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Ms.
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Survey on sustainable corporate governance

Dear Director General,
Dear Ms. Astola,

On behalf of the Board of Deutsches Aktieninstitut, the organization of German exchange-listed and capital market-oriented companies, I would like to express my sincerest gratitude for giving us the opportunity of participating in the afore-mentioned survey on sustainable corporate governance. While the development of corporate governance remains of crucial importance for our member companies and us, we feel deeply committed to contribute to the objective of adding the perspective of CSR and sustainability to it. German as well as other European companies take corporate sustainability issues very seriously, which is displayed by the large variety and volume of voluntary CSR-activities undertaken. In order to maintain, strengthen and incentivize these voluntary efforts, a sufficient level of flexibility is needed as only this can cater for the existing variety of company structures and business models. Integrating sustainability into corporate governance should thus be a matter of corporate governance codes rather than of new regulatory rules. From this understanding and perspective, sustainability aspects have played a crucial role in the latest corporate governance code reforms in many EU member states, most importantly in France and Germany.

It appears to us that these developments and circumstances have not been sufficiently taken into account when the questionnaire for the above-mentioned survey was drafted. In our opinion, the questionnaire shows a bias and remains doubtful from the alleged underlying objective of collecting empiric evidence for the necessity of EU-wide regulatory action or absence of the latter. In various sections, questions seem to aim at the personal opinion of the respondent rather than on receiving facts. This is shown by wordings such as "Do you believe...", "To what extent do you think...", "In your view, what is/would be..." or simply by asking the respondent to put different company issues pursuing entirely different objectives into a ranking-order set to display his/her sole perspective.

For example all the aspects mentioned in **Q.8** are subject to regular board agendas. If any ranking of these aspects were possible at all, it would depend on the specific situation, which the company is exposed to. A 'general ranking' of these issues is just impossible.

Furthermore, the bias of some questions is shown by excluding relevant topics. **Q.53** asks for one's opinion on the statement that the wide discretion of directors to buy back shares of their companies undermines the

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allocation of company resources to investment and sustainability. At least in Germany, the buyback of shares is permitted only in certain circumstances and strict, mandatory limitations apply, please see Sec. 71 et seq. Stock Corporation Act.

In addition, some of the suggestions for possible policy solutions enumerated under **section 4** of the questionnaire raise concerns.

First of all, the proposals are unclear and will lead to different interpretations by respondents so that the answers given will hardly be comparable.

An example is the **obligation for the companies to have a purpose of creating general public benefit, which shall be identified in a specific charter issued by a public office**. The meaning of “purpose” in this context remains unclear. If purpose corresponds to the company object/purpose laid down in the statutes, adding a general public benefit to be pursued would be equal to changing the statutes. Such a change, however, is subject to the exclusive responsibilities of the shareholders. So, should such amendment to the purpose be made by management and board alone circumventing shareholder consent and relevant company law requirements? Would, in the notion of the survey, a purpose of creating general public benefit be contrasting private benefit, anyway? This proposal recalls the concession system to be found in Germany and some other Member States until the 19th century. Under this system, the concession to establish a private company depended on a public body that examined e.g. in Prussia 1845 if “firstly it is from a general perspective useful and worth to be promoted and secondly requires due to the amount of capital required or due to the nature of the business the cooperation of a large number of participants.” So, would such public office examine if the company follows (also) a general public benefit and grant the “license to operate” by issuing the charta?

Other proposals allege a kind of objectivity in appearance. E.g. **the obligation to “balance” the interests of shareholders with those of stakeholders combined with the possibility to launch respective proceedings by shareholders**. Political decisions are normally not subject to court proceedings. Also for companies, the balancing of interests of a wider group of stakeholders would be ‘political’ decisions. Only if based on clear facts and obligations, e.g. derived from the company objectives it is possible for the decision makers to realistically live up to such obligation. In most situations of management decisions such conciseness will probably not be given. The same considerations apply for another policy suggestion, the implementation of a sustainability strategy, a term which is by the way not defined in the introduction to the survey.

Finally, the idea of **assigning an NGO with a right to raise legal actions on behalf of the company against board members** appears to be circumventing both existing and well-tried legal structures of many member states ranging within the exclusive competence of the latter.

We kindly ask you to consider our argumentation and strongly recommend refraining from EU-wide policy action based on responses to a biased questionnaire. We would be happy to explain our position also in a personal meeting together with issuer-representatives upon your convenience.

Yours sincerely



Dr. Christine Bortenlänger
Executive Member of the Board