

# Sustainability and Company Law: An Improbable Union?

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Although the notion of ‘sustainability’ has gained currency with many academics, managers, civil society actors, and policy makers as a crucial goal for any environmentally responsible and future-oriented community, it remains a discourse largely foreign to the world of company law and affiliated financial and securities regulation. Many business leaders and corporate regulators continue to believe that dealing with climate change, biodiversity conservation, or other ecological issues is a matter best quarantined within environmental law. Likewise, human rights and labour standards are expected to be largely segregated from business affairs. Company law, on the other hand, is a milieu they believe should be reserved for furthering business organizations and economic prosperity.

It is thus a curious partition, given that so much business literature and corporate rhetoric espouses the business case for environmental and social responsibilities. Renowned commentators such as Elkington,<sup>1</sup> Schmidheiny,<sup>2</sup> Hawken, and others<sup>3</sup> have long been advising business heads to make corporate responsibility and sustainability a top management and board issue and to integrate it into firms’ corporate strategy and business models. Porter and van der Linde,<sup>4</sup> among many others, have shown how being prosperous and virtuous can often go hand in hand, as companies attentive to their environmental performance can obtain business advantages through lower resource needs, less waste and opportunities for technological innovation, capture of new markets, and a better social license. Likewise, numerous Corporate Social Responsibility (CSR) codes of conduct, such as the Global Compact, Responsible Care, and the Equator Principles, are premised on the mutually advantageous relationship between corporate citizenship and business success.

Yet, as the articles in this edition of *European Company Law* reveal, from a wide variety of jurisdictions in Europe and other parts of the world, such insights have hardly penetrated business and corporate law. While a few legal initiatives have begun to bring sustainability issues into the internal decision-making in companies, such as modifying the fiduciary duties of boards to allow (but rarely to insist on) consideration of the environment,<sup>5</sup> and requiring companies to report publicly on their social or environmental performance (generally to the extent such performance is perceived to be ‘financially material’),<sup>6</sup> company law leaves business managers with considerable discretion to act *unsustainably*. Existing CSR standards are largely confined to voluntary codes, whose fervent embrace by business leaders is matched by their equally fervent opposition to inclusion of such standards in any hard regulation. The demise of the UN’s proposed *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*<sup>7</sup> illustrates the typical fate of attempts to introduce credible CSR regulation of companies.

Sustainability, as a framework for environmental stewardship and social justice, should be incorporated into company law because current approaches to improving corporate environmental performance do not work well enough considering the urgency to address ecological degradation, the depletion of natural resources, and global warming. Environmental law, despite extensive innovations to break away from the rigid and inefficient command-and-control regulation, suffers from poor implementation in part because it is perceived, and thus resisted, by many companies as extraneous to business success. Likewise, with the plethora of voluntary CSR codes, despite the business sector’s involvement in their design, they largely tinker with

1 John Elkington, *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Stony Creek, CT: New Society Publishers, 1998).

2 Stephen Schmidheiny, *Changing Course: A Global Business Perspective on Development and the Environment* (Cambridge: MIT Press, 1998).

3 Paul Hawken, Amory Lovins & L. Hunter Lovins, *Natural Capitalism: The Next Industrial Revolution* (New York: Little, Brown, 1999).

4 Michael E. Porter & Class van der Linde, ‘Green and Competitive: Ending the Stalemate’, *Harvard Business Review* 73, no. 5 (1995): 120.

5 For example, s. 172(1) of the UK Companies Act 2006 reformulated directors’ fiduciary duties to include consideration of ‘the impact of the company’s operations on the community and the environment’ if they are perceived by directors to be relevant to promoting ‘the success of the company’. Among civil law jurisdictions, the new Dutch corporate governance code, the Code Frijns, requires the board of directors to adopt a policy on CSR: Tineke Lambooy, ‘Institutionalisation of Corporate Social Responsibility in the Corporate Governance Code: The New Trend of the Dutch Model’, *Critical Studies on Corporate Responsibility, Governance and Sustainability* 1 (2010): 145.

6 Among examples of legislative reform, the European Union’s Accounts Modernization Directive requires companies to produce a ‘fair review of the business of the company’, including a discussion of ‘environmental matters’ using non-financial key performance indicators ‘to the extent necessary for an understanding of the development, performance or position of the business of the company’: Directive 2003/51/EC of 18 Jun. 2003, OJ 2003, L 178/16 Art. 14.

7 E/CN.4/Sub.2/2003/12 (2003).

current practices while aiming to avoid drastic changes in corporate practices. The sustainability concept itself is perhaps partly to blame for the lack of progress. Part of sustainability's appeal is its potential ambiguity and open-endedness, enabling numerous actors with divergent objectives to embrace it without being held measurably accountable.<sup>8</sup>

If sustainability is to become a meaningful framework for corporate social and environmental responsibilities, its principles and methods must be elaborated and refined. For example, how should dealing with climate change become translated into a credible environmental performance standard for business? In turn, company law must be opened to the sustainability agenda through rigorous changes, spanning board's fiduciary duties, shareholder rights, corporate reporting, co-determination, and much more. Thereby, the very purpose of the post-modern corporation will unify the public and private interests into a firm managed sustainably for long-term prosperity and ecological health.<sup>9</sup> This may seem improbable from our vantage point today, but the history of law reform in many countries shows that what was once unimaginable can eventually become taken for granted.

Given the importance and urgency of these issues, we must thank and congratulate the leadership and fine work of Professors Beate Sjøfjell and Tineke Lambooy, who have compiled this special edition of *European Company Law*. As part of their work towards the 'Sustainable Companies' project funded by the Research Council of Norway, they have masterfully assembled and edited a very wide range of contributions from scholars in Europe and other parts of the world, who address both common and jurisdictionally specific challenges in uniting sustainability and company law. In addition, through their individual chapters, Professors Sjøfjell and Lambooy also share with readers their own insights about some of these challenges.

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In view of the size of this Special Issue on Corporate Social Responsibility the Editorial Board has decided to combine Issues 2 and 3 of *European Company Law* 2011 into one Issue.

<sup>8</sup> See Andrew D. Basiago, 'Methods of Defining Sustainability', *Sustainable Development* 3 (1995): 109; Keith Pezzoli, 'Sustainable Development: A Transdisciplinary Overview of the Literature', *Journal of Environmental Planning and Management* 40, no. 5 (1997): 549.

<sup>9</sup> See further Michael E. Porter & Mark R. Kramer, 'Strategy and Society: The Link between Competitive Advantage and Corporate Social Responsibility', *Harvard Business Review* (December 2006): 1.