

The Jigsaw Puzzle of Sustainability

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We are entering a new era in the discussion of how to best regulate companies and markets. Although much energy is currently spent on how to promote growth and 'business as usual', there are inspiring indications of a broader perspective. This is crucial, as getting back on the 'business as usual' track is a very certain path towards a very uncertain future. If we are to secure the very basis

of existence for ourselves, our children, and their children's children, there is no way around thinking in a new and more comprehensive manner about regulating companies, these all-important components of the market economies that we depend so heavily on.

With such fundamental challenges, there has arguably never been a more exciting time to be a company law scholar. Company law debate is no longer unanimously only about shareholders and their profit (as was the mainstream tendency for some years); instead, company law finds itself at the heart of a new debate on how to secure the sustainability of not only our companies, not only our economies, but also our social welfare systems and the environment – the very basis for all things.

Whether from a mainstream perspective shaken by financial crises or from an activist social or environmental perspective, the significance of promoting a broader long-term perspective is increasingly recognized. The Commission's Green Paper on Corporate Governance,¹ the report from the Reflection Group on the Future of EU Company Law,² and the Commission's Green Paper on corporate social responsibility (CSR)³ all show tentative tendencies towards a convergence of mainstream traditional economic goals and CSR into a common striving towards sustainability. In this lies the key to sustainability, for there is no single area of law – no one

measure – that can secure the basis of our existence. If we are to have a chance to avoid reaching the tipping point of climate change, to prevent dangerous and irreversible degradation of biodiversity and to achieve a development towards a world with enough fresh water, food, and breathable air for future generations, all regulatory means must be considered and no stone left unturned. Article 11 of the Treaty on the Functioning of the European Union (TFEU) encapsulates this necessity in its rule obligating EU institutions to integrate environmental considerations in all policies and activities, with the aim of sustainable development.

The international research project Sustainable Companies, unique in its focus on the hitherto mainly ignored area of company law, is illustrative of such a broader, more long-term, and inclusive approach.⁴ The goal of the project is to find out how to achieve sustainable companies, defined as companies that seek profit in such a way as to contribute towards the overarching goal of sustainable development understood as balancing economic and social development and environmental protection within the non-negotiable ecological limits of our planet. A significant part of our project is dedicated to identifying barriers and possibilities for promoting sustainable companies in core company law, group law, and accounting and auditing law.⁵ This will form the basis for the project's reform proposals.⁶ The focus of the project does not entail the rejection of other areas of law. Indeed, there should be no competition between different disciplines to solve the sustainability puzzle. All areas of law need to be considered in a holistic perspective, to ensure that they are not counterproductive to each other's goals but rather complement each other and all contribute to achieving the overarching goals of society.⁷

This Special Issue, heavily influenced by the Sustainable Companies project,⁸ starts out with a core company law and corporate governance issue and goes on to highlight a number of important

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1 Available at <http://ec.europa.eu/internal_market/company/docs/modern/com2011-164_en.pdf>, 21 Jan. 2012.

2 Available at <http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf>, 21 Jan. 2012.

3 Available at <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr/new-csr/act_en.pdf>, 21 Jan. 2012.

4 For more information about this Oslo-led project, see <www.jus.uio.no/ifp/english/research/projects/sustainable-companies/>, 21 Jan. 2012.

5 See B. Sjäffell, 'Regulating Companies as if the World Matters – Reflections from the Ongoing Sustainable Companies Project', *Wake Forest Law Review* (2012, forthcoming); University of Oslo Faculty of Law Research Paper No. 2011-35, <<http://ssrn.com/abstract=1964213>>, January 2012. Forthcoming publications from the project will include the mapping papers and in-depth cross-jurisdictional analyses of all three areas.

6 To be presented at our conference on 12–13 Nov. 2012, <www.jus.uio.no/ifp/english/research/projects/sustainable-companies/events/>, 21 Jan. 2012. A 2013 Special Issue of *European Company Law* will include an overview of reform proposals for a selection of jurisdictions as well as a synthesis of the project.

7 The Sustainable Companies project team also includes scholars in international public law and environmental law.

8 The lead editor for this Special Issue, Dr Tineke Lambooy, is a Member of the Sustainable Companies project team, as are a number of the authors.

surrounding areas impacting on the regulation of companies and their performance. We start with an article by the lead editor of this Special Issue, Dr Tineke Lambooy, on new obligations regulating the composition of the board, with relevance for the broader human rights and corporate responsibility discourse. We continue with Professor Celia Taylor's analysis of potentially very interesting developments in US securities law, relevant for all European companies listed on US stock exchanges. These are followed by Georgina Tsagas' and Jelena Stamenkova's illustrations of the close connection between company law, corporate governance, and securities law, discussing the Takeover Directive and the Prospectus Directive, respectively, and possible reforms to further promote CSR.⁹

The relevance of the Lisbon Treaty reform including the strengthening of Article 11 TFEU is illustrated in the following two contributions by Yulia Levashova and Dr Ottavio Quirico. The focus is on the important EU policy areas of foreign direct investment and the EU's common commercial policy and the role of CSR in these areas. We move on to two thought-provoking articles discussing important soft law developments, with Dr Surya Deva providing a critical analysis of the Guiding Principles on Business and Human Rights and their relevance for companies and Dr Andrew Johnston critically scrutinizing ISO 26000 and its attempt at giving 'Guidance on Social Responsibility' for organizations in general.

Initiatives by companies themselves are no less important, and the next two contributions have this as their topic. These are the reflection of two action research projects, where the researchers have worked together with companies, governments, and CSR initiatives. The first article, by Jure Zrilc, presents a brief overview of some of the most relevant CSR self-assessment tools for companies, highlighting one central self-evaluation tool based on the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. The second, by Katarzyna Kryczka, Sarah Beckers, and Dr Tineke Lambooy shows us contours of the landscape of emerging mechanisms for defining and upholding corporate responsibility norms related to human rights, when operating in fragile states.

The role of shareholders and financial markets is crucial to the achievement of sustainable companies. We are happy to include two articles on socially responsible investment (SRI): Professor Benjamin Richardson investigates the influence of SRI on the social and environmental impact of the market and corporate behaviour, and Eva van der Zee explores the scope of SRI responsibilities of sovereign wealth funds.¹⁰

We conclude our Special Issue with two conference reports, the first by Jure Zrilc showcasing the research presented at the first Sustainable Companies Conference (August 2011)¹¹ and the second by Mary Varner on a Ius Commune Research School Conference Workshop on CSR (November 2011) presenting and discussing

research projects with relevance for the application of the Ruggie Framework.

It is vital that sustainable development be the guiding principle for all regulatory efforts, whether private or public, soft or hard law, voluntary or obligatory. The inspiring contributions of this Special Issue pinpoint missing pieces of the universal jigsaw puzzle of sustainability and serve to illustrate the potential of the regulation of companies and markets in contributing to sustainability as the new law.

This Issue of *European Company Law* is a Special Issue on Corporate Social Responsibility (CSR) and Socially Responsible Investment (SRI). The Editorial Board highly appreciates the work done by Tineke Lambooy, Beate Sjøfjell, and Mary Varner, who as special editors prepared and coordinated this Issue. Many of the contributors to this Special Issue participate in the research project Sustainable Companies, Faculty of Law, Oslo University, headed by Beate Sjøfjell. This project financed the proofreading of this Special Issue. More information is available at www.jus.uio.no/ifp/english/research/projects/sustainable-companies/.

⁹ Interested readers may note the seminar to be held in Oslo in June 2012 on the Takeover Directive; see website reference in n. 7 above.

¹⁰ A forthcoming Special Issue of the *International and Comparative Corporate Law Journal* (2012) contains other in-depth analyses of SRI developments.

¹¹ Other forthcoming Special Issues of the *International and Comparative Corporate Law Journal* (2012) will bring a selection of papers from the conference. See also www.jus.uio.no/ifp/english/research/projects/sustainable-companies/publications/, 21 Jan. 2012.