CONSULTATION ON THE RENEWED SUSTAINABLE FINANCE STRATEGY – the additional comments

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Question 1: With the increased ambition of the European Green Deal and the urgency with which we need to act to tackle the climate and environmental-related challenges, do you think that (please select one of the following):

☐ _Major additional policy actions are needed to accelerate the systematic sustainability transition of the EU financial sector.

☐ _Incremental additional actions may be needed in targeted areas, but existing actions implemented under the Action Plan on Financing Sustainable Growth are largely sufficient.

☐ _No further policy action is needed for the time being.

[No relevant option]

The heavy reliance on the financing channel by the EU to develop and implement its sustainability strategy is open to question. There has been no proper discussion of the alternative approach of developing a 'green enterprise' strategy whereby the focus is more directly on operating enterprises rather than financing activities. While there is undoubtedly a role for investors in promoting ESG through portfolio selection and engagement with companies, the selected approach will focus mostly on mature public companies and much less on the growing SME sector, which is not heavily represented in capital raising on public markets. It will lead to the duplication of the production of information by operating and financial enterprises. And it risks confusing regulatory interventions across industry sectoral, environmental and financial regimes, making it harder to interpret and measure the impact of regulatory interventions. It may also incentivize 'green arbitrage' between privately-held and publicly quoted companies, with carbon intensive activities gravitating towards private ownership and a less intensive regulatory regime.

See further Q91 below.

Question 28: In its final report, the High-Level Expert Group on Sustainable Finance recommended to establish a minimum standard for sustainably denominated investment funds (commonly referred to as ESG or SRI funds, despite having diverse methodologies), aimed at retail investors. What actions would you consider necessary to standardise investment funds that have broader sustainability denominations?

☐ _No regulatory intervention is needed.

☐ _The Commission or the ESAs should issue guidance on minimum standards.

☐ _Regulatory intervention is needed to enshrine minimum standards in law.

☐ _Regulatory intervention is needed to create a label.

This would provide a more flexible approach to cope with a rapidly evolving landscape.

Question 41: Do you think that a defined set of EU companies should be required to include carbon emission reductions, where applicable, in their lists of ESG factors affecting directors' variable remuneration?
Yes/No/Do not know.

The Shareholder Rights Directive II underlines the alignment of remuneration with the long-term and sustainable development of companies across the EU (see Arts. 9(a)(6), 9(b) (1)(a)

SRD II). Art. 9(a)(6) points out that "where a company awards variable remuneration, the remuneration policy (...) shall indicate the financial and non-financial performance criteria, including, where appropriate, criteria relating to corporate social responsibility(...)." Therefore, arguably, carbon emission reductions can be already mentioned in the list of ESG factors affecting directors' variable remuneration.

One might argue that it would be beneficial to make an explicit reference to this factors here. However, on the other hand, there is a danger in creating a list of factors that would be applicable to all companies and it is clearly counterproductive to create an exhaustive list of factors.

Question 47: Do you think that an EU framework for supply chain due diligence related to human rights and environmental issues should be developed to ensure a harmonised level-playing field, given the uneven development of national due diligence initiatives?

Yes/No/Do not know.

None of the international human rights instruments aim to create obligations which are legally binding on companies themselves. The instruments are each likely to increase the pressure on companies to respect human rights, by threatening greater reputational harm to those that fail to do so. But more is needed and hence the 'yes' to this question.

Question 91: Do you see merits in adapting rules on fiduciary duties, best interests of investors/the prudent person rule, risk management and internal structures and processes in sectorial rules to directly require them to consider and integrate adverse impacts of investment decisions on sustainability (negative externalities)?
 _Yes/No/Do not know.
 _If yes, what solution would you propose? [BOX max. 2000 characters]

If the current approach of relying on the financial channel for regulatory intervention is maintained, adjustment of these rules is likely to be necessary. That is the inevitable result of regulating the demand side of sustainable investment (through the financial channel) rather than the supply side (through direct regulation of enterprises and the duties of their boards of directors). Flipping that approach would have the result that there was no need to alter the duties in the financial channel as sustainable purposes would already be ensured at the enterprise level.

Asset managers owe separate contractual and fiduciary obligations to their clients. The contractual obligations will be set out in the terms of the mandate that has been agreed between the asset manager and the client. The fiduciary duties are governed by the common law and the regulatory obligations of asset managers to their clients. The content and scope of the latter will have an impact on the former. When the asset managers invest in the company on behalf of the client, the obligations that they owe to the client result in indirect pressure being placed on the company to take into account ESG factors in the company's decision-making. Meanwhile, the fiduciary duties that are owed by directors to the company will place the company under direct pressure to consider ESG matters.

When serving their clients asset managers will ultimately put pressure on the directors of the investee companies and that can result in a clash of duties as the company directors have duties to their companies and not to the clients of the asset managers. There should be symmetry in the operation of the two sets of fiduciary duty since:

- *directors owe their duty to the company and the definition of the company interest focuses in particular on shareholders;*

- *and the shareholders' interests (assuming they are mainly institutional investors) should be driven by their clients.*

This is currently not the case. Were that symmetry to be realised some of the sustainability problems might be solved. However, in each instance a principal-agent problem intervenes, with the result that client interests may not be properly reflected in the way that companies make decisions and operate.