability in tort law are mandatory, antagonistic, and primarily oriented towards establishing responsibility for past mistakes under the judicial processes. A judicial process requires clear material norms instead of the high level generic norms that the RBC is providing. In our view, mandatory due diligence legislation should build upon the RBC approach. We see a risk of legal uncertainty when codifying high level / generic, procedural norms (based on the (OECD Guidelines for Multinational Enterprises / UN Guiding Principles on Business and Human Rights, which were not meant to be laws<sup>1</sup>) to be applied to specific cases. This concern needs to be addressed appropriately.

- **Directors' duty of care**

We see the importance of Responsible Business Conduct and the role that companies and banks can play. Banks exert influence through their customers. This is a challenging task, but we believe that with a 'smart mix' of binding and non-binding measures from an ecosystem approach with various actors that this is possible. The consultation of stakeholders is an important element but should be done in a proportionate way and limited to relevant stakeholders. Considering the large variety of possible stakeholders, we should avoid a "one size fits all approach", there is no need for a legislative obligation and certainly not at board level. Flexibility should be allowed as to the means used to achieve general duties (i.e. in order to take into account a high level principle such as environmental protection, there is no need to introduce a legal obligation to identify the stakeholders).

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<sup>1</sup> <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>, p. 1 and [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf), p. 9.



A legal requirement to balance interests as part of the responsibility of the director, will undoubtedly lead to scenarios which are currently uncharted territory for companies / directors. We believe that advancing human rights in the supply chain of companies can be realized with other measures than legal duties of care for company directors. A due diligence obligation with clear requirements and definitions embedded in law would help to advance RBC. The obligation should rest on the company, not on its directors to avoid derisking and divesting from challenging supply chains rather than seeking to improve adverse impacts.

We agree that companies should follow a holistic approach when it comes to governance structures, as already required by for example the Dutch Corporate Governance Code. The voluntary codes work well as appropriate norms and have already been laid down in national codes. As such, we see more added value for RBC in a legislative proposal on mandatory due diligence. While we support the importance of sustainability, we feel this consultation overemphasizes the domain of directors duties as the right place to propose regulatory change.

If there would nonetheless be new obligations at EU level, they should:

- Be for the company, not the (individual) board members;
- Be for all topics and not one topic such as sustainability singled out;
- Be in line with international commitments;
- Be in line with the current framework for fit and proper testing by the supervisors;
- Be proportionate;
- Create legal certainty, and
- Take into account the specific situation and needs of SMEs.

- **Questionnaire**

We note that we had difficulty answering some of the questions, since the concepts of due diligence legislation and corporate governance are sometimes mixed-up in the questions. It is important to pay close attention to this and try to make a clear distinction between these two very different and incomparable concepts. The desired changes in due diligence can be achieved without changes in corporate governance.

**Contact information**

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