Sustainability and Purpose-Driven Companies: New Legal Trends from a Comparative Law Perspective

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KEYWORDS

sustainable companies, fiduciary duties, comparative analysis

ABSTRACT

As sustainability takes centre stage in the political agenda and corporate governance discussions, the law becomes crucial in facilitating the transition from shareholder primacy to responsible capitalism. The law has the potential to influence the behaviour of private companies by establishing rules that ensure businesses profit from creating benefits rather than generating detriments to society, effectively incentivising positive practices while disincentivising harmful ones. Nevertheless, the existence of a grey area for activities that do not materialise in tort, or the violation of other mandatory rules, cannot be denied, and is probably where the reconceptualisation of fiduciary duties and corporate purpose can mediate. New legal trends in these areas are analysed with a special focus on the European context and some comparative law considerations with respect to the UK and the US. An examination of the law in the books and the law in action suggests that the boundaries of directors' duties are expanding, and the dual-purpose companies' directors' management and accountability model appears an appropriate general management paradigm for the new era of responsible capitalism.

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I. From Shareholder Primacy to Sustainable Corporate Governance?

The shareholder primacy model,[1] which originated primarily within the US corporate

[1] Shareholder primacy is a shareholder-centric model of corporate governance according to which companies should be run for the benefit of shareholders who provide risk capital to companies and the shareholders' interest must be primarily considered in decision-making. The focus of shareholder primacy thus, is on maximising the value of shareholders before considering the interests of other stakeholders of the corporation. On the contrary, in the stakeholder model companies should be run for the benefit of all the stakeholders, those who can affect the company and can be affected by the company activity; all the interested of stakeholders need to be considered in the decision-making process. On the birth of the two models of shareholder and stakeholder primacy see the seminal debate between Berle and Dodd: Berle, A. "Corporate Powers as Powers in Trust." *Harvard Law Review*, vol. 44, no. 7, 1931, pp. 1049-1074 (in which the author states that managers are only bound to pursue the interests of shareholders); Dodd, E. "For Whom Are Corporate Managers Trustees?" *Harvard Law Rev*iew, vol. 45, no. 7, 1932, pp. 1145-1163 (which states the need for the corporation, as an institution, to

framework, only recently emerged as the dominant approach in corporate practice and company law[2] (particularly in the second half of the nineteen century),[3] even though the pursuit of some form of public interest was one of the core elements of business corporations since their birth as chartered companies.[4] Despite the existence of different 'varieties of capitalism',[5] the Anglo-Saxon liberal market approach and the principle of shareholder primacy have influenced not only the UK and other common law systems, but also Continental Europe's legal systems. The latter, traditionally characterised by a more significant interaction of firms with other stakeholders,[6] such as trade unions and financial institutions, have also been encouraged to move towards the Anglo-American model[7] due to the growing role of the capital market and financialization.[8] By the end of the 20th century, a notable convergence among major Western legal systems[9] was observed, although the degree of emphasis on shareholder primacy continues to vary across jurisdictions.

In recent decades, driven by global economic and financial crises, rising inequality, ethics-related corporate scandals, and growing awareness of climate change and planetary boundary[10] risks, there has been a profound rethinking of current economic and capitalist

also pursue public interests); Berle, A. "For Whom Corporate Managers Are Trustees: A Note." *Harvard Law Review*, vol. 45, no. 8, 1932, pp. 1365-1372 (in which, responding to Dodd's criticism, the impossibility for managers to be accountable to parties other than shareholders is reaffirmed). Numerous influential scholars and economists have supported the shareholder primacy doctrine over the years, framing it as essential for ensuring corporate accountability and efficiency, among them, Berle, A, and G Means. *The Modern Corporation and Private Property*. New York, 1932; Friedman, M. "The Social Responsibility of Business Is to Increase Its Profits." *The New York Times Magazine,* 13 Sep., 1970; Jensen, M, and W Meckling. "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure." *Journal of Financial Economics*, vol. 3, no. 4, 1976, pp. 305-360; Easterbrook, F, and D Fischel. *The Economic Structure of Corporate Law*. Harvard University Press, 1991; Hansmann, H, and R Kraakman. "The End of History for Corporate Law." *Georgetown Law Journal*, vol. 89, no. 2, 2001, pp. 439-468; Bainbridge, S. "Director Primacy: The Means and Ends of Corporate Governance." *Northwestern University Law Review*, vol. 97, no. 2, 2003, p. 547-606; Bebchuk, L. "The Case for Increasing Shareholder Power." *Harvard Law Review*, vol. 118, no. 3, 2005, pp. 833-914.

[2] *see, e.g.*, Bainbridge, S. "Participatory Management Within a Theory of the Firm." *Journal of Corporate Law*, vol. 21, no. 4, 1996, p. 717; Davis, K. "Discretion of Corporate Management to Do Good at the Expense of Shareholder Gain-A Survey of and Commentary on, the US. Corporate Law." *Canada-United States Law Journal*, vol. 13, 1988, pp. 7-74; and Lund, D, and E Pollman. "The Corporate Governance Machine." *Columbia Law Review*, vol. 121, no. 8, 2021, pp. 2563-2634, describing the United States "corporate governance machine" as a complex governance system composed of law, markets, and culture that orients corporate decision-making towards shareholders primacy.

[3] Sneirson, J. "The History of Shareholder Primacy, from Adam Smith through the Rise of Financialism." *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability*, edited by B Sjåfjell and C Bruner, Cambridge University Press, 2019, pp. 73-85.

[4] Williston, S. "History of the Law of Business Corporations Before 1800." *Harvard Law Review*, vol. 2, no. 3, 1888, pp. 109-112.

[5] The 'varieties of capitalism' framework, developed by political economists Peter Hall and David Soskice, refers to the fact that capitalism is not a one-size-fits-all model but varies significantly across countries. Capitalist economies, indeed, take distinct forms based on specific institutional arrangements, which influence how companies, workers, governments, and other economic actors interact: *see* Hall, Peter, and David Soskice. *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage.* Oxford University Press, 2001.

[6] Hopt, K. "Comparative Corporate Governance: The State of the Art and International Regulation." *American Journal of Comparative Law*, vol. 59, no. 1, 2011, pp. 28-29.

[7] Collison, D, et al. *Shareholder Primacy in UK Corporate Law: An Exploration of the Rationale and Evidence*. Association of Chartered Certified Accountants Report 125—Certified Accountants Educational Trust (London), 2011, pp. 9-11.

[8] Arrighi, G. *The Long Twentieth Century: Money, Power, and the Origins of Our Times*. Verso, 1994; Aglietta, M, and A Reberioux. *Corporate Governance Adrift. A Critique of Shareholder Value*. Edward Elgar Publishing, 2005; Sneirson (n 3) *supra*.

[9] *see* Hansmann and Kraakman (n 2) *supra*, noting a "large degree of uniformity [on shareholder primacy] across developed market jurisdictions," and that "[t]here is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value."

[10] On the concept of planetary boundaries in business and corporate law, *see*, among others, Whiteman, G, et al. "Planetary Boundaries: Ecological Foundations for Corporate Sustainability." *Journal of Management Studies*, vol. 50, no. 2, 2013, pp. 307-336; Sjåfjell, B. "Sustainable Value Creation Within Planetary Boundaries—Reforming Corporate Purpose and Duties of

systems. This has sparked calls for a new model of stakeholder or "responsible" capitalism,[11] where businesses generate profit not as an end in itself, but as a by-product of creating value for society as a whole. The issue of sustainability has thus taken centre stage, and debates on corporate governance and the managerial and legal concept of "corporate purpose" have gained significant traction among business and legal scholars,[12] particularly in countries rooted in Western legal traditions.[13]

Beyond a social and economic reconsideration of the capitalist system, this debate has been both driven by and has further fuelled various legal developments. On the one hand, recent legislative and regulatory initiatives at both international and national levels have aimed to address environmental and social challenges. On the other hand, a growing pressure to reinterpret directors' fiduciary duties in terms of sustainability has emerged, fuelled by the rise of sustainability-related lawsuits[14] (supported by ESG, climate, and human rights litigation funds that increase access to justice),[15] and ESG-driven shareholder activism.[16] However, it must be stressed that, in both cases, the outcomes in terms of sustainability have been mixed, for and against sustainability.[17] This reinterpretation of directors' duties expands the board's legal exposure beyond traditional fiduciary and tort liability, opening the door to actions against directors for breaching their duty of care, diligence, and oversight in

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the Corporate Board." *Sustainability*, vol. 12, no. 15, 2020, p. 6245; Veldman, J, and A Jansson. "Planetary Boundaries and Corporate Reporting: The Role of the Conceptual Basis of the Corporation". *Accounting, Economics, and Law*, vol. 10, no. 2, 2020, p. 20180037; Heikkurinen, P, et al. "Managing the Anthropocene: Relational Agency and Power to Respect Planetary Boundaries." *Organization & Environment*, vol. 34, no. 2, 2021, pp. 267-286.

[11] *see* the many contributions on this issue published in the ECGI Blog, available online.

[12] On the corporate purpose debate *see* Mayer, C. *Firm Commitment*. Oxford University Press, 2013; Mayer, C. "Who's Responsible for Irresponsible Business? An Assessment." *Oxford Review of Economic Policy*, vol. 33, no. 2, 2017, pp. 157-175; Mayer, C. *Prosperity: Better Business Makes the Greater Good*. Oxford University Press, 2018; *The Future of the Corporation: Principles for Purposeful Business*. The British Academy, 2019; Bebchuk, L, and R Tallarita. "The Illusory Promise of Stakeholder Governance." *Cornell Law Review*, vol. 106, no. 1, 2020, pp. 91-177; Mayer, C. "Shareholderism Versus Stakeholderism – A Misconceived Contradiction: A Comment on 'The Illusory Promise of Stakeholder Governance' by Lucian Bebchuk and Roberto Tallarita." *Cornell Law Review*, vol. 106, no. 7, 2020, pp. 1859-1879; Rock, E. "For Whom Is The Corporation Managed in 2020?: The Debate Over Corporate Purpose." European Corporate Governance Institute, Law Working Paper No. 515/2020; Fisch, J, and S Davidoff Solomon. "Should Corporations Have a Purpose?" *Texas Law Review*, vol. 99, no. 7, 2020, pp. 1309-1346; Edmans, A. *Grow the Pie: How Great Companies Deliver Both Purpose and Profit*, Cambridge University Press, 2020; Fleischer, H. "Corporate Purpose: A Management Concept and Its Implications for Company Law." *European Company and Financial Law Review*, vol. 18, no. 2, 2021, pp. 161-189; Lund, D, and E Pollman. "The Corporate Governance Machine." *Columbia Law Review*, vol. 121, no. 8, 2021, pp. 2563-2634; Strine, L. "Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy – A Reply to Professor Rock." *Business Law*, vol. 76, no. 2, 2021, pp. 397-436; Mayer, C. *Capitalism and Crises: How to Fix Them*. Oxford University Press, 2024.

[13] Puchniak, D. "No Need for Asia to be Woke: Contextualizing Anglo-America's 'Discovery' of Corporate Purpose." *RED*, vol. 4, no. 1, 2022, pp. 14-21.

[14] *see*, for example, *Milieudefensie v Royal Dutch Shell plc* ECLI:NL:RBDHA:2021:5339, The Hague District Court, 26 May 2021; *ClientEarth v Shell Plc & Ors* [2023] EWHC 1137 (Ch); *John Trotter, Trustee of the PG&E Fire Victim Trust v Lewis Chew & Ors*, San Francisco Superior Court Case No CGC-18-572326, 2021.

[15] Among the major litigation funds pursuing ESG investments are Therium, Deminor, Woodsford, North Wall Capital, and Litigation Lending Services.

[16] Katelouzou, D. "Worldwide Hedge Fund Activism: Dimensions and Legal Determinants." *University of Pennsylvania Journal of Business Law*, vol. 17, no. 3, 2015, pp. 789-860; Castañón Moats, M, et al. "The Director's Guide to Shareholder Activism." *Harvard Law School Forum on Corporate Governance*, 11 June 2021; Mocanu, D, and L Ventura. "Future of Boards – Legal and Regulatory Frameworks for Sustainability (Phase 1, Part 2)." University of Cambridge Institute for Sustainability Leadership Technical Report, 2023, [6]-[7].

[17] In the UK, in the specific field of directors' duties, *see e.g.*, the negative outcomes for sustainability issues of *ClientEarth* (n 14) *supra*, where the England and Wales High Court dismissed ClientEarth's application for permission to bring a derivative action against Shell's directors in respect of their alleged failures to properly address the risks of climate change; and *McGaughey & Anor v Universities Superannuation Scheme Ltd & Ors* [2023] EWCA Civ 873, where the England and Wales Court of Appeal rejected an appeal brought by academics requesting permission to bring a derivative claim against the directors of a university pension scheme for its alleged failure to divest from fossil fuels.

relation to violations of existing sustainability obligations and commitments arising from various sources. In this transition from maximising shareholder value to responsible capitalism, the concept of purpose-driven organisations (that is, business organisations aligning their reason to exist with improving the long-term wellbeing of people and planet)[18] becomes crucial. Businesses must adapt to promote wider prosperity producing "profitable solutions to the problems of people and planet and not to profit from producing problems for people or planet."[19]

When considering the role of law in shaping strategies to ensure that businesses profit from generating benefits for the society rather than causing harm, it is important to distinguish between legal interventions aimed at incentivising positive outcomes and those designed to disincentivise negative ones. The creation of harms is typically regulated by law through tort and specialised statutes, particularly in areas like labour, human rights, and environmental protection. More recently, new legislation on supply chain due diligence has been enacted to specifically address companies' negative social and environmental impacts throughout their value chain. Nevertheless, it is undeniable that a grey area exists for activities that do not rise to the level of tort or violate other mandatory regulations. Some lawful activities can generate profits for the company while simultaneously creating negative externalities for the community and the environment, without falling under any legal liability scenario. This grey area is where the role of purpose and the legal reconceptualisation of directors' duties can serve as a crucial mediating force. When it comes to promoting the production of societal benefits, legislative intervention is more complex due to the widely accepted constitutional principle of freedom of economic initiative, which limits excessive state intrusion into entrepreneurs' and shareholders' private ordering. As a result, efforts to steer companies toward generating societal benefits were initially pursued through self-regulation and soft law mechanisms, such as codes of ethics, principles and guidelines from international organisations, and corporate governance and stewardship codes based on the 'comply or explain' approach.

More recently, mandatory disclosure requirements and capital markets regulations have been introduced to nudge companies in this direction. While these rules do not directly influence the decision-making process, they demand greater transparency regarding sustainability impacts and help channel investments toward sustainable products and firms. In recent years, these hard law measures have been complemented by direct interventions in company law, particularly through the introduction of dual-purpose companies in several jurisdictions as optional legal forms. These companies are characterised by a 'dual' or 'blended' purpose: they aim not only to generate profit (the profit-making purpose) but also to deliver public or common benefits (the public benefit purpose) by reducing negative externalities and creating a positive impact on the environment and society through their business activities. Due to the limitations of voluntary and soft law instruments, legislators have thus increasingly intervened to impose sanctions on harmful practices and to encourage companies to create benefits for society.

In the following paragraphs, the aforementioned legal trends will be explored, with a particular focus on the European context, along with comparative law considerations regarding the UK and the US. From this investigation will become clear that sustainability is increasingly central to the governance of commercial companies, and that directors' duties are evolving to encompass a growing array of sustainability

[18] This is the definition elaborated in 2022 by the British Standards Institution (BSI), PAS Standard 808, *Purpose-Driven Organisations: Worldviews, Principles and Behaviours*, 2022.

[19] *see* The British Academy's Future of the Corporation initiative, in particular *Reforming Business for the 21st Century – A Framework for the Future of the Corporation*. The British Academy, 2018.

obligations. In this context, it seems that the management and accountability model advanced by dual-purpose companies offers an appropriate management paradigm for the new era of responsible capitalism.

II. **Directors' Duties Developments**

According to company law, directors' duties are generally owed to the "company as a whole"[20] but in practice this has been often interpreted in such a way as to give priority to the interests of shareholders. Currently, we see an increasing pressure to reinterpret the content of directors' fiduciary duties in terms of sustainability and thus requiring directors to take into account the interests of stakeholders and, more generally, of the society as a whole.

In the UK, the issue of shareholder primacy was addressed during the preparatory work for the 2006 Companies Act reform,[21] which codified directors' fiduciary duties that had previously been governed primarily by case law (according with a shareholder-oriented common law duty). In particular, the new section 172 of the Companies Act 2006 imposes on directors the duty to "promote the success of the company for the benefit of its members as a whole"[22] and introduced the so-called "enlightened shareholder value" providing that directors have regard to a broad range of interests, balancing the interests of shareholders with other stakeholder interests, including the promotion of environmental, social and governance (ESG) objectives.[23] The provision, which captured some aspects of corporate governance pluralist approaches and the long-term perspective, does not represent a substantive change because it does not compel directors to act based on stakeholders' interests (they are only required to "have regard" to them). Since its enactment, section 172 occupied a relevant space in policy and academic discussions in the UK and abroad,[24] but the mainstream interpretation of the new provision sees the preservation of shareholder primacy as a key principle of UK company law.[25] To better align the interests of shareholders with those of the society and the environment, the Better Business Act campaign was launched in 2021 to further amend section 172, providing that the duty of a director is to "advance the purpose of the company" to benefit its members as a whole and the wider society and the environment, having regard to the interests of the stakeholders and reducing or eliminating the harms the company creates, or costs it imposes on them.[26]

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[20] Mocanu and Ventura (n 16) *supra* at pp. 64-67.

[21] Great Britain Company Law Review Steering Group, *Modern Company Law, For A Competitive Economy: Developing the Framework*. Department of Trade and Industry, 2000.

[22] Companies Act 2006, s. 172: "(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to — (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company."

[23] Environmental, Social, and Governance—ESG—are the key criteria used to evaluate the sustainability and ethical impact of companies or organisations. ESG criteria are increasingly used by investors, regulators, and companies to assess investment decisions, risks, and opportunities in alignment with sustainable and responsible business practices.

[24] Among others, Harper Ho, V. "'Enlightened Shareholder Value': Corporate Governance Beyond the Shareholder-Stakeholder Divide." *Journal of Corporate Law*, vol. 36, no. 1, 2010, pp. 59-112; Ho, K. "Director's Duty to Promote the Success of the Company: Should Hong Kong Implement a Similar Provision?" *Journal of Corporate Law Studies*, vol. 10, no. 1, 2010, pp. 17-33; Zhao, J. "Promoting More Socially Responsible Corporations Through UK Company Law After the 2008 Financial Crisis: The Turning of the Crisis Compass." *International Criminal Court Law Review,* vol. 22, no. 9, 2011, pp. 275-284.

[25] Williams, R. "Enlightened Shareholder Value in UK Company Law." *UNSW Law Journal*, vol. 35, no. 1, 2012, pp. 360-377.

[26] *see* the Better Business Act Campaign, according to which s. 172 of the Companies Act 2006 shall be amended and replaced in its entirety as follows: "(1) A director of a company must act in the way the director considers, in good faith, would be most likely to advance the purpose of the company, and in doing so must have

In the US, the "success of the company" is not mentioned in Delaware corporate law, neither in the Model Business Corporations Act (MBCA),[27] nor in the American Law Institute (ALI) Principles of Corporate Governance,[28] all referring to the duty of directors to perform their functions in "good faith" and in a manner believed to be "in the best interest of the corporation." As for corporate purpose, the ALI Principles explicitly state in section 2.01 that "a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholders gain."[29] The *ALI Restatement of the Law of Corporate Governance* project, aimed at capturing the evolution of corporate law, including the recent emphasis on ESG issues, attempted to revise the content of section 2.01 on the objective of a corporation. However, the tentative draft, which includes a reference to the possibility of considering interests of different stakeholders (employees, suppliers, customers, the community, the environment, and ethical considerations) has encountered several critics.[30] From a general perspective, although from the 1980s most US states (but not Delaware) have adopted constituency statutes[31] allowing or requiring boards to have regard to the interests of stakeholders other than shareholders,[32] shareholder primacy is still considered the underpinning principle of corporate law, especially in Delaware, where, according to case law, directors, as agent of the corporation's shareholders,[33] owe their duties primarily to the corporation's shareholders.[34]

In the European Union, company law harmonisation directives do not reference the "success of the company" and have not yet addressed the definition of "corporate purpose" or the content of directors' duties, leaving these matters largely within the jurisdiction of individual Member States. An effort to move in this direction was made with the European Commission's proposal for a Corporate Sustainability Due Diligence

regard (amongst other matters) to the following considerations — (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a well-deserved reputation for trustworthiness and high standards of business conduct, and (f) the need to act fairly as between members of the company. (2) The purpose of a company shall be to benefit its members as a whole, whilst operating in a manner that also — (a) benefits wider society and the environment in a manner commensurate with the size of the company and the nature of its operations; and (b) reduces harms the company creates or costs it imposes on wider society or the environment, with the goal of eliminating any such harm or costs. (3) A company may specify in its Articles a purpose that is more beneficial to wider society and the environment than the purpose set out in subsection (2)."

[27] Revised Model Business Corporations Act § 8.30: Standards of Conduct for Directors: "(a) Each member of the board of directors, when discharging the duties of a director, shall act: (i) in good faith, and (ii) in a manner the director reasonably believes to be in the best interests of the corporation."

[28] American Law Institute Principles of Corporate Governance: Analysis and Recommendations § 4.01(a).

[29] ibid at § 2.01.

[30] *see*, *e.g.*, Orts, E. "The ALI's Restatement of the Corporate Objective Is Flawed." *The CLS Blue Sky Blog: Columbia Law School's Blog on Corporations and the Capital Markets,* 6 Jun. 2022.

[31] On this issue, *see* Bainbridge, S. "Interpreting Nonshareholder Constituency Statutes." *Pepperdine Law Review*, vol. 19, no. 3, 1992, pp. 971-1025; von Stange, G, "Note. Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?" *Hofstra Labour & Employment Law Journal*, vol. 11, no. 2, 1994, pp. 461-497; Bisconti, A. "Note. The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in Revlon Land?" *Loyola of Los Angeles Law Review*, vol. 42, no. 3, 2009, pp. 765-805.

[32] Sjåfjell, B, et al. "Shareholder Primacy: The Main Barrier to Sustainable Companies." *Company Law and Sustainability: Legal Barriers and Opportunities*, edited by B Sjåfjell and B Richardson, Cambridge University Press, 2015, p. 98.

[33] 8 Delaware Code § 141 *et seq*.

[34] In case law, *see*, for example, *Guth v Loft, Inc,* 5 A.2d 503, 510 (Del. 1939); *Revlon, Inc v MacAndrews & Forbes Holdings, Inc*, 506 A.2d 173, 182 (Del. 1958); *Unocal Corp v Mesa Petroleum Co*, 493 A.2d 946, 955 (Del. 1985); *Polk v Good,* 507 A.2d 531, 536 (Del. 1986); *N Am Catholic Education Programming Foundation, Inc v Gheewalla*, 930 A.2d 92, 101 (Del. 2007); *In Re Trados Incorporated Shareholder Litigation*, Civil Action No. 1512-CC (Del. Ch. Jul. 24, 2009); *eBay Domestic Holdings, Inc v Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

Directive (CSDDD),[35] published in February 2022.[36] One of its initial aims was also to harmonise certain aspects of directors' duties in European companies. The original text of the proposal prepared by the European Commission, indeed, provided for a broader duty of care. According to the original article 25, directors, in fulfilling their duty to act in the best interests of the company, should have considered the consequences of their decisions for sustainability matters (including human rights, climate change and environmental consequences) across the short, medium and long terms. The provisions on directors' duties, though, were removed from the final text approved by the EU Institutions in June 2024. At Member State level, the "success of the company" or the "company purpose", intended as the ultimate goal of the business to contribute to the common good, other than the legal purpose,[37] is traditionally not mentioned by legislators. Reference is made to the concept of "company interest" with its slightly different interpretations in the various legal systems (generally open to the possible consideration of other stakeholders' interests).[38]

A jurisdiction in Europe that recently attempted to revise the traditional domestic concept of "company interest" is France with the *Loi Pacte* of 2019.[39] The reform that was drawn up based on the Notat-Senard Report[40] and previous academic studies[41] addresses both managerial duties and new optional legal forms (analysed in the next paragraph). As for the first issue, amending article 1833 of the Civil Code,[42] the reform introduced a new paragraph applicable to all company types, which enshrines the jurisprudential notion of "company interest"[43] and expands it in view of sustainability considerations, providing a general obligation for boards to manage the company in the "company interest" (*intérêt social*), "taking into consideration the social and environmental challenges of its activity."[44] Even though interpretations vary as to the actual relevance of the legislative

[35] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, of 23 February 2022, COM(2022) 71, 2022/0051 (COD).

[36] On the European Commission Proposal, *see* Ventura, L. "Corporate Sustainability Due Diligence and The New Boundaries of the Firms in the European Union." *European Business Law Review*, vol. 34, n. 2, 2023, p. 239-268.

[37] *see* Joly, H. "Creating a Meaningful Corporate Purpose." *Harvard Business Review*, 28 Oct. 2021.

[38] *see, e.g.*, the examples of Italy, Portugal, Germany, Austria, Spain, and France, as described by Tombari, U. "*Potere" e "Interessi" Nella Grande Impresa Azionaria*. Giuffré, 2019, pp. 38-47.

[39] Law No 2019-486 of May 22, 2019, art. 169, art. 176.

[40] Senard, J, and N Notat. *L'Entreprise, Objet D'Intérêt Collectif*. French Ministry of Economy, Finance, and Industry, 9 Mar. 2018.

[41] Segrestin, B, and A Hatchuel. *Refonder L'Entreprise*. Seuil, 2012; Segrestin, B, et al. *L'Entreprise: Point Aveugle du Savoir*. Éditions Sciences Humaines, 2014; Segrestin, B, et al. *La "Société à Objet Social Etendu": Un Nouveau Statut pour L'Entreprise*. Presses des Mines via OpenEdition, 2016; Levillain, K. *Les Entreprises à Mission: Un Modèle de Gouvernance pour L'Innovation*. Vuibert, 2017.

[42] Code Civil art. 1833[2]: "La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité."

[43] The reference is to the concept of "enterprise" as opposed to that of "company", and to the institutional conception of the company, as opposed to the proprietary and contractual one. A consolidated case law in France states the superiority of the "company interest" (or "enterprise's interest") as the independent common interest of the company, other than the interest of shareholders, which is not a juxtaposition of stakeholder interests, nor those of its associates. According to this conception of "company interest", a company must take into consideration the interest of its stakeholders. On this issue, *see* Hiez, D. "The Suitability of French Law to B Corp." *The International Handbook of Social Enterprise Law: Benefit Corporations and Other Purpose-Driven Companies*, edited by H Peter et al., Springer Nature, 2023, pp. 572-573; Cohen, E. *La Société à Mission*. Hermann, 2019, pp. 50-54. On the concept of "enterprise" *see* Levillain, K, et al. "Profit-with-Purpose Corporations: An Innovation in Corporate Law to Meet Contemporary CSR Challenges." *The Oxford Handbook of Corporate Social Responsibility: Psychological and Organizational Perspectives*, edited by A McWilliams et al., Oxford University Press, 2019, p. 490; Segrestin, B, et al. "When the Law Distinguishes Between the Enterprise and the Corporation: The Case of the New French Law on Corporate Purpose." *Journal of Business Ethics*, vol. 171, no. 1, 2021, pp. 1-13.

[44] It seems that the law, therefore, recognises the existence of a superior social interest of the company itself, distinct from that of the members, employees, customers or creditors, extended to other considerations than the financial ones. On this issue, *see* the report of the working group Association Française Des Entreprises Privées (AFEP) and Conseil National Du Patronat Français (CNPF), *Le Conseil d'Administration des Sociétés*

amendment,[45] it can nevertheless be regarded as a step forward in legally providing a new management paradigm where social and environmental dimensions enter the decision-making process, and directors are at least explicitly required to consider them in their activity.[46] Moreover, amending article 1835 of the Civil Code, the reform allowed any company to specify in its articles of association, on a voluntary basis, a "*raison d'être*"[47] (literally the "reason for being"), the principles the company is endowed with, that wants to pursue in its business[48] and for the pursuit of which it intends to allocate means (for instance, through investment or innovation strategies).[49] The consequence of the reform is that directors should consider the social and environmental dimensions as well as the existing *raison d'être* in setting the strategic direction of the company's activities.[50]

The topic of corporate purpose and fiduciary duties has historically been at the centre of scholarly debate, but it is worth noting that in the legal sphere no substantial radical reforms can be observed, with the partial exception of the 2019 French reform.

III. The Birth of Dual-Purpose Companies

Another significant legal trend, alongside the evolutions in the area of directors' duties, is an advancement in organisational forms. Due to the widespread cultural and legal dominance of shareholder primacy, recent decades have witnessed the emergence of new hybrid legal entities designed to help businesses address social and environmental objectives. In the UK, the "community interest company" (CIC) was introduced in 2004.[51] CICs are blended legal structures[52] for businesses that primarily have social and environmental objectives and whose surpluses are principally reinvested in the business or in the community, rather than being driven by the need to maximise profit for shareholders. CICs can raise equity capital as well as for-profit companies but company's assets shall be dedicated to public benefit. Thus, the distribution of dividends is capped at 35% of the aggregate total company profits[53] and in the event of dissolution a CIC's assets must go to similar entities pursuing community benefits. CICs are overseen by the CIC Regulator, which ensures compliance with the "community interest test" (verifying that the CIC's activity is carried on for the benefit of

Cotées, Jul. 1995, p. 8; Heinich, J. "Intérêt Propre, Intérêt Supérieur, Intérêt Social." *Revue des Sociétés*, vol. 10, 2018, p. 568; Schmidt, D. "La Loi PACTE et L'Intérêt Social." *Recueil Dalloz*, 2019, p. 633.

[45] Some scholars question the concrete consequences of such amendment, considering that the social and environmental dimensions are not part of the "company interest", but they represent additional considerations. Thus, the directors' decision must follow the company interest while social and environmental consequences need only to be taken into account. For this analysis see Hiez (n 43) *supra*.

[46] Commercial Code, art. L. 225-35 and L. 225-64, as amended by the *Loi Pacte*.

[47] The *raison d'être* shapes the identity and vocation of a company, and it must be consistent with the general principle of creating a positive impact on society and the environment provided by art. 1833[2] of the Civil Code. It entails those guiding principles that determine the long-term strategic orientation of a company and integrates the economic dimension of the corporate purpose: *see* the description provided by the Conseil d'État in its *Avis sur un Projet de Loi Relatif à la Croissance et la Transformation des Entreprises*, No. 384.599 and 395.021, 14 Jun. 2018, p. 39, which describes it as "… un dessein, une ambition, on toute autre considération générale tenant à l'affirmation de ses valeurs on de ses préoccupations de long terme."

[48] As suggested by scholars, the *raison d'être* must be sufficiently precise to support decision-making and cannot be merely anecdotal because it can impact the activity and corporate decisions. It must be used to clarify the corporate purpose and its extension.

[49] Civil Code art. 1835: "Les statuts peuvent préciser une raison d'être, constituée des principes dont la société se dote et pour le respect desquels elle entend affecter des moyens dans la réalisation de son activité."

[50] Commercial Code, art. L. 225-35 and L. 225-64.

[51] Companies (Audit, Investigations and Community Enterprise) Act, 2004, c. 27, s. 26. In legal literature, *see, e.g.*, Lloyd, S. "Transcript: Creating the CIC." *Vermont Law Review*, vol. 35, no. 1, 2010, pp. 31-43; Esposito, R. "The Social Enterprise Revolution in Corporate Law." *William & Mary Business Law Review*, vol. 4, no. 2, 2013, pp. 674-678.

[52] Both companies limited by guarantee and companies limited by shares can acquire CIC status.

[53] *see* Office of the Regulator of Community Interest Companies. *Community Interest Companies: Guidance Chapters, Chapter 6: The Asset Look*, p. 6.

the community)[54] and receives the CIC's annual report. It is worth noting that CICs do not have tax advantages and are subject to the corporation tax regime. CICs represent a first step towards a new blended-value entity, but they have non-distribution constraint limits that characterise the non-profit sector.[55]

In the US, several more innovative hybrid entities combining for-profit and non-profit objectives were developed. Among them, the low-profit limited liability company,[56] the social purpose corporation,[57] and the benefit corporation. The latter is the most widespread among US states and represents the archetype of dual-purpose company legal forms. Benefit corporations are for-profit corporations whose purpose, in addition to producing profits, is to reduce negative externalities and generate a positive impact on the environment, society, the workers, and the community in which they operate. They differ from traditional business corporations in entity purpose, directors' accountability, and transparency, but not in taxation. The first benefit corporation statute passed in Maryland in 2010. Currently, about forty US jurisdictions have passed statutes,[58] the majority of which are inspired by the Model Benefit Corporation Legislation,[59] while Delaware introduced its own slightly different statute in 2013 with the Public Benefit Corporation Act.[60]

The benefit corporation legal model circulated in other jurisdictions in Europe, Latin America and Canada.[61] In Europe, it was transplanted at first in Italy in 2015 with the introduction of "*società benefit*",[62] which allows the internalisation in the articles of association of social and environmental objectives ("*beneficio commune*"), making them legally binding for the directors that must manage the company in a responsible, sustainable and transparent manner, balancing the financial interests of the shareholders, the interests of other stakeholders, and the specific public benefits identified in the company agreement.

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[54] Companies (Audit, Investigations and Community Enterprise) Act, 2004, c. 27, s. 35(2), according to which "A company satisfies the community interest test if a reasonable person might consider that its activities are being carried on for the benefit of the community."

[55] On this issue, *see* Hansmann, H. "The Role of Nonprofit Enterprise." *Yale Law Journal*, vol. 89, no. 5, 1980, pp. 835-901; Hansmann, H. "Reforming NonProfit Corporations Law." *University of Pennsylvania Law Review*, vol. 129, no. 3, 1981, p. 500.

[56] The first statute for Low-Profit Limited Liability Companies (L3C) was introduced in Vermont in 2008: Vt. Stat. Ann. Tit. 11, §3001(27). Other states such as Illinois, Louisiana, Maine, Michigan, Rhode Island, Utah, and Wyoming introduced L3C statutes. L3Cs are companies aimed primarily at performing a socially beneficial (charitable or educational) purpose, and not at maximising income. In particular, the L3C legal form is designed to make it easier for socially oriented businesses to attract investments from foundations, simplifying compliance with the Internal Revenue Service's 'Program Related Investments' (PRI) regulations: I.R.C. §§4944(c); 170(c)(2)(B); 26 CFR 53.4944-3(b) Ex. (3). The purpose of the L3C statute is to attract PRIs from foundations, investments considered by the IRS as "qualifying distributions", meaning that they count toward the IRS's requirement that private foundations spend 5% of their net worth in any given year. Indeed, thorough PRIs private foundations can satisfy their obligation under the Tax Reform Act of 1969 to distribute annually at least 5% of their assets for charitable purposes. Investments in L3Cs that qualify as PRIs can fulfil this requirement while allowing the foundations to receive a return from the investment. L3Cs have been widely criticised for their unclear regulation under tax law. On L3Cs see Kelley, T. "Law and Choice of Entity on the Social Enterprise Frontier." *Tulane Law Review*, vol. 84, no. 2, 2009, p. 356; Lang, R, and E Carrott Minnigh. "The L3C, History, Basic Construct, and Legal Framework." *Vermont Law Review*, vol. 35, no. 1, 2010, p. 15; Esposito (n 51) *supra*; Murray, J. "The Social Enterprise Law Market." *Maryland Law Review*, vol. 75, no. 2, 2016, pp. 545-546.

[57] It was introduced for the first time in California in 2011 (formerly known as the flexible purpose corporation), then in a few other states, like Washington in 2012 and in Florida in 2014. The SPC is a new corporate entity enabling directors to consider and give weight to one or more social and environmental purposes in decision-making. Unlike the L3C, where the charitable purpose overrides profit maximisation, the SPC gives directors the discretion to choose social and environmental purposes over profits: *see* Esposito (n 51) *supra*.

[58] For further information, *see* the Social Enterprise Law Tracker, available online.

[59] The Model Benefit Corporation Legislation has been drafted by Bill Clark and B Lab with the support of the American Sustainable Business Council.

[60] Delaware Code Ann. Tit. 8, §§361-368.

[61] Similar hybrid models have been introduced in Colombia, Ecuador, Peru and Uruguay ("*Sociedades de Beneficio e Interés Colectivo*"), and in British Columbia in Canada ("benefit company").

[62] Law No. 208, 28 December 2015, art. 1, [376]-[384].

A similar dual-purpose company structure has been introduced in Spain in 2022, the "*sociedades de beneficio e interés común*",[63] and in France with the *Loi Pacte* of 2019. The latter regulated an optional dual-purpose legal form, the "*société à mission*", close to the US benefit corporation but characterised by different governance features to control the purpose. It allows a for-profit company to incorporate into the articles of association, together with the *raison d'être*, one or more social and / or environmental objectives that wants to pursue in the framework of its activity,[64] which must be considered in the management of the company and monitored by a new dedicated internal body, the "*comité de mission*" (or "*référent de mission*" for companies with less than 50 employees).[65] The most innovative aspect of these new corporate forms is that they not only allow but require directors to take into account social and environmental objectives, which enter the articles of association and the "company interest", and provide for clear accountability and disclosure mechanisms.

At the European level, although some Member States have introduced dual-purpose companies, there is not a harmonised dual-purpose company legal structure for purpose-driven organisations, a structure aimed at greater integration of sustainability into business operations in terms of purpose, director duties, and impact reporting. The Union instead, has taken action in other areas, such as disclosure requirements and supply chain due diligence, as discussed below. However, the introduction of a uniform or harmonised dual-purpose company legal structure could be useful to include in the European framework by specific rules to incentivise business to profit from creating benefit for the society. It could be modelled on the dual-purpose company examples developed in Italy and France and introduced through the enactment of an EU regulation establishing a European hybrid model (for instance, a "European benefit company"), or a harmonisation directive requiring Member States to regulate a dual-purpose company at the domestic level.

IV. **Sustainability Reporting and Disclosure Requirements**

In recent years, significant further legal developments around sustainability have taken place in the area of disclosure of non-financial information. Sustainability reporting and disclosure requirements, indeed, moved from voluntary corporate actions to mandatory legal obligations. The main aim of this shift is to promote transparency on companies' impacts and improve comparability between companies' sustainability information. To that end, several harmonisation initiatives of sustainability-related reporting standards have been developed at the international and regional levels.[66] Examples are the increasing number of countries mandating the alignment of climate risk disclosures with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD),[67] like the UK;[68] the adoption of the

[63] Law No. 18/2022, 28 Sep. 2022.
[64] Commercial Code, art. L. 210-10.
[65] See Segrestin, B, and K Levillain. "Profit-with-Purpose Corporations: Why Purpose Needs Law and Why it Matters for Management." *European Management Review*, vol. 20, no. 4, 2023, pp. 733-740.
[66] On the necessity to define common metrics for sustainable value creation, *see*, e.g., *Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation*. World Economic Forum, 2020.
[67] In 2015, the Financial Stability Board (FSB) created the TCFD to develop recommendations on the types of information that companies should disclose to support investors, lenders, and insurance underwriters in assessing and pricing risks related to climate change. The TCFD's recommendations report was published in 2017. It contains recommended disclosures around four thematic areas (governance, strategy, risk management, and metrics and targets) that should help investors and others to understand how report and assess climate-related risks and opportunities. In 2023, the TCFD has been disbanded, and the International Financial Reporting Standards (IFRS) Foundation in now in charge of the monitoring of the progress of companies' climate-related disclosures.
[68] The UK since 2022 mandated TCFD-aligned disclosure for large entities in the private sector, like large companies and LLPs, publicly traded companies, banking and insurance companies, companies with an annual turnover of more than 500 million pounds and more than 500 employees, issuers, asset managers with more

International Sustainability Disclosure Standards (IFRS SDS) elaborated by the International Sustainability Standards Board's (ISSB) in June 2023;[69] and the birth of the European Union Sustainability Reporting Standards (ESRS) developed by the European Financial Reporting Advisory Group (EFRAG).[70]

In particular, with regard to the European Union, which is the leading actor in setting the rules for the transition to a sustainable economy, sustainable development has long been at the heart of the European project,[71] but especially after the adoption of the UN 2030 Agenda for Sustainable Development[72] and the Paris Agreement on climate change,[73] the EU has been working extensively on strategies aimed at achieving their goals and targets. Among other initiatives,[74] the EU Commission published in 2018 the *Action Plan on Financing Sustainable Growth*[75] (launching an ambitious and comprehensive strategy on sustainable finance), in 2019 the *European Green Deal*[76] (aimed at making all sectors of the EU's economy fit to meet climate targets, such as the reduction of emissions by at least 55% compared to 1990 levels by 2030, and climate neutrality by 2050), and in 2020 the plan for *A Strong Social Europe for Just Transitions*[77] (to set the road towards a just and fair transition that leaves nobody behind in the achievement of a climate-neutral and environmentally sustainable economy).

To support these policies, an intense period of revising and updating European rules applicable to the business sector and financial markets is ongoing. As for the legislative tools used by the European institutions, it is worth noting that from an initial promotion of voluntary instruments through soft law, as in

than 5 billion pounds of assets under management, and occupational pension schemes with more than 1 billion pounds of assets under management.

[69] To meet the demand of high quality, transparent, reliable and comparable reporting on environmental, social and governance matters, in November 2021, the International Financial Reporting Standards Foundation announced the creation of the new International Sustainability Standards Board (ISSB), which has been established at COP26 to develop a comprehensive global baseline of sustainability disclosures. In June 2023 (effective from Jan. 2024), using the starting basis of Integrated Reporting, CDSB, SASB and TCFD, the ISSB issued its first two IFRS Sustainability Disclosure Standards, IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information, and IFRS S2 Climate-related Disclosures.

[70] In July 2023 the EU Commission adopted the European Sustainability Reporting Standards (ESRS) covering the full range of environmental, social, and governance issues (including climate change, biodiversity and human rights) that must be used by all companies subject to the Corporate Sustainability Reporting Directive (CSRD). The ESRS, which take account of discussions with the International Sustainability Standards Board (ISSB) and the Global Reporting Initiative (GRI) to ensure interoperability, provide information for investors to understand the sustainability impact of the companies.

[71] The issue of sustainable development was included in the Maastricht Treaty of 7 Feb. 1992 (*see* Article B), and in the Amsterdam Treaty of 2 Oct. 1997 (*see*, e.g., amendment of Article B and Article 2, as well as the "principle of integration" of environmental policies into all other Union policies of Article 6). Nowadays, the consolidated version of the Treaty on European Union (TEU), art. 3, paragraph 3, refers to a balanced and sustainable development of economic activities; while Article 11 of the consolidated version of the Treaty on the Functioning of the European Union (TFEU) recalls the protection of the environment and the promotion of sustainable development. With regards to the business sector, from the early 2000s onwards, the EU recognised the UN Guiding Principles for Business and Human Rights and developed its Strategy on Corporate Social Responsibility.

[72] UNGA Resolution A/RES/70/1. The commitment to the SDGs is expressed in the EU Commission Communication of 22 Nov. 2016, *Next Steps for a Sustainable European Future. European Action for Sustainability* (COM(2016) 739), and Council conclusions on *A Sustainable European Future: The EU Response to the 2030 Agenda for Sustainable Developmen*t, adopted by the Council at its 3552nd meeting held on 20 June 2017.

[73] Paris Agreement to the United Nations Framework Convention on Climate Change (Paris Agreement), Dec. 12, 2015, TIAS No 16-1104. The agreement has been adopted by the European Union through Council Decision (EU) 2016/1841 of 5 Oct. 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (OJ L 282, 19.10.2016, p. 1).

[74] *see*, *e.g.*, EU Commission Communication of 2 Dec. 2015, *Closing the Loop: An EU Action Plan for the Circular Economy*, COM/2015/0614, then renewed with the EU Commission Communication of 11 Mar. 2020, *A New Circular Economy Action Plan. For a Cleaner and More Competitive Europe*, COM/2020/98.

[75] EU Commission Communication of 8 Mar. 2018, *Action Plan: Financing Sustainable Growth,* COM/2018/097.

[76] EU Commission Communication of 11 Dec. 2019, *The European Green Deal*, COM/2019/640.

[77] EU Commission Communication of 14 Jan. 2020, *A Strong Social Europe for Just Transitions*, COM(2020) 14.

the case of corporate social responsibility programs[78] and good governance standards for directors' remuneration,[79] the focus has shifted towards the production of hard law to demand the adoption of sustainable business practices. Examples are the 2014 Directive on Non-Financial reporting,[80] imposing on certain large public-interest companies[81] reporting requirements on sustainability-related matters on a "comply or explain" basis, and the 2017 Shareholder Rights Directive II,[82] promoting more long-termism in share ownership and shareholder engagement.[83] A closer look at the most recent EU legislative policies also reveals how, so far, EU institutions have tried to achieve the shift toward a sustainable economy mainly indirectly,[84] through the regulation of financial markets and reporting requirements. In particular, the Sustainable Finance package, a comprehensive strategy aimed at redirecting investments towards sustainable activities to reach climate neutrality by 2050, comprises a regulation on sustainability-related disclosure in the financial services sector[85] and the taxonomy regulation on the establishment of a framework to facilitate sustainable investment decisions and tackle greenwashing.[86]

Moreover, at the end of 2022 the Corporate Sustainability Reporting Directive (CSRD)[87] was approved, replacing the 2014 Non-Financial Reporting Directive, to ensure the reporting of reliable and comparable sustainability information to investors and other stakeholders. The main objectives of CSRD are (i) to extend the scope of reporting requirements of non-financial information to all large undertakings (whether listed or not)[88] and all undertakings with securities listed on EU regulated markets (except listed

[78] *see*, e.g., *Promoting A European Framework for Corporate Social Responsibility*, 2001, COM(2001) 366; the Commission Communication of 15 May 2001, *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development*, COM(2001) 264; the Commission Communication of 13 Dec. 2005 on *The Review of the Sustainable Development Strategy – A Platform for Action*, COM(2005) 658; the Commission Communication of 25 Oct. 2011 on *A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM(2011) 681.

[79] *see* EU Commission Recommendation 2004/913/EC of 14 Dec. 2004, the EU Commission Recommendation 2005/162/EC of 15 Feb. 2005, and the EU Commission Recommendation 2009/385/EC of 30 Apr. 2009, which promoted the inclusion of good governance standards regarding directors' remuneration in corporate governance codes on a "comply or explain" base. The ineffectiveness of this approach was demonstrated by the *Report on the Application of the Commission Recommendation on Directors' Remuneration* (SEC 2007, 1022), and the *Report on the Application of the Commission 2009/385/EC Recommendation* (SEC 2010, 285).

[80] Directive 2014/95/EU of the European Parliament and of the Council of 22 Oct. 2014 Amending Directive 2013/34/EU.

[81] Directive 2014/95/EU was applicable to large EU public-interest entities, and to public-interest entities which are parent companies of a large group that have more than 500 employees and, alternatively, a total balance sheet exceeding EUR 20 million or a net turnover exceeding EUR 40 million.

[82] Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 Amending Directive 2007/36/EC; Commission Implementing Regulation (EU) 2018/1212.

[83] According to Directive (EU) 2017/828, the remuneration policy should contribute to the business strategy, long-term interests and sustainability of the company and should not be linked entirely or mainly to short-term objectives. Moreover, the Directive and the Regulation (EU) 2018/1212 improved the transparency of institutional investors and asset managers regarding how they engage with the companies they invest in, and how they consider and monitor the long-term and non-financial performance of these companies and their environmental and social impact, requiring investors to disclose their engagement policy and their strategy. However, these governance rules strengthened shareholder rights and directors' accountability towards shareholders, but do not cover directly the interests of other stakeholders and the environment.

[84] With some partial exceptions of directives that have affected the organisation and management of companies, such as the above-mentioned Shareholder Rights Directive II (Directive (EU) 2017/828), and the Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 Nov. 2019 Amending Directive (EU) 2017/1132.

[85] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 Nov. 2019.

[86] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 Jun. 2020 Amending Regulation (EU) 2019/2088.

[87] Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU.

[88] The reference is made to undertakings meeting at least two out of the three following criteria: (i) a net turnover of more than EUR 40 million; (ii) balance sheet assets greater than EUR 20 million; (iii) more than 250

micro-enterprises),[89] and (ii) to assure the comparability of non-financial information. Indeed, it ends flexibility[90] in reporting methods, introducing detailed and standardised mandatory reporting standards based on the "double materiality" principle, as per the EU Sustainability Reporting Standards drafted by the European Financial Reporting Advisory Group (EFRAG). Although the CSRD and other mandatory sustainability disclosure requirements provided in other jurisdictions are expected to significantly improve sustainability-related disclosure, they are usually not underpinned by any substantial obligation to consider sustainability issues in the decision-making process. They push companies to do it from the ex-post perspective of disclosure requirements, such that they only indirectly regulate companies' behaviour. Given that limit, other initiatives in company law were needed to tackle the problem from an ex-ante perspective, mandating or at least legitimising directors to consider sustainability outcomes in decision-making. An example is the regulation of supply chain due diligence.

V. **Supply Chain Due Diligence Legislation**

A shift from voluntary initiatives to mandatory requirements has also taken place in the context of supply chain due diligence in recent years.[91] After a first generation of issues specific statutes protecting specific industry sectors or areas of human rights through disclosure requirements, such as the 2019 Dutch Child Labor Due Diligence Law[92] and the UK 2015 Modern Slavery Act,[93] a new generation of more comprehensive statutes have been enacted providing general protection against violations of human rights and environmental damages through

employees. Insurance undertakings and credit institutions will be required to comply regardless of their legal form, provided they meet the relevant size criteria. Non-European companies with substantial activity in the EU (that is, a net turnover over EUR 150 million euro in the EU) will also have to report according to the directive.

[89] Micro-enterprises are defined by art. 3 of the Accounting Directive (2013/34/EU) as undertakings that do not exceed the limits of at least two of the three following criteria: (a) balance sheet total: EUR 350 000; (b) net turnover: EUR 700 000; (c) average number of employees during the financial year: 10. Nonetheless, listed micro companies and non-listed small-medium enterprises (SMEs) can apply the provisions on a voluntary basis.

[90] The 2014 Non-Financial Reporting Directive allowed significant flexibility with respect to the reporting method to be used. Undertakings were allowed to use international, European, or national frameworks to produce their non-financial statements. The Directive Recital 9 referred, for instance, to national frameworks, Union-based frameworks such as the Eco-Management and Audit Scheme (EMAS), or international frameworks such as the United Nations (UN) Global Compact, the Guiding Principles on Business and Human Rights implementing the UN "Protect, Respect and Remedy" Framework, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the International Organisation for Standardisation's ISO 26000, the International Labour Organisation's Tripartite Declaration of principles concerning multinational enterprises and social policy, and the Global Reporting Initiative. Aware of the problem, and trying to minimise this flexibility, the European Commission published voluntary Guidelines to help companies disclose environmental and social information in 2017 and Guidelines on reporting climate-related information in 2019.

[91] *see* McGaughey, F, et al. "Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom." *Business and Human Rights Journal*, vol. 7, no. 2, 2022, pp. 249-270; Palombo, D. "The Duty of Care of the Parent Company: A Comparison Between French Law, UK Precedents and the Swiss Proposals." *Business and Human Rights Journal*, vol. 4, no. 2, 2019, pp. 265-286.

[92] Netherlands Kamerstukken I, 2016/17, 34 506, A. According to the Dutch Child Labor Due Diligence Law, all companies (whether domiciled in the Netherlands or not) operating in the country are required to issue a statement declaring that they have exercised due diligence to prevent their goods and services being made using child labor.

[93] Modern Slavery Act 2015. It establishes an independent Anti-Slavery Commissioner and contains provisions to prevent modern slavery and protect the victims: *see* Jason, H. "The Modern Slavery Act (2015): A Legislative Commentary." *Statute Law Review*, vol. 37, no. 1, 2016, pp. 33-56; Rae, L, et al. "Hardly Soft Law: The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights." *Business Law International*, vol. 18, no. 1, 2017, pp. 29-50; Mantouvalou, V. "The UK Modern Slavery Act 2015 Three Years On." *Modern Law Review*, vol. 81, no. 6, 2018, pp. 1017-1045; Voss, H, et al. "International Supply Chains: Compliance and Engagement with the Modern Slavery Act." *Journal of the British Academy*, vol. 7, no. 1, 2019, pp. 61-76; Islam, M, and C van Staden. "Modern Slavery Disclosure Regulation and Global Supply Chains: Insights from Stakeholder Narratives on the UK Modern Slavery Act." *Journal of Business Ethics*, vol. 180, 2022, pp. 455-479.

disclosure and substantive oversight obligations. The primary examples of these second generation of statutes are the 2017 French Duty of Vigilance Law,[94] the 2021 German Act on Corporate Due Diligence Obligations in Supply Chains,[95] and the European Union Directive on Corporate Sustainability Due Diligence (CSDDD).[96] With this latest directive, a second shift occurred within the context EU legal framework, from disclosure regulations, the focus moved to the production of rules directly affecting companies' activities, decision-making, risk management, and liability regimes. Moreover, the goal of the Directive is to harmonise the rules in this field aligning them with international standards on due diligence,[97] ensuring a level playing field within the EU internal market and avoiding distortions of competition.

The main areas regulated by the CSDDD are supply chain due diligence obligations and climate change obligations. As for supply chain due diligence, the directive requires to European and foreign large companies under the scope (now restricted to companies with more than 1,000 employees—not applicable to foreign companies—and a net worldwide turnover of more than EUR 450 million, for two consecutive financial years; and to the ultimate parent company[98] of a group that reaches the thresholds)[99] to implement and integrate in company's polices and risk management systems plans and strategies (developed through effective engagement with stakeholders) to identify and assess, monitor, prevent, mitigate, end, or minimise[100] actual or potential human rights and environmental adverse impacts[101] arising from the companies' own operations, those of their subsidiaries[102] and business partners in

[94] Law No. 2017-399, 27 Mar. 2017. The law introduced Articles L. 225-102-4 and L. 225-102-5 into the French Commercial Code.

[95] *Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz*: "*LkSG*"), 16 Jun. 2021, Bundesgesetzblatt (BGBl) I 2021, 2959.

[96] Directive 2024/1760 of the European Parliament and of the Council of 13 June 2024 Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859.

[97] *see* UN Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the "Protect, Respect and Remedy" Framework* (UNGPs), HR/PUB/11/04, 2011, and the 2011 amendment to the OECD Guidelines for Multinational Enterprises.

[98] According to articles 22(1) to (5) of Directive 2013/34/EU of the European Parliament and of the Council.

[99] SMEs are not included but can be indirectly affected as a result of large companies' actions across their value chains. The directive also provides specific thresholds for companies / parent companies that entered into franchising or licensing agreements in the Union in return for royalties, if they had a net worldwide turnover of more than EUR 80 million in the last financial year and royalties amount to more than EUR 22,5 million in the last financial year: *see* Directive 2024/1760 on Corporate Sustainability Due Diligence, art. 2. With a few exceptions, financial institutions including banks will be required to comply with the directive; *see* Directive 2024/1760 on Corporate Sustainability Due Diligence, art. 3(a)(iii).

[100] Directive 2024/1760 on Corporate Sustainability Due Diligence, articles 5 to 11.

[101] The adverse impacts covered are the ones resulting from the violation of rights, prohibitions and obligations provided by international human rights and environmental conventions listed in the Annex to the directive. The directive, thus, on one side spreads in third countries European accepted legal standards in the field and, on the other, also makes legally binding for companies under the scope of the directive international standards usually directed to states, regardless of whether the jurisdictions in which the alleged violations take place have ratified the international conventions listed: *see* on this issue Enriques, L, and M Gatti. "The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention." *Oxford Business Law Blog*, 21 Apr. 2022.

[102] A subsidiary is a "controlled undertaking" as defined in Article 2(1)(f) of Directive 2004/109/EC of the European Parliament and of the Council of 15 Dec. 2004 Amending Directive 2001/34/EC. In particular, the reference is to an undertaking (i) in which a natural person or legal entity has a majority of the voting rights; or (ii) of which a natural person or legal entity has the right to appoint or remove a majority of the members of the administrative, management or supervisory body and is at the same time a shareholder in, or member of, the undertaking in question; or (iii) of which a natural person or legal entity is a shareholder or member and alone controls a majority of the shareholders' or members' voting rights, respectively, pursuant to an agreement entered into with other shareholders or members of the undertaking in question; or (iv) over which a natural person or legal entity has the power to exercise, or actually exercises, dominant influence or control.

their chain of activities.[103] An annual report on due diligence activities shall be provided.[104] Companies are not required to guarantee in all circumstances that adverse impacts will be avoided, they have an "obligations of means" not an "obligation of results". Their duty is to take all the appropriate measures capable of achieving due diligence's objectives by effectively addressing adverse impacts, which are proportionate with the degree of severity and the likelihood of the adverse impact.[105] As for climate change obligations, the aim was to incorporate the European Green Deal goals into the daily governance of large companies operating in Europe. The Directive requires to adopt and put into effect a climate change transition plan[106] to ensure (through best efforts) that the business model and strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1.5 degrees Celsius, in line with Paris Agreement[107] and climate neutrality targets of European Climate Law.[108] The plan is updated annually and contains a description of the progress the company has made towards achieving its targets.

Both public and private enforcement mechanisms are provided in case of breach of Directive's rules. The public enforcement system is based on the oversight of national and European network of supervisory authorities, which may impose penalties (up to 5% of the company's net worldwide turnover) on companies breaching the Directive's rules.[109] Supervisory authorities will also oversee the adoption and design of the climate change transition plan. The private enforcement system is based on complaints and notification mechanisms[110] as well as a specific hypothesis of civil liability for companies violating their due diligence duties. A company, indeed, can be held liable for damages[111] to a natural or legal person caused by the company's intentional or negligent noncompliance with key provisions of the Directive to prevent, mitigate, end, or minimise the identified adverse impacts arising from the company's own operations, those of its subsidiaries and business partners in its chain of activities. However, a company cannot be held liable if the damage was caused only by its business partners in its chain of

[103] The reference is to direct and indirect business partners, entities performing upstream or downstream (in the letter case excluding distribution, transport, storage being subject to export control specific rules) business operations related to the operations, products or services of the company. See Directive 2024/1760 on Corporate Sustainability Due Diligence, art. 3(f) and 3(g).

[104] Directive 2024/1760 on Corporate Sustainability Due Diligence, art. 16.

[105] Directive 2024/1760 on Corporate Sustainability Due Diligence, Recital 19.

[106] According to art. 22 of Directive 2024/1760 on Corporate Sustainability Due Diligence, the transition plan shall contain: (a) time-bound targets related to climate change for 2030 and in five-year steps up to 2050 based on conclusive scientific evidence and including, where appropriate, absolute emission reduction targets for greenhouse gas for scope 1, scope 2 and scope 3 greenhouse gas emissions for each significant category; (b) a description of decarbonisation levers identified and key actions planned to reach targets referred to under point (a), including where appropriate changes in the undertaking's product and service portfolio and the adoption of new technologies; (c) an explanation and quantification of the investments and funding supporting the implementation of the transition plan; (d) a description of the role of the administrative, management and supervisory bodies with regard to the plan.

[107] *see* art. 2.1 (a) of the Paris Agreement (n 73) *supra*.

[108] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law).

[109] Directive 2024/1760 on Corporate Sustainability Due Diligence, articles 24 to 28.

[110] Companies shall establish and maintain internal complaints procedure, so that third parties affected (or potentially affected), trade unions or other workers' representatives, and civil society organisations can raise their concerns regarding actual or potential adverse impacts directly to the company. Additionally, they shall establish an accessible mechanism for the submission of notifications (anonymously or confidentially) by persons and organisations with information or concerns regarding actual or potential adverse impacts. This internal notification and complaint mechanism will allow the companies to be aware of possible risks of adverse impacts and to promptly act and remediate in accordance with the directive: *see* Directive 2024/1760 on Corporate Sustainability Due Diligence, art. 14.

[111] According to art. 29 of Directive 2024/1760 on Corporate Sustainability Due Diligence, damage caused to a person's protected legal interests should be understood in line with the EU Member State's national law, and derivative damage, caused indirectly to other persons who are not the victims of adverse impacts and who are not protected by the rights, prohibitions or obligations listed in the Directive's Annex I is not covered; *see* also Directive 2024/1760 Recitals 79 to 91.

activities. Victims have the right to full compensation for the damage occurred in accordance with applicable national law.

Supply chain due diligence regulations could be considered a further attempt by the legislator to address the creation of negative detriments by companies. Their effect is to make companies internalise their suppliers' externalities, becoming responsible for their behaviour in the event of a breach of vigilance duties. This results in expanding the firm's boundaries (in terms of directors' obligations and civil liability) beyond the legal ones (for instance, those linked to ownership rights[112] or the chain of control)[113] and beyond the limits traditionally identified by twentieth-century economic theories (linked to the costs of the two methods of co-ordination, markets and management hierarchies).[114] The firm's boundaries and responsibility and oversight function of the directors nowadays seem to move along with sustainability requirements provided by the law, regulations, or the company agreement (like in the case of dual-purpose companies).

VI. **Final Remarks**

The predominance of shareholder primacy has resulted in a misinterpretation of directors' duties as being exclusively owed to shareholders. This perspective has served as the theoretical foundation for short-termism, excessive risk-taking, and unsustainable corporate practices that negatively impacted the environment and society, all in the pursuit of maximising corporate profits and shareholder value. As sustainability takes centre stage in the political agenda and corporate governance discussions, law becomes crucial in facilitating the transition from shareholder primacy to responsible capitalism. Law has the potential to influence the behaviour of private companies by establishing rules that ensure businesses profit from creating benefits rather than generating detriments to society, effectively incentivising positive practices while disincentivising harmful ones.

The emerging legal trends analysed here illustrate a well-established transition from soft law to hard law in establishing sustainability requirements and obligations for businesses. Moreover, legislators are shifting from merely imposing sustainability disclosure requirements to enacting substantive sustainability obligations that impact the decision-making processes of companies. This evolution could lead to a reinterpretation of the normative content of directors' duties. Even in the absence of specific reforms to directors' duties, an examination of both the law in the books, with recent developments in legislative and regulatory framework (like sustainability disclosure requirements, supply chain due diligence, dual-purpose companies), and the law in action, with the growth of ESG-led shareholders' activism and sustainability related litigation, suggests that the boundaries of directors' duties are expanding. This expansion either necessitates, or, at a minimum, legitimises, a sustainability-conscious approach in decision-making and the formulation of a company's strategy and policies. In this context, the dual-purpose companies' directors' management and accountability model appears to be an appropriate general management paradigm for the new era of responsible capitalism. Dual-purpose companies, indeed, can serve as

[112] *see* Demsetz, H. "Toward a Theory of Property Rights." *American Economic Review*, vol. 57, no. 2, 1967, pp. 347-359.

[113] Among others, *see* Penrose, E. *The Theory of the Growth of the Firm*. Oxford University Press, 1959; Weick, K. "Educational Organizations as Loosely Coupled Systems." *Administrative Science Quarterly*, vol. 21, no. 1, 1976, pp. 1-19; Porter, M. *Competitive Strategy: Techniques for Analyzing Industries and Competitors*. Free, 1980; Ashkenas, R, et al. *The Boundaryless Organization, Breaking the Chains of Organizational Structure*. John Wiley & Sons, 1995.

[114] See, in particular, Coase, R. "The Nature of the Firm." *Economica*, vol. 4, no. 16, 1937, pp. 386-405; Coase, R. "The Nature of the Firm: Influence." *Journal of Law, Economics, & Organization*, vol. 4, no. 1, 1988, pp. 33-47; Alchian, A. and H Demsetz. "Production, Information Costs and Economic Organization." *American Economic Review*, vol. 62, no. 5, 1972, pp. 777-795; Jensen, M, and W Meckling. "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure." *Journal of Financial Economics*, vol. 3, no. 4, 1976, pp. 305-360.

a stepping stone toward mainstream change in the business community, rather than merely an alternative to it, particularly in the medium-term. The widespread regulation of dual-purpose companies can thus promote the growth of purpose-driven organizations, demonstrating that a shift away from business-as-usual is not only possible but also profitable and desirable.