

European Company Case Law

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ECCL

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FOREWORD

European company law lives as a part of a multi-level legal system: It consists of EU primary and secondary law as well as of the national laws within the Single Market. ECCL aims to be a review for theoretical-practical reflection of all those legal sources, as well as up-to-date exposition and critical evaluation of jurisprudence.

The Review aims to highlight the core concepts and the main similarities and differences among Member States' laws in approaching the great themes of company law. It is dedicated to the circulation of knowledge about national company acts and case laws, last but not least with a view to the desirability of more or less harmonization in company law at EU level. Member States should not only be aware that other Member States' laws must comply with EU law (this is obvious), but also be concerned about how this compliance takes place, i.e. they should be interested in other States' domestic rules (this is much less acknowledged).

The description of the jurisprudence of the CJEU is also paramount. As the Court has shown again and again with ground-breaking rulings, the mere presence of the fundamental principles of the EU Treaties prohibits domestic laws from deterring companies and investors from making cross-border transactions and thus hampering the basic freedoms. Beside harmonisation, it is therefore probable that we will see further revolutionary changes in EU company law in the near future induced by the Court's case law.

The Review is therefore divided into two parts: the first part is dedicated to articles, with a view on the main themes and trends on the European and domestic level; the second part is devoted to CJEU and national Courts' rulings and other reports of high topicality. The most important rulings on companies (also operating in the banking, financial and insurance sectors), both of the Courts of the Member States and the Court of Justice of the European Union, with annotations, and essays of doctrine on the same subjects will be published every three months.

In the Editorial Board, each of the 27 Member States is represented. That is a core concept in order to be directly aware of the most relevant issues of each national system and to make ECCL a joint European project of academics and practitioners from all Member States.

This description of national acts, domestic jurisprudence, main EU trends and CJEU case law will be useful for academics, lawyers and judges who work in these fields and are interested in these developments. It is not easy to trade in a Single Market with a multitude of greatly varying jurisdictions.

We trust that this new Journal will help in the spread of knowledge of EU company law and support the development of European institutions.

June 2023.

The Editorial Board.

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Corporate sustainability and due diligence

by Beate Sjøfjell*

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A. Introduction

My starting point for this article is that it is time to get real about corporate sustainability. That means that I am not going to use a lot of space in this article to talk about climate change, declared to be code red for humanity,¹ or research showing that the fifth of the hitherto identified nine planetary boundaries is now exceeded² – putting even further stress on the Earth systems on which we depend for this Earth to be relatively safe space for humanity.³ Nor am I going to elaborate on how many of the global value chains of European businesses are based on destruction of the environment, exploitation of people and undermining of the economic basis for functioning societies⁴ – threatening

* Professor, University of Oslo, Faculty of Law, Visiting Professor, College of Europe, European Legal Studies Department. This article is a shortened version of the chapter with the title ‘A general corporate law duty to act sustainably’ in Hanne Birkmose, Mette Neville and Karsten Engsig Sørensen (eds) ‘Instruments of EU Corporate Governance: Effecting Changes in the Management of Companies in a Changing World’ (Kluwer Law International, 2023), and it is republished here with the kind permission of the editors and the publisher.

1 United Nations, ‘UN Meetings Coverage and Press Releases: Secretary-General Calls Latest IPCC Climate Report “Code Red for Humanity”, Stressing “Irrefutable” Evidence of Human Influence’ (August 2021), <https://press.un.org/en/2021/sgsm20847.doc.htm>.

2 L. Persson, B. M. Carney Almoth, C. D. Collins, S. Cornell, C. A. de Wit, M. L. Diamond, P. Fantke, M. Hassellöv, M. MacLeod, M. W. Ryberg, P. Søgaard Jørgensen, P. Villarrubia-Gómez, Z. Wang, and M. Z. Hauschild, ‘Outside the Safe Operating Space of the Planetary Boundary for Novel Entities’ (2022) *Environmental Science & Technology*.

3 J. Rockström, W. Steffen, K. Noone, Å. Persson, F. S. I. Chapin, E. Lambin, T. Lenton, M. Scheffer, C. Folke, H. J. Schellnhuber, B. Nykvist, C. de Wit, T. Hughes, S. van der Leeuw, H. Rodhe, S. Sörlin, P. Snyder, R. Costanza, U. Svedin, M. Falkenmark, L. Karlberg, R. Corell, V. Fabry, J. Hansen, B. Walker, D. Liverman, K. Richardson, P. Crutzen, and J. Foley, ‘Planetary Boundaries: Exploring the Safe Operating Space for Humanity’ (2009) 14 *Ecology and Society*; W. Steffen, K. Richardson, J. Rockström, S. E. Cornell, I. Fetzer, E. M. Bennett, R. Biggs, S. R. Carpenter, W. de Vries, C. A. de Wit, C. Folke, D. Gerten, J. Heinke, G. M. Mace, L. M. Persson, V. Ramanathan, B. Reyers, and S. Sörlin, ‘Planetary boundaries: Guiding human development on a changing planet’ (2015) 347 *Science* 1259855; Persson et al, ‘Outside the Safe Operating Space of the Planetary Boundary for Novel Entities’.

4 J. Hickel, *The Divide: A Brief Guide to Global Inequality and its Solutions* (William Heinemann, 2017); M. B. Taylor and M. van der Velden, ‘Resistance to Regulation: Failing Sustainability in Product Lifecycles’ (2019) 11

the overarching goal of sustainability, which in this article is understood as mitigating pressures on planetary boundaries and securing social foundations for humanity now and for the future – a safe and just space for humanity on this planet.⁵

In this article, I am not going to make the argument for the necessity of the contribution of business to achieve sustainability and how sustainability-oriented legislation is necessary to secure that contribution. That argument is made multiple times elsewhere, by many scholars.⁶ Instead, the topic of this article responds to the question of how we can use law to ensure this contribution; concretely, how to integrate sustainability into corporate governance. Integrating sustainability into corporate governance is also by the European Commission seen as a prerequisite for securing the contribution of business to sustainability.⁷

I propose that this integration can be done through implementing a general corporate duty to act sustainably, with the corporate board as the key actor. For that we need to go to company law, which is the regulatory infrastructure for decision-making in business, not as a silver bullet – but as a key contribution to the regulatory jigsaw puzzle of sustainability. As all company law scholars who have analysed the sources know, company law gives a broad discretion to corporate boards and by extension senior management in their corporate governance.⁸ There is space within the current company law and corporate governance systems to steer businesses in more sustainable directions.⁹ This space is, however, taken up by the social norm of shareholder primacy.¹⁰ Company law must take back that space and clarify what the legislative aim is with allowing and encouraging companies to be used as a main form for organising business, and give a principle-based instruction to boards on how to do their jobs in this era, defined by the extreme unsustainabilities resulting from business as usual.¹¹

In Section B, I introduce the concept of sustainable value creation, which already is increasingly being referenced in corporate governance, and suggest that it needs to be in-

Sustainability 6526; K. Raworth, 'A safe and just space for humanity: can we live within the doughnut' (2012) *Oxfam Discussion Papers*.

5 M. Leach, K. Raworth, and J. Rockström, 'Between social and planetary boundaries: Navigating pathways in the safe and just space for humanity' World Social Science Report 2013, (OECD Publishing, 2013), pp. 84–90. See further in Section 2 below.

6 Including as results of the EU-funded SMART Project, e.g. B. Sjäffjell, 'How Company Law has Failed Human Rights – and What to do About it' (2020) *Business and Human Rights Journal*; see also e.g. C. M. Bruner, *The Corporation as Technology: Re-Calibrating Corporate Governance for a Sustainable Future* (Oxford University Press, 2022).

7 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 (23 February 2022), Explanatory Memorandum, page 1.

8 B. Sjäffjell, A. Johnston, L. Anker-Sørensen, and D. Millon, 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in B. Sjäffjell, B. J. Richardson (eds.), *Company Law and Sustainability: Legal Barriers and Opportunities*, (Cambridge University Press, 2015), pp. 79–147.

9 Ibid.

10 Ibid.

11 Ibid.

terpreted within a research-based concept of sustainability, to make sense. This includes positioning it within the concept of planetary boundaries. In Section C, drawing on work from two international research projects,¹² I discuss how the concepts of ‘sustainable value creation’ and ‘planetary boundaries’ can be used to establish a general duty and thereby integrated into corporate governance, with company law duties of the board at the core. As a follow-up of the EU’s Sustainable Corporate Governance initiative, the European Commission in February 2022 presented its proposal for a Corporate Sustainability Due Diligence Directive.¹³ With its suggestion for a sustainability-oriented ‘duty of care’, it is directly relevant to the discussion of a corporate duty to act sustainably. I therefore engage with this proposal to the extent possible within the constraints of space, in the discussion in this Article. In Section D I turn to due diligence, as a key tool to operationalise such a general duty, where the proposed Directive is also a part of the analysis. Due diligence is especially relevant at the time of writing, as a core issue in policy-making discussions, influenced by international norm sets, notably the UN Guiding Principles for Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises (OECD Guidelines), developments in domestic legislation,¹⁴ and the proposal for a Corporate Sustainability Due Diligence Directive. Section E discusses briefly enforcement questions, while Section F presents concluding reflections.

B. Sustainable value creation and planetary boundaries

The core of the proposal on how to integrate sustainability into corporate governance through company law reform in this article, is *sustainable value creation*. Sustainable value creation is an emerging concept, increasingly reflected in corporate governance codes in Europe.¹⁵ Rather than profit maximization or maximization of returns for shareholders (which the social norm of shareholder primacy requires), *value creation* is a concept that resonates with business – it is what business sees itself as doing. *Sustainable value creation* is in line with the Zeitgeist of our time as business increasingly recognizes its role as a contributor to the fundamental transformation to sustainability,

12 Sustainable Companies (2010-2014), <https://www.jus.uio.no/ifp/english/research/projects/sustainable-companies/> and SMART (2016-2020), <https://www.smart.uio.no/>.

13 Proposal for the Corporate Sustainability Due Diligence Directive. The proposal is currently (early April 2023) in the EU legislative process and I am basing my analysis on the February 2022 proposal, with the addition of a couple of references to the Council Position of December 2022.

14 See e.g. M. Krajewski, K. Tonstad, and F. Wohltmann, ‘Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?’ (2021) 6 *Business and Human Rights Journal* 550–58.

15 B. Sjäffell and G. Tsagas, ‘Integrating Sustainable Value Creation in Corporate Governance: Company Law, Corporate Governance Codes and the Constitution of the Company’ in B. Sjäffell, G. Tsagas, C. Villiers (eds.), *Sustainable Value Creation in the European Union: Towards Pathways to a Sustainable Future through Crises*, (Cambridge: Cambridge University Press, 2023), Ch. 9

for the sake of business itself, in light of the increasing financial and corporate risks of unsustainability,¹⁶ and to fulfil its societal role.

To avoid that the concept of sustainable value creation becomes a mechanism of ‘sustainability washing’ (using references to sustainability to cover over continued unsustainable business) or ‘sustainability wishing’¹⁷ (for example, business goals related to sustainability without clear plans on how to achieve them), the concept must be positioned within a research-based understanding.¹⁸ This entails firstly that the creation of sustainable value must be interpreted as activity that engages with the goal of securing social foundations for humanity now and for the future, in a way that contributes to mitigating pressures on planetary boundaries.¹⁹

Connecting sustainable value creation to the concept of planetary boundaries in this way has potential significance on three interconnected levels: firstly, it brings to the forefront that there are ecological limits (conversely, that being perceived as ‘environmentally friendly’ may be totally inadequate) and that transgressing these limits has current and future catastrophic consequences. 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. All this is not to say that it is the sole responsibility of business to mitigate pressures on planetary boundaries. The convergence of crises caused by the changing of the climate, the accelerated extinction of species, the pressures on fresh water, soil and the oceans, and the pollution of the air we breathe, is an international calamity. International institutions, regional and national governments across the world have a duty to act. However, mitigating pressures on planetary boundaries without the contribution of business is not possible. It is therefore necessary to find adequate ways of translating the necessity of action into the governance of business.

16 P. W. Keys, V. Galaz, M. Dyer, N. Matthews, C. Folke, M. Nyström, and S. E. Cornell, ‘Anthropocene risk’ (2019) 2 *Nature Sustainability* 667–73; B. Sjäffjell, ‘Taking finance seriously: Understanding the financial risks of unsustainability’, in *The Cambridge Handbook of EU Sustainable Finance: Regulation, Supervision and Governance*, edited by Kern Alexander, Matteo Gargantini and Michele Siri (Cambridge University Press, forthcoming 2023), Ch 2. Available as preprint, University of Oslo Faculty of Law Research Paper No. 2022-58, SSRN: <https://ssrn.com/abstract=4294693>.

17 Thank you to Sarah Cornell of Stockholm Resilience Centre for coining this apt phrase.

18 This presentation of ‘sustainable value’ and ‘planetary boundaries’, draws on and updates the presentation in B. Sjäffjell and G. Tsagas, ‘Integrating Sustainable Value Creation in Corporate Governance: Company Law, Corporate Governance Codes and the Constitution of the Company’.

19 See further B. Sjäffjell, T. Häyhä and S. Cornell, ‘A Research-Based Approach to the UN Sustainable Development Goals. A Prerequisite to Sustainable Business’ (28 January 2020), University of Oslo Faculty of Law Research Paper No. 2020-02, Nordic & European Company Law Working Paper No. 21-12, Available at SSRN: <https://ssrn.com/abstract=3526744> or <http://dx.doi.org/10.2139/ssrn.3526744>.

This necessity is reflected also in the opening sentences of the explanatory text of the proposed Corporate Sustainability Due Diligence Directive:

The behaviour of companies across all sectors of the economy is key to succeed in the Union's transition to a climate-neutral and green economy in line with the European Green Deal and in delivering on the UN Sustainable Development Goals, including on its human rights- and environment-related objectives.²⁰

Indeed, also securing social foundations for humanity now and for the future requires action on all levels, from international institutions through to the individual business. Engaging with these goals in the governance of business 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. Further, sustainable business entails supporting democratic political processes and 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.²¹

As an intrinsic element of transitioning towards sustainable value creation, the following must be included: participatory aspects of the social foundations,²² of workers, regardless of their labour law status, and of affected communities, including indigenous peoples and ensuring that all affected are fully involved. And yet, we must avoid merely replacing the 'shareholder' in shareholder primacy with 'stakeholder'.²³ 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),²⁴ and the aim of a sustainable future where the pressures on planetary boundaries are successfully mitigated.

20 Proposal for a Directive on corporate sustainability due diligence, Explanatory Memorandum, p. 1.

21 Sjäfjell, 'How Company Law has Failed Human Rights – and What to do About it'.

22 T. Novitz, 'Engagement with sustainability at the International Labour Organization and implications for worker voice' (2020) *International Labour Review*.

23 B. Sjäfjell and J. Mähönen, *Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy* (2022), University of Oslo Faculty of Law Research Paper No. 2022-43, Available at SSRN: <https://ssrn.com/abstract=4039565> or <http://dx.doi.org/10.2139/ssrn.4039565>.

24 L. J. Kotzé, 'The Anthropocene, Earth system vulnerability and socio-ecological injustice in an age of human rights' (2019) 10 *Journal of Human Rights and the Environment* 62–85.

C. Integrating sustainable value creation in corporate governance

I. Sustainable value creation as corporate purpose

Integrating the concepts of ‘sustainable value creation’ and ‘planetary boundaries’ into corporate governance can be done by company law setting this out as the overarching purpose of the company, as a basis for a general duty for the company and thereby for its board. Alternatively, we can assume this purpose and go directly to the question of how to set out sustainability as a general duty for the company, integrated into the duties for the board. For several reasons, including that it would be the ultimate push-back by company law against the social norm of shareholder primacy, I would prefer to see such a purpose included in a company law reform, and I will outline here how we have suggested that such a purpose could be set up.²⁵

Such a proposal, to redefine the overarching purpose of the company, should not be seen as one that dramatically changes the nature of European businesses or their purpose. 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 undertakings in the European economy, and how profit is used and distributed in them. For example, cooperatives will still be distinguishable from companies, and multinational enterprises from SMEs. This does not challenge the distinction between for-profit and not-for-profit, nor attempt to make all businesses into social enterprises.

What our proposal does do, is to position the value creation of European companies, with profit as an intrinsic element, within the context of the transition to sustainability that we all need to undertake. Today European businesses are at best struggling to be a part of the transition to sustainability, within a globalised economic system that in aggregate appears to value short-term maximization of returns above all else, albeit with local, jurisdictional and temporal variations. This tension entails that businesses are trying to create value in a sustainable way, while maximization of returns is perceived by many as the overarching purpose, due to the shareholder primacy drive. I therefore propose, drawing on our previous work, that sustainable value creation, including contributing to mitigating pressures on planetary boundaries, is set as the overarching purpose, outlining the scope within which profit will continue to be made. This would give the sustainability-oriented businesses in Europe, of which there undoubtedly are many, the competitive advantage over unsustainable business.

In the SMART proposal we suggested a text for a reform of EU law. I include it below with the revisions based on newer research. Obviously, this can be adapted to a national company law context without being adopted on the EU level first. In our proposal we

25 This Section draws on B. Sjøfjell, J. Mähönen, T.A. Novitz, C. Gammage and H. Ahlström, ‘Securing the Future of European Business: SMART Reform Proposals’ (7 May 2020). University of Oslo Faculty of Law Research Paper No. 2020-II, Nordic & European Company Law Working Paper No. 20-08, Available at SSRN: <https://ssrn.com/abstract=3595048>, Section 6.2.1.

suggested that the text of the reform should speak generally of undertakings rather than specifically of companies, which otherwise is the focus of this article.

Such an overarching purpose could simply be expressed in the following manner:

The overarching purpose of the undertaking is to create sustainable value in a manner that contributes to mitigating pressures on planetary boundaries.²⁶

Both key concepts should be defined, and we suggested the following definitions in the specific context of the proposed reform:

... ‘planetary boundaries’ shall mean the 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.

... to create ‘sustainable value’ shall mean 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.²⁷

The specific purposes in legislation governing the various forms of undertakings in the Member States may be maintained, with any necessary adjustment to clarify their positioning within the proposed overarching purpose. Similarly, the instruments of constitution, and memorandum and articles of association, could, of course, include a more detailed and individual purpose for the specific undertaking.

II. Sustainable value creation as the duty of the company and of the board

Whether an overarching purpose for business is spelled out in legislation or not – and ‘not’ is the most likely – a general duty to act sustainably for the company can be established. The crucial point in operationalising this is to integrate sustainable value creation within the duties of the board.²⁸ That is what I will concentrate on in this section.

1. Company law, the interests of the company and the misleading shareholder vs stakeholder dichotomy

Much of the discussion after the Commission launched its Sustainable Corporate Governance Initiative has been constrained within a shareholder vs stakeholder dichotomy, with an understandable confusion as to what this may mean for the company law definition of the interests of the company. Going down the rabbit hole of discussing whether shareholder primacy is preferable to a vague stakeholder concept ignores company law

²⁶ Ibid.

²⁷ Ibid.

²⁸ ‘Board’ can be understood as the administrative or management organ as well as the supervisory organ of the company, depending on the corporate governance system of the individual company.

proper; it seems to have been used as a strawman in the discussion, and it is in my view the biggest mistake the European Commission made in its initiative.

Taking a company law point of view, it is clear that the core duty of the board according to company laws across jurisdictions 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, from the monistic, concentrating on the economic interest, with more or less emphasis on the shareholders, to the pluralistic, including a variety of other involved or affected parties.²⁹ Company legislation rarely expressly stipulates what is included in the interests of the company. The interpretation is thereby left to the boards, and in light inter alia of the business judgment rule, the question of whether the board has interpreted their duty correctly rarely comes to a head in case law. The interests of the company as a company law concept should not be harmonized in EU company law. It only places countries and scholars in different camps, waking up old discussions. Defining the interests of the company should be left to the individual development of the law in each country.

The reform proposal I draw on and present here therefore recognises the concept of ‘interests of the company’ in company law and does not propose to harmonise this. Rather it integrates the concept of ‘sustainable value creation’ in a research- and principle-based manner. The latter reflects our aim to find the balance between proposing rules that are principles-based and open enough to allow for the individual innovative value creation of each business, which characterises successful market economies, while being firm enough on the framework and the basis.

Our proposed rules on the board therefore start out with clarifying what is well-established in European company law, yet which nevertheless has become clouded through the influence of the shareholder primacy drive, namely that the core duty of the board is to promote the interests of the company.³⁰ This important step of clarification is included in the proposed Corporate Sustainability Due Diligence Directive Article 25(1), setting out the language of ‘when fulfilling their duty to act in the best interest of the company’ concerning the corporate board (and more broadly, ‘directors’).³¹

However, the proposed Due Diligence Directive Article 25(2) continues the sentence by saying that the ‘directors’ ‘when fulfilling their duty to act in the best interest of the company (...)’ ‘shall take into account the consequences of their decisions for sustainability matters, including, where applicable, human rights, climate change and environmental consequences, including in the short, medium and long term’. A reference to ‘take into account’ is reminiscent of the ‘enlightened shareholder value’ approach of section 172 of

29 Sjäffjell et al. ‘Shareholder Primacy’.

30 Ibid.

31 For a further discussion of this point, see Sjäffjell and Mähönen, *Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy*, Section 5.1.

the UK Companies Act, and is not a good starting point. To the contrary, the ‘enlightened shareholder value’ is an approach that has not contributed to more sustainability-oriented business, and rather continued to facilitate shareholder primacy, as is well-documented in the literature.³² Rather than improving on the content of the provision, the Council Position of December 2022 is to remove the whole provision, seeing board duties as something that should not be regulated in the Directive at all.³³

2. Sustainable value creation as the core connecting element

Environmental, social and governance aspects together form the core of sustainable value creation. We can expect to see the concept of sustainable value creation developed further in legislation and through codes and standards, by Member States, business organisations and front-runner companies. A principle-based formulation of the duty of the board can inspire and form a positively formulated framework for such further development. The sustainability due diligence duty of the board as a key tool, and the guidance developed for this duty, can provide the specificity of which negative sustainability impacts and risks that shall be prevented or mitigated.

The Commission’s aim with the proposed Directive, as expressed in the Commission Staff Working Document, is to contribute to the transition to sustainability through fostering sustainable value creation in European companies:

The general objective of this initiative is to better exploit the potential of the single market to contribute to the transition to a sustainable economy, to *foster sustainable value creation* and improve the long-term performance and resilience of EU companies.³⁴

Sustainable value creation could have been a useful connecting point between the sustainability goals of the European Union and the sustainability efforts of business. It is, however, not mentioned in the proposed Directive or even in its Explanatory Memorandum (as opposed to in the Commission Staff Working Document cited above). This is a missed opportunity.

Engaging with sustainable value creation drawing on a research-based concept of sustainability is what the proposal I draw on and present here does. The proposal outlines the boundaries within which the board shall promote the interests of the company, clarifying and redefining the duties of the board. Developing the understanding of what

32 See amongst many contributors A. Johnston, ‘Market-Led Sustainability through Information Disclosure: The UK Approach’, in B. Sjäffell and C.M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, 2019), Chapter 15.

33 Press release, ‘Council adopts position on due diligence rules for large companies’, 1 December 2022, <https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/>

34 Commission Staff Working Document, February 2022, <https://data.consilium.europa.eu/doc/document/ST-6533-2022-ADD-5/en/pdf>, Section 4.1. Emphasis in original omitted with emphasis added here to highlight relevance to the text.

the interests of the specific company entail in a specific instance should remain with the board to define, within the scope of European and national legislation, articles of association, and existing contracts and commitments.

If an overarching purpose is included in a company law reform, as suggested above in Section 3.1, that would of course be the starting point for the formulation of the duty of the board. A reform including the overarching purpose seems highly unlikely at the time of writing. I will therefore here concentrate on the alternative, namely encompassing such an overarching purpose indirectly through a general duty to act sustainably, integrated into the formulation of the duties of the board.

3. Operationalising sustainable value creation as the duty of the board

To express a general duty to act sustainably, the duty of the board may be formulated as ‘promoting the interests of the company in such a way as to create sustainable value that also contributes to mitigating pressures on planetary boundaries’. The duty should encompass the entire business of the company across global value chains.

The duty should be further specified. This specification can start out by requiring that the board it to ensure the alignment of the business model of the company with this duty and to draw up a strategy that ensures the follow-up of the duty, including the integration into internal control and risk management systems.³⁵

Including a duty to assess the business model of the company resonates with the reporting duty according to the so-called Non-Financial Reporting Directive of 2014³⁶ and further in the Corporate Sustainability Reporting Directive of 2022.³⁷ The proposal for the Corporate Sustainability Due Diligence Directive references the 2014 Directive and the 2021 proposal for the now adopted Corporate Sustainability Reporting Directive, with the intention of an alignment. Yet, in the proposal for the Corporate Sustainability Due Diligence Directive, business model and strategy requirements are concentrated in Article 15 on climate change (albeit with the ‘transition to a sustainable economy’ as a stepping stone), where it is set out that Member States shall ensure that companies shall

adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement.³⁸

35 Sjøfjell et al., ‘Securing the Future of European Business: SMART Reform Proposals’, Section 6.2.1.

36 Directive 2014/95/EU 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, p. 1–9), adding Article 19a to the 2013 Accounting Directive.

37 European Parliament, and Council. 2022. ‘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 (Text with EEA Relevance)’. <http://data.europa.eu/eli/dir/2022/2464/oj/eng>.

38 Already in the 2021 proposal for the Corporate Sustainability Reporting Directive, climate was given such an emphasis.

The provision goes on to set out a double materiality standard, stating that the plan shall identify the extent to which ‘climate change is a risk for, or an impact of, the company’s operations’. Where climate change is, or ‘should have been’, identified as a ‘principal risk for, or a principal impact of, the company’s operations’, the company is to include ‘emission reduction objectives’ in its plan.³⁹ This approach, albeit limited to climate in the proposed Directive, resonates with the requirement for drawing up an ambitious improvement process, which we suggest should be adopted for all sustainability aspects. I will return to this below, where I will also discuss further the proposed Directive’s limited and fragmented approach.

Climate change is a crucial issue. However, climate change is not the only planetary boundary which is transgressed, posing threats to humanity. Nor is achieving sustainability possibly without social justice. The complexity and interconnectedness of a research-based concept of sustainability should therefore form the basis for a company law duty to act sustainably. It is not possible to avoid defining sustainability if the intent is to achieve a level playing field and legal certainty on the path towards securing the contribution of business to sustainability. The concepts of sustainable value creation and planetary boundaries should be explicitly included in the duty of the board, and clearly defined, for example as we proposed, cited above in Section 3.1. Further specification is needed – and that is what we suggest to include in our reform, cited below. Mitigating pressures on planetary boundaries is not something that easily can be operationalised on the individual company level.⁴⁰ It should therefore in a corporate governance context be formulated as a duty to *contribute* to the mitigation, as indicated in Section 2 above. Again, I draw on our SMART reform proposal, slightly revised here:

The board shall work to ensure that the operations and activities of the business, including the full life of the products, processes and services of the business, contribute to global society mitigating pressures planetary boundaries,⁴¹ employing best available knowledge and technology. This entails complying with the at any time most ambitious politically adopted targets at the EU level or relevant Member State level. This further entails protecting and regenerating natural resources and processes. This includes avoiding, or reducing as far as possible, contributions to:

- 39 In the negotiations leading to the adoption of the Corporate Sustainability Reporting Directive in December 2022, the specific reporting requirements on climate are made even more ambitious, see the revised Article 19a.
- 40 See e.g. R. Clift, S. Sim, H. King, J. L. Chenoweth, I. Christie, J. Clavreul, C. Mueller, L. Posthuma, A.-M. Boulay, R. Chaplin-Kramer, J. Chatterton, F. DeClerck, A. Druckman, C. France, A. Franco, D. Gerten, M. Goedkoop, M. Z. Hauschild, M. A. J. Huijbregts, T. Koellner, E. F. Lambin, J. Lee, S. Mair, S. Marshall, M. S. McLachlan, L. Milà i Canals, C. Mitchell, E. Price, J. Rockström, J. Suckling, and R. Murphy, ‘The Challenges of Applying Planetary Boundaries as a Basis for Strategic Decision-Making in Companies with Global Supply Chains’ (2017) 9 *Sustainability* 279.
- 41 For the definition of planetary boundaries in the context of the SMART reform proposal, see Section 3.1 above.

- a) biodiversity loss in all ecosystems, including oceans;
- b) freshwater pollution and scarcity;
- c) land system change, including change in regional vegetation;
- d) greenhouse gas emissions;
- e) atmospheric aerosol emissions;
- f) chemical pollution including synthetic organic pollutants, heavy metal compounds and radioactive materials; and the introduction of novel entities including microplastics and nanomaterials;
- g) ozone depletion;
- h) nitrogen and phosphorus pollution; and
- i) ocean acidification.⁴²

Sustainable value creation, on the other hand, can be more specifically defined and operationalised on the level of the individual company:

The board shall further ensure that the operations and activities of the business, including the full life of the products, processes and services of the business, creates sustainable value.⁴³ This entails promoting:

- a) employment and its protection;
- b) a working environment in which dignity, health and safety are protected, including provision of suitable pay, hours and holidays;
- c) the acquisition of skills, competencies and qualifications;
- d) the elimination of discrimination in respect of employment and occupation, regardless of characteristics such as gender, race, age, disability, and migrant status;
- e) freedom of association and the effective recognition of the right to collective bargaining;
- f) consultative processes for engagement with local communities, including indigenous peoples affected by the operations and activities of their business;
- g) inclusion of all affected groups and persons, whether workers, subcontractors, or local or national interest groups and community representatives in due diligence scrutiny; and
- h) responsible tax behaviour.

This further entails avoiding:

- a) child labour and any form of abuse, exploitation, trafficking and violence against children;
- b) any connection with forced or compulsory labour, modern slavery and human trafficking;

42 Sjøfjell et al., 'Securing the Future of European Business: SMART Reform Proposals', Section 6.2.1.

43 For the definition of sustainable value in the context of the SMART reform proposal, see Section 3.1 above.

- c) bypassing any representative government processes or subverting the rule of law, including through corruption;
- d) any form of tax evasion; and
- e) breach of internationally recognised human rights.⁴⁴

In the proposal for duties of the board, we proposed a duty to undertake a stringent sustainability assessment, including employing sustainability due diligence. Items f) and g) in the list above, on the consultative process and the inclusion of affected groups and communities, central to effective sustainability due diligence, show how our proposed general duty clearly connects with the key tool of due diligence. I discuss sustainability due diligence in Section 4 below, after first discussing the proposed Directive's limited and limiting approach to sustainability. Thereafter, Section 5 turns to the follow up of the duties in the proposal.

4. The proposed Directive's limiting approach to sustainability

The proposed Directive's title of Corporate Sustainability Due Diligence, resonating with the title of the now adopted Corporate Sustainability Reporting Directive, indicates that a broad approach to sustainability is taken. However, as we can see in the specification of environmental and human rights issues, this proposed Directive does not draw on any research-based concept of sustainability. The Commission's proposal text does not engage with the planetary boundaries framework, although that would have given a good basis for setting out more ambitious environmental requirements. The proposal document does not define sustainability, in spite of the term 'sustainability' being used 50 times in the proposal text after the title of the proposed Directive itself. Rather, it narrows 'sustainability' down to those aspects that flow from international environmental and human rights conventions. This shows a Commission on the defensive and out of sync with the EU regulatory system with which its proposal intends to engage and create policy coherence. It is also insufficient in light of a research-based concept of sustainability.

Limiting the 'sustainability matters' to environmental and human rights issues fails to encompass other aspects of the extreme unsustainabilities of our time, notably the undermining of the economic bases of well-functioning societies through illicit financial flows.⁴⁵ It is also not in line with the so-called Non-Financial Reporting Directive of 2014, which sets out that companies are to report on 'as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters',⁴⁶

44 Sjäffell et al., 'Securing the Future of European Business: SMART Reform Proposals', Section 6.2.1.

45 See Section 2 above and J. Hickel, 2017.

46 Then Article 19a.

which is followed up in the now adopted Corporate Sustainability Reporting Directive.⁴⁷ The proposed Corporate Sustainability Due Diligence Directive further limits the scope of its 'sustainability matters' by defining those with reference only to international conventions.⁴⁸

The definition of sustainability aspects in the process leading up to the Commission's proposal were much broader. Environmental aspects were set out in the following way in the suggested wording in the European Parliament, Committee of Legal Affairs draft Directive of September 2020:

- 'environmental risk' means any potential or actual adverse impact that may impair the right to a healthy environment, whether temporarily or permanently, and of whatever magnitude, duration or frequency. These include, but are not limited to, adverse impacts on the climate, the sustainable use of natural resources, and biodiversity and ecosystems. These risks include climate change, air and water pollution, deforestation, loss in biodiversity, and greenhouse emissions.⁴⁹

In the final version of the European Parliament resolution of March 2021, we see that it was suggested that the Directive should have an Annex, which broadly should set out

a list of types of business-related adverse impacts on the environment, whether temporary or permanent, that are relevant for undertakings. Such impacts should include, but should not be limited to, production of waste, diffuse pollution and greenhouse emissions that lead to a global warming of more than 1,5°C above pre-industrial levels, deforestation, and any other impact on the climate, air, soil and water quality, the sustainable use of natural resources, biodiversity and ecosystems.⁵⁰

The necessity of policy coherence within the EU legal system is also highlighted in the March 2021 resolution, highlighting that it wishes to 'contribute to the internal coherence of Union legislation and to provide legal certainty', and referring to the Taxonomy Regulation,⁵¹ which in turn repeatedly references EU law on a variety of environmental aspects.

47 The Corporate Sustainability Reporting Directive connects its definition of 'sustainability matters' to the 'sustainability factors' in the Sustainable Finance Disclosure Regulation Article 2(24): 'environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters'.

48 See the proposed Annex listing the bases for human rights and environmental violations, available at https://ec.europa.eu/info/sites/default/files/1_2_183888_annex_dir_susta_en.pdf

49 DRAFT REPORT with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), pp. 18-19, available at https://www.europarl.europa.eu/doceo/document/J_URI-PR-657191_EN.pdf

50 European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), item (23), https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title2 (23)

51 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.

Also social issues are spelled out broadly in the European Parliament’s Legal Affairs Committee Report, not limiting the bases to the international conventions, rather including also rights that flow from ‘the European Convention on Human Rights, the European Social Charter, the Charter of Fundamental Rights of the European Union, and national constitutions and laws recognizing or implementing human rights’.⁵²

The European Parliament’s Legal Affairs Committee Report approach to governance resonates with the approach we took in the SMART project, including also reacting to the undermining of democratic processes as crucial elements.⁵³

Followed up in the European Parliament’s final resolution of 2021, the broad range of social issues, the interconnections between social and environmental issues as well as the significance of good governance is highlighted. For the latter, an annex is suggested that should set out

a list of types of business-related adverse impacts on good governance that are relevant for undertakings. They should include non-compliance with OECD Guidelines for Multinational Enterprises, Chapter VII on Combatting Bribery, Bribe Solicitation and Extortion and the principles of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and situations of corruption and bribery where an undertaking exercises undue influence on, or channels undue pecuniary advantages to, public officials to obtain privileges or unfair favourable treatment in breach of the law, and including situations in which an undertaking becomes improperly involved in local political activities, makes illegal campaign contributions or fails to comply with the applicable tax legislation.⁵⁴

Yet, in the proposal for the Corporate Sustainability Due Diligence Directive, ‘bribery’, ‘corruption’ and ‘tax’ are not even mentioned.

It is understandable, in light of the push-back the Commission was confronted with while preparing the proposal,⁵⁵ that the proposal is reticent in both the company law duties it suggests and the way it limits its own concept of sustainability. It is also regrettable.

The important arguments from a perspective that understands business and its challenges, are those of legal certainty and a level playing field. Taking, as the proposed

52 DRAFT REPORT with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), p. 18, available at https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf

53 Ibid, p. 19.

54 European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), items (21), (22) and (24), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title2.

55 Which was twice rejected by the Regulatory Scrutiny Board, in a way that has given rise to the question of whether the Scrutiny Board should be scrutinised, ‘MEPs Wolters, Hautala, Aubry and Durand: “The Regulatory Scrutiny Board still has questions to answer on Due Diligence delay”’, 21 January 2022 <https://responsiblebusinessconduct.eu/wp/2022/01/21/meps-wolters-hautala-aubry-and-durand-the-regulatory-scrutiny-board-still-has-questions-to-answer-on-due-diligence-delay/>.