3. A Perfect Match? The German Concept of the Company's Interest and the EU Sustainable Corporate Governance Agenda

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A. Introduction

Sustainability is the defining planetary challenge of our time. International commitments such as the Paris Agreement and the UN Agenda for Sustainable Development 2030 are shaping the global direction of sustainability policy. The ecological transformation of the economy is at the top of the European legislature's agenda, with climate change being the most urgent task in this context. According to the findings of natural and social science research, sustainability issues are not limited to climate change but rather are complemented by several other ecological concerns that form a framework of planetary boundaries[1] and are complemented by a social foundation.[2] The equality of the three dimensions of sustainability – ecological, social, and economic – is emphasised by recent declarations of the United Nations (UN),[3] which built on the Brundtland Report,[4] a foundational document in the formation of the modern sustainability concept. The intent of

1 See Rockström/Steffen et al., Ecol. Soc. 14 (2) 2009, 32; Rockström/Steffen et al., Nature (461) 2009, 472 et seqq.; Steffen/Rockström et al., Science 347 (6223) 2015, 1259855.

2 Leach/Raworth/Rockström p. 84; Raworth, Oxfam Discussion Papers, p. 9; Raworth, chapter 1 et passim.

3 United Nations, Report of the United Nations Conference on Environment and Development, Annex I., Declaration on Environment and Development, 12.8.1992, UN-Doc. A/CONF.151/26 (Vol. I); United Nations, Report of the United Nations Conference on Environment and Development, Annex II, Agenda 21, 12.8.1992, UN-Doc. / CONF.151/26 (Vol. II); United Nations, transforming our world: the 2030 Agenda for Sustainable Development, 25.12.2015, UNDoc. A/RES/70/1/L.1.

4 UN-General Assembly, Report of the World Commission on Environment and Development, 11.12.1987, UN-Doc. A/RES/42/187; WCED, our Common future, p. 43.

the European Green Deal[5] and the resulting European Climate Law[6] was to pave the way for a sustainable economy, while regulatory measures are designed to address human rights abuses in transnational company supply chains.[7]

Although public law instruments, such as direct regulatory emission controls, or market solutions, like emission fees or tradable emission rights, have a long tradition as political instruments for environmental protection, recent legislative efforts for a more comprehensive sustainability transformation emphasise the role of private law in the implementation of climate policy goals.[8] Since transformation towards incorporation of the sustainability goals requires an adaptation of prevailing economic behaviours, companies as central market actors need to be analysed.[9] Initially, financial reporting was seen as the means of choice at the union level,[10] but with the progressing legal formalisation of corporate responsibility, the Commission increasingly relies on real compliance and behavioural obligations. At the heart of these European sustainability approaches to company law is the Corporate Sustainability Due Diligence Directive (CSDDD); its adoption

5 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.

6 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999.

7 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, PE/9/2024/REV/1, OJ L, 2024/1760, 5.7.2024 (CSDDD) and various national initiatives, see for example French and Swiss reforms Fleischer/Danninger DB 2017, 2849.

8 In addition to the CSDDD, in particularly Directive (EU) 2024/1799 of the European Parliament and of the Council of 13 June 2024 on common rules promoting the repair of goods and amending Regulation (EU) 2017/2394 and Directives (EU) 2019/771 and (EU) 2020/1828, PE/34/2024/REV/1, OJ L, 2024/1799, 10.7.2024.

9 See also Weber/Mittwoch RECol 2023, 143.

10 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 L 330, 15.11.2014, which exists already in the second generation: Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, PE/35/2022/REV/1, OJ L 322, 16.12.2022.

was the result of the broader EU Commission's Sustainable Corporate Governance Initiative that was launched in 2020.[11] This initiative, as well as the CSDDD, sparked the discussion about sustainability and company law in the EU.

The CSDDD propelled one of the core concepts of company law – the interest of the company – to the centre of the corporate sustainability discussion. One of the most controversial provisions of the CSDDD was the proposed Art. 25, which stated in para. 1 that, in fulfilling their duty to act in the best interest of the company, directors take into account the consequences of their decisions for sustainability matters. Under Art. 25 para. 2 CSDDD, Member States would have been required to ensure that their rules on breaches of the duties of directors reflected Art. 25 para. 1 CSDDD. Member States would also be required to extend their sanction regimes to the duty to consider sustainability concerns. In German company law, the proposed Art. 25 CSDDD was directly connected to Section 76 para. 1 and Section 93 para. 1 and 2 of the German Stock Corporation Act (AktG),[12] which would have needed to be revised to implement the CSDDD.[13] However, Art. 25 CSDDD and the duty to act in the best interest of the company were removed from the CSDDD before adoption and are not part of its final version.[14] Adoption of the proposed Art. 25 CSDDD would undoubtedly have caused a paradigm shift in company law and been a milestone in the development of sustainable corporate governance.

Thus, irrespective of the deletion of Art. 25 CSDDD, it is worth looking at the legal concept of the company's interest as a cornerstone of the sustainability discussion in company law. The company's interest is the guiding principle for management behaviour and thus is the starting point for the discussions about the nature of the company and its relation to

11 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23.2.2022, COM/2022/71 final (CSDDD-draft), on the regulatory content of the CSDDD-draft and in particular on the company law provisions from a German perspective Hübner/Habrich/Weller NZG 2022, 644.

12 Stock Corporation Act of 6 September 1965 (Federal Law Gazette I, p. 1089), as last amended by Article 7 of the Act of 22 February 2023 (Federal Law Gazette 2023 I no. 51), https://tinyurl.com/m2apyrwk, herein after referred to as "AktG".

13 See Hübner/Habrich/Weller NZG 2022, 644 (650); Fest AG 2023, 713 (718 et seqq.).

14 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, PE/9/2024/REV/1, OJ L, 2024/1760, 5.7.2024.

society. The company's interest is also directly connected to the current dichotomy between the shareholder primacy model and the stakeholder value system in defining the company's interest – a discussion that is largely informed by the Anglo-American corporate governance debate. The debate on the company's purpose, which is also more pronounced in the Anglo-American legal discussion, is connected to the concept of the company's interest. Finally, the concept of the company's interest is based on various economic theories that may need to be re-evaluated in the light of the current sustainability transformation. This chapter examines the German perspective and attempts to answer the question of whether the concept of the company's interest from a German perspective is compatible with the current EU approaches to fostering sustainable corporate governance. The concept of the company's interest is first assessed from a historical and economic perspective (B.). Drawing on this historical background, recent developments are then reviewed to clarify the extent to which sustainability-related duties of the board could be implemented in German company law (C). Following analysis of these modern approaches, the central question as to what extent the legal concept of the company's interest can serve as a vehicle for sustainable corporate governance is then addressed (D).

In international discussions, the German corporate governance system is usually characterised as a prime example of the pluralistic interest or stakeholder value system to the company's interest, particularly regarding the right of co-determination and the legal construct of the company's interest.[15] But is the German system truly an example of the stakeholder value system? And if it is, does this mean German company law and sustainability are a perfect match?

B. The evolution of the company's interest in Germany

In German company law, the legal concept of the company's best interest has traditionally served as an unwritten guideline for the actions of a company's executive bodies: both the management and supervisory board must base their decisions on the company's best interest.[16] Making deci-

15 Keay, p. 42; Ireland MLR 1999, 32 (32); Salacuse L. & Bus. Rev. Am. 2003, 33 (47); Wen JIBLR 2011, 325 (326).

16 German company law traditionally provides for a two-tier board system.

sions in the company's best interest is primarily a behavioural maxim for management and supervisory board members that reflects the brief legal requirement in Section 76 para. 1 AktG that the management board must manage the company on its own responsibility. The formulation of the best interests of the company as an explicit requirement of the business judgment rule in Section 93 para. 1 sentence 2 AktG provides a clearer indication of the relevance of the company's interests. But how can this legal concept be given substance, and to what extent is it relevant in practice? Questions about the company's interest are usually connected to corporate governance of a stock corporation: while the managing directors of a German Limited Liability Company (GmbH) can be significantly restricted in their freedom of decision or be subject to instructions by the articles of association and shareholder resolutions, the management board of a German Stock Corporation is shielded from the shareholders in its management duties by Section 119 para. 2 AktG, which provides that the general meeting may only take a decision regarding matters of the management of the company's affairs if the management board requests it. According to Section 111 para. 4 AktG the measures to be taken by the management may not be transferred to the supervisory board. For this reason, the concept of the company's interest is of considerable importance in stock corporations in Germany. Yet, German company law traditionally has been controversial as to which interests the board must consider when managing the company. Determination of which interests to include is not simple, as it is linked to fundamental questions of company law, namely the nature and purpose of the company, its relationship to society, and ultimately, the relationship between the market and the state. In Germany, this discussion on which interests a board must consider when managing a company has a long tradition and was initially started under the broader heading of whether companies must serve the common good (I.1). Discussion about the nature of the common good laid the groundwork for debate about the concept of the company's interest (I.2). More recently, discussion about the company's interest has been economised and somewhat simplified (II.), which does not seem to fit well with the historical developments. The current sustainability transformation illustrates this dichotomy of shareholder primacy and stakeholder value approach and sheds new light on key issues of corporate governance.

I. The market and state: a historically significant relationship

1. Serving the common good

Historically, the relationship between the state and the market has been discussed mainly in the context of the obligation of companies to serve the common good, a discourse that dates to the beginnings of company law.[17] At the end of the 18th century, during the period of the octroi system, the Prussian state was somewhat suspicious of company founders, particularly due to the introduction of the principle of limited liability. Due to concerns about abuse of power, market-dominating positions, and actions at the expense of the common good, the Prussian legislature attempted to link public and private interests through regulation by establishing public benefit of a German stock corporation as a requirement for its formation.[18] Accordingly, II 6 § 25 of the General Prussian Land Law of 1794[19] stipulated that corporations required state approval and had to be incorporated for the purpose of a lasting public benefit.[20] However, what exactly constituted a public benefit was not universally clarified. The law did not provide a definition, nor did case law use the term consistently.[21] The public benefit was regularly recognised in cases where the enterprise was rooted in a general economic interest of the State.[22] The concept of public benefit at that time can certainly not be equated with the modern understanding of public benefit, especially considering the emergence of the US Benefit Corporation and other related ideas. However, the concept of public benefit historically intended to express the consideration of public interests in the broadest sense. Furthermore, the appointment of commissioners or governors entrusted with representing state interests in the late 18th century, who could oversee, and directly intervene in, the company management highlights the regulatory connection of state interests and public interests.

17 For an overview in the context of the current sustainability transformation, see also Mittwoch, p. 296 et seqq.

18 At this time, the General Prussian Land Law of 1794 already recognised the legal form of the corporation, which can be compared in its legal characteristics with today's German stock company; the invention of the German limited liability company did not follow until around 100 years later.

19 Reprinted in: Hattenhauer, p. 433.

20 Hattenhauer, p. 433.

21 Mittwoch, p. 301.

22 For example, in the motives for the regulation on joint-stock companies of 31 January 1840, printed in: Baums, p. 54 et seq.; Weber, p. 28 et seqq.

To safeguard public benefit interests, the state was also entitled to send representatives to the general meeting.[23] Such personnel instruments are indeed being discussed again today with a view to promoting corporate sustainability.[24]

As liberalisation progressed and the state's influence on the formation of companies diminished, reference to the public benefit disappeared from German company law when the General Commercial Code was amended in 1870.[25] Neither the introduction of the Commercial Code in 1897 nor the Civil Code in 1900 brought it back.

However, at the beginning of the 20th century, the debate on the "theory of the enterprise as such", initiated by *Walther Rathenau*, reintroduced the link between the company and the public interest, primarily due the high macroeconomic importance of large companies.[26] Rathenau suggested that the stock corporation should no longer be seen as a creation of private law interests only, but rather as a national economic factor which, despite its private economic characteristics as a profit-making enterprise, also served public interests.[27] The subsequent discussion of a theory of the enterprise as such did not immediately find normative expression, but it decisively shaped the recognition of the independence of the corporation and its detachment from various individual interests.[28]

Only a few years later, the National Socialist legislature introduced Section 70 para. 1 in the 1937 amendment to the German Stock Corporation

23 Lehmann, 1898, p. 286; Lehmann, 2018, p. 82–88; in this context, see section 46 of the Royal Prussian Railway Act of 3 November 1838.

24 European Commission, Public consultation on the Sustainable Corporate Governance Initiative between October 2020 and February 2021, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/public-consultation_en; in the context of Benefit Corporations and Certified B Corporations in US corporate law Möslein/Mittwoch RabelsZ 2016, 399 (417 et seqq); on the current debate in Germany see C. III (Footnote 83 et seq.).

25 The amendment of 11 June 1870 also removed the requirement for joint-stock companies to hold a concession, cf. article 208 para. 2, reprinted in: Schubert/Hommelhoff, p. 115; more about the first amendment to company law in 1870 Bayer/Habersack/Lieder, p. 318 et seqq.

26 Rathenau; Rathenau himself never advocated the doctrine of the enterprise as such (*Lehre des Unternehmens an sich*), but his writing never got rid of this misconception after Haussmann supposedly recognised the doctrine in Rathenau's writing, see Haussmann JW 1927, 2953; Laux, p. 59 et seq.

27 Rathenau, p. 38 et seq.

28 Haussmann Bank-Archiv 1930, 57 (64); Habersack AcP (220) 2020, 594 (624); Mittwoch, p. 332.

Act, which required the management board to manage the company on its own responsibility, in the way the "welfare of the company and its successors and the common good of the people and the empire require".[29] Reference to the common good meant that the common good should act as an unwritten preamble and guideline for the whole of company law.[30] Of course, the National Socialist legislature also sought to enshrine its ideology – such as the principle of "common good before individual good" – in German company law.[31] Although the clause on the common good still bears the stamp of National Socialism, its roots can be traced back even further in German history, to the Weimar Republic and the debate on the theory of the enterprise.[32]

Regardless of origin, the concept of the common good was removed again by the 1965 company law reform and has not been reintroduced since. Interestingly, removal of the common good in the 1965 reform was justified on the grounds that the orientation of the board towards the common good was self-evident – its explicit normative formulation was therefore considered dispensable.[33] The lawmakers referred to the German constitution (Grundgesetz), namely to Art. 20 para. 1 on the social obligation of property under its Art. 14 para. 2, and to the social market economy as the applicable economic policy system.[34] Sixty years later, the orientation of the stock corporation towards the common good is anything but self-evident. In fact, the unwritten commitment of company law to the common good has diminished considerably.[35] Despite the discussion about its implicit continued validity, importance of the common good has decreased due to a

29 Printed in: Schröder, p. 46.

30 Schlegelberger/Quassowski, § 70 mn. 8.

31 Official commentaries openly refer to the "Führer principle" and the National Socialist principle of "common good before individual good" ("Gemeinnutz vor Eigennutz"), see: Danielcik, § 70 mn. 6; Schlegelberger/Quassowski, § 70 mn. 1, 8.

32 The official explanatory memorandum to the standard refers to the principle of responsible economic management, see in this context Mittwoch, p. 314; Schubert, p. 26 et seq., in particular Fn. 41; Ballerstedt/Hefermehl/Schilling, p. 159 (161); Jahn/Kempf/Prittwitz/Schmitt-Leonardy/Spindler, p. 249 (263).

33 Explanation of the government's draft printed at Kropff, p. 97; to this Bayer/Wöbbeking/Poppe/Langlet/Sommerer/v. Maltitz/Mittwoch, p. 54 (71).

34 Baas, p. 79 et seqq., 164; Reuter AcP (179) 1979, 509 (552); Münchner Kommentar zum Aktiengesetz/Spindler, § 76 mn. 78; Rittner JZ 1980, 113; Rittner, p. 132; critical of this Großmann, p. 117 et seqq.; Birke, p. 172, different view especially Mülbert AG 2009, 766 (770).

35 Beck'scher Online-Großkommentar Aktiengesetz/Fleischer, § 76 mn. 23; similar Mittwoch/Klappstein/Botthof/Bühner/Figge/Schirmer/Stöhr/Wolff/Weber, p. 419

lack of significant practical impacts[36] and was absorbed into the debate on the company's interest.

The question of the company's purpose is inherently tied to the issue of whose interests the company's management must take into account. Since the 1970s, this question has been examined through the legal concept of the company's interest. As the debate on the common good of the company faded, its values were internalised in the debate on the company's interest.

2. From co-determination to legal doctrine: the shaping of the company's interest

A key moment in the development of the concept of the company's interest was the introduction of co-determination rights on supervisory boards in Germany. The Co-Determination Act of 1976 established equal employee representation for companies with more than 2,000 employees that were not part of the coal, iron, or steel industry.[37] Employee participation on supervisory boards contributed to be a growing debate about which interests management can or should account for when exercising their discretion for the company. The institutionalisation of employees' interests led legal scholars to argue that these interests must play a role in company decision-making.[38] As a result, the co-determination movement was strongly associated with the company's interest and came to be seen as a reflection

(433) stating that there is no clear result of the historical interpretation from today's perspective.

36 Koch, § 76 mn. 30; Schubert, p. 27 et seq.; Fleischer ZGR 2017, 411 (415 et seq.); Reuter AcP (179) 1979, 509 (525); Fischer/Gessler/Schilling/Serick/Ulmer/Raisch, p. 347 (352 et seqq.); Ballerstedt/Hefermehl/Schilling, p. 159 (168 et seq.); disapproving Münchner Kommentar zum Aktiengesetz/Spindler, § 76 mn. 79; Rittner JZ 1980, 113 (113) instead derives the common good obligation from Art. 14 para. 2 GG; particularly opposing Mülbert AG 2009, 766; Baas, p. 68 et seq.

37 Co-determination Act of 4 May 1976 (Federal Law Gazette I p. 1153), last amended by Article 17 of the Act of 7 August 2021 (Federal Law Gazette I p. 3311), section 1, herein after referred to "Co-determination Act"; in addition to the Co-Determination Act, two more co-determination laws are in force: the Coal, Iron, and Steel Codetermination Act and the One-Third Participation Act.

38 Reichert-Facilides/Rittner/Sasse/Raiser, p. 101 (114); Schilling, ZHR 1980, 136 (143); Ballerstedt, ZGR 1977, 133 (135 et seq.); Mertens, ZGR 1977, 270 (275 et seqq.); controversial Mülbert, ZGR 1997, 129 (151); cf. Paefgen, p. 115, 118.

of a pluralistic stakeholder value understanding of the company's interest in Germany and internationally.[39]

However, the controversy did not end with the passing of the Co-Determination Act. When opponents of the Act asked the Federal Constitutional Court (Bundesverfassungsgericht, in short BVerfG) to assess the compatibility of co-determination with the constitution, the court not only upheld the Act, but also explicitly acknowledged the pluralistic view of the company's interest in its reasoning.[40] Additionally, the German Federal Court of Justice (Bundesgerichtshof, in short BGH) also recognised the concept of the company's interest around the same time and used it as a benchmark for assessing the confidentiality obligations of supervisory board members, which sparked further debate about the company's interest.[41]

Both court decisions and the Co-Determination Act itself triggered a decade of academic debate about the meaning and the scope of the concept of the company's interest. Scholars approached the issue from different angels, ranging from interdisciplinary theories to procedural models enriched by material principles.[42] The debate was further fuelled by a broader discussion about the development of German enterprise law as a counterpart to company law, which directly linked these developments to the company's interest and resulted in enterprise-specific approaches in law to defining the company's interest.[43]

39 Schubert, p. 145, 147 et seq.; from an international perspective: Sjåfjell/Bruner/Rühmkorf, p. 232 (237 et seq.); Sjåfjell/Richardson/Millon, p. 35 (48 et seqq.).

40 BVerfG 01.03.1979 – 1 BvR 532, 533/77, 419/78, 1 BvL 21/78, NJW 1979, 699 (703).

41 BGH 05.06.1975 – II ZR 156/73, BGHZ 64, 325, NJW 1975, 1412 (1413).

42 Overview of the variety of approaches towards the company's interest, Jürgenmeyer, p. 88 et seqq.; Mülbert ZGR 1997, 129 (142 et seqq.).

43 The German academic debate still revolves around the notion "enterprise's interest" (*Unternehmensinteresse*) and not "company's interest". This is due to historical reasons, as the concept of the company's interest was closely linked to approaches to the development of a business law. These approaches argued for a shift in focus from the legal entity of the company to the broader construct of the enterprise, cf. Reichert-Facilides/Rittner/Sasse/Raiser, p. 101 (117); Schilling ZHR 1980, 136 (144). However, to this day, no consistent business law has been established in Germany. The reflection on the enterprise was used to justify an autonomous interest of the enterprise, recognising all potential interests of the stakeholders within the enterprise. Today, the difference between the two concepts is disappearing, as already pointed out by Flume, who considered the company's interest and the enterprise's interest to be identical Sandrock/Flume, p. 43 (63); lately also Koch, § 76 mn. 66 who states that the term is used as an acronym to define the board's guiding principle.

An interdisciplinary interpretation, influenced by social-science, views the company's interest as the autonomous interest of a social organisation – a group of people linked by a common economic purpose and by their means.[44] Here, the company's interest is understood as emerging through an integrative process in which the specific interests of each member of the social organisations equate to an autonomous interest of the company.[45] This understanding of the company's interest is a rather dynamic construct which can be compared to public law doctrine on the exercise of discretion: allowing a variety of lawful choices in the light of a specific individual situation.[46] The outcome of exercising this discretion does not necessarily have to be aligned with the individual interests of its members.

However, most legal scholars advocate for a procedural approach to determining the interest of the company.[47] They call for rules that clarify how interests can be managed, particularly conflicting interests. This is done by assessing and then harmonising the different interests of the stakeholders. While accounting for differing interests in this way is primarily procedural, scholars have enriched the concept so it can operate within a framework. According to most legal scholars, the guiding principle when assessing and harmonising the interests of different stakeholders is the profitability of the company.[48] Profitability is mainly understood in the long-term, as long-term profitability best meets the needs of shareholders and other

44 *Fechner* was the leading figure in shaping this concept of social organisation under company law, see Fechner, Die Treubindungen des Aktionärs, p. 67 et seq.; Fechner, Das wirtschaftliche Unternehmen in der Rechtswissenschaft, passim.

45 Boettcher/Hax/Kunze/v. Nell-Breuning/Ortlieb/Preller, p. 143 et seq.; Ballerstedt/Hefermehl/Kunze, p. 47 (47 et seqq.); Fischer/Hefermehl/Kunze, p. 333 (347 et seqq.); Kunze, ZHR 1980, 100 (102 et seqq.).

46 Cf. for instance Kunze, ZHR 1980, 100 (117).

47 With differences as to which individual interests should be taken into account, cf. Hanau ZGR 1979, 524 (544); cf. Westermann ZGR 1977, 219 (223), who considers a prevalence of the interests of the shareholders in conflicts to be legitimate; cf. also Kunze ZHR 1980, 100 (117); Schilling ZHR 1980, 136 (144); Fischer/Gessler/Schilling/Serick/Ulmer/Raisch, p. 347 (357); as well Semler, p. 33 et seq.

48 Jürgenmeyer, p. 99, 103; Kort AG 2012, 605 (609 et seq.); Hirte/Mülbert/Roth/Kort, § 76 mn. 53; Schubert, p. 32 et seq.; Fischer/Gessler/Schilling/Serick/Ulmer/Raisch, p. 347 (361, 363) understanding profitability as the long-term capital preservation; see further BGH 13.10.1977 – II ZR 123/76, NJW 1978, 104 (106) advocating a pluralistic understanding within the guiding principle of economic efficiency.

stakeholders.[49] Others defend a monistic view, arguing that public interests are best served when individuals focus on maximising their own interests.[50] Still, the prevailing pluralistic perception recognises the relevance of public interests in business decisions-making, reinforcing a pluralistic understanding of the company's interest. From a pluralistic perspective, the board **may** take into account the interests of shareholders and employees, as well as the public interests, as long as the long-term profitability is not compromised, but they are not **required** to do so.

Since the 1980s, the once-broad debate on the company interest has increasingly narrowed to primarily shareholder versus stakeholder interests. This dichotomy originates from the Anglo-American corporate governance discussion, which was widely embraced in Germany from the time it emerged and is still highly relevant to this day.

II. Economically-motivated dichotomy of shareholder and stakeholder

Today's discussion about the content of the company's interest, both nationally and internationally, is mostly limited to the dichotomy of the shareholder primacy model and the stakeholder value system or, in other words, the contrast between a monistic and a pluralistic conception.[51] The basis of this discussion is not in law but in economics.[52] Underlying microeconomic theories play an essential role in the US corporate governance discussion and have led to the approach that shareholder interests should be prioritised in relation to the interests of other stakeholders (shareholder primacy model), when defining the company's interest. The following section sketches out the microeconomic theories that support shareholder primacy and contrasts shareholder primacy with the stakeholder value system.

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49 Already then, it was pointed out that profitability cannot be measured solely in economic terms but must also take account of 'societal' or 'social' factors, Martens AG 1976, 113 (118); Brinkmann, p. 101 et seqq.; Jürgenmeyer, p. 102 et seq.

50 Hölters BB 1978, 640 (642).

51 For the purpose of simplicity, only the currently dominant dichotomy between the shareholder and stakeholder approaches will be discussed here; other concepts, in particular mediating approaches such as enlightened shareholder value, will be excluded; for more details on enlightened shareholder value, see Mittwoch, p. 136 et seqq.

52 Mülbert ZGR 1997, 129 (134 et seqq.); Groh DB 2000, 2153; v. Colbe ZGR 1997, 271; fundamental from an economic perspective in particular Markowitz J. Finance (7) 1952, 77; Fama J. Finance 1970, 383; Friedman; Jensen/Meckling J. Financ. Econ. (3) 1976, 305.

The first microeconomic theory that supports a shareholder primacy model assumes a separation between shareholders, as the economic owners of the company, and managers, who exercise control over the company.[53] The separation of ownership and control, combined with the fact that company shares are increasingly dispersed in ownership, creates the risk that managers may not necessarily act in the interests of the owners, but might instead use their position as corporate trustees for their own benefit, engaging in opportunistic behaviour. This concept of ownership and control creates a principal-agent relationship between shareholders and the board, which comes with many problems.[54] The monistic approach aims to mitigate these problems by giving management a clear mandate: their guiding principle should always be maximal value creation for the shareholders. It should be noted however, that unlike in the US, the German shareholder landscape was never characterised by dispersed ownership of shares; instead, shares were, and still are, typically held in block ownership.

The capital market efficiency hypothesis also lends itself to a shareholder primacy model, as it finds that a company's share price simultaneously reflects all available information about the respective company.[55] For publicly-listed companies, this means the success or failure of the company should be reflected in the company's share price, and thus, members of the boards of public companies are often committed to the short-term financial interests of shareholders, with profit orientation in favour of shareholder being the primary or even exclusive goal of the company. This means that under the capital market efficiency hypothesis, specific interests of other stakeholders, such as employees, customers, and suppliers, receive less attention than the financial interests of shareholders.[56] The key advantage of

53 Fundamental Berle/Means; Jensen/Meckling J. Financ. Econ. (3) 1976, 305; more recently Armour/Gordon J. Leg. Anal. (6) 2014, 35; In Germany, the concept of economic ownership can be found in the explanatory memorandum to the 1965 Stock Corporation Act, but it does not provide any explicit differentiation for the complex nature of share ownership, see Schoppe, p. 88; Webering, p. 7.

54 This theory originally goes back to the so-called Berle-Dodd debate on the orientation of modern companies, Alchian/Demsetz Am. Econ. Rev. (62) 1972, 777; Jensen/Meckling J. Financ. Econ. (3) 1976, 305; Fama J. Political Econ. (88) 1980, 288.

55 Fundamental Fama J. Finance 1970, 383; Rappaport; from a German perspective Mülbert ZGR 1997, 129 (131 et seqq.); Crezelius/Hirte/Vieweg/Mülbert, p. 421 (424 et seqq.); Groh DB 2000, 2153.

56 Fundamental Rappaport; in detail Hommelhoff/Hopt/v. Werder/Fleischer, p. 185; Kuhner ZGR 2004, 244 (258, 273); Ulmer AcP (202) 2002, 143, (155 et seqq.); Groh DB 2000, 2153 (2158); using the example of reducing the number of jobs to increase

the capital market efficiency hypothesis is that it focuses business decisions on financial parameters that can be easily presented within the framework of disclosure and financial reporting obligations, and which can be subject to judicial scrutiny if disputes arise. Proponents of the shareholder primacy model state that the capital market efficiency hypothesis effectively minimises the risk of opportunistic management behaviour. The capital market efficiency hypothesis together with the portfolio theory form the second fundamental assumption of shareholder primacy.[57] The latter focusses on minimising risk or maximising return for shareholders in a diversified portfolio.[58]

A third microeconomic approach that supports the shareholder primacy model is the linking of microeconomic theory with corporate law theory. The combination of these two theories highlights questions about the nature of the company by characterising the company as a network for contracts.[59] In this network, shareholders are the only interest group that is not contractually bound to the company in such a way that their claims are contractually secured, which is typically the case for employees, suppliers, or customers. Rather, shareholders are regarded as profit beneficiaries and risk bearers (residual claimants) because any remaining profit in the form of dividend payments is allocated to them only after the contractual claims of other stakeholders have been satisfied. Since shareholders are thus seen as the economic owners and risk bearers of the company under this approach, their priority in management decisions is justified.[60]

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the return on equity v. Werder ZGR 1997, 69 (75) and from a business perspective Bischoff, p. 83; the shareholder approach according to Rappaport is based on net present value, which in principle also takes into account cash flows in the distant future. If the capital market systematically misprices transactions in the distant future (i.e. if there is no capital market efficiency), this has an (indirect) impact on the duties of the board under the shareholder value approach.

57 Fundamental to the efficient market hypothesis Fama J. Finance 1970, 383.

58 Groundbreaking to the portfolio theory Markowitz J. Finance (7) 1952, 77.

59 Alchian/Demsetz Am. Econ. Rev. (62) 1972, 777; Jensen/Meckling J. Financ. Econ. (3) 1976, 305; for an overview see Easterbrook/Fischel; Hart; from the German perspective Groh DB 2000, 2153 (2158); instead of many Eisenberg J. Corp. L. 24 (1998), 819; critical also Kraakman et al., p. 5 et seqq., with a preference for the term "nexus for contracts"; on the various theories on the nature of the legal person Mittwoch, p. 362 et seqq.; Fleischer NZG 2023, 243 (245 et seqq.); Watson J. Corp. L. Stud. (19) 2019, 137; Watson ECGI Working Paper N° 701/2023.

60 Easterbrook/Fischel, p. 36 et seq.; Allen Wash. & Lee L. Rev. 1993, 1395 (1400); Hommelhoff/Hopt/v. Werder/Schmidt/Weiß, p. 161 (169).

Finally, proponents of the shareholder primacy model assume that prioritising shareholders is also efficient for the company as a whole and ultimately aligns with the interests of other stakeholders. Capital providers are more likely to make positive investment decisions in favour of the company if their interests are protected, which can especially be achieved by granting control rights.[61] Positive investment decisions are of paramount importance for the company's fate because capital is the only truly scarce resource in the entrepreneurial production process. All other resources, such as labour or necessary environmental goods, have either unlimited availability or – ideally – are substitutable without limit.[62] Based on these considerations, there are no arguments for prioritising the interests of other stakeholders over those of shareholders; the mere fact that stakeholders contribute to the creation of value in the company is not sufficient from an economic perspective to justify priority for them in decision-making.[63]

The countermodel to shareholder primacy is the stakeholder value system, which was significantly shaped by *Robert Edward Freeman* and further developed by *Margaret Blair* and *Lynn Stout* in the form of team production theory, sees things differently.[64] In contrast to the monistic paradigm of model, the stakeholder value system is based on the fundamental assumption that a company is generally managed in the interests of all stakeholders equally, without any abstract prioritisation of the shareholders or any other stakeholder group.[65] Shareholders are not in opposition to other stakeholder groups: they are one of several groups of stakeholders with a special economic relationship. The various stakeholder groups work together as a team for the collective benefit.[66] Under the stakeholder value system, managers are seen as trustees of the company's assets:

61 Hommelhoff/Hopt/v. Werder/Schmidt/Weiß, p. 161 (170).
62 Boubaker/Cumming/Nguyen/v. Werner/Stoner, p. 179 (182); on the problem of substitutability of environmental goods, see Mittwoch, p. 38 et seqq. and in-depth p. 43 et seqq.
63 Hommelhoff/Hopt/v. Werder/Schmidt/Weiß, p. 161 (170).
64 Freeman; Freeman/Reed Cal. Mgmt. Rev. 1983, 88; Freeman Bus. Ethics Q. 1994, 409; Blair; Blair/Stout Va. L. Rev. (85) 1999, 247.
65 With fundamental considerations Alchian/Demsetz Am. Econ. Rev. (62) 1972, 777, (779 et seqq.), who also already use the term team production (794); in addition Dean Co. Law. 2001, 66 (69); Preston/Sapienza J. Behavioral Economics 1990, 361.
66 Blair/Stout Va. L. Rev. (85) 1999, 247 (278).

they operate as mediating hierarchs and have the task of promoting the prosperity of the company as a whole, not just the profits of shareholders.[67]

There is no consensus in German literature as to which of the two approaches is superior, which is why the shareholder primacy model has not been adopted, neither in academia, nor in court decisions.[68] German company law does not decide the issue on the books, and it is also blind to the dichotomy of shareholders' and stakeholders' interests. This is because the purpose of the stock corporation and the understanding of its overall nature have historically been shaped less by economic theories and more by the socio-legal question of the relationship between the state and the market or public and private interests, as laid out above. While the shareholder primacy model's influence reached its peak in the German corporate governance debate in the late 1990s and early 2000s, the 2010s brought an increased awareness for sustainability issues in business that has reshaped the discussion, including the adoption of the European directive on nonfinancial reporting.[69]

C. Transformation of the company's interest through sustainability?

I. Implementation of sustainability-related management duties

The review of the historical roots of the company's interest in German company law has shown that sustainability-related duties of boards, insofar as they are relevant to the management's actions in the company's interests, can be easily implemented into German company law. Even before the publication of the directive proposal, various parties had proposed enshrining the stakeholder value system (pluralist model) of the company's interest as the guiding principle for the board of the German stock corporations in Section 76 para. 1 AktG;[70] some proposals even included substantive

67 Blair/Stout Va. L. Rev. (85) 1999, 247 (271, 281 et seq.); Stout U. Pa. L. Rev. (152) 2003, 667 (669); from a German perspective Grundmann/Kirchner/Raiser/Schwintowski/Weber/Windbichler/v. Werder, p. 285 (287 et seq.).

68 Yet this was the theory of Hansmann/Kraakman Geo. L. J. (89) 2001, 439 (441).

69 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 L 330, 15.11.2014.

70 Schubert, p. 210 et seqq., 220 (thesis 24) calls for an adjustment to the current state of discussion; Mittwoch, p. 358 et seqq.; Hommelhoff ZGR 2001, 238 (250); cf. his more

concretization with reference to the company law binding to the common good.[71] Despite of the fact that key provisions of the Stock Corporation Act, like Section 76 or 93 AktG, have not been changed, recent developments demonstrate that sustainability aspects are increasingly shaping the pluralist approach to corporate governance in Germany, as illustrated by recent versions of the German Corporate Governance Code (GCGC). Furthermore, there have been prominent discussions among academics and practitioners: in 2024, the 74th German Jurists' Conference discussed the relationship between company law and climate change and a working group of experts in stock corporation law considered the role of sustainability in developing proposals for a comprehensive reform of stock corporation law.

II. Sustainability in the German Corporate Governance Code (GCGC)

The GCGC is separate from the Stock Corporation Act and is not enacted by a democratically-legitimised lawmaker but instead by a commission whose members are appointed by the German Federal Minister of Justice. This commission presents essential statutory regulations for the management and supervision of German listed companies and contains, in the form of recommendations and suggestions, nationally and internationally acknowledged standards for good and responsible corporate governance.[72]

The current version of the GCGC offers a definition of the company's interest ("the enterprise's best interest") in its foreword. The foreword explicitly states that "the Code highlights the obligation of [m]anagement [b]oards and [s]upervisory [b]oards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise

recent position Hommelhoff NZG 2015, 1329 (1330 et seq.); Hommelhoff NZG 2017, 1361 (1362, 1366).

71 Relevant draft laws were introduced by the Bündnis 90/Die Grünen parliamentary group in 2012 (BT-Drs. 17/11686, Entwurf eines Gesetzes zur Änderung des Aktiengesetzes vom 18.11.2012) and by the SPD parliamentary group in 2017 (SPD-Fraktion, Entwurf eines Gesetzes zur Angemessenheit von Vorstandsvergütungen und zur Beschränkung der steuerlichen Absetzbarkeit vom 20.2.2017); in-depth analysis of the various proposals at Mittwoch, p. 324 et seq.

72 The GCGC is regularly updated and available online at https://www.dcgk.de./en/home.html.

and its sustainable value creation". By committing the management and supervisory boards to sustainable value creation, the Code goes much further than the European Commission's original proposal of Art. 25 CS-DDD, which only required management to consider the impact of their decisions for sustainability aspects – but not to act accordingly. If the foreword of the GCGC were binding law, Germany would already have sustainability-related duties of management in place[73]: the foreword connects these duties directly to the concept of the company's interest, which at the same time calls for sustainable value creation.[74] The GCGC also stipulates in Recommendation A.1 that the management board shall systematically identify and assess the risks and opportunities associated with social and environmental factors, as well as the ecological and social impacts of the enterprise's activities. In addition to long-term economic objectives, the corporate strategy should also give appropriate consideration to ecological and social objectives. According to Recommendation A.3, corporate planning should include corresponding financial and sustainability-related objectives. The internal control system and the risk management system shall also cover sustainability-related objectives, unless required by law anyway, which includes processes and systems for collecting and processing sustainability-related data.

The same concepts apply to the supervisory board under the GCGC: according to Principle 6 of the GCGC, supervision and advice also include sustainability issues. Recommendation C.1 GCGC suggests that the supervisory board's skills and expertise profile should include expertise regarding sustainability issues that are relevant to the enterprise. Such expertise is particularly important in the field of accounting. According to Recommendation D.3 GCGC, accounting and auditing also include sustainability reporting.

As important and interesting as the requirements of the GCGC are for the development of sustainable corporate governance in Germany, it is important to note that its scope is limited to listed companies, and the GCGC also has no binding legal status and is considered soft law. According to Section 161 para. 1 of the AktG, the executive board and supervisory board of the listed company must declare annually that the recommendations of the

73 On the distinction between the existing approaches to sustainability-related duties, cf. Harbarth AG 2022, 633.

74 See on the concept of sustainable value creation in the European Union Sjåfjell/Tsagas/Villiers.

GCGC are being complied with or which of the Code's recommendations are not being applied and why not.[75] Thus, the GCGC foreword's commitment to sustainable value creation has little effect: as a mere principle (and not a recommendation), it is not even part of the declaration of compliance pursuant to Section 161 AktG; thus the comply-or-explain mechanism does not apply. Nevertheless, the importance of the GCGC requirements should not be underestimated.[76] As the GCGC is a relatively flexible soft law instrument, it has repeatedly been used as a testing ground for innovative but controversial corporate law requirements. For example, the introduction of gender quotas for management and supervisory board appointments was tested in the GCGC before it was subsequently included in the Stock Corporation Act in 2015 and 2021.[77] The shaping of the company interest as a driver for sustainability in the GCGC can thus be considered as an important step to sustainable corporate governance for listed companies in Germany.

III. Current academic discussions

The current academic discussion points in a similar direction and it is picking up speed: the 74th German Jurists' Day 2024 analysed whether legislative measures in company law were recommended in the fight against climate change.[78] The Association of German Jurists, founded in 1860,

75 GCGC provisions can be categorised as principles, recommendations and suggestions. Only recommendations are covered by Section 161 AktG, see the foreword of the GCGC, see fn. 73.

76 According to their declarations of compliance, all 40 DAX companies comply with recommendations A.1 and A.3 of the GCGC, Gleiss Lutz, p. 5, 15 et seq. In general, empirical studies indicate a high level of acceptance of the Code, see Corporate Governance Reports on the 2017 and 2020 versions of the GCGC: v. Werder/Danilov/Schwarz DB 2021, 2097; Beyenbach/Rapp/Strenger;v. Werder/Danilov DB 2018, 1997.

77 Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst vom 24.04.2015, BGBl. I 2015, p. 642 ("FüPoG I"); Gesetz zur Ergänzung und Änderung der Regelungen für die gleichberechtigte Teilhabe von Frauen an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst vom 07.08.2021, BGBl. I 2021, Nr. 51, p. 3311 ("FüPoG II").

78 See the resolutions of the Business Law Division of the 74th German Jurists Association: https://djt.de/wp-content/uploads/2024/09/djt_74_Beschluesse_Wirtschaftsrecht.pdf and for more details on the Business Law Division: https://djt.de/74-djt/fachprogramm/wirtschaftsrecht/.

examines the necessity of amendments to the German and European legal system on an academic basis, presenting proposals for the further development of the law to the public, pointing out legal abuses, and encouraging lawyers from all professional groups and fields to exchange views.[79] Since the association does not represent the interests of specific professional or social groups, its word carries weight in the legal community and with the legislature.[80]

Heidelberg-based legal scholar *Marc-Philippe Weller*'s legal opinion served as a basis for the 2024 discussion. Although his legal opinion did not explicitly recommend the integration of sustainability-related duties of the board into the concept of the company's interest,[81] it presented three concrete proposals in the form of a "climate triad" for company law: first, the introduction of climate quotas for large companies as provided for in Art. 22 CSDDD; second, the introduction of the legal form "climate-neutral" that could be added to any legal form in German company law for the purpose of signalling; and third, with regard to "climate governance" there are different recommendations for the management board, the supervisory board, and the general meeting of a stock corporation.[82] Although, or perhaps because, some of the proposals were quite progressive, most of them did not meet the approval of the German Jurists' Conference. Nevertheless, *Marc-Philippe Weller*'s developments demonstrate that the sustainability discussion has arrived at the centre of company law.

In this vein, a proposal by a group of 26 prominent academics called for a major reform of German Stock Corporation Act in 2024,[83] in an effort to bring the Act up to date with the modern reality of stock corporations in honour of its 60th birthday in 2025. The cornerstones of the academics' proposal were digitalisation, artificial intelligence, and the shift towards sustainability.[84] While this working group explicitly rejected the idea of requiring management boards commit to sustainability or public interest aspects when managing the company on the basis of Sections 76, 93 AktG,

79 Section 2 para. 1 of the articles of association of the German Jurists' Day, available at https://djt.de/djt-e-v/der-verein/ueber-uns/.

80 See also the Association's website, https://djt.de/djt-e-v/der-verein/ueber-uns/.

81 74. djt I/Weller, p. F92 et seq.; see explanatory summary Weller NJW Beilage 2/2024, 58.

82 Weller/Hößl/Seemann ZGR 2024, 180.

83 Gesellschaftsrechtliche Vereinigung; see also the explanatory summary Habersack/Vetter AG 2024, 377 (379 et seq.).

84 Habersack/Vetter AG 2024, 377.

they did consider introducing an obligation for management boards to take sustainability and public interest into account. The working group rejected a change in the composition of the management and supervisory boards, to the effect that these bodies would each be supplemented by a person with sustainability expertise. However, the working group did introduce the concept of a "Say on Climate", which ultimately produces a mixed picture and results in no clear decision.

The current academic discussion on sustainability in company law has not yet led to the German legislature taking any concrete measures. Whether the German Stock Corporation Act itself will be reformed in the near future and to what extent sustainability aspects would be part of such a reform is thus questionable. However, considering the rapidly developing academic and political discussion, driven by international and European developments in the area of corporate sustainability, it is almost certain that the legal infrastructure will be changed to some extent; it just remains to be seen whether the company's interest will play a major role in this respect.

D. Conclusion: A Perfect Match?

In international discussions, the German corporate governance system is characterised as a prime example of a pluralistic interest or stakeholder value system, particularly regarding the right of co-determination and the legal construct of the company's interest.[85] From a comparative perspective, this is certainly true. Considering its historical development, the German pluralistic concept of the company's interest seems predestined to implement the European Sustainable Corporate Governance Agenda, placing sustainability at the heart of corporate law. There are two reasons for this. First, the pluralistic approach already allows for the consideration of sustainability issues, despite there generally being no requirement to do so. Second, the concept of the company's interest is linked to the debate on the commitment of stock corporations to serve the common good and thus accounts for the significant relationship between market and state. In this respect, the consideration of sustainability aspects by corporate boards is the modern successor of the traditional debate on serving the common good. Since German company law is historically aware of the integration of private and public interests into the corporate purpose and company's

85 Refer to footnote 15.

interest, it is not surprising that the academic debate on sustainability transformation has been groundbreaking for German company law.

The question of how sustainability could be more effectively implemented in German company law is already being addressed by the GCGC with regard to publicly-listed stock corporations. The concept of the company's interest plays a central role in these developments. If the GCGC were binding law, Germany would exceed the proposed requirements of the European Sustainable Corporate Governance Agenda, specifically of the (deleted) Art. 25 CSDDD. Such a development does not appear to be out of the question, as the GCGC has historically been used as an innovation hub for best practices in company law, which have led to corresponding changes in the German Stock Corporation Act.

In terms of legal policy, however, the direction in which German company law will develop is questionable; the prospects for greater integration of sustainability into the concept of the company's interest do not appear to be very promising. At the 74th German Jurists' Day in 2024, the concept of the company's interests was not addressed; instead, the focus was on "softer" measures such as a "Say on Climate" and climate-neutral labelling.[86] Similarly, the 2024 academic proposal rejected the idea of obligating management to pursue environmental or public interest under Sections 76 and 93 AktG, but did consider introducing an obligation to take environmental and public interests into account. These developments illustrate that a rapid update of these provisions in the light of the debate of corporate sustainability is possible but unlikely.

Therefore, the German concept of the company's interest and the EU Sustainable Corporate Governance Agenda are indeed a great match – this is evidenced by historical development and academic interpretation of the concept. However, there is a strong political reluctance to reshape the concept in terms of promoting sustainability. Instead, it is often suggested that the sustainability transformation should be achieved through special legal acts that do not affect company law, or at least do not affect core concepts of company law. The current omnibus initiative of the EU Commission could be a game-changer in this respect: the call for fewer regulatory and bureaucratic burdens on companies and their boards in favour of leaner solutions could push German company law to zoom out from its current focus on imposing specific legal obligations and instead

86 74. djt I/Weller, p. F76 et seqq., F101 et seqq.; see also the resolutions of the 74th German Jurists Day (fn. 79).

emphasise more general legal concepts. The concept of the company's interest could be the general principle that guides businesses on the way toward economic activity without compromising planetary boundaries and social foundations, while allowing for the reduction of bureaucracy. In this way, the concept of the company's interest could enable strategic planning and lead to corporate sustainability.

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