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Integrating sustainability in EU Corporate Governance Codes*

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Abstract

In the light of the strong commitment by the EU in undertaking a sustainable path towards the goals set by the Paris Agreement and the UN 2030 Agenda, and the prospected EU initiatives concerning the establishment of a sustainable corporate governance, it is more pressing then ever evaluating how companies can truly integrate a long-term sustainable approach in their strategies and operations, and therefore whether corporate governance codes could provide a useful tool towards such objectives. Many authors investigated the effective implementation of corporate governance codes, but a few considered the role of the codes in promoting environmental and social responsibility. The aim of the chapter is to comparatively evaluate the most recent attempts to integrate sustainability considerations in corporate governance codes of listed companies within the EU Member States, in order to understand if such progress is on the way and which best practices could be taken into consideration and disseminated by the EU authorities in the years to come.

1. Introduction

The transition to a more responsible economic system – that considers the impact of business activities in terms of environmental and social effects - has become an urgent and unavoidable demand. In such a context, corporate governance of listed companies and financial institutions - considered in the past as one of the determinants of the global financial crisis - [1] is a key factor that can contribute to the promotion of sustainable strategies and decision-making processes, as essential for «aligning businesses more closely with long-term perspectives».[2] The recent Covid-19 outbreak confirmed the importance of ensuring that non-financial risks – especially those associated to loss of biodiversity and wildlife habitat – are duly taken into account in order to reduce the risks of future pandemics which would threaten human health and economic development.[3]

Notably, EU policymakers essentially left the regulation of corporate governance practices of non-financial companies to self-regulatory and soft law mechanisms. In particular, Directive 2006/46/EC now requires that all listed companies refer to a national corporate governance code in their corporate governance statement, explaining the reason for any departure from it.

However, further developments are on the way, as the EU Commission recently launched a public consultation on possible legislative and soft law measures to support a sustainable corporate governance.[4] In such a context, it is even more important that soft law and self-regulatory tools, such as

[1] See, for example Kirkpatrick, G. (2009). The Corporate Governance Lessons from the Financial Crisis. In OECD Journal of Financial Market Trends (2009), 1, 61; and EU Commission, Green Paper, Corporate governance in financial institutions and remuneration policies, Bruxelles, 284 final, 2010. For a critical evaluation in relation to the banking sector, see: Fahlenbrach, R. & Stulz, R. M. (2010). Bank CEO Incentives and the Credit Crisis. In *Journal of Financial Economics*, 99, 1, 11; Hopt, Klaus J., Better Governance of Financial Institutions (April 1, 2013). "Corporate Governance of Banks and Other Financial Institutions After the Financial Crisis", Journal of Corporate Law Studies 13 Part 2 (2013) 219-253 (Part B), "Corporate Governance of Banks after the Financial Crisis", in: E. Wymeersch, K. J. Hopt, G. Ferrarini, eds., Financial Regulation and Supervision, A post-crisis analysis, Oxford University Press 2012, pp. 337-367 (Part A), ECGI - Law Working Paper No. 207, Available at SSRN: https://ssrn.com/abstract=2212198; Mülbert, Peter O., Corporate Governance of Banks after the Financial Crisis - Theory, Evidence, Reforms (April 2010). ECGI - Law Working Paper No. 130/2009, Available at SSRN: https://ssrn.com/abstract=1448118 or http://dx.doi.org/10.2139/ssrn.1448118; Beltratti, Andrea and Stulz, Rene M., Why Did Some Banks Perform Better during the Credit Crisis? A Cross-Country Study of the Impact of Governance and Regulation (July 13, 2009). Charles A Dice Center Working Paper No. 2009-12 , Fisher College of Business Working Paper No. 2009-03-012, Available at SSRN: https://ssrn.com/abstract=1433502 or http://dx.doi.org/10.2139/ssrn.1433502 (with mixed results about the role of corporate governance during the crisis).

[2] See High-Level Expert Group on Sustainable Finance (HLEG) (2018). Final Report. 38.

[3] European Commission, Consultation document: Renewed sustainable finance strategy (8 April 2020), p. 37.

[4] EU Commission, Inception Impact Assessment, Sustainable Corporate Governance, Ref. Ref. Ares(2020)4034032 - 30/07/2020.

corporate governance codes, are analyzed as a possible response to the need to integrate sustainability "…into the corporate governance framework, as many companies still focus too much on short-term financial performance compared to their long-term development and sustainability aspects".[5]

Many authors investigated the effective implementation of corporate governance codes,[6] but a few considered the role of the codes in promoting environmental and social responsibility.[7] Even though many corporate governance codes already require that boards address stakeholders' (employees, creditors, customers, suppliers and local communities) interests,[8] existing studies denounce that the meaning and real implications of such indication diverge, the recommendations are quite generic and vague,[9] and the interests of stakeholders are nonetheless subordinate to the shareholder primacy principle.[10] In the light of the strong commitment by the EU in undertaking a sustainability path towards the goals set by the Paris Agreement and the UN 2030 Agenda, it is more pressing then ever evaluating how companies can truly integrate a long-term sustainable approach in their strategies and operations, and therefore whether corporate governance codes could provide a useful guidance towards such objectives.

The aim of the chapter is to comparatively evaluate the most recent attempts to integrate sustainability considerations in corporate governance codes of listed companies within the EU Member States, in order to

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[5] EU Commission, Communication on the European Green Deal, 11 December 2019, COM(2019) 640 final p. 17.

[6] See, for example: Wymeersch, E. (2013). European corporate governance codes and their effectiveness. In M. Belcredi & G. Ferrarini (Eds.), *Boards and shareholders in European listed companies facts, context and post-crisis reforms* (pp. 67–142). Cambridge University Press; Böckli, P., Davies, P. L., Ferran, E., Ferrarini, G. and Garrido Garcia, J. M., Hopt, K. J., Pietrancosta, A., Pistor, K., Roth, M., Skog, R. R., Soltysinski, S., Winter, J. W. and Wymeersch, E. O. (2014). Making Corporate Governance Codes More Effective: A Response to the European Commission's Action Plan of December 2012. Oxford Legal Studies Research Paper No. 56/2014; Ferrero-Ferrero, I. & Ackrill, R. (2016). Europeanization and the Soft Law Process of EU Corporate Governance: How Has the 2003 Action Plan Impacted on National Corporate Governance Codes? In *Journal of Common Market Studies*, Vol. 54, Issue 4, pp. 878-895, 2016; Stiglbauer, M. and Velte, P. (2014). Impact of Soft Law Regulation by Corporate Governance Codes on Firm Valuation. The Case of Germany. In the International Journal of Business in Society 14, 395-406; Bianchi, M., Ciavarella, A., Novembre, V., and Signoretti, R. (2011). Comply or Explain: Investor Protection Through the Italian Corporate Governance Code. In *Journal of Applied Corporate Finance*, Vol. 23, Issue 1, pp. 107-121, 2011; and RiskMetrics Group et al. (2009). Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States. Study commissioned by the European Commission.

[7] See Sjåfjell, B. (2016). When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes. In J. J. Du Plessis and C.K. Low (eds), Corporate Governance Codes for the 21st Century: International Perspectives and Critic, 23-55; and Szabó, D. G. & Sørensen, K. E. (2013). Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU. In *European Business Law Review* 24, Issue 6, pp. 781–828.

[8] See Szabó, D. G. & Sørensen, K. E. (2013). Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU. In *European Business Law Review* 24, Issue 6, pp. 781–828.

[9] Id.

[10] See Sjåfjell, B. (2016). When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes. In J. J. Du Plessis and C.K. Low (eds), Corporate Governance Codes for the 21st Century: International Perspectives and Critic, 23-55.

understand if such progress is on the way and which best practices could be taken into consideration and disseminated by the EU authorities in the years to come.

The chapter starts by briefly analyzing the EU approach to the promotion of corporate governance practices, with a particular focus on the diffusion of corporate governance codes. [11] Then, it focuses on the recent EU actions addressing sustainable development, from the launch of the EU Sustainable Development Strategy in 2001[12] to the announcement of the European Green Deal strategy in December 2019 and the latest regulatory proposals in 2020. It follows a description of the methodology adopted in the comparative analysis, conducted on corporate governance codes currently in force in the EU Member States, also considering the G20/OECD Principles of Corporate Governance (2015) ['OECD Code'] and UK Corporate Governance Code (2018) as undeniably the most influential codes around the globe. Finally, the paper describes the results of such research and concludes.

2. Corporate governance codes: the EU approach

The first modern corporate governance code was adopted in the UK in 1992 as a series of best governance practices – known as the Cadbury Code – by the Cadbury Committee on Corporate Governance Issues, which defined corporate governance as «the system by which companies are directed and controlled». [13] The aim of the Code was to raise standards of corporate governance in order to increase the level of confidence in financial reporting and auditing, by clearly defining the rights and responsibilities of shareholders, directors and auditors. In particular, the Code was developed in reaction to the series of business scandals that hit the UK, including the Guinness share-trading fraud, the collapse of the Bank of Credit and Commerce International and Maxwell's pension fund affair.[14]

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[11] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions the European Green Deal, COM/2019/640 final.
[12] European Commission. Communication from the Commission a Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, COM/2001/0264 final (15 May 2001).
[13] Cadbury, A., (1992), The Financial Aspects of Corporate Governance (Cadbury Report), *London, UK: The Committee on the Financial Aspect of Corporate Governance (The Cadbury Committee) and Gee and Co, Ltd*, p. 15, §2.5.
[14] Boyd, Colin. "Ethics and Corporate Governance: The Issues Raised by the Cadbury Report in the United Kingdom." Journal of Business Ethics 15, no. 2 (1996): 167-82.

The issuance of the Code was associated with the birth of the corporate governance movement in Europe,[15] as it paved the way for the adoption of corporate governance codes throughout Europe.[16] As so, for many years, the improvement of corporate governance standards was left by EU policymakers to soft law mechanisms, with an exception for the financial sector where – following the 2007 financial crisis – stricter governance requirements were provided for banks and other financial institutions.[17] However, a relevant step towards a model including hard law elements was registered with the introduction of Directive 2006/46/EC, that requires listed companies to include a corporate governance statement in their annual reports, containing a reference to the national corporate governance code to which each company adheres and, in the event of non-application of any of the provisions enclosed in such code, an explanation for such choice.[18]

As to other interventions on corporate governance practices, the main intentions by the EU legislator were set in three Green Papers published in 2003, 2010, and 2011, which described the evolution of the Commission's thinking with regard to future regulatory initiatives concerning corporate governance. The EU policies on corporate governance following such documents, and disclosed in the Corporate Governance Action Plan of 2012,[19] focused on the enhancement of specific issues, such as corporate transparency, protection of shareholder rights, board effectiveness and the promotion of shareholder long-term engagement and stewardship.[20]

The improvement of corporate governance code reporting - based on companies' general tendency to provide insufficient explanation for company choice to depart from national corporate governance provisions - was among the initiatives included in the Corporate Governance Action Plan, and was

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[15] Gerner-Beuerle, Carsten, Diffusion of Regulatory Innovations: The Case of Corporate Governance Codes (October 26, 2016). Journal of Institutional Economics, 13(2), 271-303.

[16] See Clarke, T., *International Corporate Governance* (Routledge 2007), 175-179; Wymeersch, E., 'The Corporate Governance "Codes of Conduct" between State and Private Law', in Zimmermann, R. et al. (eds), *Globalisierung und Entstaatlichung des Rechts* (Mohr Siebeck 2008) vol 2, 66-72; and Zattoni, A. and Cuomo, F., 'Why Adopt Codes of Good Governance? A Comparison of Institutional and Efficiency Perspectives' (2008) 16 Corporate Governance: An International Review 1, 6-7.

[17] See, for example, Guido Ferrarini, 'CRD IV and the Mandatory Structure of Bankers' Pay' in ECGI Law Working paper Series, ECGI - Law Working Paper No. 289, 2015, p.20; Peter O Mulbert & Alexander Wilhelm, 'CRD IV Framework for Banks' Corporate Governance', in Danny Busch & Guido Ferrarini (eds) European Banking Union, Oxford University Press, 2015, 155, 196-97.

[18] Directive 2006/46/EC of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings.

[19] EU Commission Communication, Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies, COM/2012/0740 final.

[20] In this regard, consider Directive 2013/50/EU ('Transparency Directive') revised in 2013, and the recent Directive 2017/828 ('Shareholder Rights Directive II') replacing the 2007 version.

finally addressed by the EU Commission in its Recommendations on the quality of corporate governance reporting issued in 2014.[21]

However, the explicit link between corporate governance and sustainable development was not mentioned by EU policymakers until 2018, in the context of the implementation of the Commission Action Plan on financing sustainable growth, as better described in the next section. [22]

3. EU approach to sustainable development and the need for a sustainable corporate governance

Since the launch of the EU Sustainable Development Strategy in 2001[23] the EU Commission has made a clear commitment to contribute to the promotion of sustainable development. The introduction of the Europe 2020 Strategy in 2010,[24] the signing of the Paris Agreement,[25] the adherence to the UN Sustainable Development Goals in 2016,[26] as well as the announcement of the European Green Deal strategy in December 2019, [27] clearly confirmed the EU's intention to lead the global evolution towards a new economic model.

In particular, the first EU legislative interventions addressing the promotion of corporate sustainability developed along two main intertwined dimensions: sustainable finance and corporate non-financial disclosure.

As to non-financial disclosure – Directive 2014/95/EU on disclosure of non-financial and diversity information ['Non-financial Reporting Directive'][28] – entered into effect in January 2018 – requires that certain large

[21] EU Commission, Recommendations of 9 April 2014 on the quality of corporate governance reporting ('comply or explain').

[22] EU Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth, COM (2018) 97 final (March 2018).

[23] European Commission, Communication from the Commission A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development, COM/2001/0264 final.

[24] EU Commission, Europe 2020: A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final.

[25] UN, Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1 (12 December 2015).

[26] EU Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Next steps for a sustainable European future European action for sustainability, COM(2016) 739 final.

[27] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions the European Green Deal, COM/2019/640 final.

[28] In accordance to Article 2 of the same directive, in 2017 the EU Commission published some voluntary guidelines on methodology for reporting non-financial information in order "to help companies disclose high quality, relevant, useful, consistent and more comparable non-financial information in a way that fosters resilient and sustainable growth and employment, and provides transparency to stakeholders". The EU Commission further integrated such guidelines to improve the corporate disclosure of climate-related information in line with recommendations made by the EU Technical Expert Group on Sustainable Finance. European Commission. See Guidelines on non-financial reporting 2017/C 215/01 and European Commission. Guidelines on Non-Financial Reporting: Supplement on Reporting Climate-Related

companies[29] disclose information about their due diligence processes and policies in relation to environmental, social and employee matters, respect of human rights, anti-corruption and bribery issues, and diversity on company boards (in terms of age, gender, educational and professional background). Notwithstanding the potentially strong impact performed by the introduction of such directive on corporate practice, many concerns were raised in relation to its implementation,[30] and empirical research found that non-financial statements are generally affected by lack of quantitative disclosure, lack of clarity concerning the selection and measurability of non-financial targets, but also that they are over-generic, they do not appropriately address climate-related risks nor provide sufficient descriptions of due diligence processes, especially related to human rights and social matters.[31] The consequences of such failure could be particularly harmful, especially considered that the quality of sustainability disclosure is a key aspect to prevent market actors from relying exclusively on financial metrics which may encourage a focus on short-term measures of performance.[32] Moreover, the lack of reliable corporate non-financial disclosure is undoubtedly one of the main challenges faced by financial market participants and financial advisers in performing their new disclosure duties in relation to ESG factors in the context of EU sustainable finance regulation.[33] In considerations of such limitations, the revision of the Non-Financial Reporting Directive is one of the first key actions included in the initial roadmap of the policies and measures needed to achieve the European Green Deal,[34] and a public consultation on its review was launched

Information, C (2019) 4490 Final (17 June 2019). Available online: https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf (accessed on 28 September 2019).

[29] Such directive applies, specifically, to "large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year. See Article 19a of the Non-Financial Reporting Directive.

[30] Recital 16 of the Non-Financial Reporting Directive requires that 'statutory auditors and audit firms should only check that the non-financial statement or the separate report has been provided' and leaves to the Member States the discretionary power to 'require that the information included in the non-financial statement or in the separate report be verified by an independent assurance services provider'. The lack of mandatory third-party verification of non-financial statements reduces their reliability level. See Siri M., Zhu S (2019) Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda. Sustainability, 2019, 11, pp 1-23.

[31] See ESMA, Report Enforcement and regulatory activities of European enforcers in 2019 (April 2020) and Alliance for Corporate Transparency, 2019 Research Report: An analysis of the sustainability reports of 1000 companies pursuant to the EU Non-Financial Reporting Directive (February 2020).

[32] See ESMA, Report Undue short-term pressure on corporations (18 December 2019).

[33] Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector.

[34] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions the European Green Deal, COM/2019/640 final, Annex.

on 20 February 2020.[35] Interestingly, the majority of respondents expressed support for a great number of proposals that would greatly impact the existing directive.[36] In particular, support was shown in relation to: the adoption of a common reporting standard in order to avoid issues concerning comparability, reliability and relevance; the development of simplified standards for SMEs; the imposition of stronger audit requirements; the digitalization of non-financial information which should be available through a single access point and machine-readable; the requirement on companies to disclose their materiality assessment process; the expansion of the scope of the Non-financial Reporting Directive to other categories of companies; and the alignment of environmental disclosure with the EU taxonomy structure. The finalization and entrance into force of the EU regulation providing of a common EU Taxonomy for sustainable financial products[37] and EU climate benchmarks[38] will undeniably help to prevent greenwashing practices among companies, but also to increase transparency and comparability of disclosed information.

As to the second dimension – sustainable finance – the EU Commission has recently started intervening on the regulation of the financial sector, as it became clear that a real change would be possible only by reorienting private capital to more sustainable investments. In fact, it was estimated that more capital flows should be oriented towards sustainable investments to close the €180-billion gap of additional investments needed to meet the targets of the Paris Agreement. In the meantime, great financial risks might occur for business activities in case of inaction, as it was estimated that delays in tackling the climate issue could cost companies nearly $1.2 trillion over the next 15 years for a universe of 30,000 listed companies.[39]

As a consequence, at the end of 2016, the EU Commission appointed a High-Level Expert Group (HLEG) on sustainable finance to advise it on

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[35] https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation. See Commission, 'Consultation strategy for the revision of the Non-Financial Reporting Directive – Background document' (20 February 2020).

[36] See EU Commission, Summary Report of the Public Consultation on the Review of the Non-Financial Reporting Directive, Ares(2020)3997889 - 29/07/2020, available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12129-Revision-of-Non-Financial-Reporting-Directive/public-consultation.

[37] See Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.

[38] Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks.

[39] UN Environment-Finance Initiative. Changing Course 2019. Available online: https://www.unepfi.org/publications/investment-publications/changing-course-a-comprehensive-investor-guide-to-scenario-based-methods-for-climate-risk-assessment-in-response-to-the-tcfd/ (accessed on 28 September 2019).

developing a comprehensive EU strategy on sustainable finance and development. The HLEG final report,[40] issued in January 2018, stressed the importance of promoting sustainable finance through a systemic review of the financial framework, and proposed eight recommendations, as well as many crosscutting recommendations and actions, addressed to specific financial sectors. In relation to corporate governance, the HLEG Report recommended, *inter alia*, the strengthening of director duties related to sustainability, and invited the Commission to explore ways to enhance director duties and incorporate sustainability in corporate practice, by taking into account the interests of all stakeholders, employees included, and the likely consequences of any decision in the long term on the community and environment. The report suggested that directors should be adequately trained in order to exercise reasonable care, skill and due diligence in relation to the company's affairs, so as to consider the direct and indirect impact of the company's business model, production and sales processes on stakeholders and the environment. The HLEG also recommended that sustainability-related competences should be considered during board nomination processes, the company management should develop a climate strategy aligned with climate goals, and remuneration should be aligned with long-term and sustainability goals. Such suggestions, addressed to the financial sector, could and should reasonably apply as best practices to non-financial companies as the main drivers of economic change.

In March 2018, on the basis of the final report published by the HLEG, the EU Commission developed a framework, the 'Action plan on Financing Sustainable Growth" ('Action Plan'),[41] which established a strategy to support the re-orientation of private capital flows towards sustainable investments, so enhancing the connection between the financial industry and sustainable development. The EU strategy specifically develops around 10 key actions to be fully implemented by the end of 2019,[42] the last of which concerns the

[40] HLEG. Final Report. 2018. Available online: https://ec.europa.eu/info/sites/info/files/180131-sustainable-finance-final-report_en.pdf (accessed on 28 September 2019).

[41] EU Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth, COM (2018) 97 final (March 2018).

[42] The 10 key action are: a) establishing an EU classification system for sustainable activities; (b) creating standards and labels for green financial products; (c) fostering investment in sustainable projects; (d) incorporating sustainability when providing financial advice; (e) developing sustainability benchmarks; (f) better integrating sustainability in ratings and market research; (g) clarifying institutional investors' and asset managers' duties; (h) incorporating sustainability in prudential requirements; (i) strengthening sustainability disclosure and accounting rule-making; and (l) fostering sustainable corporate governance and attenuating short-termism in capital markets. See also Siri M., Zhu S (2019) Will the EU Commission Successfully Integrate Sustainability Risks and Factors in the Investor Protection Regime? A Research Agenda. Sustainability, 2019, 11, pp 1-23.

promotion of sustainable corporate governance and reducing short-termism in capital markets.

As to such action, the Commission argues that corporate governance «can significantly contribute to a more sustainable economy, allowing companies to take the strategic steps necessary to develop new technologies, to strengthen business models and to improve performance», but also «improve their risk management practices and competitiveness».[43] Indeed, a corporate governance framework excessively focused on short-term performance could lead managers to take risks that are unsustainable in the long-term, also in economic terms. Moreover, the EU Commission committed itself to carry out analytical and consultative work with relevant stakeholders to assess: (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets; and (ii) the possible need to clarify the rules according to which directors are expected to act in the company's long-term interest. As to the former, in February 2020 the Commission published a study on due diligence,[44] which indicated the need for policy intervention for the identification and mitigation of adverse social and environmental impact in a company's own operations and supply chain. As to the latter, a study on directors' duties and possible sustainability targets will be finalized in Q2 2020.

As to the latter, the recent publication, in July 2020, of the "Study on directors' duties and sustainable corporate governance" – prepared by EY for the EU Commission DG Justice and Consumer - [45] represented an important step towards the establishment of a sustainable corporate governance, even though it raised much criticism by scholars and other stakeholders. Based on the assumption that "there is a trend for publicly listed companies within the EU to focus on short-term benefits of shareholders",[46] the report identifies seven main problem drivers contributing to such "short-termism" in corporate governance[47], and also analyzes the impacts of possible EU level solutions,

[43] EU Commission, n 740, 11.
[44] Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza-Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara and Camille Salinier and Héctor Tejero Tobed, Study on due diligence requirements through the supply chain, Final report (January 2020), available at https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.
[45] EY, Study on directors' duties and sustainable corporate governance, July 2020, available at https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en/format-PDF.
[46] Ibidem, p. 10.
[47] According to the study, these are: (1) directors' duties and company's interest tendency to favour the short- term maximisation of shareholder value; (2) growing pressures from investors with a short-term horizon; (3) companies lack of a strategic perspective over sustainability; (4) board remuneration structures that incentivise the focus on short-term shareholder value; (5) current board composition inadequacy to support a shift towards sustainability; (6) current corporate governance frameworks and practices

from the publication of guidance documents or recommendations to the adoption of hard/legislative measures (including, for example, the requirement that directors should integrate ESG issues while performing their mandate, that corporate boards consider sustainability criteria in the board nomination process and that Member States introduce mechanisms to incentivize longer shareholding periods). Building on the report, the EU Commission has recently launched a public consultation on possible legislative and soft law measures to support a sustainable corporate governance.[48] However, the EY report, the inception impact assessment and consultation questionnaire they all have been subject to strong criticism by respondents, as accused of not being adequately evidence-based, of moving from biased assumptions and being poorly structured (especially in relation to the structure of the questions of the public questionnaire), but also inadequate to respond to the real problems at stake (which could not be simply considered to be the strong short-term market pressure and the lack of a stakeholder approach).[49] Moreover, it should be noted that the existence of non-regulatory incentives – such as, for example, the evaluation by rating agencies, score providers and institutional investors of sustainability aspects such as the adherence to international standards (e.g. the UN Guiding Principles on Business and Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work) and the general tendency by institutional investors to adopt a long-term view on investment activities[50] – should be considered when evaluating the best tools for supporting a more responsible decision-making by corporations.

In the light of the strong criticism moved to a possible hard/regulatory approaches to support the establishment of a sustainable corporate governance, we find it useful performing an analysis of existing practices concerning the integration of CSR, sustainability, environmental and social issues among corporate governance codes adopted by the EU Member States,

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insufficient stakeholder engagement and involvement; and (7) limited enforcement of the directors' duty to act in the long-term interest of company.

[48] EU Commission, Inception Impact Assessment, Sustainable Corporate Governance, Ref. Ref. Ares(2020)4034032 - 30/07/2020.

[49] See, for example, Roe, Mark J. and Spamann, Holger and Fried, Jesse M. and Wang, Charles C. Y., The European Commission's Sustainable Corporate Governance Report: A Critique (October 14, 2020). European Corporate Governance Institute - Law Working Paper 553/2020, Available at SSRN: https://ssrn.com/abstract=3711652 or http://dx.doi.org/10.2139/ssrn.3711652. See also Ringe, W.-G., Bassen, A., Lopatta, K., EC Corporate Governance Initiative Series: 'The EU Sustainable Corporate Governance Initiative—room for improvement', Opinion (15 Oct 2020), available at https://www.law.ox.ac.uk/business-law-blog/blog/2020/10/ec-corporate-governance-initiative-series-eu-sustainable-corporate.

[50] Consider, one for all, Larry Fink's Letter to CEOs, available at https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

so as to investigate a possible role of such self-regulatory and soft-law measures in enhancing a more responsible corporate behaviors.

Notwithstanding the initiatives undertaken by the EU legislator, the integration of corporate sustainability is still at its infancy, and many policy interventions have to be done. However, the restructuring of corporate governance practices will be an obliged step to the achievement of international sustainability targets.

As already mentioned, many authors investigated the effective implementation of corporate governance codes,[51] but a few considered the role of the codes in promoting environmental and social responsibility.[52] Even though many corporate governance codes already include CSR recommendations, by requiring, for instance, that the board address stakeholders' (employees, creditors, customers, suppliers and local communities) interests,[53] scholars denounce that the meaning and real implications of such indication diverge, the recommendations are quite generic and vague,[54] and the interests of stakeholders are nonetheless subordinate to the shareholder primacy principle.[55] As such, the integration of CSR in corporate governance codes seems superficial and usually done by using boilerplate language.

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[51] See, for example Wymeersch, E. (2013). European corporate governance codes and their effectiveness. In M. Belcredi & G. Ferrarini (Eds.), *Boards and shareholders in European listed companies facts, context and post-crisis reforms* (pp. 67–142). Cambridge University Press; Böckli, P., Davies, P. L., Ferran, E., Ferrarini, G. and Garrido Garcia, J. M., Hopt, K. J., Pietrancosta, A., Pistor, K., Roth, M., Skog, R. R., Soltysinski, S., Winter, J. W. and Wymeersch, E. O. (2014). Making Corporate Governance Codes More Effective: A Response to the European Commission's Action Plan of December 2012. Oxford Legal Studies Research Paper No. 56/2014; Ferrero-Ferrero, I. & Ackrill, R. (2016). Europeanization and the Soft Law Process of EU Corporate Governance: How Has the 2003 Action Plan Impacted on National Corporate Governance Codes? In *Journal of Common Market Studies*, Vol. 54, Issue 4, pp. 878-895, 2016; Stiglbauer, M. and Velte, P. (2014). Impact of Soft Law Regulation by Corporate Governance Codes on Firm Valuation. The Case of Germany. In the International Journal of Business in Society 14, 395-406; Bianchi, M., Ciavarella, A., Novembre, V., and Signoretti, R. (2011). Comply or Explain: Investor Protection Through the Italian Corporate Governance Code. In *Journal of Applied Corporate Finance*, Vol. 23, Issue 1, pp. 107-121, 2011; and RiskMetrics Group et al. (2009). Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States. Study commissioned by the European Commission.

[52] See Sjåfjell, B. (2016). When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes. In J. J. Du Plessis and C.K. Low (eds), Corporate Governance Codes for the 21st Century: International Perspectives and Critic, 23-55; and Szabó, D. G. & Sørensen, K. E. (2013). Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU. In *European Business Law Review* 24, Issue 6, pp. 781–828.

[53] See Szabó, D. G. & Sørensen, K. E. (2013). Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU. In *European Business Law Review* 24, Issue 6, pp. 781–828.

[54] Id.

[55] See Sjåfjell, B. (2016). When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes. In J. J. Du Plessis and C.K. Low (eds), Corporate Governance Codes for the 21st Century: International Perspectives and Critic, 23-55.

4. Methodology

The present study is based on the analysis of the content of corporate governance codes in force in all EU 27 Member States[56] as of November 2020, with specific reference to the approaches followed in integrating corporate social responsibility and/or sustainability issues among the recommendations included therein. In addition to the examination of EU corporate governance codes, the study also includes a comparison with the OECD Code and the UK Code as reference frameworks.

The study builds on a previous work conducted in 2013 on the integration of corporate social responsibility in corporate governance codes in the EU.[57] Undoubtedly, the present study partially provides some updates on the state of the codes. At the same time, it differs in the scope of the analysis, as it is limited to the 27 EU corporate governance codes instead of all European codes, and includes the analysis of some additional factors, such as the presence in the codes of provisions concerning gender diversity, non-financial disclosure, compensation linked to non-financial/sustainability criteria, and the institution of specific CSR committees.

The findings of this study have to be seen in the light of some limitations. First of all, it should be specified that the broad scope of the research made it necessary for the study to be based on the English convenience translations of the codes provided by the issuers,[58] and therefore it could present biases to the extent that such translations show some inconsistencies with the official codes issued in the original language. Further limitations of the study could also originate from the different historical, cultural and institutional contexts in which each code is implemented, that have not been the object of this study but could have influenced in multiple ways the consideration of sustainability-related issues in corporate governance recommendations. It is also important to specify that the study does not assess the level of implementation/efficiency of corporate governance rules nor the integration of sustainability concerns in national legislation.

Finally, it should be noted that, in some cases, more than one code of corporate governance was published in some Member State, but that only the

[56] Austria, Belgium, Bulgaria, Croatia, Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.

[57] Szabó, D. G. & Sørensen, K. E. (2013). Integrating Corporate Social Responsibility in Corporate Governance Codes in the EU. In *European Business Law Review* 24, Issue 6, pp. 781–828

[58] Excepted for the Czech Corporate Governance Code, as only the Czech version was provided and, therefore, the authors had to rely on a software-based translation.

main code into effect has been considered for the current analysis. In this regard, Table 1 provides the list of codes analyzed for each EU country.[59]

Table 1 – National codes of corporate governance (EU countries)

Country	Selected corporate governance code	Custodian	First code	Latest update
Austria	Austrian Corporate Governance Code[60]	Austrian Working Group for Corporate Governance	2002	2020
Belgium	The Belgian Code on Corporate Governance[61]	Corporate Governance Committee	2004	2020
Bulgaria	National Corporate Governance Code[62]	National Corporate Governance Committee	2007	2016
Croatia	Corporate Governance Code[63]	Croatian Financial Services Supervisory Agency, Zagreb Stock Exchange	2007	2019
Republic of Cyprus	Corporate Governance Code[64]	Cyprus Stock Exchange	2011	2019
Czech Republic	Czech Corporate Governance Code	…[65]	2001	2018
Denmark	Recommendations on Corporate Governance[66]	Committee on Corporate Governance	2001	2019
Estonia	Corporate Governance Recommendations[67]	Estonian Financial Supervision Authority (EFSA), NASDAQ OMX Tallinn Stock Exchange	2005	2006
Finland	Finnish Corporate Governance Code[68]	Securities Market Association	1997	2020
France	Corporate governance code of listed corporations[69]	Association Française des Entreprises Privées (AFEP), Mouvement des	2003	2018

[59] Data are partially drawn from OECD, The Corporate Governance Factbook, 2019, pp. 43-46.
[60] Available at https://www.corporate-governance.at/uploads/u/corpgov/files/code/corporate-governance-code-012020.pdf.
[61] Available at https://www.corporategovernancecommittee.be/en/over-de-code-2020/2020-belgian-code-corporate-governance.
[62] Available at http://download.bse-sofia.bg/Corporate_governance/CGCode_April_2016_EN.pdf.
[63] Available at https://zse.hr/userdocsimages/legal/Corporate%20Governance%20Code-eng2010.pdf.
[64] Available at http://www.cse.com.cy/CMSPages/GetFile.aspx?guid=b77dda20-8bfb-4ab6-86c7-84cdcc6df050.
[65] In the Czech Republic, there is no formal custodian since 2006, when the Czech Securities Commission (the former custodian) was formally integrated to the Czech National Bank. The Code is available at https://www.mfcr.cz/cs/o-ministerstvu/odborne-studie-a-vyzkumy/2019/kodex-spravy-a-rizeni-spolecnosti-cr-201-34812.
[66] The (Danish) Recommendations on Corporate Governance are available at https://corporategovernance.dk/recommendations-corporate-governance.
[67] Available at https://ecgi.global/code/corporate-governance-recommendations-1.
[68] Available at https://cgfinland.fi/wp-content/uploads/sites/39/2019/11/corporate-governance-code-2020.pdf.
[69] Available at https://afep.com/wp-content/uploads/2018/06/Afep-Medef-Code-revision-June-2018-ENG.pdf. Actually, other private entities published codes of best practices in France such as the Middlenext

		Entreprises de France (MEDEF)		
Germany	German Corporate Governance Code[70]	Commission of the German Corporate Governance Code	2002	2019
Greece	Hellenic Corporate Governance Code For Listed Companies[71]	Hellenic Corporate Governance Council		2013
Hungary	Corporate Governance Recommendations[72]	Budapest Stock Exchange Company Limited	2004	2018
Ireland	Irish Corporate Governance Annex[73]	Irish Stock Exchange (following UK Financial Reporting Council recommendations)	2010	2019
Italy	Corporate Governance Code[74]	Corporate Governance Committee	1999	2020
Latvia	NASDAQ Principles of Corporate Governance/Disclosure Rules on KOSPI Market[75]	Nasdaq Riga	2005	2010
Lithuania	The Corporate Governance Code for the Companies Listed on NASDAQ OMX Vilnius[76]	Nasdaq Vilnius	2006	2010
Luxembourg	Ten Principles of Corporate Governance[77]	Luxembourg Stock Exchange	2007	2017
Malta	The Code of Principles of Good Corporate Governance[78]	Malta Financial Services Authority	2001	2019

Governance Code For Small And Midcaps (2016), available at https://www.fsa.go.jp/en/refer/councils/corporategovernance/reference/france-middlenext.pdf.

[70] Available at https://www.dcgk.de/files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf.

[71] Available at https://www.athexgroup.gr/documents/10180/2227279/HCGC_EN_20131003.pdf/c32f35ac-2f4b-459a-989f-4f41618cfdc5.

[72] Available at https://www.bse.hu/Issuers/Corporate-Governance-Recommendations.

[73] Available at https://www.ise.ie/Products-Services/Sponsors-and-Advisors/Irish-Corporate-Governance-Annex.pdf. - The code integrates the main applicable corporate governance code in Ireland, i.e. the UK Corporate Governance Code developed by the Financial Reporting Council, available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf.

[74] Available at https://www.borsaitaliana.it/comitato-corporate-governance/codice/2020eng.en.pdf.

[75] Available at https://www.nasdaqbaltic.com/files/riga/corp_gov_May_2010_EN.pdf.

[76] Available at https://www.nasdaqbaltic.com/files/vilnius/teisesaktai/The%20Corporate%20Governance%20Code%20for%20the%20Companies%20Listed%20on%20NASDAQ%20OMX%20Vilnius.pdf.

[77] Available at https://www.bourse.lu/corporate-governance.

[78] Available at https://www.mfsa.mt/publications/corporate-publications/corporate-governance/. Actually, two other codes were issued: the Corporate Governance Manual for Directors of Investment Companies and Collective Investment Schemes and the Corporate Governance Guidelines for Public Interest Companies. We chose to limit our analysis to the first code since mandatory disclosure duties are provided only in relation to it.

Netherlands	Dutch Corporate Governance Code[79]	Monitoring Committee Corporate Governance Code	2003	2016
Poland	Code of Best Practices of WSE Listed Companies[80]	Warsaw Stock Exchange (WSE)	2002	2016
Portugal	The Corporate Governance Code of IPCG[81]	Portuguese Corporate Governance Institute (IPCG)	2013	2018
Romania	Code of Corporate Governance[82]	Bucharest Stock Exchange	2001	2015
Slovak Republic	Corporate Governance Code for Slovakia[83]	Central European Corporate Governance Association	2003	2016
Slovenia	Corporate Governance Code for Listed Companies[84]	Ljubljana Stock Exchange, Slovenian Directors' Association	2004	2016[85]
Spain	Good Governance Code of Listed Companies[86]	National Securities Market Commission (CNMV)	1998	2020
Sweden	The Swedish Corporate Governance Code[87]	Swedish Corporate Governance Board	2005	2020

5. Findings

The final results of the study are summarized in Table 2 and described in the next 7 sections, as briefly specified below:

(a) **The purpose of corporate governance and of codes**: this part includes many indicators, such as the explicit mentioning of sustainability/CSR considerations in the description of the main purpose of the code, but also the approach adopted in defining the function and objective of corporate governance.

(b) **CSR/Sustainability**: this section analyzes how corporate governance codes address sustainability, either by mentioning concepts such as 'sustainable success', 'corporate social responsibility', 'sustainable

[79] Available at https://www.mccg.nl/?page=4738.
[80] Available at https://www.gpw.pl/pub/GPW/o-nas/DPSN2016_EN.pdf.
[81] In 2017, the CMVM concluded a protocol with the Portuguese Institute of Corporate Governance (IPCG) in order to establish a model of self-regulation of the corporate governance recommendation regime. Therefore, the CMVM Corporate Governance Code was replaced by the Corporate Governance Code of the IPCG. The Code is available at https://cam.cgov.pt/en/the-ipcg-corporate-governance-code-2018.
[82] Available at https://ecgi.global/code/code-corporate-governance-romania-2015.
[83] Available at http://www.bsse.sk/Portals/2/Issuers%20Guide/2018/kodex_ENG_akt.pdf.
[84] Available at https://ecgi.global/code/slovenian-corporate-governance-code-listed-companies-2016-updated-2018.
[85] The Code was updated in 2018.
[86] Available at https://www.cnmv.es/DocPortal/Publicaciones/CodigoGov/CBG_2020_ENen.PDF.
[87] Available at http://www.bolagsstyrning.se/UserFiles/Koden/2020/The_Swedish_Corporate_Governance_Code_1_January_2020_00000002.pdf.

value creation', 'sustainable long-term value', 'sustainable development', or by dedicating an entire chapter/principle prescribing the duties of the company towards its stakeholders.

(c) **Stakeholders**: this part addresses the presence of recommendations/principles concerning the consideration and treatment of stakeholders' interests, as well as the provision of a definition of the concept of 'stakeholder'.

(d) **Employees**: the paragraph focuses on the inclusion in the codes of specific provisions fostering employee engagement and participation.

(e) **Gender diversity**: the section describes how codes consider gender diversity, distinguishing among corporate governance codes that only recommend that board should be elected promoting gender diversity and codes that even set a minimum percentage for the representation of the female gender.

(f) **Sustainability/CSR committee**: this part concerns the presence of provisions recommending the establishment of specific sustainability/CSR committee with the task of performing CSR functions.

(g) **Compensation and sustainability**: the section analyses the presence of provisions recommending the integration of non-financial and sustainability-related factors in compensation policies.

a. The purpose of corporate governance and of codes

The 2004 version of the OECD Code defines 'corporate governance' as «a set of relationships between a company's management, its board, its shareholders and other stakeholders».[88] To this definition, the 2015 version adds also that «the purpose of corporate governance is to help building an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies".[89] Supporting sustainable growth is therefore among the ultimate objectives included in the latest OECD Code, alongside with the support of economic efficiency and financial stability through the improvement of the legal, regulatory and institutional framework for corporate governance.[90]

[88] OECD Code (2004), p. 11.
[89] OECD Code (2015), p. 7.
[90] OECD Code (2015), p. 9.

The current version of the UK Corporate Governance Code, similarly to the OECD Code, mentions the original definition of corporate governance provided in 1992 by the Cadbury Committee as «the system by which companies are directed and controlled» but, at the same time, specifies that the long-term success of any business depends on its relationships with its stakeholders, and states that good corporate governance should ensure company long-term sustainable success, generating value for shareholders and contributing to wider society.[91]

The latest version of both codes seems therefore to have started including some specific references to the need for companies to perform their activities with a long-term perspective, taking into account the interests of other stakeholders and the society in general, so moving away from a shareholder-centric vision based on the need to define corporate bodies functions for agency costs reduction.

As to the EU 27 analyzed codes, we found that 12 companies out of 27 define the purpose and function of corporate governance (Greece, Denmark, Lithuania, Portugal, Luxembourg, The Netherlands, Bulgaria, Germany, Sweden, Latvia, Poland, Romania). In particular, we identified three approaches to the definition of corporate governance function.

The first approach, followed by the codes from Latvia, Poland, Denmark and Romania, focuses on corporate value creation, market competitiveness and transparency, with no mention of stakeholders' interests, nor to corporate responsibility towards the society.

A second approach – adopted by the Lithuanian and Greek codes - defines corporate governance as a framework of the company's management and control involving a set of relationship between bodies of corporate management and supervision, the company's shareholders and stakeholders. It should be noted that the codes that follow this approach clearly adhere to the 2004 definition provided by the OECD Code stating that «corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders».[92]

The third approach, which aligns with the current integrated definition of corporate governance by the OECD Principle[93] and the UK Code[94] – and adopted by codes from Bulgaria, Germany, Luxembourg, the Netherlands, Portugal and Sweden – mentions the contribution of corporate governance to

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[91] UK Code (2018), p. 1 and Principle A.

[92] OECD Code, 2015, p. 9.

[93] "The purpose of corporate governance is to help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies", G20/OECD Code of Corporate Governance (2015), p. 7.

[94] UK Code (2018), p. 1.

sustainable development/growth and pays attention to corporate responsibility towards society. In particular, Bulgarian code states that «modern corporate governance practices contribute to global sustainable development and growth of national economies» and that «good corporate governance requires corporate boards to be accountable, loyal, responsible, transparent and independent in order to act in the best interest of the company and society». [95] The German code specifies that «with their actions, the company and its governing bodies must be aware of the enterprise's role in the community and its responsibility vis-à-vis society» as «social and environmental factors influence the enterprise's success».[96] The Luxembourg code highlights concepts such as 'integrity', 'responsibility' and 'respect for the interests of shareholders and any other stakeholders'.[97] The Dutch code defines governance as a concept related to «management and control, about responsibility and influence, and about supervision and accountability», based on the underlying notion that «a company is a long-term alliance between the various stakeholders of the company», of which interests should be taken into account with «a view to ensuring the continuity of the company and its affiliated enterprise, as the company seeks to create long-term value».[98] Swedish code defines 'good governance' as a tool to ensure that «companies are run sustainably, responsibly and as efficiently as possible on behalf of their shareholders", and adds that «the confidence of legislators and the public that companies act sustainably and responsibly is crucial if companies are to have the freedom to realize their strategies to create value».[99] Similarly, Portuguese code suggests that corporate governance should strengthen the trust of investors, employees and the general public in the quality and transparency of management and supervision, as well as in the sustained development of the companies.[100]

As to the purpose of the code, 20 out of 27 codes (Austria, Belgium, Bulgaria, Czech Republic, Croatia, Denmark, Estonia, Finland, Germany, Greece, Hungary, Latvia, Luxembourg, Malta, the Netherlands, Portugal, Sweden, Romania, Slovakia, Slovenia, Spain) specify what objectives the code was arranged for and its function in relation to the targeted companies. Of these, only 6 (Austria, Belgium, Croatia, Luxembourg, the Netherlands, Spain) mention CSR/sustainability factors, such as the consideration of stakeholders'

[95](Bulgarian) National Corporate Governance Code (2016), p. 3.
[96] German Corporate Governance Code (2020), p. 2.
[97] The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), p. 6.
[98] The Dutch Corporate Governance Code (2016), p. 8.
[99] The Swedish Corporate Governance Code (2020), p. 2.
[100] (Portuguese) Corporate Governance Code (2018), p. 11

interests,[101] the sustainable long-term value creation,[102] responsibility towards the society,[103] and non-financial reporting.[104]

Specifically, the Belgian, Spanish and Luxembourg codes highlight that one of the main drivers leading to the last revision of the code was the inclusion of a long-term and sustainable approach to value creation. The Luxembourg code, in particular, begins with the announcement of the commitment taken by the Luxembourg Stock Exchange – when it asked for the revision of the code at the beginning of 2017 - to promote «investment in the transition towards a more sustainable economy», by integrating CSR principles in the code.[105]

Even though some codes include CSR/sustainability issues and/or stakeholder interests in their introductory statements, the majority of the analyzed codes still do not consider corporate responsibility towards the society and the environment as a key aspect of corporate governance function. On the contrary, the analysis suggests that stakeholders' interests - if considered at all - are usually taken into consideration only if not hindering investors' interests.

b. CSR/sustainability

Although the current version of the OECD Code includes some references to CSR issues, such as stakeholder treatment,[106] non-financial disclosure,[107] inclusion of environmental and social consideration in board decision-making[108] and ethics,[109] it does not directly address sustainability issues but, instead, refers to other international guidelines and conventions. In particular, it clarifies that factors such as «environmental, anticorruption or ethical concerns» are considered but «are treated more explicitly in a number of other instruments including the OECD Guidelines for Multinational Enterprises, the Convention on Combating Bribery of Foreign Public Officials

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[101] The 2020 Belgian Code on Corporate Governance (2020), p.3; (Croatia) Corporate Governance Code (2019), p. 6; The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), 4; The Dutch Corporate Governance Code (2016), 7.
[102] Austrian Code of Corporate Governance (2020), p. 9; The 2020 Belgian Code on Corporate Governance (2020), p.3; The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), 4; The Dutch Corporate Governance Code (2016), 7.
[103] Austrian Code of Corporate Governance (2020), p. 9; The Dutch Corporate Governance Code (2016), 7; (Spain) Good Governance Code of Listed Companies (2020), p. 9.
[104] The 2020 Belgian Code on Corporate Governance (2020), p.3; The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), 4.
[105] The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), 4.
[106] OECD Code (2015), IV.
[107] OECD Code (2015), V. A.
[108] OECD Code (2015), VI. D. 6.
[109] OECD Code (2015), VI C.

in International Business Transactions, the UN Guiding Principles on Business and Human Rights, and the ILO Declaration on Fundamental Principles and Rights at Work, which are referenced in the Principles».

The 2018 updated version of the UK Code clearly identifies the promotion of the 'long-term sustainable success' of the company as a core duty of the board. The UK Code, however, does not include a definition of 'sustainable success', a concept that is also mentioned in relation to director re-election[110] and remuneration policies and practices,[111] nor does specifically address stakeholder, environmental and social matters. Therefore, its contribution to the integration of sustainability consideration in corporate governance seems rather modest.

As to the EU, we found that 15 out of 27 corporate governance codes (from Austria, Belgium, Bulgaria, Czech Republic, Croatia, Germany, Italy, Lithuania, Luxembourg, Malta, The Netherlands, Slovakia, Slovenia, Spain, Sweden) address corporate social responsibility, sustainable value creation or dedicate an entire chapter/principle of the code prescribing the duties of the company towards its stakeholders. In particular, we identified four main approaches:

(i) Sustainable success

The Italian and Spanish codes mention – in line with the UK Code – the need for the board of directors to manage the company pursuing its 'sustainable success', which is defined by the Italian code as «the objective that guides the actions of the board of directors and that consists of creating long-term value for the benefit of the shareholders, taking into account the interests of other stakeholders relevant to the company».[112] Such criteria should also guide the definition of the compensation policy[113] and the activities performed by the internal control system.[114] The Spanish Code recommends that the board of directors should «be guided at all times by the company's best interest, understood as the creation of a profitable business that promotes its sustainable success over time, while maximizing its economic value» but, as the UK code, does not define what 'sustainable success' means.[115] However, the Spanish code requires that the board strives to «reconcile its own interests with the legitimate interests of its employees, suppliers, clients and other

[110] UK Code (2018), Provision 18.
[111] UK Code (2018), Principle P.
[112] Italian Corporate Governance Code (2020), Principle I.
[113] Italian Corporate Governance Code (2020), Principle XV.
[114] Italian Corporate Governance Code (2020), Principle XIII.
[115] (Spain) Good Governance Code of Listed Companies (2020), Recommendation 12, p. 25.

stakeholders, as well as with the impact of its activities on the broader community and the natural environment».[116]

(ii) Sustainable development/ value creation/sustainable long-term value

Codes from Austria, Belgium, Czech Republic, France, Germany, Netherlands and Sweden recommend that companies should be managed in order to ensure a sustainable development/value creation/sustainable long-term value, intended as the maximization of shareholders' wealth with the permanent consideration of stakeholders' interests.[117] Even though not expressly mentioning sustainability, the French code recommends the consideration of social and environmental aspects among the criteria to be followed by directors in the performance of their duties, as well as among the conditions to be integrated in directors' training and compensation.[118]

Interestingly, the Dutch code specifies that the management board should develop a long-term oriented strategy that takes into consideration, *inter alia*, the interests of the stakeholders but also «the environment, social and employee-related matters, the chain within which the enterprise operates, respect for human rights, and fighting corruption and bribery».[119] However, the Dutch code also explains that, in the event, the company could make short-term adjustments to its long-term strategy – in case of events such as a bankruptcy or takeover – it should expressly clarify why long-term value creation can no longer be a corporate priority.

(iii) Corporate Social Responsibility (CSR)

Codes from Bulgaria, Denmark, Luxembourg, Malta, Slovenia and Spain include recommendations related to the adoption of CSR initiatives. However, while the Danish Code simply declares the possibility for the board to adopt CSR initiatives[120] and the Bulgarian code mentions the requirement for corporate management to inform stakeholders of CSR and environmental policies adopted,[121] the Maltese code goes further, by recommending that «directors should seek to adhere to accepted principles of corporate social responsibility in their day- to-day management practices of their company»,[122] where CSR is defined as the "continuing commitment by business entities to behave ethically and contribute to economic development while improving

[116] *Ibidem.*
[117] Austrian Code of Corporate Governance (2020), Preamble; The 2020 Belgian Code On Corporate Governance (2020), §2.1, 2.2; German Corporate Governance Code (2020), p. 2; The Dutch Corporate Governance Code (2016), §1.1.1; and The Swedish Corporate Governance Code (2020), Principle 3.
[118] Corporate governance code of listed corporations (2018), §1, §24.1.1 and §12.1.
[119] The Dutch Corporate Governance Code (2016), §1.1.1, v) and vi).
[120] (Denmark) Recommendations on Corporate Governance (2019), § 2.2.
[121] (Bulgarian) National Corporate Governance Code (2016), §42.
[122] (Malta) The Code of Principles of Good Corporate Governance, Principle 12.

the quality of life of the work force and their families as well as of the local community and society at large». In such a context, listed companies are encouraged to: (i) adopt «initiatives aimed at augmenting investment in human capital, health and safety issues, and managing change, while adopting environmentally responsible practices related mainly to the management of natural resources used in the production process», (ii) «act as corporate citizens in the local community and work closely with suppliers, customers, employees and public authorities», and (iii) «go through material relating to the theme of corporate social responsibility and keep abreast with initiatives being taken in the local and international scenario». [123]

Codes from Luxembourg and Spain even recommend the definition of a corporate social responsibility policy in order to integrate CSR aspects into corporate strategy, that should be adequately published and on which a periodic report should be issued by the company. [124] The Spanish code describes in detail the minimum content of the environmental and CSR policies, that should include at least: « (a) the principles, commitments, objectives and strategy regarding shareholders, employees, clients, suppliers, social welfare issues, the environment, diversity, fiscal responsibility, respect for human rights and the prevention of corruption and other illegal conducts; (b) the methods or systems for monitoring compliance with policies, associated risks and their management; (c) the mechanisms for supervising non-financial risk, including that related to ethical aspects and business conduct; (d) channels for stakeholder communication, participation and dialogue; and (e) responsible communication practices that prevent the manipulation of information and protect the company's honour and integrity».[125] As to reporting, the Luxembourg code recommends that the company publishes CSR performance indicators applicable to its business activities, and provide a list of possible relevant indicators to be measured (workforce, staff training, safety, absenteeism, gender balance, subcontracting and relations with suppliers, energy consumption, water consumption, waste treatment, CO2 emissions, adaptation to the consequences of climate change, measures taken to preserve or develop biodiversity).[126]

(iv) Stakeholders

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[123] (Malta) The Code of Principles of Good Corporate Governance, Supporting Principles under Principle 12.

[124] The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), Principle 9; and (Spain) Good Governance Code of Listed Companies (2020), III.3.5.

[125] (Spain) Good Governance Code of Listed Companies (2020), III.3.5.

[126] The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), Guideline under Recommendation 9.4.

Codes from Bulgaria, Croatia, Lithuania, Slovakia and Slovenia also include an entire chapter prescribing the duties of the company towards its stakeholders (see the section below).

c. Stakeholders

Employees and other stakeholders are recognized by the OECD Code as important contributors to the long-term success and performance of the company. [127] Chapter 4 of the OECD Code is entirely devoted to the stakeholder issue and defines stakeholders as the «different resource providers including investors, employees, creditors, customers and suppliers, and other (stakeholders)». In the revision process from the 2004 version to the current version of the code, the chapter has not been altered, except for some minor changes,[128] such as the reference to OECD Guidelines for Multinational Enterprises for due diligence procedure,[129] the activation, by many countries, of National Contact Points were to bring cases of violation of such guidelines, [130] and the reference to the recognition - by international conventions and national norms – of the rights of employees to information, consultation and negotiation.[131]

As for the other sections of the chapter – that have been left untouched – the OECD Code requires that companies recognize the rights of stakeholders established by law (e.g. labour, business, commercial, environmental, and insolvency laws) or through mutual agreements, as well as to allow stakeholders to freely communicate and obtain redress for the violation of their rights and for any unethical and illegal practices by corporate officers to the board or to the competent public authorities.[132] Moreover, the activation of mechanisms for stakeholder – especially employee - participation is encouraged, provided that sufficient and reliable information is accessible on a timely and regular basis. [133] The code provides also some examples of mechanisms for employee participation, such as the employee representation on boards and governance processes allowing employees to share their view on the most relevant decisions.[134] Finally, Chapter VI on the responsibilities of

[127] OECD Corporate Governance Code (2015), 9.
[128] See Trade Union Advisory Committee (TUAC) Secretariat, The review process of the OECD Principles of Corporate Governance, 24 September 2015.
[129] OECD Corporate Governance Code (2015), IV. A.
[130] OECD Corporate Governance Code (2015), IV. E.
[131] OECD Corporate Governance Code (2015), IV. C.
[132] OECD Corporate Governance Code (2015), IV. A, B, E.
[133] OECD Corporate Governance Code (2015), IV. C, D.
[134] OECD Corporate Governance Code (2015), IV. C.

the board requires that the board takes into account stakeholder interest in its decisions.[135]

The UK Code does not broadly address stakeholder interests, nor provide a definition of 'stakeholder'. The Code mentions such concept only in Principle D - requiring the board to ensure stakeholder engagement and participation - and Provision 5 - requiring that the board discloses in the annual report how stakeholders' interests have been considered in board decision-making and that employees are involved through one or a combination of three methods (the appointment of a director from the workforce, the creation of a formal workforce advisory panel, and the designation of a non-executive officer).

In relation to the EU, our study found that 20 (Belgium, Bulgaria, Croatia, Czech Republic, Denmark, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden) out of 27 corporate governance codes mention stakeholders, out of which 12 (Bulgaria, Croatia, Czech Republic, Greece, Lithuania, Luxembourg, Malta, Netherlands, Slovakia, Slovenia and Spain) also include a more or less detailed definition of what a 'stakeholder' is. On the contrary, codes from Austria, the Republic of Cyprus, Estonia, Finlandia, Ireland, Latvia and Poland do not include any reference to the concept of 'stakeholder'.

Most of the definitions provided (Greece, Lithuania, Luxembourg, Malta, Netherlands, and Slovakia) recall the OECD Code definition of stakeholders, just mentioning the list of interest groups that could fall into the definition (employees, clients, investors, suppliers, local community, and regulators). Interestingly, the Spanish Code mentions, in addition to traditional stakeholder categories, also the concept of «impact» of company «activities on the broader community and the natural environment».[136]

The definitions included in the Bulgaria and Dutch codes do not only include a list of interested parties and groups but also generally refer to the concept of reciprocal, direct and indirect, "influence" between the company and such groups.[137] The same concept also recurs in the Czech code, that define stakeholders as "those whose interests are o are going to be influenced by the company". Similarly, the Croatian Code refers to the concept of "direct and indirect risks in relation to the company and with regard to the company".[138]

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[135] OECD Corporate Governance Code (2015), VI C.
[136] (repres Good Governance Code of Listed Companies (2020), Recommendation 12.
[137] (Bulgarian) National Corporate Governance Code (2016), §38; The Dutch Corporate Governance Code (2016), p. 8.
[138] (Croatian) Corporate Governance Code (2019), p. 23.

On the contrary, Slovenian approach to the concept of "stakeholders" (defined as «interest groups that contribute, either voluntarily or involuntarily, to the ability and activities of companies to create added value, and are therefore also the vehicle of potential gains and risks undertaken by the company»)[139] reveals a company-centric approach, as it seems only to consider the influence of "interest groups" on the success of the company, and not the negative/positive impact the corporate activities could produce on them.

Codes from Bulgaria, Croatia, Lithuania, Slovakia and Slovenia include an entire chapter prescribing the duties of the company towards its stakeholders. Such inclusion is sometimes clearly justified by specifying that stakeholders take over certain direct or indirect risks in relation to the company and with regard to the company,[140]or that they contribute to the building of competitive and profitable companies[141] as «vehicle of potential gains and risks undertaken by the company».[142] On the long-term, the success of the corporation is therefore considered strictly aligned with stakeholders' interests.[143]

In particular, the company is required to: (1) identify the stakeholders who are in the position to influence and impact on company's sustainable development,[144] (2) comply with existing laws protecting stakeholders' rights,[145] (3) ensure transparency and access to information through constant dialogue and non-financial disclosure,[146] (4) ensure that stakeholders can freely communicate their concerns about illegal or unethical practices to the board,[147] (5) promote stakeholder participation in corporate decisions (such as employee participation in certain key decisions and/or in company's share capital, creditor involvement in governance in the context of the company's insolvency etc.),[148] (6) report on its relationships with stakeholders.[149]

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139 Slovenian Corporate Governance Code for Listed Companies (2016), p. 7.
140 (Croatian) Corporate Governance Code (2019), p. 23.
141 Corporate Governance Code for Slovakia (2016), p. 17.
142 Slovenian Corporate Governance Code for Listed Companies (2016), p. 7.
143 Corporate Governance Code for Slovakia (2016), p. 17.
144 (Bulgarian) National Corporate Governance Code (2016), §38.
145 (Bulgarian) National Corporate Governance Code (2016), §39; The (Lithuanian) Corporate Governance Code for the Companies Listed on NASDAQ OMX Vilnius (2010), Principe 9.1.; (Croatian) Corporate Governance Code (2019), p. 23; Corporate Governance Code for Slovakia (2016), p. 17.
146 (Bulgarian) National Corporate Governance Code (2016), §42-43, (Czech) Corporate Governance Code based on the OECD Principles (2004), p.18; The (Lithuanian) Corporate Governance Code for the Companies Listed on NASDAQ OMX Vilnius (2010), Principle 9.3; Slovenian Corporate Governance Code For Listed Companies (2016), p. 8; The (Maltese) Code Of Principles Of Good Corporate Governance, Principle 4.
147 Corporate Governance Code for Slovakia (2016), p. 18, (Czech) Corporate Governance Code based on the OECD Principles (2004), p.18
148 The (Lithuanian) Corporate Governance Code for the Companies Listed on NASDAQ OMX Vilnius (2010), Principle 9.2, Corporate Governance Code for Slovakia (2016), p. 17.; Slovenian Corporate Governance Code for Listed Companies (2016), p. 8.
149 Slovenian Corporate Governance Code for Listed Companies (2016), p. 8.

In addition to legal obligations, some codes also recommend, in line with the OECD Code, that companies comply with the UN Guiding Principles on Business and Human Rights or the OECD Guidelines for Multinational Enterprises.[150] However, such reference is not frequently made, and even where it is recommended that stakeholders' interests should be taken into consideration by the company, we noticed that, generally, shareholder value maximization is still strongly prioritized over stakeholder interests. The Slovenian code, for instance, states that «the management and supervisory boards are obliged to act exclusively in the best interest of the company irrespective of the will or wishes of individual shareholders and other stakeholders» and that «the boards act exclusively at their own discretion in the interest of the company and do not communicate with individual shareholders and other stakeholders about their decisions».[151] Similarly, the Greek code requires that «in discharging its role, the board should take into account the interests of key stakeholders such as employees, clients, creditors, and the communities in which the company operates so long as this does not go against the company's interests».[152]

In general, stakeholders' interests seem to be taken into consideration, not as a core value based on ethical and social/environmental concerns and distinct from the company's interests, but as a sort of risk factor that should be taken into account in order not to endangered shareholder value on the long-term.

d. Employees

As mentioned above, the OECD Code includes many provisions addressing stakeholder interests. As to employees, the enforcement of mechanisms allowing employee participation should be ensured by the access to information and training for employee representatives.[153] As to individual employees, the Code does not include particular provisions, except for the need to ensure a free communication of unethical/illicit conduct by corporate officers.[154]

Similarly, the UK Code recommends the strengthening of employee engagement, requiring, as already mentioned, the adoption of one or a combination of three specific methods (a director appointed from the

[150] Corporate Governance Code for Slovakia (2016), p. 17.
[151] Slovenian Corporate Governance Code for Listed Companies (2016), p. 10.
[152] Hellenic Corporate Governance Code for Listed Companies (2013), p. 30.
[153] OECD Code (2015), VI.G.
[154] OECD Code (2015), IV.D.

workforce; a formal workforce advisory panel; a designated non-executive director).[155] Moreover, the Code recommends – similarly to the OECD Code – that some procedures should be established, allowing employees to raise concerns to the board anonymously.

As to the EU, the role of employee engagement is mentioned in a more or less detailed way in corporate governance codes depending on the institutional framework of each Member State, especially in relation to the obligation for companies of a certain size to ensure employee representation in the board.[156] Except for codes from Croatia, Poland, Ireland and Portugal,[157] all other corporate governance codes from countries which recognized some kind of employee representation at the board-level mention employees' right/interests among their principles/recommendations. In addition, some countries with no legislation or other arrangements providing for board-level representation[158] mention employees' rights or interests in their codes of corporate governance. On the contrary, corporate governance codes from Belgium, Bulgaria, Cyprus, Estonia, Italy and Romania – countries which do not provide employee board representation – do not make specific recommendations in relation to employee rights/interests.

In addition to representation in the board, some codes require that appropriate training,[159] consultation, communication and reporting tools,[160] information,[161] and remuneration[162] are ensured by the company.

As also provided by Directive 2014/95/EU on disclosure non-financial and diversity information, some corporate governance codes[163] require that

[155] UK Code (2018), Provision 5.

[156] This is the case for Austria, Croatia, Czech Republic, Germany, Denmark, Finland, France, Hungary, Luxembourg, Netherlands, Poland, Sweden, Slovenia, Slovak Republic, Spain, Greece, Ireland and Portugal. See Conchon, A., Board-level employee representation rights in Europe. Facts and trends. Report 121, ETUI (2011). See also https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2 .

[157] It should be noted that - in relation to Poland, Ireland and Portugal - board level representation is limited to some state-owned or municipally-owned companies.

[158] Latvia, Lithuania, Malta.

[159] Corporate Governance Code for Slovakia (2016), p. 27; The (Maltese) Code of Principles Of Good Corporate Governance, Principle 6.

[160] German Corporate Governance Code (2019), Recommendation A.2; The Dutch Corporate Governance Code (2016), §2.6.1.; Corporate Governance Code for Slovakia (2016), p. 18; (Lithuanian) The Corporate Governance Code for the Companies Listed on NASDAQ OMX Vilnius (2010), §9.2.

[161] (Latvian) Principles of Corporate Governance and Recommendations on Their Implementation (2010), §10.1

[162] In particular, the annual remuneration policy should compare the compensation of the board of directors and managing director to the development of the average remuneration of employees, and the remuneration policy should specify how the terms and conditions of the company's employees' salaries and employment relationships have been taken into account. See Finnish Corporate Governance Code 2020 (2020), p. 68; Hellenic Corporate Governance Code for Listed Companies, p. 32; Corporate governance code of listed corporations (2018), § 24.3.3.

[163] (Hungarian) Corporate Governance Recommendations, 2018, § 1.6.1; Slovenian Corporate Governance Code For Listed Companies (2016), §29.2; Corporate Governance Code for Slovakia (2016), p. 21;

companies annually publish a non-financial/sustainability report, including also relevant information on employees.

e. Gender diversity

The OECD Code refers to gender diversity in Chapter VI, in relation to the board assessment of diversity requirements. In particular, the code invites countries to include mechanisms (such as board quotas, disclosure requirements, voluntary targets etc.) to enhance gender diversity on boards and in senior management.[164]

Principle J under the UK Code recommends that board election practices should promote gender diversity, alongside diversity of ethnic background, cognitive and personal strengths.[165] The annual reports should include a section concerning how the policy on diversity and inclusion has been implemented by the nomination policy.[166]

As to the EU, even though in 2012 the EU Commission submitted a proposal for a Directive on improving the gender balance on corporate boards[167] - which sets a minimum of 40% of non-executive members of the under-represented sex on company boards – a qualified majority has not been reached in the Council notwithstanding the Parliament strongly supported the introduction of the directive. However, the necessity for an EU intervention to foster gender equality in corporate boards[168] remains strong, especially considered that, according to a report recently published by the EU Commission, over the period 2016-2018, women's average pay is about 16 % lower than that of men and only 6.3 % of CEO positions in major publicly listed companies in the EU were held by women.

Our analysis found that 17 out of 27 of the EU corporate governance codes (codes from Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovenia, Spain, Sweden) recommend that board composition should appropriately represent both genders.

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[164] OECD Code (2015), VI.E.4.
[165] UK Code (2018), Principle J.
[166] UK Code (2018), Provision 23.
[167] Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012)614 final, available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0614:FIN:en:PDF.
[168] EU Commission, 2019 Report on equality between women and men in the EU, https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/annual_report_ge_2019_en_1.pdf.

However, only the Austrian, Dutch, German, Italian and Spanish codes specify a mandatory minimum percentage for the representation of the female gender in the board. The Italian code requires that at least 1/3 of board members[169] consist of representatives from the least represented gender.[170] The Austrian code requires that the supervisory board should be made up of at least 30% women and 30% men, provided the supervisory board consists of at least six members, and the employee representatives should comprise at least 20% female and male employees each.[171] In the Dutch code a reference is made to the legal requirement of at least 30% of male/female diversity in the management board and the supervisory board lapsed as of 1 January 2016.[172] Similarly, the German code [173] requires that the composition of the supervisory board should comply with the legal 30% female quota requirement. Finally, the Spanish Code recommends that female directors represent at least 40% of the total number of members by 2022.[174]

f. Sustainability/CSR committee

The OECD Code does not address the establishment of a CSR/sustainability committee but suggests introducing an ethics committee to which unethical/illicit conduct should be reported.[175] The UK Code, as well, does not address the issue among its provisions.

Amongst the analyzed codes, only the Luxembourg, Danish and Spanish corporate governance codes suggest that companies could assign corporate social responsibility functions to a pre-existing committee (such as the audit or nomination committee) or to an ad hoc corporate governance and social responsibility committee. [176] The Spanish code recommends that such committee should, *inter alia*,

« […]

[169] In Italy, even though both one-tier and two-tier governance models are accepted and can be adopted by companies, the prevailing corporate governance structure is the so-called 'traditional' structure, composed by a board of directors (*consiglio di amministrazione*) and a board of statutory auditors (*collegio sindacale*), both appointed by the shareholders' meeting. See Melis, Andrea, Corporate Governance in Italy. Corporate Governance: An International Review, Vol. 8, No. 4, October 2000. Available at SSRN: https://ssrn.com/abstract=238590.

[170] (Italian) Corporate Governance Code (2020), Recommendation 8.

[171] Austrian Code of Corporate Governance (2020), §52.

[172] The Dutch Corporate Governance Code (2016), §2.1.5.

[173] German Corporate Governance Code (2020), Principle 11.

[174] (Spanish) Good Governance Code of Listed Companies (2020), p. 27.

[175] OECD Code (2015), VI. 6.

[176] (Spanish) Good Governance Code of Listed Companies (2020), Recommendation 53; The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), Recommendation 9.3, Guideline 2; (Denmark) Recommendations on Corporate Governance (2019), p. 22.

b) Monitor the implementation of the general policy regarding the disclosure of economic-financial, non-financial and corporate information, as well as communication with shareholders and investors, proxy advisors and other stakeholders. Similarly, the way in which the entity communicates and relates with small and medium-sized shareholders should be monitored.

c) Periodically evaluate the effectiveness of the company's corporate governance system and environmental and social policy, to confirm that it is fulfilling its mission to promote the corporate interest and catering, as appropriate, to the legitimate interests of remaining stakeholders.

d) Ensure the company's environmental and social practices are in accordance with the established strategy and policy.

e) Monitor and evaluate the company's interaction with its stakeholder groups.».[177]

Outside Europe, such practice is mandated in India, where Section 135 of the Companies Act (2013) requires companies meeting specified criteria[178] to establish a corporate social responsibility committee consisting of at least three directors, out of which at least one director shall be an independent director. In particular, such CSR committee shall formulate and recommend to the board a CSR policy, ensuring that the company spend at least 2% of the average net profit in activities provided for in Schedule VII (such as, for example, eradicating hunger, poverty, promoting healthcare, education, gender equality, protecting the environment etc.), activities that partially overlap with the SDGs.[179] According to a recent study, in 2019 76% of the top 100 companies by market capitalization fully spent 2% of more on CSR activities,[180] which represent a striking 100 per cent increase over the last five years.

Far from introducing a similar requirement, we recommend that the express attribution of CSR-related activities to a specific – pre-existing of new – committee should be included in corporate governance codes and should become a common practice among EU companies, as this would ensure that sustainability issues are duly taken into consideration at the board level,

[177] (Spanish) Good Governance Code of Listed Companies (2020), Recommendation 53.

[178] «Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crores or more or a net profit of rupees five crores or more during any financial year…», §135, Companies Act (2013).

[179] Harpreet Kaur, Achieving Sustainable Development Goals in India, in Beate Sjåfjell and Christopher M. Bruner (eds), Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability (Cambridge University Press, 2020), 465.

[180] See KPMS, India's CSR Reporting Survey 2019, February 2020, available at https://home.kpmg/in/en/home/insights/2020/02/india-s-csr-reporting-survey-2019.html.

especially in view of the newly introduced and upcoming legislation on non-financial reporting and sustainable finance (see above § 2).

g. Compensation and sustainability

The OECD Code includes some provisions concerning the alignment of compensation with long term interests, [181] but no provision specifically addresses the inclusion of non-financial, social or environmental criteria among those on which compensation policy should be based.

The UK Code recommends that remuneration policies and practices should be designed to support the sustainable success of the company,[182] and that workforce engagement has taken place in order to describe how executive compensation aligns with wider company remuneration policy.[183] However, similarly to the OECD code, there is no reference to non-financial factors to be considered in the design of compensation policies.

As to the EU, the Shareholder Rights Directive II states that directors' variable remuneration should be based on both financial and non-financial performance, where applicable. [184] However, there is no requirement in relation to what portion of variable remuneration should be linked to as to non-financial performance. As such, the introduction of a mandatory share of remuneration linked to non-financial performance is one of the main issues on which the EU commission required feedback in its consultation document on the renewed sustainable finance strategy. [185] Indeed, studies found a connection between sustainability-linked management board compensation and firm ESG performance, [186] but also a possible positive impact of between the adoption of sustainability incentives in executive remuneration and firm performance.[187]

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[181] OECD Code (2015), VI. D. 4.
[182] UK Code (2018), Principle P.
[183] UK Code (2018), Provision 41.
[184] Directive 2007/36/EC, as amended by Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement. See also Communication from the Commission, Guidelines on the standardised presentation of the remuneration report under Directive 2007/36/EC, as amended by Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement.
[185] EU Commission, Consultation Document. Consultation on the Renewed Sustainable Finance Strategy, April 2020, Question n. 40.
[186] Velte, Patrick. (2016). Sustainable Management compensation and ESG performance - The German case. Problems and Perspectives in Management. 14. 10.21511/ppm.14(4).2016.02; Hong, B., Li, Z. & Minor, D. Corporate Governance and Executive Compensation for Corporate Social Responsibility. *J Bus Ethics* 136, 199–213 (2016).
[187] Abdelmotaal, H. and Abdel-Kader, M. (2016), "The use of sustainability incentives in executive remuneration contracts: Firm characteristics and impact on the shareholders' returns", Journal of Applied Accounting Research, Vol. 17 No. 3, pp. 311-330.

Our analysis on EU codes found that only 10 out of 27 corporate governance codes (Austria, Belgium, Czech Republic, Republic of Cyprus, France, Germany, Italy, Luxembourg, Slovenia and Spain) include a reference to non-financial criteria or to sustainable value creation in the determination of compensation policy.

The Luxembourg code, for example, recommends that «the company shall define, precisely and explicitly, the quantitative and qualitative criteria linked to the CSR aspects when determining the variable part of the remuneration of members of the Executive Management».[188] Similarly, the French code requires that directors' compensation should incorporate «one or more criteria related to social and environmental responsibility».[189]

However, a direct reference to environmental and/or social impact criteria is not common among the other analyzed codes. More frequently, the reference is generically made in relation to non-financial criteria. For instance, Principle 25 of the Spanish corporate governance code requires that «variable payments to executive directors should be linked to predetermined and measurable performance criteria, including criteria of a non-financial nature, which promote the company's long-term sustainability and success», and Recommendation 58 specifies that variable remuneration items should promote the «long-term sustainability of the company and include non-financial criteria that are relevant for the company's long-term value creation». However, it is also specified that such criteria include, for example, «compliance with its internal rules and procedures and its risk control and management policies».

Similarly, the Italian corporate governance code requires that the compensation policy should be aligned with the pursuit of the corporate 'sustainable success, which, as mentioned before, is defined as the «creation of long-term value for the shareholders, taking into account the interests of the relevant stakeholders».[190]

In conclusion, the specific reference to environmental and social performance criteria is infrequent among the EU codes, which seems to confirm the lack of clarity concerning the selection and measurability of non-financial targets denounced in relation to the implementation of the Non-Financial Reporting Directive.[191]

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[188] The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), Recommendation 9.3, Guideline 1.

[189] Corporate governance code of listed corporations (2018), § 24.1.1.

[190] Principle XV, Italian Corporate Governance Code (2020).

[191] See ESMA, Report Enforcement and regulatory activities of European enforcers in 2019 (April 2020) and Alliance for Corporate Transparency, 2019 Research Report: An analysis of the sustainability reports of 1000 companies pursuant to the EU Non-Financial Reporting Directive (February 2020).

h. Sustainability reporting

Chapter V of the OECD Code – addressing corporate transparency and disclosure – includes a strengthened reference to non-financial reporting compared to the previous version of the code. In particular, it encourages companies to disclose material information related to business ethics, environmental and social issues, human rights and employee issues. It also mentions the introduction – in some countries – of legal requirements concerning the disclosure of non-financial information by large companies.[192]

On the contrary, the UK Code does not address non-financial/sustainability reporting, but only mentions the duty of the board to describe in the annual report on the sustainability of the business model, without specifying if the concept of sustainability concerns only economic sustainability on the long term or also the social and environmental impact of the company.[193]

In the EU, the reporting requirement contained in Directive 2014/95/EU – that, as already mentioned in § 2, is going to be amended in order to facilitate sustainable financing and therefore integrate the current EU reform enacted with the launch of the Action Plan - [194] has also been integrated in many corporate governance codes. However, only 16 out of 27 codes (from Austria, Republic of Cyprus, Bulgaria, Czech Republic, Denmark, Estonia, Finland, Germany, Italy, Lithuania, Luxembourg, Netherlands, Slovakia, Slovenia, Spain, Sweden) recommends the reporting of non-financial information or material issues concerning stakeholders. It should be noted that some codes have not been updated recently, which could explain the lack of reference to the Directive and to the disclosure of non-financial information in general.

Some codes even went further than the Directive. The Luxembourg code, for instance, requires that the company should define a corporate social responsibility policy and that CSR aspects are integrated in its strategy.[195] Moreover, the code invites companies to align with the 17 Sustainable Development Goals in their reporting activities.[196] The Swedish code requires that companies make available on their websites the ten most recent years' sustainability reports, along with auditor's written statement concerning its

[192] OECD Code (2015), V.A. 1-2.
[193] UK Code (2018), Provision 1.
[194] EU Commission. Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Action Plan: Financing Sustainable Growth, COM (2018) 97 final (March 2018).
[195] The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), Principle 9 and Recommendation 9.1.
[196] The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), Guideline under Principle 9.

assurance activities related to the sustainability report.[197] The Slovak code, in addition to environmental and social information, recommend the disclosure of information on political donations.[198] The Dutch code requires that the management board should align its strategy to a view on long-term value creation, taking into consideration – in addition to matters included in the Directive – also «the chain within which the enterprise operates».[199] The sustainability of the supply chain represents, by no means, one of the most critical issues in relation to corporate sustainability, even though the Non-Financial Reporting Directive does not address it directly.[200]

As mentioned above, sustainability reporting has been recently addressed by the EU legislator, but a revision intervention is going to be soon realized, probably requiring more precise, measurable and standardized information, as well as verification standards. Nonetheless, the express mention of such a requirement in the context of corporate governance codes would ensure the strengthening of the perceived relevance of the same.

i. Ethics

The OECD Code includes many provisions addressing ethics. In particular, Chapter VI states that «the board should apply high ethical standards» as these «are in the long term interests of the company as a means to make it credible and trustworthy».[201] As a consequence, the same chapter suggests that existence of a company code of ethics – usually based on professional standards and sometimes broader codes of behaviour - could help to ensure that any unethical/illicit behaviour is duly reported without fear of negative consequences.[202] Moreover, the OECD code encourages the establishment of ethics programs,[203] an audit or ethics committee to which report any concerns about unethical or illegal behaviour,[204] and the disclosure of policies and performance concerning business ethics.[205]

The UK Code mentioned ethics only in passing in relation to the responsibilities of the audit committee, that should develop and implement

[197] The Swedish Corporate Governance Code (2020), Rule 10.4.
[198] Corporate Governance Code for Slovakia (2016), Section VI, A.2.i.
[199] The Dutch Corporate Governance Code (2016), Best Practice Provision 1.1.1., Section VI.
[200] Some requirements are included only in the related guidelines. See Communication from the Commission — Guidelines on non-financial reporting (methodology for reporting non-financial information).
[201] OECD Code (2015), VI. C.
[202] OECD Code (2015), VI. 6.
[203] OECD Code (2015), VI. 7.
[204] OECD Code (2015), VI. 6.
[205] OECD Code (2015), V. A. 2.

policy on the engagement of the external auditor in supplying non-audit services taking into account the relevant law and ethical guidance.[206]

As to the EU, 12 out of 27 analyzed codes (Belgium, Bulgaria, Czech Republic, Denmark, France, Germany, Hungary, Latvia, Luxembourg, Malta, the Netherlands, Slovakia, Slovenia, Spain) include some reference to the notion of ethics.

In particular, 5 codes recommend that a code of conduct/ethics[207] should be adopted by the managing board/board of directors, and that the compliance to such code by employees and directors should be monitored (by the supervisory board or the internal audit function) and ensured. [208]

The French and Luxembourg codes provide professional, ethical rules for directors, mainly focused on the compliance with conduct duties related to their mandates, such as the respect of confidentiality, attendance and reporting obligations, and the avoidance of any direct or indirect conflict of interest with the company.[209]

However, from the overall analysis of the EU codes, the concept of ethics seems not to be directly connected to the above-mentioned concepts of 'sustainable value creation', 'sustainable success', 'CSR' et al. that have been only recently introduced in the context of the corporate governance codes.

6. Final remarks and future steps

The analysis shows that even though some EU corporate governance codes have started including specific references to sustainability-related concepts, some gaps and weaknesses identified for each of the analyzed aspects reveal that further effort is needed for the full integration of environmental and social issues in corporate governance codes. The results of the study, therefore, confirm the generic nature and inadequacy of sustainability and CSR integration in corporate governance codes already denounced by previous literature. [210]

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[206] UK Code, Provision 25.

[207] The Bulgarian code define an 'ethical code of conduct' as "a set of moral and ethical norms, principles and standards of conduct". (Bulgaria) National Corporate Governance Code (2016), p. 4.

[208] The 2020 Belgian Code on Corporate Governance (2020), Recommendation 2.18; (Bulgaria) National Corporate Governance Code (2016), p. 4; The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), Recommendation 2.3, Guideline 3; Corporate Governance Code for Slovakia (2016), V, C; The Dutch Corporate Governance Code (2016), § 2.5.2.

[209] The X Principles of Corporate Governance of the Luxembourg Stock Exchange (2017), Principle 5; Corporate governance code of listed corporations (2018), § 20.

[210] See Sjåfjell, B. (2016). When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes. In J. J. Du Plessis and C.K. Low (eds), Corporate Governance Codes for the 21st Century: International Perspectives and Critic, 23-55; and Szabó, D. G. & Sørensen, K. E. (2013).

However, we could notice that a growing number of codes tend to mention sustainability, CSR, social and environmental issues, so signaling a growing interest towards the impact of environmental and social factors on business success on the long term. Specifically, some codes, such as the Italian and the Spanish codes, mentioned the new concept of 'sustainable success' introduced – but not defined – by the UK Code. Other codes recommend that companies should be managed in order to ensure a sustainable development/value creation/sustainable long-term value, intended as the maximization of shareholders' wealth with the permanent consideration of stakeholders' interests. Other codes include recommendations related to the adoption of CSR initiatives.

As to the purpose and function of corporate governance, we found that 12 companies out of 27 define the purpose and function of corporate governance, adopting three main approaches. In particular, by adhering to most progressive approach, codes from Bulgaria, Germany, Luxembourg, the Netherlands, Portugal and Sweden mention the contribution of corporate governance to sustainable development/growth and pay attention to corporate responsibility towards society in defining the purpose of corporate governance.

Nevertheless, only a few codes expressly mention CSR/sustainability factors in relation to the main function and objectives of the code. Specifically, the Belgian, Spanish and Luxembourg codes highlight that one of the main drivers leading to the last revision of the code was the inclusion of a long-term and sustainable approach to value creation.

In general, even though some codes include CSR/sustainability issues and/or stakeholder interests in their introductory statements, the majority of the analyzed codes still do not consider corporate responsibility towards the society and the environment as a key aspect of corporate governance function. As to stakeholders, for instance, notwithstanding a high number of corporate governance codes mention the concept of 'stakeholder', only a few provide a proper definition and devote specific provisions to the treatment of stakeholders' interests. While most of the definitions provided recall the OECD Code definition of stakeholders, others refer more generally to the subjects who could impact on/influence or be impacted/influenced by companies activities. However, most of codes seem to consider stakeholders' interests only to the extent these could impact on shareholder value in the long term. Such risk-averse approach applied to CSR/sustainability reveals that shareholder primacy rule is far from been overcome, and it is undeniably the

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same leading the entire sustainable finance reform, as non-financial risks – especially climate-related risks – are considered to be among the most impactful on the future financial performance of listed companies. However, the integration of non-financial risks in the long term is just a small part of what is needed for a truly successful transition to a sustainable economy, as the concept of impact should be considered also in relation to that created by the company on the environment and on society.

As to gender diversity, our analysis found that the majority of the EU corporate governance codes recommend that board composition should appropriately represent both genders, but only the Austrian, Dutch, German, Italian and Spanish codes specify a mandatory minimum percentage for the representation of the female gender in the board.

With regard to the attribution of CSR function to a specialized committee, only the Luxembourg, Danish and Spanish corporate governance codes suggest that companies could assign corporate social responsibility functions to a pre-existing committee or to a newly established committee. In this regard, we recommend that the express attribution of CSR-related activities to a specific – pre-existing of new – committee should be included in corporate governance codes and should become a common practice among EU companies, as this would ensure that sustainability issues are duly taken into consideration at the board level, especially in view of the newly introduced and upcoming legislation on non-financial reporting and sustainable finance

In relation to compensation, the analysis found that a minority (only 7 out of 27) of corporate governance include a reference to non-financial criteria or to sustainable value creation in the determination of compensation policy.

As to sustainability reporting, even though the reporting requirements contained Directive 2014/95/EU are effective from more than two years now, only 16 out of 27 codes recommend the reporting of non-financial information or material issues concerning stakeholders, with some codes even going further than the Directive (Luxembourg, Sweden, Netherlands, Slovak Republic).

As to ethics, 12 out of 27 analyzed codes include some reference to the notion of ethics and 5 of them recommend that a code of conduct/ethics should be adopted by the managing board/board of directors, and that the compliance to such code by employees and directors should be and ensured. However, from the overall analysis of the EU codes, the concept of ethics seems not to be directly connected to the above-mentioned concepts of 'sustainable value creation', 'sustainable success', 'CSR' et al..

Among the analyzed EU codes, the most 'sustainability inclusive' – as performing well in all the identified indicators, sometimes going even beyond

the OECD Code – is the Luxembourg code, which - by the way – is the only one that expressly announces in its introduction the commitment by its issuer (the Luxembourg Stock Exchange) to integrate CSR principles in the revised code for promoting responsible and sustainable investing. The Dutch and the Spanish code follow, while the codes issued in Cyprus, Estonia, Ireland[211] and Poland seems the weakest in addressing sustainability/CSR/ethical issues. For their part, the two internationally most influential codes, the OECD and the UK Code, undeniably address sustainability-related issues, but cannot be considered as the most advanced and inclusive cases.

Hopefully, the upcoming new EU legislation on mandatory human rights and environmental corporate due diligence, as well as the future initiatives on the establishment of a sustainable corporate governance will lead to a more homogeneous, complete and coherent approach to the integration of sustainability concerns in corporate governance practices. In this regard, a further analysis of the level of implementation of the codes and of the practices actually enacted by listed companies in relation to code provisions and recommendations integrating sustainability aspects is necessary in order to better understand the real impact such measures.

[211] However, it should be noted that the Irish Corporate Governance Annex just integrates the main applicable corporate governance code in Ireland, i.e. the UK Corporate Governance Code.

Table 2 (Part 1)

Country	Purpose of the code		Definition of CG			Sustainability	Mentioning of stakeholders	Definition of Stakeholders
	Non-CSR	CSR	I Approach	II Approach	III Approach			
Austria (2020)	0	1	0	0	0	1	0	0
Belgium (2020)	0	1	0	0	0	1	1	0
Bulgaria (2016)	1	0	0	0	1	1	1	1
Croatia (2019)	0	1	0	0	0	1	1	1
Republic of Cyprus (2019)	0	0	0	0	0	0	0	0
Czech Republic (2018)	1	0	0	0	0	1	1	1
Denmark (2019)	1	0	1	0	0	1	1	0
Estonia (2006)	1	0	0	0	0	0	0	0
Finland (2020)	1	0	0	0	0	0	0	0
France (2018)	0	0	0	0	0	1	1	0
Germany (2019)	1	0	0	0	1	1	1	0
Greece (2013)	1	0	0	1	0	0	1	1
Hungary (2018)	1	0	0	0	0	0	1	0
Ireland (2019)	0	0	0	0	0	0	0	0
Italy (2020)	1	0	0	0	0	1	1	0
Latvia (2010)	1	0	1	0	0	0	0	0
Lithuania (2010)	0	0	0	1	0	1	1	1
Luxembourg (2017)	0	1	0	0	1	1	1	1
Malta (2019)	1	0	0	0	0	1	1	1
Netherlands (2016)	0	1	0	0	1	1	1	1
Poland (2016)	0	0	1	0	0	0	0	0
Portugal (2018)	1	0	0	0	1	0	1	0
Romania (2015)	1	0	1	0	0	0	1	0
Slovak Republic (2016)	1	0	0	0	0	1	1	1
Slovenia (2016)	1	0	0	0	0	1	1	1
Spain (2020)	0	1	0	0	0	1	1	1
Sweden (2020)	1	0	0	0	1	1	1	0
OECD (2015)	0	1	1	0	0	1	1	1
UK (2018)	0	1	1	0	0	1	1	0

Table 2 (Part 2)

Country	Employee interests	Gender balance	CSR Commitee	Sustainable Compensation	Non-financial disclosure	Concept of Ethics	Code of Ethics
Austria (2020)	1	1	0	1	1	0	0
Belgium (2020)	0	1	0	1	1	1	1
Bulgaria (2016)	0	0	0	0	1	1	1
Croatia (2019)	0	0	0	0	0	0	0
Republic of Cyprus (2019)	0	1	0	1	0	0	0
Czech Republic (2018)	0	1	0	1	1	1	0
Denmark (2019)	1	1	1	0	1	1	0
Estonia (2006)	0	0	0	0	1	0	0
Finland (2020)	1	1	0	0	1	0	0
France (2018)	1	1	0	1	0	1	0
Germany (2019)	1	1	0	1	1	1	0
Greece (2013)	1	0	0	0	0	0	0
Hungary (2018)	1	1	0	0	0	1	0
Ireland (2019)	0	0	0	0	0	0	0
Italy (2020)	0	1	0	1	1	0	0
Latvia (2010)	1	0	0	0	0	1	0
Lithuania (2010)	1	0	0	0	1	0	0
Luxembourg (2017)	1	1	1	1	1	1	1
Malta (2019)	1	0	0	0	0	1	0
Netherlands (2016)	1	1	0	0	1	1	1
Poland (2016)	0	1	0	0	0	0	0
Portugal (2018)	0	1	0	0	0	0	0
Romania (2015)	0	1	0	0	0	0	0
Slovak Republic (2016)	1	0	0	0	1	1	1
Slovenia (2016)	1	1	0	1	1	1	0
Spain (2020)	1	1	1	1	1	1	0
Sweden (2020)	1	1	0	0	1	0	0
OECD (2015)	1	1	0	0	1	1	1
UK (2018)	0	1	0	1	0	1	0

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