

Reforming Company Law for Sustainable Companies

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COMPANY LAW CAN MAKE A DIFFERENCE



This Special Issue of European Company Law is the third special issue since 2011 on the subject of Corporate Social Responsibility (CSR) and Socially Responsible Investment (SRI).¹ We can observe that from year to year, more and more CSR and SRI topics are gaining a foothold with

companies and investors who want to make a difference. Interesting approaches can be found in the strategies of Unilever and Puma, multinationals which aim to reduce the environmental impacts of their core activities, measure the impacts and report on them.² Other trendsetting examples are displayed by some banks and institutional investors. They use sustainability standards in their financing and investment decisions and/or withdrew investments from companies that did not act responsibly (e.g., Triodos Bank, FMO bank, the Norwegian Government Pension Fund Global and Dutch PGGM).³ Approximately 200 multinational companies aspiring to become sustainable companies collaborate in the World Business Council for Sustainable Development.⁴ In the USA, groups of companies have urged the government to adopt climate change policies.⁵

Legislators are taking part in these developments but they are hardly ever the frontrunners. Here and there, we see legislative developments that support CSR and SRI, such as the adoption of the European Timber Directive which requires the use of legal timber in the EU.⁶ Another significant example can be found in the Indonesian corporate law and investment law which since 2007 oblige natural resource companies to apply CSR.⁷ Norway was the trendsetter in introducing the mandate that both genders be included on corporate boards both as a corporate governance initiative and to resolve the gender inequality in business.⁸ This example is now followed by the EU Commission and various EU Member States.⁹ In the Netherlands, since 2008, the corporate governance code has included the topic of CSR explicitly as a norm for board members,¹⁰ and in the UK, far-reaching anti-corruption legislation was implemented through the UK Bribery Act and is also being effectively enforced.¹¹ Various EU Member States such as France, Sweden and Denmark have adopted new requirements on environmental reporting by companies and corporate groups (additional to the reporting requirements which apply in all EEA states pursuant to the EU Modernization Directive).¹²

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1 European Company Law [2011] 8 (2/3) and European Company Law [2012] 9 (2).

2 Unilever, 'Home page' (date unavailable) www.unilever.com; Puma, 'Home page' (date unavailable) www.puma.com, both (accessed 15 Jan. 2014).

3 Triodos Bank (Netherlands), 'Home Page' (date unavailable) www.triodos.nl; FMO - Entrepreneurial Development Bank (Netherlands), 'Home page' (date unavailable) www.fmo.nl; PGGM, 'Home Page' (date unavailable) www.pggm.nl; Norwegian Government Pension Fund Global, 'Home Page' (date unavailable) www.regjeringen.no; all websites (accessed 15 Jan. 2014).

4 World Business Council for Sustainable Development, 'Home Page' (date unavailable) www.wbcsd.org (accessed 15 Jan. 2014). In 2009, the WBCSD produced 'Vision 2050', 'a report that plots a pathway to a world in which 9 billion people live well and within the boundaries of the planet' World Business Council for Sustainable Development, 'Vision 2050: The new agenda for business' (2009) available at: <<http://www.wbcsd.org/pages/edocument/edocumentdetails.aspx?id=219&nosearchcontextkey=true>> (accessed 19 Mar. 2014). A framework for action is called 'From Vision 2050 to Action2020' which aims 'to rally the efforts of business to deliver on the economic, environmental and social promises made in Vision 2050'. World Business Council for Sustainable Development, 'Action2020' available at: <<http://www.wbcsd.org/action2020.aspx>> (accessed 19 Mar. 2014).

5 See the contribution of Marcia Narine in this Special Issue.

6 Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 Oct. 2010 laying down the obligations of operators who place timber and timber products on the market [2005] OJ L 295. Y. Levashova, *How effective is the New EU Timber Regulation in the Fight against Illegal Logging*, 20 (3) RECIEL (2011).

7 Indonesian Company Law 2007, Art. 1 and 74; Indonesian Investment Law 2007, Art. 15 and 17, and Indonesian State-Owned Enterprises Law 2003, Art. 88.

8 B. Sjöfjell & H.B. Reiersen, *Report from Norway: Gender Equality in the Board Room*, 5 European Company L. 191–195 (2008).

9 T.E. Lambooy, *30% Women on Boards: New Law in the Netherlands*, 9 (2) ECL (2012).

10 T.E. Lambooy, *Corporate Social Responsibility - Legal and semi-legal frameworks that support CSR* 107–143 (Kluwer 2010).

11 UK Anti-Bribery Act 2010. Examples with regard to the Act's enforcement can be found in: thebriberyact.com.

12 Commission, 'Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups' (Staff Working Draft) S7WD (2013) 127

At the international level, the CSR standards have been tightened. In 2011, an updated version of the OECD Guidelines for Multinational Enterprises was issued,¹³ the UN Guiding Principles on Business and Human Rights were launched,¹⁴ the ISO 26000 operational CSR guidelines became available,¹⁵ and the EU Commission published a new definition of CSR promoting CSR as the standard, not just a voluntary choice.¹⁶ In 2012 and 2013, the international corporate and policymakers' attention was mainly directed at non-financial corporate reporting. This is regarded as an important instrument to assist companies in taking the sustainability path. The US Dodd-Frank Financial Reform Act required companies to disclose information on payments to governments and to conduct due diligence to avoid purchasing 'conflict minerals'.¹⁷ Similar provisions were introduced at the EU level in the New Accounting Directive.¹⁸ The EU Commission also prepared a Proposal for a Directive on Non-Financial Reporting.¹⁹ Furthermore, the International Integrated Reporting Council drew attention by starting integrated reporting pilots with approximately eighty multinational companies,²⁰ and the Global Reporting Initiative, the organization which has established global sustainability reporting guidelines that are indeed employed by many companies worldwide, launched its fourth generation set of reporting guidelines, the G4.²¹

Law firms, the large accounting firms, management consultants and investment banks are discovering CSR and SRI, developing their advisory skills, participating in conferences, and providing client brochures on various topical items.²²

Despite these positive developments, according to the Intergovernmental Panel on Climate Change (IPCC) reports, the annual rise in temperature is still increasing and climate change is already affecting the local climate and causing harm to crops, sea life, and people.²³ The loss of biodiversity and ecosystems is increasing and also other planetary boundaries are being surpassed.²⁴ Corporate lawyers and for that matter, national policy makers, may not have scientific literature on the planetary boundaries on their reading list. However, for corporate advisers, it is important to keep track of these developments because they matter to their clients, and indeed to all of us. That is why we draw explicit attention to these studies in this Special Issue and interpret their meaning in the context of corporate law.²⁵

Corporate activities contribute to a large extent to climate change, the loss of biodiversity and the threat to ecosystems, directly through pollution, land conversion and the extraction and exploitation of raw materials in the production process, and indirectly through the impacts of the use and waste of products. The European Directive on Greenhouse Gas Emissions (GHG) has

final, 5, 49–54 eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SWD:2013:0127:FIN:EN:PDF (accessed 15 Jan. 2014). UNEP et al., 'Carrots and Sticks: Promoting Transparency and Sustainability: An update on trends in Voluntary and Mandatory Approaches to Sustainability Reporting' (May 2010) www.unep.fr/shared/publications/pdf/WEBx0161xPA-Carrots%20&%20Sticks%20II.pdf (accessed 15 Jan. 2014). Regarding the Modernisation Directive: T.E. Lambooy & N. van Vliet, *Transparency on Corporate Social Responsibility in Annual Reports*, 5 (3) European Company L. 127–135 (2008).

13 The 2011 version of the OECD Guidelines for Multinational Enterprises emphasizes the need for more transparency and responsibility of companies toward managing their impact as well as the impact which they have through their business relations and supply chains on environmental and social issues, including GHG emissions. See Chapter VI about Environment of the 2011 OECD Guidelines for Multinational Enterprises and Commentary, paras. 65–68. OECD Guidelines for Multinational Enterprises 2011 www.oecd.org/daf/inv/mne/48004323.pdf (accessed 15 Jan. 2014).

14 Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework: Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises', A/HRC/17/31 (21 Mar. 2011).

15 ISO 26000:2010 www.iso.org/iso/home/standards/iso26000.htm (accessed 15 Jan. 2014).

16 Commission, 'A renewed EU strategy 2011–14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 6 eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF (accessed 15 Jan. 2014).

17 Sections 1502 and 1504. See C. Taylor, *New Disclosure Requirements under the Dodd-Frank Financial Reform Act: A Move towards Greater Transparency*, 9(2) European Company L. 64–69 (2012).

18 Directive 2013/34/EU of the European Parliament and of the Council of 26 Jun. 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 Text with EEA relevance [2013] OJ L 182/19, Preamble para. 44 as well as Art. 48.

19 Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups' (Proposal) COM (2013) 207 final eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0207:FIN:EN:PDF (accessed 15 Jan. 2014).

20 International Integrated Reporting Council, 'IIRC Pilot Programme' (date unavailable) www.theiirc.org/companies-and-investors/ (accessed 15 Jan. 2014).

21 Global Reporting Initiative, 'G4 Sustainability Reporting Guidelines' (date unavailable) www.globalreporting.org/reporting/g4/Pages/default.aspx (accessed 15 Jan. 2014).

22 See eg. websites of Loyens & Loeff, Allen & Overy, E&Y, PWC, KPMG, McKinsey & Company, Goldman Sachs.

23 See eg. IPCC, 'Working group I contribution to the IPCC fifth assessment report climate change 2013: The physical science basis', Chapter 14, 37–61 www.ipcc.ch/report/ar5/wg1/#.UpcEWMTD_T8 and IPCC Press Release, 'Headline Statements from the Summary for Policymakers', (27 Sep. 2013) www.ipcc.ch/news_and_events/docs/ar5/ar5_wg1_headlines.pdf (accessed 15 Jan. 2014).

24 See notably the seminal article J. Rockström et al., 'Planetary boundaries: exploring the safe operating space for humanity' (2009) 14(2) *Ecology and Society* 32 www.ecologyandsociety.org/vol14/iss2/art32/ (accessed 31 Mar. 2014) and A. Wijkman and J. Rockström, *Bankrupting Nature: Denying our Planetary Boundaries* (Earthscan/Routledge 2012).

25 See the contribution of Beate Sjöfjell and Jukka Mähönen in this Special Issue.

not (yet) achieved the desired results. Pursuant to this Directive, national *environmental* laws were enacted.²⁶ They imposed rules in relation to the GHG emissions of industrial sites rather than prescribing to companies and corporate groups to implement a climate change reduction programme in their worldwide organization. This EU approach has proved to be imperfect. In order to generate success in the required transition towards sustainable corporate activities, companies need to integrate goals for reducing GHG emissions into their core strategy.

If corporate lawyers, accountants, management consultants and investment bankers integrate the CSR and SRI perspective in their (strategic) advice, they can assist companies and their financiers in making a difference. This Special Issue serves the purpose to inform about new legislative developments and thoughts pertaining to the transition of companies into sustainable companies.

Legislators and public policymakers can also play an important role as they can influence the legal framework in which companies and their advisors operate. One of the most neglected areas in this respect is company law, the cornerstone of the functioning of companies. The *Sustainable Companies Project*,²⁷ an extensive research project initiated by Professor Beate Sjåfjell of Oslo University, has worked on this theme for the last four years (2010–2014). In the project, the company laws of twenty-five jurisdictions were analysed to find out to what extent these laws support or obstruct companies in integrating environmental sustainability in their core business strategy, structures and activities. The case in point and the main research questions are (i) *whether there are any barriers in corporate law that inhibit companies from mitigating climate change, and (ii) which opportunities or best practices in legal approaches are available*. To answer these questions, the research group had to find out what the corporate law in the selected jurisdictions stipulates about the duties and the rights of companies, corporate groups, their legal structure, the corporate governance instruments, and what rules apply to group accountability and liability. The methodology employed consisted of empirical and theoretical research supplemented by input and feed-back acquired in multiple academic expert meetings, workshops and conferences. A final conference was organized in December 2013, where the participants were challenged to present law reform proposals. The conference resulted in a rich collection of proposals, of which a number are included in this Special Issue.²⁸ They can inspire policymakers and legislators in developing the path forward.

The reading order of this Special Issue is as follows: the first contributions sketch the sustainability issues on a general company law level. Beate Sjåfjell & Jukka Mähönen present the outline of an innovative proposal to reform Nordic company law in order to make companies keep their activities within the planetary boundaries, while Andrew Johnston shares ideas on how UK company law and corporate governance could be reformed. Whereas Sjåfjell & Mähönen see the Nordic region as a possible trendsetter, Johnston is clear on the necessity of EU intervention. Carol Liao and Tineke Lambooy & Aikaterini Argyrou discuss new hybrid corporate models suitable for social entrepreneurship, and also share proposals to amend the corporate purpose in such a way that it embraces sustainability. Janet Dine explains how modern Albanian corporate law contains enterprise liability for corporate groups. She argues that if other jurisdictions follow this, more transparency and accountability would be created concerning multinational companies.

The second topic concerns governance: how can we change current corporate law and practices in order to reduce ecological risks? María Ángeles Fernández-Izquierdo, María Jesús Muñoz-Torres & Idoya Ferrero-Ferrero introduce an elaborate model for CSR and financial risk management. Mark Taylor explores how CSR due diligence can be imposed as a means to avoid negative impacts of (new) corporate activities. He also explains that a properly conducted due diligence assessment could constitute a defence against claims from stakeholders. Another approach to produce business decisions that are within the planetary boundaries would be to include more stakeholders in corporate decision-making bodies. Vincenzo Bavoso, Shann Turnbull and Lorraine Talbot, each submit original ideas with this aim. During the last decade, shareholders were regarded as the gate keepers for responsible company management. Blanaid Clarke, Anita Halvorsen and Tomasz Regucki offer their critique on this view from different perspectives and suggest changes.

The third group of reform proposals deal with environmental assessments, annual reporting, auditing standards and assurance. Charlotte Villiers explains the concept of integrated reporting as a sustainable development mechanism. She warns against capture by market actors and urges greater involvement of stakeholders, NGOs and civil society. David Monciardini shares his ideas on how to improve the current and forthcoming EU legislation on non-financial annual reporting. Jianbo Lou advocates the mandating of environmental auditing at the closure of business. Yuri Biondi reveals the flaws in the current accounting standards and practice on the point of contingent environmental risks and liabilities.

26 Council Directive 2003/87/EC of 13 Oct. 2003 that establishes a scheme for greenhouse gas emission allowance trading within the Community (Community scheme) in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner [2003] OJ L 275/32. This Directive was amended in 2009 by Council Directive 2009/29/EC of 23 Apr. 2009 OJ L 140/63 eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:140:0063:0087:en:PDF (accessed 15 Jan. 2014).

27 See for details regarding the conference's proceedings and outcome the website of the SCP: www.jus.uio.no/ifp/english/research/projects/sustainable-companies/ (accessed 31 Mar. 2014).

28 The conference materials, including videos of most presentations and all panel debates are available at the conference website via the password (bit.ly/H6VzPa).

Raphael Heffron contends that it is necessary that (energy) companies disclose the financial support that they receive from governments, directly through subsidies or indirectly through tax cuts. Amanda Sonnerfeldt discusses how to regulate third party assurance engagements on sustainability reports. And last but not least, not in the area of corporate law but on the topic of procurement law, Marcia Narine presents proposals on how to use procurement rules in the USA to effectuate policy changes in the USA in order to reduce climate change emissions.

Enjoy these interesting contributions from around the world on the subject matter of creating sustainable companies! We are happy to receive comments and questions.

This Issue of *European Company Law* is the third Special Issue on Corporate Social Responsibility (CSR) and Socially Responsible Investment (SRI). The Editorial Board highly appreciates the work done by Beate Sjøfjell, Tineke Lambooy and Jukka Mähönen, who as special editors prepared and co-ordinated 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. More information is available at www.jus.uio.no/ifp/english/research/projects/sustainable-companies/.