4. Embedding Sustainability in the Interest of the Company: Unpacking the EU Sustainable Corporate Governance Initiative

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A. A European Initiative for a Sustainable Corporate Governance

In 2020, the European Commission launched the Sustainable Corporate Governance Initiative. Its aim was to improve the European regulatory framework, using company law and corporate governance as a vehicle to foster sustainable behaviour in business and finance.[1] The Commission explicitly stated that the initiative was intended to enable companies to focus on long-term sustainable value creation rather than short-term benefits and to better align the interests of companies, their shareholders, managers, stakeholders, and society.[2] In this vein, the initiative's purpose is to help companies better manage sustainability-related matters in terms of social and human rights, climate change, and the environment. The Commission launched an open public consultation which ran from 26 October 2020 until 8 February 2021 and intended to publish a proposal for a directive in the summer of 2021. However, it was not until 23 February 2022 that the proposal for a directive on Corporate Sustainability Due Diligence (CSDDD) was finally published, marking a turning point in the debate on sustainability and company law.[3] The final version of the directive was adopted in June 2024.[4]

This chapter explores the ideas and regulatory developments of sustainable corporate governance at the EU level. It sketches out the Commission's

1 Https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

2 See "About this initiative. Summary," European Commission, Https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en.

3 European Commission, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final, 2022/0051(COD) of 23.2.2022.

4 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, OJ L of 5.7.2024.

Sustainable Corporate Governance Initiative of 2020 and the proposal and fate of the subsequent CSDDD – particularly regarding the concept of the company's interest. The future development of sustainable corporate governance in the EU will be significantly influenced by the implementation of the European legislation by the Member States. This national implementation will in turn influence further European developments. The status quo of national implementation and sustainable corporate governance in general will be examined in detail for numerous Member States in the following chapters. However, the European perspective provides the foundation and framework for this process. The EU legislature has recently – without success – attempted to explicitly integrate sustainability into the concept of the interest of the company and is now in the process of implicitly developing this core concept of company law further towards sustainable corporate governance.

B. Contextualization: The Commission's long way to sustainability in company law

It is important to emphasize that the European debate on corporate sustainability has only been conducted within the framework of company law relatively recently. This focus is welcomed, as the transformation to a sustainable economy and thus to sustainable business law is inherently also a company law matter and should have been treated as such much earlier. In earlier years, however, the Commission strongly focused on Corporate Social Responsibility (CSR), a movement that was closely linked to information duties. For many years, CSR was also closely linked to the "business case" for corporate sustainability – it was perceived as a mere voluntary instrument by the Commission and officially defined as such in 2001.[5] Only after that was CSR gradually changed into a binding legal concept, defined as "the responsibility of enterprises for their impacts on society" in 2011.[6]

5 European Commission, Greenpaper Promoting a European Framework for Corporate Social Responsibility, COM(2001) 2001, 366 final of 18.7.2001, p. 6; on the concept of the business case for CSR S. MacLeod, European Public Law 2007, 671 (680 et seq.); Rühmkorf, p. 20.

6 Communication from the Commission, A renewed EU strategy 2011–14 for Corporate Social Responsibility, COM(2011) 681 final of 25.10.2011, p. 6.

This shift in meaning, and the fact that the Commission explicitly abandoned voluntariness as the defining characteristic of CSR, paved the way for the adoption of the Non-Financial Reporting Directive (NFRD),[7] which amended the Accounting Directive[8] in 2014. The NFRD expressly justified the obligation to provide non-financial reporting with the socio-political goal of enabling the transition to a sustainable global economy that combines the long-term profitability of companies with social justice and environmental protection.[9] Its core is the obligation for large public-interest companies with an average of more than 500 employees to issue a non-financial statement in their management report or in a separate non-financial report. The statement should contain the information necessary for understanding the course of business and should at least refer to social and environmental issues, employee issues, and human rights, as well as the fight against corruption. The NFRD is already in its second generation: the Corporate Sustainability Reporting Directive (CSRD) was adopted in 2022 and significantly expands and tightens the reporting requirements of the NFRD.[10] The CSRD develops non-financial reporting into sustainability reporting and expands its scope to include even small and medium-sized enterprises. Nevertheless, the underlying regulatory approach remains unchanged: just like the NFRD, the CSRD uses the instrument of information duties. Neither directive contains any obligations for managers to actively integrate sustainability aspects into corporate strategy.

Nevertheless, a transformative effect is achieved: through the use of transparency obligations, the European legislature activates market forces

7 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 330/1 of 15.11.2014.

8 Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC, OJ L 182/19 of 29.6.2013.

9 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 330/1 of 15.11.2014, recital 3.

10 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, OJ L 322/15 of 16.12.2022.

and nudges companies to more sustainable behaviour, aligning the goals of profit maximisation and the protection of social and environmental interests.[11] Considering this purpose of the NFRD and CSRD, the European legislature could have used the instruments of company law to achieve their regulatory goal by addressing, for example, the duties of the board. As this was not done, the NFRD was referred to as a revolution of company law through the back door[12]: in order to report on compliance with human rights and environmental standards, boards had to make sure that the company engaged in these issues and complied. Thus, the reporting duties exerted – at least to some extent – a leverage effect on corporate behaviour.

The technique of regulating company law indirectly by creating information duties for market actors continued when sustainable finance entered the debate of corporate sustainability. In 2018, one year before the European Green Deal launched and put sustainability at the top of the agenda of the EU legislature,[13] the Commission published its ambitious Action Plan of Financing Sustainable Growth.[14] Shortly after that, the Taxonomy Regulation,[15] the Sustainable Finance Disclosure Regulation (SFDR),[16] and the new Benchmark Regulation[17] were adopted, forming the framework for the dynamic development of sustainable finance. Since August 2022, the delegated acts to MiFID II[18] and IDD[19] have required sustainability preferences to be included in investment and insurance advice. While the

11 Groundbreaking on the concept of nudging Thaler/Sunstein, 2009.
12 Bork/Kayser/Kebekus/Hommelhoff, p. 291.
13 European Commission, The European Green Deal, COM(2019) 640 final, December 11, 2019.
14 Communication from the Commission, Action Plan: Financing Sustainable Growth, COM(2018) 97 final of 8 March 2018.
15 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, OJ L 198/13 of 22.6.2020.
16 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, OLJ L 317/1 of 9.12.2019.
17 Regulation (EU) 2019/2089 of the European Parliament and of the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, OJ L 317/17 of 9.12.2019.
18 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173/349 of 12.6.2014.
19 Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, OJ L 26/19 of 2.2.2016.

Taxonomy Regulation provides a framework for a definition of the concept of (ecological) sustainability, the SFDR again focuses on the instrument of information duties in order to reach the central goal of the Sustainable Finance Action Plan – to reorient capital flows towards sustainable investment to achieve sustainable and inclusive growth.[20] However, with the 2018 Action Plan, the Commission went one step further: Action 10 of the plan considers the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain. It also considers a possible need to clarify the rules according to which directors are expected to act in the company's long-term interest.[21] This was not just about information duties; Action 10 of the 2018 Action Plan envisioned a direct obligation for boards to act. Crucially, this obligation extended beyond the financial sector and applied to companies in the real economy as well. In doing so, it created a conceptual and regulatory opening for a future European directive on sustainable company law.

C. The approach of the Sustainable Corporate Governance Initiative

The Commission's Sustainable Corporate Governance Initiative builds on Action 10 of the Sustainable Finance Action Plan and, for the first time, addresses company law directly. The Commission approached the issue in four steps, which it outlined in detail in a public consultation and put up for discussion of a company law directive. The consultation was divided into four sections accordingly:

Section 1: Need and objectives for EU intervention on sustainable corporate governance

Section 2: Directors' duty of care – considering stakeholder interests

Section 3: Due diligence duty; and

Section 4: Other elements of sustainable corporate governance, like better stakeholder engagement, remuneration of directors and enhancing sustainability expertise in the boards.

While the Commission did not question the need for action (section 1), it gradually abandoned the regulatory aspects outlined in Section 4 as the

20 Communication from the Commission, Action Plan: Financing Sustainable Growth, COM(2018) 97 final of 8 March 2018, p. 2.

21 Communication from the Commission, Action Plan: Financing Sustainable Growth, COM(2018) 97 final of 8 March 2018, p. 11.

initiative progressed. Sections 2 and 3 of the initiative thus remained highly relevant and formed the core of the initiative. In this vein, it is important to recognize that the CSDDD was never planned as a pure supply chain act. Instead, core company law – particularly in the form of a directors' duty of care embedded in the concept of the company's interest – was to be just as much a topic as the regulation of a corporate supply chain due diligence. From the outset, the Commission had the intention to link these two central approaches in a single piece of legislation. This twofold approach proved particularly challenging. During the legislative process, the CSDDD was ultimately reduced to a supply chain-focused instrument. The proposed duty of care for directors with regard to the considerations of sustainability aspects did not survive in the final version of the directive.

I. Directors' duty of care – Considering sustainability interests

In a first step, the Commission planned to harmonise the directors' duty of care. It emphasized the fact that the company law of all Member States required company directors to act in the interest of the company – this is the concept of the duty of care.[22] However, none of the national company laws clearly define what the interest of the company means. This lack of legal certainty, according to the Commission, contributes to short-termism and to a narrow interpretation of the duty of care that requires a focus predominantly on shareholders' financial interests. Conversely, the absence of such clarification may lead to a disregard of stakeholders' interests, which is not helpful in terms of sustainability, as these stakeholders may contribute to the long-term interest and the resilience of the company. To address this, the Commission initially intended to propose harmonising legislation concerning the company interest and, by extension, the directors' duty of care. The goal was to clarify that corporate directors should balance the interests of all stakeholders, rather than focusing solely on the short-term interests of the shareholders.

The Commission put this plan into action in the CSDDD proposal of February 2022: Art. 25 of the proposal stated in para. 1 that in fulfilling their duty to act in the best interest of the company, directors consider

22 It should be noted that the Commission's terminology "directors" is strongly influenced by the Anglo-American corporate governance discussion: the concept of directors does not have the same meaning in the legal tradition of continental Europe, where boards are the organs of a company.

the consequences of their decisions for sustainability matters. While in the beginning of the initiative the Commission had used the term "stakeholder interests", the draft CSDDD used the term "sustainability matters" and specified these as "including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term". According to Art. 25(2) CSDDD proposal, Member States had to ensure that their rules on breaches of the duties of directors also applied to the determination of Art. 25(1) CSDDD and had to extend their sanction regimes to the duty to consider sustainability concerns.

In this respect, the proposal engaged with nothing less than the long-standing and well-known corporate governance debate concerning shareholder versus stakeholder interests as a guideline for the actions of a company's bodies and sought to resolve it in favour of the latter. The foundation of this discussion is found in economics.[23] Economic theories have, for decades, informed the legal debate on whose interests' corporate directors should prioritize when making decisions in the best interest of the company. The central underlying microeconomic theories play an essential role in the Anglo-American corporate governance discussion and lead to the paradigm that shareholders' interests should generally be prioritised in relation to the interests of other stakeholders (shareholder primacy). The diametrically opposed view prefers an interest-pluralistic stakeholder model that 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.[24] The dichotomy of the shareholder and stakeholder model has dominated corporate governance for many years not just in the US, but has been picked up in numerous other jurisdictions, including continental Europe, which has historically not focused on this dichotomy.[25] In the light of the

23 Fundamental from an economic perspective in particular Markowitz J. Finance 1952, 77; Fama J. Finance 1970, 383; Jensen/Meckling J. Financ. Econ. 1976, 305.

24 Freeman/Reed Cal. Mgmt. Rev. 1983, 88; Freeman Bus. Ethics Q. 1994, 409; Blair; Blair/Stout Va. L. Rev. 1999, 247; with fundamental considerations Alchian/Demsetz Am. Econ. Rev. 1972, 777, 779 et seqq., who also already use the term team production; in addition Dean Co. Law. 2001, 66, 69; Preston/Sapienza J. Behavioral Economics 1990, 361.

25 Hansmann/Kraakman Georgetown Law Journal 2001, 439, 441: "as a consequence of both logic and experience, there is convergence on a consensus that the best means to (…) the pursuit of aggregate social welfare is to make corporate managers strongly accountable to shareholders interests and, at least in direct terms, only to those inter-

growing demand for a more sustainable economy, the discussion has gained new momentum.

However, the Commission failed to capitalise on this momentum with Art. 25 of the draft CSDDD. Instead, Art. 25 and the harmonisation of the duty to act in the best interests of the company did not find political majority support. They were finally removed from the CSDDD final version. This was for several reasons.[26] First, the material scope and content of the sustainability-related topics that should be addressed by the board members had only been vaguely indicated. The expression "sustainability matters" was circumscribed by a narrow catalogue of examples, i.e., human rights, climate change, and environmental consequences. There was no direct definition or referral to a definition of these "matters" to be found in the CSDDD Proposal. Second, the CSDDD Proposal indistinctly stated that the board members' duty of care involved "taking into account" sustainability matters. Neither the CSDDD Proposal nor the Explanatory Memorandum provided guidance on how "taking into account" should be interpreted. It remained entirely unclear at what level of priority sustainability matters should be considered by the board members. And third, in light of this uncertainty, the liability risk was considered too high under Art. 25(2) of the draft CSDDD.

Ultimately, the idea of introducing a duty of care for company management to consider sustainability aspects through the CSDDD was not pursued further.

II. Due Diligence Duty

In a second step – the only one that made it from the early initiative into the final text of the CSDDD – the Commission planned to introduce a due diligence duty for companies of a certain size. This due diligence duty requires companies to establish and implement adequate processes to prevent, mitigate and account for human rights and environmental impacts, both in the company's own operation and in its supply chain. The idea of a due diligence duty originates from international standards like the UN Guiding Principles on Business and Human Rights (UNGPs) and the

ests"; for criticism see Sjåfjell/Richardson/Sjåfjell/Johnston/Anker-Sørensen/Millon, p. 79.

26 See in more detail Weber/Mittwoch RECol 2023, 143 (151).

OECD Guidelines for Multinational Enterprises. The due diligence aspect became the main component of the CSDDD, and the CSDDD officially entered into force in June 2024. In the beginning of the Sustainable Corporate Governance Initiative and in the draft CSDDD, the Commission used a broad concept of the term supply chain and included subsidiaries as well as suppliers and subcontractors. This went well beyond the understanding of national supply chain acts like the German LkSG[27] and recent actions under the current Omnibus Initiative,[28] which stipulate a due diligence duty only with regard to the company's direct contacts within the supply chain (the "Tier 1" approach).

In terms of the due diligence duty itself, the CSDDD today lays down compliance obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the operations carried out by their business partners in the chains of activities of those companies. According to Art. 7(1) CSDDD, Member States shall ensure that companies integrate due diligence into all their relevant policies and risk management systems and have a due diligence policy in place that ensures risk-based due diligence. Potential adverse impacts for human rights and the environment must be identified, prevented, and put to an end; where the latter is not possible, they must at least be adequately mitigated (Art. 8 CSDDD et seq.).

However, these obligations are not absolute. First, they are not spelled out as a duty to succeed or even a strict liability in such a way that every violation of human rights or environmental concerns in supply chains is stopped and compensated for but rather are designed as 'duties of effort'. The CSDDD refers to various international human rights and environmental agreements. Only with these in mind must companies conduct risk-based human rights and environmental due diligence as laid down in Articles 7 to 16 CSDDD. When fulfilling the due diligence duty, stakeholders must be involved in a meaningful way (Art. 13 CSDDD). Regular reports must be made on compliance with the due diligence duty (Art. 16 CSDDD). Enforcement is a melange of public and private enforcement, with national supervisory authorities that monitor compliance with due diligence obligations on the one hand (Art. 24 CSDDD) and a civil liability

27 Act on Corporate Due Diligence in Supply Chains (short LkSG) from 16. July 2021, BGBl. I 2021, p. 2959.

28 See the next paragraph (D).

in favour of victims of breaches of these duties on the other (Art. 29 CSDDD).

The due diligence duty laid down in the CSDDD thus follows a principle-based, not a sector-specific approach. The European legislator today combines this with additional sector-specific acts, namely the Conflict Minerals Regulation[29] and the Deforestation Regulation of 2023.[30]

Looking back to the origins of the Sustainable Corporate Governance Initiative, the idea of the due diligence duty is the only one that has prevailed, and it now forms the heart of the CSDDD. But even if the CSDDD does not develop the concept of the company's interest in the light of sustainability, this core company law concept is touched upon indirectly by the various elements of the CSDDD's due diligence duty. The many compliance obligations in the CSDDD's due diligence duty – i.e. integrating due diligence into the company's policies and risk management system, preventing and mitigating potential adverse impacts, carrying out meaningful engagement with stakeholders, and establishing and maintaining a notification mechanism and a complaints procedure – substantially change the tasks and behaviour of management. The resulting transformation effects have the potential to change our fundamental understanding of the company's interests in the future. For this reason, it is particularly important not to stop at an analysis of the specific compliance obligations of supply chain due diligence, but to observe and examine their effects on the fundamentals of company law – like the concept of the interest of the company.

D. The status quo: A challenged CSDDD in a jigsaw puzzle of sustainability

Even after more than five years of dynamic development, the saga surrounding the Commission's Sustainable Corporate Governance Initiative, and the CSDDD's principal outcome, is not yet concluded. The adoption

29 Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130/1 of 19.5.2017.

30 Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L150/206 of 9.6.2023.

of the CSDDD was a challenging process overall. The publication of the Commission's draft was already more complicated than usual, having previously been blocked twice by the Commission's Regulatory Scrutiny Board[31]. This weakened the CSDDD's provisions even before the first proposal was published in 2022, and the provisions were subsequently watered down further during the trilogue. Ultimately, the directive's adoption was almost prevented by the 'German vote': although the German federal government had supported the directive in the trilogue, it abstained in the final vote in the formal legislative procedure.

Even following its adoption in June 2024, discussion of the CSDDD remains on the political agenda. On 26 February 2025, the Commission made a U-turn and published the first proposal of its Omnibus Package for the revision and simplification of various sustainability-promoting legal acts.[32] Besides the CSRD and the Taxonomy Regulation, the CSDDD is centrally affected by this proposal. The Omnibus Package aims to reduce the bureaucratic burden on companies and to make the obligations to promote sustainability simpler and more coherent, in particular by reducing the burden on small and medium-sized enterprises. This development was announced in the Draghi report of September 2024[33] and a following Communication from the Commission of January 2025.[34] With regard to the CSDDD, the proposed amendments concern the scope of application and key regulatory concepts, specifically the scope of the activity chain, stakeholder participation, the climate protection plan, and civil liability of companies. In addition, the obligation to terminate business relationships under Art. 10(6) and Art. 11(7) CSDDD is to be abolished. Even if the basic concept of corporate due diligence for the protection of human rights and environmental concerns remains unchanged, the provisions of the CSDDD are thus being further watered down, even before companies have a chance to apply them in their daily practice. The future of sustainable corporate governance in the EU thus remains uncertain, but undoubtedly dynamic.

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31 European Commission, Regulatory Scrutiny Board Opinion, 26.11.2021, SEC(2022) 95; in more detail Weber/Mittwoch RECol 2023, 143 (148 et seq.).

32 Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2013/34/EU, (EU) 2022/2464 and (EU) 2024/1760 as regards certain corporate sustainability reporting and due diligence requirements, COM(2025) 81 final, 2025/0045 (COD) of 26.2.2025.

33 The future of European competitiveness, 2024, Part A, A competitiveness strategy for Europe, p. 67–69; Part B. In-depth-analysis and recommendations, p. 161, 169.

34 Communication from the Commission, A Competitiveness Compass for the EU, COM(2025) 30 final of 29.1.2025.

E. The future of the company's interest as a vehicle for corporate sustainability

Although it seems unlikely given the current "ESG backlash", the shortcomings of Art. 25 draft CSDDD could certainly be remedied in the future. The adoption of a similar provision would represent a paradigm shift in company law and a milestone in the development of sustainable corporate governance. However, the most critical question in this respect remains unanswered. The Commission had explained that a board member's general duty of care for the company is present in the company law of all Member States and was only "being clarified" by the proposed Art. 25 draft CSDDD.[35] However, as far as can be determined, there is no comparative legal evidence for this assumption. On the contrary, the concept of the company's interest and its normative significance for corporate sustainability are evolving along divergent paths across the Member States.[36]

These developments are particularly relevant in light of the ongoing debate surrounding the concept of the company interest and its future evolution, as well as for the broader trajectory of corporate sustainability. The European legislature would be well advised to acquire a nuanced understanding of the realities of the economic sustainability transformation within the Member States. Only on this basis can a coherent legal framework for a sustainable European economy be established and practical acceptance by market actors be ensured. The second part of this book aims to help fill this gap. It analyses key developments across selected Member States, drawing conclusions as to how corporate sustainability can be further reinforced within European law.

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35 Explanatory Memorandum 22 of the draft CSDDD.

36 For Germany and Poland see Weber/Mittwoch RECol 2023, 143.

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