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Directors' responsibilities in a time of change

Intesa Sanpaolo Business Law and Regulation Conference

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Executive summary

The Intesa Sanpaolo Business Law and Regulation Conference took place in Oxford on 6 March, bringing together leading scholars, practitioners, and policymakers to reflect on the evolving responsibilities of corporate directors in a time of rapid legal, economic, and societal change.

The business environment has been volatile, uncertain, complex, and ambiguous (VUCA) for many years. More recently, that volatility has intensified, with shifting geoeconomic dynamics and an accelerating technological transition. Global markets are contracting into trade blocs; the international rules-based order is threatened by creeping populism and nationalism; and conversations about the sustainability responsibilities of companies are becoming increasingly difficult as the current US administration leads a backlash against ESG.

The conference explored how boards can navigate these intersecting challenges alongside new developments in legal and regulatory frameworks on both sides of the Atlantic.

One of the key themes underlying all discussions was the issue of board overload. Historically, boards have always complained of being time-poor, but in the increasingly demanding and complex business environment today it seems that every new issue is automatically escalated to the highest possible level of governance, leaving board directors struggling to give individual agenda items the attention they need.

The previous explosion of interest in ESG matters, followed by sudden retrenchment, has been challenging for organisations to respond to, especially as the risks themselves have not gone away and some stakeholders continue to demand ESG commitments. Even though regulation is weakening, climate litigation is expanding rapidly, with, currently, the most common and successful claims relating to greenwashing and specific projects. The most serious new development is the rise of climate damage litigation, made possible by advances in attribution science that can link corporations and their emissions to specific harms. The possible size of these claims may open the door to insurers prepared to go after fossil fuel companies to recoup their own losses.

Against this background, due diligence requirements in sustainability and human rights raise some challenging questions. The greater part of the EU Corporate Sustainability Due Diligence Directive has a prescriptive due diligence requirement, possibly adding to the board's workload but at least clear. However, the climate transition plan requirement is more open-ended, defining the objective but leaving it to the company to decide

how to get there, which could result in minimal action. A similar ambiguity exists in human rights, where a broad understanding that companies have a responsibility to prevent and mitigate human rights abuses is complicated by the fact that there is no agreement about who in the firm should be responsible, and no universal definition of what human rights are.

These issues point to a need for boards to evolve in different ways. They need to be able to draw on specialist expertise in a wide variety of areas while still being able to see the big picture. Diversity of thought is also key, bringing together different viewpoints, personality types, introverts and extroverts to contribute different perspectives and experiences. In managing the different priorities and avoiding overwhelm, the role of the chair and the governance architecture of the board itself are vital.

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What's changing for boards?

Setting the scene – a transatlantic perspective

John Armour, *University of Oxford*

The backdrop of business is changing from one of global competition, open markets, and free trade to a world characterised by trade blocs and weaponised tariffs, in which competition is not between businesses but between states. The liberal political order that we used to take for granted is now threatened by a rise in populism that could become entrenched in authoritarian regimes. And within the business sector itself, ownership is becoming increasingly concentrated, with the growth of dual-class shares allowing founders to retain control of companies, and the continuing rise of private equity.

Enthusiasm for ESG (environmental, social, and governance), which used to occupy much of the conversation around stakeholders, is fluctuating. At the same time, companies increasingly need to engage with governments, both directly as contracting partners and indirectly through the impact of government action. Against this background, the law is evolving to heap more responsibility on to boards of directors, particularly in regard to Related Party Transactions (RPTs) and ESG.

With the trend towards consolidating control in the hands of a few, RPTs carry a greater risk of allowing controllers to exploit minority shareholders – something that was historically minimised by different legal safeguards in the UK, US, and EU. Recent changes, however, have inclined towards less scrutiny of transactions rather than more – prompted in Delaware by companies' threatening to leave (most noisily Elon Musk) and in London by a dwindling number of IPOs. In the US, the definition of 'controller' has been narrowed, effectively making it harder to find someone a controller; but the key innovation is that instead of requiring both independent board approval and minority shareholder approval for RTCs, it is now either/or. In the UK, the requirement for minority shareholder voting has been removed entirely from new Listing Rules, making it a disclosure-based regime. The overall effect has been a transfer of responsibility from shareholders and the courts to board directors.

ESG issues reach boardrooms through two different channels. One is top-down, where regulation or governing rules require boards to take ESG or stakeholder considerations into account. Examples of this from the EU are the Corporate Sustainability Reporting Directive and the Corporate Sustainability Due Diligence Directive, both of which put obligations on companies to disclose and then to consider due diligence in their supply chain with respect to stakeholders. The other route is bottom-up, where pressures come from the stakeholders themselves. For

example, where the parties that the firm contracts with care about ESG issues, it becomes a business issue for the board; if the investors want to reduce emissions, then that affects the cost of capital; if customers demand a socially responsible production process, that affects the markets for the product; and if employees want to be part of a diverse workforce, then that becomes a recruitment issue.

Both routes are currently in flux on both sides of the Atlantic. The EU directives have been watered down, and in the US, investors are typically less interested in ESG – some even passing resolutions to ask companies not to engage, along with significant regulatory pushback in this area. However, other stakeholders – particularly employees and customers – retain their belief in the importance of ESG, which leaves boards with a difficult balancing act.

Meanwhile, thanks to global challenges, other due diligence considerations are emerging. Directors have to ask themselves not just about the quality of the human rights compliance in the supply chain, but whether the supply chain is within the same trade bloc as the operating entities. What are the national interests in the technology that the company is using? Where is the technology from? And, perhaps above all, what is the risk of war for the supply chain?

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Board overload

Roy Shapira, *Reichman University*
Moran Ofir, *University of Haifa*

These new issues and regulations add to an already crowded board agenda that has in recent years expanded via the imposition of regulatory board involvement mandates to include a range of requirements such as actively overseeing financial reports; overseeing and reporting to the regulator on anti-money laundering policies; approving and reporting on the company's data security policies; reporting on climate change measures in the EU; and for boards of health institutions in the US, for approving the credentialling process for joining the Medicare programme.

Taken in isolation, each of these requirements makes sense. First-order issues should be overseen at the highest tier of governance in the company. But taken together, they create an excess of paperwork and too little time to discuss each agenda item. Strategy is pushed out and compliance takes over, leaving boards merely rubber-stamping decisions made by outside advisors.

> *Agenda items basically come at the expense of each other, because if you want boards to discuss cybersecurity, they may not discuss geopolitics, and if you want them to discuss cybersecurity and geopolitics and human rights, they will not discuss business strategy.*
>
> **Roy Shapira**

A further pressure comes from a resurgence of oversight duty litigation, particularly in the US, where time allocated to board discussion of areas of oversight comes under particular scrutiny. A review of the judicial opinions of successful Caremark cases shows that each one specifically criticises the board for not allocating enough time for discussions.

Despite this marked increase in responsibilities, boards have not increased in size, and nor do they meet more frequently. Attempts by companies to reduce information overload by delegating some topics to committees, hiring specialist directors, and using AI to summarise hefty board packs can be effective at reducing the complexity of a single task, but they do not relieve pressure on the full board agenda. Directors are still having to make impossible decisions about how they prioritise where they spend their time and attention.

Regulators therefore need to recognise that mandating board involvement is effectively an attempt to micromanage boards and companies, and that when they place new responsibilities on the board they are likely to crowd out existing responsibilities. They should instead go back to directing *what* they want to happen rather than dictating *how* or *who*. In addition, recognition of board overload has implications for the way that courts assess board oversight liability or assess the liability of those who provide information to boards. The role of third-party advisors or the officers who filter, screen, and package information for boards is highly important, and there should be ways of holding those people accountable.

Discussion points

- AI may help alleviate the pressures on individual directors by reducing information overload, but it cannot do anything to reduce the problems of overcrowded agendas. Indeed, because of the known problems caused by AI hallucinations and the need to monitor AI closely, it may create even more work for directors and press more on the agenda.

- Boards are composed of executive and non-executive directors, who experience different levels of overload. For non-executives an answer to overload may seem to be to increase the frequency of board meetings, but that would create challenges for the executive because they would have to produce more papers more frequently. Does the persistence of board overload imply that the current model of part-time or non-executive directors is unsuited to modern corporate governance? Would full-time, professional boards be a solution? Or would it simply add another layer to decision-making and increase the potential for micromanagement?

- One-size-fits-all regulatory mandates, along the lines of insisting that all boards of publicly traded companies hear quarterly from the CISO about data privacy, are unhelpful. A better approach might be to focus on mission-critical issues for individual organisations. For an ice-cream manufacturer, for example, the board should prioritise discussions of food safety over discussions of cybersecurity or similar topics.

- Why not let management manage the information overload? Or, conversely, ensure that the board is properly supported as a separate body, with a company secretary and team who can ensure that the board and not the executive set the agenda. Committees, working between board meetings, can also help to reduce pressure on the board, although the informal nature of these meetings may create problems legally as they are not recorded or minuted.

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Corporate climate litigation

Mapping corporate climate litigation outside the US

Ekaterina Aristova, *University of Surrey*
Clara Cibrario Assereto, *Columbia University*

If some ESG and climate-based regulation is weakening, the same cannot be said for corporate climate-based litigation. This is rapidly evolving and can be thought of as encompassing both specific climate-related cases and broader disputes that incorporate pollution, biodiversity, human rights, and other related issues. Equally, climate-based litigation includes litigation against companies and litigation involving companies.

An analysis of judicial cases across 31 countries outside the United States where corporations are listed as defendants (either sole defendants or co-defendants with governments or individuals) revealed nine major categories of dispute, often with areas of overlap, featuring different strategies and a mix of traditional and novel legal arguments. The largest groups are those featuring greenwashing claims and project-based challenges.

> *Whenever insurers do decide to get in that game, that will dramatically shift it because insurers are deep-pocketed, experienced institutional litigators. They're regulated. They have a fiduciary duty towards their shareholders to bring back the money – and now increasingly also towards taxpayers, because these schemes exist through public support... And so the need and the ability of insurers to go after that money in a way that is instrumental to their solvency is really, really key.*
>
> **Ekaterina Aristova**

Greenwashing claims challenge misleading climate-related representation: in other words, corporate narratives, and how corporations describe their products, services, and the efforts they make to manage their emissions. Companies often base their green credentials on carbon offset schemes, and litigation is increasingly questioning both the transparency of those schemes and their efficiency. Greenwashing claims are the most frequent and relatively the most successful of all the categories of litigation.

Project-based challenges target individual projects, such as opening coal mines or building power plants, in two distinct ways. The first, in which government is typically the main defendant and corporations are involved as project operators, essentially accuses the government of having failed to assess climate properly. The second group consists of cases in which corporations are the primary and often sole defendants, and which aim to prevent or close down the projects altogether.

Other categories of litigation highly relevant to board directors include challenges to directors' responsibilities, potentially brought by shareholders. Corporate emissions reduction claims go beyond individual projects, focusing on company-wide strategies and often demanding that the business model is changed or restructured in order to reduce emissions. There are also climate damage cases seeking monetary damages based on companies' alleged contribution to climate change or environmental harm.

Claims involving directors' fiduciary duties in the context of climate change remain hard to win. For example, ClientEarth versus Shell, the derivative action that argued that directors had breached their duties under the UK Companies Act by not adopting a transition plan for Shell in line with the Paris Agreement, did not succeed because the court was reluctant to interfere with 'management decisions'. Shareholders themselves tend to be divided on climate commitments, and, as discussed in the first session, regulations have been watered down.

However, pressure is mounting in the area of climate damage litigation. While a German court dismissed the claim brought against energy giant RWE by a Peruvian farmer, it was on evidentiary grounds only. In principle, they said, major emitters can be held liable for their historical contribution to climate harm. So as developments in attribution science now make it possible to link emissions to specific damage, it will also be possible to calculate individual companies' share of responsibility. This will make future claims much easier to prove and could run to billions of dollars' worth of liabilities.

The picture becomes even more interesting when insurance companies are added to the mix. As climate-related disasters become more common and payouts are increasingly unaffordable, insurance companies are likely to want to recoup their losses by suing fossil fuel companies.

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Manager partitioning

William Moon, *Maryland Carey Law*
Jill Fisch, *University of Pennsylvania Law School*

The idea of corporate personhood, the existence of a company as a separate legal entity, is usually thought of principally as a protection for shareholders. But corporate personhood also implies a separation between company and managers. This protects the firm from the liabilities of its managers (if a manager goes bankrupt, say, the firm will not have to pay) and protects managers from legal liability by assigning the consequences of their actions to the firm. This type of separation is helpful for organisational continuity, but it does not, and nor should it, wholly insulate managers from liability. Indeed, in the US, there are regulatory laws in fields ranging from the environment to worker safety that attach criminal and civil liability to individual directors and officers.

Climate-related cases which have involved targeting managers include United States versus Baxter-Kraus in which the wood products treatment company was alleged to have boiled off hazardous wastewater in violation of both the Clean Water Act and the Clean Air Act. Company directors and officers did not order this, but they knew about it and did not prevent it. Criminal liability was imposed on the company officer, the CEO, for three months. In other cases, violations were ordered by managers, leading to criminal sentencing. These were clear-cut cases in which the managers targeted were actively at fault. Increasingly, however, managers are also liable when they fail to prevent wrongdoing by others.

Arguably, this targeting of managers works because individuals care more than corporations. Corporations are large; they can pay large fines without flinching, usually through insurance, and they continue operating much as they were. The only way to get a corporation to change its behaviour is to get individual corporate decision-makers to change theirs. However, because individuals care more, they also fight more. Their reputations, if not their finances, are at stake; they are not just going to pay a fine and walk away without a serious legal challenge.

In addition, not only may it be easier to target organisations rather than individuals, but manager targeting may have a range of undesirable consequences. It might, for example, discourage some people from serving as directors. It might make managers overly cautious, and it might increase costs in areas such as indemnification and insurance.

Finally, manager targeting may, in a contradictory fashion, liberate corporations to focus even more on shareholder primacy. Milton Friedman's doctrine is that the goal of business is to maximise profits, so long as it stays within the rules of the game. If the rules of the game are strictly enforced, and managers do not wish to risk personal liability by crossing the boundaries, they might as well just focus on profits and shareholders.

Discussion points

- Even when managers have been found personally liable, it feels as if the penalties are often inconsequential. How many directors involved in big corporate scandals have ever been to jail? Or paid fines out of their own pockets? Having said that, the reputational consequences of being found guilty of misconduct can be harsh. It could translate into severe financial losses if you are less attractive to other boards – or, in the UK, simply banned from serving on them.

- At the company level, even when there is clear liability for substantial harms, it can be difficult to impose proportional penalties. If you impose penalties that are so large that the company goes out of operation, the impact is felt on employees and communities, and sometimes the economy as a whole.

- Historical asbestos and tobacco litigation may provide useful lessons for examining the likely overall effectiveness of climate litigation. Special litigation in those cases did result in exposing harms and in restructuring firms. However, litigation is backwards-looking and reactive. Addressing climate change needs to be forward-looking and may therefore be better handled through regulation. In addition, many climate-related claims are brought by indigenous communities, based on harms such as loss of traditional knowledge, which are difficult to compensate.

- Many of the recent climate litigation cases have been cause driven, with NGOs or individuals behind them. However, as the balance-sheet implications of climate impacts become apparent, we are likely to see an increase in cases driven by financial loss, but also duty of care and corporate framework litigation.

Sustainability due diligence

Corporate sustainability due diligence: all roads lead to somewhere

Andreas Engert, *Freie Universität Berlin*
Paul Davies, *University of Oxford*

Are we really going to ask individual firms to decide for themselves how sustainable they should be? And will that work? The EU Corporate Sustainability Due Diligence Directive draws on the common understanding of 'due diligence' as meaning the active and thorough investigation of risks by firms at the level they would employ when dealing with their own affairs. The greater part of the directive, which deals with human rights and environmental adverse impact, has what can be described as a prescriptive due diligence requirement. It is detailed; it has a well-defined objective; and it is clear about the process, monitoring, and actions that should be taken. However, the climate transition plan requirement is more open-ended. The objective is defined, but an appeal to planning by the company and the anticipation that targets will be missed, requiring the plan to be updated, seems to be giving the company a lot of discretion over what exactly to do.

Arguably, this could give many firms the licence to do as little as possible. If we assume that firms are predominantly profit-maximising, albeit within the rules of the game, they are unlikely to put any weight on sustainability concerns that eat into profits unless they have to. Prescriptive due diligence requirements effectively enforced may therefore incentivise action, but open-ended due diligence duties will not.

> *We know from the economics of technology adoption and innovation that under such strategic uncertainty there's always an incentive to delay one's own commitment. That's called the penguin effect, because penguins also, when it comes to jumping into the water, prefer to let others jump first and figure out whether there are any threats.*
>
> **Andreas Engert**

Owners and other stakeholders often say that they care about sustainability and would be willing to reward sustainable behaviour by firms. In theory, firms that respond to stakeholders' interests and sentiments would therefore want to act sustainably and directors could assess how they do that through open-ended due diligence duties. Unfortunately, however, people and firms tend to say they care more than they are actually prepared to act (or pay for), which would suggest that open-ended due diligence is not an effective mechanism for improving sustainability in firms.

It might, however, solve what is essentially a coordination problem in climate change mitigation. Firms, governments, and investors are all waiting for everyone else to act. Firms will invest in carbon abatement technologies only if others are doing so, and in the expectation that governments will be enforcing carbon neutrality by 2050. But governments are waiting to see if firms are ready before imposing strict carbon neutrality rules.

This is where open-ended due diligence could work. If firms were required to create, publish and update transition plans now, everyone could see what others are committing to do. This would create momentum amongst companies and reduce uncertainty on the part of governments, making it more likely that they will stick to their own climate plans and not U-turn. The investments then made during the transition plans will accelerate the transition process and reduce costs for consumers and society in general.

There may still be problems, however, if costs remain too high and cause substantial consumer pushback; if successful new technologies destroy jobs and communities built around old technologies; or if governments change their own plans in pursuit of popularity. In this event, the result may be a stalemate, in which neither governments nor companies have sufficient incentive to commit to what is necessary.

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The human rights obligations of corporate directors

Kish Parella, *Washington and Lee School of Law*
Assaf Hamdani, *University of Oxford*

Despite the attention that human rights issues in business have received over past 15 to 20 years, there are still governance gaps. It is generally established that corporations have a responsibility prevent, address, and mitigate human rights abuses, but there seems to be no agreement about who within the firm should be responsible and how they should tackle the issue. This, of course, is a question of corporate governance.

There are four principal ways in which decision-makers within a corporation have facilitated human rights abuses. These are failed oversight, when boards ignore warning signs or even actual warnings; financing arrangements, when companies fund or support abusive actors; revenue sharing, when companies profit alongside human rights violators; and when the company's own business model actively causes harm.

An example of an oversight failure is the case of Jacobs Solutions Inc, which was linked to the construction of facilities for the Qatar World Cup. Despite what looked like a strong human rights policy on paper, drawing on the United Nations guiding principles, the Universal Declaration of Human Rights, the International Bill of Human Rights, and the Iowa Declaration, Jacobs seemed to ignore it in operation and did not act on clear formal warnings about abuses. This led to two lawsuits that aimed to compensate victims and also to hold the directors and officers accountable for failing to implement an oversight system and thus failing to exercise due care and loyalty to Jacobs and its stockholders. And what is particularly interesting is that Jacobs is accused of failing to follow international law, when the company had voluntarily adopted it in its policy.

Jacobs' human rights policy in fact looks almost identical to the human rights policies of many multinational corporations. This should act as a warning to many boards about the gap between policies and practice and how it can open up a firm to civil and criminal actions, with the associated reputational risk.

Shareholders are beginning to ask detailed questions about what good governance of human rights might look like. What is the nature of oversight? Is there a particular committee tasked with looking at human rights? And is responsibility for human rights formally written into the charter of that committee?

But a bigger question might be, given what we know about the pressures on boards, why is the focus on boards alone? Why not the CEO? And are human rights violations just compliance problems, like stealing or any other illegal act, or are they about broader ethical responsibilities that go beyond the law? A further complication comes from globalisation, which means that companies operate in many countries with different laws and attitudes to human rights. Is an agreement on global standards possible or, as we have seen with AI cases, will companies continue to make their own decisions about where they stand?

Discussion points

- Open-ended due diligence rules make sense in the context of the transition to net zero, because governments do not necessarily know what companies should do, and there is considerable variation between companies. Having said that, it is important to ensure that, once companies have developed and published plans, they have an incentive to follow them.

- What is the distinction between corporate liability and directors' liability? Cases currently progressing in the UK are focused on corporate liability for human rights harms, rather than being directors' duties claims. Logically, this is because directors cannot be sued for lack of oversight if there is no clear underlying duty, and that is not yet clearly established.

Concluding panel discussion

Navigating complexity: directors' duties in practice

Matteo Boaglio, *Intesa Sanpaolo*
Karoline Herms, *Legal & General Investment Management*
Maria Darby-Walker, *Non-Executive Director*
Barbara Navarro, *Banco Santander*

- *Executives face overload, and fear losing control of the agenda*

  Companies are feeling the weight of huge societal expectations about their role. Issues that used to be outside the remit of business strategy, such as the climate transition, technological sovereignty, and geopolitical tensions, are now firmly in the centre and expected to part of the decision-making process.

  The overload at board level discussed in the first section is repeated at the executive and management levels. Not only is there a large amount of information available, but the high level of scrutiny from regulators, supervisors, and government is feeding into compliance departments' demanding increased transparency from executives. Add to that the uncertainty around AI – along with the pressure to use it – an increasingly fragmented and politicised environment, the polarisation of attitudes to sustainability, and the continuing importance of values and principles to employees and future talent, and executives face both losing control of the agenda and losing sight of what matters.

- *Structure, discipline, and integrity are vital for effective boards*

  There is no getting away from the fact that boards have a wide range of responsibilities. They consider numerous stakeholders: shareholders, yes, but also employees, the supply chain, customers, regulators and wider communities. They need to think about the company's impact on the environment, the importance of maintaining a reputation for high standards of business conduct, cyber security, human rights issues, anti-slavery measures and more.

  In managing these different priorities and avoiding overwhelm, the role of the chair and the governance architecture of the board itself are vital. Individual committees can cover detailed technical work in areas such as audit and risk, compliance, operational resilience, cyber, ESG, and governance, referring up to the main board when necessary but otherwise keeping the

board agenda focused. Independent auditors can audit performance on all kinds of matters, giving independent oversight of what is going on within the business, and benchmarking against what the auditors are seeing elsewhere. Auditors can also point out any gaps in the business model, suggest a plan for addressing those gaps, and check on progress. The chair is key to how the board is run and therefore how effective it is, responsible for ensuring open discussions and sharing information. Board members need to feel comfortable that they share values with the organisation and with their colleagues on the board, being prepared to walk away if they feel that they may be compromised.

- *Long-term thinking drives commitment to ESG*

  Commitment to ESG often falters when it is set against the prospect of short-term profits. But fiduciary duties are not all the same, and large, index-based asset managers, for example, have long-term responsibilities to their clients. This means they and asset owners such as pension funds think in terms of system-wide stewardship and time horizons of 30 to 40 years and more. They have a duty to address systemic risks, such as climate change, because they have the potential to become financially material, even if the impacts are not immediate.

  Having said that, it is not necessarily the case that all ESG investments will pay off financially, even in the long term. Sometimes doing the right thing costs money, and directors are not incentivised to trade social and public good for lower profits, especially if their competitors are not doing the same thing. How can shareholders influence them to embrace the big picture?

- *The profile of the 'ideal board' has changed*

  It used to be that directors focused predominantly on finance and operations, but as responsibilities have been expanded to include, for example, sustainability and AI, boards need a greater mix of expertise combined with the ability to see the big picture. Diversity of thought is also key, bringing together different viewpoints, personality types, introverts and extroverts to contribute different perspectives and experiences.

  This does not mean that boards should be perpetually adding expert directors; they will become unwieldy and inefficient. So they need to find other ways to bring in needed expertise while keeping the board itself lean and nimble. Advisory committees can be a solution for this, especially for small companies that do not have the cash flow to pay additional people all year round. However, investors emphasise that directors are ultimately accountable, as 'the board is who we can vote on. We cannot vote on managers'. The board is where the buck stops.

Thank you

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