



NOTE

1. februar 2021

The Danish Government's response to the public consultation on an initiative on sustainable corporate governance

It is a key priority for the Danish Government to enable a green and sustainable transformation of the society. Private companies play a vital role in order to fulfil the ambitions of the Paris agreement, the UN Sustainable Development Goals, the purpose of the UN Guiding Principles for Business and Human Rights and the OECD Guidelines for Responsible Business Conduct.

The Danish Government supports the initiative of the Commission in the European Green Deal to address how private companies can be further encouraged to structure decisions in terms of sustainability. The Danish government believes that sustainability, growth and competitiveness must be aligned and not be contradictions. That the most profitable and successful companies of tomorrow are the companies where management acknowledges that long-term sustainability is fundamental to their business. The Danish Government appreciates the opportunity to comment on the European Commission's preliminary approach to an initiative on sustainable corporate governance. This response builds on a national consultation about sustainable corporate governance in the autumn of 2020.

The Danish Government supports the intention of the initiative, but notes that the approach indicated by the Commission contains two different sets of regulations: mandatory due diligence and corporate governance. The Danish Government, broadly supported by Danish stakeholders, strongly encourage the Commission to treat the two sets of regulation separately.

Both the initiative on due diligence and the initiative on corporate governance are closely related to existing and new EU measures that aim at encouraging companies to further integrate sustainability. In order to achieve an integrative approach, effective regulation and prevent unnecessary policy overlap and incoherent regulation the Danish Government encourages the Commission to ensure a detailed alignment with ongoing and newly implemented initiatives such as the Non-Financial Reporting Directive (NFRD), the Shareholder Rights Directive II (SRDII), the Disclosure Regulation, the Taxonomy Regulation and the Circular Economy Action Plan. This would also be in line with the principles for Better Regulation.

Due diligence

The Danish Government supports the purpose of the regulation on due diligence to ensure that companies contribute to sustainable and responsible

business conduct by describing possible risks of their adverse impacts on e.g. human rights and labour rights issues, the environment etc. and on that basis take steps to address the risks. Implementing risk-based due diligence processes is key for a responsible supply chain management in line with the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises. It is recommended that this basic purpose is clearly stated in the regulation and mirrored in proposed requirements.

The Danish Government believes that regulating due diligence processes will have a significant impact in private companies' sustainable decision-making. This includes the engagement of directors in the process, which is needed in order to further integrate sustainability in private companies and to make questions of sustainability and responsible supply chain management a matter for directors, and not just a sustainability department.

When considering due diligence regulation, it is the view of the Danish Government that the following issues must be addressed in order for the regulation to have the intended and needed impact:

Creating legal certainty

The aim for companies to identify and manage risks, ultimately and ideally to avoid harm, presumes an ongoing and contextual process suited to the dynamic character of the risks in question. A set standard of conduct for companies' due diligence to be measured against can deliver legal certainty for companies in regard to social expectations or potential penalties, or to ensure a level playing field between companies. However, defining due diligence as a standard of conduct might shift companies' focus towards compliance with that standard [tick-the-box]. This might detract from their efforts to effectively identify and manage risks through an ongoing and contextual process.

It is therefore the view of the Danish Government, that the Commission should make careful considerations on this difficult issue of how to introduce a legal standard of conduct without a trade-off in terms of the effective operational results of the due diligence process.

Proportionality

Considering the complex nature and novelty of due diligence legislation a step-by-step approach in terms of scope and detail is a sensible and cautious approach. The Danish Government recommends the Commission to start by regulating only larger companies (in line with the current requirements of the NFRD). Larger companies are also often the companies that are engaged in complex value chains and who holds enough leverage to influence the different parts of the value chains. The smaller companies

will be affected indirectly as requirements trickle down the supply chains. After gathering experiences, the scope can possibly be adjusted over time.

Access to remedy

The Danish Government finds it essential that any authority dealing with supervision is competent and independent. However, there can be challenges related to such supervision due to the complexity of cases dealing with risk-based due diligence. Therefore, it can be beneficial to consider experiences from the National Contact Point system, which is established as a part of the OECD Guidelines, and deals with cases concerning risk-based due diligence.

The Danish Government recommends the Commission to learn from the NCP system that handles cases of violation of international standards and principles of global responsible business conduct. Moreover, NCPs are responsible for raising awareness of what responsible business conduct entails. Since the Danish NCP is law-based, it can handle cases of whether public authorities in addition to civil society organizations and companies act in compliance with the due diligence principles set up by the OECD Guidelines. Moreover, the Danish NCP has the possibility to take on cases on its own instigation.

Corporate Governance

The Danish Government acknowledges that in order to achieve e.g. the goals of the Paris agreement on climate change and the Sustainable Development Goals it is vital that businesses contribute to a sustainable development. The Danish Government believes that the most profitable and successful companies of tomorrow are the companies where management acknowledges that long-term sustainability is fundamental to their business and who effectively use this knowledge in their everyday management.

The Danish Government agrees with the Commission that it is necessary to empower directors to further integrate a wider range of interests into corporate decision-making than just the interests of the shareholders in order to avoid a narrow focus on the short term. For a company to succeed and maintain its 'licence to operate', directors need to effectively work with long-term sustainability. However, this is not, in our view, promoted or achieved by restricting the ability of the directors to act in the way they deem most effective, or by stripping the directors of instruments at their disposal. The focus should be on encouraging companies to work with sustainability, not limit their ability to act in the manner they see fit.

The Danish Government believes that introducing mandatory due diligence as described above, would be the most effective and proportionate instrument to achieve the empowerment of the companies and their directors and to make sure that companies work effectively with long-term

sustainability. The Danish Government finds that hard regulation of directors' duties and liability could hamper the ability of companies to deliver on the sustainability agenda in the most effective way.

Directors' duties and directors' liability

To enable a green and sustainable transformation of the society the Danish Government finds it essential that private companies use and allocate resources in order to fulfil this transition by making long-term investments including in new technologies, sustainable business models and supply chains. However, reducing companies' opportunity e.g. to pay out dividends to shareholders and share buybacks can potentially harm the performance and competitive position of a company, the ability to attract venture capital, and the possibility to allocate capital to companies that need capital in order to develop new technology.

Furthermore, the right to hold shares and the economic rights attached to this ownership, such as the right to dividend in a company, are a part of the private property rights for the shareholders protected in article 73 of the Danish Constitution. Limitation of such property rights must comply with the rules of expropriation.

While we share intention of companies contributing to long-term sustainability, the potentially harmful effects should therefore be considered very carefully before moving forward with such proposals.

Stakeholders' involvement in company decisions and the enforcement of the duty of care

It is the view of the Danish Government that many of the most successful Danish companies in recent years are the ones who have shown that they take into account the interests of their stakeholders and the surrounding society. The Danish Government thus supports the view that companies' stakeholders' interests are very relevant and that the best way of engaging these stakeholders is by introducing mandatory due diligence. However, it is often unclear who these stakeholders are and it is often difficult to narrow down the most relevant stakeholders, and then in which form, how, and when they should be involved. It is a concern for the Danish Government that if the regulation outlined by the Commission is adopted, it may have negative consequences if the companies do not comply with a duty to involve certain stakeholders. This could lead to a general increase in the circle of litigants entitled to sue the company, which then would introduce a high degree of legal uncertainty for companies.

Scope

As regards the scope of the outlined initiative, it is unclear which companies will be included, including listed/non-listed companies, large companies, SME's and/or micro-enterprises. Significant burdens will be imposed

on SME's and micro-enterprises if they become part of potential legislation. The Danish Government does not consider it appropriate to allow external stakeholders to have a direct influence on the management of especially SME's and micro-enterprises.

Impact assessment

The Commission's upcoming proposal is primarily based on the heavily criticized report by Ernest and Young (EY) "*Study on directors' duties and sustainable corporate governance*". The conclusions from the report have been criticized by e.g. company law professors around the world and numerous business organizations. This criticism was repeated from Danish stakeholders in the hearing by the Danish Government leading up to this response. The Danish Government is therefore of the opinion that the need and the foundation for an upcoming EU proposal on corporate governance has not been documented and we recommend the Commission to provide a better basis for decision-making.

Final remarks

The Danish Government has decided not to fill in the questionnaire as we find it difficult to provide precise and nuanced answers to many of the questions by filling in the questionnaire. This is a viewpoint shared by many Danish stakeholders and we urge the Commission to consider other inputs provided by Member States and stakeholders to gain a representative understanding of the stakeholder engagement. Two annexes are attached to further elaborate our contributions towards mandatory due diligence and corporate governance.

The Danish Government would once again encourage the Commission to separate the two initiatives on mandatory due diligence and corporate governance and focus on a legislative proposal on mandatory due diligence since this would be the best way to achieve the goal of companies actively contributing to a more sustainable future.

The Danish Government remains at your disposal for any further questions and stands ready to contribute throughout the process.