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# Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate Purpose and Duties of the Corporate Board

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**Abstract:** Business, and the dominant legal form of business, that is, the corporation, must be involved in the transition to sustainability, if we are to succeed in securing a safe and just space for humanity. The corporate board has a crucial role in determining the strategy and the direction of the corporation. However, currently, the function of the corporate board is constrained through the social norm of shareholder primacy, reinforced through the intermediary structures of capital markets. This article argues that an EU law reform is key to integrating sustainability into mainstream corporate governance, into the corporate purpose and the core duties of the corporate board, to change corporations from within. While previous attempts at harmonizing core corporate law at the EU level have failed, there are now several drivers for reform that may facilitate a change, including the EU Commission’s increased emphasis on sustainability. Drawing on this momentum, this article presents a proposal to reform corporate purpose and duties of the board, based on the results of the EU-funded research project, Sustainable Market Actors for Responsible Trade (SMART, 2016–2020).

**Keywords:** corporate purpose; corporate boards; sustainability; due diligence; planetary boundaries; social foundation; climate change; human rights; EU company law; EU Green Deal; EU Sustainable Finance Initiative

## 1. Introduction

The COVID-19 pandemic illustrates how everything is connected to everything else [1], and that the stakes with continued unsustainability are high. To achieve sustainability, defined as securing the social foundation for humanity now and in the future within planetary boundaries [2], the contribution of business is crucial [3]. After outlining the EU legal basis and high policy support for sustainability in Section 2, Section 3 summarizes the results of multijurisdictional comparative analysis identifying “shareholder primacy” as a main barrier to sustainable business. “Shareholder primacy,” as will be explained further below, is a social norm that dictates that business is about maximizing returns to shareholders. “Sustainable business” is here intended as a short reference to business that contributes to achieving the global goal of sustainability. Discussions of the unsustainability of business, and criticism of the prevailing shareholder primacy theory, has long roots, including progressive company law scholarship from the 1990s onwards [4–6], and more recent contributions [7–11]. The contribution of this article is, firstly, to position the discussion of sustainable business within a research-based concept of sustainability [2,12–14]. Secondly, to base the analysis on multijurisdictional comparative analysis [3,15,16], strengthening the foundation for stating that shareholder primacy is (still) a main barrier and for finding a way forward. Thirdly, drawing on the results of the EU-funded project, Sustainable Market Actors for Responsible Trade (SMART) [17,18], to present concrete and detailed reform proposals to mitigate shareholder primacy and pave the way for sustainable business.

How business can contribute to sustainability, and how the barrier to sustainability should and can be mitigated, is accordingly the topic for Section 4, the main section of this article. In this Section, I outline what is encompassed in the definition of sustainability as securing the social foundation for humanity now and in the future while staying within planetary boundaries, and how this can be translated for business into sustainable value creation within planetary boundaries. This includes the highly topical issues of mitigating climate change and respecting human rights, but it is not limited to these issues. On this basis, I outline an EU law reform proposal for securing the contribution of business to sustainability—and thereby securing the future of business itself, by streamlining much of what sustainability-oriented business is already aiming to do by creating a level playing field for the business transition to sustainability.

In Section 5, I briefly discuss challenges associated with the proposed reforms. I conclude with a discussion of why such a reform of EU law appears to be possible now—and why it is necessary.

This article concentrates on the dominating legal form for doing business: the corporation. However, the results, and the SMART Project analysis that this article draws on [18], are relevant to and encompass any form for doing business, independent of its legal form and size [18,19].

## 2. Sustainability in EU Treaty Law and Policy

There is increasing high-level policy commitment to sustainability in the EU. This is reflected in the political guidelines of the European Commission 2019–2024, which emphasized right from the beginning of its period, in December 2019, its prioritization of sustainability, launching a European Green Deal, with a “just transition” that leaves “nobody behind,” refocusing the coordination of economic policies across the EU to integrate sustainability [20]. Executive Vice-President, Frans Timmermans, underlined the need for an “ambitious Green New Deal for Europe, which shapes the future for our children and ensures their health, prosperity and security on a green and thriving planet” [21,22]. Furthermore, as a group of ministers of climate and environment amongst the EU Member States have emphasized, the path towards recovery post COVID-19 must be a sustainable one, which responds to the climate and environmental crises we face [23].

The EU’s commitment to sustainability is anchored in the EU Treaties. Sustainability is an overarching objective of the European Union and meant to be the guiding principle for the EU’s policies and activities within Europe and in its relations with the rest of the world, to promote “peace, its values and the wellbeing of its peoples”, Treaty on the European Union (TEU), Article 3(1). The values are set out in Article 2 TEU: “respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. The internal founding values of the EU set out in Article 3(3) and 3(5) TEU are externalized in the Treaty on the Functioning of the European Union (TFEU) Article 21, and reinforced in the EU’s development cooperation with developing countries under Article 208 TFEU. Article 11 TFEU requires the implementation of environmental protection requirements in all EU policies where necessary to achieve sustainability [24–26]. Policy coherence for development (PCD) is set out as an EU legal norm in Article 208 TFEU, requiring that any area of EU law and policy must not work against developmental policies, also with the sustainability aim of “leaving no one behind” [27].

The adoption of the United Nations Sustainable Development Goals (SDGs) in 2015 [28], together with the Paris Agreement on Climate Change in the same year [29], has given a new impetus to the public discourse concerning what we need to do to achieve sustainability. The EU’s commitment to implementing the SDGs is elaborated on in the European Commission’s 2016 communication “Next steps for a sustainable European future—European action for sustainability” and the EU’s 2017 Consensus on Development [30,31].

However, as the analysis in the SMART Project has contributed to showing, much work remains to be done before we can say that the European Union is truly on a track to sustainability [3]. This does not only concern business, which this articles concentrates on, but also the follow-up of the EU’s

Sustainable Finance Initiative, launched in March 2018 [32–34] and the Circular Economy Action Plans, first launched in December 2015 [35,36].

### 3. Identifying a Main Barrier to Sustainable Business

Shareholder primacy is a systemically entrenched barrier to the contribution of business to sustainability. Denoting *shareholder primacy* as a barrier of such significance is a short form for a complex mix of perceived market signals and economic incentives, informed by path-dependent corporate governance assumptions and postulates from legal-economic theories [15]. Shareholder primacy should be distinguished from the legal norm denoted *shareholder value*, which we find notably in the UK [37]. In earlier work, David Millon uses “radical” and “traditional” shareholder primacy to distinguish between the social norm and the legal norm [38]. That the distinction between the social and the legal norm often is not made is symptomatic of the dominance of the shareholder primacy thinking, also in corporate law doctrine [15]. Shareholder value is on the one end of the spectrum with a pluralistic approach to the interests of the company on the other, as we have documented in several multi-jurisdictional comparative analyses [15,16].

No company law system insists on boards focusing only on returns for shareholders, and certainly not requiring that returns be maximized. In addition to the obvious point that company law in all jurisdictions expects boards to ensure legal compliance, company law provides—across this spectrum—a large latitude to the board, and by extension, the management to shape business in a sustainable manner [15,39]. However, as is also evident from the state of unsustainability we are in, boards in aggregate do not predominantly choose sustainability-enhancing options even within the realm of the business case, let alone challenge the outer boundaries of the scope to pursue profit in a sustainable manner by going beyond the business case. Indeed, the lack of cases challenging the boundaries for how far corporate boards can go in promoting long-term sustainability in their decision-making, is a striking feature in the major multijurisdictional comparative analysis, which was an outcome of a project preceding SMART, the Sustainable Companies Project [15].

The shareholder primacy drive combined with a lack of understanding of the scope the law gives the board, and by extension management, has given rise to legal myths inspired by law-and-economics postulates, dictating that the board and senior managers are the “agents” of the shareholders and must maximize returns to shareholders as measured by the current share price. This legal myth of shareholder primacy [40] operates alongside the interconnected legal myth of shareholders owning corporations, which they, as a matter of corporate law, clearly do not [41,42]. The shareholder primacy norm is contrary to a proper analysis of company law, which shows that the aim of any legislation allowing for companies to exist and become a dominant form of business, has done so based on the assumption that this is positive for society. The idea is that companies create value, for themselves, for their employees, their business partners, their local communities and the broader society. There is no company law in any jurisdiction that promotes companies as a business form based on the assumption that this will maximize returns to shareholders to the detriment of society [15,43], yet, this is far too often the consequence.

As, among others, Jay Cullen and Jukka Mähönen, and Christopher M. Bruner, elucidate, capital markets function to funnel and exacerbate the shareholder primacy drive, supported by securities regulation and stock exchange rules that have, as their primary aim, to protect investors, not the various other interests affected by corporate activity [44,45]. The normative impact of the shareholder primacy drive goes beyond the listed corporations. It is exacerbated by the chasm between corporate law’s approach to corporate groups and the dominance and practice of such groups [46]. Further, as we see in the analyses by Jaakko Salminen and Linn Anker-Sørensen, the extensive use of global value chains, and other non-equity modes of control [47–49], allow for an intensified externalization of environmental, social and economic costs.

The social norm of shareholder primacy in limited liability companies is at the heart of the unsustainability of globalized business [3,15,16]. Shareholder primacy results in pressure on

decision-makers in those companies to maximize returns for investors, especially shareholders. This acts as a systemically entrenched barrier to corporate sustainability, to the contribution of business to sustainability, by informing the externalization of societal impacts across global value chains. While especially strong in listed companies, shareholder primacy affects also non-listed companies, and has knock-on effects on other business forms. Over two-thirds of trade now takes place through global value chains [50], exacerbating the problem with shareholder primacy. The unsustainability of Europe's globalized business is contrary to the goals of European company law and of the values and overarching objectives set out in the Treaties of the EU [51], and to the global goal of sustainability.

The core role of EU's secondary legislation regulating business, notably company and financial market law, is perceived to be the promotion of economic development by acting as a vehicle for market integration, through facilitating and enabling cross-border business and promoting investment in the European financial markets, and to protect the interests of the involved parties— both to promote business and facilitate integration, and as an objective in its own right [18,51]. Increasingly, these areas of EU law and policy are explicitly recognized as having a role in achieving the overarching sustainability objectives of the EU. However, the existing regulatory framework tends either to be neutral to the purpose and direction of business, leaving then space for the social norm of shareholder primacy, or to be directly informed by shareholder primacy [15,16]. The outcome of the combination of this regulatory situation with the market pressure for maximization of returns, and the distance between business decisions and unsustainable impacts, is unsustainability.

#### **4. A Proposal for EU Company Law Reform**

In the SMART Project, we have, drawing on the research outlined above, concluded that it is necessary for company law to take back the power to define the purpose of the company, and the duties of the board. This has to be done in a way that not only pushes back against the legal myth that shareholder primacy has developed into, but also to clarify that the purpose of business and the duty of the board is actually not to maximize returns for shareholders. In light of the convergence of crises we face, a legislative reform is also required to facilitate and ensure that business partakes in the transition to sustainability. The financial risks of unsustainability, directly impacting on the productivity of business, underline that this is necessary also from a conservative economic point of view [52,53]. We know it is inadequate to rely solely on the strengthening of compartmentalized specific legislation on environment, product safety and labor, both national and international [54], or on sustainability reporting as a driver for change [55,56]. We also know that competing social norms are insufficient, and that we cannot rely on self-regulation or voluntary improvement [57,58].

##### *4.1. Replacing Shareholder Primacy with Corporate Sustainability*

To transition towards sustainability requires innovative solutions in order to achieve a transformation of business. Corporate sustainability, ensuring the contribution of business to sustainability, requires more than resource-efficiency and recyclability. It must be more than a minimalist "do no harm" business respect of human rights. Rather, the full cycle of products, processes and services of business must be designed and carried out with the aim of contributing to staying within planetary boundaries and to securing the social foundation for people and communities across global value chains. This includes issues such as paying living wages and not undermining the economic bases of welfare states, whether they are well-established or weak [59].

The challenge is to encompass as much as possible of the abovementioned in a company law reform. The dominance of shareholder primacy shows what we must explicitly regulate to push back against. In a similar way, knowledge about the existential risk we all share [12,13,53], our vulnerability as humanity interconnected in complex socio-ecological systems, and the systemic reasons for extreme variations in resilience in space and time [60–62], indicate what and who we must explicitly regulate to protect.

Based on our research, the two key concepts in the redefinition of the purpose of the company and the role and duties of the board should be “sustainable value” and “planetary boundaries.” Accordingly, we propose that the purpose of the company, as a legal concept, should be formulated as creating “sustainable value within planetary boundaries.”

*Sustainable value creation* is an emerging concept in corporate law and corporate governance [63–66] and in stewardship [67]. In the context of a company law reform, it needs to engage with a research-based concept of sustainability. Strong, or more precisely, real, sustainability is an integrated, dynamic, interconnected and complex aim [68–70]. The goal of creating “sustainable value,” as a redefinition of corporate purpose, must reflect the multifaceted and interconnected environmental, social, cultural, economic and governance aspects of securing the social foundation for humanity. It concerns “questions of justice and inequality relating to global patterns of consumption and production, resource allocation, benefit distribution, and so on” [71] (pp. 7–8)—in other words, securing a *just* space for humanity. While planetary boundaries is a science-based environmental ceiling, the basis for the social foundation as launched by Kate Raworth, is the political consensus on which aspects were important in the adoption of the United Nations Sustainable Development Goals [2,72]. As also Raworth emphasizes, the minimum requirement intrinsic in securing the social foundation of humanity now and in the future is that of ensuring the realization of basic human rights [72]. Any company law reform intending to ensure that business transition to sustainability, must accordingly also, as a minimum, secure that business respects human rights [62].

In a similar way as the science basis for the concept of planetary boundaries must continuously evolve in light of new understanding of what is “safe,” attempts at defining and pursuing the social foundation must be rigorously interrogated in light of what is “just,” which cannot be exhaustively defined by the SDGs nor by a minimalistic approach to human rights. We therefore must look also further than human rights in defining the social foundation, albeit also arguably to the roots of human rights: to “human dignity” as intrinsic to a *just* space for humanity. This is an area that requires more research. However, based on the work done so far, we can conclude that securing the social foundation for humanity entails attention to a range of interconnected issues. Amongst the pivotal aims must also be that of “decent work,” advocated in the ILO 2008 Declaration [73,74]. As an intrinsic element of the transition, the following factors must be included: participatory aspects of the social foundation [74,75] of workers, regardless of their labor law status, and of affected communities, including indigenous peoples, and ensuring that all affected are fully involved (as indeed is envisaged by SDG 16).

Yet, as Jukka Mähönen has pointed out, we must avoid merely replacing the “shareholder” in shareholder primacy with “stakeholder” [18]. While involving affected communities, trade unions, and civil society is crucial, a mere canvassing of “stakeholder interests” and giving priority to the ones that make themselves heard the most is insufficient. The backdrop must always be the interconnected complexities and the vulnerability of the often unrepresented groups (whether invisible workers deep in the global value chains, indigenous communities, or future generations), and the aim of the “safe and just” space for humanity, now and in the future, within planetary boundaries.

Positioning sustainable value creation within *planetary boundaries*, and translating this concept into company law and thereby into corporate governance has the potential of significance on three interconnected levels: Firstly and most importantly, it brings to the forefront that there are ecological limits (conversely, that being perceived as “environmentally friendly” is totally inadequate) [12,13]. Secondly, it highlights the complex interaction between planet-level environmental processes and that, for example, climate change, however topical (and difficult to mitigate), is only one aspect of the convergence of crises we are heading towards [76]. Thirdly, it continuously reminds us that state-of-the-art natural science must inform our decisions on a work-in-progress basis, encompassing the uncertainty and complexity of the global challenges [77,78].



#### 4.2. Sustainable Value Creation within Planetary Boundaries

We propose to push against shareholder primacy, firstly, by clarifying core issues in European company law, rejecting thereby, once and for all, this legal myth that has dominated so much of also the European corporate governance discussion over the last decades [15,39,41,45,58]. Secondly, these same core issues require a legal redefinition, because of the urgency in transitioning to sustainability [3,79–81]. Specifically, we propose that the EU Company Law Directive 2017 (Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (Text with EEA relevance)) Title I, is revised with a redefinition of the purpose of the undertaking and the duties of the board in a new Chapter IIA.

In the proposed new Chapter IIA, we suggest to redefine the overarching purpose of the company as being “to create sustainable value within planetary boundaries.” “Planetary boundaries” should in this context shall be defined as “the scientifically recognized processes that regulate the stability and resilience of the Earth system within which humanity can continue to develop and thrive for generations to come.” Further, we propose that “sustainable value” shall be defined as “creating value for the undertaking, while respecting the rights of its members, investors, employees, and other contractual parties, and promoting good governance, decent work and equality, and the human rights of its workers and affected communities and peoples” (Section 6.2.1 [18]). As is evident from the latter quote, while this article concentrates on the company, in our reform proposal, we have chosen to use the term “undertaking” to broaden the scope from “company” and we suggest broadening of the scope of the Company Law Directive accordingly, to include any type of undertaking with limited liability (Section 6.2.1 [18]).

The redefined purpose has the potential of securing the future of European businesses, by facilitating a shift in business models and stimulating creative innovation. Our proposal to redefine the purpose of the undertaking is, accordingly, not one that dramatically changes the nature of European businesses or their purpose. It does not take away profit as an intrinsic element of the nature of business or of their value creation. It does not change the differences between various forms of undertakings in the European economy, and how profit is used and distributed in them. For example, cooperatives will still be distinguishable from companies, and multinational enterprises from SMEs. We do not challenge the distinction between for-profit and not-for-profit, nor do we propose to make all businesses become social enterprises [82]. Further, specific purposes in the legislation governing the various forms of undertakings in the Member States may be maintained, with any necessary adjustment to clarify their positioning within the proposed overarching purpose. Similarly, the instruments of constitution, and memorandum and articles of association, may include a more detailed and individual purpose (Section 6.2.1 [18]).

What our proposal does do, is to position the value creation of European business, with profit as an intrinsic element, within the context of the transition to sustainability that we all need to undertake. Today, European business is struggling to be a part of the transition to sustainability, within a system that appears to value short-term maximization of returns above all else. This entails trying to create value in a sustainable way, while maximization of returns is perceived by many as the overarching purpose, due to the shareholder primacy drive. Instead, we propose that sustainable value creation within planetary boundaries is set as the overarching purpose, outlining the scope within which profit will continue to be made. This gives the sustainability-oriented businesses in Europe, of which there undoubtedly are many, the competitive advantage over unsustainable business.

To operationalize the redefined purpose, we also propose redefined duties of the board (Section 6.2.1 [18]). We include in our definition of the board both the administrative or management organ of the undertaking as well as the supervisory organ. Our proposed rules on the board start out with clarifying what is well-established in European company law, yet which nevertheless has become clouded through the influence of the shareholder primacy drive, namely that the core duty of the board is to promote the interests of the company [15,16]. The definition of the interests of the company, as a matter of company law, that is, based on proper legal analysis, and not drawing merely

on postulates derived on certain law-and-economics doctrines, as we have seen in the shareholder primacy-influenced literature [15,45], varies across European countries. It ranges from the monistic, concentrating on the economic interest, with more or less emphasis on the shareholders [37], to the pluralistic, including a variety of other involved or affected parties [64]. Company legislation rarely expressly stipulates what is included in the interests of the company. The interpretation is thereby left to the boards, and in light, inter alia of the business judgment rule, the question of whether the board has interpreted their duty correctly rarely comes to a head in case law [15,83].

We do not suggest a harmonization of the definition of the interests of the company in EU company law. Rather, we propose to draw up the boundaries within which the board shall promote the interests of the company, through redefining the duties of the board in such a way as to operationalize the proposed overarching purpose. What the interests of the specific company entail in a specific instance lies with the board to define, within the scope of legislation, articles of association, and existing contracts and commitments.

Through this operationalization of the overarching purpose, we aim to clarify the role and duties of the board to ensure that the business creates *sustainable value*. We propose that the board shall have a duty to ensure that the business model of the undertaking is in line with the overarching purpose. Further, that the board shall develop and publish a strategy that enables the achievement of the overarching purpose throughout the business, integrating it in the internal control and risk management systems. The board shall work to ensure that the operations and activities of the business, including the full life of the products, processes and services of the business, contribute to global society staying within *planetary boundaries*, employing best available knowledge and technology. We suggest that this should be explicated to entail complying with the, at any time, most ambitious politically adopted targets at the EU level or relevant Member State level. Further, that it entails protecting and regenerating natural resources and processes. This entails avoiding, or reducing as far as possible, contributions to transgression of the hitherto identified planetary boundaries, thereunder “biodiversity loss in all ecosystems, including oceans”, “greenhouse gas emissions” and “chemical pollution including synthetic organic pollutants, heavy metal compounds and radioactive materials; and the introduction of novel entities including microplastics and nanomaterials” (Section 6.2.1 [18]).

We also propose that the board shall ensure that the operations and activities of the business, including the full life of the products, processes and services of the business, create *sustainable value*. This should entail promoting a number of aspects which we see as crucial to securing the social foundation of humanity, including “employment and its protection”; “the elimination of discrimination in respect of employment and occupation, regardless of characteristics such as gender, race, age, disability, and migrant status”; “consultative processes for engagement with local communities, including indigenous peoples affected by the operations and activities of their business” and “responsible tax behavior.” Further, we propose that this entail avoiding harms, including “any connection with forced or compulsory labor, modern slavery and human trafficking”; bypassing any representative government processes or subverting the rule of law, including through corruption; and “breach of internationally recognized human rights” (Section 6.2.1 [18]).

Furthermore, we propose that the board shall, every three years, or more frequently in case of fundamental changes to the business model, ensure that a stringent sustainability assessment is carried out of the business of the undertaking. This shall include employing sustainability due diligence across the operations of its business, covering all the aspects we have explicated to be included in the duty of the board. This sustainability due diligence accordingly covers the mandatory human rights due diligence for which there increasingly is a call, while positioning this in the broader context of sustainability, on which securing human rights arguably depends [62].

Based on this sustainability assessment, the board shall identify ongoing negative sustainability impacts and principal risks of future negative sustainability impacts, and select relevant quantitative and qualitative Key Performance Indicators. In its identification and management of principal risks, the board shall be guided by the “precautionary principle” (Section 5.3 [18]). We suggest that the

“precautionary principle” should be defined as entailing that where there are threats of serious or irreversible damage to nature or to humans, avoidance or mitigation of possible harm must be undertaken also in cases of scientific uncertainty (Section 6.2.1 [18]).

Where the negative impacts or risks thereof are caused by lack of legal compliance, the board must, according to our proposal, ensure that this is rectified as soon as possible. For other issues, a system for an ambitious continuous improvement process must be put into place. This provides a basis then, also for meaningful sustainability reporting. The processes included in the sustainability assessment, the identification of the ongoing negative sustainability impacts and principal risks of future negative sustainability impacts as well as the selection of relevant Key Performance Indicators, shall be assured by independent experts. Such experts may, depending on the laws of each Member State, be natural or legal persons or companies or firms. Our reform proposals for EU company law are accompanied by reform proposals for accounting and auditing law (Sections 6.2.3–6.2.4 [18]), as Jukka Mähönen outlines in his contribution to this Special Issue [56].

Our proposal draws on commonly agreed upon sustainability goals and sustainability science, thereby increasing legal certainty for business in the sense that it will become clearer what the boundaries of legitimate business activities are. This also provides a level playing field for sustainability-oriented business, contributing to streamlining sustainability efforts by business. With the tools and processes we propose, risk management will be improved, as will legal certainty in the sense of better knowing the extent of the vulnerabilities of the business. Sustainability due diligence will further act as a defense, if claims are made against the company, for wrongdoings that have happened in spite of the best efforts of the company to avoid them.

#### *4.3. Taking People and the Environment as Seriously as Financial Issues*

As John Quinn emphasizes in his contribution to this Special Issue, reliance on private enforcement only is clearly insufficient [83]. Yet, there is potential in the international trend of lawsuits against parent companies and lead companies of global value chains, in what Mark Taylor has described as “counter-corporate litigation” [84]. It would therefore be helpful for potential claimants, as it would for companies and their decision-makers as potential defendants, to have legal clarity as to the conditions on which a lawsuit can be filed, and on what basis it will be adjudicated. As a part of the suggested company law reform, we propose that the Member States shall be required to lay down rules governing the civil liability of the company for any breach of board duties, as well as of those acting on behalf of the company, including but not limited to board members. We propose that the company and the decision-makers, notably the board, shall be jointly and severally liable for breach of their duties (Section 6.2.1 [18]). This concerns also a harmonization of procedural rules and probably also substantive rules for claims from affected parties, which may range from company law and contractual legal bases to tort-based claims. A harmonization and codification of the procedural and substantive rules for such claims could provide more legal certainty to both affected parties as well as undertakings.

In a study undertaken for the European Parliament’s Sub-Committee on Human Rights in February 2019 [85], recommendations are made to revise European procedural rules to make it easier and clear in which cases alleged victims of human rights violations may be brought against European parent companies. We suggest a broader revision, clarifying that cases may be brought also against European-led undertakings of global value chains. We propose that this should include but not be limited to human rights, and that it is linked to the duty to undertake a sustainability due diligence, which should be a duty for the undertaking, and—to make it effective and ensure follow-up—a duty for the board, as I have outlined in Section 4.2 above. If the sustainability due diligence has not been carried out in accordance with EU law and harm has occurred, there should be a presumption of liability for the undertaking and its board members. Conversely, if due diligence has been carried out and assured by external experts as proposed as a duty, this may serve as a defense for the undertaking



and its board. This will increase the legal certainty for European business, while providing better access to justice for affected workers and communities.

Public enforcement is indubitably also necessary. It is time that we take humanity and the environment, as the basis of all existence, as seriously as we for centuries have taken financial issues. This entails that board duties to promote sustainable value creation within planetary boundaries should be treated as they are proposed to be above—as core company law duties. The company registrar can provide for an absolute minimum of enforcement in our proposal, if these rules are adopted. This can be done by making submission of core documents a prerequisite for the continued validity of the registration of an undertaking. We suggest that these should include (a) the strategy (valid until resubmitted); (b) the externally assured documentation of the sustainability assessment and the sustainability due diligence (at a minimum every three years); (c) financial statements (annually); and the audited management report (annually) (Section 6.2.1 [18]). The lack of submission of any of these documents would lead to sanctions and eventually, in cases of continued non-compliance, the winding-up of the undertaking, or dissolution. This is comparable to the consequence for nullity of a company in present Article 12 [2] of the Company Law Directive 2017.

Nevertheless, we want to go further, for several reasons. Inspired by the corporate regulatory powers of the Australian Securities and Investment Commission [86,87], we propose a new European regulatory body to ensure public enforcement of European company law in general. We envisage this as a new member of the European Supervisory Agencies together with the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurances and Occupational Pensions Authority (EIOPA). It could, for example, be called the European Supervisory Authority of Business (ESAB). This new supervisory authority should be able to bring public interest proceedings against undertakings that are not following up their EU company law duties as implemented national legislative acts. As indicated, this supervisory authority should have the competence to enforce the full scope of EU company law duties, which would fill a gap in the supervisory system. As a minimum, the supervisory authority should be given the mandate of enforcing the duties we propose here. Affected parties, also across global value chains of European undertakings, should have the possibility of bringing complaints in before the supervisory authority (Section 6.2.1 [18]).

As an alternative to the abovementioned, it could be considered to give the European Ombudsman mandate to investigate complaints against European businesses alleging violations of the EU company law duties. However, the existing competence of the European Ombudsman is limited to actions of the institutions, bodies and agencies of the EU. It may be considered problematic to enlarge its competence to private actors when it cannot investigate complaints against national, regional or local administrations in the Member States, even when the complaints are about EU matters.

Whatever solution is chosen, the new European supervisory authority, or the European Ombudsman with an expanded competence, should have the right to require information and documentation from European undertakings, make public statements and issue fines to non-compliant undertakings. This would provide a channel for dealing with complaints from, for example, workers in global value chains of European undertakings, without them having to resort to a lawsuit against the European undertaking (Section 6.2.1 [18]).

Improved public enforcement would complement and also be a stronger option (with fines as sanctions) compared to the more limited possibility that is now available through the extra-judicial system of National Contact Points institutionalized through and as an enforcement of the OECD Guidelines for Multinational Enterprises. Although the OECD Guidelines, together with the United Nations Guiding Principles for Business and Human Rights, have been a significant influence in the public discourse on legitimate expectations of business, the actual impact has been limited in the face of the stronger social norm of shareholder primacy [58]. The limitations of the OECD National Contact Point system includes the types of businesses it concerns, the non-judicial nature of the system,

the low number of complaints and even lower number of cases in which remedy actually has been granted [57,88].

## 5. Why Reform is Possible Now—and Necessary

The transnational nature of business and its unsustainability makes it clear that action on EU level indeed is necessary. Individual initiatives by Member States can be inspiring examples and stimulate EU action, and initiatives such as the French vigilance law are laudable [89]. However, they also bring with them challenges including questions of scope and of legal certainty for businesses with cross-border operations and activities. To ensure the contribution of business to the Treaty objectives of sustainability, action on EU level is necessary—and in the SMART Project, we have, in developing our proposals, taken into account the proportionality principle, so that the proposed reforms do not go further than necessary. Conversely, we believe it is important to go far enough, as ineffective regulatory reforms not only do not have the intended effect, as they can create regulatory apathy and even resistance against regulation.

However, the abovementioned does not mean that reform as proposed here without its challenges. The fundamental transition to sustainability, which is required in practically all areas, *is* challenging, in a number of ways. This includes the difficulty of disrupting a path-dependent system that keeps so much of business on an unsustainable path. It is therefore vital that national governments and the European Union also put into place economic incentives to support the transition—and remove incentives for unsustainable business. Economic recovery packages for businesses that needs support in the recovery from the still ongoing COVID-19 pandemic must be used to stimulate the transition—both away from unsustainable activities and towards sustainable ones. Used well, the recovery packages can help our businesses, our economics and our societies transition faster to sustainability. We suggest in our SMART reform proposals that a help desk or hub should be put into place for SMEs [18], and that seeing the necessity of supporting sustainable innovation and start-ups should be more obvious now than ever.

Furthermore, EU reforms may expose European business to competition from business outside of the EU. In our SMART reform proposals, we therefore make some suggestions for how the EU can protect European business in the transition period [18]. Also, we propose how the EU can strengthen its initiatives within sustainable finance, sustainable public procurement, and broaden sustainable product requirements in its circular economy initiatives, so that these reinforce and strengthen the sustainable business reforms [34,36]. Ultimately, sustainable European business can attract also international sustainability-oriented investments, and the reforms we propose should also incentivize business outside of Europe to shift towards sustainability both as a part of global value chains of European business and to achieve (continued) access to European markets.

New developments on the EU level suggest that company law reform now is feasible [20,21,23,33,83]. I believe that sustainability is still possible, and that there never has been a better time for putting into place the reforms necessary to remove the barriers to achieving sustainability. Facilitating the transition of European business to sustainability is crucial to achieving this goal—and vital to ensuring that Europe has the market leaders of tomorrow. The financial risks of unsustainability bring home the significance of integrating sustainability throughout the business of any undertaking. If this is not done, the financial risks will increasingly materialize, as the international trend of lawsuits against European businesses is already showing [84]. Ultimately, the risk of continuing with “business as usual” is existential. The global catastrophic risks of continued environmental degradation, including but not limited to climate change, cannot be ignored. Neither can the risks of continuing with exploitation of human beings, and increasing inequality between and across jurisdictions. There are a number of scenarios that can lead to societal collapse, and in none of these are steady returns for investors or profitable business likely [52]. Sustainability is not only possible—it is necessary, for all of us.

There has never been a stronger case for all partners working together for a better system, and the way out of the COVID-19 pandemic must also be a path to sustainability. The EU as a global actor and as European policymaker and legislator has a crucial role here to ensure that the international and European regulatory framework for business mitigates the financial risks of unsustainability as far as possible. The risks of continuing on an unsustainable path of “business as usual” are enormous, as well as the possibilities for securing good lives and sustainable prosperity.

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