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# Corporate Purpose and Stakeholder Value - Historical, Economic and Comparative Law Remarks on the Current Debate, Legislative Options and Enforcement Problems -

Law Working Paper N° 690/2023
March 2023

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Max Planck Institute for Comparative and International Private Law and ECGI

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## Abstract

One of the oldest corporate law issues – for whom is the corporation managed? – has become one of the hottest public policy issues of corporate law. The traditional idea, especially in the USA, is one of profit generation for shareholders (shareholder value). The new trend holds instead that the purpose of companies is to produce solutions to problems of people and planet and in the process to produce profits. This has been accompanied by a vivid battle between the shareholder value theory and the stakeholder value theory. For financial institutions and other regulated companies, the regulators see the primary objective of corporate governance in safeguarding stakeholders' interest in conformity with the public interest on a sustainable basis. Historically, state concessions for corporations were granted only if a public utility could be established. Yet the concession system faded away, and the targeted pursuit of general interests was assigned no longer to stock corporations under stock corporation law, but to antitrust law, securities regulation and other laws. Traditional economic theory defends the primacy of the shareholder as the most efficient operating principle, one which leads to value creation for all stakeholders of the company, whereby tax and transfer systems can be used to redistribute economic value to other stakeholders. From the side of behavioural economics and the social sciences, the main criticism is the externalisation of costs and damages as projected onto stakeholders other than the company and the shareholders. With the ESG movement, the development of an indirect pursuit of general aims seems to reverse the historical development and challenges legislators. This is exemplified by the French Duty of Vigilance Law of 2017, the French Loi Pacte of 2019, the German Value Chain Diligence Law of 2021 and the European Directive on Corporate Sustainability Due Diligence, forthcoming in 2023. These laws pose many problems as they lack clarity and thus carry uncertain practical and economics effects not only for enterprises but also for their suppliers and buyers (including SMEs) and for international and global competitiveness. For the legislators who want to promote stakeholder interests, the key problem is enforcement and enforceability. They have to choose from, or combine, various options: market discipline and self-regulation; codes with the comply and explain mechanisms; disclosure and auditing; and building an enterprise law with internal and external requirements. These requirements include: duties of the enterprise; rights, duties and organisation of the corporate organs; public enforcement by state agencies, public procurement mechanisms and the attorney general; and private enforcement by shareholders and possibly stakeholders.

Keywords: corporate purpose, corporate social responsibility, stakeholders, stakeholder capitalism, stakeholder governance, corporate governance, accountability, comparative law, legislative options

JEL Classifications: D21, G32, G34, G38, K22

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# Corporate Purpose and Stakeholder Value

## - Historical, Economic and Comparative Law Remarks on the Current Debate, Legislative Options and Enforcement Problems -

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## I. The current debate on corporate purpose, stakeholder participation and ESG

### 1. Corporate purpose: mandatory or optional?

"One of the oldest corporate law issues – For Whom Is the Corporation Managed? – has become one of the hottest public policy issues." With these words, *Edward B. Rock*, the designated rapporteur of the forthcoming new US Restatement of the Law of Corporate Governance,[1] began his reflections for the first Munich Lecture on Securities Regulation and Corporate Governance at the University of Munich.[2] The current protagonist of corporate purpose, with numerous widely acclaimed publications,[3] is the British economist *Colin Mayer*, who teaches at Oxford and, together with the British Academy,[4] has initiated a discussion that has spread far into the sphere of economy, society and politics.[5] *Mayer* opposes the prevailing idea, especially in the USA, of profit generation for shareholders (shareholder value) and the associated externalisation of negative effects by companies. This leads him to a new conception of profit, a corresponding method of accounting and the corporate goal: "The purpose of companies is to produce solutions to problems of people and planet and in the process to produce profits, but profits are not per se the purpose of companies. They are derivative from purpose …".[6] *Mayer*

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[1] American Law Institute, Restatement of the Law, Corporate Governance, Reporter: *Edward B. Rock,* New York University.
[2] *Edward D. Rock,* For Whom is the Corporation Managed in 2020? The Debate over Corporate Purpose, 76 Bus. Law 363 (2021).
[3] *Colin Mayer,* Prosperity, Better Business Makes the Greater Good, Oxford 2018; *Colin Mayer,* The Future of the Corporation and the Economics of Purpose, J. Mgt. Stud. 58 (2021), 887 et seq.; *Colin Mayer,* The Governance of Corporate Purpose, in: Ronald J. Gilson/Mats Isaksson/Erik Lidman/Johan Munck/Erik Sjöman, eds., Festskrift till Rolf Skog, Stockholm 2021, p. 913 also available as ECGI Law Working Paper No 609/2021 at < https://ssrn.com/abstract=3928613 >.
[4] *British Academy,* Research Project "Future of the Corporation", Reports available at < https://thebritishacademy.ac.uk/programmes/future-of-the-corporation/ >; *idem,* Policy & Practice for Purposeful Business, The final report of the Future of the Corporation programme, September 2021.
[5] *Thilo Kuntz,* Corporate Purpose, konzeptionelle Grundlagen, rechtshistorische und rechtsdogmatische Aspekte, ZHR 186 (2022) 652 at 653, contributes his large impact to the fact that his ideas are, with the help of the British Academy, marketed ("vermarktet") internationally with an apocalyptic campaign trumpeting a transformation of capitalism.
[6] *Mayer,* Prosperity (note 3), p. 109.

is not in favour of regulation; rather, companies should set themselves a corporate purpose in their articles of association. However, this is precisely what the legislature should prescribe for them,[7] and at least insofar it is mandatory The corporate bodies and functionaries must then act in a fiduciary capacity according to this corporate purpose.[8] At the same time, the legislature should make various legal forms with different corporate purposes available to companies,[9] including the legal form of a benefit corporation.[10] In this context, *Mayer* mentions foundations that support industrial companies such as Germany's Bosch and Bertelsmann and others.[11] But he is also thinking of alternative legal forms that give employees and other stakeholders or even certain shareholders stronger control rights.[12]

Similar ideas can be found in *Alex Edmans*, who uses the metaphor of a pie and calls his theory "pieconomics".[13] The pie represents the value an enterprise creates for society, i.e. value not only for shareholders and investors, but also for other stakeholders such as employees, customers, suppliers, the environment and governments. The aim is to increase the size of this pie (pie-growing) instead of distributing it differently (pie-splitting), as according to him has been the case in the past. *Andrew Keay*[14] has already at an earlier time presented his "entity maximisation and sustainability model (EMS)" and placed special emphasis on the enforcement[15] of this model. But he has been well aware of the difficulty of combining managerial discretion and accountability.[16]

But what could or should be the appearance of such corporate objectives? The UK Financial Reporting Council has included the following principle in the revised UK Corporate Governance Code 2018: "(T)he board should establish the company's purpose, values and

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[7] *Mayer,* Prosperity (note 3), p. 22, 24, 225, 232; *British Academy,* Final Report (note 4), p. 22: "Legislation would require companies to adopt purposes that aim to benefit people and planet as well as shareholders, and report on their success in so doing."
[8] *Ira Milstein/Colin Mayer/Jeff Gordon/Kristin Bresnahan/Ron Gilson/Marty Lipton,* Session I: Corporate Purpose and Governance, 31/3 Journal of Applied Corporate Finance 10 (2019).
[9] *Mayer,* Prosperity (note 3), p. 201.
[10] On benefit corporations, see infra note 104.
[11] *Mayer,* Prosperity (note 3), p. 40 et seq.
[12] *Mayer,* Prosperity (note 3), p. 157.
[13] *Alex Edmans,* Grow the Pie. How Great Companies Deliver Both Purpose and Profit, Cambridge 2020; see also *Parajon Skinner,* Cancelling Capitalism? Book Review, 97 Notre Dame L. Rev. 417 (2021).
[14] *Andrew Keay,* The Corporate Objective, Cheltenham/Northampton 2011, on enforcement, see part 5, p. 240 et sec.
[15] *Idem,* p. 233 et seq.
[16] According to *Keay* (note 14), p. 302, the ten accountability mechanisms are: markets, boards, investors, courts, contract, regulators, social norms, regulation, codes and auditing.

strategies, and satisfy itself that these and its culture are aligned".[17] In corporate practice, there are numerous examples of how such freely chosen corporate objectives can look. Some of them can be found in the charter, others only on the websites of the companies. Traditionally, they simply lay out a broad field for corporate activity, such as the objective set by DowDuPont in the USA.[18] Often they also define a corporate mission and vision, as done, for example, by Adidas, Europe's largest sportswear manufacturer: "Through sports we can change lives"; by the French tyre manufacturer Michelin: "Offering a better way forward"; or by Google: "To organize the world's information and make it universally accessible and useful".[19] Danone, a French food and beverage company, ambitiously defines its corporate goal as building a balanced, profitable and sustainable growth model.[20]

## 2. Shareholders v. stakeholders or shareholders and stakeholders?

### a) The classical shareholder value concept

The Statement on the Purpose of a Corporation issued by the Business Roundtable on 19 August 2019 has caused quite a stir among the international public and experts. This statement was signed by 181 chief executive officers from the USA, led by Jamie Dimon, Chairman and CEO of J. P. Morgan Chase & Co.[21] According to the statement, these CEOs "commit to lead[ing] their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders".[22] This is a break with the conventional belief in shareholder value, which is firmly established in the USA and which has paid little heed to the continental

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[17] *Financial Reporting Council*, The UK Corporate Governance Code, London 2018, available at < https://frc.org.uk/directors/corporate-governance-and-stewardship/uk-corporate-governance-code >.

[18] "The purpose of the Company is to engage in any lawful act or activity for which a corporation may now or hereafter be organized under the General Corporation Law of the State of Delaware." See *Jill E. Fish/Steven Davidoff Solomon,* Should Corporations Have a Purpose? 99 Texas L. Rev. 1309 (2021) at 1316 et seq., with further US examples.

[19] For examples of corporate purpose statements from Germany, France and the USA, see *Holger Fleischer,* Corporate Purpose: A Management Concept and its Implications for Company Law, European Company and Financial Law Review (ECFR) 2021, 161 at 170, 173 and 178.

[20] *Guido Ferrarini,* Redefining Corporate Purpose: Sustainability as a Game Changer, in: Danny Busch/Guido Ferrarini/Seraina Grünewald, eds., Sustainable Finance in Europe, EBI Studies in Banking and Capital Markets Law 2021, available at < https://doi.org/10.1007/978-3-030-71834-3_4 > at 91 et seq.: Danone, Vodafone, Enel, Electrolux.

[21] *Business Roundtable,* Statement on the Purpose of a Corporation, August 19, 2019, available at < https://opportunity.businessroundtable.org/ourcommitment/ >.

[22] Press Release of the *Business Roundtable* of August 19, 2019. Similarly, based on interviews, *Stavros Gadinis/Amelia Miazad,* Corporate Law and Social Risk, 22 May, 2020, available at < https://ssrn.com/abstract=3441375 >, Vanderbilt Law Review, forthcoming.

European ideas of taking stakeholder interests into account.[23] The classic formulation comes from Milton Friedman in 1970: "There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game ...". [24] Almost five decades later, US economists *Oliver Hart* and *Luigi Zingales* similarly stated: "Companies Should Maximize Shareholder Welfare Not Market Value."[25]

b) Stakeholder value theories

The reversal made by the Business Roundtable with its statement of 19 August 2019 was thus all the more astonishing.[26] The first reaction in the USA was correspondingly sizable and in part enthusiastic. In any case, the statement was seen as "tremendous news", according to Darren Walker, president of the Ford Foundation.[27] The new ordering of stakeholders in the statement was also surprising. Shareholders are mentioned last. Still, the pronouncement says that every stakeholder is important, and it promises to create value for all stakeholders.[28] The Davos Manifesto 2020 took this up and propagated stakeholder capitalism".[29] Such stakeholder value concepts were advocated long before.[30] They belong to different theories. One can distinguish between the stakeholder theory, the shared value theory, the team production theory

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[23] See e.g. *Klaus J. Hopt,* Comparative Corporate Governance: The State of the Art and International Regulation, 59 American Journal of Comparative Law 1 (2011) at 28 et seq.

[24] *Milton Friedman,* The Social Responsibility of Business is to Increase its Profits, The New York Times Magazine, September 13, 1970, p. 126, see earlier *idem,* Capitalism and Freedom, Chicago 1962. See also *Alfred Rappaport*, Creating Shareholder Value, New York et. al. 1986; *Henry Hansmann/Reinier Kraakman*, The End of History for Corporate Law, 89 Georgetown L.J. 439 (2001) at 440 et seq.; *Michael C. Jensen*, Corporate Control and the Economics of Finance, J. Applied Corp. Finance 14:3 (2001), 8 et seq.; *idem, Value* Maximization, Stakeholder Theory, and the Corporate Objective Function, Business Ethics Quarterly 12(2) (2002) 235: enlightened value maximization, i.e. "the maximization of shareholder valuations subject to safeguarding its reputational capital in the eyes of all stakeholders". From Germany, see e.g. *Peter Mülbert* (note 24), ZGR 1997, 129; *idem,* Marktwertmaximierung als Unternehmensziel der Aktiengesellschaft, Festschrift für Röhricht, Cologne 2005, p. 421 at 424 et seq.

[25] *Oliver Hart/Luigi Zingales,* Companies Should Maximize Shareholder Welfare Not Market Value, ECGI Finance Working Paper No 521/2017, July 2017, available at < https://ssrn.com/abstract=3004794 >. In the same vein, *Oliver Hart/Luigi Zingales,* The New Corporate Governance, ECGI Law Working Paper No 640/2022, April 2022, available at < http/ssrn.com/abstract_id=4087738 >.

[26] *Business Roundtable* (note 21).

[27] *Business Roundtable,* Press Release (note 22) with numerous comments on the Statement.

[28] *Business Roundtable* (note 21), Statement, last sentence.

[29] "The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders – employees, customers, suppliers, local communities and society at large." *Klaus Schwab,* Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution, World Economic Forum, The Davos Manifesto, 2 December 2019, available at < https://weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/ >.

[30] *Edward Freeman,* Strategic Management: A Stakeholder Approach, Boston 1984; *Lynn Stout*, The Shareholder Value Myth, San Francisco 2012; *Kent Greenfield*, The Failure of Corporate Law, Paperback ed., Chicago 2010, S. 123 et seq.; *Keay* (note 14), p. 40 et seq.

and others.[31] These theories are considered by some to be part of conventional corporate social responsibility (CSR),[32] but the representatives of the new movement explicitly reject this.[33] Their theses also go beyond mere management concepts.[34] It is about a shift in mindset; the task is "legally framing the corporate purpose based on stakeholderism".[35]

c) Compromising views: Pursuit of both, shareholder and stakeholder interests

In response to this discussion, legal and economic mainstream thinkers, especially in the USA, have defended the shareholder value principle in detail, as done very resolutely by *Lucian Bebchuk* and *Roberto Tallarita*[36] and more subtly by *Edward Rock*.[37] While it is correctly noted that there is no binary choice between shareholders and stakeholders,[38] *Rock* points out and criticises a common misunderstanding that shareholder primacy is equated with "short-term share-price maximisation" during the day-to-day management of the company.[39] The Delaware Supreme Court has clarified that "... the question of 'long-term' versus 'short-term' results is largely irrelevant because directors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon."[40]

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[31] See *Eli Bukspan,* Corporate Purpose and Stakeholder Fairness Through the Lens of Behavioral Economics: Legal Implications, available at < https://ssrn.com/abstract=3972970 > at 76 et seq.

[32] See *Elizabeth Pollman,* Corporate Social Responsibility, ESG, and Compliance, in: Benjamin Van Rooij/D. Daniel Sokol, eds., The Cambridge Handbook of Compliance, Cambridge 2021, p. 662; *Cynthia A. Williams*, Comparative and transnational developments in corporate social responsibility, in: Afra Afsharipour/Martin Gelter, eds., Comparative Corporate Governance, Cheltenham/Northampton 2021, p. 92; *Barnali Choudhury/Martin Petrin,* Corporate duties to the public, Cambridge et al. 2019.

[33] *Mayer* (note 3), p. 117: "This is not corporate social responsibility (CSR) as meritorious philanthropy; it is poverty alleviation and environmental protection as core corporate activities."; *Edmans* (note 13), at 27: "pieconomics" is more, specifically "… to create profits only through creating value for society."

[34] See *Fleischer* (note 18).

[35] *Bukspan* (note 31) at 78. Cf. most recently *Christopher M. Bruner,* Corporate Governance Reform and the Sustainability Imperative, 131 Yale L. J. 1217 (2022).

[36] *Lucian A. Bebchuk/Roberto Tallarita,* The Illusory Promise of Stakeholder Governance, 106 Cornell L. Rev. 91 (2020); cf. also *Lucian A. Bebchuk/Kobi Kastiel/Roberto Tallarita,* Does Enlightened Shareholder Value Add Value? The Business Lawyer 77 (2022) 731; *idem,* For Whom Corporate Leaders Bargain, 94 S. Cal. L. Rev. 1467 (2021). But see also the rebuttal by *Colin Mayer,* Shareholderism versus Stakeholderism – A Misconceived Contradiction, ECGI Law Working Paper No 522/2020, available at < https://ssrn.com/abstract_id=3617847 >.

[37] *Rock* (note 2) at 391 et seq. See also *Columbia Law School Symposium,* Corporate Governance "Counter-Narratives": On Corporate Purpose and Shareholder Value(s), 31/3 Journal of Applied Corporate Finance 10-73 (2019); *Columbia Law School Roundtable*, The Future of Capitalism, 32/2 Journal of Applied Corporate Finance 42-63 (2020); *Stephen Bainbridge,* A Critique of the American Law Institute's Draft Restatement of the Corporate Objective, The University of Chicago Business Law Review 2 (2022) 1.

[38] *British Academy,* Final report (note 4), p. 21, contending that the debate of shareholder versus stakeholder is a "sterile debate"; *Bruner* (note 35), 131 Yale L. J. 1217 (2022) at 1237 et seq.

[39] *Rock* (note 2) at 379. On the distinction between short-termism and sustainability, *Eckart Bueren,* Sustainable Finance, ZGR 20219, 813 at 819 et seq.

[40] Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1989). On the controversial debate as to short-termism, see e.g. *Martin Petrin/Barnali Choudhury,* Corporate purpose and short-termism, in: Afsharipour/Gelter (note 32) p. 73.

It is also clear in the US that the Business Roundtable's statement and adherence to it by business leaders is not a legally binding commitment, and the initial enthusiasm soon ebbed[41] and there was even a good deal of "greenwashing".[42] Suggestions for reform have come from the pen of *Leo E. Strine, Jr.*, former Chief Justice of the Delaware Supreme Court and now an affiliate of Harvard and the University of Pennsylvania. In a long article titled "Toward Fair and Sustainable Capitalism", he argues for "a system of enlightened capitalism" with more sustainability for the American economy and attention paid to ESG (environmental, social and governance) factors as well as workers' interests (EESG – employee, environmental, social, and governance).[43] Among his numerous reform proposals, the following are particularly interesting for the topic here: more disclosure, the establishment by the board of a committee for employee concerns in large companies (annual sales of $1 billion or more) and easier formation of, and reorganisation into a benefit corporation.[44] But the "corporate governance machine" in the United States with its many mighty players – in particular institutional investors, but also investor associations, proxy advisers, the stock exchange with their stock indices and the rating agencies – is so well established that the prognosis is convincing that stakeholderism may gain ground only by shaping the meaning of shareholder primacy to encompass stakeholder interests.[45]

### d) The special case of financial institutions and other regulated companies

The debates described above are about public limited companies and other companies that do not constitute regulated companies, such as financial institutions or insurance companies. This is important to mention precisely because proponents of ESG and climate protection are making

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[41] Blackrock, Reply to the Attorneys General Letter, dated August 4, 2022, 6.9.2022, available at < https://www.blackrock.com/us/individual/literature/press-release/blackrock-response-attorneys-general.pdf >; cf. also *Patrick Bernau/Roland Lindner,* Nicht mehr ganz so heilig, Frankfurter Allgemeine Sonntagszeitung, 18.9.2022, No. 37 p. 17.

[42] See the earlier article by *Miriam A. Cherry/Judd F. Sneirson,* Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster, Tulane Law Review 85 (2011) 983.

[43] *Leo E. Strine, Jr.,* Toward Fair and Sustainable Capitalism, University of Pennsylvania Law School ILE Research Paper No. 13-39, available at < https://ssrn.com/abstract=3461924 >; Strine uses EESG as described in the text, but in other contexts the first "E" in EESG stands for "economic" and sometimes also for "ethical". See also *Milstein/Mayer/Gordon/Bresnahan/Gilson/Lipton* (note 8).

[44] As to benefit corporations, see infra note 104.

[45] *Dorothy S. Lund/Elizabeth Pollman,* The Corporate Governance Machine, 121 Columbia Law Review 2563 (2021) at 2634; the authors mention also the Delaware courts, the US Congress, the Securities and Exchange Commission and the Department of Labor, idem at 2579 et seq.. All this is different for small-cap corporations, for which the private-ordering mechanisms of corporate governance fail; *Kobi Kastiel/Yaron Nili,* The Corporate Governance Gap, 131 Yale L. J. 782 (2022).

statements and legal policy demands that amount to a blurring of a fundamental difference which is central for our economic system. In the case of regulated companies, such as financial institutions, corporate governance is quite different. Typical of this is the clear statement of the Basel Committee on Banking Supervision in its Corporate Governance Principles for Banks of July 2015: "The primary objective of corporate governance should be safeguarding stakeholders' interest in conformity with public interest on a sustainable basis. Among stakeholders, particularly with respect to retail banks, shareholders' interest would be secondary to depositors' interest."[46] This is even more remarkable since, at that time, there was no talk of ESG.

In banking supervisory law and in the law of other regulated companies, this view is concretised more precisely – in what some see as an infatuation with detail – by regulations for the companies and their bodies.[47] As one sees in Germany, this can tempt the civil courts to make use of this legal arsenal and to subject non-regulated companies to these provisions by analogy. However, this is rightly regarded as very problematic because in this way the courts, instead of the legislature called upon to do so, disregard the fundamental difference between regulated and non-regulated companies. An analogy can therefore be only an exception and justified only in exceptional cases under special conditions.

3. The "public" or the "private" corporation?

a) The "public" corporation in the first half of the 19th century and the separation of corporate law, antitrust, securities regulation and other public laws

In the debate about the iconic turn from shareholder value to CSR, ESG and stakeholder value, there is often a recalling of the early days of the public limited company.[48] The state concession of the joint-stock company and its predecessors played a decisive role in this period. In England,

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[46] *Basel Committee on Banking Supervision,* Guidelines, Corporate governance principles for banks, Bank for International Settlements (BIZ), Basel, July 2015, p. 3, Introduction No. 2. Cf. *Klaus J. Hopt,* Corporate Governance of Banks and Financial Institutions: Economic Theory, Supervisory Practice, Evidence and Policy, 22 European Business Organization Law Review (EBOR) 13 (2021); *Sarah E. Light/Christina P. Skinner,* Banks and Climate Governance, 121 Colum. L. Rev. 1895 (2021).
[47] Cf. *Klaus J. Hopt/Jens Binder/Hans-Joachim Böcking,* eds. Handbuch Corporate Governance von Banken und Versicherungen, Munich, 2d ed. 2020.
[48] E.g. *Elizabeth Pollman,* The History and Revival of the Corporate Purpose Clause, 99 Texas L. Rev. 1423 (2021); see also *Fish/Davidoff Solomon* (note 18), at 1313 et seq., mentioning English companies of the 16th and 17th centuries; *Fleischer* (note 19), at 164 et seq., looking back to the medieval companies of Northern Italy in the Trecento, and at 167 et seq. mentioning early German stock corporations in the 19th century.

the English Crown and Parliament began to grant corporate charters to joint-stock companies in the early 17th century. These were granted only if a public utility could be established. This concession system was also adopted in the United States. Here we are talking about the "Public Service Origins of the American Business Corporation".[49] In the case of the Dutch East India Company (VOC), for example, the preamble stated how important shipping and trade commerce were for the "prosperity of the United Netherlands".[50] According to the Ministerial Instruction on the Licensing of Joint Stock Companies in Prussia of 1845,[51] what mattered was whether the promotion of the branch of industry or business to which the company belonged was desirable in the general interest, whether the form of the joint stock company was necessary because of the amount of capital required or the nature of the business and, finally, whether the public was sufficiently protected from harm in personal and financial terms. In addition to investor, consumer and creditor protection, the issue was the danger of monopolisation and a corruption of the political process. [52] A recent study penned by *Thilo Kuntz*, however, specifies that a distinction must be made between the concepts of the general public benefit and the public purpose of the public limited company and that, from a legal-historical and comparative law perspective, the concession requirement cannot be used as a general basis for the public purpose character of public limited companies.[53]

As is well known, the concession system first eroded in most countries in the second half of the 19th century and was then changed in favour of the normative system that is generally applicable today.[54] The targeted pursuit of general interests was no longer assigned to stock corporations under stock corporation law. Instead, it became the task of antitrust law (first and foremost in the USA with the Sherman Act of 1890) and securities regulation (since the 1930s and again first in the USA). This occurred both times with a worldwide following. This was

[49] *Ronald E. Seavoy,* The Public Service Origins of the American Business Corporation, 52 Business History Review 30 (1978).

[50] "This was considered by us, the States General, and given due weight in recognising how much importance to the united provinces and the good residents thereof was thereto attached that this shipping trade and commerce be maintained …". *Pollman* (note 48), 99 Texas L. Rev. 1423 (2021) at 1430.

[51] Instruktion, die Grundsätze in Ansehung der Konzessionirung von Aktiengesellschaften betreffend, vom 22.4.1845, Ministerial-Blatt für die gesammte innere Verwaltung in den Königlich Preußischen Staaten 1845, p. 121; *Klaus J. Hopt,* Ideelle und wirtschaftliche Grundlagen der Aktien-, Bank- und Börsenrechtsentwicklung im 19. Jahrhundert, in: Helmut Coing/Walter Wilhelm, eds., Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert, vol. V Geld und Banken, Frankfurt 1980, p. 128 at 144.

[52] On the political aims of the concession system, cf. *Bernhard Grossfeld,* Die rechtspolitische Beurteilung der Aktiengesellschaft im 19. Jahrhundert, in: Coing/Wilhelm (note 51), vol. IV Eigentum und industrielle Entwicklung. Wettbewerbsordnung und Wettbewerbsrecht, p. 236 at 239 et seq.

[53] *Kuntz* (note 5).

[54] *Stephan Harbarth,* Die Aktiengesellschaft im Wandel der Zeit zwischen Wirtschaftlichkeit und Gemeinwohl, ZGR 2022, 533.

later succeeded by numerous other special areas of public law, such as environmental law in particular.[55]

b) Retour of the "public" corporation?

With the ESG movement, this historical development seems to be reversing. This is facilitated by the fact that the state has become increasingly influential in response to the various major crises of the 21st century. This is immediately evident in the extent to which the state participates in the economy. It is not only in Romance countries, such as France, Italy or Spain, that public enterprises (in the sense of companies that the state controls or companies in which the state has a significant stake) have traditionally played a central role; rather, state-owned enterprises and state participation are also very common and important in countries with a strong market economy, such as Germany. As a result of the COVID pandemic, but also as occurred in earlier financial crises, this state influence through corporate participation has increased even further and significantly.[56] It is true that these companies basically operate on the market like other private companies, unless they have a special legal form such as foundations, savings banks or, in some cases, cooperatives. But state influence is unmistakable, though it is by no means oriented only towards the common good, sometimes being even quite to the contrary as is the case with other private enterprises.

In addition, there is the enhanced regulation of important companies, and not only the so-called regulated companies such as financial institutions and insurance companies.[57] In this context, different concepts of "public companies" must be distinguished, for each of which special groups of legal rules apply. First of all, one speaks of public companies if the company is listed on the stock exchange (e.g. the CAC 40 in France or the recent DAX 40 in Germany) or is otherwise active on the capital market. For these companies, a separate "stock exchange company law" (Börsengesellschaftsrecht) has developed over and above the public stock exchange law, as evidenced in Germany, Switzerland and Austria. In accounting law, especially European accounting law, as well as capital market law there are the so-called public interest

[55] *Norbert Horn/Jürgen Kocka*, eds., Recht und Entwicklung der Großunternehmen im 19. und frühen 20. Jahrhundert/Law and the Formation of the Big Enterprises in the 19th and Early 20th Centuries, Göttingen 1979; *William R. Cornish,* Legal Control over Cartels and Monopolization 1880-1914. A Comparison, in Horn/Kocka, ibidem, p. 280; *Morton Keller,* Public Policy and Large Enterprise. Comparative Historical Perspectives, in Horn/Kocka, ibidem, p. 515.
[56] *Ferrarini* (note 20), at 94 et seq.: corporate purpose movement and COVID-19.
[57] See the notion of "regulated financial undertaking, regardless of its legal form" in Article 3(a)(iv) of the EU Corporate Sustainability Due Diligence Directive of 30 November 2022, infra II 4.

entities (PIEs). These are defined with the help of a triad of criteria (balance sheet total, turnover, number of employees).[58] In the new European supply chain legislation, in addition to the companies covered in terms of their number of employees and global turnover, companies from certain "high-impact sectors" are also covered more broadly.[59] Such European legislation and the corresponding national ESG and supply chain laws, as in France and Germany, blur the traditional lines between unregulated and regulated companies in a critical way.

## II. Current economic, social science and policy arguments and legislative options

### 1. Economic arguments v. social science and policy arguments

The debate on corporate purpose and stakeholder value described under (I) occurs mostly on a very abstract level. Factual statements, socio-political postulates and values are not always clearly distinguished. *Edward Rock* is right when he criticises the fact that four different debates on corporate governance get conflated: the legal debate, the academic finance and economics debate, the management debate and the political debate.[60] The classical basic statement, which clearly prevails among economists and lawyers, especially in the USA, can be summed up as follows: "Economic theory defends the primacy of the shareholder as the most efficient operating principle", profit maximisation "leads to value creation for all stakeholders of the company" and "tax and transfer systems can be used to redistribute economic value to nonshareholders".[61] This leads to various individual arguments and rejoinders. In what follows, the arguments and counterarguments used explicitly or implicitly in these debates will be summarised briefly. In part, they overlap.

#### a) The shareholders as ultimate risk-bearers v. impacts on and contributions of stakeholders

The starting point of the economic argument is the conviction that shareholders are the ultimate risk-bearers, and, as such, their interests deserve priority as residual claimants of the firm. This

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[58] E.g. for Germany § 267 of the Commercial Act: balance sheet 6 mio. Euro, turnover 12 mio. Euro, number of employees 50.

[59] Article 2(1)(a) and (b) of the EU Corporate Sustainability Due Diligence Directive of 30 November 2022, infra II 4: more than 500 employees and worldwide turnover of more than 150 mio. Euro; in high-impact sectors such as the manufacture of textiles, agriculture and others: 250 employees and 40 mio. Euro.

[60] *Rock* (note 2), at 369; also *Ferrarini* (note 20), at 138 et seq, describing the multiple uses of corporate purpose.

[61] *Fish/Davidoff Solomon* (note 18), 99 Texas L. Rev. 1309 (2021) at 1319; with further arguments, *idem*, at 1320 et seq.

is indeed reflected in all insolvency laws, as the shareholder group is the last to be satisfied, with priority given to all creditors.

By contrast, it is argued that both capital and labour contribute to the generation of profit. This is used to justify worker participation in the boardroom, for example. Insofar as the generation of profit is associated with costs and damage for other stakeholders, such as the environment and the climate, externalisation to the detriment of the latter is criticised and re-internalisation is demanded.[62] This is propagated in the ESG-movement. Yet there is a clear tension in ESG between "E" on the one side and "S" and "G" on the other side, with the regulatory initiatives concentrating solely on "E" while neglecting "S" and particularly "G". This has become particularly obvious in Germany, with its two-tier board system and labour co-determination in the supervisory board, where there is no place for a third party beyond shareholders and labour.

b) Principle-agent theory and stakeholder interests

According to the principal-agent theory that is established in the current law and economics debate, shareholders are seen as the principals of the directors, who are their agents. If directors are allowed, or even required, to take into account the interests of other stakeholders, this necessarily has the effect of insulating the directors to some extent from the influence and control of the shareholders. Most company laws therefore see shareholders as the primary controllers of directors, a control which today is increasingly exercised outside the general assembly. *Michael Jensen* concluded already in 2002 that stakeholder theory cannot specify the relationship between the various interests[63] and therefore only leads to top managers being able to determine this for themselves and thus run their companies in the company's interest.[64] In addition, shareholder value can be measured by share prices, even if it is generally agreed that this is only an imperfect yardstick.[65]

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[62] On the shareholders as residual claimants, *Reinier Kraakman et al.,* The Anatomy of Corporate Law: A Comparative and Functional Approach, 3d ed., Oxford 2017, p. 79 et seq., discussing the protection of minority shareholders, employees and external constituencies.
[63] In Germany, these stakeholder interests are considered to be equal, *Gerald Spindler* in Gerald Spindler/Eberhard Stilz (eds.), Beck-OGK Aktiengesetz, 1 February 2022, Munich 2022, § 116 comment 31.
[64] *Jensen* (note 24) argues for enlightened value maximisation, i.e. the maximisation of shareholder valuations subject to safeguarding its reputational capital in the eyes of all stakeholders. Similarly *Vikas Mehrotra/Randall Morck,* Governance and Stakeholders, ECGI Finance Working Paper No 507/2017, May 2017, available at < https://ssrn.com/abstract=2971943 >.
[65] Cf. *Keay* (note 14), p. 47 et seq., 72, considering metrics and the role of share price.

On the other hand, the influence of institutional investors – but also of other stakeholders such as large debtholders – who press for ESG to be taken into account[66] is pointed out, and it is proposed to strengthen their rights and make directors legally responsible for stakeholder concerns as well. Some control is also possible through transparency, as, for instance, shown by the far-reaching ESG regulations of the European Union[67]. Share prices also reflect both the reputational risks in terms of ESG and the pressure from institutional investors on companies and directors in this regard. Finally, there is social performance measurement. While it is still difficult, it is no longer in its infancy.[68]

c) The problem of divergent interests of shareholders and of stakeholders

It is true that the interests of the various shareholders, namely major and minor shareholders, are by no means always the same. This is already evident from the fact that the protection of minority shareholders from controlling shareholders is traditionally considered the core problem of company law. Nevertheless, these shareholders' interests are more uniform than those of the various stakeholders, who are quite heterogeneous and present directors with difficult choices and a balancing act.

In various European countries, however, laws on employee participation in the workplace and on the board specifically take into account the interest of employees. There is an extensive, but mixed, experience with this topic, for example in Germany.[69] In some countries there are also so-called public interest representatives on the board. But even without such institutional anchoring, the legal system can oblige directors to take stakeholder concerns into account and require that they are selected in conformity with certain criteria, as for example diversity or even ESG. It is also true that the business judgment rule, which grants directors broad entrepreneurial discretion, is limited by several, sometimes far-reaching requirements.[70] This is laid down by rules in German company law, for example, and it is spelled out extensively in

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[66] *Gerard Hertig,* Governance by Institutional Investors in a Stakeholder World, in Jeffry N. Gordon/Wolf-Georg Ringe, eds., Oxford Handbook on Corporate Law and Governance, Oxford 2016, p. 109, 2d ed. forthcoming.
[67] See infra II 4.
[68] Cf. *John Armour/Luca Enriques/Thom Wetzer,* Mandatory Corporate Climate Disclosures: Now, but How?, Columbia Bus. L. Rev. 1086 (2021). On measurement, *British Academy,* Final Report (note 4), p. 35 et seq.; *Sanjai Bhagat/Glenn Hubbard,* Rule of law and purpose of the corporation, 30 Corporate Governance International Review 10 (2022) at 20-21, on measuring and understanding a company's ESG policy, ESG ratings and the impact on corporate performance.
[69] *Kraakman et al,,* The Anatomy of Corporate Law (note 62), p. 105 et seq.
[70] For Germany, see *Klaus J. Hopt/Markus Roth* in: Heribert Hirte/Peter Mülbert/Markus Roth, eds., Großkommentar zum Aktiengesetz, 5th ed., Berlin et al. 2015, § 93 comments 71 et seq.

legal commentaries. Legislatures could require that business judgment include ESG concerns as well.

d) Solving social and environmental problems: Who can contribute?

Directors and managers, it is argued, are ill-equipped to solve social problems. Their skills and experiences are different, and they are also not democratically legitimised. Social and general economic problems such as unemployment or inflation cannot be solved in isolation by individual companies. Here, the legislative and executive branches are in a very different position in terms of identifying such problems across sectors and weighing solutions.[71] They have the help of experts and interdisciplinary inquiries.

However, such skills and experience can be taken into account also at the time of selecting directors and managers. Accordingly, what becomes important is the profile of these individuals and whether this profile is made transparent to shareholders and investors. The legislature can also hold companies accountable for their contribution to solving these problems.

e) Economic and social problems: responsibility of the state v. engaging private enterprises

Finally, it is considered possible that the choice of shareholder value or stakeholder interests may have wider economic consequences, such as a reduction in innovation.[72] However, this and many other possible economic and political consequences and side-effects of such decisions should and must be empirically substantiated. This also applies to the advantages and disadvantages of employee participation in the supervisory board or the (one-tier) board.

From the side of behavioural economics and the social sciences, the main argument in favour of rethinking is the externalisation of costs and damages as projected onto stakeholders other than the company and the shareholders.[73] According to authors in these fields, the future of

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[71] Cf. *Company Law Review Steering Group,* Company Law Review, Modern Company Law For a Competitive Economy: Developing the Framework, London DTI 2000 at para 2.12: "… would impose a distributive economic role on directors …".

[72] *Parajon Skinner* (note 13) at 429 et seq.. For a survey of the literature in economics, finance, organisation behavior and management strategy as regards organisational higher purpose and for the empirical pros and cons, see *Anjan Thakor,* Higher Purpose, the Greater Good and Finance, Finance Working Paper No. 824/2022, April 2022, available at < http://ssrn.com/abstract_id=4097198 >.

[73] *Bukspan* (note 31).

humanity and the planet is ultimately at stake.[74] Private companies should be obliged to make their contribution towards protecting such interests, or at least have the company and its shareholders (re-)internalise costs and damages. Yet the questions remain how this contribution should be made (directly or indirectly, economically efficient or just and "fair"?[75]) and by what standards this issue should be judged in each case.

In the text that follows, we shall have a look at the experiences that several countries have made when including stakeholder interests into corporate law and also the practice of corporations.

2. Legislative options: Shareholder value, constituency statutes and balancing of interests

a) Pure or enlightened shareholder value systems

The classic fiefdom of shareholder value is Delaware, featuring the traditionally most attractive legal system for the incorporation of American companies. According to Chancellor William Chandler of the Delaware Chancery Court, the "objective" of the corporation is "to promote the value of the corporation for the benefit of the shareholders".[76] The American Law Institute (ALI), in its Principles of Corporate Governance of 1984, still clearly stated: "A corporation ... should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[77] However, the US Supreme Court clarified in 2014: "While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."[78] This is also true in Delaware, though – after the famous *Revlon* case – with the exception that when a company is sold for cash, all shareholders must participate and the board's duty is to get the highest possible amount for the shareholders.

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[74] *British Academy,* Final Report (note 4), p. 22; *Beate Sjafjell,* Reforming EU Company Law to Secure the Future of Corporate Business, ECFR 2021, 190; *Beate Sjafjel/Jukka Mähönen,* Corporate purpose and the misleading shareholder vs stakeholder dichotomy, available at < https://ssrn.com/abstract=4039565 >, taking sides against *Kraakman et al.* (note 62): Corporate purpose as "the core overarching issue of company law … (is) not something that should be framed within path-dependent Anglo-American inspired law and economics"; also *Bruner* (note 35), 131 Yale L. J. 1217 (2022) at 1250 et seq.: "Re-envisioning the Corporate Form and Corporate Law."

[75] Cf. *Bukspan* (note 31) at 20 et seq. 76.

[76] eBay Domestic Holdings Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010). See the earlier ruling of Dodge v. Ford Motor Corporation, 170 N.W. 668, 684 (Mich. 1919), but this was in the company's charter, and it was a close corporation rather than a public corporation. On Delaware case law, see *Rock* (note 2) at 371 et seq.; *Fish/Davidoff Solomon* (note 18), 99 Texas L. Rev. 1309 (2021) at 1324 et seq.

[77] 1994 Principles of Corporate Governance of the American Law Institute (ALI), vol. I, § 2.01(a).

[78] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 711-712 (2014) (citations omitted).

In this "end game", a balancing with other stakeholder interests is not permissible.[79] Incidentally, however, shareholder primacy must not be equated with "short-term share-price maximization"; under Delaware law, the question of "long-term" versus "short-term" is largely irrelevant.[80]

b) Constituency statutes and balancing of interests

By contrast, numerous individual US states have been so-called constituency states since as far back as the 1980s.[81] The relevant Pennsylvania statute, for example, explicitly rejects shareholder primacy and allows directors to consider all relevant interests and, in the event of a conflict, to put the interests of shareholders aside.[82] The forthcoming, newly drafted US Principles of Corporate Governance will probably also provide for such an opening.[83] This corresponds to the legal situation in many European countries, such as Germany traditionally.[84] Similar determinations are made on the question of enlightened shareholder value, as is the case in the United Kingdom, for example.[85] However, it is an open question whether and to what

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[79] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1958). For detailed comments, see *Rock* (note 2) at 372 et seq., 380.
[80] *Rock* (note 1) at 379 note 53: "(D)irectors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon."
[81] See *Rock* (note 2) at 371 et seq.: at present in 41 US states.
[82] *Rock* (note 2) at 372 on the very detailed "§ 1715 Exercise of power generally".
[83] Draft Restatement 2022 § 2.01 (note 1): "The Objective of a Corporation
(a) The objective of a corporation is to promote the value of the corporation, within the boundaries of the law,
(1) (Common Law Jurisdictions): for the benefit of the corporation's shareholders. In doing so, a corporation may consider:
a. the interests of the corporation's employees,
b. the desirability of fostering the corporation's business relationships with suppliers, customers and others,
c. the impact of the corporation's operations on the community and the environment,
d. ethical considerations related to the responsible conduct of business, and
e. other appropriate matters.
(2) (Stakeholder jurisdictions): for the benefit of the corporation's shareholders and/or to the extent permitted by state law, for the benefit of employees, suppliers, customers, communities, the environment, or any other constituencies.
(b) Whether or not it promotes the value of the corporation, a corporation, in the conduct of its business, may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes."
[84] *Jens Koch,* Aktiengesetz, 16th ed., Munich 2022, § 76 comments 28 et seq., discussing the interpluralistic purpose concept; explicitly in § 70 section 1 of the German Corporate Act of 1937; *Mathias Habersack,* Gemeinwohlbindung und Unternehmensrecht, AcP 220 (2020) 594; *Klaus J. Hopt,* Aktionärskreis und Vorstandsneutralität, ZGR 1993, 534 at 536 et seq.; *Anne-Christin Mittwoch,* Nachhaltigkeit und Unternehmensrecht, Tübingen 2022, p. 296 et seq., 330 et seq.. Cf. also German Corporate Governance Code, version of 28 April 2022, Recommendation A.1; *Gregor Bachmann,* Nachhaltiger Kodex? ZHR 196 (2022) 641.
[85] *Paul L. Davies/Susan Worthington/Christopher Hare,* Gower's Principles of Modern Company Law, 11th ed., London 2021, marg. no. 10-026 et seq. on s. 172, and marg. no. 9-016 et seq. on the UK Corporate Governance Code; *David Kershaw/Edmund-Philipp Schuster,* The Purposive Transformation of Company Law, 69 American Journal of Comparative Law 478 (2021), available at < https://ssrn.com/abstract=3363267 >. On the UK Corporate Governance Code 2018 and on the UK Stewardship Code 2020, cf. *Ferrarini* (note 20) at 91. Cf. also *Fleischer* (note 19), ECFR 2021, 161 at 174 et seq.

extent this actually benefits stakeholder interests.[86] This, in turn, depends on how much discretion the formulation of the business judgment rule affords directors, on whether directors are required to "balance" the interest of the members with those of the stakeholders (required in Germany but not required in the UK)[87] and on the associated legal preconditions; but it depends as well on the degree of pressure exerted by institutional investors or otherwise outside the law.[88]

### 3. Corporate purpose legislation

#### a) Options for the shareholders and the board

In the meantime, as already mentioned at the outset, there is a growing demand to legally oblige companies to state their own purpose. It would then be the duty of the directors to manage the company according to this purpose.[89] Unfortunately, this reform, supposedly "an embarrassingly simple policy", is anything but simple and effective.[90] This starts with the terminology itself, which is used and applied very differently in the various disciplines.[91] But of even greater relevance is that while many companies today announce their own purpose,[92] by far not all companies do this, and if they do, then usually not explicitly in the articles of association and only very exceptionally in a manner oriented towards public welfare interests beyond the specific field of business.[93] With a purpose such as that chosen by the Danish

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[86] *Fish/Davidoff Solomon* (note 18), 99 Texas L. Rev. 1309 (2021) at 1338: unlikely to change behaviour; offering similar assessments for the USA (largely ineffective) and the UK (even more shareholder-centric than the USA), *Petrin/Choudhury* (note 40), p. 78 et seq. For a more positive evaluation, see *Vanessa Knapp,* Sustainable Corporate Governance: A Way Forward?, ECFR 2021, 218.

[87] *Davies/Worthington/Hare* (note 85), marg.no. 10-027.

[88] For an earlier articulation of this idea, supra I 2 on the Business Roundtable Statement (note 21), at the end; see also *A. Johnston et al.*, Corporate Governance for Sustainability, Statement, available at < https://ssrn.com/abstract=3502101 >. As to the growing role of institutional investors, *Zohar Goshen/Sharon Hannes,* The Death of Corporate Law, 94 N.Y.U. L. Rev. 263 (2019).

[89] *The British Academy,* Principles for Purposeful Business, How to deliver the framework for the Future of the Corporation, London 2019, see also note 4. Cf. *Johnston et al.* (note 87). See also *Mayer,* Prosperity (note 3); *Edmans* (note 13).

[90] For a shift in mindset, see e.g. *Bukspan* (note 31); *Petrin/Choudhury* (note 40); *Ferrarini* (note 20) at 137 et seq., offering a holistic view of corporate purpose; *Fish/Davidoff Solomon* (note 18), 99 Texas L. Rev. 1309 (2021) at 1328 et seq., 1339 et seq., though a corporate purpose sceptic, the author favours an instrumental view of corporate purpose; *Fleischer* (note 19), ECFR 2021, 161 at 182 et seq.; *Pollman* (note 48), 99 Texas L. Rev. 1423 (2021); see also *IESE ECGI Conference on Corporate Purpose,* October 28-30, 2020, 33 Journal of Applied Corporate Finance 41. From Germany, *Mathias Habersack*, "Corporate Purpose", Festschrift für Windbichler, 2020, p. 707 at p. 720 et seq.; see also the earlier work of *Wolfgang Schön*, Der Zweck der Aktiengesellschaft – geprägt durch europäisches Gesellschaftsrecht?, ZHR 180 (2016) 279 et seq.

[91] *Rock* (note 2); see also *Ferrarini* (note 20) at 138 et seq., discussing the multiple uses of corporate purpose.

[92] This purpose must not be confused with the general purpose of the company in a legal sense.

[93] *Pollmann* (note 48), 99 Texas L. Rev. 1423 (2021) at 1448: "The vast majority of corporations have adopted broad, boilerplate purpose clauses, or use the "any lawful purpose" language."

brewery company Carlsberg – our purpose is to brew better beers[94] – nothing is gained for ESG. To prescribe by law a common-good purpose for all companies can necessarily be done only in a very general and unspecific way. The advocates of a legally prescribed choice of a purpose acknowledge this and only seek to prescribe the choice as such, but not the content.[95] For the same reason the French Loi Pacte of 2019[96] introduced only a non-mandatory option, i.e. a kind of enabling provision for the company, in Article 1835 of the Code Civil: "The Articles of Association may specify a raison d'être, consisting of the principles which the company sets out to uphold and for which it intends to allocate resources in order to carry out its activity."[97]

b) Mandatory purpose clauses

But even if the public limited company has chosen a purpose oriented towards the common good, this does not necessarily mean much in terms of entrepreneurial activity – apart from benefit corporations and similar forms.[98] For it is indisputable that the board and the management must have broad entrepreneurial discretion in the development of the corporate strategy and even more so in making individual, day-to-day entrepreneurial decisions. If it is to be ensured that these decisions are based on or take into account the common good or individual and concrete common-good goals, this cannot be prescribed at the general level of the choice of a purpose; rather, it must occur through a legal requirement governing the entrepreneurial activity of the board or management. As we shall see, this is what the European corporate sustainability due diligence Directive of 2023 actually attempts to do.[99] Even then, however, the question is how the board can actually be held accountable for not following the purpose of the company. One option could be to leave this to the institutional investors, who already exert considerable pressure on companies and their directors before and during the general meeting. If one does not trust them and the market, one can give shareholders more say in the corporation itself, for example through a say on environment.[100]

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[94] Carlsberg Group, Our purpose, < https://carlsberggroup.com/who-we-are/about-the-carlsberg-group/our-purpose/ >.

[95] *Mayer,* Prosperity (note 3) at 22 et seq., 109 et seq., 201 et seq.. Against mandatory rules but in favour of flexibility of the law, *David Kershaw & Edmund Schuster,* The Purposive Transformation of Corporate Law, The American Journal of Comparative Law 69 (2021) 478.

[96] Article 169 Loi Pacte, Loi no 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises, J.O. 23 mai 2019, Texte 2 sur 152; for more on this law in detail, see infra II 4 a.

[97] *Pietrancosta,* Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives, ECGI Law Working Papier No. 639/2022, available at < https://ssrn.com/abstract=4083398 >, at nos 53 et seq.

[98] See infra notes 103-105.

[99] Infra II 4 c.

[100] Infra III 4 b at the end.

In summary, *Paul Davies* has rightly said: "(E)xtending mandatory public purposes to companies in non-regulated industries would require a fundamental reconsideration of the role of companies in society and of the relationship between the state and entrepreneurial endeavour".[101] If the choice of purpose is left to the shareholders, *Marco Ventoruzzo*'*s* criticism cannot be dismissed out of hand: Corporate purpose is often too generic, and it is difficult to monitor; it just means a move from the business judgment rule to a "benefit judgment rule".[102] *Holger Fleischer* formulates laconically about the efforts in his article on "Corporate Purpose: A Management Concept and its Implications for Company Law": "Much ado for little".[103] Instead of mandatory corporate purpose provisions for all companies, shareholders should be able to decide on their own, which is already possible in many legal systems, including the choice of a special legal form such as the US benefit corporation,[104] the French société à mission[105] and the British community interest company.[106]

4. ESG, corporate sustainability due diligence and climate change legislation: Examples from France, Germany and the European Union

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[101] *Paul L. Davies,* Introduction to Company Law, 3d ed., Oxford 2020, p. 332 et seq., 339; more in detail idem, Shareholder Voice and Corporate Purpose: The Purposeless of Mandatory Corporate Purpose Statements, ECGI Law Working Paper, No 666/2022, November 2022, available at < https://ssrn.com/abstract=4285770 >, the paper concludes "that the mandatory purpose requirement will either be largely ineffective by itself … or largely unnecessary …". From the perspective of behavioural ethics with concrete reform proposals, *Yuval Feldman/Adi Libson/Gideon Parchomovsky,* Corporate Law for Good People, 115 Nw. U. L. Rev. 1125 (2021).

[102] *Marco Ventoruzzo,* Brief Remarks on "Prosperity" by Colin Mayer and the often Misunderstood Notion of Corporate Purpose, Rivista delle società 65 (2020), 43 at 46; *Ferrarini* (note 20), at 123 et seq. See also *Guido Ferrarini,* An Alternative View of Corporate Purpose: Colin Mayer on Prosperity, Rivista delle Società 65 (2020), 27. Cf. earlier *Klaus J. Hopt* (note 84), ZGR 1993, 534 at 540 et seq., describing corporate purpose as too generic and hard to concretise, and seeing the better option as having directors as trustees.

[103] *Holger Fleischer,* Gesetzliche Unternehmenszielbestimmungen im Aktienrecht – Eine vergleichende Bestandsaufnahme, ZGR 2017, 411 at 425. Even more critical is *Rock* (note 2) at 393: "Here, Mayer's lack of legal background gives him an optimism for legal solutions that few corporate lawyers would share." See also *Holger Spamann/Jacob Fisher,* Corporate Purpose: Theoretical and Empirical Foundations/Confusions, ecgi Law Working Paper No. 664/2022, November 2022, < https://ecgi.global/content/working-papers >, II. Empirics of Purpose.

[104] See *Frederick H. Alexander,* Benefit corporation and governance, Oakland 2018; *Livia Ventura,* Philanthropy and the For-profit Corporation: The Benefit Corporation as the New Form of Firm Altruism, EBOR 23 (2022) 603. See also *Rock* (note 2) at 374; *William M. Klimon,* Beyond the Board: Alternatives in Nonprofit Corporate Governance, Harvard Business Law Review Online vol. 9 (2019); *Holger Fleischer,* Benefit Corporation zwischen Gewinn- und Gemeinwohlorientierung: Eine rechtsvergleichende Skizze, Festschrift für Seibert, Cologne 2019, S. 219; *Birgit Weitemeyer,* Alternative Organisationsformen auf dem Vormarsch: Unternehmensstiftung, gemeinnützige GmbH, Benefit Corporation, ZGR 2022, 627.

[105] Code de Commerce Art. L. 210-10, 210-11, 210-11, 210-12; on the five conditions to acquire the label of "société à mission" see *Pietrancosta* (note 97), Part II B, at nos 53 et seq.

[106] Section 6 Companies Act 2006 and Part 2 of the Companies (Audit, Investigations and Community Enterprise) Act 2004.

While corporate purpose legislation may change much less than what its advocates promise, other more focused legislative options are proposed. Indeed ESG, corporate sustainability due diligence and climate change legislation is proliferating.[107] In what follows, just three examples are spelt out: the French legislation because it was setting the example in 2017 and 2019, the German legislation which followed this example in 2021 and most recently the European Directive (CS3D) of 2023.

a) The French Duty of Vigilance Law of 2017 and the Loi Pacte of 2019

The dilemma which has been described above[108] is confirmed when we first look at the French Duty of Vigilance Law of 2017[109] and the French Law Pacte of 2019.[110] With both laws the French legislators set international examples for ESG regulation.

The Duty of Vigilance Law of 2017 was the first law which imposed a general mandatory due diligence requirement for human rights and environmental impact and therefore received very broad attention.[111] The law is very brief; it contains only three articles that are included in the French Commercial Code (Article 225-102-4 and Art. 225-102-5). The law applies to French companies and to their French subsidiaries having at least 5,000 employees or to French companies having subsidiaries in and outside of France with a total of at least 10,000 employees.[112] The main obligation for these companies is to establish vigilance plan.[113] The plan shall include reasonable vigilance measures which should identify risks and prevent serious infringements of human rights and fundamental freedoms, the health and safety of persons, and the environment, if these infringements result from the activities of the company

[107] Study on due diligence requirements though the supply chain, European Commission, January 2020, p. 40 et seq., 170 et seq., with a list of countries where such laws have been adopted or discussed.
[108] Supra II 3 b at the end.
[109] The French Duty of Vigilance Law: Loi no 2017-399 du 27 mars 2017 relative au devoir de vigilance, J.O. 2017, Texte 1 sur 99. See the very detailed information in *Pietrancosta* (note 97), Part I, nos 11 et seq.; as to the many criticisms, *idem* at no. 15.
[110] Article 169 Loi Pacte (note 96). See the very detailed information in *Pietrancosta* (note 97), Part II, nos 35 et seq. See also *Fleischer* (note 19) at 171 et seq.
[111] See the long list of publications in French in *Pietrancosta* (note 97) no. 12 footnote 75.
[112] It has been estimated that this affects around 250 companies, *Pietrancosta* (note 97) no. 20 footnote 109.
[113] Among other elements, the plan includes: a mapping of the risks with procedures for regular assessment of the risk situation of the subsidiaries, subcontractors or suppliers who are subject to the provision; appropriate measures to mitigate risks or prevent serious harm; an alert mechanism which is established in consultation with the representative trade union in the company; and a mechanism for monitoring the measures implemented and evaluating their effectiveness. The requirements for the plan were extended for certain companies in view of "combating climate change and strengthening resilience" by Law no 202-1104 of 22 August 2021, *Pietrancosta* (note 97) no. 22. The serious harms envisaged may come not only from the company and its subsidiaries but also from suppliers and subcontractors, though only in respect of those with whom there is an "established business relationship". As to the doubt whether the latter extends to cascade partners, *idem* no. 22.

and its directly or indirectly controlled subsidiaries.[114] This obligation is enforced by fines, public injunction, public disclosure and civil liability at the request of any interested party.[115] The notion of interested party is defined very broadly and includes all kind of affected people and communities. With this the enforcement threat goes far beyond what has been provided for in other European countries.[116] It is hardly surprising that the law met with doubts and criticisms.[117] In the end, the law was somewhat softened, the envisaged presumption of wrongdoing in the event of harm was dropped and the penalties of 10 to 30 million Euros were declared unconstitutional by the French Constitutional Court.[118]

The Loi Pacte amended Article 1833 of the Code Civil, which applies to all French companies. The former Article 1833 provided that a company must have a lawful purpose and be formed in the common interest of its members. The new article retains this but adds further: "The company shall be managed in the corporate interest, taking into account the social and environmental concerns linked to its activity." The Code of Commerce Article L. 225-35 provides that "[t]he board of directors shall determine the direction of the company's activities and shall ensure that they are carried out in accordance with the company's interest, taking into account the social, environmental, cultural and sporting concerns connected with its activities. It shall also take into account, where appropriate, the raison d'être of the company within the meaning of Article 1835 of the Code Civil." This amendment has been widely debated in France and raises many doubts, but it is understood that the law increases the directors' scope for decision-making.[119] But in the end it has been observed that this law does not instate pluralistic stakeholder theory as the firm's profitability should remain the priority.[120]

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[114] Article L225-102-4 section 3 of the French Commercial Code.

[115] For details, see Article L225-102-4 sections 5 and 6 and Article L225-102-5 of the French Commercial Code.

[116] *Axel Marx/Claire Bright/Nina Pineau/Jan Wouters,* Corporate Accountability Mechanisms in EU Member States for Human Rights Abuses in Third Countries, in: Philip, Czech, Lisa Heschl, Karin Lukas, Manfred Nowak, Gerd Oberleitner, eds., European Yearbook on Human Rights 2019, Cambridge/Vienna 2019, 157, available at < https://ssrn.com/abstract=3524499 >.

[117] For example, *Pietrancosta* (note 97), no. 15, identifying considerable and ill-defined obligations, distortion of international competition and problems for SMEs; he sees all this without achieving the objectives of the law, since companies might turn to less risky global suppliers, to the detriment of local businesses.

[118] Conseil Constitutionel, decision no 2017-750, of March 23, 2017.
As of the end of 2022 the Law has not yet led to any fines or penalties. But on 28 September 2022 nine leading food manufacturers and distributors were given formal notice from non-profit groups to reduce their use of plastic and three NGOs have initiated court proceedings against one of the ten biggest plastic polluters in the word. They request the court to order the company to publish a new more ambitious vigilance plan.

[119] See in detail *Pietrancosta* (note 97) nos. 37 et seq., 43 et seq., raising the fear that this may add to managerial entrenchment.

[120] *Veronique Magnier/Yves Paclot,* Le clair-obsur de la loi pacte: vers un nouveau paradigme de la gouvernance? Mélanges Alain Couret, Paris 2020, p. 121; *François-Xavier Lucas/Didier Poracchia,* La prise en considération des enjeux sociaux et environnementaux de l'activité de la société, idem, p. 89; *Pietrancosta* (note 97) nos. 44.

b) The German Supply Chain Due Diligence Act of 2021

The German Supply Chain Due Diligence Act of 2021[121] is intended to implement the United Nations Guiding Principles for Business and Human Rights of 2011 and a number of other international conventions listed in the appendix to the Act.[122] The law applies to enterprises, regardless of their legal form, which have their head office or seat in Germany and generally employ at least 3,000 employees. Foreign companies that have a branch in Germany and at least 3,000 employees are also covered. From 2024 on, the threshold will be lowered to 1,000 employees. This means that from then on around 4,800 companies will be covered. The law primarily aims to prevent human rights violations that are sufficiently likely to occur on the basis of factual circumstances, but it also looks to prevent some particularly serious environmental risks. Which human rights violations are recorded is defined in detail in the law. This also applies to environmental risks.[123] The core of the law are the duties of care, which are spelt out in detail in the Act.[124]

In view of the stricter European law,[125] it is important to note that the law distinguishes between direct and indirect suppliers. In the case of the latter, the company has to intervene only if it has factual indications that make a violation of a human rights-related or environmental obligation by indirect suppliers appear possible (substantial knowledge).[126] It is also significant that the law expressly states that a breach of the obligations under this law does not give rise to civil liability. Civil liability established independently of the act remains unaffected.[127] The law is

[121] Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten of 16 July 2021, Official Gazette 2021 I 2959 (German Supply Chain Due Diligence Act). First comments on the many problems that the application of the law entails in respect to corporate groups by *Patrick Leyens* in Klaus J. Hopt, ed., Handelsgesetzbuch (Commercial Law Commentary), (2) Lieferkettensorgfaltspflichtengesetz, 42th ed. Munich 2023; more details in *Holger Fleischer/Peter Mankowski,* eds., Lieferkettensorgfaltspflichtengesetz, Munich 2023; *Markus Kaltenborn/Markus Krajewski/Gisela Rühl/Miriam Saage-Maaß,* eds., Sorgfaltspflichtenrecht, Munich 2023; and in several new commentaries and handbooks on the new law.
[122] See § 2 section 1 of the German Act with annexes No. 1 to 11.
[123] § 2 sections 2 and 3 of the German Act.
[124] According to §§ 3-10 of the Act, these due diligence obligations include, among other obligations, the establishment of risk management, the performance of regular risk analyses, the issuing of a policy statement, the anchoring of preventive measures in the company's own business area and vis-à-vis direct suppliers, and the implementation of risk due diligence obligations for indirect suppliers. The company's own business area includes all activities for the manufacture and exploitation of products and the provision of services, regardless of whether they are carried out at a location in Germany or abroad. In affiliated companies, the parent company's own business area includes a company belonging to the group if the parent company exercises decisive influence over the company belonging to the group (§ 2 section 6 of the Act).
[125] Infra II 4 c.
[126] § 9 of the German Act.
[127] § 3 section 3 of the German Act.

controlled and enforced by the competent national authority. This supervision is the responsibility of the German Federal Office of Economics and Export Control (BAFA). Apart from fines, there is also a risk of being excluded from the awarding of public contracts.[128] In the meantime, BAFA has considerably increased the number of its employees and has begun to carry out a comprehensive risk assessment. There are already numerous articles, commentaries and books on the new law, which point out the very considerable requirements for companies and many remaining uncertainties in the law.[129]

c) The European Corporate Sustainability Due Diligence Directive of 2022

On 23 February 2022, the European Commission presented the draft of a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence (CS3D).[130] This is the latest example of extensive ESG legislation. As mentioned before, it had been preceded by due diligence legislation in France in 2017[131] and in Germany in 2021.[132] Other Member States (Belgium, the Netherlands,[133] Luxembourg and Sweden) are expected to follow in the near future. The genesis of the draft was quite difficult and controversial. The European Commission did not follow its own principles of good regulation and was criticised from inside[134] and outside[135] as biased. In view of the clear reservations of the Member States, in particular from the Scandinavian countries,[136] and after various controversial versions in the

[128] § 22 of the German Act.
[129] See the list in *Leyens* (note 121), before the introduction.
[130] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Brussels, 30 November 2022 (OR. en) 15024/1/22 Rev 1 (CS3D). The original proposal of the European Commission was far more ambitious, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23 February 2022, COM(2022) 71 final (Corporate Sustainability Due Diligence Directive). Among the many reactions in academia, cf. for example *Leonhard Hübner/Victor Habrich/Marc-Philippe Weller,* Corporate Sustainability Due Diligence, NZG 2022, 644. For a comparison of the European law and the German law, cf. *Sebastian Lutz-Bachmann/Kristin Vorbeck/Lenard Wengenroth,* Nachhaltigkeitsbezogene Sorgfaltspflichten in Geschäftsbeziehungen - zum Entwurf der EU-Kommission für eine "Lieferkettenrichtlinie", Betriebs-Berater 2022, 835.
[131] French Duty of Vigilance Law, supra note 109.
[132] German Supply Chain Due Diligence Act, supra note 121.
[133] The Netherlands have introduced a more specialised law on child labour: Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbeid), Staatsblad 2019, 401.
[134] The Regulatory Scrutiny Board of the European Commission twice issued an overall negative opinion.
[135] See the detailed comment by *Patricia Sarah Stöbener de Mora/Paul Noll,* Noch grenzenlosere Sorgfalt? EuZW 2023, 14-25. As to the risks for companies under the Directive, see *Sophie Burchardi,* Lieferkettensorgfaltspflichten: Risiken für die Unternehmensleitung, NZG 2022, 1467.
[136] Cf. the *Ernst & Young Study for the European Commission,* Study on directors' duties and sustainable corporate governance, Final Report by Ernst & Young for the European Commission DG Justice and Consumers, July 2020, 157 with two Annexes, Annex I (Branches), Annex II (Country Fiches of the 12 Selected Member States). This Study has been severely criticized, e.g. by the *European Company Law Experts (ECLE),* Comment July 2020 available at < https://europeancompanylawexperts.wordpress.com/publications > and by

legislative process, a compromise was found, and the Directive will be enacted in 2023 – but it will allow for a generous transposition time.[137] The Directive has chosen a number of interesting legislative options, and therefore a quick look at it may be useful.

The Directive foresees obligations for companies regarding actual and potential adverse human rights impacts and adverse environmental impacts as well as liability for violations by the company itself, its subsidiaries and within its value chain. It applies to companies having more than 500 employees on the average and a net worldwide turnover of more than EUR 150 million, with lower levels in the case of certain risk sectors (Group 2 countries).[138] In an attempt to create an equal playing field, it also applies to third-country companies having a turnover of more than EUR 150 million within the European Union.[139] The Commission estimates that about 13,000 EU companies and 4,000 third-country companies will be covered.[140] These companies are expected to conduct human rights and environmental due diligence by carrying out various actions such as integrating due diligence into their policies, identifying and preventing potential adverse impacts, and bringing actual adverse impacts to an end or at least minimising their extent.[141] This includes a complaints procedure, monitoring and communication. A special article deals with combating climate change.[142] The value chain responsibilities of the company extend beyond the business partners with whom the company has a direct relationship to partners of these business partners, this to be achieved by a contractual cascade of assurances, yet without making clear how this could be put into practice nor what economic consequences this has for international trade.[143] This is in sharp contrast to the German value chain legislation, which encompasses only to contractual suppliers and which is, unsurprisingly, highly controversial both in practice and in theory. As a last resort, if the potential adverse impact is severe, the company is even be obliged to terminate the business relationship with the partner in question.[144] Under certain conditions the companies are liable for damages if they have failed to comply with their obligations, and this liability is to be of

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*Edmans,* one of the protagonists of ESG (note 13); see response of Edmans, 1 January 2021, contending the evidence was "very one-sided and low-quality".

[137] Art. 30 of the Directive.

[138] Art. 2 section 1 (a) and (b).

[139] Art. 2 section 2 (a) and (b).

[140] Draft Directive, Explanatory Memorandum p. 16.

[141] Articles 4 on due diligence and 4a on due diligence at a group level; spelt out in detail in Articles 5 to 11.

[142] According to Article 15, Group 1 countries are to 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.

[143] Article 7 sections 2 (b) and 3.

[144] Article 7 paragraph 5 (b) and article 8 paragraph 6 (b). Cf. *John Armour* in ECGI-Symposium 29 March 2022, available at < https://ecgi.global/content/corporate-sustainability-due-diligence >.

overriding mandatory application in cases where the law applicable to such is not the law of a Member State.[145] The Draft Directive still contained a provision according to which directors must set up and oversee due diligence and may be personally liable for breach of their duties,[146] but this was no longer taken up in the final compromise version of the Directive. In view of all these controversies and remaining uncertainties,[147] it is important that the Directive contains a soft sunset clause foreseeing a report of the European Commission after seven years.[148]

In summary, the European Directive must be transformed into the Member State laws, and less strict national legislation, such as the German value chain responsibility laws, will have to be tightened up. The enterprises affected as well as the national supervisory agencies must live with the far-reaching demands and many uncertainties of the Directive and will adapt themselves to it. Yet the effects of these new laws will be considerable. In order to meet the requirements, enterprises will have to alter their value chains considerably. The result of this process may very well be that certain developing countries – and their suppliers – not meeting the new standards will be left out of these chains entirely. One must realize that not only those enterprises for which the Directive is directly applicable will be affected since these enterprises will also require their suppliers and their buyers, irrespective of their size, to meet the prescribed standards. Small and medium-sized companies will in fact carry the burden. The effects on international competition are also open, even though the Directive reaches out to non-EU enterprises. In view of this it will be important that the enterprises are not left alone and that the States live up to their own responsibility regarding human rights, climate change and ESG.

## III. Making stakeholder governance work: Enforcement problems

As shown in Section I, the debate on the corporate goal and on shareholder or stakeholder value is based on basic economic and ethical convictions that are difficult to reconcile. The economic, sociological and legal policy arguments discussed in Section II and the options available to legislatures thereafter have been and still are consistently confronted with arguments for and against them. In the following Section III, an attempt is made to bring the debate down from the top level of general theories and fundamental convictions to a more realistic level, without getting lost in the details of the individual arguments, especially since these are mostly without

[145] Article 22.
[146] Articles 25 and 26.
[147] But see Article 12, which foresees model contract clauses and Article 13 with forthcoming guidelines.
[148] Article 29, Review.

empirical support.[149] In this attempt, genuine possibilities of an actual realisation and implementation of stakeholder governance are to be examined. In our opinion, it is not only the setting of rules that is important; rather, it is the enforcement and enforceability of such rules that is also relevant and perhaps of even greater significance. In this context, a whole arsenal of regulatory or legislative options emerges. These options must be graded according to the intensity of the interference with personal freedom and the market, and a strict principle of proportionality must apply to such interventions. This is already stipulated by the constitutions of many countries.

1. Market discipline and self-regulation

In business, it is already the case today that many companies – and not only the large and internationally active ones – are aware of the challenges of realising more sustainable business beyond mere profit maximisation, and they are changing course accordingly.[150] This transformation process is now strongly driven by institutional investors, societal expectations and reputational risk, but – as should be acknowledged in view of the growing general ideological condemnation of capitalism – also by a true sense of entrepreneurial responsibility and employee motivation. According to a German survey of CFOs and supervisory board chairs of 160 listed companies from October 2021,[151] 76% of the respondents already have a sustainability strategy in place. The companies set concrete ESG targets and use ratings, benchmarking and key performance indicators (KPIs). More than half of the respondents report that their company already has a corporate sustainability board consisting of board members and executives from different divisions. Six out of ten respondents already take ESG objectives into account in board compensation, and this number increases to nine out of ten when including companies planning such a step. The number of ESG committees is projected to more than triple. Risk management has been expanded with regard to ESG at 74% of the respondent companies. Empirical studies also show that well-managed companies have higher CSRs and

[149] *Dirk A. Zetzsche/Linn Anker-Sorensen,* Regulating Sustainable Finance in the Dark, 23 European Business Organization Law Review 47 (2022) at 82, fearing a “quack regulation”.
[150] Cf. the empirical data in *Allen Ferrell/Hao Liang/Luc Renneboog,* Socially Responsible Firms, (2016) 122 Journal of Financial Economics 585; see also *Pollman* (note 32), at 666 et seq., on the difficulties of interpreting the empirical data.
[151] *Hengeler Mueller/Deutsches Aktieninstitut,* Unternehmen im Transformationsprozess, Frankfurt 2021, the survey covered 310 persons, of whom 20% answered. Among the factors identified as motivating more sustainable action, the results were: reputation (8%), feeling of responsibility (87%), expectation of the investors (85%), ESG risk (78%) and potential of innovation (78%).

that CSR is perfectly compatible with corporate value and shareholder returns.[152] Above all, however, there is a very considerable influence of institutional investors and hedge fund activists on companies in the market and increasingly also in general meetings.[153]

This does not, however, rule out the insight that market regulation and self-discipline alone are insufficient. This is not limited to a few "black sheep" among many "white" ones. Green washing remains a problem. An empirical study from the USA has shown that the signatories of the Business Roundtable's 2019 Statement[154] have indeed not noticeably changed their entrepreneurial decisions since that time.[155] Moreover, it is easy to measure profits but very difficult to capture consideration of stakeholder interests and ESG. The role of manipulation and deception in the corporate world and in the markets has been impressively demonstrated by Nobel Prize winners *George A. Akerlof* and *Robert J. Shiller*.[156] The results of a 2019 empirical study suggest that in many companies unethical behaviour is tolerated to some degree; indeed "a quarter of managers tend to set aside moral views and act in an ethically questionable manner in certain situations".[157] The ruthless exploitation of the formal text and lacunae in the applicable legislation is illustrated by the huge and outrageous German tax scandal that featured the illegal issuance of multiple dividend refunds by tax authorities who had been deceived on the basis of an alleged lacuna in tax law the so-called cum/cum and cum/ex affair), which is now before the courts and has been clearly described by them as

[152] *Ferrell/Liang/Renneboog* (note 150) at 605: "… corporate social responsibility … can be consistent with a core value of capitalism, generating more returns to investors, through enhancing firm value and shareholder wealth". Cf. also *Felix Mormann/Milica Mormann,* The Case for Corporate Climate Ratings: Nudging Financial Markets, 28.4.2022, available at < https://ssrn.com/abstract=3952018 >.

[153] *James D. Cox/Randall S. Thomas,* A Revised Monitoring Model Confronts Today's Movement Toward Managerialism, 99 Texas L. Rev. 1275 (2021); cf. also *Williams* (note 32), p. 97 et seq., noting, however, that CSR is hardly sufficient, p. 114. On ESG investing and in favour of a market-led approach, *Wolf-Georg Ringe*, Investor-Led Sustainability in Corporate Governance, ECGI Law Working Paper No 615/2021, available at < https://ecgi.global/content/working-papers >; *Iain MacNeil/Irene-marié Esser,* From a Financial to an Entity Model of ESG, 23 European Business Organization Law Review 9 (2022).

[154] Supra note 21.

[155] *Lucian A. Bebchuk/Roberto Tallarita,* Will Corporations Deliver Value to All Stakeholders?, available at < https://ssrn.com/abstract=3899421 >, to be published in Vanderbilt Law Review. None of the twenty companies reviewed amended its corporate governance guidelines to incorporate stakeholder welfare as an independent aim of the corporation; to the contrary, in many of them the guidelines kept a strong statement of the shareholder primacy principle. See also *Ferrarini* (note 20), p. 142 et seq.

[156] *George A. Akerlof/Robert J. Shiller,* Phishing for Phools. The Economics of Manipulation and Deception, Princeton University Press, 2015.

[157] See Wertekommission/TUM School of Management der Technischen Universität München, Führungskräftebefragung 2019, on p. 22, 30. Similar results for the financial sector in *Alain Cohn/Ernst Fehr/Michel André Maréchal,* Business culture and dishonesty in the banking industry, Nature, vol. 516, 4 December 2014, p. 86.

illegal.[158] The temptation to gain an edge over competitors in this way is particularly strong when a company is struggling in the market. So when it comes to restoring the legitimacy of the capitalist structures, market discipline and self-regulation certainly make an important contribution that is unjustly underestimated by the public. But they are not enough. On the other side, it is not enough to immediately call for regulation. Empirical studies indicate that the behaviour of managers is determined less by regulation than as being decisively influenced by their values and corporate culture.[159] This is a broad field not only for practice but also for the law. Furthermore, the increasing influence of institutional investors may bring about decisive changes in the market and in companies.

2. The code movement: comply and explain

In recent decades, the movement of corporate governance codes has gained great importance not only in the European Union and its Member States, but internationally as well. Most industrially developed countries now have such codes, which are usually enforced by declarations of compliance – "comply or disclose" or stronger "comply or explain" – and some are even required by law.[160] These codes require corporate leaders, though usually only those of listed companies, to comply not only with laws and regulations (the vast field of legal compliance) but also with business ethics, and they encourage the setting of a corporate goal. The German Corporate Governance Code refers back to the model of the "honourable merchant", which first appeared among the Italian merchants of the Renaissance and, as far as Germany is concerned, dates back to the times of the North German Hanseatic League in the 16th century.[161] The UK Corporate Governance Code of July 2018 states: "The board should

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[158] The punishability of such business practices has now been confirmed by the Federal Court of Justice, see the German Bundesgerichtshof, decision of 28 July 2021 – 1 StR 519/20, NJW 2022, 90; many penal court cases are pending. A Hamburg top banker was just sentenced to five-and-a-half years in prison.

[159] *Renée Adams,* in ECGI-Symposium 29.3.2022, available at < https://ecgi.global/content/corporate-sustainability-due-diligence >. For reforms in viewing corporate governance through the lens of behavioral ethics, *Feldman/Libson/Parchomovsky* (note 101) at 1130 et seq., 1144 et seq.. See also *Amir Licht,* Culture and Law in Corporate Governance, in Gordon/Ringe (note 65), p. 129.

[160] See the collection of such codes by the *European Corporate Governance Institute (ECGI),* available at < https://ecgi.global/content/codes >. For international standards, such as the UN Global Compact or the OECD Guidelines for Multinational Enterprises, 2011, see *Ferrarini* (note 20) at 140.

[161] *Daniel Klink* in Joachim Schwalbach, ed., Corporate Social Responsibility, ZfB-Special Issue 3/2008, 57 at 61 et seq.; *Joachim Schwalbach*, Ehrbare Kaufleute als Leitbild verantwortungsvoller Unternehmensführung - Geschichte und Perspektiven, zfwu 17/2 (2016), 216; *Michael Hüther,* Ordnungspolitischer Einspruch, Moral als Unternehmenswert, Handelsblatt 30./31.5./1.6.2008 Nr. 103 S. 8. More generally on codes of conduct/ethics, *CalPERS,* Governance & Sustainability Principles, June 18, 2018, p. 31, available at < https://calpers.ca.gov/docs/forms-publications/governance-and-sustainability-principles.pdf >. But voicing doubts *Holger Fleischer*, Ehrbarer Kaufmann – Grundsätze der Geschäftsmoral – Reputationsmanagement: Zur "Moralisierung" des Vorstandsrechts und ihren Grenzen, Der Betrieb 2017, 2015 at 2016. Cf. also *Jennifer Milinovic,* Der ehrbare Kaufmann im deutschen Recht, Bern/Pieterlen et. al. 2019.

establish the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned."[162] For some time now, these codes have increasingly focused on sustainability and the long-term pursuit of stakeholder interests,[163] for example in the Netherlands[164] and most recently also in Germany.[165] There is even talk of these codes becoming "green", and in some cases the codes explicitly integrate climate protection, such as the UK Stewardship Code 2020.[166]

The effectiveness of such codes has always been debated. The experience with them – in the United Kingdom, for example, and there especially in the financial sector and in the context of corporate takeovers[167] – has in some cases been quite impressive, but in other countries experiences are mixed.[168] At present, the contribution of such codes to the improvement of corporate governance of companies must certainly be regarded as important. This is especially true if there is appropriate transparency. Today, this is largely achieved through a legal or regulatory principle of comply or explain. On the other hand, there is thus far a lack of clear empirical evidence that non-compliance with code recommendations really has an impact on the price of the corresponding shares.[169] The only certainty is that company managers actually shy away from explaining non-compliance. This is also shown by the high compliance rates. So in the end, codes are just "regulation in the shadow of the law",[170] motivated also by the desire to keep state regulation low.[171]

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[162] UK Corporate Governance Code as of July 2018, in its opening section: "Board Leadership and Company Purpose", Principle B. Cf. *Fleischer* (note 19), ECFR 2021, 161 at 173 et seq.
[163] *Michele Siri/Shanshan Zhu,* Integrating Sustainability in EU Corporate Governance Codes, in: Busch/Ferrarini/Grünewald (note 20), p. 175; *Maria Lucia Passador,* Stewardship or trusteeship codes? available at < https://ssrn.com/abstract=4029991 >.
[164] *Manuel Lokin/Jeroen Veldman,* The Potential of the Dutch Corporate Governance Model for Sustainable Governance and Long Term Stakeholder Value, Erasmus Law Review 2019/4, 50.
[165] German Corporate Governance Code, Revision 2022 (note 84). On the preceding version of 2020, see *Klaus J. Hopt/Patrick C. Leyens,* Der Deutsche Corporate Governance Kodex 2020 – Grundsatz- und Praxisprobleme, ZGR 2019, 929.
[166] *Paul L. Davies,* The UK Stewardship Code 2010-2020: From Saving the Company to Saving the Planet", in: Dionysia Katelouzou/Dan W. Puchniak, eds., Global Shareholder Stewardship, Cambridge 2022, p. 44 at 59 et seq., discussing ESG (including climate change). See more generally UK Stewardship Code 2020 and UK Corporate Governance Code 2018.
[167] UK Takeover Code, 13th ed., July 5, 2021; cf. *Klaus J. Hopt,* Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis, Columbia Journal of European Law (CJEL) 20 (2014) 249, taking sides in favour of the British model against the US model.
[168] In Germany, the experiences with the voluntary Insider Trading Guidelines and the Takeover Guidelines were so bad that the legislature stepped in, though only as a result of European Union pressure.
[169] *Patrick Leyens* in: Heribert Hirte/Peter Mülbert/Markus Roth, eds., Großkommentar zum Aktiengesetz, 5th ed., Berlin et. al. 2018, § 161 comments 48 et seq.; *Klaus J. Hopt,* Self-Regulation in Banking and Finance – Practice and Theory in Germany –, in: La Déontologie bancaire et financière/Ethical Standards in Banking & Finance, Brussels 1998, p. 53.
[170] *Ferrarini* (note 20), at 10, 33 et seq.
[171] *Davies* (note 166) at 65: "common concern to keep government regulation of investment intermediation to a minimum".

3. Disclosure and auditing: Selected countries and the European Corporate Sustainability Reporting Directive of 2022

Traditionally, mandatory disclosure is considered to be a more appropriate enforcement mechanism than mandatory regulation.[172] The idea behind this is that disclosure obligations turn "under the table into a duty of conduct" and that (European company) law thus sets in motion "an ingenious mechanism of action" that unexpectedly changes the purpose of the public limited company and practically enforces this change.[173]

The United Kingdom has embraced the enlightened shareholder value principle since the 2006 reform. According to this principle, directors have a duty to promote the long-term success of the commercial company, taking into account a non-exhaustive catalogue of stakeholder interests (including those of employees, suppliers, customers, the community and the environment).[174] However, this was apparently successful only to a limited extent.[175] Consequently, for accounting periods beginning on or after 1 January 2019, UK legislators have prescribed a so-called section 172(1) statement, in which a "strategic report" must be included in the company's annual report and accounts.[176] In it, the directors must describe how they have taken into account the wider social factors.

For the motherland of shareholder value, the USA, Justice Strine has also suggested a whole series of disclosure requirements,[177] namely annual reports for large, socially important companies as to the impact of their business on workers, consumers, communities, the environment and the nation. All companies with annual revenues of more than $1 billion would

[172] Cf. *Holger Daske/Luzi Hail/Christian Leuz/Rodrigo S. Verdi,* Mandatory IFRS Reporting Around the World: Early Evidence on the Economic Consequences, last revised 19 January 2023, available at < https://ssrn.com/abstract=1024240 >. On the theory of financial disclosure, see *Wolfgang Schön,* Informationspflichten der Unternehmensleitung zwischen Aktionärsinteresse, Kapitalmarktinformation und sozialer Verantwortung, in: Katharina Boele-Woelki et al., eds., Festschrift für K. Schmidt, Munich 2019, vol. II, p. 391; on voluntary versus mandatory enterprise disclosure, *idem,* p. 394 et seq.;
[173] *Schön* (note 90), ZHR 180 (2016) 279 at 283.
[174] Section 172(1) of the Companies Act 2006, duty "to promote the success of the company for the benefit of its members as a whole, and in doing so to have regard (amongst other matters) to …" For details, *Davies/Worthington/Hare* (note 85), marg. no. 10-027-10-032. On enlightened shareholder value, *Jensen* (note 24), 12(2) Business Ethics Quarterly 235 (2002) at 245 et seq. (enlightened stakeholder theory).
[175] See also *Andrew Keay/Taskin Iqbal*, The impact of enlightened shareholder value, Journal of Business Law 2019, 304.
[176] UK Companies Act sections 172(1), 414CZA from 2019, identifying the strategic report as part of the annual report; description of how the directors have had regard for the matters is set out in section 172(1)(a) to (f).
[177] *Strine* (note 43), p. 8 et seq.

be covered, including those that are not listed on the stock exchange, so as not to distort competition. The supervisory authorities are to ensure that the reports are standardised so that they can be compared more easily. Where companies issue prospective quarterly reports, not only three-month earnings expectations should be disclosed but also long-term planning. Recently, the US Securities and Exchange Commission (SEC) has proposed not only disclosure of certain material human capital measures or objectives that management focuses on in managing the business, but even certain climate-related disclosures in the registration statements and annual reports filed with the SEC.[178]

The most recent piece of legislation on mandatory disclosure is the European Corporate Sustainability Reporting Directive of 2022 (CSRD).[179] This Directive goes far beyond the Directive on nonfinancial reporting of 2014, the CSR Directive.[180] While the latter intended to strengthen the confidence of investors and consumers via information, the CSRD expressly extends the addressees of information to two primary groups of users: the first being investors, including asset managers, the second being civil society actors, including non-governmental organisations and social partners who wish to better hold undertakings to account for the impact they have on people and the environment.[181] The CSR Directive still relied on the comply and

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[178] *SEC,* The Enhancement and Standardization of Climate-Related Disclosures for Investors, Proposed March 21, 2022, Press release, proposed rule and fact sheet available at < https://sec.gov/news/press-release/2022-46 >. For an overview of the proposed changes, see the fact sheet: "The … proposed rules amendments … would require a domestic or foreign registrant to include certain climate-related information in its registration statements and periodic reports … including: Climate-related risks and their actual or likely material impacts on the registrant's business, strategy, and outlook; The registrant's governance of climate-related risks and relevant risk management processes; The registrant's greenhouse gas ("GHG") emissions, which, for accelerated and large accelerated filers and with respect to certain emissions, would be subject to assurance; Certain climate-related financial statement metrics and related disclosures in a note to its audited financial statements; and Information about climate-related targets and goals, and transition plan, if any."; Cf. *Armour/Enriques/Wetzer* (note 68).

[179] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 as regards corporate sustainability reporting, OJEU 16.12.2022, L 322/15, referred to in this article as Corporate Sustainability Reporting Directive (CSRD). Cf. *Eberhard Vetter,* Sustainable Corporate Governance Reporting, ESG-Berichterstattung, in Peter Hommelhoff/Klaus J. Hopt/Patrick Leyens, eds., Rechte und Pflichten in der Unternehmensführung, Munich 2023, forthcoming, § 42. For a thorough and critical evaluation of the European sustainability disclosure rules, see *Wolfgang Schön,* "Nachhaltigkeit" in der Unternehmensberichterstattung, Zeitschrift für die gesamte Privatrechtswissenschaft 2022, 207.

[180] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJEU 15 November 2014, L 330/1. See also Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector, OJ L 317, 9 December 2019 (Transparency-Regulation); Regulation (EU) 2020/852 on the establishment of a framework to facilitate sustainable investment, OJ L 198, 22 June 2020 (Taxonomy-Regulation); on both regulations, see e.g. *Chris van Oostrum*, Sustainability through Transparency and Definitions: A few thoughts on Regulation (EU) 2019/2088 and Regulation (EU) 2020, 852, 18 European Company Law Journal 15 (2021).

[181] CSRD (note 179), Recital (9). The text continues on and states that other stakeholders might also make use of sustainability information disclosed in annual reports, in particular to foster comparability across and within market sectors

explain principle. The CSRD goes considerably further. The Directive will cover many more enterprises, an estimated 15.000 enterprises, the mandatory information is greatly expanded, and instead of the comply and explain principle the sustainability report must be audited. The CSRD relies on a so-called double materiality perspective: Undertakings are required to report both on the impact of their activities on people and the environment and on how sustainability matters affect the undertaking.[182] Whether this affects the purpose of the corporation is unclear and disputed.[183]

Even though some international empirical data is already available on the consequences and possible benefits of mandatory disclosure on ESG,[184] many questions about the effectiveness of such disclosure requirements remain unanswered and controversial.[185] Mandatory auditing in particular has been criticised,[186] though it is true that a formal may still be helpful.[187] *Colin Mayer* and others go further and advocate a total reform of accounting and reporting which has as its central focus the "net of the costs of maintaining human, social, and natural as well as physical assets".[188] While this may well be debatable theoretically, it is hardly realistic.

4. Enterprise law: Outside and inside requirements

a) Outside requirements: Duties of the enterprise

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[182] CSRD (note 179), Recital (29), i.e. not only information to the extent necessary for an understanding of the undertaking's development, performance and position, but also information necessary for an understanding of the impact of the undertaking's activities on environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.

[183] As to this discussion, see *Stefan Harbarth*, Nachhaltigkeit im Rahmen unternehmerischer Entscheidungen, Festschrift für Ebke, 2021, 307 at 314 et seq.; *idem,* Unions- und verfassungsrechtliche Vorgaben der Unternehmensausrichtung an nichtfinanziellen Parameters (ESG), in Hommelhoff/Hopt/Leyens (note 179), § 6; *Mittwoch* (note 84), p. 145 et seq.; *Koch* (note 84) § 76 comment 35d; *E. Vetter* (note 179).

[184] *Florencio Lopez-de-Silanes /Joseph A. McCahery /Paul C. Pudschedl,* ESG Performance and Disclosure: A Cross-Country Analysis, Singapore Journal of Legal Studies 217 (2020).

[185] *Chiara Mosca/Chiara Picciau,* Making Non-Financial Information Count: Accountability and Materiality in Sustainability Reporting, in: Hugues Bouthinon-Dumas/Bénédicte François/Anne-Catherine Muller, eds., Finance durable et droit: perspectives comparées, Paris 2020, p. 175; idem, 6 February 2020, Bocconi Legal Studies Research Paper No. 3536460, available at < https://ssrn.com/abstract=3536460 >; *Patrick A. Hell,* Offenlegung nichtfinanzieller Informationen, Tübingen 2020; cf. on the pros and limits of disclosure, *Kraakman et al.* (note 62) at 245 et seq.

[186] *Joachim Hennrichs*, Die Grundkonzeption der CSR-Berichterstattung und ausgewählte Problemfelder, ZGR 2018, 206 at 229 et seq., finding the relevant matters, "only externally auditable and justiciable to a limited extent", this with regard both to the accuracy and, above all, to the completeness of the disclosures; the author articulates instead a fear of burocratisation and instrumentatlisation for positive self-promotion ("green washing.

[187] Cf. International Accounting Standard Board (IASB), Effects of climate-related matters on financial statements, November 2020, available at < https://ifrs.org/news-and-events/news/2020/11/educational-material-on-the-effects-of-climate-related-matters/ >. See also *British Academy,* Final Report (note 4), p. 37.

[188] *Mayer* (note 3), The Governance of Corporate Purpose, at 10.

Disclosure requirements – as demonstrated by the European Union's accounting law – reflect a seemingly unstoppable trend towards ever increasingly detailed disclosure. This overburdens medium-sized and smaller companies in particular financially and in terms of personnel, and it puts them at a noticeable disadvantage in international competition. There is thus a case for legislators to impose instead clear, limited conduct requirements on companies, thereby ensuring that the impact of corporate conduct on ESG, climate change and other stakeholder interests is not externalised but borne rather by the companies themselves. Yet such regulations should be examined in advance as to both their effectiveness and their compliance with the principle of proportionality (by means of a careful, comprehensive cost-benefit analysis); thereafter they would have to be democratically legitimised. This has not really been done sufficiently in connection with the European Corporate Sustainability Due Diligence Directive.[189] In particular the cascading rules of the Directive regarding obligations extending beyond the specific contractual relationship are unclear and problematic.[190] They go much further in terms of content and addressees than the German Supply Chain Responsibility Act, which for its part covers indirect supplier relationships only in exceptional cases.[191]

b) Inside requirements: Rights, duties and organisation of the corporate organs

More far-reaching than such externally directed rules of conduct for the companies as such are requirements for the internal organisation of the companies and, above all, the personal commitment of the corporate bodies and other functionaries in the companies with regard to stakeholder interests, ESG and climate protection.

In Germany, in particular, there is long experience of requiring board members (in the two-tier system, executive board and supervisory board members) to consider the interests of other stakeholders, namely employees, as well as the common good in their decisions – thus, aims reaching beyond specific shareholder interests.[192] The German experience is that this legal rule gives the directors broad entrepreneurial discretion (business judgment rule). But this discretion is by no means carte blanche, instead being limited by a number of preconditions, especially

[189] Supra II 4 c.
[190] In particular, Article 22 of the CS3D (note 130) on the civil liability of the companies and a right of full compensation, which covers not only the immediate suppliers who are bound by contract but also extends to the business partners of the latter, see Article 7 (2)(b).
[191] See the German Supply Chain Due Diligence Act (note 121), § 2 para. 8, § 3 para. 1 sentence 2 number 8, § 9.
[192] See *Rüdiger Veil,* Two models of stakeholder governance: The trustee model and the representative model – Experiences from Germany (and Europe), forthcoming.

with regard to the required disclosure and conflicts of interests.[193] There is also extensive, well-established strict case law on the limits that the board of directors must observe with regard to corporate donations and other benefits if it does not want to incur liability for damages.[194] The decisive factor under corporate law is that the corporate interest takes precedence over the individual interests of shareholders and stakeholders, which follows from the concept of the corporation as a separate legal personality. This precedence is evident not only, but above all, in a company crisis. The European Commission's Proposal for a Directive had proposed that directors, when acting in the best interests of the company, had a duty "to 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". Accordingly, directors would have been personally liable for such breaches of duty.[195] But this requirement met with broad criticism, and, in contrast to duties of the company itself, was ultimately not taken up by the final version of the Directive.[196]

In Europe, there are also many years of experience with corporate co-determination in the supervisory board, which has recently been considered also in the USA.[197] However, these proposals do not go as far as in Germany, with its quasi-parity employee participation in large German companies.[198] While limited employee co-determination in the board is now widely established and accepted in Europe, Germany's much more far-reaching co-determination remains controversial. It has blocked agreement on a quite modest regime of European company law for decades and is by no means an "export model", as is claimed by interested

[193] *Hopt/Roth* (note 70), § 93 comments 61 et seq., 90 et seq., 102 et seq.; § 116 comments 60 et seq., 142 et seq.; *Klaus J. Hopt,* Conflict of Interest, Secrecy and Insider Information of Directors, A Comparative Analysis, ECFR 2013, 167. Cf. *Guido Rossi,* Il conflitto epedemico, Milano 2003.
[194] *Hopt/Roth* (note 70), § 93 comments 210 et seq.; *Hopt/Veil,* Rivista delle società (introductory note) at 947 et seq.
[195] Article 25(2) of the draft directive, also Article 26. These articles leave open the question of who has a claim (the company, the shareholders or third parties) and who has standing.
[196] Cf. ECLE (note 130).
[197] Senator *Elizabeth Warren,* S. 3348, Accountable Capitalism Act, 115th Cong (2018), stating that the Act would be applicable to all firms with more than $ 1 billion in sales; employees would elect at least 40 per cent of the directors, and the board must consider the interest of all stakeholders, not just of the shareholders. On the Warren proposal, see *Rock* (note 2) 387 et seq.; *Bruner* (note 35), 131 Yale L. J. 1217 (2022) at 1262 et seq., but also pointing at the Volkswagen scandal, 1265; *Strine* (note 43) at 9 et seq., proposing for large companies (with over $ 1 billion in annual sales) the formation of a board committee on labour interests; *Martin Gelter,* The Dark Side of Shareholder Influence: Managerial Autonomy and Shareholder Orientation in Comparative Corporate Governance, 50 Harvard Int. L. J. 129 (2009). See also the utopia of *Kent Greenfield*, Reclaiming Corporate Law in a New Gilded Age, 2 Harvard Law and Policy Review 1 (2008) at 24, finding that all important stakeholders should be represented in the board. Contra *Jens Dammann/Horst Eidenmüller,* Codetermination: A Poor Fit for U.S. Corporations, 3 Colum. Bus. L. Rev. 870 (2020). *Leo E. Strine, Jr./Aneil Kovvali/Oluwatomi O. Williams,* Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance, 106 Minnesota Law Review 1325 (2022).
[198] For details, *Veil* (note 192).

parties such as German labour unions and, in part, by the Social Democratic Party. It is far too inflexible and clearly in need of reform.[199]

In international discourse, there are various other model proposals, such as the establishment of special bodies in the company for ESG matters, for example an ESG officer or an ESG committee, or special ESG knowledge and requirements in terms of the composition of the board.[200] Many companies already do this in response to the pressure of institutional investors, the financial press or the public, but also on their own initiative. More problematic is the inclusion of an ESG or stakeholder representative in the board, as asked for in the reform discussion. In countries with labour representation on the board – in particular if parity or quasi-parity is required by law, as in Germany,[201] but also in countries with mandatory minority representation as in Italy[202] – this may have unwelcome consequences, such as splitting up the shareholder side of the board excessively. This is even more true regarding pleas to install a debtholder representative or even a public interest representative on the board.[203] By contrast, the consideration of ESG in the variable remuneration of board members is, as mentioned,[204] already corporate practice in some instances. This is what the CS3D of 2023 has taken up in view of the Paris Climate Change Agreement.[205] Interesting also are proposals to give shareholders more say in the pursuit of ESG, not only through more information about it and the possibility of discussion and proposals in the general assembly, but through a broader dialogue between the board (including the individual directors) and institutional investors. The latter proposal, however, raises questions of equal treatment. Additionally, a mandatory

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[199] See the reform proposals made by interdisciplinary experts, Arbeitskreis Unternehmerische Mitbestimmung, Zeitschrift für Wirtschaftsrecht (ZIP) 2009, 885.
[200] *Strine* (note 197); *Philipp Jaspers,* Nachhaltigkeits- und ESG-Ausschüsse des Aufsichtsrats, Die Aktiengesellschaft 2022, 309.
[201] See *Veil* (note 192).
[202] As to minority representation in the board, as required for example in Italy since the reform of 2005, see empirical data provided by *Andrea Ciavarella/Sara De Masi/Nadia Linciano/Andrea Zorzi,* Who looks for sustainability? Diverging interests within the boardroom, Miami Herbert Business School, 12-13 November 2022.
[203] *Paul L. Davies/Klaus J. Hopt,* Non-Shareholder Voice in Bank Governance: Board Composition, Performance, and Liability, in: Danny Busch/Guido Ferrarini/Gerard van Solinge, eds., Governance of Financial Institutions, Oxford 2019, p. 117.
[204] Supra III 1.
[205] Article 15(3) of the CS3D (note 130), supra II 4 c.

resolution of the general meeting on ESG (a "say on climate" parallel to "say on pay") could be envisaged.[206] The AGM could even be opened up to certain stakeholder groups.[207]

5. Public enforcement: State agencies, public procurement, the attorney general

The actual enforcement of such proposals to take into account stakeholder interests, ESG and climate protection raises numerous further problems that can only briefly be touched upon here. A basic distinction must be made between enforcement by government bodies and by private parties, though it is now generally agreed that both must be involved and fill their specific roles.

State enforcement is carried out by public authorities. In this respect, the CS3D provides that each Member State is to entrust one or more supervisory authorities with the task of monitoring compliance with business rules, and it stipulates that these authorities are to be given broad powers, including, for example, the power to investigate and impose sanctions.[208] Sanctions must be effective, proportionate and dissuasive. Pecuniary sanctions are to be based on the company's worldwide net turnover.[209] Decisions of the supervisory authority imposing sanctions must be published.[210] National supervisory authorities are to cooperate in a European Network of Supervisory Authorities.[211] Corresponding activities on ESG and climate protection can also be seen in actions undertaken by the EBA, ESMA and the European Central Bank.[212]

[206] *Edmans* (note 13) at p. 206 et seq.; cf. *ShareAction,* Fit-for-purpose? The Future of the AGM, January 2021, therein Companies Act Section 172. Contra *Ferrarini* (note 20), at 108, because of the collective action problems; *Fleischer* (note 19) at 184 et seq., identifying "murky corporate governance clauses in practice" and up to now no "informed decisions" being possible. See also *Jill E. Fisch,* Purpose Proposals, ECGI Law Working Paper No. 638/2022, April 2022, available at < http://ssrn.com/abstract_id=4079135 >, forthcoming 1 U. Chi. Bus. L. Rev. (2022), discussing the problems raised by intermediate stock ownership. For a survey on comparative law, see *Holger Fleischer/Philipp Hülse,* Klimaschutz und aktienrechtliche Kompetenzverteilung: Zum Für und Wider eines "Say on Climate", Der Betrieb 2023, 44.

[207] *ShareAction* (note 206), stating that a core list of stakeholder groups should be given the right to register.

[208] Articles 17 and 18 of the CS3D (note 130). On public enforcement of the German Law of 2021 and the CS3D, see *Martin Burgi,* Public Enforcement im Recht der nachhaltigen Unternehmensführung, ZHR 186 (2022) 779.

[209] Article 20(3).

[210] Article 20(4).

[211] Article 21.

[212] Cf. *European Banking Authority,* EBA Report on Management and Supervision of ESG Risks for Credit Institutions and Investment Firms, EBA/Rep/2021/18; *idem,* Action Plan on Sustainable Finance, December 6, 2019; *ESMA,* Strategy on Sustainable Finance, February 6, 2020; *European Central Bank (ECB),* Guide on climate-related and environmental risks, Supervisory expectations relating to risk management and disclosure, November 2020.

A particularly severe state sanction is exclusion from the awarding of public contracts. This is explicitly provided for in the German Supply Chain Responsibility Act, for example.[213] It is important that such an administrative exclusion be subject to judicial review.

The European CS3D does not contain any criminal sanctions. This is partly because there is thus far no uniform corporate criminal law in the European Union. However, this does not rule out the possibility that violations of ESG and climate protection regulations in the Member States will be punished through administrative offence law or even criminal law. It should be remembered that using criminal law against enterprises and organisations as such is controversial and that there is a need for more empirical data regarding the extent and effectiveness of criminal sanctions imposed against directors. In any case, using criminal sanctions should be restricted to grave violations as a last means of enforcement.

6. Private enforcement by shareholder and stakeholders

Private enforcement is particularly controversial. This is already true under the conventional shareholder value concept, but it is even more the case for stakeholder suits. Under German stock corporation law, for example, executive and supervisory boards do not only have entrepreneurial discretion, they are also personally liable if they exceed it – although in principle only vis-à-vis their own company.[214] Direct liability towards third parties exists only in exceptional cases, namely if a law violated by the corporate body is a protective law for third parties.[215] Whether the latter is the case is rarely explicitly stated in the law in question; it is instead decided on a case-by-case basis with reference to existing court jurisprudence – and not for the act as a whole but for each individual provision which has allegedly been violated. This also means that under German corporate law there is no standing for individual shareholders, let alone all possible stakeholders. But certain minorities can bring a court action so as to require that the company holds a (management or supervisory) board member liable.[216] The claim – common in foreign literature and sometimes even amongst German academia – that this approach has the consequence that in Germany board members, and especially supervisory board members, are only rarely held liable may have been true in the past, but it is no longer

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[213] German Supply Chain Responsibility Law (note 121), § 22.
[214] § 93 and § 116 of Stock Corporation Act, covering members of the management board and those of the supervisory board.
[215] For details, see *Hopt/Roth* (note 70), § 93 comments 623 et seq., 648 et seq.
[216] § 147 para. 1 German Stock Corporation Act and *Hopt/Roth* (note 70), § 93 comments 623.

grounded in corporate reality since the various major financial crises. Indeed, it is actually highly inaccurate.[217] While it is indisputable that directors must also be subject to personal liability for their misconduct, the extent of personal liability is regulated very differently internationally, and it is a controversial topic in terms of legal policy, especially with regard to ESG obligations.[218]

Internationally, the situation is partly different. For example, the Canadian Business Corporation Act 1985 provides for shareholder suits by individual shareholders.[219] Most importantly, however, the number of international lawsuits related to environmental damage, climate change and human rights is increasing dramatically today.[220] This goes hand in hand with the affirmative standing of non-profit associations, environmental groups, trade unions[221] and more recently even of individual aggrieved stakeholders. According to the French Duty of Vigilance Law, stakeholders even have the right to bring pre-emptive claims.[222] However, such standing for everyone is highly problematic, especially if all possible jurisdictions are open to claimants based on both the place of violation and its effect. There is then a danger that companies will be overburdened with years of litigation, even if a claim is unfounded. Even worse, it cannot be excluded that a business niche may emerge for "predatory ESG stakeholders", as is the experience in Germany with "predatory shareholders". But it is not only standing that is problematic; it is also the role of the courts. The climate change lawsuit against Shell in the Netherlands, in which a civil court ordered the Shell group to make very specific reductions in its climate-damaging emissions (at least 45% by the end of 2030 relative to 2019 emissions), ordered in response to lawsuits by private associations and foundations,[223] was an international sensation and met with both vehement approval and vehement criticism. There are

[217] *Klaus J. Hopt,* Die Verantwortlichkeit von Vorstand und Aufsichtsrat: Grundsatz und Praxisprobleme – unter besonderer Berücksichtigung der Banken, ZIP 2013, 1793.
[218] Favouring personal liability, see e.g. *John Armour/Jeffrey Gordon/Geeyoung Min,* Taking Compliance Seriously, 37 Yale Journal on Regulation 1 (2020); but see also *Adams* (note 159).
[219] Section 238(d) of the Canadian Business Corporations Act 1985: "any other person who, in the discretion of a court, is a proper person to make an application under this part"; see *P. M. Vasudev,* Corporate Stakeholders in Canada – An Overview and Proposal, 45 Ottawa L. Rev. 137 (2013) at 141, 145 et seq.; but this approach has not been followed up by other jurisdictions, *Fleischer* (note 103), ZGR 2017, 411 at 425.
[220] *Marc-Philippe Weller/Mai-Lan Tran, idem,* Klimawandelklagen im Rechtsvergleich – *private enforcement* als weltweiter Trend? ZEuP 2021, 573, with reports on the USA, Canada, Australia, UK, Italy, France and the Netherlands; *Marc-Philippe Weller*/Nina Benz, Corporate Governance und Klimaschutz, ZGR 2022, 563. See also OECD, Climate Change and Corporate Governance, Paris 2022.
[221] E.g. § 11 of the Germany value chain law (note 120).
[222] See II 4 a note 114.
[223] Rechtsbank Den Haag, Vereniging Milieudefensie et al. v. Royal Dutch Shell plc, May 26, 2021. In the meantime, Shell has changed its seat to the UK, presumably also in reaction to this judgment.

now numerous other similar proceedings.[224] In accord with the view expressed here, it is certainly the case that in such a manner the enforcement of regulations for the protection of the environment, climate and human rights is promoted quite considerably. On the other hand, due to the lack of clear and sufficient limits for such lawsuits, especially in terms of standing, the effort and uncertainties for companies are enormous. Above all, however, it is problematic when courts impose requirements on companies in individual proceedings between individual private parties, as in the Shell case. Understood properly, this is a matter for democratically legitimised legislatures, which have quite different avenues for undertaking the necessary investigations and which are capable of taking measures across the entire sector and of more generally distributing the costs incurred.

In the end it remains to be seen how all these efforts may change the culture of corporate governance. The culture of the players involved in corporate governance – but also of the legislator, the courts and society – may be the most important factor.[225] It may very well be that the culture in the United States and in Europe becomes more divergent as to shareholderism v. stakeholderism.

## IV. Conclusions and theses

1. One of the oldest corporate law issues – *for whom is the corporation managed?* – has become one of the hottest public policy issues. The traditional idea, especially in the USA, is one of profit generation for shareholders (shareholder value). Yet the new trend holds: "The purpose

[224] *Wolfgang Kahl/Marc-Philippe Weller,* eds., Climate change litigation, Munich et al. 2021; *Holger Fleischer,* Klimaschutz im Gesellschafts-, Bilanz- und Kapitalmarktrecht, Der Betrieb 2022, 37; *Sarah E. Light,* The Law of the Corporation as Environmental Law, 71 Stanford L. Rev. 137 (2019); *Stefanie Schmahl,* Internationale Klimaklagen aufgrund von Menschenrechtsverträgen: sinnvoll oder vergeblich?, Juristen-Zeitung 2022, 317. For a collection of environmental law suits internationally, see e.g. *The Sabin Center for Climate Change Law at Columbia Law School*, Climatecasechart, currently listing 1,407 cases in the U.S. and 564 cases outside the U.S. and providing links to respective case documents, available at < http://climatecasechart.com/ >; *Deutsche Umwelthilfe*, DUHwelt 3/2021, p. 9-11, Klagen fürs Klima, available at < https://duh.de/publikationen/duhwelt/ >; *European Coalition for Corporate Justice* (ECCJ), Suing Goliath, Brussels, September 2021: Collection of civil actions for damages and for injunctive relief and other proceedings, available at < https://corporatejustice.org/publications/suing-goliath/ >.

[225] Cf. *Oliver E. Williamson,* The New Institutional Economics: Taking Stock, Looking Ahead, 28 Journal of Economic Literature 595 (2000) at 596; *Peter A. Hall/David Soskice,* Varieties of Capitalism: The Institutional Foundations of Comparative Advantage, in: idem, Varieties of Capitalism, Oxford 2001, p. 1 at 13; *Lund/Pollman* (note 45) at 2602 et seq.. On Boards and Stakeholders and on Enforcement *Paul Davies/Klaus J. Hopt/Richard Nowak/Gerard van Solinge,* eds., Corporate Boards in Law and Practice: A Comparative Analysis in Europe, Oxford 2013, General Report, p. 4 at p. 68 et seq.. 78 et seq.; on employee representation on the board, cf. also *Paul L. Davies/Klaus J. Hopt,* Corporate Boards in Europe – Accountability and Convergence, 61 The American Journal of Comparative Law 301 (2013) at 339 et seq.

of companies is to produce solutions to problems of people and planet and in the process to produce profits, but profits are not per se the purpose of companies. They are derivative from purpose …". Today there is a vivid battle between the shareholder value theory and the stakeholder value theory.

2. For financial institutions and other regulated companies, the regulators see the primary objective of corporate governance as safeguarding stakeholders' interest in conformity with the public interest on a sustainable basis.

3. Historically, state concessions for corporations were granted only if a public utility could be established. Yet the conc,ession system faded away, and the targeted pursuit of general interests was assigned no longer to stock corporations under stock corporation law, but to antitrust law, securities regulation and other laws. With the ESG movement, this historical development seems to be reversing.

4. Prevailing economic theory defends the primacy of the shareholder as "the most efficient operating principle"; profit maximization "leads to value creation for all stakeholders of the company"; "(i)n addition tax and transfer systems can be used to redistribute economic value to nonshareholders".[226] This leads to various individual arguments and rejoinders. From the side of behavioural economics and the social sciences, the main criticism is the externalisation of costs and damages as projected onto stakeholders other than the company and the shareholders.

5. The classic fiefdom of shareholder value is Delaware. By contrast, numerous individual US states have been so-called constituency states since as early as the 1980s. The forthcoming and newly drafted US Principles of Corporate Governance will probably also provide for such an opening.

6. The corporate purpose movement demands that companies be legally obliged to formulate their purpose. It would then be the duty of the directors to manage the company according to this purpose. Yet this reform, supposedly "an embarrassingly simple policy", is anything but simple and effective. This dilemma is confirmed when one looks at the French Loi Pacte law of 2019.

Extending mandatory public purposes to companies in non-regulated industries would require a fundamental reconsideration of the relationship between the state and entrepreneurial endeavour. If the choice of purpose is left to the shareholders, corporate purpose clauses are

[226] *Fish/Davidoff Solomon* (note 18), 99 Texas L. Rev. 1309 (2021) at 1319; with further arguments, *idem*, at 1320 et seq.

often too generic, and they are difficult to monitor; it may just mean a move from the business judgment rule to the "benefit judgment rule".

7. Legislators have various options for regulating ESG, corporate sustainability diligence and climate change. Prominent examples can be found in France with the Duty of Vigilance Law of 2017 and the Loi Pacte of 2019, and in Germany with the Supply Chain Due Diligence Act of 2021. The most recent movement in the direction of stakeholderism is the European Draft Directive on Corporate Sustainability Due Diligence, forthcoming in 2023.

8. Yet it is not only the setting of rules that is important; rather, it is the enforcement and enforceability of such rules that is perhaps of even greater significance. In this context, a whole arsenal of regulatory or legislative options with different possible effects as well as draw-backs emerges: 1) Market discipline and self-regulation; 2) The code movement: comply and explain; 3) Disclosure and auditing; 4) Enterprise law with outside and inside requirements, in particular: a) duties of the enterprise; b) rights, duties and organisation of the corporate organs; 5) Public enforcement: state agencies, public procurement, the attorney general; and 6) Private enforcement by shareholders and stakeholders.

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