



# ECLE Response to the EY Report

(Twelve Corporate Law Professors from Eleven European Jurisdictions)

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“The study appears biased towards producing preconceived results rather than containing a dispassionate, impartial and comprehensive analysis. It proceeds by unsupported assertions – managers and investors are short-termist and corporate law is responsible for it – rather than rigorous demonstration. In lieu of hard data, the study rests heavily on reviews of existing literature, but overlooks non-supporting contributions.”

Commission invited initial reactions to the EY study, but limited to 4000 characters (not words)

# The Consultation Document

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Period for reactions to EY Report ended July 8, 2020

July 26 Commission issues “Consultation Document: Proposal for an Initiative on Sustainable Corporate Governance”

No mention of initial adverse reactions. Con Doc “builds on data collected” in EY Report

Basic structure of the consultation is constrained choice answers: (agree strongly, agree to some extent, disagree to some extent, disagree strongly).

Answers permissible only via the electronic questionnaire

Unlikely to reveal the full range of views in fact held

# How not to frame a 'yes/no' question

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“Do you believe that corporate directors should balance the interests of all stakeholders, instead of focusing on the *short-term* financial interests of shareholders, and that this should be clarified in legislation as part of directors’ duty of care?” (Question 8 of Commission Consultation of October 2020)

How do you answer this if you think that focussing on the *long-term* interests of shareholders promotes overall social welfare in the most effective way?

Yes implies you favour a stakeholder approach

No implies you favour a focus on short-term shareholder value.

Neither is what you believe. Your view is “hidden”.

Or suppose you think reform of directors’ duties is not the best way to protect stakeholders.

# Another Example

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Question 10. As companies often do not have a strategic orientation on sustainability risks, impacts and opportunities, as referred to in question 6 and 7, do you believe that such considerations should be integrated into the company's strategy, decisions and oversight within the company?

How do you answer this question if you disagree with its factual predicate?

# Have you stopped beating your dog?

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**Yes** implies you did beat your dog in the past but have now stopped.

**No** implies that you are still beating your dog.

If I have never beaten my dog, this question is simply a trap.

# Addressing symptoms, not causes

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EY report accepts directors' current duty of loyalty does *not* require a focus on short-term gain for shareholders

Asserts that duty is interpreted by managers so as to require a short-term focus

Solution proposed: explicitly build stakeholder interests and the environment into the core duty.

More productive to focus on what drives the erroneous interpretation

Otherwise, changing legal duty may produce no change in behaviour

Changing behaviour may remove need to change legal duty

# “Growing pressure from investors” for short-term results

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But is it true?

“Greater involvement of shareholders in corporate governance is one of the levers that can help improve the financial and non-financial performance of companies, including as regards environmental, social and governance.” (Recital 14, SRD II, 2017)

Rise of ESG investing (OECD Report 2020: *Sustainable and Resilient Finance*)

Commission right in 2017, wrong now – or vice versa?

Or the picture is too complex for mere sloganising to deal with?

Pension funds/activist hedge funds; dispersed/concentrated shareholders; family control/private equity.

# Sustainability: External Regulation and Internal Corporate Law

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What is the balance to be here?

Corp gov easily copes with impact of the environment on company; less obvious is its role when dealing with impact of co on environment (externality)

Corp law can do some things: disclosure of adverse impacts

Advantages of regulation: better addresses coordination problems; more legitimate handling of distributional conflicts

Limits range of tasks to be performed by corp gov rules (operational efficiency)

Political process broken?

# Overall

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Neither EY Report nor Commission Consultation Document a basis for sustainable corporate law/governance reform

This is depressing since the problems are many and pressing and deserve a more sophisticated analysis and response

Perhaps a more open debate will be encouraged by other actors in the EU legislative process.