

Sustainability and Company Law: A Long Path to Walk

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As is very clear to any scholar or practitioner, over recent years sustainability has been assuming increasing importance for Company Law.

In particular, in the last twelve months several interventions or proposals for interventions have been raised by the European Institutions in order to increase the sustainability rate of European Company Law. Naturally, the subject is already present in many pieces of legislation currently in force, above all the Non-Financial Reporting Directive¹ and the consolidated version of the Shareholder Rights' Directive.² Both of them seem nonetheless to be more referable to the voluntary area of Corporate Social Responsibility, rather than to *duties* linked to a *needed* sustainability promotion. Besides these Directives, and the current projects for their amendment, the subject is also present in several documents and papers issued by different branches of the European Commission; they have a specific focus on the impact of new

technologies on social economy³ and several aspects of sustainable finance. In the latter area, the EU is developing the so-called 'EU Green Bond Standards', following the lines anticipated in the European Green Deal, and has already published the 'Disclosure' and 'Taxonomy' regulations,⁴ mentioned as priorities in the 'Action plan on financing sustainable growth', of March 2018.⁵

However, the most relevant document that has been released during the last months is certainly the final report of the 'Study on directors' duties and sustainable corporate governance', prepared by EY for the European Commission, and published at the end of July 2020.⁶ The Report and its Annexes are actually very detailed and comprehensive, but we can summarize the ultimate aim of the document by saying that it focuses on company directors' attitudes to managing their businesses with a short-term view, while a long-term approach should be used, as it is held to be more likely to promote a 'sustainable value creation'.

As was easily predictable, the report met with harsh criticism from scholars and practitioners; it has been argued that it encompasses major methodological issues,⁷ and that the conclusions are somewhat ideologically driven.⁸ Based on that study, the EU has nevertheless started a public consultation – currently (February 2021) just concluded⁹ – on several of the issues dealt with in the report, with a view to making it the foundation of a new initiative. It would improve a company's attitude to act focussing on long-term sustainable value creation, rather than short-term benefits. In the view of the European Commission, this should 'better align the

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1 Directive 2014/95/EU.

2 Directive 2007/36/EC, as amended by Directive (EU) 2017/828.

3 <https://ec.europa.eu/docsroom/documents/43221?locale=en>.

4 Document 'New technologies and digitization: opportunities and challenges for the social economy and social enterprises', Elaborated by Q-PLAN International, Manchester Institute of Innovation Research, UNU-MERIT Sept. 2020, for European Commission, DG for Internal Market, Industry, Entrepreneurship and SMEs.

5 Regulations (EU) 2019/2088, and (EU) 2020/852, respectively. On this topic see in this issue of ECL, C. H. A. Van Oostrum, *Sustainability Through Transparency and Definitions: A Few Thoughts on Regulation (EU) 2019/2088 and Regulation (EU) 2020/852*.

6 <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en>. On this topic, and for a critical review, see in this issue of ECL, F. Möslein & K. Engsig Sørensen, *Sustainable Corporate Governance: A Way Forward*.

7 Confer the feedback from Professor Alex Edmans, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/F556360>.

8 See J. C. Coffee jr., *The European Commission Considers 'Short-Termism' (And 'What Do You Mean By That?')*, <https://ecgi.global/news/european-commission-considers-%E2%80%9Cshort-termism%E2%80%9D-and-%E2%80%9Cwhat-do-you-mean-%E2%80%9D>.

9 Such public consultation has itself been criticized for the wording of many questions, that would not allow accurate answers. See European Company Law Experts Group (ECL), *EC Corporate Governance Initiative Series: Comment by the European Company Law Experts Group on the European Commission's Consultation Document 'Proposal for an Initiative on Sustainable Corporate Governance'*, <https://www.law.ox.ac.uk/business-law-blog/blog/2020/12/ec-corporate-governance-initiative-series-comment-european-company>.

interests of companies, their shareholders, managers, stakeholders and society', and, in this way, companies would be helped 'to better manage sustainability-related matters in their own operations and value chains as regards social and human rights, climate change, environment, etc.'¹⁰ In other words, such an attitude should create a virtuous circle for the benefit of society as a whole, fed by this (mandatorily) enlightened new sustainable attitude enacted by companies.

I am not going to discuss here the outcome of the study, nor address the cited criticism raised against the report. I believe that it addresses issues of actual and extreme relevance, but this closer focus on long-term attitude is just a part of the bigger picture. Even recognising that a long-term approach is more likely to lead to a 'common value' creation than a short-term attitude, this does not mean that a similar value creation is impossible in many short-term situations, and, what is worse, that a long-term approach does not prevent, by itself, a selfish attitude by the company and its directors. Long-termism does not seem to be the panacea for the unsustainability of company law. It is one of the remedies, even among the most effective, but not the only one.

Besides long-termism, another key issue is currently debated among scholars all over the world, i.e., the purpose of the company.¹¹ Naturally, the discussion on short- and long-termism can also be seen as a part of this debate, but the basic question is 'what are companies for?',¹² and naturally, along with this, the different but closely related issue of whose interests the company directors are supposed to serve.

In my view, the entire building of sustainability must be founded on the company's purpose. The point is that these purposes seem to

be different from Member State to Member State,¹³ and it seems at least debatable that the European Union, whose intervention is based on the principle of subsidiarity, has the power to legislate in this area. It is my personal belief – for what it is worth – that business organizations should have, from a legal point of view, a neutral purpose, their members being completely free to decide which goal to pursue, with no legal constraint either in the sense of profit maximization, or of a mandatorily-oriented focus on external constituencies. Regardless of that, in the EU there are some legislations focussing only on the shareholders' value, and others that also centre their attention on other stakeholders.

Naturally, in these years, we are also encountering great novelties in the field of company's purposes: the new Belgian *Code des sociétés et des associations* explicitly mentions the profit as one of the purposes of the company¹⁴; the outcome of the *Loi PACTE* in France,¹⁵ with the amendment of Arts. 1833 and 1835 of the *Code civil*, introduced a principle of *enlightened shareholder value* similar to the well-known section 172 of the UK's Companies Act 2006,¹⁶ and the possibility of including in a company's social object also the mention of the principles to be pursued in its management.¹⁷ These matters are naturally of the utmost importance; and even if they seem to have different foreseeable impacts in practice, they are the expression of a very clear trend towards an increased focus on the impact of a company's function, beyond its own members and shareholders. And this has naturally to do with sustainability in its generally recognized fields of action, i.e., environmental, social, and economic,¹⁸ as these subjects may now enter with full legitimation in a company's articles.

10 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance?mc_cid=664fe83cf0&mc_eid=8f12b1e180.

11 The debate is somehow a 'classic' for company law, and it has been re-launched by the well known Business Roundtable Statement, signed by 181 CEOs of major American companies on 19 Aug. 2019, <https://opportunity.businessroundtable.org/ourcommitment/>. For different positions on the issue, see L. A. Bebchuk & R. Tallarita, *The Illusory Promise of Stakeholder Governance*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544978; A. Ferrell, H. Liang & L. Renneboog, *Socially Responsible Firms*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2464561; L. Strine, *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3461924; C. Mayer, *Shareholderism Versus Stakeholderism – a Misconceived Contradiction. A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617847.

12 The question has been having a strong impact outside the academia after the Business Roundtable Statement, and appeared as a main title for the edition of 22 Aug. 2019 of the periodical *The Economist*.

13 See H. Fleischer, *Gesetzliche Unternehmenszielbestimmungen im Aktienrecht – Eine vergleichende Bestandsaufnahme*, 46 *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 411–425 (2017).

14 Article 1:1: 'Une société est constituée par un acte juridique par lequel une ou plusieurs personnes, dénommées associés, font un apport. Elle a un patrimoine et a pour objet l'exercice d'une ou plusieurs activités déterminées. *Un de ses buts est de distribuer ou procurer à ses associés un avantage patrimonial direct ou indirect*'.

15 LOI n. 2019-486, 22 May 2019, on the growth and the transformation of enterprises. Art. 1833 states: 'Toute société doit avoir un objet licite et être constituée dans l'intérêt commun des associés. La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité.' Art. 1835: 'Les statuts doivent être établis par écrit. Ils déterminent, outre les apports de chaque associé, la forme, l'objet, l'appellation, le siège social, le capital social, la durée de la société et les modalités de son fonctionnement. Les statuts peuvent préciser une raison d'être, constituées des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité'. On both the articles, see P. H. Conac, *Le nouvel article 1833 du Code civil français et l'intégration de l'intérêt social et de la responsabilité sociale d'entreprise: constat ou révolution?*, *revistaodc.eu* 497 (2019); I. Urbain-Parleani, *L'article 1835 et la raison d'être*, *revistaodc.eu* 533 (2019).

16 See G. Tsagas, *Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2996090. See also, for an approach similar to the UK's one, Art. 64 of Portuguese *Código das sociedades comerciais*, since 2006: '1 – Os gerentes ou administradores da sociedade devem observar: a) Deveres de cuidado, revelando a disponibilidade, a competência técnica e o conhecimento da actividade da sociedade adequados às suas funções e empregando nesse âmbito a diligência de um gestor criterioso e ordenado; e b) Deveres de lealdade, no interesse da sociedade, atendendo aos interesses de longo prazo dos sócios e ponderando os interesses dos outros sujeitos relevantes para a sustentabilidade da sociedade, tais como os seus trabalhadores, clientes e credores.'. See on that R. Costa, *Deveres fundamentais, in Código das sociedades comerciais em comentário*, Vol. I, 757 ss (J. Coutinho de Abreu coord., 2d ed., Almedina: Coimbra 2017).

17 Principles that could be of social, environmental, solidaristic nature, for instance: see Urbain-Parleani, *supra* n. 15.

18 See B. Sjäffell & C. M. Bruner, *Corporations and Sustainability*, in *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* 3 ss (Eid., Cambridge University Press 2019).

In this situation, however, we can also distinguish some national experiments where a decision was made to pursue a different path, other than generally relaxing the rules concerning a company's purpose. They preferred, instead, to create forms of business organizations that are specifically devoted to the pursuit of a common benefit,¹⁹ along with the profit. Even if such an attitude may seem at a glance even more respectful of external constituencies, and therefore ultimately of sustainability, than the one we have just mentioned, this is not the case. By establishing specific business forms with a 'sustainable' purpose, the States de facto reaffirm that this 'sustainable' attitude is possible *only* in those special business forms, while for the remaining ones, that are reasonably going to remain the overwhelming majority, there *must* be a 'business as usual' approach.²⁰ This is clearly against a comprehensive and integrated approach towards sustainability.

In addition, whatever normative attitude is adopted by the – national or European – lawmakers, the key issue is still different, and deals with the enforceability of the actual pursuit of the common benefit purposes by a company's management. In fact, on the one hand, there is in no European State, to the best of my knowledge, a specific title enabling the external beneficiaries to challenge directors' decisions when they are not compliant with the pursuit of the common benefit on which the company is supposed to be focused. And, on the other hand, a legal provision enabling such a right to challenge the decisions, or to promote lawsuits against the directors based on their liability, is hard to formulate, as it involves as a precondition the detection of the actual level of balance in directors' activities, between the pursuit of both profit, and common benefit; this is naturally very difficult to assess. This is, in my opinion, the very point of intersection of the debate on company purpose and the EY Report, and the promotion of a more respectful attitude towards sustainability must necessarily start with a reflection on the former.

The EY report, and the subsequent remarks that – with different approaches and degrees of appreciation – have been made by scholars and practitioners, and also by the European lawmaker itself,²¹ have however an unquestionable merit: they have made it

clearer than ever that solutions based merely on disclosure, with little or no impact on the actual management duties of directors, are unlikely to promote true sustainability 'in action'. This leads to the need to re-think the general approach to sustainability, to understand whether some of the specific areas of interest for sustainability are currently in peril to an extent that justifies a strong normative action in order to preserve them. Such a strong normative intervention would naturally pose constraints and, at least in the short-term, higher costs for the companies – in terms of compliance with mandatory norms, or of the duty to execute an environmental due diligence, for instance – but an intervention in the field of environmental sustainability seems no longer delayable any longer. This does not mean that the social and economic profiles are less relevant²²; simply, that the planetary boundaries are currently imposing mandatory interventions that are needed to prevent further natural disasters, whose impact would be on society as a whole.²³ The duty of the lawmakers in this field is not that different from the one that they have in the current pandemic era; they must resist the temptation to think that the protection of our environment is less urgent than protecting people from the Coronavirus.

On the opposite side of the fence, companies must acquire awareness that a paradigm shift is needed when it comes to the environment. It might be hard, but this, along with the issues linked to economic and, above all, social sustainability, must be addressed by means of a long-term education process.

The founding idea of the Jean Monnet Chair 'Business Law in the European Union and Sustainable Economy' (BLEUSE)²⁴ which I have been granted, and that will be running at the University of Macerata, Department of Law, until August 2023, is precisely this. Focus on education for sustainability is needed, and it is not possible to discuss and analyse sustainability in economic development through the lens of just one specific area. For this reason, many areas besides Company Law are included in the Chair even extending beyond a strictly legal perspective.²⁵ Every reader is invited to discover more on the Chair's website, and to participate in the events we are going to organize. Please be assured that you and your proposals will always be more than welcome.

19 This is the case of Italian *Società benefit*, for instance. For a comprehensive report, see G. Riolfo, *The New Italian Benefit Corporation*, 21 Eur. Bus. Org. L. Rev. 379 ss (2020). For the situation in The Netherlands, with a comprehensive focus on the definition of specific social business forms, see in this issue of ECL T. Lambooy, A. Argyrou & A. Bolhuis, *A Tailor-Made Legal Form for Social Enterprises in the Netherlands on Its Way*.

20 See more extensively on Italian case, A. Bartolacelli, *The Unsuccessful Pursuit for Sustainability in Italian Business Law*, in B. Sjäfjell & C. M. Bruner, *The Cambridge Handbook*, supra n. 18, at 295. On the topic, more in general, see also C. Liao, *Social Enterprise Law: Friend or Foe to Corporate Sustainability*, supra n. 18, at 655.

21 See, <https://www.europarl.europa.eu/news/en/press-room/20201211IPR93636/sustainability-businesses-interests-must-align-with-society-s-interests>.

22 In particular, as far as economic sustainability is concerned, it seems that the issue is at large present in general Enterprise Law provisions. However, we must underline that the wide diffusion of low-capital company forms all over Europe is likely to affect the economic sustainability of the system as a whole in the case of chains of failures; see A. Bartolacelli, *Capital Requirements and the Abuse of Companies*, in *Abuse of Companies* 179 ss (H. S. Birkmose, M. Neville & K.Engsig Sorensen, Wolters Kluwer 2019).

23 See Sjäfjell & Bruner, supra n. 18.

24 Chair website: www.unimc.it/bleuse.

25 Besides scholars in the fields of Constitutional, Administrative, Agricultural, Comparative and, naturally, Company Law, the Chair's key teaching staff also includes a Philosopher, an Economist and an Historian. The key teaching staff is made up of the author, Profs. Janet Dine (Queen Mary – University of London), Christopher Bruner (University of Georgia), Chiara Bergonzini, Ninfa Contigiani, Chiara Feliziani, Benedetta Giovanola, Pamela Lattanzi, Francesca Spigarelli and Laura Vagni (all from the University of Macerata).