

BusinessEurope
Mr Pedro Oliveira
Director
Legal Affairs Department
168 Avenue de Cortenbergh
1000 Brussels
Belgium

By E-Mail to: p.oliveira@businesseurope.eu

3rd February 2021

Consultation on sustainable corporate governance and due diligence

Dear Sir,

Thank you for the possibility to comment on the draft of BusinessEurope's reply in the consultation on sustainable corporate governance and due diligence.

As you know, on November 29th, 2020 Switzerland rejected the Responsible Business Initiative (RBI) in a referendum. If approved, the RBI would have mandated the government to propose a bill obliging companies to conduct vast due diligence in the area of human and environmental rights throughout their whole supply chain. In addition, it would have included a new legal liability before Swiss courts and under Swiss law for the Swiss parent company for any violation abroad. The Swiss company could have been held liable even if only economically controlled third parties, i.e. business partners had been involved. Thus, the RBI would have requested – especially compared to the current discussion in the EU – far reaching new legal instruments in the context of CSR.

Switzerland's rejection of the RBI was the result of a very intense and emotional debate. Knowing that a popular vote could bring on the risk of alienating business from society, discussions took place years before the vote with the leading NGOs in order to find a valid counterproposal, allowing a withdrawal of the initiative. This, however, proved to be impossible in light of the far-reaching demands of the NGOs. Important elements were non-negotiable, particularly when it came to devising more accurately the new Due Diligence requirements or the applicable law as well as the introduction of sufficiently functioning safeguards to prevent abuse of the requested legal instruments. Thus, a counterproposal acceptable for NGOs and business alike was not feasible. However, the exchange with the NGOs on the basis of CSR regulation and on technical questions as to how to implement it, enabled business to gain a conclusive understanding of the scope of the NGOs' political agenda on a national as well as on an international level, and the system changing intentions behind the initiative and similar popular movements abroad.

Fortunately, Parliament as well as the government were opposed to the RBI. Instead, once it realised that the NGOs' demands could not be satisfied, Parliament adopted an indirect counterproposal that takes on board the broad strokes of the initiative while limiting its scope and refraining from introducing untested liability provisions. This counterproposal will now become effective.

Based on the vast experience we were able to make in Switzerland - particularly concerning the strategic agenda of the NGOs - we take the liberty to comment on the following points of your draft:

1 Clear definition of red lines / no hints at concessions whatsoever

We recommend to clearly define red lines. All concessions will likely be subject to further political pressure, particularly regarding the extent of the due diligence requirements and the applicable norms (see 3). The company law elements (directors' duties, board remuneration, etc) constitute a paradigm shift. It is important to take a strong stand against these new directors' duties as these would interfere significantly with the autonomy of companies and their right to manage their business as they see fit. All due diligence obligations clearly have to be operable, reduced to first tier business relations and should ideally follow a risk-based approach.

2 Stable and functioning safeguards, unrelated to the specific civil procedure systems

The civil procedure systems in Europe vary. Instruments such as preliminary measures, procedural questions related to the burden of proof and pre-trial discovery measures highly influence the impact of new liability provision within the respective national law. Thus, stable and functioning safeguards have to be put in place, notwithstanding the specific new liability aspects brought forward. Such safeguards should comprise balanced protective measures against abusive or PR litigation, as well as the regulation of litigation funders. Otherwise, particularly in combination with the new instruments of collective redress in the EU, there is a high risk that a new business model will be enabled by way of combining legal action on the grounds of human rights protection or environmental protection with class actions.

3 No immediate third-party effect of constitutional rights, no transfer of soft law into hard law

Another strategic goal of the NGOs is to substantially broaden the third-party effect of constitutional rights and of soft law on companies and to include these legal bodies into civil law. Regarding this, it should be made clear that companies cannot substitute the role of government, hence all norms that are directed towards states cannot be used to bring action against companies.

Last but not least we would like to emphasize the significance of international alignment when it comes to implementing vast changes like those discussed in the current consultation. Implementation would be very problematic and difficult for EU subsidiaries of US companies. Thus, particularly in light of the new Biden administration, an alignment of the EU with the USA in these questions is of the utmost importance.

Best regards,

Erich Herzog
Member of the
Executive Board
economiesuisse

Sandrine Rudolf von Rohr
Deputy Head
Competition & Regulation
economiesuisse

Denise Laufer
Member of the
Executive Board
SwissHoldings

Julia Burkhalter
Project Manager
SwissHoldings