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Beate Sjøfjell

Reforming EU Company Law to Secure
the Future of European Business

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Beate Sjøfjell

**Reforming EU Company Law to Secure the Future of
European Business**

Reforming EU Company Law to Secure the Future of European Business

Beate Sjøfjell*

Abstract

The world faces a complex convergence of social and ecological crises: climate change, biodiversity loss, resource scarcity, human rights violations, rising inequality and societal instability. The United Nations adopted Sustainable Development Goals (SDGs) for ‘the future of humanity and of our planet’, calling on business to contribute to solving these pressing challenges. Yet business in aggregate is a driver of the current convergence of crises and the discussion of how to promote sustainable business is therefore high up also on the agenda of the European Union (EU). The EU increasingly shows recognition of the need for regulatory initiatives to promote the integration of sustainability into European business, resonating with the EU’s high-level commitment to sustainability. This article is a contribution to the discourse on how to regulate European business so that it contributes to a sustainable future for all, including for European business itself. The article briefly outlines the basis in the EU treaties for reform of EU company law and the risks of continued unsustainability, moving on to the argument for including company law in the legislative toolbox, and outlining ideas for how such a reform could be shaped.

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1. Introduction

The world faces a complex convergence of social and ecological crises: climate change, biodiversity loss, resource scarcity, human rights violations, rising inequality and societal instability.¹ The United Nations adopted Sustainable Development Goals (SDGs) for ‘the future of humanity and of our planet’, calling on business to contribute to solving these pressing challenges. Yet business in aggregate is a driver of the current convergence of crises and the discussion of how to promote sustainable business is therefore high up also on the agenda of the European Union (EU).

The adoption of the United Nations Sustainable Development Goals (SDGs) in 2015,² together with the Paris Agreement on Climate Change in the same year,³ has given a new impetus to the public discourse concerning what we need to do to achieve sustainability. The EU’s commitment to implementing the SDGs is elaborated on in the European Commission’s 2016 communication ‘Next steps for a sustainable European future – European action for sustainability’, and the EU’s 2017 Consensus on Development.⁴

The EU increasingly shows recognition of the need for regulatory initiatives to promote the integration of sustainability into European business, resonating with the EU’s high-level commitment to sustainability. The EU’s recognition of the need to change the way business operates reflects an emerging understanding of the weaknesses of the siloed approach to law and policy, where environmental law and policy has perceived to be sufficient to ensure adequate environmental protection, where labour issues could be left to labour law and human rights issues to human rights law, and so on.⁵ There is ample research on the limitations of, for example, environmental law,⁶ and of how business law currently reinforces these inherent limitations and is associated with negative environmental and social business impacts.⁷

¹ This is also recognized in the EU Green Deal, which in its first paragraph states: ‘The atmosphere is warming and the climate is changing with each passing year. One million of the eight million species on the planet are at risk of being lost. Forests and oceans are being polluted and destroyed’, with reference in footnote 1 to these sources: ‘(i) Intergovernmental Panel on Climate Change (IPCC): Special Report on the impacts of global warming of 1.5°C; (ii) Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services: 2019 Global assessment report on biodiversity and ecosystem services; (iii) The International Resource Panel: Global Resources Outlook 2019: Natural Resources for the Future We Want; (iv) European Environment Agency: the European environment — state and outlook 2020: knowledge for transition to a sustainable Europe’, The European Commission, 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, 11.12.2019, COM (2019) 640 final.

² See also *The UN General Assembly*, General Assembly Resolution 70/1. Transforming Our World: the 2030 Agenda for Sustainable Development, A/RES/70/1, (25 September 2015), www.undocs.org/A/RES/70/1.

³ *The Paris Agreement*, Paris, 12 December 2015, in force 4 November 2016, U.N. Doc. FCCC/CP/2015/L.9/Rev.1.

⁴ *The European Commission*, ‘2019 EU Report on Policy Coherence for Development’, SWD (2019) 20 Final, 28.1.2019; Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission, ‘The new European Consensus on Development, Our World, Our Dignity, Our Future’, (2017/C 210/01), p. 3; *The European Commission*, ‘Next steps for a sustainable European future’, COM (2016) 739 final, 22.11.2016.

⁵ *Beate Sjøfjell/Mark B. Taylor*, ‘Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose’, *International and Comparative Corporate Law Journal* 13 (2019), 40.

⁶ *Stephan Wood/Georgia Tanner/Benjamin J. Richardson*, ‘What Ever Happened to Canadian Environmental Law?’, *Ecology Law Quarterly* 2010, 981.

⁷ *Christopher M. Bruner/Beate Sjøfjell*, ‘Corporate Law, Corporate Governance and the Pursuit of Sustainability’ in: *Beate Sjøfjell/Christopher M. Bruner* (eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance*,

This article is a contribution to the discourse on how to regulate European business so that it contributes to a sustainable future for all, including for European business itself. A sustainable future is defined, based on sustainability research, as one that secures social foundations for humanity now and for the future within planetary boundaries.⁸

Section 2 briefly outlines the basis in the EU treaties for reform of EU company law. Section 3 is the main part of the article, starting out with a brief discussion of the risks of continued unsustainability, moving on to the argument for including company law in the legislative toolbox, and outlining ideas for how such a reform could be shaped. This is based on the reform proposals presented by the H2020-funded project Sustainable Market Actors for Responsible Trade (SMART), which was concluded in the spring of 2020.⁹ Section 4 offers some concluding reflections.

2. The EU legal basis for sustainability reforms

The EU's commitment to sustainability is anchored in the EU Treaties. Sustainability is an overarching objective of the European Union and meant to be the guiding principle for the EU's policies and activities within Europe and in its relations with the rest of the world, to promote 'peace, its values and the wellbeing of its peoples'.¹⁰ The EU's treaty-based values and objectives further include respect for human dignity and human rights, social policy, minority peoples and rights of the child.¹¹ Together with the legal requirement for policy coherence for development (PCD), requiring that any area of EU law and policy must not work against developmental policies, this reinforces the sustainability aim of 'leaving no-one behind'.¹²

and Sustainability, 2019, p. 713–720; Lynn A. Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public*, 2012.

⁸ Melissa Leach/Kate Raworth/Johan Rockström, 'Between social and planetary boundaries Navigating pathways in the safe and just space for humanity', *World Social Science Report* 2013, 84; see further Beate Sjøffjell/Tiina Häyhä/Sarah Cornell, 'A Research-Based Approach to the UN Sustainable Development Goals. A Prerequisite to Sustainable Business' University of Oslo Faculty of Law Research Paper 2 (2020), available at SSRN: <https://ssrn.com/abstract=3526744> or <http://dx.doi.org/10.2139/ssrn.3526744> (last accessed 21.2.2021).

⁹ See smart.uio.no. The author has subsequently become a member of the European Commission's Informal Group of Company Law Experts (ICLEG), for the period 2020-2024. The reform proposals presented in this article draw on the SMART project results, independently of the ongoing work in the ICLEG.

¹⁰ Treaty on the European Union (TEU), Article 3(1), with the values set out in Article 2: 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. See further Article 3(3) and 3(5) TEU and Article 21 TEU.

¹¹ Article 2 TEU. See also the Preamble of the Treaty, where the Member States confirm their 'attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers'.

¹² Article 208 in the Treaty on the Functioning of the European Union (TFEU). See Clair Gammage, 'The EU's Evolving Commitment to Promoting Sustainability in its External Actions: Policy (In)Coherence for Development?' SMART working paper on file with current author, University of Oslo (2020). See also General Assembly Resolution A/RES/70/1.

Any area of EU law and policy is as a matter of EU law meant to contribute to the overarching objectives of the EU as set out in the EU Treaties.¹³ To reinforce this, the EU Treaties contain crosscutting rules such as the environmental integration duty in Article 11 TFEU:¹⁴

Environmental protection requirements *must* be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.¹⁵

This rule encapsulates a legal principle that constitutes one of the most important elements of EU environmental law.¹⁶ Article 11 TFEU entails that any legal basis in the Treaties is also a basis for environmental protection requirements, with its aim of contributing to sustainability. It constitutes a core tool to implement the concept of sustainability in EU policies and to facilitate the transition towards sustainability. With its explicit aim of ‘sustainable development’, complying with the duty contained in Article 11 TFEU entails integrating environmental protection requirements in such a way as to achieve sustainable development.¹⁷

In addition to the environmental integration principle in Article 11 TFEU and the principle of social policy integration in Article 9 TFEU,¹⁸ we have a general principle of integration of policy objectives contained in Article 7 TFEU requiring that the EU must ensure consistency between its policies and activities.¹⁹

Economic development and social welfare, or as formulated as an objective of EU law: achieving ‘a highly competitive social market economy, aiming at full employment and social progress’,²⁰ is in the long run fully dependent on the stability of our ecosystems. Likewise, societal stability is dependent on ensuring fundamental social rights. Thereby the social dimension is also included in the aim of a sustainable development, while a number of other EU sources, including the values and aims expressed

¹³ The system of the Treaties as well as the case law of the Court of Justice shows that the general objectives function as a framework for EU law and thereby for the institutions of the EU, see *Beate Sjøfjell*, *The Legal Significance of Article 11 TFEU for EU Institutions and Member States*, in: Beate Sjøfjell/Anja Wiesbrock (ed.), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously*, 2015, p. 51.

¹⁴ *Sjøfjell*, *The Legal Significance* (fn. 13) See also *David Grimeaud*, ‘The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?’ *European Energy and Environmental Law Review* 2000, 207; *García M. Durán/Elisa Morgera*, *Environmental Integration in the EU’s External Relations: Beyond Multilateral Dimensions*, 2012; *Javier Solana*, ‘The Power of the Eurosystem to Promote Environmental Protection’, *European Business Law Review* 2019, 547.

¹⁵ Emphasis added. *Beate Sjøfjell*, *Towards a Sustainable European Company Law: A Normative Analysis of the Objectives of EU Law*, 2009, p. 204–214 and 217–228; inter alia *Ludwig Krämer*, *The Genesis of EC Environmental Principles*, in: Richard Macrory (ed.), *Principles of European Environmental Law*, 2004, p. 29–47..

¹⁶ See *Christina Voigt*, *Article 11 TFEU in the Light of the Principle of Sustainable Development in International Law*, in: Beate Sjøfjell/Anja Wiesbrock (eds.), *The Greening of European Business under EU Law*, 2014, p. 31–50.

¹⁷ Arguably even more clearly expressed in the Charter of Fundamental Rights of the European Union, OJ 2000 C-364/1 Article 37: ‘A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’.

¹⁸ Article 9 TFEU: ‘In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’.

¹⁹ Article 7 TFEU: ‘The Union shall ensure consistency between its policies and activities, taking all of its objectives into account’.

²⁰ Article 3(3) TEU.

in Articles 2 and 3(5) TEU, the Charter of Fundamental Rights and the EU's own case law, provide further bases for the inclusion and promotion of fundamental human and social rights.²¹

The subsidiarity principle of the EU entails that in areas where the EU does not have exclusive competence, it may only act when the objectives of an action cannot be sufficiently achieved by the Member States, but can be better achieved at EU level, 'by reason of the scale and effects of the proposed action'.²² Under the principle of proportionality, the 'content and form' of EU action shall not 'exceed what is necessary to achieve the objectives of the Treaties'.²³

The transnational nature of business and its unsustainability makes it clear that action on EU level is necessary. Individual initiatives by Member States can be inspiring examples and also stimulate EU action, and initiatives such as the French vigilance law are laudable.²⁴ However, they also bring with them challenges including questions of scope and of legal certainty for businesses with cross-border operations and activities. To ensure the contribution of business to the Treaty objectives of sustainability, action on EU level is necessary.

All this forms the framework also for the specific legal bases for company law. The EU regulation on company law, accounting law and auditing law is based on Article 50 of the TFEU, especially 50(1). The provision is complemented by Article 50(2)(g) stating that the European Parliament, the Council and the Commission shall carry out the duties devolving upon them under the preceding provisions, in particular:

by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 54 with a view to making such safeguards equivalent throughout the Union.

With this provision, the scope of Article 50(1) is enlarged to encompass all legal business forms, both public and private:

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

²¹ For a discussion of the legal status of human rights protection after the Lisbon Treaty, which, inter alia, gives binding, primary law status to the Charter of Fundamental Rights, see S. Douglas-Scott, 'The Court of Justice of the European Union and the European Court of Human Rights after the Treaty of Lisbon', in in: Stephen Weatherill/Sybe de Vries/Ulf Bernitz (eds.), *The Protection of Fundamental Rights in the EU After Lisbon*, 2013, p. 153–180.

²² Article 3(5) TEU.

²³ Article 3(4) TEU.

²⁴ See *Véronique Magnier*, *Old-Fashioned Yet Innovative: Corporate Law, Corporate Governance and Sustainability in France*, in: Beate Sjøfjell/Christopher M. Bruner (eds.), *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 276–289.

‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.²⁵

Article 50 is the basis of major European company, accounting and auditing legislation, such as the Company Law Directive 2017, the Accounting Directive, the Transparency Directive, and the Shareholder Rights Directive I and II. Article 50 does not set other limitations to the type, purpose or size of the undertaking, except excluding entities with pure non-profit purpose.

The EU Treaties show that there is a general duty for the EU institutions to act to achieve the overarching objectives of the European Union.²⁶ The unsustainability of business activities in Europe and across global value chains present threats to the achievement of the overarching goals, both as set out in the Treaties and those flowing from international policy commitments as set out in the SDGs and the Paris Agreement. Dealing with these cross-border threats require action on EU level, and the EU has the legal bases to do so.

3. Integrating sustainability into EU company law

3.1 The risks of continued unsustainability

The economic, corporate and financial risks of continued unsustainability²⁷ should bring the question of how to reform European business squarely onto the radar of all who are concerned with the resilience of European societies. The argument is accordingly not just one of business contributing to sustainability. It is as much about securing the future of European business. From a systemic perspective, this may come across as an unnecessary and formalistic point to make. Of course, securing a sustainable future for all is also relevant and important for business. Without a sustainable future for humanity on this planet, there is no sustainable future for business either. Business – and the economy in which it operates – does not exist as a bubble separate from society and the environment. Yet, the point is necessary to make in light of the false dichotomy between economic issues on the one hand, and ‘ethical’ issues, encompassing the interest of people and the environment on the other. The emphasis on the financial risks of climate change is one example of an impactful initiative seeking to bridge this dichotomy. I take this as my starting point, and develop this further in a summary of a broader and research-based approach to the corporate and financial risks of unsustainability.

Much of the EU’s sustainability-oriented policy initiatives since the adoption of Paris Agreement on Climate Change in 2015 has concerned the mitigation of the risks of climate change. The EU’s Sustainable Finance Initiative²⁸ has a strong emphasis on climate change and the EU’s Green Deal is marketed under the slogan of ‘Striving to be the first climate-neutral continent’.²⁹ The

²⁵ Article 54 TFEU.

²⁶ Articles 1(1) and 3(6) TEU.

²⁷ *World Economic Forum*, The Global Risks Report 2020; *Patrick W. Keys/Victor Galaz et al.*, ‘Anthropocene risk’, *Nature Sustainability* 2019, 667; *Beate Sjøffjell*, ‘The Financial Risks of Unsustainability: A Research Agenda’, University of Oslo Faculty of Law Legal Studies Research Paper 18 (2020), available at SSRN: <https://ssrn.com/abstract=3637969> (last accessed 18.2.2021). This Section draws notably on the latter paper.

²⁸ *The European Commission*, Communication from the Commission. Action Plan: Financing Sustainable Growth, COM/2018/097 final, 8.3.2018.

²⁹ See https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en (last accessed 21.2.2021).

recommendations of the Financial Stability Board's Task Force on Climate-Related Financial Disclosure³⁰ have done much to contribute to awareness of potential financial impacts of climate-related risks and opportunities. The 2019 additional guidelines to the EU's so-called Non-Financial Reporting Directive are based on these recommendations.³¹ Yet, the Task Force's report has shortcomings when analysed in the context of a research-based sustainability perspective, as we outline in this subsection, where we discuss the financial and business risks of unsustainability.³² First, concerning the Task Force report's scoping of climate change, it excludes important aspects of climate risks. The report does not speak about societal risks, including risk of societal breakdown. Although the report discusses both acute and chronic physical risks of climate change, it only explores the risks to human beings to a very limited extent. There is only a very brief mention of negative impacts on the 'workforce' from acute physical risks,³³ but business-relevant risks also include the financial risks associated with increased likelihoods of spread of diseases and of unmanageable heatwaves. The report mentions the danger of 'catastrophic environmental and social consequences' in its introduction,³⁴ but it stops short of explaining the potential severity of the financial risks of climate change. The report does not spell out what climate change, insufficiently mitigated, may entail in the form of global catastrophic risks.³⁵

A broader approach is called for.³⁶ Climate change, albeit a crucial issue, is just one of the hitherto identified *planetary boundaries*, whose breaching has potential to fundamentally change how the world functions.³⁷ Biodiversity loss, natural resource use and the release of novel entities are examples of other environmental categories that should be included in assessments of financial risks.³⁸ Further, risks concerning social aspects should be included. As examples of the undermining of social foundations, I have selected human rights violations, lack of decent work and tax evasion that undermines the welfare state. Tax evasion is intrinsically linked to an undermining of the economic bases for our societies, the increasing inequality between and within countries, and the rise of populism and the risk of societal

³⁰ *Task Force on Climate-Related Financial Disclosures*, Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures, June 2017, available at www.fsb-tcfd.org/publications/final-recommendations-report (last accessed 15.2.2021).

³¹ *The European Commission*, Communication from the Commission — Guidelines on non-financial reporting: Supplement on reporting climate-related information, C/2019/4490, OJ C 209, 20.6.2019, p. 1–30.

³² The Task Force concentrates on financial risks, i.e. risks from an investor or financier perspective, while the risks of unsustainability that we discuss here are equally business risks - risks that affect the viability of the business itself. Business and financial risks are naturally closely linked albeit not always overlapping. I will not go further into this distinction here.

³³ *Task Force on Climate-Related Financial Disclosures* (fn. 32), 10.

³⁴ *Task Force on Climate-Related Financial Disclosures* (fn. 32), 1 (Background).

³⁵ See e.g. Seth D. Baum/Itsuki. C. Handoh, 'Integrating the planetary boundaries and global catastrophic risk paradigm', *Ecological Economics* 107 (2014), 13; Global Challenges Foundation., 'Global Catastrophic Risks 2018' (2018), <https://globalchallenges.org/initiatives/analysis-research/reports/> (last accessed 1.2.2021)

³⁶ *Keys/Galaz et al.* (fn. 27). This article also illustrates how risks span across scales as a consequence of social-ecological interconnectivity.

³⁷ *Johan Rockström/Will Steffen et al.*, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity', *Ecology and Society* 14 (2009); *Will Steffen/Katherine Richardson et al.*, 'Planetary boundaries: Guiding human development on a changing planet', *Science* 347 (2015), 736.

³⁸ *PricewaterhouseCoopers (PwC)/WWF*, Nature is too big to fail. Biodiversity: the next frontier in financial risk management, 2020, www.pwc.ch/en/insights/regulation/nature-is-too-big-to-fail.html (last accessed 20.2.2021). We see this reflected also in the new initiative for a Task Force on Nature-related Financial Disclosures, <https://tnfd.info/> (last accessed 19.2.2021).

instability that this entails. Some of the most disturbing trends in major industrialised countries reflect such a lack of social stability, and corporations and associated financial markets have a role in this.³⁹

The Task Force report divides climate-related risks into two major categories: (1) *transition risks*, i.e. risks related to the transition to a lower-carbon economy and (2) *physical risks*, i.e. related to the physical impacts of climate change. In a broader approach, the risk of *business model change* may be added to the transition risks, and *global catastrophic risk* to the physical risks. Further, a third major risk category is proposed: *Societal risks*, including risk of unrest, risk of authoritarianism, and societal breakdown risk.⁴⁰

The category of *transition risks* are accordingly financial and business risks for businesses that are not taking part in the transition to sustainability – which we have begun to see the contours of – or not transitioning quickly enough. The risks are caused by action or expected action from other actors or institutions: policy makers, victims of environmental harm or human rights violations, investors or other financiers, or competitors.

Policy risks, as the first category of transition risks, may be seen as increasing now in the EU with its Green Deal and willingness to legislate to promote sustainability. Some business actors may then see lobbying against such initiatives as a protection against risk. However, businesses aiming to mitigate the policy risk will need to see this in connection with other aspects of the financial and business risks of unsustainability, including other transition risks as well as the physical and societal risks. These risks will tend to increase if policy risks are low; i.e. if policy-makers do not regulate efficiently to support the transition to sustainability and to mitigate impacts of unsustainability.

An illustration of this is the *liability risk*: the increase in lawsuits against corporations, including parent corporations, for environmental or social harm allegedly caused by their subsidiaries, and against lead corporations for negative environmental or social impacts in their global value chains, shows that the liability risk of unsustainability is materialising.⁴¹ While many cases are rejected for procedural reasons, and many lost, some are likely to be won, and the sheer multitude of cases makes them a risk to be reckoned with.

A further illustration is *reputation risk*, in the form of customers or clients choosing not to purchase products or services from the business, employees and job seekers looking for work elsewhere, and contractual parties, private and public, not wishing to renew or sign up with the business. With social norms and expectations gradually changing, there is an indication of a shift in consumer preferences,⁴²

³⁹ See further *Beate Sjøfjell/Christopher M. Bruner*, *Corporations and Sustainability*, in: Beate Sjøfjell/Christopher M. Bruner (eds.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 3–12.

⁴⁰ *Sjøfjell*, *Financial Risks of Unsustainability* (fn. 27).

⁴¹ *Mark B. Taylor*, 'Litigating Sustainability – Towards a Taxonomy of Counter-Corporate Litigation', University of Oslo Faculty of Law Research Paper 8, 2020, available at SSRN: <https://ssrn.com/abstract=3530768> (last accessed 5.1.2021). See also the *Grantham Research Institute on Climate Change and the Environment*, *Global Trends in Climate Change Legislation and Litigation: 2017 Update*, 2017, www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2017/ (last accessed 12.1.2021).

⁴² *Julia Wilson*, 'Consumer Preferences Continue to Shift Toward Sustainability, Market Research Shows', *TriplePundit*, 2018, www.triplepundit.com/story/2018/consumer-preferences-continue-shift-toward-sustainability-market-research-shows/55496 (last accessed 12.12.2020). However, limitations of relying on 'consumer power' are well-established, *Eléonore Maitre-Ekern/Carl Dalhammar*, 'Towards a Hierarchy of Consumption Behaviour in the Circular Economy', *Maastricht Journal of European and Comparative Law* 26 (2019),

as well as in the preferences of job seekers.⁴³ Media also plays an important role here, in revealing unsustainable business activities, as illustrated for example through the Panama Papers.⁴⁴

Further related to the above, is the *technology risk*. The risk of ‘stranded assets’ — assets that no longer have value — to any corporation involved in exploiting fossil fuels is the obvious example here. However, this risk is also borne by corporations indirectly relying on these resources, such as manufacturers of fossil-fuelled cars. Further, with the emerging recognition of the impact of e.g. increasing biodiversity loss, businesses continuing with products that either are based on exploitation of biodiversity resources that are becoming scarce, may find themselves outcompeted by products developed in new ways. The broad shift from unsustainable linear business models to the sustainable circular model involves financial and business risks for businesses not anticipating and adapting to this shift.⁴⁵ *Business model change* is therefore proposed as a risk category to be taken into account.

The two next broad risk categories, *physical risks* and *societal risks*, distinguish themselves from the transition risks category above, in that they affect businesses also seeking to transition to sustainability, and quickly. The severity of the risks depends on the speed with which the global society transitions to sustainability, and will, of course, have local variations. This emphasises the importance for business to work together to mitigate the physical and societal risks as far as possible. This could take the form of lobbying for and not against necessary legislative and policy reforms. It could take the form of transitioning in their businesses and whole sectors towards sustainability, without waiting for policy reforms. Of course, this is not only relevant for business. It also places the onus on the government at national levels as well as on the EU to act to mitigate physical and social risks to citizens.

Ultimately, the *physical risks* may go beyond that which can be managed through anticipation and adaptation. This is reflected through changes in insurance premiums for certain areas, ‘with some insurers simply withdrawing from the market’.⁴⁶ Unmitigated environmental degradation and continued overshoot of planetary boundaries brings with it global catastrophic risks, defined as the risk of a scenario which takes ‘the lives of a significant portion of the human population, and may leave survivors

394; Julian Kirchherr/Laura Piscicelli et al., ‘Barriers to the Circular Economy: Evidence From the European Union (EU)’, *Ecological Economics* 150 (2018), 264.

⁴³ María Del Mar Alonso-Almeida/Josép Llach, ‘Socially responsible companies: Are they the best workplace for millennials? A cross-national analysis’, *Corporate Social Responsibility and Environmental Management* 26 (2019), 238.

⁴⁴ *International Consortium of Investigative Journalists*, ‘Explore the Panama Papers Key Figures’, 31.1.2017, <https://www.icij.org/investigations/panama-papers/explore-panama-papers-key-figures/> (last accessed 12.2.2021); Amy Wilson-Chapman/Antonio Cucho/ Will Fitzgibbon, ‘What happened after the Panama Papers?’, 3.4.2019, <https://www.icij.org/investigations/panama-papers/what-happened-after-the-panama-papers/> (last accessed 7.12.2020).

⁴⁵ A linear business model is one that takes responsibility for, e.g., a product, only until it is sold, and typically does not encompass the supply chain of the product and all its components. Conversely, a circular business model takes responsibility for a product from cradle to cradle, encompassing each stage from design to recycling/upcycling or management of the waste.

⁴⁶ See also *World Economic Forum*, *Global Risk Report 2020*, 15 January 2020, www.weforum.org/reports/the-global-risks-report-2020/ (last accessed 20.2.2021), 32: ‘More common extreme weather events could make insurance unaffordable or simply unavailable for individuals and businesses: globally, the “catastrophe protection gap” —what should be insured but is not—reached US\$280 billion in 2018’.

at enhanced risk by undermining global resilience systems'.⁴⁷ The risks posed to most businesses in global catastrophe scenarios are existential.⁴⁸

Societal risks include risk of social unrest caused by social inequality, human rights violations, and the corporate undermining of the economic basis of our welfare systems. Tax evasion, or other forms of undermining the economic basis for good welfare societies,⁴⁹ may negatively impact on these societies' ability to protect their population against physical risks due to environmental degradation, human rights violations and lack of decent work, thereby causing the physical risks to materialise or to be strengthened. Similarly, lack of economic resources in a country undermines its possibility to put into place relevant measures to adapt to environmental change.

Businesses involved in undermining the economic basis of societies, in human rights violations, exploitation of workers, or manipulating the public discourse and democratic processes, may find that these bring a spectrum of societal risks. These may range from societal unrest, via paving the way for increased authoritarianism, to societal collapse. Societal unrest may take the form of rioting and lack of safety for workers, customers and creditors, with negative impacts for the business. An increase in authoritarianism can materialise through sudden regime changes with increased risk of nationalisation or instability in the country that make it difficult to continue with business as planned.⁵⁰

There are a number of scenarios that can lead to global catastrophic risks, including climate change and other environmental degradation.⁵¹ Ultimately, there is a risk of societal collapse, which may be caused by a combination of the factors discussed here.

All these risks are not only relevant for business involved in wrongdoings, although they may be more directly at risk from social unrest which targets those perceived to have been involved in wrongdoings. The financial and business risks of unsustainability are also relevant for other businesses in the same country or region. In case of societal collapse, practically all businesses are affected. This strengthens the argument for business recognising these risks and working together, for example in a sector, to alleviate them. It underlines the importance of responsible business behaviour, and the significance of business supporting appropriate policy reforms.

The categories of global catastrophic risk, and the risk of societal collapse, underline that we cannot settle for a mainstream 'business case' approach. Recognising the risks of unsustainability does not mean that it is sufficient to only internalise environmental, social and broader governance issues to the extent that a clear cause-and-effect line can be drawn from ignoring an issue to the risk it entails for the corporation. Identifying the risk is not intended as a boundary of what issues are relevant to corporate sustainability. The point is to challenge the dichotomy of profits versus sustainability and show that, however little a business may care about 'ethics' and 'corporate social responsibility', (un)sustainability

⁴⁷ *Shahar Avin/Bonnie C. Wintle et al.*, 'Classifying global catastrophic risks', *Futures* 102 (2018), 20.

⁴⁸ See also *World Economic Forum*, *Global Risk Report 2020* (fn. 46).

⁴⁹ *Jason Hickel*, *The Divide: A Brief Guide to Global Inequality and its Solutions*, 2017; *Jason Hickel*, 'The sustainable development index: Measuring the ecological efficiency of human development in the Anthropocene', *Ecological Economics* 167 (2020).

⁵⁰ Involving different types of policy – or political – risks to that discussed above.

⁵¹ See *World Economic Forum*, *Global Risk Report 2020* (fn. 46).

will sooner or later, in one way or another, affect most businesses. This is the grand challenge facing our economies, including business and financial markets, and more broadly, our societies.

3.2 The argument for reform of EU company law

Company law is currently the missing piece in EU's regulatory reform to promote sustainable business. Starting from the paradigm shift of Corporate Social Responsibility (CSR) in the Commission Communication of 2011,⁵² which was followed up notably in accounting law, with the adoption of the so-called Non-Financial Reporting Directive in 2014,⁵³ the next steps were taken in financial market law. Firstly, the revision of the Shareholder Rights Directive in 2017⁵⁴ and moving on to the broader Sustainable Finance Initiative, with its 2018 Action Plan,⁵⁵ already followed up, inter alia, with the Disclosure Regulation in 2019⁵⁶ and Taxonomy Regulation in 2020.⁵⁷ Further work is ongoing under the auspices of the Renewed Sustainable Finance Strategy.⁵⁸ All of these Sustainable Finance actions aim to shift the investments and the governance activities of investors to promoting more sustainable business activities. Currently, the so-called Non-Financial Reporting Directive is being revised,⁵⁹ which is expected to see it closely aligned to the Taxonomy,⁶⁰ and shifting from its rather misleading language of 'non-financial' to the more accurate 'sustainability reporting'.

The EU Green Deal's ambition that 'sustainability should be further embedded into the corporate governance framework', is followed up most recently in its Sustainable Corporate Governance

⁵² *The European Commission*, A renewed EU strategy 2011-2014 for Corporate Social Responsibility. COM (2011) 681 final, section 3.1.

⁵³ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014 No. L 330/1.

⁵⁴ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJ L 184, 14.7.2007, p. 17–24, as amended by Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder, OJ L 132, 20.5.2017, p. 1–25.

⁵⁵ *The European Commission*, Communication from the Commission. Action Plan: Financing Sustainable Growth, COM/2018/097 final, 8.3.2018.

⁵⁶ Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector (Text with EEA relevance), PE/87/2019/REV/1 OJ L 317, 9.12.2019, p. 1–16.

⁵⁷ 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, (Text with EEA relevance), PE/20/2020/INIT, OJ L 198, 22.6.2020, p. 13–43.

⁵⁸ *The European Commission*, 'Renewed sustainable finance strategy and implementation of the action plan on financing sustainable growth', 5.8.2020, https://ec.europa.eu/info/publications/sustainable-finance-renewed-strategy_en (last accessed 21.2.2021).

⁵⁹ *The European Commission*, 'Non-financial reporting', https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/non-financial-reporting_en#review (last accessed 21.2.2021).

⁶⁰ See also regarding plans for delegated act by June 2021 'specifying the information companies subject to the non-financial reporting directive will have to disclose on how, and to what extent, their activities align with those considered environmentally sustainable in the taxonomy', *European Commission*, 'Implementing and delegated acts', https://ec.europa.eu/info/law/sustainable-finance-taxonomy-regulation-eu-2020-852/amending-and-supplementary-acts/implementing-and-delegated-acts_en (last accessed 21.2.2021).

initiative.⁶¹ In this initiative, the environmental and notably climate change focus of the Sustainable Finance Initiative is merged with the push for mandatory human rights due diligence, informed by the UN Guiding Principles, supported by the European Parliament and a range of national legislative initiatives.⁶²

Company law is crucial to business and to the governance of business. Company law provides the dominant legal form of the company for organising business, and it sets out the organisation and the structure for the decision-making in companies. Many of the above very briefly outlined initiatives aim to influence the corporate board directly or indirectly. As also the European Commission has observed earlier, boards have a ‘vital part to play in the development of responsible companies’.⁶³ The EU has in its Sustainable Finance Initiative, in Action 10 of its Action Plan, indicated that it sees a role for legislative intervention in the rules concerning corporate boards.⁶⁴

As a matter of company law, the corporate board has a crucial role in determining the strategy and the direction of the undertaking, and supervising how this plays out.⁶⁵ The core duty of the board is to promote the interests of the company. The definition of the interests of the company, as a matter of company law, varies across European countries,⁶⁶ from the monistic, concentrating on the economic interest, with more or less emphasis on the shareholders – which we may denote ‘shareholder value’ jurisdictions⁶⁷ – to the pluralistic, including a variety of other involved or affected parties (often misleadingly denote ‘stakeholder value’ jurisdictions).⁶⁸ Company legislation rarely expressly stipulated what is included in the interests of the company. The interpretation is thereby left to the boards. In

⁶¹ The EU Green Deal Action Plan, section 2.2.1, and see the European Commission’s recently concluded public consultation on the topic at <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance> (last accessed 21.2.2021). The legislative proposal is expected in the second quarter of 2021.

⁶² *Lise Smit/Claire Bright et al.* for the European Commission, Study on due diligence requirements through the supply chain, final report, 20.2.2020, <https://op.europa.eu/sv/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> (last accessed 21.2.2021).

⁶³ *European Commission*, The EU corporate governance framework (Green paper). COM(2011) 164 final, 5.4.2011, p. 5.

⁶⁴ *European Commission*, Communication from the Commission. Action Plan: Financing Sustainable Growth, COM/2018/097 final, 8.3.2018, p. 11.

⁶⁵ The ‘board’ is used in this article as a general term encompassing both levels of boards in countries where there is a supervisory board and an administrative or management board, such as the German *Aufsichtsrat* and *Vorstand*.

⁶⁶ *Beate Sjøfjell/Andrew Johnston et al.*, Shareholder Primacy: The Main Barrier to Sustainable Companies, in: Beate Sjøfjell/Benjamin J. Richardson (eds.), *Company Law and Sustainability: Legal Barriers and Opportunities*, 2015, p. 79–147.

⁶⁷ *Andrew Johnston*, Market-led Sustainability through Information Disclosure: the UK Approach, in: Beate Sjøfjell/Christopher Bruner (eds.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 204–217.

⁶⁸ *Andreas Rühmkorf*, Stakeholder Value versus Corporate Sustainability: Company Law and Corporate Governance in Germany, in: Beate Sjøfjell/Christopher Bruner (eds.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 232–245.

light, inter alia, of the business judgment rule,⁶⁹ the question of whether the board has interpreted their duty correctly rarely comes to a head in case law.⁷⁰

No company system insists on boards focusing only on returns for shareholders,⁷¹ and certainly not requiring that returns be maximised. In addition to the obvious point that jurisdictions expect boards to ensure legal compliance, company law provides – across this spectrum – a large latitude to the board and by extension the management to shape business in a sustainable manner.⁷² However, as is also evident from the state of unsustainability we are in, boards in aggregate do not predominantly choose sustainability-enhancing options even within the realm of the business case, let alone challenge the outer boundaries of the scope to pursue profit in a sustainable manner by going beyond the business case.⁷³

At the heart of the problem we find the social norm of *shareholder primacy*, a systemically entrenched barrier to the contribution of business to sustainability. Denoting *shareholder primacy* as a barrier of such significance is a short form for a complex mix of perceived market signals and economic incentives, informed by path-dependent corporate governance assumptions and postulates from legal-economic theories.⁷⁴ Shareholder primacy should be distinguished from the legal norm denoted *shareholder value*, which we find notably in the UK.⁷⁵ That this distinction often is not made is symptomatic of the dominance of the shareholder primacy thinking, conflating what is seen as practice and what still dominant legal-economic theories describe as efficient, with what company law actually sets out.⁷⁶

Shareholder primacy, combined with a lack of understanding of the scope the law gives the board, and by extension management, has given rise to legal myths inspired by law-and-economics postulates, dictating that the board and senior managers are the ‘agents’ of the shareholders and must maximize returns to shareholders as measured by the current share price.⁷⁷ This is contrary to a proper analysis of company law, which shows that the aim of any legislation allowing for companies to exist and become a dominant form of business, has done so based on the assumption that this is positive for society. The idea is that companies create value, for themselves, for their employees, their business partners, their

⁶⁹ Which exists in some form in all European jurisdictions, albeit not necessarily employing the terminology of ‘business judgment rule’.

⁷⁰ *Sjåffjell/Johnston et al.* (fn. 66).

⁷¹ Even the shareholder value bastion of the UK sets out in the UK Companies Act Section 172 that the board in promoting the success of the company ‘for the benefit of its members as a whole’, shall have regard to, amongst other things, ‘the impact of the company’s operations on the community and the environment’.

⁷² E.g. *Andrew Johnston/Jeroen Veldman et al.*, ‘Corporate Governance for Sustainability’, 7.1.2020, Available at SSRN: <https://ssrn.com/abstract=3502101> or <http://dx.doi.org/10.2139/ssrn.3502101> (last accessed 27.1. 2021).

⁷³ The lack of cases challenging the boundaries for how far corporate boards can go in promoting long-term sustainability in their decision-making, is a striking feature in the multijurisdictional comparative analysis presented in *Sjåffjell/Johnston et al.* (fn. 66).

⁷⁴ *Sjåffjell/Johnston et al.* (fn. 66).

⁷⁵ In earlier work, David Millon uses ‘radical’ and ‘traditional’ shareholder primacy to distinguish between the social norm and the legal norm; *David Millon*, ‘Radical Shareholder Primacy’, *University of St. Thomas Law Journal* 10 (2013), 1013. On UK law, see *Johnston* (fn. 67).

⁷⁶ *Sjåffjell/Johnston et al.* (fn. 66).

⁷⁷ Along with that of shareholders owning corporations, which they as a matter of corporate law clearly do not; e.g. *Paddy Ireland*, ‘Company Law and the Myth of Shareholder Ownership’, *Modern Law Review* 62 (1999), 32; *Lorraine Talbot*, *Critical Company Law*, 2nd ed., 2015.

local communities and the broader society. There is no company law in any jurisdiction that promotes companies as a business form based on the assumption that this will maximise returns to shareholders to the detriment of society. Yet, that is far too often the consequence.

The capital markets function to funnel and exacerbate the shareholder primacy drive, supported by securities regulation and stock exchange rules that have as their primary aim to protect investors, not the various other interest affected by corporate activity.⁷⁸ The normative impact of the shareholder primacy drive goes beyond the listed corporations, and is exacerbated by the chasm between corporate law's approach to corporate groups and the dominance and practice of such groups,⁷⁹ and the extensive use of global value chains, and other non-equity modes of control,⁸⁰ allowing for an intensified externalisation of environmental, social and economic costs.

This is not to say that shareholder primacy is in the interest of shareholders or that it is supported by shareholders. Rather, as outlined in Section 3.1 above, continuing on the track of 'business as usual', brings with it systemic risks affecting all investors, as we see expressed also in the emerging recognition of the financial risks of climate change. However, having become such a deeply entrenched norm, it is intrinsic to the financial market system that shareholders operate within. Without comprehensive reforms of the whole system, it is not easy to break out from or properly understand the consequences of the system. The legislative initiatives very briefly outlined in the beginning of this Section are important steps towards such a comprehensive reform, based on some degree of recognition that the current system is detrimental for shareholders, for businesses and for society more broadly. Yet, without connecting them to and including the core corporate governance rules in company law, the outlined initiatives have not had their desired effect. The unrealised potential Non-Financial Reporting Directive is amply illustrated through the Alliance for Corporate Transparency's study of 1000 companies' reports, which show very limited follow-up.⁸¹ In addition to lack of EU-level rules on verification,⁸² the gap between the dominant view of the duty of the boards being to maximise returns for shareholders and the broader sustainability issues that the board is being asked to report on, has left sustainability reporting susceptible to green-washing, blue-washing and – since 2015 – SDG-washing.⁸³

⁷⁸ *Jay Cullen/Jukka Mähönen*, Taming Unsustainable Finance: The Perils of Modern Risk Management, in: Beate Sjøfjell/Christopher M. Bruner (ed.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 100–113; *Christopher M. Bruner*, 'Corporate Governance Reform in a Time of Crisis', *Journal of Corporation Law*, 36 (2011), 309.

⁷⁹ *Blanaid Clarke/Linn Anker-Sørensen*, The EU as a Potential Norm Creator for Sustainable Corporate Groups, in: Beate Sjøfjell/Christopher M. Bruner (eds.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 190–203.

⁸⁰ *Jaakko Salminen*, Sustainability and the Move from Corporate Governance to Governance through Contract, in: Beate Sjøfjell/Christopher M. Bruner (eds.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 57–70.

⁸¹ *The Alliance for Corporate Transparency*, 2019 Research Report. An analysis of the sustainability reports of 1000 companies pursuant to the EU Non-Financial Reporting Directive, 2019, www.allianceforcorporatetransparency.org/ (last accessed 12.2.2021).

⁸² *Jukka Mähönen*, 'Comprehensive Approach to Relevant and Reliable Reporting in Europe: A Dream Impossible?', *Sustainability* (12) 2020.

⁸³ *SDG Knowledge Hub*, Responsible Business Report Finds High Risk of 'SDG Washing', 29.5.2018, <http://sdg.iisd.org/news/responsible-business-report-finds-high-risk-of-sdg-washing/> (last accessed 12.1.2021).

To push back against the shareholder primacy drive, company law needs to take back the power to define what the purpose of the company is and what the duties of the board are. This has to be done in a way that dismantles the legal myth that shareholder primacy has developed into, clarifying that the purpose of business and the duty of the board is actually not to maximize returns for shareholders. However, that is not enough. In light of the convergence of crises we face, a legislative reform should also facilitate and ensure that business partakes in the transition to sustainability.

The argument for including company law in the legislative toolbox, is not one against the relevance of other areas of law. To the contrary, it is one that argues for coherence in policy-making and legislation, connecting the key governance role of the corporate board to business compliance with legislation on environmental protection, product safety and labour, and promoting business action beyond legal compliance. Competing social norms to the shareholder primacy drive, notably the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles for Business and Human Rights, have been crucial in opening up the public debate on what responsible business is and how it should act, and they are relevant sources in the further discussion of how business should be regulated and governed. Yet, these competing social norms are not enough in themselves to change the prevailing system, and the self-regulation or voluntary improvement by business of their activities has proven insufficient.⁸⁴ In such a fragmented regulatory system, it is difficult, time-consuming and even irrational for the individual sustainability-oriented company to attempt to report openly on its actions, with the risk of being out-competed by businesses whose publicly available reporting is neither relevant nor reliable as concerns its sustainability impacts. This is the backdrop for the reforms proposed in the Section below.

3.3 Redefining corporate purpose and the duties of the board

Corporate purpose has recently re-emerged as a topical issue, disrupting the established truism of corporate purpose being to maximise returns for shareholders. Even the US 'Business Roundtable' has, in its statement of August 2019, allegedly moved away from shareholder primacy and towards a broader 'stakeholder' approach.⁸⁵ It seems an open question whether this was a strategic step to pre-empt support for US senator Elisabeth Warren's 2018 proposal for an Accountable Capitalism Act,⁸⁶ or a recognition of the risks of continuing with business as usual, but it certainly has gained a lot of attention, including from Lucian Bebchuk and Roberto Tallarita with their critique of stakeholder approaches.⁸⁷ However, as Colin Mayer points out, 'the stakeholder-shareholder debate is vacuous and misses the point. It is the wrong framing of the question'.⁸⁸ There may be a danger that stakeholder approaches

⁸⁴ *Charlotte Villiers*, *Global Supply Chains and Sustainability: The Role of Disclosure and Due Diligence Regulation*, in: Beate Sjøfjell/Christopher M. Bruner (eds.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 551–565.

⁸⁵ *Business Roundtable*, 'Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans"', 19.8.2019, <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> (last accessed 23.2.2021).

⁸⁶ *Elisabeth Warren*, 'Warren Introduces Accountable Capitalism Act', <https://www.warren.senate.gov/newsroom/press-releases/warren-introduces-accountable-capitalism-act>, 15.8.2018 (last accessed 23.2.2021).

⁸⁷ *Lucian A. Bebchuk/Roberto Tallarita*, 'The Illusory Promise of Stakeholder Governance', *Cornell Law Review* 106 (2020), 91.

⁸⁸ *Colin Mayer*, 'The Future of the Corporation and the Economics of Purpose', *Journal of Management Studies* 2020, section 1, <https://doi-org.ezproxy.uio.no/10.1111/joms.12660> (last accessed 23.2.2021).

are used as a deflection device away from the discussion of how what changes of the current system are required to achieve sustainable business, as Carol Liao has highlighted in the context of the B Lab-driven Canadian law reform.⁸⁹ Certainly taking some kind of stakeholder approach is not synonymous with business contributing to strong, or real, sustainability.⁹⁰

Rather, what is the topic here, is corporate purpose understood as the overarching purpose set out for companies in company law. Company law does generally not explicitly set out such an overarching purpose of companies, which has, together with the historically understandable emphasis on the relationship between shareholders and companies in company legislation, given ample space for the development of the law-and-economics based conceptualisation of the purpose as maximisation of returns to shareholders. The first aim of proposing a legislative and explicit redefinition of corporate purpose is therefore to dismantle this legal myth that has dominated so much of also the corporate governance discussion over the last decades.⁹¹ Secondly, and giving direction to the content of such a redefinition, it should be done in a way that supports the transition towards sustainability, securing the future of European businesses, by facilitating the shift in business models and stimulating creative innovation.

Together with Jukka Mähönen, and drawing on contributions of the research teams across two international research projects,⁹² I have developed ideas on how to redefine corporate purpose and the duties of the board, to achieve these aims.⁹³ Corporate purpose is, as set out in the newly revised Danish corporate governance code, a ‘considerable driving force in the company’s strategy and decision-making processes’.⁹⁴ Corporate purpose, as I am using the concept here, should be distinguished against the individual and more detailed purpose expressed by the individual business in instruments of constitution or memorandum and articles of association. A redefined corporate purpose should be expressed on an overarching level in EU legislation, without replacing the specific purposes that the legislation governing the various forms of undertakings in the Member States may set out. Our proposal to redefine the overarching purpose of the undertaking is not one that dramatically changes the nature of European businesses or their specific purposes. It does not take away profit as an intrinsic element of the nature of business or of their value creation. It does not change the differences between various forms of

⁸⁹ Carol Liao, ‘A Critical Canadian Perspective on the Benefit Corporation: “The Benefit Corporation and the Firm Commitment Universe”’, *Seattle University Law Review* 40 (2017), 2, 683.

⁹⁰ See e.g. Nigel Roome, *Looking Back, Thinking Forward: Distinguishing Between Weak and Strong Sustainability*, in: Pratima Bansal/Andrew J. Hoffman (eds.), *The Oxford Handbook of Business and the Natural Environment*, 2011. See also *Sjåffjell/Bruner* (fn. 39), and further Beate Sjåffjell/Jukka Mähönen, ‘Corporate purpose and the misleading shareholder vs stakeholder dichotomy’ (2021) working paper on file with current author.

⁹¹ Christopher M. Bruner, *Corporate Governance in the Common-Law World: The Political Foundations of Shareholder Power*, 2013; *Bruner/Sjåffjell* (fn. 7).

⁹² The Sustainable Companies Project (2010-2014) and the SMART Project (2016-2020), www.jus.uio.no/companies under Projects, Concluded Projects (last accessed 23.2.2021).

⁹³ Starting out with Beate Sjåffjell/Jukka Mähönen, ‘Upgrading the Nordic Corporate Governance Model for Sustainable Companies’, *European Company Law* 11 (2014), 58, and continuing through the SMART Project, culminating in the working paper Beate Sjåffjell/Jukka Mähönen et al., ‘Securing the Future of European Business: SMART Reform Proposals’, 7.5.2020. University of Oslo Faculty of Law Research Paper No. 2020-11, available at SSRN: <https://ssrn.com/abstract=3595048> (last accessed 3.12.2020); on which the reform proposals in this article draw.

⁹⁴ Danish Committee on Corporate Governance, ‘Danish Recommendations on Corporate Governance’, 2020, <https://corporategovernance.dk/recommendations-corporate-governance> (last accessed 23.2.2021).

undertakings in the European economy, and how profit is used and distributed in them. For example, cooperatives would still be distinguishable from companies, and multinational enterprises from small- and medium-sized enterprises (SMEs). We do not challenge the distinction between for-profit and not-for-profit, nor do we propose to make all businesses become social enterprises.

What the proposal does do, is to position the value creation of European business, with profit as an intrinsic element, within the context of the transition to sustainability that we all need to undertake, and in such a way that gives European undertakings a level playing field and legal certainty. Drawing on sustainability research, we propose that *sustainable value creation within planetary boundaries* is set as the overarching purpose, outlining the scope within which profit will continue to be made.⁹⁵

Sustainable value creation is an emerging concept in corporate law and corporate governance,⁹⁶ which can become a meaningful contribution if interpreted within a research-based concept of sustainability.

Translated into the governance of business, *sustainable value creation* encompasses issues such as fair treatment of employees as well as of workers and local communities across global value chains, with respect for international human rights and core ILO conventions as a minimum, ensuring a 'living wage' and safe working conditions. This further entails supporting democratic political processes and as a minimum not undermining these through engaging in corporate capture of regulatory processes. It also entails contributing to the economic basis of the societies in which the business interacts by not engaging in so-called aggressive tax planning and outright evasion.⁹⁷

Turning to the UN Guiding Principles for Business and Human Rights (UNGPs),⁹⁸ we see that 'internationally recognised human rights' as the 'benchmarks against which other social actors assess the human rights impacts of business enterprises',⁹⁹ refer as a minimum to those expressed in the International Bill of Human Rights. These include the Universal Declaration of Human Rights and its main instruments of codification: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,¹⁰⁰ as well as the principles concerning fundamental

⁹⁵ *Sjåffjell/Mähönen et al.* (fn. 93), section 6.2.1.

⁹⁶ Examples include: the 2017 revision of the Australian Council of Superannuation Investors (ACSI) Governance Guidelines, emphasizing board oversight of 'sustainable, long-term value creation', see *Victoria Schnure Baumfield*, *The Australian paradox: Conservative Corporate Law in a Progressive Culture*, in: Beate Sjåffjell/Christopher M. Bruner (ed.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 161–175; the German Corporate Governance Code on the duty of the Management Board to manage the company 'in the best interests of the company ... with the objective of sustainable value creation', see *Rühmkorf* (fn. 68); the increased emphasis in the 2016 revision of the Dutch Corporate Governance Code on acting 'in a sustainable manner by focusing on long-term value creation', see *Anne Lafarre/Christoph Van der Elst*, *Corporate Sustainability and Shareholder Activism in the Netherlands*, in: Beate Sjåffjell/Christopher M. Bruner (ed.), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, 2019, p. 260–275; also the new Belgian corporate governance code is based on sustainable value creation, see *Corporate Governance Committee*, 'The 2020 Belgian Code on Corporate Governance', www.corporategovernancecommittee.be/en/over-de-code-2020/2020-belgian-code-corporate-governance, 7.5.2020, (last accessed 23.2.2021).

⁹⁷ *Beate Sjåffjell*, 'How Company Law has Failed Human Rights – and What to Do About It', *Business and Human Rights Journal* 5 (2020), 179.

⁹⁸ The Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (UNGPs), 2011, Principle 12.

⁹⁹ UNGPs (fn. 98), Principle 12, Commentary.

¹⁰⁰ UNGPs (fn. 98), Principle 12, Commentary.

rights set out in the eight ILO core conventions, set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work 1998.¹⁰¹

An emphasis on vulnerability arguably resonates with the Commentary to the UNGPs Principle 12, which emphasises that business 'may need to consider additional standards'. These concern, according to the Commentary, the human rights of 'specific groups or populations that require particular attention', elaborated on in United Nations instruments regarding the 'rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families'.¹⁰² The elimination of discrimination in respect of employment and occupation, whether on the basis of gender, race, age, disability or migrant status, is crucial.¹⁰³

As an intrinsic element of the transition to sustainable business must be included participatory aspects of the social foundations,¹⁰⁴ of workers, regardless of their labour law status, and of affected communities, including indigenous peoples and ensuring that all affected are fully involved.¹⁰⁵ And yet, we must avoid merely replacing the 'shareholder' in shareholder primacy with 'stakeholder'.¹⁰⁶ While involving affected communities, trade unions, and civil society is crucial, a mere canvassing of 'stakeholder interests' and giving priority to the ones that make themselves heard the most is insufficient. The backdrop must always be the interconnected complexities and the vulnerability of the often unrepresented groups (whether invisible workers deep in the global value chains, indigenous communities, or future generations),¹⁰⁷ and the aim of a sustainable future within planetary boundaries.

Positioning sustainable value creation within *planetary boundaries* has potential significance on three interconnected levels: firstly and most importantly, it brings to the forefront that there are ecological limits (conversely, that being perceived as 'environmentally friendly' while not respecting those limits is

¹⁰¹ UNGPs (fn. 98), 12, Commentary. These eight conventions are: Convention Nos. 87 and 98 on freedom of association and collective bargaining (1948 and 1949); Conventions Nos. 29 and 105 on the elimination of all forms of forced and compulsory labour (1930 and 1957); ILO Convention No. 138 on the minimum age for admission to employment (1973); and ILO Conventions Nos. 100 and 111 on the elimination of discrimination in respect of employment and occupation (1957 and 1958), and the 1999 ILO Convention No. 182 on the worst forms of child labour. These have been criticised as merely promoting 'civil and political rights (and even just a selection of these), while moving away from insistence on broader socio-economic entitlements', *Tonia Novitz, 'Past and Future Work at the International Labour Organization'*, *International Organizations Law Review* 17 (2020), 10.

¹⁰² UNGPs (fn. 98), Principle 12, Commentary. Also, in cases of armed conflict, the Commentary emphasises that business should respect the 'standards of international humanitarian law', *ibid.*

¹⁰³ See the International Labour Organization, ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 18 June 1998, art. II(d), SDG 8 targets (including SDG target 8.8 concerning migrant workers); the International Convention on the Protection of Migrant Workers and their Families, New York, 18 December 1990, in force 1 July 2003, A/RES/45/158, and the 2019 ILO Centenary Declaration, including Art. II(A)(xvi) concerning decent work for migrant workers.

¹⁰⁴ *Tonia Novitz, 'Engagement with sustainability at the International Labour Organization and wider implications for collective worker voice'*, *International Labour Review* 159 (2020), 463. Concerning some of the challenges involved, see also *Ian Scoones, 'The Politics of Sustainability and Development'*, *Annual Review of Environment and Resources* 41 (2016), 293.

¹⁰⁵ As indeed is envisaged by SDG 16.

¹⁰⁶ See also *Marco Ventoruzzo, "On 'Prosperity' by Colin Mayer: Brief Critical Remarks on the (Legal) Relevance of announcing a Multi-Stakeholders 'Corporate Purpose'"*, *Bocconi Legal Studies Research Paper* 3546139 (2020), available at SSRN: <https://ssrn.com/abstract=3546139> (last accessed 14.1.2021).

¹⁰⁷ *Louis J. Kotzé, 'The Anthropocene, Earth system vulnerability and socio-ecological injustice in an age of human rights'*, *Journal of Human Rights and the Environment* 2019, 62, 73–75.

totally inadequate). Secondly, it highlights the complex interactions between planet-level environmental processes, recognizing for example that climate change, however topical (and difficult to mitigate), is only one aspect of the convergence of crises we are heading towards. Thirdly, it continuously reminds us that state-of-the-art natural science must inform our decisions on a work-in-progress-basis, encompassing the uncertainty and complexity of the global challenges.

This entails that a research-based precautionary approach is needed. The conceptual framework for planetary boundaries itself proposes a strongly precautionary approach, by ‘setting the discrete boundary value at the lower and more conservative bound of the uncertainty range’.¹⁰⁸ The precautionary principle has a basis in EU law. Article 191(2) TFEU includes the precautionary principle in its stipulation of environmental principles that the EU shall follow. It is recognized that the scope is much wider than environmental issues in practice, and where ‘preliminary objective scientific evaluation’ indicates that there are ‘reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community’, the precautionary principle should be invoked.¹⁰⁹

The planetary boundaries framework does not offer a finite set of environmental issues that require recognition and protection. Rather, planetary boundaries as a concept forms the rationale by which new boundaries may be identified and better operational quantifications or metrics adopted.¹¹⁰ This entails that a legislative reform integrating the recognition of planetary boundaries¹¹¹ cannot be satisfied with regulating the protection of the hitherto identified nine boundaries. Rather, the concept of ‘planetary boundaries’ itself needs to be included, as a general clause, to be interpreted in light of the science as it develops.

With this backdrop, we propose that creating ‘sustainable value’ should be defined as creating value for the undertaking, while respecting the rights of its members, investors, employees, and other contractual parties, and promoting good governance, decent work and equality, and the human rights of its workers and affected communities and peoples. ‘Planetary boundaries’ should be defined as scientifically recognised processes that regulate the stability and resilience of the Earth system within which humanity can continue to develop and thrive for generations to come.¹¹²

This overarching purpose of sustainable value creation within planetary boundaries should be operationalised through a redefinition of the duties of the board, outlining in a way that provides legal certainty for undertakings. To clarify a key concept of European company law, which has become

¹⁰⁸ *Rockström/Steffen* (fn. 37), 472-475.

¹⁰⁹ *The European Commission*, Communication from the Commission on the precautionary principle, COM/2000/0001 final, 2.2.2000.

¹¹⁰ *Sarah Cornell*, ‘Planetary Boundaries and Business’, working paper on file with current author.

¹¹¹ Or the ‘limits of our planet’, as formulated in the Environment Action Programme to 2020, Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’, OJ L 354, 28.12.2013, p. 171–200. The EU 7th Environmental Action Programme to 2020 (7th EAP) was adopted in 2013, <https://www.eea.europa.eu/policy-documents/7th-environmental-action-programme> (last accessed 14.1.2020). The proposed 8th EAP, to guide European environmental policy to 2030, explicitly mentions the planetary boundaries: <https://ec.europa.eu/environment/pdf/8EAP/2020/10/8EAP-draft.pdf> (last accessed 14.1.2020). See further *Sjåfjell/Häyhä/Cornell* (fn. 8), section 2.

¹¹² *Sjåfjell/Mähönen et al.* (fn. 93), section 6.2.1.

somewhat clouded through the influence of the shareholder primacy drive, it should be set out in EU company legislation that the core duty of the board is to promote the interests of the company. This operationalisation would not entail a harmonisation of the definition of the interests of the company in EU company law. Rather, it would draw up the boundaries within which the board shall promote the interests of the company. Developing the understanding of what the interests of the specific company entail in a specific instance should remain with the board to define, within the scope of national legislation, articles of association, and existing contracts and commitments.¹¹³

The duty of the board to promote the interests of the undertaking in a way that that contributes to the overarching corporate purpose, should be set out as ensuring that the operations and activities of the business creates sustainable value and contributes to global society staying within planetary boundaries. Encompassing respect for human rights, ensuring decent working conditions and promoting good governance should be key aspects of sustainable value creation. Contributing to ensuring that global society stays within planetary boundaries should entail complying with the at any time most ambitious politically adopted targets at the EU level or relevant Member State level, and – within the scope of the business of the undertaking – protecting and regenerating natural resources and processes, and avoiding, or reducing as far as possible, contributions to the transgression of currently identified planetary boundaries.¹¹⁴

A legislative reform should specify that the board is to ensure that the business model of the undertaking is in line with the overarching purpose, developing and publish a strategy that integrates the purpose throughout the business, including in the internal control and risk management systems.¹¹⁵ Further, it should define clearly the sustainability assessment – including sustainability due diligence – that the board must ensure is undertaken, to identify ongoing negative sustainability impacts and principal risks of future negative sustainability impacts. The due diligence process should be set out so as to encompass consultative processes for engagement with local communities, including indigenous peoples and other groups and persons affected by the operations and activities of the business, encompassing as relevant in the specific case, workers, subcontractors, and local or national interest groups and community representatives. Follow-up of the due diligence process should also be stipulated, where identified lack of legal compliance should be rectified immediately. For other identified sustainability impacts and risks, an ambitious continuous improvement process should be drawn up under the leadership of the board. The ambitious continuous improvement plan should include qualitative and quantitative Key Performance Indicators where appropriate. EU rules should also provide for external verification that the due diligence process is undertaken in accordance with the rules, and annual reporting on this should be audited. Together this would provide a good basis for legal

¹¹³ *Sjåfjell/Mähönen et al.* (fn. 93), section 6.2.1.

¹¹⁴ Biodiversity loss in all ecosystems, including oceans; freshwater pollution and scarcity; land system change, including change in regional vegetation; greenhouse gas emissions; atmospheric aerosol emissions; chemical pollution including synthetic organic pollutants, heavy metal compounds and radioactive materials; and the introduction of novel entities including microplastics and nanomaterials; ozone depletion; nitrogen and phosphorus pollution; and ocean acidification. See further *Sjåfjell/Mähönen et al.* (fn. 93), section 6.2.1.

¹¹⁵ This resonates with existing requirements in the Non-Financial Reporting Directive as well as with the proposal in the Action Plan for sustainable finance, Action 10.

certainty for the board that it is following this up as it should and a level playing field in the sense that it would know that other undertakings would be subject to the same rules.¹¹⁶

Further, such a process would provide legal certainty for the undertaking as concerns its sustainability impacts, mitigating effectively the risks of unsustainability. As Lise Smit and Claire Bright point out, it is important that due diligence does not act as a safe harbour, i.e. that affected parties cannot file a lawsuit against the undertaking or its board, nor must it devolve into a box-ticking exercise.¹¹⁷ However, compliance with a thoughtfully formulated mandatory sustainability due diligence regime, would serve as a defence for the undertaking and its board. This will increase the legal certainty for European business, while providing better access to justice for affected workers and communities.

This proposal draws on commonly agreed upon sustainability goals and sustainability science, thereby increasing legal certainty for business in the sense that it would clarify what the boundaries of legitimate business activities are. Followed up by clearly defined rules for sustainability assessment, notably including mandatory sustainability due diligence, risk management would be improved, as would legal certainty in the sense of better knowing the extent of the vulnerabilities of the business. This would give the sustainability-oriented businesses Europe, of which there undoubtedly are many, the competitive advantage over unsustainable business.

4. Concluding reflections

The European Commission has through its EU Green Deal signalled an unprecedented broad and ambitious approach towards transitioning to a sustainable future, with a ‘just transition’ that leaves ‘nobody behind’, refocusing the coordination of economic policies across the EU to integrate sustainability.¹¹⁸ Integrating sustainability into corporate purpose and the duty for corporate boards is key to achieving the relevance and reliability of information from businesses. Relevant and reliable information is currently the missing link in the EU’s Sustainable Finance initiative.¹¹⁹ Providing such information will give sustainability-oriented investors and investees the level playing that they are asking for. Integrating sustainability into corporate governance in this way also provides a better basis for Sustainable Public Procurement,¹²⁰ and resonates with and strengthens the EU’s Circular Economy initiative.¹²¹

¹¹⁶ *Sjöfjell/Mähönen et al.* (fn. 93), section 6.2.1.

¹¹⁷ *Lise Smit/Claire Bright*, ‘The concept of a “safe harbor” and mandatory human rights due diligence’, CEDIS Working Papers 2020, https://cedis.fd.unl.pt/wp-content/uploads/2020/12/CEDIS_working-paper_the-concept-of-safe-harbour.pdf (last accessed 23.2.2021).

¹¹⁸ With reference to the UN Sustainable Development Goals (SDGs); see *Ursula von der Leyen*, ‘A Union that strives for more. Political guidelines for the next European Commission 2019-2024’, 16.7.2019, <https://op.europa.eu/s/n4FS> (last accessed 23.2.2021).

¹¹⁹ *David Monciardini/Jukka Mähönen/Georgina Tsagas*, ‘Rethinking Non-Financial Reporting: A Blueprint for Structural Regulatory Changes’, *Accounting, Economics and Law: A Convivium* 1 (2020).

¹²⁰ *The European Commission*, ‘Green and Sustainable Public Procurement’, https://ec.europa.eu/environment/gpp/versus_en.htm (last accessed 19.2.2021); *Marta Andhov/Roberto Caranta et al.*, ‘Sustainability Through Public Procurement: The Way Forward – Reform Proposals’, 23.3.2020, available at SSRN: <https://ssrn.com/abstract=3559393> or <http://dx.doi.org/10.2139/ssrn.3559393> (last accessed 21.2.2021).

¹²¹ *The European Commission*, ‘EU Circular Economy Action Plan’, <https://ec.europa.eu/environment/circular-economy/> (last accessed 23.2.2021); *Eléonore Maitre-Ekern*, ‘Re-Thinking Producer Responsibility for a Sustainable Circular Economy’ *Journal of Cleaner Production* 286 (2021), 125454.

The risks of unsustainability bring home the importance of integrating sustainability throughout the business of any undertaking. If this is not done, the risks will increasingly materialise, as the international trend of lawsuits against European businesses is already showing. Ultimately, the risk of continuing with 'business as usual' is existential. There are a number of scenarios that can lead to societal collapse, and in none of these are steady returns for investors or profitable business likely.

There has never been a stronger case for all partners working together for a better system, and the way out of the Covid-19 pandemic must also be a path towards sustainability. The EU as a global actor and as European policymaker and legislator has a crucial role here to ensure that the international and European regulatory framework for business mitigates the risks of unsustainability as far as possible and secures the contribution of business to a sustainable future.

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